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.	:	Index No. 652282/2010 Part 60
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.	:	Index No. 652002/2011 Part 60

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONER/PLAINTIFF'S MOTION TO STRIKE RESPONDENTS/DEFENDANTS' JURY DEMANDS

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PRELIMINARY STATEMENT

At bottom, Respondents/Defendants' entire argument rests upon a contention, purportedly supported by a ***single case***, that CPLR 4101(1) creates a right to a jury separate and apart from any constitutional/historical right. Because the contention is groundless, Petitioner/Plaintiff's motion to strike must be granted in its entirety.

ARGUMENT

I

RESPONDENTS/DEFENDANTS CONCEDE THAT THEY HAVE NO RIGHT TO A JURY TRIAL IN THE SPECIAL PROCEEDING.

At the outset, Respondents/Defendants[1] concede that there exists no right to a jury trial in the Special Proceeding. Opp. Mem. at 1 ("Although no jury trial is required in the Special Proceeding (No. 652282/2010) – in which Cristina seeks purely equitable relief ... ."). *Id.* at 15 ("Although Respondents/Defendants recognize that no jury trial is required on … Cristina's claims in the Special Proceeding … .").[2] Respondents/Defendants merely argue that a jury should, as a matter of this Court's discretion, render a nonbinding, advisory verdict on the claims in Special Proceeding -- a request that will be addressed in detail below.

II

RESPONDENTS/DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL IN THE ACTION.

Respondents/Defendants' entire argument that the claims in the Action must be tried to a jury is premised upon their mistaken assertion that CPLR 4101(1) somehow enlarges or expands

[1] Capitalized terms used herein shall have the meanings ascribed to them in Petitioner/Plaintiff's Moving Memorandum, dated December 16, 2019 ("Mov. Mem.").

[2] Respondents/Defendants also concede that they have no right to a jury trial on their equitable defenses (*Id.*) and offer no argument or authority refuting Petitioner/Plaintiff's contention that their legal defenses do not provide an independent basis for a jury trial. Mov. Mem. at 16.

upon those instances in which a jury trial is required. Respondents/Defendants argue that "[t]hat provision 'enlarges upon' the constitutional right to a jury, . . . , which guaranteed a jury trial only in actions historically tried to juries, ..." Opp. Mem. at 3. An analysis of the sparse authority Respondents/Defendants cite in support of this "enlargement" argument demonstrates that it is unsupportable and, as a result, that the underpinning of Respondents/Defendants' entire jury trial position is flawed.

Respondents/Defendants rely on *Murphy v. Am. Home Prods. Corp.*, 136 A.D.2d 229 (1st Dep't 1988) ("*Murphy*") in contending that CPLR 4101(1) expands the right to a jury trial beyond that derived from a historical, constitutional analysis. Because of this purported enlargement/expansion, Respondents/Defendants maintain that "[h]istorical practice thus is not dispositive of whether a jury trial is required under CPLR 4101 … . What matters is whether damages could provide relief." Opp. Mem. at 3. Yet, neither the facts of *Murphy*, the authority it relies upon, nor subsequent citations to it support Respondents/Defendants' novel contention that CPLR 4101(1) reworks the law on jury trials. Indeed, that is not surprising, given that if, as Respondents/Defendants aver, CPLR 4101(1) entirely rewrote rather than simply codified the law on jury trials, one would expect more than a single case reflecting this.

Murphy dealt with the novel issue of whether a plaintiff seeking damages under a newly-enacted age discrimination statute was entitled to a jury trial. *Id.* at 233-34. Hence, on its face, *Murphy* did not and could not deal with any historical, constitutional analysis, as the new statute in question was simply not amenable to any such analysis. *Murphy* dealt with the far more limited question of whether a party is entitled to a jury trial on a new statutory cause of action under CPLR 4101(1). It certainly never spoke -- nor had reason to speak -- to CPLR 4101(1)'s relationship to causes of action with a historical pedigree -- such as the breach of fiduciary duty

and derivative claims asserted here. Indeed, *Murphy* itself acknowledged the continued importance of a historical analysis, finding that "[a]lthough procedurally the separate forms of action have been abolished (*see*, CPLR 103 (a)), the substantive distinction as to whether an action is one at law or equity still has relevance in determining whether a jury trial was historically utilized in a particular type of action and thereby protected." *Id.* at 231-32 (citations omitted).

