SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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S. KARIN EPSTEIN, HAL EPSTEIN, and VINCENT MCGEE,

Plaintiffs,

- v -

EPSTEIN TEICHER PHILANTHROPIES, ALAN TEICHER, JANE HEFFNER, and ADRIENNE SIMPSON,

Defendants.

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INDEX NO. 654417/2020

MOTION DATE _____

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 43, 44, 45, 56, 58
were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55
were read on this motion to/for DISMISS.

In Motion Sequence Number 002, defendants Epstein Teicher Philanthropies, Alan Seth Teicher, Jane E. Heffner, and Adrienne Simpson move pursuant to CPLR 3211(a)(1), (3), (10), and (11) to dismiss the action brought by plaintiffs S. Karin Epstein and Hal Epstein, as co-successor executors of the Estate of William A. Epstein, and Vincent F. McGee, Jr., as a member of Epstein Teicher Philanthropies. In Motion Sequence Number 001, McGee seeks access to Epstein Teicher Philanthropies' books and records. Motion sequence 001 and 002 are consolidated for disposition.

Background

Epstein Teicher Philanthropies (ETP) is a not-for-profit 501(c)(3) charitable membership corporation organized under the laws of New York. (NYSCEF Doc. No.

[NYSCEF] 1, Complaint ¶ 1.) ETP, originally known as Epstein Philanthropies,[1] was established in 1976 by four siblings to pursue their charitable interests: Emanual (Manny), Thomas (Tom), William (Bill), and Florence Epstein (collectively known as the Epstein Siblings). (*Id.* ¶¶ 2, 36.) "The Epstein Family was a very tight knit, New York-based, Jewish family. The siblings attended neighborhood public and Hebrew schools, worshiped at the local synagogue, and played in Prospect Park, located just across the street from their apartment off Eastern Parkway." (*Id.* ¶ 31.) On April 29, 1976, Tom and Manny signed the Certificate of Incorporation (Certificate) establishing Epstein Philanthropies. (*Id.* ¶ 37.) The original Board of Directors, listed on the Certificate, consisted only of the Epstein Siblings. (*Id.* ¶ 38.) On December 18, 1976, the Epstein Siblings held a Special Meeting of the Board of Directors to adopt the foundation's first set of by-laws (1976 By-laws), elect officers, and name the Chairman of the Board. (*Id.* ¶ 41; NYSCEF 34, 1976 By-laws.)

Since ETP's founding over four decades ago, there have been many changes to the Board and leadership resulting from marriages and the inclusion of outsiders. Tom and Manny never married; Bill married Ruth Meyer and plaintiffs S. Karin Epstein (Karin) and Hal M. Epstein (Hal) are their children; and Florence married Milton Teicher (Milton). (NYSCEF 1, Complaint ¶¶ 33-35.) Milton had two children from a previous marriage, defendant Alan Seth Teicher (Seth) and a daughter, Karen Teicher, who passed away in 1995. (*Id.* ¶ 35.) Milton was elected as a director in 1992. (*Id.* ¶ 51.) The composition of ETP also changed upon the deaths of the Epstein Siblings: Manny

[1] In 2008, the name of the foundation was changed from Epstein Philanthropies to its current name, Epstein Teicher Philanthropies. (NYSCEF 1, Complaint ¶ 60.)

died in 1982; Bill died in 1990; Tom died in 2003, and Florence died in 2005. (*Id.* ¶¶ 77-81.) Florence was the last Epstein Sibling to serve on the board in 2004 and Milton became President of ETP in 2004. (*Id.* ¶ 49.) McGee alleges he and Seth were appointed members of ETP in August 2005 and that he was subsequently named a "Lifetime Member of ETP." (*Id.* ¶¶ 51, 55; NYSCEF 9, Draft Minutes of October 3, 2005 Special Meeting at 3.) On October 3, 2005, James Mulcahy, Kenneth Roth, McGee, Milton, and Seth were elected as directors. (NYSCEF 1, Complaint at ¶ 51.) Mulcahy, Roth, and McGee were all outsiders. (*Id.* ¶ 51.) McGee and Roth were social and professional friends of Florence and Milton. (*Id.* ¶¶ 53-54.) Defendant Jane Heffner joined ETP as a director in 2007 and defendant Adrienne Simpson joined the Board in 2012. (*Id.* ¶¶ 66, 90.) In 2008, prior to Simpson joining the board, Milton, Seth, and Heffner "ousted" Mulcahy, Roth, and McGee from the Board. (*Id.* ¶ 58.) Milton died in 2012. (*Id.* ¶ 69.) The current Directors are Seth, Heffner, and Simpson, the individual defendants. (*Id.* ¶ 4.)

