SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of CRISTINA QUAZZO, Petitioner, -against- 9 CHARLTON STREET CORPORATION, et al., Respondents.	Mot. Seq. 12 Index No. 652282/2010 Justice Friedman Part 60 ORAL ARGUMENT REQUESTED

CRISTINA QUAZZO, both individually and derivatively on behalf of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION, Plaintiff, -against- 9 CHARLTON STREET CORPORATION, et al., Defendants.	Mot. Seq. 7 Index No. 652002/2011 Justice Friedman Part 60 ORAL ARGUMENT REQUESTED

RESPONDENTS/DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER/PLAINTIFF'S MOTION TO STRIKE JURY DEMAND

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PRELIMINARY STATEMENT

A jury trial is warranted on all of Petitioner/Plaintiff Cristina Quazzo's claims. CPLR 4101 extends the right to a jury trial to ***any claim*** redressable through "a judgment for a sum of money only," even if the claim sounds in equity. CPLR 4101(1). There is no exception for claims alleging a breach of fiduciary duty. As the First Department has recognized, a defendant is entitled to a jury trial on claims for "breach of fiduciary duty primarily seeking monetary relief." *Miller v. Epstein*, 293 A.D.2d 282, 282 (1st Dep't 2002). CPLR 4101 thus requires a jury trial on Cristina's claims for breach of fiduciary duty in the Plenary Action (No. 652002/2011). Not only does Cristina principally seek money damages in that action, but this Court "dismissed" the "equitable portion" of Cristina's individual claims years ago. Index No. 652002/2011, NYSCEF Doc. 56 at 9. Under the circumstances, it would contravene CPLR 4101 to deprive Respondents/Defendants of a jury trial in the Plenary Action.

Although no jury trial is required in the Special Proceeding (No. 652282/2010) – in which Cristina seeks purely equitable relief – there are nonetheless excellent reasons to submit ***all*** claims to a jury. There is no question the Court may ask a jury to render an advisory verdict. And requesting an advisory verdict would minimize the danger of conflicting verdicts in a pair of actions involving the same parties and almost completely identical facts. It also would avoid the waste and expense that would come with two trials (one jury, one bench) on highly similar issues. By contrast, Cristina's proposal to subdivide the upcoming trial into multiple, discrete proceedings would needlessly burden the Court, the parties, and the witnesses called to testify.

The Court should deny Cristina's motion to strike Respondents/Defendants' demand for a jury trial.

STATEMENT

In December 2010, Cristina turned a personal family grievance into this decade-long litigation. She triggered a special proceeding over three corporations that her father, Ugo Quazzo, had built himself: 9 Charlton Street Corporation, Pearlbud Realty Corporation, and Orbis International Corporation (collectively, the "Corporations"). Pl. Ex. 1. Cristina's petition alleges that her father and her brothers, Stephen and Marco Quazzo, breached various fiduciary duties to the Corporations; wasted or diverted corporate assets; declined to recognize that she was a stockholder of the Corporations; and failed to observe other requirements (*e.g.*, provide her access to corporate books and records). *Id.* ¶¶26-61. Cristina sought a wide variety of equitable relief, including dissolution of the Corporations, appointment of a receiver, access to corporate records, and an injunction. *Id.* at 28-29 (prayer for relief).

Seven months after filing the Special Proceeding, Cristina brought individual and derivative claims in another proceeding (the "Plenary Action") against Ugo, her brothers, and other defendants based on "substantially identical" factual allegations. Index No. 652002/2011, NYSCEF Doc. 52 (letter from Cristina); *see* Index No. 652002/2011, NYSCEF Doc. 56 at 6 ("identical claims"). This time, Cristina sought damages. Pl. Ex. 2, ¶¶79-80, 90-91, 101-02, 130-31, 141-42, 152-53, 162-63, 174-75, 182-83, 189-90, 200-01, 213-14, 221-22, 237-38, 255 (prayer for relief). She also sought equitable and declaratory relief. *Id.* at 255 (prayer for relief). In July 2012, however, this Court dismissed Cristina's complaint in part. Index No. 652002/2011, NYSCEF Doc. 56. Observing that Cristina's requests for equitable relief were duplicative of those in the Special Proceeding, the Court dismissed the "equitable portion" of her individual claims. *Id.* at 5-7, 9-11. The only individual claims that remain in the Plenary Action are for damages. *Id.* at 9.

Ugo and the Corporations have demanded a jury trial in both actions. Pl. Ex. 3. Stephen demanded a jury in the Plenary Action "as to all causes of action, affirmative defenses and counterclaims in the action so triable." Pl. Ex. 4. Cristina moved to strike those demands.