Moreover, the authority *Murphy* itself cites establishes that neither *Murphy* nor CPLR 4101(1) can be read as occasioning a transformation of the law on jury trials. The same section of the Practice Commentary to CPLR 4101 to which *Murphy* cites (*id.* at 232) reiterates that, far from occasioning a game-changing revision to the law, this "section 'is not required because the constitutional right to a jury trial exists apart from any statute . . . and various statutes include a specific reference to the right to a jury trial." McKinney's CPLR § 4101, Legislative Studies and Reports. Further, not one New York case cites *Murphy* for the remarkable proposition that CPLR 4101(1) enlarges upon the historical/constitutional right to a jury.

In taking this vacuous position, ***Respondents/Defendants are forced to ignore and entirely fail to address the established authority Petitioner/Plaintiff cites at pages 7-8 of the Moving Memorandum confirming that a historical/constitutional analysis is appropriate and that CPLR 4101(1) in no way alters the propriety of such an inquiry.*** Respondents/Defendants' silence speaks volumes.[3]

[3] Respondents/Defendants contend that Petitioner/Plaintiff "never reconciles her position with CPLR 4101's plain text." Opp. Mem. at 5. Yet, it is Respondents/Defendants who fail to even address this authority establishing that a demand for money damages and potential redress through an award of damages is not dispositive of the right to a jury trial under CPLR 4101.

A. There Is No Right To A Jury Trial On The Breach Of Fiduciary Duty Claims.

After engaging in their misguided *Murphy* analysis, Respondents/Defendants cite several cases that they claim establish their right to a jury trial on Petitioner/Plaintiff's breach of fiduciary duty claims. Because these cases fail to meaningfully address the required historical/constitutional analysis, they fail to support Respondents/Defendants' position.

Respondents/Defendants rely heavily upon *Miller v. Epstein*, 293 A.D.2d 282 (1st Dep't 2002) ("*Miller*"). Yet, *Miller* itself cites only to *Lipson v. Dime Sav. Bank of N.Y.*, 203 A.D.2d 161 (1st Dep't 1994) (another case Respondents/Defendants cite), which fails to in any way separately evaluate the breach of fiduciary duty claim in that case, including in terms of the required historical/constitutional analysis. *Id.* at 163. To compound this error, another case Respondents/Defendants rely upon, *Parker Chapin Flattau & Klimpl, LLP v. Bamira*, 8 Misc.3d 135(A) (1st Dep't 2005), cites to and relies on the flawed and empty conclusion in *Miller*. *Id.* at *1.[4]

In contrast, cases that do employ the required historical/constitutional analysis, such as those cited by Petitioner/Plaintiff, establish that Respondents/Defendants have no right to a jury trial on Petitioner/Plaintiff's breach of fiduciary duty claims, which sound in equity. Mov. Mem. at 8-10. Respondents/Defendants attempt to distinguish those cases, especially *In re Estate of Rappaport*, 150 A.D.2d 779 (2nd Dept. 1989) and *In re Estate of Coyle*, 34 A.D.2d 612 (3rd Dept. 1970), on the ground that they address "whether there is a ***constitutional right*** to a jury trial – not the ***broader, statutory right*** created by CPLR 4101." Opp. Mem. at 6. But, as demonstrated above, this dichotomy between a constitutional and statutory right is a fiction of

[4] The remaining two cases Respondents/Defendants cite, *Abrams v. Rogers*, 195 A.D.2d 349 (1st Dep't 1993) and *Moser v. Devine Real Estate, Inc.* (Fla.), 42 A.D.3d 731 (3rd Dep't 2007), are even less compelling. In those cases, the breach of fiduciary duty claims were simply assumed legal claims entitled to a jury determination without analysis or discussion. *Id.* at 349-50 and 736-37, respectively.