Plaintiffs' Allegations

Plaintiffs allege that, following this drastic change in leadership, the charitable purpose of the ETP was ignored. (*Id.* ¶ 63-69.) According to plaintiffs, ETP "cut[] back on or eliminating grant making to many New York City-area charities and Jewish causes important to the Epstein Siblings" following Florence's death and the election of Milton and Seth to the board. (*Id.* ¶ 56.) Instead, a series of large grants were diverted to Ohio-based charities, such as the Appalachian Community Visiting Nurse Association, and the Hillel Foundation at Ohio State University. (*Id.* ¶¶ 56, 61-63.) Plaintiffs allege that the new directors approved grants to Ohio-based charities due to Seth's ties to

Ohio. (*Id.* ¶ 72.) When Heffner joined the Board in 2007, it approved grants to the Department of Ophthalmology at Columbia University's Irving Medical Center, where Heffner is employed as Executive Director of Development. (*Id.* ¶ 59.) Plaintiffs calculate for the years 2004 to 2017 (when no Epstein Sibling served on the Board of Directors), that Ohio charities received grants exceeding 21.4% of the total grants paid and the amount of grants to Jewish causes declined 76.1%. (*Id.* ¶ 63.)

Plaintiffs claim that ETP's charitable mission was to support New York City-based institutions and Jewish causes. (*Id.* ¶ 2.) They point to ETP's long history of making grants to primarily New York City-based charities and Jewish causes to support their view of the Epstein Siblings' charitable intent. (*Id.*) Plaintiffs allege that between 1977 and 2003, when at least one Epstein Sibling sat on the board of ETP, causes such as Mount Sinai Hospital, Hebrew Immigrant Aid Service, Hadassah, and the Simon Wiesenthal Center for Holocaust Studies were among the grantees that received the most funding. (*Id.* ¶ 64.) These were some of ETP's legacy grantees, but notably, according to plaintiffs, these institutions "never received funding again after the Teichers and later Jane Heffner took control [of the board]." (*Id.*)

Plaintiffs assert eleven causes of action against defendants together, and against Heffner, individually. (*Id.* ¶¶ 114-173.) Plaintiffs Karin and Hal's claims center around their late father's (William Epstein) testamentary bequest to ETP. William's Last Will and Testament left the lesser of one million dollars or twelve percent of his gross estate to ETP. (*Id.* ¶ 78.) According to them, the estate paid "$500,000 to [ETP] in 1990" and ETP accepted the gift the same year. (*Id.* ¶¶ 126, 130.) Karin and Hal allege that ETP was unjustly enriched when ETP accepted their father's bequest, but funded Ohio-

based charities. (*Id.* ¶ 127.) Accordingly, Karin and Hal applied for and received Successor Letters Testamentary from the Westchester County Surrogate's Court on July 6, 2020 "to perform all acts requisite to the proper administration and disposition of William A. Epstein's estate." (*Id.* ¶¶ 7-8.) They specified in their application to the Surrogate's Court that the estate had an asset remaining—a cause of action against ETP for failure to honor donor intent. (NYSCEF 53, Petition for Successor Letters Testamentary, Estate of William Epstein at 2.) In their capacities as co-successor executors of their late father's estate, they bring a breach of quasi-contract (third cause of action); equitable estoppel (fourth cause of action); breach of constructive or quasi-trust (fifth cause of action); breach of fiduciary duties under N-PCL §§ 717 and 720 (sixth and tenth cause of action) against the individual defendants and for their removal under N-PCL §§ 706 and 714; wrongful related party transactions under N-PCL § 715 against ETP (ninth cause of action). (NYSCEF 1, Complaint ¶¶ 124-145, 154-164.) Against Heffner individually, plaintiffs allege (i) breach of fiduciary duty to ETP under N-PCL §§ 717 and 720 (seventh cause of action) and (ii) wrongful related party transactions under N-PCL § 715 (eighth cause of action). (*Id.* ¶¶ 114-164.) Plaintiffs Karin and Hal seek a declaratory judgment (first cause of action), removal of each individual defendant as director under N-PCL §§ 706 and 714 (sixth and seventh causes of action), and injunctive relief against all defendants (second cause of action). (*Id.* ¶¶ 146-153.)

