

To Be Argued By:  
E. Michael Rosenstock  
Time Requested: 15 Minutes

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# New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

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JAMES SCHIANO,

**Docket No.**  
**2023-04614**

*Plaintiff,*

*against*

PETER HARSANYI, individually as fiduciary of  
SYSTEMS VEND MANAGEMENT CORP., VENDING SERVICE.COM, INC.  
and CWS VENDING, INC.,

*Defendants.*

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*(Additional Caption on the Reverse)*

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## BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT

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SYSTEMS VEND MANAGEMENT CORP.,

*Third-Party Plaintiff-Appellant,*

*against*

JAMES SCHIANO,

*Third-Party Defendant,*

*and*

JOSEPHINE J. CASTRO,

*Third-Party Defendant-Respondent.*

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## **COUNTER STATEMENT OF QUESTIONS PRESENTED**

1. Did the lower court err in dismissing third-party plaintiff-appellant's second cause of action alleging aiding and abetting fraud against third-party defendant-respondent Josephine Castro pursuant to CPLR 3211(a)(7) for failure to state a cause of action?

Answer: No. The lower court correctly determined that third-party plaintiff-appellant's complaint failed to state a cause of action for aiding and abetting fraud.

2. Did the lower court err in dismissing third-party plaintiff-appellant's fourth cause of action alleging breach of fiduciary duty against third-party defendant-respondent Josephine Castro pursuant to CPLR 3211(a)(7) for failure to state a cause of action?

Answer: No. The lower court correctly determined that third-party plaintiff-appellant's complaint failed to state a cause of action for breach of fiduciary duty.



## STATEMENT OF THE FACTS

The plaintiff and third-party defendant, James Schiano (“Schiano”), commenced the instant action by filing a summons and verified complaint on March 29, 2022 (R.39). The crux of Schiano's claims against the defendants, Peter Harsanyi (“Harsanyi”), individually as fiduciary of Systems Vend Management Corp. ("SVMC"), Vending Service.com, Inc., and CWS Vending, Inc. (collectively, "defendants"), is that Schiano contends he was involved in a *de facto* business partnership with the defendants, in which he invested and otherwise directly/indirectly contributed funds totaling more than \$800,000.00, beginning around 2010 and ending around March of 2021, when he was shut out of the business premises (R.41-46). He maintains that the instant action was brought at both law and equity for Schiano to enforce his rights to enjoy the benefits of his substantial investments in the parties' business relationship (R.41-46).

Defendant/third-party plaintiff SVMC commenced a third-party action on May 16, 2022 by filing a third-party summons and complaint against third-party defendants James Schiano and Josephine J. Castro (R.19). According to the third-party complaint, SVMC is a corporation and is solely owned by defendant Harsanyi (R.21). SVMC operates a vending machine business, in which it delivers vending machines to individuals, entities, or locations, to sell snacks and drinks to the public or third-party individuals (R.21). SVMC alleges that Schiano was first

hired by SVMC as a part-time employee in 2010, but then he was ultimately promoted to be SVMC's full-time office manager (R.21).

The third-party complaint alleges that Schiano devised a fraudulent scheme to allow him to steal money and claim equity ownership of SVMC, and that this scheme greatly relied on third-party defendant Castro (R.23). It is alleged that Castro never questioned Schiano and allowed him to remove cash from SVMC's office without first receiving a report for the money tallied by Schiano, that Castro knowingly used Schiano's false reports and deceptively mischaracterized Schiano's transactions as loans or capital contributions made to SVMC, and that she purposefully withheld her internal records from Harsanyi and SVMC's accountant, allowing Schiano's fraudulent scheme to continue for years. (R. 24).

Castro is a former bookkeeper for the third-party plaintiff SVMC. (R. 23). She was hired as the bookkeeper for SVMC – a vending machine business -- in 2010 (R.23). She reported to Harsanyi and Schiano. Her duties and responsibilities included: (1) maintaining bookkeeping systems in place; (2) compiling sales reports and summaries; (3) reconciling bank accounts; (4) recording items and creating journal entries for items such as accrued expenses, prepaid expenses, and loans to the company. Castro was a valued employee of SVMC but her duties and responsibilities did not rise to the level of a fiduciary.

