[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Hubschman Plaintiff (s),

- v -

1010 Tenth Corp Defendant (s).

INDEX NO. 114697/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

FILED

SEP 24 2012

NEW YORK COUNTY CLERK'S OFFICE

Motion (s) decided in accordance with the accompanying memorandum decision

cc: 12/6/12

nol: 12/7/12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/19/12

Hon. Judith J. Gische, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Barbara Hubshman, *individually and derivatively and behalf of 1010 Tenants Corp.*,

Plaintiff (s),

-against-

1010 Tenants Corp., Richard Born, Estelle Greet, John E. Johnnidis, Roy Levit, Michael Wolf, *individually and as members of the Board of Directors of defendant 1010 Tenants Corp.*, Douglas Elliman Property Management, Neil Rappaport, Herrick Feinstein, LLP and William R. Fried, *individually and as a partner or member of defendant Herrick Feinstein, LLP*,

Defendant (s).

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DECISION/ ORDER
Index No.: 114697/10
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
1010 n/m (partial 3212) w/JVDT affirm, RB affid, exh	1
Hubshman opp w/BHW affirm, BH affid, exhs	2
1010 reply w/JVDT affirm, NR affid (sep back) exhs	3
Hubshman sur-reply w/BHW affirm, BH affid, exhs	4
Correspondence 7/31/12, 8/6/12	5
Various stips of adjournment	6
Steno minutes OA 9/13/12	7

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff Barbara Hubshman ("Hubshman"), a shareholder in the 1010 Tenants Corporation ("coop"), the corporation that owns the residential cooperative building located at 1010 Fifth Avenue, New York, New York ("building"), brings this action on her

own behalf and derivatively against the coop, the board, the managing agent, the individual board members in their official capacities and the lawyers for the defendants.

The motion at bar is by defendants 1010 Tenants Corp., Born, Greer, Johnnidis, Levit, Wolf, Douglas Elliman Property Management and Neil Rappaport ("coop defendants") for partial summary judgment on the 11th cause of action ("11th COA") for waste and mismanagement of coop assets. Issue was joined, but the note of issue has not yet been filed. Since summary judgment relief is available, the motion will be decided on its merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Background and Arguments

Hubshman is the proprietary lessee of a penthouse coop apartment in the building owned by 1010 Tenants Corp. ("the coop"). Hubshman and the coop have long history of disputes regarding a garden she maintains on the terrace outside her apartment[1]. The terrace floor is the roof of the apartment below her apartment. In 2009 the coop, then represented by the law firm of Herrick Feinstein, LLP, commenced an action on behalf of the coop against Hubshman. The action was for a declaration regarding the parties' rights with respect to paragraph 7 of the proprietary lease which deals with penthouses, terraces and gardens (1010 Tenants Corp. v. Hubshman, Supreme Court, Index No. 602966/09) ("garden case"). Briefly, the dispute in the garden case was over whether there was a condition on the roof garden of Hubshman's

[1]The area where the plantings are located have at times been called the "roof terrace garden," "terrace garden," "roof appurtenant to the penthouse," or just "garden." Regardless of nomenclature, it is the area covered by page 6, paragraph 7 of the Proprietary Lease between 1010 Tenants Corp. and Barbara Hubshman ("proprietary lease").

apartment that required repairs, if so how the work would be done, specifically who would hire the contractor, and otherwise direct the work.

The coop took the position in the garden case that it had the right not only to determine that repairs were needed, but also that it could contract for the work to be done on an emergency basis without consulting Hubshman. Hubshman took the position that assuming repairs were needed to the roof garden membrane, she had the contractual right to either let the coop hire someone to do the work and pay for it, or elect to hire someone to do the work for her at the coop's expense.

Following extensive litigation, including a motion for summary judgment by the coop, the court issued the declaration set forth in its decision, order and Judgment dated September 22, 2011 ("Judgment"). In issuing that declaration, the court granted Hubshman, the non-moving party, reverse summary judgment. Subsequently, in connection with a motion by Hubshman with respect to legal fees, the court declared Hubshman the prevailing party and ordered the coop to pay her legal fees in an amount to be recommend by a special referee in a report after a hearing (Decision, Order and Judgment 1/27/12). The parties eventually settled their remaining disputes in the garden case, including the appeals that had been filed, and the issue of legal fees. The action at bar, however, was not part of that global settlement.