Plaintiff McGee alleges he was made a Member of ETP and thereafter a "Lifetime Member" in 2005. (*Id.* ¶ 51.) Thus, he brings a derivative action against defendants and joins in on the sixth, seventh, eighth, ninth, and tenth causes of action.

(*Id.* ¶¶ 138-164.) In his capacity as a Member, he asks the court for an order allowing him to inspect ETP's books and records (eleventh cause of action). (*Id.* ¶¶ 165-173.)

Defendants assert three arguments in their motion to dismiss: (i) under CPLR 3211(a)(1) and (3), plaintiffs lack standing; (ii) under CPLR 3211(a)(11), qualified immunity under N-PCL; and (iii) under CPLR 3211(a)(10), plaintiffs failed to join the New York State Attorney General as a necessary party.

As set forth below, the court denies defendants' motion to dismiss in its entirety.

Legal Standard

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "'support the ground on which the motion is based.'" (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

Under CPLR 3211(a)(3) motion to dismiss, the moving party has the burden to establish a prima facie case that plaintiff lacks standing. (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016] [citation omitted].) "[T]he plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the

plaintiff's submissions raise a question of fact as to its standing." (*Luong v Ha The Luong*, 67 Misc 3d 1210(A), *4 [Sup Ct, NY County 2020] [citation omitted].)

On a CPLR 3211(a)(10) motion to dismiss for failing to join a necessary party, defendants must demonstrate that the inclusion of such a party is necessary to "accord full relief to the parties presently joined or that the [party] would be inequitably affected by any judgment that might result." (*Amsellem*, 280 AD2d at 360-361.)

CPLR 3211(a)(11) authorizes the dismissal of a complaint when a defendant is immune from liability pursuant to N-PCL § 720-a. N-PCL § 720-a requires the court to conduct a two-part analysis. (*See Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 112 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010].) The first prong is whether the moving party is entitled to the protection of N-PCL § 720-a. (*See id.*) If the answer is in the affirmative, then, the issue is whether the plaintiff has established negligence with reasonable probability, meaning whether they can show there is a fair likelihood that the defendant was grossly negligent or intended to cause the resulting harm. (*See id.*)

Analysis

A. Sufficiency of Standing

Defendants contend that plaintiffs Karin and Hal, acting as co-successor executors lack standing to bring this action. Defendants likewise challenge whether McGee has standing to bring a derivative action, because, according to defendants, McGee is not a Member of ETP.

i. McGee's Standing

McGee asserts that he was appointed a Member on August 29, 2005 by Milton and remains a member as he has never been removed from membership. (NYSCEF 7, McGee aff ¶¶ 3, 8.) McGee alleges further that Milton personally appointed him a "Lifetime Member" on October 3, 2005 during a Special Meeting of the Board of Directors. (*Id.* ¶ 6.) Defendants, however, challenge his membership status based on ETP's Certificate, the 1976 By-laws, 2007 by-laws, and the 2017 by-laws. Defendants argue that McGee was not designated as a member in the foundational documents (Certificate and the 1976 By-laws) and 2007 and 2017 by-laws listed other directors and/or members to the exclusion of McGee, signifying that McGee was not a Member.

N-PCL § 601 states that if the corporation has members, "membership may be effected and evidenced by: (1) Signature on the certificate of incorporation. (2) Designation in the certificate of incorporation or the by-laws. (3) Membership certificate or card or capital certificate. (4) Such method, including but not limited to the foregoing, as is prescribed by the certificate of incorporation or the by-laws." (N-PCL § 601[c].) Membership is determined based on one of these four tests. (*Getman v Mohawk Valley Nursing Home, Inc.*, 44 A2d 392, 395 [4th Dept 1974].) If proceeding under the fourth test, the controlling by-laws are the by-laws when plaintiff was admitted to membership. (*See Croughan v N.Y. Mut. Benev. Soc.*, 179 AD 211, 213 [1st Dept 1917].)

ETP's Certificate does not state how members are chosen but Article II, paragraphs one through three of the 1976's By-laws set out how members can be added, their rights, and resignation procedures. (NYSCEF 30, Certificate at 2-8[2];

[2] Pages cited refer to NYSCEF generated pagination numbers.