ARGUMENT

I. A JURY TRIAL IN THE PLENARY ACTION IS REQUIRED

A. A Jury Trial Is Required on Cristina's Individual Claims

CPLR 4101 provides that "issues of fact ***shall*** be tried by a jury" in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only." CPLR 4101(1) (emphasis added). That provision "enlarges upon" the constitutional right to a jury trial, *Murphy v. Am. Home Prods. Corp.*, 136 A.D.2d 229, 232 (1st Dep't 1988), which guaranteed a jury trial only in actions historically tried to juries, *State Farm Mut. Auto. Ins. Co. v. Sparacio*, 25 A.D.3d 777, 778 (2d Dep't 2006). Historical practice thus is not dispositive of whether a jury trial is required under CPLR 4101. *See Murphy*, 136 A.D.2d at 231-32. What matters is whether damages could provide relief. *Id.* Courts thus regularly hold that claims historically sounding in equity – including claims for breach of fiduciary duty – must be tried to a jury where damages could provide relief. *See, e.g.*, *Moser v. Devine Real Estate, Inc. (Fla.)*, 42 A.D.3d 731, 736-37 (3d Dep't 2007); *Parker Chapin Flattau & Klimpl, LLP v. Bamira*, 8 Misc. 3d 135(A) (1st Dep't 2005) (unpublished); *Miller*, 293 A.D.2d at 282; *Lipson v. Dime Sav. Bank of N.Y.*, 203 A.D.2d 161, 161-63 (1st Dep't 1994); *Abrams v. Rogers*, 195 A.D.2d 349, 349-50 (1st Dep't 1993).

In determining whether damages could provide relief, courts must be wary of efforts to "deprive a defendant of a jury trial" by "artful pleading." *Azoulay v. Cassin*, 103 A.D.2d 836, 836 (2d Dep't 1984). Although ***a plaintiff*** may "waive" her right to a jury trial by joining legal and equitable claims, *Horizon Asset Mgmt., LLC v. Duffy*, 106 A.D.3d 594, 595 (1st Dep't 2013),

a plaintiff may not "deprive" ***defendants*** of their right to a jury trial by "join[ing] . . . legal and equitable claims," *Azoulay*, 103 A.D.2d at 836; *see Le Bel v. Donovan*, 96 A.D.3d 415, 417 (1st Dep't 2012); *Gordon v. Cont'l Cas. Co.*, 91 A.D.2d 987, 987-88 (2d Dep't 1983). Nor may a plaintiff prevent a jury trial by "characterizing his claim as equitable," *Azoulay*, 103 A.D.2d at 836, "limiting his demand to equitable relief," *id.*, or making an "incidental" requests for equitable relief, *Abrams*, 195 A.D.2d at 349-50. However a plaintiff might structure a complaint, a defendant is entitled to a jury trial on claims for "breach of fiduciary duty primarily seeking monetary relief." *Miller*, 293 A.D.2d at 282.

Those principles require a jury trial here. A "judgment for a sum of money only" could provide redress for Cristina's breach-of-fiduciary-duty claims in the Plenary Action. CPLR 4101(1). That is particularly clear with respect to Cristina's individual claims. Those claims do not just "primarily" seek monetary relief. *Miller*, 293 A.D.2d at 282; *Bressler v. Kalow*, 13 A.D.3d 70, 70 (1st Dep't 2004). They ***exclusively*** seek monetary relief. Years ago, this Court dismissed "the equitable portion" of Cristina's individual claims for breach of fiduciary duty as duplicative of claims she had brought in the separate Special Proceeding. Index No. 652002/2011, NYSCEF Doc. 56 at 9; *see id.* at 5-7, 9-11. Only individual claims for money damages now remain in the Plenary Action. "[M]oney damages alone" thus would necessarily "afford a full and complete remedy" on Cristina's individual claims. *Cadwalader Wickersham & Taft v. Spinale*, 177 A.D.2d 315, 316 (1st Dep't 1991). A jury trial on those claims is therefore required.

Controlling precedent confirms that a jury trial is required. In *Miller*, the First Department upheld a ruling that claims for "breach of fiduciary duty" should be tried to a jury under CPLR 4101. 293 A.D.2d at 282. For purposes of CPLR 4101, the First Department

explained, those claims were considered "legal in nature" because the plaintiff "primarily" sought "monetary relief" and "could obtain full relief by means of a monetary award." *Id.*; *see also Parker Chapin*, 8 Misc. 3d at 135(A) (counterclaims "for breach of fiduciary duty" that sought "only money damages" were "essentially legal"). That holding applies with equal force here. Damages could provide Cristina with full relief on her individual claims because the only remaining claims are for damages. CPLR 4101 thus affords Respondents/Defendants the right to a jury trial.