Respondents/Defendants' own making. Indeed, in *Clearview Gardens First Corp. v. Weisman*, 206 Misc. 526 (N.Y. Sup. Ct. 1954) ("*Clearview*"), one of the decisions Petitioner/Plaintiff cites in her Moving Memorandum, this Court specifically addressed the "judgment for a sum of money only" language now found in CPLR 4101(1) and held that:

> What is triable by law or in equity is purely a matter of historical development. This is not materially affected by Civil Practice Act § 425, Subd. 1, providing that there shall be a jury trial where the complaint demands judgment for a sum of money only. If the right to that sum is equitable only, or in other words, where the form of relief that would be granted by equity in the particular circumstances is a decree for the payment of money, the action remains equitable and is tried in the traditional manner of equity causes.

Id. at 528. The Court went on to rule that there was no right to a jury trial on plaintiffs' breach of fiduciary duty claims based upon the required historical analysis. *Id.*[5] In other words, there exists no statutory right to a jury trial separate and apart from the historical/constitutional right. CPLR 4101(1) codifies the historical/constitutional right to a jury. It does not create a new one.

Respondents/Defendants attempt to distinguish Petitioner/Plaintiff's remaining authority on the principal ground that they, in part, involve a plaintiff's waiver of the right to a jury trial by joining equitable and legal claims. Opp. Mem. at 7-8. In so doing, they miss the point. The equitable claims being joined that result in waiver of a jury trial are breach of fiduciary duty claims. The waiver results from the threshold legal conclusion that no party, plaintiff or defendant, has a right to a jury trial on equitable, fiduciary duty claims -- Petitioner/Plaintiff's entire point. *See Zainal v. America-Europe-Asia Intl. Trade & Mgt. Consultants, Ltd.*, 254 A.D.2d 52, 53 (1st Dept. 1998) (upholding denial of jury demand, "The action cannot be viewed

[5] Respondents/Defendants attempt to distinguish *Clearview* on the ground that "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.'" Opp. Mem. at 6. First, the plaintiffs in *Clearview* unquestionably sought damages. Indeed, the Court undertook a "study of the amounts demanded ... ." *Clearview*, 206 Misc. at 528. Moreover, the language Respondents/Defendants cite makes Petitioner/Plaintiff's point -- the recovery that "could not be had at law" and that was "a matter for exclusive equity jurisdiction" was recovery in damages for breach of fiduciary duty. *Id.*

as primarily legal in nature where the main thrust of plaintiff's allegations is that defendants' transfer of franchise rights in a restaurant was a violation of their fiduciary duties to plaintiff in an alleged joint venture to develop the restaurant.") (citations omitted); *Grossman v. Sall*, 244 A.D.2d 159, 159 (1st Dept. 1997) (upholding striking of jury demand where claim involving fiduciary obligations "equitable claim"); *Zutrau v. Ice Systems, Inc.*, 2012 WL 12521016, 2012 N.Y. Slip Op. 33947[U], *2 (N.Y. Sup Ct. July 16, 2012) (striking jury demand, holding breach of fiduciary duty claim "equitable claim").

Further, Respondents/Defendants' stab at distinguishing a decision of this Court, *Cross v. Communications Channels, Inc.*, 112 Misc.2d 1082, 1083 (N.Y. Sup. Ct. 1981), on the ground that "the court applied the law-of-the-case doctrine to deny a jury demand," falls particularly flat. Opp. Mem. at 8, n. 2. Indeed, the "law-of-the-case" employed there to strike a jury demand was the explicit conclusion "that although relief in the form of a money judgment might be granted, this action was still essentially an equitable one (breach of fiduciary relationship)." *Cross*, 112 Misc.2d at 1083.