The allegations against Castro are based on her failure to report or stop certain alleged fraudulent conduct (misappropriation of funds) by SVMC's office manager, third-party defendant Schiano (R. 26-27). Castro is not alleged to have personally committed any wrongful or unlawful conduct in connection with her active performance as the company's bookkeeper. SVMC seeks to hold her accountable vicariously for Schiano's purported fraud.

Plaintiff/third-party defendant Schiano served a verified answer to the third-party complaint on June 23, 2022 (R.30).

Castro appeared by filing motions for summary judgment pursuant to CPLR §3212 and to dismiss pursuant to CPLR§3211(a)(7) for failure to state a cause of action in lieu of filing an answer to the third-party complaint (R.13). She voluntarily withdrew her summary judgment motion as premature leaving only her motion to dismiss on the pleadings to be decided by the lower court.

The motion to dismiss was fully briefed before the court below and decided on the papers. On March 14, 2023, the court below issued a decision and order granting Castro's motion and dismissing second and fourth causes of action of the third-party complaint (the "Order") (R.4).

The Court below correctly held that the allegations in the third-party complaint as to Castro's alleged knowledge of Schiano's alleged fraudulent scheme lacked the particularity required for an "aiding and abetting fraud" cause of

action and that SVMC failed to sufficiently allege that Castro by her actions or inactions breached her alleged fiduciary duty and duty of loyalty to SVMC. (R.4). The Court's analysis properly focused on the sufficiency of the complaint and not the merits of SVMC's case. Contrary to the appellant's interpretation of the Court's decision, considering the information provided, the Court properly determined that Castro had met her burden of proof and entitlement to an order of dismissal.

This Court should affirm the Order in its entirety.

### **STANDARD OF REVIEW**

On a motion to dismiss pursuant to CPLR 3211(a)(7) "the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the (pleading) as true, accord (the pleading party) the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" *Leon v. Martinez*, 84 NY2d 83, (1994). Pursuant to CPLR 3211(a)(7), the Court must dismiss a complaint where it "fails to state a cause of action"; stated another way, the court's role in a motion to dismiss is limited to determining whether the facts as alleged fit within any cognizable legal theory. *Cruciata v O'Donnell & Mclaughlin, Esqs.*, 149 AD3d 1034, 1035 (2d Dept 2017). "Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims

flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible” *Everett v Eastchester Police Dept.*, 127 AD3d 1131, 1132 (2d Dept 2015); see also *Washington Ave. Assoc. v Euclid Equip.*, 229 AD2d 486, 487 (2d Dept 1996) (“allegations in the complaint cannot be vague and conclusory”). The court may dismiss a claim pursuant to CPLR 3211(a)(1) where the documentary evidence refutes plaintiff’s factual allegations and conclusively establishes a defense as a matter of law. *Coastal Purch. Group, LLC v JPMCC 2005CIBC Collins Lodging, LLC*, 120 AD3d 1382, 1385 (2d Dept 2014). Applying these standards, the court below correctly granted Castro’s dismissal.

## ARGUMENT

### POINT I

#### **THE COURT PROPERLY DETERMINED THAT THE SECOND CAUSE OF ACTION IN THIRD-PARTY PLAINTIFF’S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR AIDING AND ABETTING FRAUD**

To state a cause of action to recover damages for aiding and abetting fraud, a complaint must allege (1) the existence of an underlying fraud, (2) knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud” *High Tides, LLC v. DeMichele*, 88 AD3d 954, 960, 931 NYS2d 69 (2011); *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins.*

Co., 64 A.D.3d 472, 476, 883 NYS2d 486 (2009). “Substantial assistance” requires an affirmative act on the defendant’s part. *Baron v. Galasso*, 83 AD3d 626, 629 (2011). “The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff” *Monaghan Ford Motor Co.*, 71 A.D.3d 848, 850 (2010).

Taking the complaint in the light most favorable to SVMC, the court below found that SVMC failed to sufficiently allege the elements of Schiano’s purported underlying fraud (R.11). The court also found that the complaint failed to allege aiding and abetting in the perpetration of the fraud by Castro with sufficient particularity to survive her motion to dismiss (R.11).