B. Cristina's Efforts To Avoid a Jury Trial on Her Individual Claims Fail

Cristina's attempts to avoid a jury trial are unavailing. Cristina does not dispute that the Court dismissed the "equitable portions" of her individual claims. Index No. 652002/2011, NYSCEF Doc. 56 at 9; *see* Pl. Mem. 2 n.1 (acknowledging ruling). Nor does she dispute that damages could provide full relief on her remaining claims. Cristina instead argues that "individual claims sounding in breach of fiduciary duty" can ***never*** be tried to a jury. Pl. Mem. 8.

Cristina's categorical assertion defies both CPLR 4101's text and binding precedent. CPLR 4101 requires a jury trial in any action where a "judgment for a sum of money" could provide redress. CPLR 4101(1). There is no exception to that rule for claims that "sound in breach of fiduciary duty." Cristina never reconciles her position with CPLR 4101's plain text. Nor does Cristina ever attempt to reconcile her position with the First Department's repeated, unequivocal holdings that a jury trial is ***required*** on claims for "breach of fiduciary duty" that "primarily seek[ ] monetary relief." *Miller*, 293 A.D.2d at 282; *see, e.g.*, *Parker*, 8 Misc. 3d at 135(A) (jury trial proper on counterclaims "for breach of fiduciary duty" seeking "only money damages"); *Lipson*, 203 A.D.2d at 162-63 (jury trial required in action including claims for "breach of fiduciary duty"); *Abrams*, 195 A.D.2d at 349-50 (jury trial proper in "action for breach of fiduciary duties").

Tellingly, none of the authorities Cristina invokes support her categorical position that "claims sounding in breach of fiduciary duty" should never be tried to a jury. Pl. Mem. 8. True, *In re Estate of Rappaport*, 150 A.D.2d 779 (2d Dep't 1989), contains a one-sentence statement that there is "no right to a jury trial" on a claim for "breach of fiduciary duty, which sounds in equity." *Id.* at 780. But that sentence is best understood as addressing whether there is a ***constitutional right*** to a jury trial – not the ***broader, statutory right*** created by CPLR 4101. In *Rappaport*, the court nowhere mentions CPLR 4101. Nor does it examine the test CPLR 4101 supplies (*i.e.*, whether a "judgment for a sum of money only" could provide relief, CPLR 4101(1)). The court instead cites *In re Coyle*, 34 A.D.2d 612, 612 (3d Dep't 1970) – which addressed what "the Constitution" requires – and paraphrases *Coyle*'s reasoning. *Compare Coyle*, 34 A.D.2d at 612 ("no right to trial by jury" on a "breach of fiduciary duty which is an action in equity"), *with Rappaport*, 150 A.D.2d at 780 ("no right to a jury trial" on a claim for "breach of fiduciary duty, which sounds in equity").[1] *Rappaport* should therefore not be read as diverging from the many other decisions from the Appellate Division recognizing that CPLR 4101 provides a jury-trial right on breach-of-fiduciary-duty-claims seeking damages.

Cristina's reliance on *Clearview Gardens First Corp. v. Weisman*, 206 Misc. 526 (N.Y. Sup. Ct. 1954), is likewise misplaced. In that case, the plaintiff did not seek legal relief (*i.e.*, damages). It sought a form of recovery that "could not be had at law" and that was "a matter for exclusive equity jurisdiction." *Id.* at 528. Here, by contrast, Cristina ***does*** seek legal relief. The Court dismissed "the equitable portion" of her individual claims years ago. Index No. 652002/2011, NYSCEF Doc. 56 at 9. That alone distinguishes *Clearview Gardens*. In any

[1] The other decision *Rappaport* cited contains no similar language or reasoning. It instead addresses the circumstances under which plaintiffs "waive[ ] their right to a jury trial" by "joining" legal and equitable claims. *Trepuk v. Frank*, 104 A.D.2d 780, 780-81 (1st Dep't 1984).

event, *Clearview Gardens* applies the wrong test to determine whether CPLR 4101 requires a jury trial on claims for breach of fiduciary duty. That decision (like Cristina's memorandum of law) suggests that whether CPLR 4101 requires a jury trial is "'purely a matter of historical development.'" Pl. Mem. 9 (quoting *Clearview Gardens*, 206 Misc. at 528). But that cannot be reconciled with binding precedent. As the First Department has explained, CPLR 4101 "enlarges upon" the historical right to a jury trial. *Murphy*, 136 A.D.2d at 232. It thus guarantees a jury trial on breach-of-fiduciary-duty claims "primarily" seeking legal relief, regardless of how similar claims would have been handled centuries ago. *Miller*, 293 A.D.2d at 282.