Finally, Respondents/Defendants fail to even reference Petitioner/Plaintiff's citation to 7C Carmody-Wait 2d New York Practice with Forms § 49:45, which directly addresses and refutes their contention that breach of fiduciary duty claims seeking damages are subject to jury determination -- "[t]here is no right to a jury trial where the cause of action is to recover damages for breach of fiduciary duty, which sounds in equity."[6]

[6] Respondents/Defendants misapprehend Petitioner/Plaintiff's argument concerning their assertion of equitable defenses. Opp. Mem. at 8-9. Petitioner/Plaintiff is not arguing waiver, but that Respondents/Defendants' assertion of such defenses amounts to a concession that Petitioner/Plaintiff's claims are equitable under the required historical/constitutional analysis.

B. There Is No Right To A Jury Trial On The Derivative Claims.

In professing that they have a right to a jury trial on Petitioner/Plaintiff's derivative claims, Respondents/Defendants repeat the same mistaken argument that CPLR 4101(1) provides for a statutory right to a jury trial separate and apart from a historical/constitutional right. Opp. Mem. at 12. Moreover, not only is the authority they cite unpersuasive, but their effort to distinguish recent, controlling First Department authority utterly fails.[7]

Respondents/Defendants mainly rely upon *Abrams v. Rogers*, 195 A.D.2d 349 (1st Dep't 1993). Yet, the Court there never even mentioned that the claims at issue were derivative claims nor ever addressed whether derivative claims are equitable in nature and, therefore, not subject to jury trial. In short, Respondents/Defendants' main authority simply fails to consider the question posed by this motion.[8] However, perhaps the most glaring weakness in Respondents/Defendants' position is their inadequate and ill-fated attempt to distinguish Petitioner/Plaintiff's recent, controlling authority directly on point.

Respondents/Defendants attempt to distinguish *Moyal v. Sleppin*, 139 A.D.3d 605 (1st Dept. 2016) ("*Moyal*") on the now familiar, purported ground that the First Department's decision there rested on waiver. Opp. Mem. at 14. **Yet, waiver is never even mentioned in *Moyal*.** The First Department there explicitly held that "Supreme Court erred in finding that plaintiff in this shareholders' derivative action was entitled to a jury trial, ***since the claims brought in his capacity as a shareholder were 'derivative and therefore equitable in nature.***'"

[7] Indeed, recognizing the weakness of their argument here, Respondents/Defendants do not even address the derivative claims in their Preliminary Statement. Opp. Mem. at 1.

[8] Likewise, in *Rocha Toussier y Asociados v. Rodrigo Rocha Rivero*, 201 A.D.2d 282 (1st Dep't 1994), the Court also failed to consider or analyze whether the derivative nature of plaintiff's claims in and of itself precluded a jury trial. And, perhaps emphasizing the tenuous nature of their position, the only other case Respondents/Defendants cite is a 1970 decision from Nassau County. *See Fedoryszyn v. Weiss*, 62 Misc.2d 889, 892-93 (N.Y. Sup. Ct 1970).

Moyal, 139 A.D.3d at 605 (citations omitted) (emphasis supplied).[9] Full stop. And, *Moyal* cites to the exact same authority Petitioner/Plaintiff relies on in reaching that conclusion. *Id.* (citing *Sakow* and *Horizon*). In other words, irrespective of the fact that the relief sought on the remaining derivative causes was purely monetary, the derivative nature of the causes itself precluded a jury trial. *Moyal*, a 2016 First Department decision, is binding here.