This action was commenced on November 9, 2010, while the garden case was pending, and before the court decided the summary judgment motions in that action. The coop defendants brought a pre-answer motion to dismiss and the law firm defendants moved for sanctions. Those motions were originally made returnable in January 2011. After several stipulated to adjournments, the motions were submitted

and decided. In its decision/order dated October 24, 2011, the court dismissed some causes of action and pared down others. The 11th COA, as it stood, was dismissed with leave to replead (see Gische, Order, 10/24/11). Hubshman has served an amended complaint (dated November 16, 2011) setting forth *inter alia* the re-pled the 11th COA for waste and mismanagement. The 11th COA, in relevant part, is as follows:

AS AND FOR AN ELEVENTH CAUSE OF ACTION
(Derivative Claim for Waste and Mismanagement on Behalf of the Co-op Against the Board, the Directors, Managing Agent and Rappaport)

195. ...the Board, including the Directors, its Managing Agent and Rappaport committed, and continue to commit, waste and engaged, and continue to engage, in gross mismanagement by their failure, to date, to properly repair and maintain the Building.

196. In addition, the Board and the Directors, aided and abetted by the Managing Agent and Rappaport, committed waste and engaged in gross mismanagement by pursuing a merit less action against Hubshman in direct retaliation for her public stance against the Board's reckless and dangerous acts and policies permitting the B-line residents to continue using their fireplaces when doing so knowingly created life-threatening and hazardous conditions for the residents of the Building including, but not limited to, Hubshman and her family.

200. ...the Board and its Directors failed and refused to avail themselves of, or simply ignored, the reports prepared by the Building's own experts, including their recommendation (the very same one made by Plaintiff, which the Board likewise ignored and dismissed) to install a flexible steel liner that would have corrected the dangers of the B-line chimney and fules

The coop defendants argue that now that issue has been joined, they are entitled to summary judgment on this cause of action because: 1) Hubshman is an "improper" representative of the coop and should not be allowed to assert this claim derivatively, 2) she has split her causes of action across two cases and, 3) the garden case was not a waste of coop resources, as she claims, but a decision protected by the

business judgment rule. A second branch of the coop defendants' motion is that the amended complaint contains unnecessary, scandalous and prejudicial allegations which should be stricken. A third branch of the motion is for a protective order against Hubshman's discovery demands dated February 28, 2012. Defendants claim the documents sought by Hubshman are privileged (without elaborating), and argue further that even if they are not privileged, the disclosure sought is irrelevant to this action because it involves a resolved case. Defendants also maintain the production of the documents demanded is burdensome, the demands are vague and over broad and by having the scope of discovery so broad, the cost and expense of this case is unjustifiedly increased.

As evident from the allegations in the 11th COA, there are two aspects to that claim. One is that the commencement of the garden case which she claims was brought to punish the Hubshman for speaking out against the coop defendants. The other branch of that claim is that the coop has not made necessary repairs to the building, resulting in a condition that is dangerous, possibly hazardous and affecting the health of all the shareholders. Hubshman alleges a member of her immediate family has already been injured, necessitating hospital care.

The coop defendants deny the garden action was a waste of the coop's assets and argue they prevailed on the issue of who determines whether repairs are needed to the roof membrane beneath Hubshman's garden. The coop defendants claim that the flue/chimney branch of the 11th COA was asserted by Hubshman derivatively solely as "pay back" and that Hubshman is not a suitable plaintiff for this derivative claim when her motives in asserting that claim are closely scrutinized.

The coop defendants argue further that Hubshman has taken actions which have directly impacted upon the coop by, for example, causing complaints to be filed against the building. They state that the other tenants are not aligned with Hubshman and that she has had disagreements with some of them. The coop defendants provide the sworn affidavit by the their managing agent ("Rappaport") who states that in March 2001, the shareholder of the B-line were notified of a problem in the B-line affecting fireplace use and provided with copies of reports setting forth possible options. Rappaport also provides at three (3) responses indicating the occupants did not want the recommended work done because it was intrusive.