The only First Department decisions Cristina cites in passing (at 9-10) do not lead to a different conclusion. *HH Princess Zarina Zainal v. Am.-Europe-Asia International Trade & Mgmt. Consultants, Ltd.*, 254 A.D.2d 52 (1st Dep't 1998), affirmed a trial-court decision holding that a ***plaintiff*** had "waived" the right to a jury trial by "joining" legal and equitable "causes of action in a single complaint." *HH Princess Larina Lainal v. Am.-Eur. Int'l Trade & Mgmt. Consultants, Ltd.*, 1998 WL 35551648, at *1 (N.Y. Sup. Ct. 1998). That decision nowhere implies ***defendants*** cannot demand a jury trial under CPLR 4101 on damages claims. *Grossman v. Sall*, 244 A.D.2d 159 (1st Dep't 1997), does not help Cristina either. Although *Grossman* held that no jury trial is required on an "equitable" claim for breach of fiduciary duty, *id.* at 159, it did not address legal claims like Cristina's. As other decisions explain, claims for breach of fiduciary duty seeking damages are considered "legal in nature" for purposes of CPLR 4101. *Miller*, 293 A.D.2d at 282. None of Cristina's authorities support her position that breach-of-

fiduciary-duty claims are automatically exempt from a jury trial under CPLR 4101.[2]

Cristina also argues that no jury trial is warranted on her individual claims for damages because ***other claims*** seek "equitable" relief. Pl. Mem. 13-14. But that ignores the well-established rule that a plaintiff cannot "deprive defendants . . . of their right to a jury trial on all issues so triable" by joining claims seeking equitable relief with claims seeking damages. *L.C.J. Realty Corp. v. Back*, 37 A.D.2d 840, 840 (2d Dep't 1971); *see Le Bel*, 96 A.D.3d at 417; *Azoulay*, 103 A.D.2d at 836; *Gordon*, 91 A.D.2d at 987-88. Cristina cites no authority for the notion that a plaintiff can deprive defendants of their right to a jury trial through creative pleading. The only authorities Cristina cites hold that a ***plaintiff*** waives her right to a jury trial by joining legal and equitable causes of action. *See Horizon Asset Mgmt.*, 106 A.D.3d at 595 (finding "waiver" of jury-trial right by "counterclaim plaintiff"); *Zutrau v. Ice Systems, Inc.*, 2012 WL 12521016, at *1 (N.Y. Sup. Ct. July 16, 2012) ("plaintiff waived her right to a jury trial"). Cristina cannot deprive the defendants of their right to a jury trial on her individual claims by pointing to requests for equitable relief made in connection with ***separate*** claims, or even claims brought in an ***entirely separate lawsuit*** (the Special Proceeding).

Finally, Cristina argues that Respondents/Defendants have somehow conceded that a bench trial is required by asserting affirmative defenses (*e.g.*, unclean hands) that "can only be maintained as to causes of action sounding in equity." Pl. Mem. 15-16. That argument misses the point. Whether CPLR 4101 requires a jury trial does not depend on whether a cause of

[2] The remaining trial-court opinions that Cristina cites do not support her categorical rule either. In *Zutrau v. Ice Systems, Inc.*, No. 375762009, 2012 WL 12521016 (N.Y. Sup. Ct. July 16, 2012), the trial court struck the ***plaintiff's*** jury demand because she joined equitable claims with legal claims and because she did not "allege facts upon which monetary damages alone will afford full relief." *Id.* at *1. And in *Cross v. Communications Channels, Inc.*, 112 Misc. 2d 1082, 1082-83 (N.Y. Sup. Ct. 1981), the court applied the law-of-the-case doctrine to deny a jury demand.

action historically sounded in equity. *See Murphy*, 136 A.D.2d at 231-32. It depends on whether "a judgment for a sum of money" could provide relief. CPLR 4101(1). That is why CPLR 4101 itself contemplates that "equitable defenses" might be asserted in actions that it requires be tried to a jury. CPLR 4101. As the First Department has ruled, defendants do not waive their right to a jury trial "merely" by "raising equitable defenses." *Hudson View II Assocs. v. Gooden*, 222 A.D.2d 163, 167 (1st Dep't 1996). Cristina addresses that ruling with silence.

C. A Jury Trial Is Required on Cristina's Derivative Claims

As with her individual claims, a "judgment for a sum of money only" could provide redress for Cristina's derivative claims. CPLR 4101(1). Cristina's complaint alleges various historical injuries, such as the improper transfer of corporate funds and the waste of corporate assets. *See* Pl. Ex. 2, ¶¶55-63. Those are the sorts of past injuries that damages are designed to redress. *See, e.g.*, *Bertoni v. Catucci*, 117 A.D.2d 892, 894-95 (3d Dep't 1986) (legal remedy was sufficient to redress waste). Cristina has thus "set[ ] forth facts which would permit a judgment for a sum of money only," entitling Ugo, Stephen, and the Corporations to a jury trial. CPLR 4101(1).