Respondents/Defendants employ the same gambit in trying to marginalize Petitioner/Plaintiff's other authority, with the same outcome. For example, by focusing on their now well-worn waiver contention, Respondents/Defendants fail to acknowledge the First Department's 2013 explicit holding, in finding defendant/counterclaim plaintiff had no right to a jury trial, that "contrary to [defendant/counterclaim plaintiff's] contention, the counterclaims for breach of contract and conversion, which he asserted derivatively, are not legal claims, since derivative actions have long been recognized in New York as equitable proceedings." *Horizon Asset Mgt., LLC v. Duffy*, 106 A.D.3d 594, 595 (1st Dept. 2013) (citations omitted). And, once again, the First Department cited to the same authority as Petitioner/Plaintiff in reaching this determination. *Id.* (citing *Sakow*).

Moreover, their attempt to distinguish *Goetz v. Manufacturers'& Traders' Trust Co.*, 154 Misc. 733 (N.Y. Sup. Ct. 1935) ("*Goetz*") on this "waiver" ground, like their attempt to distinguish *Moyal,* is simply wrong. *Goetz* nowhere addresses waiver. Indeed, the Court there found, after performing the required historical/constitutional analysis of derivative claims and acknowledging that the "demand for judgment is one for money only," that such claims are simply not amenable to trial by jury. *Id.* at 734.

[9] The trial Court had reached the opposite, erroneous result by relying on the same authority Respondents/Defendants cite here. *See* Berube Aff. Ex. 9, attaching November 2, 2015 record at 8 (citing *Fedoryszyn*).

Further, Respondents/Defendants again fail to acknowledge, as they did in addressing Petitioner/Plaintiff's breach of fiduciary duty cases, that the equitable claims being joined that result in waiver of a jury trial are derivative claims. The waiver results from the threshold legal conclusion that no party, plaintiff or defendant, has a right to a jury trial on equitable, derivative claims -- Petitioner/Plaintiff's whole point. *See Woo v. Choi*, 2017 WL 2407383, No. 652033/2014, * 1 (N.Y. Sup Ct. 2017) ("The Court hereby grants the defendant's motion, striking plaintiff's jury demand, because as the defendant has argued, plaintiff has waived its right to a jury trial by asserting derivative claims which are equitable in nature."); *Zutrau,* 2012 WL 12521016, *1 (striking jury demand, waiver resulted from joining derivative claims which are "equitable in nature"); *Tressler v. Smith*, 1994 WL 16856594, No. 25898-87, *1 (N.Y. Sup Ct. July 21, 1994) (striking jury demand, waiver resulted from joining derivative claims, "derivative shareholder's action [which sought damages] is available only in equity, and therefore Plaintiffs are not entitled to a jury trial as a matter of right."). And notably, once again, Respondents/Defendants fail to even attempt to address Petitioner/Plaintiff's citation to 15 N.Y. Jur. 2d Business Relationships § 1202 -- which could not be clearer or more apt -- "Shareholder's derivative actions are equitable in nature, and thus, a shareholder is not entitled to a jury trial."

Respondents/Defendants next suggest that *KNET, Inc. v. Ruocco*, 145 A.D.3d 989 (2nd Dept. 2016) ("*KNET*") supports their position. They are mistaken. While Respondents/Defendants accuse Petitioner/Plaintiff of omitting "critical qualifying language," it is in fact they who selectively quote from the decision to mislead. Opp. Mem. at 15. The full pertinent quote reads as follows: "shareholder derivative actions and causes of action seeking equitable relief for breach of fiduciary duty are equitable in nature and do not require a jury trial

... ."). *KNET*, 145 A.D.3d at 992. And, as with other cases, the Court cites to the same authority Petitioner/Plaintiff cites. *Id.* (citing *Moyal* and *Horizon*). *KNET* fully supports Petitioner/Plaintiff's position.

Moreover, and significantly, not a single case here addressing the derivative claims even remotely suggests that there exists some separate statutory right to a jury trial under CPLR 4101(1). Instead, these cases routinely employ the entrenched historical/constitutional analysis to conclude that there exists no right to a jury trial on derivative claims. Once more, Respondents/Defendants' "enlargement" argument with respect to CPLR 4101(1) is wholly without support.