A separate argument by the coop is that Hubshman could have, but failed to raise this "waste" claim in the garden action and that by failing to do so, she is now seeking to do so impermissibly in this case. The coop defendants argue that Hubshman should not be allowed to split her claims because there must be an end to litigation.

The paragraphs in the amended complaint that the coop defendants seek to have stricken include: ¶¶14-17, 23, 24, 41-59, 88 (partial), 89-128 and 196, as well as the facts grouped into subsections C, D, E, E [i] - [ii] of the amended complaint. The paragraphs identified as incendiary include factual statements by Hubshman (to the effect) that the coop improperly and unlawful attempts to deprive Hubshman of her contractual rights under the proprietary lease (¶15), the board and directors retaliated against her by commencing the garden case based upon false allegations (¶23) and she incurred legal fees defending against the false and malicious allegations asserted against her by the coop working in collusion with its former litigation counsel (¶24).

Paragraph 88 states that the garden case was "an utterly groundless lawsuit against her." Paragraph 89 and 90 state in sum and substance that the water leaks alleged by the coop were "resurrected" fabrications so the coop would remove her garden without any intention of replacing it. Paragraphs 41-59 set forth more facts about the garden case which, according to the coop defendants, are wholly unnecessary to Hubshman's claim about the flue, chimney, fireplace and B-line residents.

In opposing the coop defendants' motion, Hubshman denies all of their allegations and states that she should not be disqualified from bringing this action just because she may have some interests that go beyond the interests of her fellow shareholders. Hubshman also claims the coop defendants are engaged in revisionist history by saying they prevailed in the underlying action on the issue of roof repairs. Hubshman denies her factual allegations are scandalous and argues that the coop defendants' actions are not protected under the business judgment, if motivated by malice, etc. According to Hubshman, the coop's motion also suffers from procedural infirmities, including the absence of an affirmation of good faith on the issue of discovery (22 NYCRR § 202.7[a]) and failure to move to strike within the time allowed under CPLR 3024 [b].

Discussion

As the party seeking summary judgment in its favor, the coop defendants must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Only if this burden is met does it then shift to the opposing party who must submit evidentiary facts to controvert the

allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

A shareholder may bring a derivative action on behalf of the corporation alleging mismanagement and waste (BCL § 626 [a]; Chan v. Louis, 303 AD2d 151 [1st Dept 2003]). A basic requirement is that the plaintiff must be a shareholder of the corporation (Meredith v. Camp Hill Estates, Inc., 77 A.D.2d 649 [2nd Dept 1980]). Although a plaintiff may meet the legal criteria for bringing a derivative action, s/he may nonetheless be disqualified if, because of some conflict of interest, it appears that s/he is an improper party to commence the action (Gilbert v. Kalikow, 272 AD2d 63 [1st Dept 2000] lv den 95 NY2d 761 [2000]; Sigfeld Realty v. Landsman, 234 AD2d 148 [1st Dept 1996]; In re Cocolicchio, 6 Misc.3d 1041(A) [Sup Ct., N.Y. Co 2005]; Steinberg v. Steinberg, 106 Misc.2d 720 [Sup Ct., N.Y.Co. 1980]).

Steinberg v. Steinberg involved parties who were in the midst of a bitter divorce. The court dismissed plaintiff's action because it was "so fraught with a conflict of interest as to be legally impermissible." The Steinberg decision is cited with approval in the more recent decision of Gilbert v. Kalikow emanating from the Appellate Division, First Department (272 AD2d 63 [1st Dept 2000] lv den 95 NY2d 761 [2000]). The court in Gilbert v. Kalikow affirmed the lower court's dismissal of plaintiff's action on behalf of the limited partnership because, in view of "the totality of the relationship" between the plaintiff and the defendant, plaintiff had failed to demonstrate that he "would fairly and adequately represent the interests of the limited partnership"(Gilbert v. Kalikow, supra at 63). Although Gilbert v. Kalikow involved a limited partnership, not a domestic

corporation as we have here, the citation of earlier decisions involving conflicts of interests in shareholder derivative actions in the appellate court's decision is instructive[2] and indicates it is the law of the First Department that the court can examine not only the plaintiff's motivation, but the totality of the relationship between the parties when deciding a motion for summary judgment based upon the shareholder's qualifications. Thus, the issue is whether Hubshman is a suitable plaintiff, as she claims or, as the coop defendants argue, unqualified as being the "worst person to bring a derivative action."