The First Department's decision in *Abrams* confirms as much. There, the plaintiff brought an "action for breach of fiduciary duty" that sought various types of monetary and equitable relief. *Abrams*, 195 A.D.2d at 349. Notwithstanding the plaintiff's requests for equitable relief, the First Department concluded that a jury trial was required. *Id.* at 349-50. It explained that damages could provide relief because the "central focus" of the action was to determine whether the defendants had the "right to make certain payments." *Id.* at 349-50. The same reasoning applies here. Like the plaintiff in *Abrams*, Cristina asks this Court to determine (among other things) whether various payments of corporate assets were proper. *See* Pl. Ex. 2, ¶¶55-3. Damages are no less capable of providing relief for the payments at issue here than in

Abrams. Cristina thus asserts derivative claims for which a jury trial is required.

As Cristina points out (at 15-16), she does not seek only monetary relief. But neither did the plaintiff in *Abrams*. Cristina cannot "deprive" Respondents/Defendants of their right to a jury trial by including both requests for equitable and monetary relief in her complaint. *L.C.J. Realty*, 37 A.D.2d at 840.

Cristina's requests for equitable relief are also the sort of "incidental" requests that do not bar a party, plaintiff or defendant, from demanding a jury trial. *Le Bel*, 96 A.D.3d at 416. In her complaint, Cristina requests the appointment of a receiver; injunctive relief to prevent improper transfers of corporate assets; an accounting; and the removal of Ugo, Stephen, and other directors or officers. *See* Pl. Ex. 2 (prayer for relief). But Cristina's request for the appointment of a receiver is incidental to her request for dissolution of the Corporations, *see* Pl. Ex. 2, ¶2 – a request that is the subject of the separate Special Proceeding, *see* Pl. Ex. 1 (prayer for relief) (requesting dissolution and appointment of "receiver to manage" affairs "while . . . business is being wound up"). There would be no reason to appoint a receiver absent dissolution. And Cristina's request for the appointment of a receiver in the Plenary Action is duplicative of her request in the Special Proceeding. *See* Index No. 652002/2011, NYSCEF Doc. 56 at 7. Cristina's request for an appointment of a receiver in the Plenary Action is therefore only incidental to her damages claims.

Cristina's request for an injunction is similarly of no moment. As this Court has recognized, Cristina has "already" sought an injunction in the special proceeding. Index No. 652002/2011, NYSCEF Doc. 56 at 7. Her request for an injunction in the Plenary Action is duplicative. Cristina, moreover, does not and cannot show any continuing or future harm that would justify injunctive relief over and above any damages award. Her complaint concerns past

events. That, too, confirms damages can provide redress for any past harms.

Cristina's request for an accounting to "determine the full amount" of funds allegedly wasted, converted, or transferred points the same way. Pl. Ex. 2 (prayer for relief). The accounting would be but a method "by which to calculate the amount of monetary damages" due. *Le Bel*, 96 A.D.3d at 416. That sort of "incidental" request for equitable relief is not enough to defeat any party's request for a jury trial. *Id.*; *see Bressler*, 13 A.D.3d at 70 (similar).[3]

The Plenary Action's origins therefore support this position. Cristina's derivative claims arise from allegations almost "identical" to those that form the basis for her requests for equitable relief in the Special Proceeding. Index No. 652002/2011, NYSCEF Doc. 56 at 6; *see* Index No. 652002/2011, NYSCEF Doc. 52 (conceding allegations in both proceedings are "substantively identical"). There is little difference between the actions except for the relief sought. As Cristina admitted, she filed the Plenary Action specifically because "damages claims" (*e.g.*, derivative claims for breach of fiduciary duty) cannot be brought in a Special Proceeding. Index No. 652002/2011, NYSCEF Doc. 33 at 31-32. Indeed, in dismissing Cristina's individual claims for equitable relief in the Plenary Action, this Court emphasized that Cristina's requests for damages in this action are what set it apart from the Special Proceeding. *See* Index No. 652002/2011, NYSCEF Doc. 56 at 6-7, 9.[4] That confirms that Cristina's

[3] The request for an accounting is moot regardless. Where, as here, a plaintiff has had the opportunity for discovery, requests for an accounting to help determine damages are moot. *See Lio v. Mingyi Zhong*, 21 Misc. 3d 1107(A), at *3 (N.Y. Sup. Ct. 2008); *Lightbox Ventures, LLC v. 3rd Home Ltd.*, No. 16cv2379(DLC), 2018 WL 1779346, at *11 (S.D.N.Y. Apr. 13, 2018).

[4] As a formal matter, it appears that the Court dismissed only the "equitable portions" of Cristina's individual claims. Index No. 652002/2011, NYSCEF Doc. 56 at 6-7, 9. But Cristina's individual and derivative claims contain identical requests for equitable relief. *See* Pl. Ex. 2 (prayer for relief). This Court's observation that the "equitable portion[s]" of Cristina's individual claims were duplicative of her requests in the Special Proceeding thus applies with

derivative claims for "breach of fiduciary duty . . . primarily seek[ ] monetary relief," and hence must be tried to a jury. *Miller*, 293 A.D.2d at 282.