In addition, in any action based upon fraud including aiding and abetting a fraud, “the circumstances constituting the wrong shall be stated in detail” *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (2003). The court below properly found that SVMC’s complaint failed to plead aiding and abetting fraud in sufficient detail. The Order states that “even giving the third-party complaint a liberal construction and accepting the facts alleged therein as true, and even as augmented by Schiano’s EBT testimony<sup>1</sup> in a separate

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<sup>1</sup> Appellant uses reference from Schiano’s transcript as a proof of Schiano’s “specific acknowledgement” of existence of Castro’s fiduciary duty (R.134 Schiano, in lay person’s terms describes Castro’s duties and responsibilities: “[Castro] handles all the fiduciary responsibilities to all of these companies (corporate defendants). There’s not that she doesn’t”)

pending action” the court finds that the third-party complaint fails to state a claim. (R.10).

The second cause of action charges Castro with aiding and abetting Schiano’s allegedly fraudulent conduct, on the following allegations:

46. While employed as System Vend’s bookkeeper, Castro knew that Schiano was converting company money, knew that cash received was not a loan to the business, and intentionally withheld all information from Systems Vend despite demand for same.

47. Schiano would not have successfully embezzled money and fraudulently claim that cash delivered to Systems Vend were loans or a capital contribution without the help and reliance on Castro.

48. As a result of Castro’s aiding and abetting Schiano’s fraudulent embezzlement scheme as set forth above, Systems Vend has been damaged in a sum to be determined at trial (R. 26)

As with breach of fiduciary duty, the cause of action to recover damages for aiding and abetting fraud is subject to the heightened pleading standard of CPLR 3016(b), meaning that “[the] circumstances constituting the wrong” must be “stated in detail.” *Swartz v. Swartz*, 145 A.D.3d 818, 824 (2<sup>nd</sup> Dep’t 2016); and as with any theory of liability, “the plaintiff cannot rely upon mere ‘buzz words’ or vague or conclusory allegations.” *Williams v. REDF Equities, LLC*, 60 Misc.3d 1224(A) (Sup. Ct, Kings County 2018)

SVMC has failed to meet these standards in pleading aider and abettor liability for the reasons stated below. “The plaintiff must allege facts that show that the aider

and abettor had had an actual knowledge of the fraud; constructive knowledge is not sufficient.” *High Tides, LLC v. Demichele*, 27 Misc.3d 1233(A) \*4 (Nassau Co. 2010). Actual knowledge must be specifically pleaded, it cannot merely be surmised from the surrounding circumstances. *See Williams v. Sidley Austin Brown & Wood, L.L.P.*, 11 Misc.3d 1064(A) (N.Y. Co. 2006) (dismissing aiding and abetting claim because “Plaintiffs failed to allege that HVB had actual, as opposed to constructive, knowledge”).

Here, SVMC does not plead “actual” or “constructive” knowledge on Castro’s part. It alleges in conclusory fashion that she “knew” Schiano was not really making loans to the business (R. 26), “knew” he was converting cash; and “knowingly” used his false reports without questioning them (R.24). The Court is left to speculate as to how Castro somehow managed to acquire such “knowledge,” when according to SVMC itself:

- (i) at Schiano’s insistence, “no other individual [was] present” when he was counting dollar bills from the company’s vending machines “in a private room (R. 23), and
- (ii) Schiano (the Office Manager) “removed cash from the office without first submitting his tally to Castro” (the bookkeeper) (R.24).

SVMC has thus pleaded *neither* actual nor constructive knowledge on



Castro's part only the conclusory "buzz words": "knew" and "knowingly." (William) The second cause of action fails on this element of aider/abettor liability.

"Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Sanford/Kissena Owners Corp. v. Daral Properties, LLC*, 84 A.D.3d 1210, 1212 (2d Dep't 2011). "It requires an affirmative act." *Betz*, 160 A.D.3d at 700 (*Id.*). "Mere inaction by an alleged aider or abettor constitutes substantial assistance only if [she] owes a fiduciary duty directly to the plaintiff." *Monaghan v. Ford Motor Co.*, 71 A.D.3d 848, 849 (2<sup>nd</sup> Dep't 2010).

SVMC alleges that Castro "never questioned Schiano" as to what he was doing and "allowed him to remove cash from the office without first receiving a report" (R.24). Both accusations are contradicted by the allegations that Schiano was Castro's immediate superior (R.22), with the ability to "insist" upon counting the cash alone, in a private room (R.23). Castro thus would not have been in a position to "allow" Schiano to do anything, let alone stop him. In any event, both accusations amount to "mere inaction," which as noted requires a fiduciary duty to be actionable, and as argued in Point II below, Castro was not a fiduciary with respect to SVMC.