In deciding whether Hubshman is conflicted, the court considers whether Hubshman will fairly and adequately represent the interests of the corporation in connection with the issues raised (Steinberg v. Steinberg, 106 Misc.2d at 721). Although the plaintiff's motive must be scrutinized, that scrutiny is not in a vacuum, but must take the totality of the relationship in account (see Gilbert v. Kalikow, supra). In other words, a major consideration is whether the plaintiff can fulfill his or her fiduciary duty to the corporation and other shareholders (Id.).

In opposition to the coop defendants' motion, Hubshman has asserted, among other arguments, that she was declared the prevailing party in the garden case and this not only shows the coop's bias against her, but also that she is a indefatigable litigator, willing and able to take on the difficult task of advocating for the other shareholders. Frequently Hubshman paraphrases this court's prior orders in the garden case to highlight her victory. Hubshman argues that the garden action was brought against her

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[2]Partnership Law §115-a[1], like BCL§ 626[c], specifically allows for derivative actions on behalf of the entity.

solely as retribution for her being a vocal tenant and speaking out about the conditions in the B-line flue, etc. Hubshman maintains that the coop defendants' "bullying" tactics cannot go unpunished because it will have a chilling effect on whether other shareholders coming forward to complain. The coop, on the other hand, claims Hubshman has uniquely personal interests that are different than the other shareholders and even her shareholder rights are different because of the special treatment she has under the proprietary lease for her roof garden.

Although there is no clearly articulated test to determine whether a claim is derivative or personal, a claim of mismanagement or diversion of corporate assets generally pleads a wrong to the corporation (Yudell v. Gilbert, 949 NYS2d at 384 *citing* Abrams v. Donati, 66 N.Y.2d 951, 952 [1985]; Albany–Plattsburgh United Corp. v. Bell, 307 AD2d 416, 419 [3rd Dept 2003] lv. dismissed and denied 1 NY3d 620 [2004]). A plaintiff may sometimes have a claim that is individual as well as derivative. The court in Yudell (supra) recently adopted an approach used by the Delaware courts in deciding whether a claim is personal to the plaintiff or derivative. This requires an examination of: 1) who suffered the alleged harm (the corporation or the stockholders); and 2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually) (Yudell v. Gilbert, supra at 384).

Applying the above test, any argument by the coop defendants, that Hubshman's claims are purely personal in nature, not derivative, fails. She is a shareholder and alleging the coop defendants have wasted corporate resources and mismanaged by the board. Hubshman makes it clear that she is not seeking to recover her own legal fees because she has already been compensated in the garden case. Thus, any recovery

of damages would ostensibly be for the benefit of the coop. The coop defendants have other arguments about why the 11th COA should be dismissed. Those arguments are persuasive and, for the reasons that follow, the court agrees that the 11th COA, which was brought derivatively, should be severed and dismissed

Although Hubshman was declared the prevailing party in the garden case and the court set forth each of the reasons she prevailed, the court has never indicated, held nor decided that the complaint the coop brought against her in that case had no merit or was frivolous. Hubshman's lopsided statements about the garden case underscores not only the hostility between the parties, but also Hubshman's lack of objectivity when interacting with the building's governing body. This strongly demonstrates that she is not a suitable plaintiff to assert the 11th COA.