Finally, Petitioner/Plaintiff's requests for equitable relief cannot be dismissed as merely "incidental." Opp. Mem. at 10-12. For example, the requests for a receiver and injunctive relief are designed to ensure that the Corporations are managed properly going forward. They have nothing to do with damages.[10] In any event, Respondents/Defendants in no way address how Petitioner/Plaintiff's derivative requests for the removal of directors and officers (Seventeenth and Eighteenth Causes) could be "incidental" to anything, or how a jury determination on Petitioner/Plaintiff's request for attorneys' fees (Twenty-Second Cause) could possibly be proper. *See Hudson View II Assocs v. Gooden*, 222 A.D.2d 163, 169 (1st Dep't 1996) (claim seeking to remove partners equitable and no right to jury trial).[11]

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[10] The cases Respondents/Defendants cite (*Abrams*, *Le Bel*, *Bressler, Lio*, and *Lightbox*) only relate to requests for an accounting.

[11] Respondents/Defendants imply that this Court's motion to dismiss decision, Index No. 652002/2011, NYSCEF Doc. 56, can be read as dismissing all of Petitioner/Plaintiff's requests for equitable relief in the Action, including as to her derivative claims. First, as Respondents/Defendants concede, the Court clearly "dismissed only the 'equitable potions' of Cristina's individual claims." Opp. Mem. at 11, n. 4. Moreover, there is an entirely logical reason for such disparate treatment. The derivative claims belong to the Corporations, precluding any "duplicative" finding.

C. If The Court Finds That Certain Issues Can Be Tried To A Jury, The Court Should First Try All Those Not Triable To The Jury.

Respondents/Defendants dismiss Petitioner/Plaintiff's argument that, should the Court conclude that certain claims/issues are properly triable to a jury, the Court first try and determine the issues not so triable, as her "proposal." But it is not just her proposal. It the preference expressly embodied in 22 N.Y.C.R.R. § 202.40, as Professor Seigel has recognized. Mov. Mem. at 14-15. *See also* CPLR 603, 4011. And, there is an obvious and practical benefit to this preference. As referenced in § 202.40 itself, the goal is to try nonjury issues first to see if their resolution "dispose[s] of the action" before a jury is empaneled. Indeed, there is a significant possibility here that a ruling on Petitioner/Plaintiff's request for dissolution of the Corporations, which Respondents/Defendants concede is for the Court's determination (*see supra* at 1), could, as a practical matter, result in the resolution of all claims.

Respondents/Defendants contend that § 202.40 is inapplicable here because a jury trial has been demanded on all issues. But this makes no sense. Here, for example, Ugo Quazzo and the Corporations filed a jury demand in the Special Proceeding, providing that "[t]rial by jury is demanded of all issues," even though they now concede that a jury determination is not required on ***any*** issues in the Special Proceeding. Simply put, a party could always interpose an improper jury demand and write § 202.40 out of existence under Respondents/Defendants' reasoning.

As an alternative to the procedure dictated by § 202.40, Respondents/Defendants posit that the Court should try all claims in the Special Proceeding and Action together in one, joint trial, and the jury should render an "advisory verdict" on any nonjury issues. Opp. Mem. at 1, 15-18. Respondents/Defendants do not contend that an advisory verdict in the Special Proceeding would be appropriate, if tried separately.

As a threshold matter, Respondents/Defendants' application for an advisory verdict comes too late. *See* CPLR 4015 ("A motion for trial by … an advisory jury shall be made within twenty days after note of issue is filed … ."). Note of issue was filed in both the Special Proceeding and Action on July 7, 2015. *See* 652282/2010, NYSCEF Doc. No. 231; 652002/2011, NYSCEF Doc. No. 100. Respondents/Defendants' timeliness argument (Opp. Mem. at 17) conflates a ***jury demand*** under CPLR 4102(a) with a ***motion for trial by an advisory jury*** under CPLR 4015. Further, Respondents/Defendants nowhere address the fact that Stephen Quazzo cannot take any position in the Special Proceeding, as to the propriety of a jury trial or otherwise, because he never answered the Amended Petition and joined issue. Mov. Mem. at 7.