In any event, Cristina's requests for equitable relief cannot prevent a jury trial on the derivative claims against Stephen. Stephen resigned whatever positions he held in the Corporations long ago. Def. Ex. 1. He can no longer be removed from any position. For the same reason, Cristina's requests for the appointment of a receiver, an injunction, and an accounting would not operate against him. They would operate against current officers. The sole relief that Cristina could obtain against Stephen is damages. Thus, at a minimum, CPLR 4101 requires a jury trial on all of Cristina's derivative claims against Stephen.

D. Cristina's Other Efforts To Avoid a Jury Trial Fail

Cristina repeats her categorical assertion that claims "sounding in breach of fiduciary duty" can never be tried to a jury. Pl. Mem. 8-10. As explained above, however, that argument defies the text of CPLR 4101 and binding precedent. *See* pp. 3-8, *supra.* The same problems plague Cristina's similar argument (at 9-13) that jury trials are never warranted for "derivative claims." Cristina emphasizes that derivative claims are "equitable in nature." Pl. Mem. 11. But, as explained above, the right to a jury trial under CPLR 4101 does not depend on whether claims historically sounded in equity or law. *See Murphy*, 136 A.D.2d at 231. Under CPLR 4101's plain text, it depends on whether a "judgment for a sum of money only" could provide relief. CPLR 4101(1).

Binding precedent confirms that derivative claims redressable with damages must be tried to a jury under CPLR 4101. In *Abrams*, for example, the First Department required

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equal force to the "equitable portion[s]" of Cristina's derivative claims (to the extent any remain).

derivative claims for breach of fiduciary duty seeking monetary damages to be tried to a jury. 195 A.D.2d at 349-50. The party opposing a jury trial had argued – as Cristina does here – that derivative claims should not be tried to juries. *See Abrams v. Rogers*, 1992 WL 12664210 (N.Y. Sup. Ct. Nov. 24, 1992). As the trial court explained, however, the "derivative action nature of the case is . . . irrelevant to a right to jury trial analysis." *Id.*; *see id.* ("[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit."). Similarly, in *Rocha Toussier y Asociados v. Rodrigo Rocha Rivero*, 201 A.D.2d 282 (1st Dep't 1994), the First Department upheld a jury trial in a shareholder-derivative action. *Id.* at 282. And those authorities do not stand alone. *See, e.g.*, *Fedoryszyn v. Weiss*, 62 Misc. 2d 889, 889-90 (N.Y. Sup. Ct. 1970) (recognizing the defendant's right to a jury trial under CPLR 4101 in a shareholder-derivative action seeking money damages); David D. Siegel & Patrick M. Connors, *New York Practice* § 377 & n.3 (6th ed.) (citing *Fedoryszyn* favorably).

The authorities Cristina invokes (at 10-13) do not establish that derivative claims must always be resolved through a bench trial. Several cases do address the jury-trial issue. They simply observe that derivative claims historically sounded in equity. *See Koral v. Savory, Inc.*, 276 N.Y. 215, 217-21 (1937); *Sakow v.633 Seafood Rest., Inc.*, 25 A.D.3d 418, 419 (1st Dep't 2006). Other authorities – including Cristina's principal one – merely establish that ***a plaintiff*** waives any right to a jury trial by joining legal and equitable requests for relief.[5] They do not establish that ***defendants*** lose their jury trial right if a plaintiff waives hers. To the contrary, a plaintiff cannot plead defendants out of a jury trial "by join[ing] . . . legal and equitable claims." *Azoulay*, 103 A.D.2d at 836.

[5] *See Horizon Asset Mgmt., LLC v. Duffy*, 106 A.D.3d 594, 595 (1st Dep't 2013); *Woo v. Choi*, 2017 WL 2407383, at *1 (N.Y. Sup. Ct. June 1, 2017); *Zutrau*, 2012 WL 12521016, at *2; *Tressler v. Smith*, 1994 WL 16856594 (N.Y. Sup. Ct. July 21, 1994); *Goetz v. Mfrs. & Traders Tr. Co.*, 154 Misc. 733, 734 (N.Y. Sup. Ct. 1935).