The aiding and abetting claim thus boils down to charging Castro with responsibility for Schiano's alleged fraud because she failed to be a whistleblower

--- which this Court has held --- is not grounds for aider and abettor liability.

“Awareness and approval, standing alone, do not constitute substantial assistance.”

*Armstrong v. McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983); *Diehl v. Levine*, 2008 NY Slip Op 31662(U) (Sup Ct, Nassau County 2008), citing *Morrin v. Trupin*, 711 F. Supp. 97, 113 (S.D.N.Y. 1989) (“neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose”), citing *Barker v. Henderson, Franklin, et al.*, 797 F.2d 490, 497 (7<sup>th</sup> Cir. 1986).

As with fiduciary duty, if professionals are not required to blow the whistle on their superiors to avoid aider and abettor liability, surely bookkeepers need not do so. Even assuming “actual knowledge” on Castro’s part as to what Schiano was doing, her silence would not have been actionable absent a fiduciary obligation that she did not possess. *Markowits v. Friedman*, 144AD3d 993 (2d Dept, 2016).

Lastly, with regard to Schiano’s allegedly false reports: where the violation consists of either misrepresentation in (or omissions from) a specific document, the assistance must relate to preparation or circulation of the document itself in order to be “substantial” for purposes of aider and abettor liability. *Terrydale Liquidating Trust v. Gramlich*, 549 F. Supp. 529, 531 (S.D.N.Y.1982).

That was not the case here; SVMC does not allege that Castro was responsible for drafting or disseminating the reports that Schiano allegedly falsified, only failing to challenge them.

The second cause of Action also fails on this element of aider/abettor liability.

Actual damages is an essential element of any claim for aiding and abetting fraud. *Balance Return Fund Ltd. v. Royal Bank of Can.*, 83 AD3d 429 (1<sup>st</sup> Dept, 2011)

The court below properly found that the second cause of action also failed to state a cause of action for aiding and abetting and it did not allege damages (R.11).

## POINT II

### **THE COURT BELOW PROPERLY DETERMINED THAT THE FOURTH CAUSE OF ACTION IN THIRD-PARTY PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY**

The fourth cause of action for breach of fiduciary duty was correctly dismissed by the court below for failure to state a cause of action (R.12). SVMC failed to sufficiently allege that Castro had a fiduciary duty to SVMC in her role as the company's bookkeeper and that by her actions or inactions she breached that duty. The Court below found that SVMC's conclusory allegations were insufficient as a matter of law to sustain its fourth cause of action (R. 11). The court below was correct.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct” *Deblinger v. Sani-Pine Prods. Co., Inc.*, 107 AD3d 659, 967 NYS2d 394 (2013);

*Rut v. Young Adult Inst., Inc.*, 74 AD3d 776, 777 (2010). A breach of fiduciary duty claim “must be pleaded with particularity” *Dineen v. Wilkens*, 155 AD3d 607, 609 (2d Dept 2017), and conclusory allegations will not suffice. *Faith Assembly v. Titledge of New York Abstract, LLC*, 106 AD3d 47, 61 (2d Dept 2013). A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator. *Katan Group, LLC v CPC Resources, Inc.*, 2014 NY Slip Op 30120[U] (Sup Ct, NY County 2014)

The fourth cause of action fails because Castro, as SVMC’s bookkeeper, was not a fiduciary. Therefore, there could be no fiduciary obligation even if all of the *factual* allegations against her were presumed true.

The appellant’s evidence supporting existence of a special relationship, which gives rise to a fiduciary duty, is that Castro was a “signer” on various company bank account, giving her ability to withdraw funds (R.90, 98). However, the appellant simultaneously contradicts itself stating that Harsanyi (the owner of SVMC) does not remember putting her on the account (R.98) and there is no evidence of Castro ever withdrawing any funds from the appellant’s accounts.

The controlling standards for establishing a breach of fiduciary duty are as follows:

[The fiduciary relationship] is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions ... A

conventional business relationship, without more, is insufficient to create a fiduciary relationship ... Rather, a plaintiff must make a showing of “special circumstances” that could have transformed the parties’ business relationship to a fiduciary one, such as control by one party of the other for the good of the other.