Moreover, if the litigations are consolidated and jointly tried, Respondents/Defendants' request for a jury, advisory or not, fares no better. Pursuant to established authority, a defendant is not entitled to a jury trial where the "thrust" of a plaintiff's action seeks equitable relief and "judgment for a sum of money only" would not provide full relief.[12] Here, if all claims in the Special Proceeding and Action are considered together, there can be no doubt that the "thrust" of Petitioner/Plaintiff's claims is equitable -- the dissolution of the Corporations and related equitable relief that she has been seeking since the very outset of her proceedings in this Court. *See Mulder v. Donaldson, Lufkin & Jenrette*, 261 A.D.2d 134, 135 (1st Dep't 1999) (upholding striking of plaintiff's jury demand as to defendant's counterclaims, "Inasmuch as the money damages that defendant seeks in some of its counterclaims will not protect it from plaintiff's

[12] Respondents/Defendants' authority is not to the contrary. *See e.g.,Cadwalader Wickersham & Taft v. Spinale*, 177 A.D.2d 315, 316 (1st Dep't 1991) (analyzing "whether, when viewed in its entirety, the primary character of the case is legal or equitable"); *Azoulay v. Cassin*, 103 A.D.2d 836, 836 (2nd Dep't 1984) (same). Moreover, Respondents/Defendants themselves maintain that the derivative claims are incidental to the equitable claims in the Special Proceeding. Opp. Mem. at 11.

continued use of allegedly confidential information and documents, it is clear that the thrust of defendant's counterclaims, the only claims remaining to be litigated, is equitable in nature, and thus plaintiff is not entitled to a jury trial.") (citation omitted); *Downtown Art Co. v. Zimmerman*, 227 A.D.2d 226, 226 (1st Dep't 1996) (upholding striking of defendant's jury demand, "Aside from its contract claims, the main relief plaintiff seeks is an injunction against defendant's continuing her use of the Soho Booking name and logo. … The IAS court correctly held that 'the primary character of the case' is equitable …, as neither party would obtain full and complete relief by a judgment for a sum of money.") (citations omitted); *Ingenuit, Ltd. v. Harriff*, 56 A.D.3d 428, 428-29 (2nd Dep't 2008) (upholding striking of defendant's jury demand, "The main relief sought by the plaintiffs in this action is an injunction against the defendant's continued solicitation of the plaintiffs' clients and use of the plaintiffs' proprietary information to unfairly compete against them. Since the primary character of the case is equitable and the plaintiffs' damages claims are merely incidental thereto, there is no right to a jury trial … .").

Moreover, this authority also undercuts Respondents/Defendants' repeated attempts to dismiss, as "incidental" or otherwise, the equitable relief requested again and again in both the Special Proceeding and Action. Opp. Mem. at 8, 10-12. Indeed, while they readily separate the Special Proceeding and Action when convenient to their "incidental" argument (Opp. Mem. at 10-11), they fail to acknowledge that Petitioner/Plaintiff's requested equitable relief cannot even arguably be dismissed as incidental, when the two proceedings are consolidated and considered together.

Dated: New York, New York
February 6, 2020

Respectfully submitted,

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CERTIFICATION

In accordance with Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York, 22 NYCRR 202.70(g), I hereby certify that the attached Reply Memorandum of Law, exclusive of its caption on the Cover Page, tables of contents and authorities, signature block, and date and inclusive of the text in its Pages 1 through 13, contains approximately 4,190 words, according to the Microsoft Word word-processing system at Barton LLP, on which said Reply Memorandum of Law was prepared.

Dated: New York, New York
February 6, 2020

Mark A. Berube

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2020, the foregoing Reply Memorandum of Law was served by the New York State Courts Electronic Filing System on the following:

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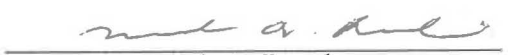

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