In making this decision, the court has not only looked at the plaintiff's personal animus, but also the long history of disputes between Hubshman, the coop and various board members. The court has also taken into consideration that Hubshman is not the only resident of the B-line, but is apparently the only shareholder who has voiced concerns about the condition of the flue, use of the fireplaces, etc. While there is no evidence that other residents of the B-line – of any resident of 1010 Fifth Avenu – share Hubshman's view about the safety of the flue or, more broadly, share her concerns that the board has ignored a dangerous, possibly hazardous condition, there is documentation that the residents of the B-line were appraised of problems in the B-line flue, provided with reports about options that were available, and even encouraged to weigh in on whether to pursue those options. Documentation shows this issue arose in 2001 and later. There is no evidence that she has taken any measures to understand

the needs or desires of her fellow shareholders before undertaking this claim.

Though Hubshman refers to the coop defendants' strong arm tactics, such tactics (if they are believed to exist) are apparently confined to the ongoing feud she has with the coop and are, therefore, personal to her. Hubshman's opinion, that she is well suited to pursuing the coop's rights (as well as her own) is of no moment, just as the coop's opinion that Hubshman commenced this action because she holds a grudge, is unhelpful.

After careful examination of the applicable law and the totality of the circumstances underlying the 11th COA, the relationship between the parties, and the nature of this claim, the coop defendants have made a prima facie showing that Hubshman is not free of adverse personal interest or animus. In opposition, Hubshman has failed to show, for example, that there is no better plaintiff or, at a minimum, to persuade the court that she will fairly and adequately represent the interests of the corporation and the other shareholders. Therefore, the coop defendants' motion for partial summary judgment on the 11th COA is granted for those reasons.

The coop defendants have also moved for partial summary judgment on the basis that Hubshman has impermissibly split her claims when she could have asserted the 11th COA in the garden case. The doctrine against claim splitting typically involves two separate claims arising from the same contract and/or occurence, ascertainable and matured when the first action is brought, but not asserted until later. The salutary goal of this doctrine is to prevent vexatious and oppressive litigation (White v. Adler, 289 NY 34 [1942]; Sannon Stamm Associates, Inc. v. Keefe, Bruyette & Woods, Inc., 68 AD3d 678 [1st Dept 2009]). Thus, "if a party will sue and recover for a portion, [s/he]

shall be barred [from] the residue" (White v. Adler, 289 NY at 42). The doctrine of claim splitting must be raised as a defense, however, and may be waived if not raised.

The splitting claim defense was not raised in the coop defendants' answer to the amended complaint. Even if had been, it is an unavailable defense under the facts of this case. Claim splitting is closely related to the doctrine of res judicata and the doctrine of res judicata may be invoked in instances of claim splitting to prohibit a plaintiff from bringing an action for only part its claim (Sannon Stamm Associates, Inc. v. Keefe, Bruyette & Woods, Inc., 68 AD3d 678 [1st Dept 2009]). The defendants in this action are different than the plaintiff in the garden case. Had Hubshman asserted her derivative claim in the garden case it would have only muddled the issues in that case, caused unnecessary confusion and greatly expanded the scope of discovery. The coop defendants have failed to show their entitlement to partial summary judgment dismissing the 11th COA on the basis of that Hubshman has split her claims.

Although the court has decided that Hubshman is not a proper plaintiff to assert the 11th COA, the court does not have to, nor will it, go further to decide whether the actions taken by the board in bringing the garden case are protected by the business judgment rule and this is not the basis upon which the court is granting summary judgment dismissing the 11th COA.

Turning its attention to the coop's motion to strike certain factual allegations in the complaint on the basis that they are scandalous, the court is guided by the requirements of CPLR § 3024 which places a time limitation on when such motion shall be made: "b) Scandalous or prejudicial matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading; c) Time limits;

pleading after disposition. A notice of motion under this rule shall be served within twenty [20] days after service of the challenged pleading . . ." The coop defendants did not move timely move after Hubshman served the amended complaint. Therefore, the relief now being sought is discretionary with the court, requiring that the coop defendants offer a reasonable excuse for their failure to move in a timely manner (CPLR § 2004). Not only is no reasonable excuse offered, the statements are not scandalous or unnecessarily inserted in the complaint. This is true even though some of the allegations relate to the now dismissed derivative action. Moreover, in addition to the derivative cause of action, Hubshman has stated causes of action against the coop defendants (and others) in her individual capacity supported by the same allegations. Thus, the allegations are relevant, "in an evidentiary sense, to the controversy" stated in the complaint and necessary for trial (Wegman v. Dairylea Co-op. Inc., 50 AD2d 108, 111 [4th Dept 1975] lv dism 38 NY2d 918 [1976]; see also, Soumayah v. Minnelli, 41 A.D.3d 390 [1st Dept 2007]). Therefore, the motion to strike the allegations as scandalous and unnecessary is denied as untimely and on the merits.

Hubshman seeks responses to her discovery demands dated February 28, 2012 and the coop defendants have moved for a protective order with respect to paragraphs 3[c], [d], 13 - 15, 23, 25 and 34. 22 NYCRR § 202.7[a][2] requires that a motion relating to disclosure be accompanied by an affirmation that counsel has conferred with counsel for the opposing part in a good faith effort to resolves the issues raised by the motion, unless (Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d 393 [1st Dept 2007]). The failure to include the good faith affirmation may be excused, however, where any effort to resolve the present dispute non-judicially would have been

futile (Baulieu v. Ardsley Associates L.P., 84 A.D.3d 666,666 [1st Dept 2011]). Although Attorney Van Der Tuin's affirmation does not address what efforts were made to resolve this discovery dispute, it is implied that under the circumstances of this case any attempt to resolve this dispute non-judicially would have been futile (Northern Leasing Systems, Inc. v. Estate of Turner, 82 A.D.3d 490 [1st Dept 2011]). Therefore, Hubshman's application to deny the coop defendants' motion on procedural grounds is denied.

The demands made in paragraphs 3 [c], [d], 15, 25 and 34 of the notice for discovery solely pertain to the now dismissed 11th COA in which Hubshman asserted certain claim derivatively. Hubshman has, however, asserted other claims individually which involve the conditions in the B-line flue/fireplaces. Those claims include: beach of contract claim (1st, 2nd COA), breach of warranty of habitability (5th COA), partial constructive eviction (6th COA) and nuisance (9th COA). Paragraphs 13, 14 and 23 seek material and necessary in the prosecution of Hubshman's claims against the defendants, but the demands made in paragraphs 13 and 14 are overly broad, vague and burdensome. Those demands are stricken, without prejudice to more particularized demands. The coop defendants shall, however, provide responses to paragraph 23 within Twenty (20) Days of this decision/order appearing on SCROLL as having been entered (Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 [1968]).

Both sides devote many pages to a discussion about whether Hubshman tried to influence the board elections or has surreptitiously been contacting city officials in an effort to put pressure on the board through her purported political connections. These arguments are unhelpful, fruitless and further highlight the inability of these parties to deal effectively and civilly with each other. None of these disputed issues even need to

decided in connection with the coop defendants' motion.

In sum, the following relief is granted:

The motion by the coop defendants for partial summary judgment dismissing the 11th cause of action asserted derivatively against the coop defendants is granted and the 11th cause of action is severed and dismissed.

The motion by the coop defendants for an order striking ¶¶14-17, 23, 24, 41-59, 88 (partial), 89-128 and 196 in the amended complaint, as well as the facts grouped into subsections C, D, E, E [i] - [ii] of the amended complaint is denied.

The motion by the coop defendants for an order striking demands made by Hubshman in her notice dated February 28, 2012 is granted as to paragraphs 3 [c], [d], 15, 25 and 34 because they pertain to the severed and dismissed cause of action. The motion is also granted as to paragraphs 13 and 14, but those paragraphs are stricken without prejudice. The coop defendants' motion to strike the demand in paragraph 23 is denied and they shall provide responses to that demand within Twenty (20) Days of this decision/order appearing on SCROLL as having been entered.

A further compliance conference was previously scheduled for December 6, 2012. The deadline for the filing of the note of issue is December 7, 2012. The parties' interim discovery order, however, sets the deadline for depositions as "on or before 12/12/11." This is apparently an error. The court sets a new deadline for depositions as "on or before November 30, 2012," but otherwise keeps the conference date and date for the filing of the Note of Issue.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by the coop defendants is granted in part and partly denied; and it is further

ORDERED that any relief any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 19, 2012

So Ordered:

Hon. Judith J. Gische, JSC