*DiTolla v. Doral Dental IPA of New York, LLC*, 100 A.D.3d 586, 587 (2<sup>nd</sup> Dep’t 2012) (internal citations and quotation marks omitted)

According to SVMC, Castro was its bookkeeper (R.23).

In that capacity, “[she] answered to SVMC’s owner, office manager and/or accountant” (R.23). The “owner” was Harsanyi (R.21) and the “office manager” was co-defendant Schiano (R.22). Castro’s responsibilities included “accounting for receivables and payables, paying bills, helping with bids, maintaining accounting computer programs and reporting information to the accountant” (R.23). It is obvious from this job description that Castro’s role was administrative and not managerial.

Even so, “[the] courts do not generally regard the accountant-client relationship as a fiduciary one.” *Fund of Funds v. Andersen & Co.*, 545 F. Supp. 1314, 1356 (S.D.N.Y. 1982). *Accord, Able Energy, Inc. v. Marcum & Kliegman LLP*, 69 A.D.3d 443, 443 (1<sup>st</sup> Dept. 2010) (affirming dismissal of claim for breach of fiduciary duty against accounting firm “since the duty owed by an accountant to a client is generally not fiduciary in nature”); *DG Liquidation, Inc. v. Anchin, Block & Anchin, LLP* 300 A.D.2d 70, 70-71 (1<sup>st</sup> Dep’t 2002).

If a company's accountant is not a fiduciary as a matter of law, then *a fortiori*, its bookkeeper cannot be a fiduciary either. Indeed, as noted, SVMC has pleaded in two places that Castro's role within SVMC's hierarchy was subordinate to the company's accountant (R.22-23). This distinction is evident from SVMC's own allegations: it "*heavily trusted* and relied on Schiano *operating* SVMC as its office manager (R.22); but only "*depended* on Castro's performance as the Bookkeeper (R.23).

SVMC thus cannot establish the "higher degree of trust" (*DiTolla*) required to establish a fiduciary relationship with Castro.

Absent a higher level of trust, SVMC would have to establish some "special circumstances" to transform the parties' "conventional business relationship" (*DiTolla*) to fiduciary status – "such as control by one party of the other for the good of the other." *L. Magarian & Co. v. Timberland Co.*, 245 A.D.2d 69, 69-70 (1<sup>st</sup> Dep't 1997). Again, however, according to SVMC itself, Castro was not in control of anything -- it was *she* who "answer[ed] to the owner, office manager and accountant" (R.22).

Given this chain of command, the allegations that Castro "never questioned Schiano and allowed him to remove cash from SVMC's office" and "knowingly used Schiano's false reports" (R.24) – even if true – are meaningless. Schiano was Castro's superior. As such, it would not have been her place to question him, let alone "allow"

him to do anything; nor could she have known that his reports were false. None of these allegations would establish actionable conduct on her part, much less “special circumstances.”

Lastly, the specific fiduciary duty which SVMC has pleaded is that of “loyalty” (R.27). However, “the duty of loyalty has been limited to cases where the employee, acting as the agent of the employer, unfairly competes with his employer, diverts business opportunities to himself or others to the financial detriment of the employer, or accepts improper kickbacks.” *Veritas Capital Management, L.L.C. v. Campbell*, 22 Misc.3d 1107(A) \*10 (N.Y. Co. 2008).

SVMC alleges no such scenario. The actionable conduct attributed to Castro pertains only to her conduct as it related to that Schiano, whom she is accused of aiding and abetting. It does not pertain to any aspect of her performance as bookkeeper – i.e., keeping track of receivables and payables, paying bills, helping with bills, maintaining computer programs or reporting information to the company’s accountant (R.22). Nor is she accused of unfairly competing, diverting business opportunities or accepting kickbacks. In fact, nowhere does SVMC even allege that Castro benefited in any manner from purportedly assisting Schiano.

“To state a cause of action to recover damages for breach of fiduciary duty under New York law, a plaintiff must allege: “(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by

the defendant's misconduct.” *Parekh v. Cain*, 96 A.D.3d 812, 816 (2<sup>nd</sup> Dep’t 2012).