NYSCEF 34, 1976 By-laws at 4-5.) Here, the 1976 By-laws, which were in effect during the time McGee alleges Milton made him a member, allows for a person to be made a member of ETP upon a vote of a majority of all ETP members. (*Id.* at 4.) McGee alleges that, at the time he was made a member in 2005, Milton was the last surviving member of ETP and thus held the majority vote. (NYSCEF 7, McGee aff ¶ 5.) McGee attested that Milton named him and Seth members of the ETP and that decision was memorialized in the August 29, 2005 minutes of the Special Meeting. (*Id.*; NYSCEF 8, Draft Minutes of August 29, 2005 Special Meeting at 2.)

Thus, the court finds that McGee has sufficiently pleaded that the procedure in naming him as a member during the August 29, 2005 Special Meeting by the then-surviving sole member of ETP complied with the controlling 1976 By-laws. Defendants offer no proof to the contrary: they do not offer documentary proof conclusively controverting McGee's membership status, showing the removal of McGee as a member, or that McGee resigned as a member from ETP. Lastly, Defendants' reliance on the 2007 and 2017 by-laws is misplaced.

In any event, to the extent that defendants contest the validity or the existence of plaintiffs' supporting documents (and thus in turn question McGee's standing), factual disputes cannot be resolved on a motion to dismiss. (*Brach v Harmony Services, Inc.*, 93 AD3d 748, 750 [2d Dept 2012] [finding the authenticity of minutes raised an issue of fact when the parties submitted affidavits attesting its authenticity].) McGee has attested that the August 2005 minutes naming him and Seth Members is true and correct. (NYSCEF 7, McGee aff ¶ 4.) Accordingly, the court denies defendants' motion to dismiss McGee's claims for lack of standing.

ii. Karin and Hal's Standing

Defendants contest plaintiffs' standing under CPLR 3211(a)(1) and (3). Specifically, Defendants contend that because the Estate of William has no claim against ETP for failure to honor decedent's donative intent (as the testamentary gift to ETP was unrestricted), the Estate's personal representatives likewise have no claim. To further support plaintiffs' lack of standing, defendants argue that documentary evidence, such as the Certificate and William's Last Will and Testament, refute Karin and Hal's claim that ETP breached its duty to the Estate of William and should be dismissed under CPLR 3211(a)(1).

Central to defendants' argument is the distinction between an unrestricted gift and an endowment fund. According to defendants, an endowment fund imposes restrictions on the donor's gift to a charitable foundation, while an unrestricted gift does not contain limitations or conditions allowing the Board of Directors to use the donation as it sees fit. Defendants argue, and offer documentary proof, that the testamentary gift made by William in his Will was an unrestricted gift. (NYSCEF 27, William Epstein Will at 3.) Defendants argue that ETP's charitable mission, as stated in its Certificate, is broad: "The purposes for which [ETP] is to be formed are exclusively to receive and administer funds for scientific, educational, and charitable purposes." (NYSCEF 30, Certificate at 4.) In essence, defendants opine that Karin and Hal cannot bring a claim against ETP, just as the Estate cannot, because William's gift to ETP was unrestricted and the Board of Directors was not tethered to any restrictions under the Certificate. Therefore, there could be no wrongdoing by the Board of Directors in allocating the money left under William's Will as the Board saw fit.

Standing to enforce the terms of a charitable gift is normally limited to the Attorney General, but this general rule does not "designate the Attorney General as the exclusive representative of donors of charitable dispositions." (*Smithers v St. Luke's-Roosevelt Hosp. Ctr.*, 281 AD2d 127, 137 [1st Dept 2001] [citation omitted].) The Attorney General is entitled to sue on behalf of possible beneficiaries or members of a class of beneficiaries for enforcement of the charitable trust to prevent vexatious litigation. (*Id.*) A plaintiff, having been appointed as a legal representative of a decedent's estate, also has standing to sue the beneficiary for enforcement of the terms of the gift. (*Id.* at 140-141.) "To hold that, [the special administratrix of the decedent's estate] . . . has no standing to institute an action to enforce the terms of the Gift is to contravene the well-settled principle that a donor's expressed intent is entitled to protection." (*Id.* at 139.) Furthermore, Article 11 of the Estates, Powers and Trusts Law (EPTL) grants fiduciaries of an estate broad powers to maintain or settle a claim on behalf of the estate. (EPTL 11-1.1[13].) Both provisions operate to protect a donor's expressed intent when making a charitable, testamentary gift.