Cristina's discussion of *Moyal v. Sleppin*, 139 A.D.3d 605 (1st Dep't 2016), is thus beside the point. As Cristina observes, the plaintiff in *Moyal* had initially sought equitable relief alongside money damages in his complaint. *See* Pl. Mem. 10; *Moyal v. Group IX, Inc.*, No. 601973/2007, NYSCEF Doc. 116 at 1 (noting that the plaintiff had initially sought, among other things, an accounting and imposition of a constructive trust). The equitable claims later fell out of the case so that the legal claims were the only claims that remained. Pl. Ex. 9, at 7-9. Although the First Department ruled that the plaintiff could not demand a jury trial on the remaining damages claims, *see* 139 A.D.3d at 605, that ruling rests on the well-established principle that a ***plaintiff*** permanently "waive[s] his right to a jury trial by joining legal and equitable claims," *Horizon*, 106 A.D.3d at 595 (cited in *Moyal*); *see Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 164 A.D.2d 845, 846-47 (1st Dep't 1990) ("Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury."). *Moyal* simply does not address whether ***defendants*** have a jury-trial right where the plaintiff seeks damages through derivative claims.

And *KNET, Inc. v. Ruocco*, 145 A.D.3d 989 (2d Dep't 2016) (cited at Pl. Mem. 12), actually supports ordering a jury trial here. That decision recognizes that CPLR 4101 requires a jury trial on claims that could be redressed through a "'judgment for a sum of money.'" *Id.* at 992. It holds that "defendants" are "entitled to a jury trial" on claims seeking money damages. *Id*. And it rejects the argument – which Cristina makes here, Pl. Mem. 13-14 – that a plaintiff can deprive defendants of a jury trial on damages claims by "join[ing] legal and equitable claims." *KNET*, 145 A.D.3d at 992. Cristina nonetheless portrays *KNET* as holding that "'shareholder derivative actions . . . are equitable in nature and do not require a jury trial.'" Pl.

Mem. 12 (quoting *KNET*, 145 A.D.3d at 992). But she omits critical qualifying language. What *KNET* actually says is that shareholder derivative actions "***seeking equitable relief*** . . . are equitable in nature and do not require a jury trial." *KNET*, 145 A.D.3d at 992 (emphasis added). *KNET* thus provides no support for Cristina's argument that no jury trial is required on her derivative claims ***seeking damages***. It instead explains precisely why one is required here.

II. THE COURT SHOULD HAVE A JURY ISSUE AN ADVISORY VERDICT ON ANY CLAIMS OR ISSUES FOR WHICH A JURY TRIAL IS NOT REQUIRED

To the extent any claims or issues are not required to be tried to a jury under CPLR 4101, the Court should request an advisory verdict on those matters. New York courts have long recognized the wisdom of holding "'one trial'" to resolve all disputed issues rather than attempting to segment a trial into different phases. *John W. Cowper Co., Inc. v. Buffalo Hotel Dev. Venture*, 99 A.D.2d 19, 23 (4th Dep't 1984) (quoting *Vinlis Constr. Co. v. Roreck*, 23 A.D.2d 895, 896 (2d Dep't 1965)). When "'legal and equitable actions'" are "'intertwined and related,'" it makes little sense to hold separate jury and bench trials. *Id.* The same is true when "legal claims" and "equitable defenses" overlap. *Hudson View*, 222 A.D.2d at 169. Rather, in those situations, it is often "'both desirable and necessary'" to hold a single trial in which a jury issues a final verdict on issues to which there is a right to a jury trial and issues an advisory verdict on other issues. *John W. Cowper*, 99 A.D.2d at 23. That procedure minimizes the danger of "conflicting verdicts," avoids needless duplication, and streamlines the trial. *Id.*; *see also Int'l Playtex, Inc. v. CIS Learning Corp.*, 115 A.D.2d 271, 271 (4th Dep't 1985).

Although Respondents/Defendants recognize that no jury trial is required on their equitable defenses or Cristina's claims in the Special Proceeding, this case presents an ideal situation for ordering an advisory verdict on any issues for which no jury trial is required. Cristina's claims in the Plenary Action (for which a jury trial is required) and in the Special

Proceeding (for which no jury is required) are almost "identical." Index No. 652002/2011, NYSCEF Doc. 56 at 6. Both proceedings involve the same parties. They concern the same three Corporations. And, as Cristina herself has conceded, the two proceedings arise from "substantially identical" events. Index No. 652002/2011, NYSCEF Doc. 52 at 1. The essence of Cristina's claims in both proceedings is that Ugo "attempt[ed] to deprive [her] of her rights and interests in [the] Corporations as a minority shareholder, in violation of New York law." Pl. Ex. 1, ¶2; *see* Pl. Ex. 2, ¶2 (same). There is thus every reason to expect that the evidence presented in a trial on Cristina's claims in the Plenary Action would be almost identical to the evidence presented in a trial on Cristina's claims in the Special Proceeding. That alone counsels in favor of holding a single trial before a jury. Holding separate jury and bench trials would require the same evidence to be presented twice. *See Int'l Playtex*, 115 A.D.2d at 271 (advising against "full relitigation" of claims).

Trying all issues before a jury would also minimize the danger of "conflicting verdicts." *John W. Cowper*, 99 A.D.2d at 23. In both the Special Proceeding and the Plenary Action, Cristina seeks determinations that Ugo and Stephen breached their fiduciary duties to the Corporations. Those claims, moreover, are based on "substantially identical" factual allegations. Index No. 652002/2011, NYSCEF Doc. 52 at 1. The overlap in Cristina's claims creates a potential danger that two different factfinders could reach different conclusions on the same substantive issues if separate bench and jury trials are held. It would be nearly impossible to guarantee that the presentation of evidence in two separate trials does not vary in any significant respect.

In a footnote, Cristina argues against having a jury render an "advisory verdict" on any claims or issues. Pl. Mem. 14 n.4. But Cristina offers no explanation as to why it makes any

sense for the Court to hold separate bench and jury trials when issues overlap so much. She instead quibbles that Stephen did not make a timely demand for a jury trial in the Special Proceeding. Pl. Mem. 7. But there is no dispute that Ugo and the Corporations did. They demanded a jury trial in the Special Proceeding only nine days after Cristina filed her note of issue, *see* Demand for Jury Trial, Index No. 652002/2011, NYSCEF Doc. 235 (July 17, 2015); Note of Issue, Index No. 652002/2011, NYSCEF Doc. 231 (July 8, 2015) – well within the 20-day deadline, *see* CPLR 4015. That renders Cristina's objection academic. The only thing that makes less sense than holding two separate trials is holding three.

Cristina, moreover, never explains how it would prejudice her to have a jury render an advisory verdict. Nor can she. After all, an advisory verdict is just that – "***advisory***." *John W. Cowper*, 99 A.D.2d at 23 (emphasis added). If the Court were to disagree with the jury's recommendation, the Court could simply "disregard the advisory verdict." *Mercantile & Gen. Reinsurance Co., plc v. Colonial Assur. Co.*, 624 N.E.2d 629, 631 (N.Y. 1993).

Cristina proposes that the Court decide "any nonjury issues in a bench trial" before any claims or issues are submitted to a jury. Pl. Mem. 6. She says that N.Y.C.R.R. § 202.40 "expresses a distinct preference for trying issues triable to the Court first." *Id.* at 14. But § 202.40 applies only "when[ ] a trial by jury is demanded ***on less than all issues of fact*** in an action." 22 N.Y.C.R.R. § 202.40 (emphasis added). Here, by contrast, there is a demand for a jury trial on ***all*** such issues. *See* Pl. Ex. 3. As a result, § 202.40 simply "is inapplicable." *Wisell v. Indo-Med Commodities, Inc.*, 303 A.D.2d 749, 750 (2d Dep't 2003).

Practical considerations weigh conclusively against Cristina's proposal in any event. Attempting to try every bench issue before every jury issue would require a bench trial in the Special Proceeding followed by a jury trial in the Plenary Action. That would require the same

evidence to be presented twice: Witnesses would have to go over the same events twice, and documents would have to be introduced twice. It makes no sense to impose that needless burden on the parties, the witnesses, and the Court for the sake of nothing more than a "preference." Cristina's proposal, moreover, is guaranteed to produce a confused, disordered proceeding. Attempting to resolve every bench issue before every jury issue would require the Court to determine whether equitable defenses – such as ratification and acquiescence – succeed ***before*** Cristina has presented her evidence on liability and damages. *See* CPLR 4101 (conferring a right to a jury trial on "issues of fact" but not "equitable defenses"). That is backwards. Respondents/Defendants cannot be expected to show that Cristina ratified or acquiesced in particular decisions without knowing which decisions Cristina believes were wrongful and why. It makes far more sense to hold a single trial that proceeds in the ordinary fashion.

Finally, adopting Cristina's proposal would contravene the principle that a court should "indulge every reasonable presumption" against any arrangement that might impinge on a party's right to a jury trial. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). Where, as here, jury and nonjury claims overlap, trying nonjury claims before jury claims can lead to "a back-door divestiture" of the right to a "jury trial." *Import Alley of Mid-Island, Inc. v. Mid-Island Shopping Plaza, Inc.*, 103 A.D.2d 797, 798-99 (2d Dep't 1984). Because "the right to trial by jury is zealously protected" and "yields only to the most compelling circumstances," *Vill. of Herkimer v. Cty. of Herkimer*, 158 A.D.3d 1195, 1196 (4th Dep't 2018), avoiding any divestiture of that right should take priority over any perceived "preference" for trying nonjury claims first. The Court should hold a single trial in which a jury resolves all factual issues in the Plenary Action, *see* CPLR 4101, and renders an advisory verdict on any remaining issues.

CONCLUSION

The Court should deny Cristina's motion to strike.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court, I hereby certify that the foregoing brief contains 6,027 words, excluding parts of the document that are exempted by Rule 17.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, the foregoing memorandum of law was served by the New York State Courts Electronic Filing System on the following:

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