The claim is also subject to the heightened standard of pleading embedded in CPLR 3016(b), which provides:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, *breach of trust* or undue influence, the circumstances constituting the wrong shall be stated in detail.

The Fourth Cause of Action contains no factual information as to how Castro’s purported fiduciary duty to SVMC came about. It states only that “as SVMC’s Bookkeeper” she was a fiduciary (R.27). Not only is this statement incorrect as a matter of law, it is *prima facie* conclusory and thus, as the court below found, could not support a claim even if it were accurate.

“The bare legal conclusion of a fiduciary relationship, unsupported by any facts whatsoever, fails to satisfy the strict pleading requirements under CPLR 3016(b)[.]” *Wilmington Trust Co. v. Metropolitan Life Ins. Co.*, 2008 WL 3819698 \*10 (N.Y. Co.). See also *U.S. Fire Ins. Co. v. Raia*, 94 A.D.3d 749, 751 (2<sup>nd</sup> Dep’t 2012) (“although the complaint alleged that Karp owed statutory and fiduciary duties ... [o]n a motion to dismiss a complaint pursuant [to] CPLR 3211(a)(7), ‘bare legal conclusions are not presumed to be true’”) (citations omitted; bracketing in original); *WMC Realty Corp. v. City of Yonkers*, 193 A.D.3d 1018, 1023 (2<sup>nd</sup> Dep’t 2021) (“complaint did not allege facts that would give rise to a fiduciary relationship”) citing *U.S. Fire Ins.* 94 A.D.3d at 751 (same); *Palmetto*



*Partners*, 83 A.D.3d at 808 (plaintiff “failed to plead with the requisite particularity the existence of a fiduciary duty”).

Accordingly, SVMC failed to plead the most important element of its claim: the very existence of a fiduciary duty.

Plaintiff has also failed to plead the last element, regarding damages. “Actual injury” is an element of a claim for breach of fiduciary duty. *Shafran v. Harley-Davidson*, 2008 US Dist LEXIS 22494 (SDNY, 2008)

Further, since claims for breach of fiduciary duty are subject to CPLR 3016(b), the damages claimed must be identifiable, and pleaded specifically. See *The Point 128 LLC v. Choi*, 2020 WL 41657 \*4 (N.Y. Co.) (“Point 128 has failed to state a viable cause of action with particularity as to that purported breach of fiduciary duty as it *has not identified* any ‘damages directly caused’ by the alleged misconduct”); *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 189 (1<sup>st</sup> Dep’t 2000) (“proponent of a claim for breach of fiduciary duty must, at a minimum, establish that the offending parties' actions were a substantial factor in causing an identifiable loss”); *DeRaffele v. 210-220-23- Owners Corp.*, 33 A.D.3d 752, 752 (2<sup>nd</sup> Dep’t 2006) (“with respect to the cause of action to recover damages for breach of fiduciary duty, the plaintiff failed to allege sufficient specific facts ... that any damages were attributable to [defendants’] actions”); *Gordon v. Dino De Laurentis Corp.*, 141 A.D.2d 435, 437 (1<sup>st</sup> Dep’t 1988) (“conclusory allegations ...

do not contain any factual detail showing *specific damages* resulting from the purported misrepresentations”) (underscoring added).

The fourth cause of action alleges only that “by reason of Castro’s [purported] breach of fiduciary duty, SVMC has been damages in a sum to be determined at trial” (R.27). This is precisely the sort of “vague, boilerplate allegation of damages” *Pitcock v. Kasowitz, Benson, et al.*, 74 A.D.3d 613, 615 (1<sup>st</sup> Dep’t 2010) that the courts have rejected as insufficient to support a claim for breach of fiduciary duty. See *Daly v. Kochanowicz*, 67 A.D.3d 78 (2<sup>nd</sup> Dep’t 2009) (affirming dismissal of claim for breach of fiduciary duty for failure to adequately plead damages).

Accordingly, allowing SVMC the benefit of every favorable inference as the court below did, and taking every factual allegation in the complaint as true, as required on a motion to dismiss under CPLR 3211(a)(7), the court below properly held that it did not plead a *prima facie* claim for breach of fiduciary duty.

**CONCLUSION**

For the reason set for herein, respondent respectfully requests that the decision and Order appealed from be affirmed.

Dated: October 27, 2023  
Rockville Centre, New York

Respectfully Submitted,



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