Here, plaintiffs Karin and Hal were appointed as co-successor executors by the Westchester County Surrogate's Court on July 6, 2020. (NYSCEF 55, Successor Letters Testamentary at 2.) Plaintiffs are not beneficiaries of ETP, nor do they purport to be. Thus, Plaintiffs are accorded the same treatment as the plaintiff in *Smithers*, who was appointed "Special Administratrix" of the decedent's estate for the purpose of pursuing a claim that the charitable organization did not honor the terms of the gift.

Defendants challenge the applicability of *Smithers* due to the contractual nature between the plaintiff and defendant in that case. Cases in this jurisdiction that have

subsequently relied on *Smithers* do not read *Smithers* as narrowly as defendants. (*Lucker v Bayside Cemetery*, 114 AD3d 162, 171 [1st Dept 2013].) The key distinction between *Lucker*, which rejected the plaintiffs' standing to bring a personal injury claim on behalf of the decedent, and *Smithers*, which permitted the wife and Special Administratrix to bring a claim on behalf of the estate to sue to enforce the terms of the donor's gift, was because "*Smithers* did not involve either beneficiary standing or standing as a family member. Although the plaintiff was the wife of the donor, she was permitted standing as the administrator of the estate of the donor of a charitable donation that had been made subject to explicit restrictions." (*Lucker*, 114 AD3d at 171.) And, because the *Lucker* plaintiffs are "relatives acting as relatives," "they fall into the opposite category from Mrs. Smithers." (*Id.*)

The court is also unpersuaded by defendants' distinction between an unrestricted gift and an endowment fund insofar as it determines whether plaintiffs have standing or not. The documentary evidence defendants offer in support of their 3211(a)(1) motion to dismiss does not contradict plaintiffs' contentions that they were appointed as representatives of their father's estate to enforce the terms of the gift. Rather, EPTL 11-1.1 authorizes plaintiffs, in their legal capacity as the representatives to their late father's estate, to bring their causes of action, despite the merits of the claim.[3] (EPTL 11-1.1[b][13].)

[3] The distinction between an unrestricted gift and an endowment fund, and the accompanying documentary evidence, can only be understood to support defendants' motion to dismiss for plaintiffs' lack of standing. Defendants' MOLs do not mention, for example, failure to state a claim.

Thus, the court finds that Karin and Hal have sufficiently shown they have standing as co-successor executors to their father's estate to bring their claims. Accordingly, the defendants' motion to dismiss under 3211(a)(1) and (3) are denied.

B. Joinder of New York State Office of the Attorney General as a Necessary Party to the Litigation

Defendants make a second but related argument for dismissal: under N-PCL § 112(a), the New York State Office of the Attorney General is the only party with standing who can bring the causes of action advanced by the plaintiffs. Defendants assert that all plaintiffs are members of the public and lack the authority to bring their claims advanced in their complaint.

N-PCL § 112(a) states that "[t]he attorney-general may initiate an action or special proceeding to "enforce any right given under this chapter to members, a director or an officer of a charitable corporation." EPTL 8-1.1(f) also gives the Attorney General the authority to "represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be [the Attorney General's] duty to enforce the rights of such beneficiaries by appropriate proceedings in courts."

Defendants' argument fails for several reasons. First, defendants' statutory argument—that N-PCL § 112 and EPTL 8-1.1(f) permit only the attorney general to bring the claims advanced by plaintiffs—is an incomplete recitation of law. EPTL 8-1.1(f) accords the Attorney General the ability to sue a charitable corporation and its board of directors on behalf of the beneficiaries of any charitable dispositions. (*Lucker*, 114 AD3d at 169-170.) On the contrary, plaintiffs here are not "possible beneficiaries" or "members of a class of possible beneficiaries" of ETP—they have sufficiently alleged that they are the executors of an ETP donor and a member of ETP, as described above.

The text of EPTL 8-1.1(f) does not apply to a plaintiff who has the legal capacity to bring an action against a charitable organization as an estate's legal representative. (*See Smithers*, 281 AD2d 127.) Likewise, N-PCL § 112(a) does not give the Attorney General the *sole* authority to bring an action against a charitable organization to enforce any rights given to members or directors. The use of "may" in connection with the Attorney General authority to initiate an action to enforce members' or directors' rights militates against defendants' view. (N-PCL § 112 [a].)

Second, defendants cite to *Thome v Alexander & Louisa Calder Foundation* for the proposition that the Attorney General is the only party who can bring an action against the defendants because plaintiffs are members of the public. In *Thome*, plaintiff sued defendant, a charity established in honor of the late sculptor Alexander Calder, and its board, for failing to appraise the purported Calder artworks plaintiff had in his possession. (*Thome*, 70 AD3d at 96-97.) There, the plaintiff was aptly described as a member of the public as defendants owed no fiduciary duties to a person who merely owns purported artworks. (*Id.*)

Here, defendants incorrectly analogize plaintiffs to "members of the general public" to support the dismissal of the action. Since the court found that Karin and Hal have standing as fiduciaries of William's estate and likewise found that McGee has sufficiently alleged he has standing as a member of ETP to bring his derivative action, defendants' characterization of plaintiffs are without merit, as discussed above.

Third, although defendants move for dismissal based on the Attorney General's alleged status as a necessary party to the just disposition of the case, defendants fail to show why this is so. (S*ee CBS Corp v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000]

[finding that defendants failed to demonstrate why party was a necessary party].) At most, defendants have established that the Attorney General has concurrent legal authority to bring an action of this nature but has utterly failed to demonstrate that the Attorney General's joinder was necessary to accord full relief to the parties.

C. Qualified Immunity Under NPCL § 720-a

Defendants' last argument to dismiss plaintiffs' claims relies on CPLR 3211(a)(11), which states that "the party is immune from liability pursuant to [N-PCL § 720-a]." The individual defendants argue that N-PCL § 720-a protects them under qualified immunity. Plaintiffs counter that immunity under this provision does not apply to derivative actions where gross misconduct is alleged.

NPCL § 720-a provides that "no person serving without compensation as a director, officer, key person or trustee of a corporation . . . described in section 501 (c)(3) of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer, key person or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability." CPLR 3211(a)(11) states that, "on a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of [§ 720-a] . . . and, if it so finds, whether there is reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm." "[A] plaintiff must come forward with evidentiary proof showing a fair likelihood that he or she will be able to prove that the defendant was grossly negligent

or intended to cause the resulting harm." (*Rabushka v Marks*, 229 AD2d 899, 900 [3d Dept 1996].) However, no reasonable probability exists when a plaintiff "fails to provide any specific allegations supporting the . . . suggestion that the individual defendants acted with gross negligence or with an intent to harm." (*Thome*, 70 AD3d at 112.)

Here, defendants are uncompensated Directors of ETP and fit squarely within the categories of individuals protected under N-PCL § 720-a. (NYSCEF 41, Simpson aff at 2.) Defendants offer a document from the IRS showing ETP is a current tax-exempt foundation. (NYSCEF 40, IRS Search Results at 2.) Thus, they are entitled to the statutory protections under N-PCL § 720-a. Next, the court must investigate whether plaintiffs have established by a reasonable probability that defendants were grossly negligent or caused the intended harms. On this, plaintiffs allege that defendants knowingly approved an interested transaction when ETP made a grant to the Department of Ophthalmology at Columbia University's Irving Medical Center an allegedly interested transaction while Jane Heffner was in their employ as an Executive Director of Development. (NYSCEF 1, Complaint ¶ 3.) Plaintiffs also allege that Seth received a pecuniary benefit from ETP's donation to an Ohio-based charity. (*Id.* ¶ 3, 71-72.) Without reaching the merits of plaintiffs' arguments, their allegations of defendants' gross negligence in the management of ETP charitable funds are sufficient to survive a motion to dismiss under CPLR 3112(a)(11). Their allegations of gross negligence are more than bare recitations of legal conclusions—they are specific and describe in detail defendants' alleged wrongdoings. (*See Am. Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92, 101 [1st Dept 2000].)

D. Motion Sequence 001

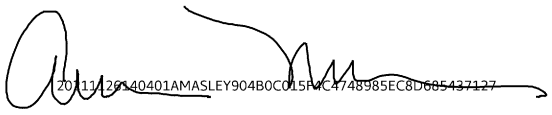
McGee's request to produce certain books and records hinges on whether he is a Member of ETP. (NYSCEF 6, Order to Show Cause.) Based on the above analysis, the court grants McGee's request.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that defendants' motion to dismiss (002) is denied and defendants shall answer within 10 business days of this decision. The parties shall submit a proposed PC order within 20 business days of this decision or competing proposed PC Orders; and it is further

ORDERED that plaintiff's motion to inspect ETP's books and records is granted and defendants shall provide plaintiff with access within 20 business days of this decision.



11/26/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE