SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

DR. GAIL BAROUH, on Behalf of Herself as a Shareholder of BAROUH EATON ALLEN CORP., and in the Right of BAROUH EATON ALLEN CORP., and on Behalf of All Other Shareholders of BAROUH EATON ALLEN CORP.,

Plaintiffs,

INDEX NO.: 021154/2008
MOTION DATE: 01/05/2009
MOTION SEQUENCE: 001

-against-

RICHARD BAROUH, Individually and as Executor of the Estate of VICTOR BAROUH, ROBERT BAROUH, KATHLEEN CICCHETTI, ZOILA MOREIRA, RICARDO RODRIGO, BAROUH EATON ALLEN CORP. and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to plaintiffs,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavit & Exhibits Annexed 1
Affirmation Pursuant to 22 NYCRR § 202.7(f) and in Support of Order to Show Cause 2
Defendants' Attorney Affirmation in Opposition of Daniel J. Costello, Affidavit of Richard Barouh, Affidavit of Robert Barouh & Affidavit of Danielle Chester 3
Defendants' Attorney Supplemental Affirmation in Opposition of Daniel J. Costello & Exhibit Annexed 4
Memorandum of Law in Opposition to Plaintiffs' Order to Show Cause for a Temporary Restraining Order, Preliminary Injunction and the Appointment of a Receiver 5
Table of Exhibits A - I 6
Defendants' Attorney Supplemental Affirmation in Opposition of Daniel J. Costello & Exhibits Annexed 7

Order to show cause by the plaintiff Dr. Gail Barouh pursuant to, *inter alia*, CPLR 6301 for: (1) the appointment of a receiver *pendente lite* to manage the Barouh Eaton Allen Corp. ["the Corporation"] and wind down its affairs; (2) the issuance of a temporary restraining order enjoining the defendants from "distributing, devaluing and/or dissipating the asserts of the Corporation" and compelling them to preserve the assets of the Corporation; (3) restraining the defendants from the commission of any further waste upon or damage to the Corporation; and enjoining Richard Barouh, as Trustee of the Victor Barouh Trust, from conveying and/or transferring the assets of the Trust, including but not limited to, the real property at 18 Midway Lane Pound Ridge, New York; (4) and permitting plaintiff and their accountants to inspect the books and records of the Corporation, to make copies of same and to make extracts of them, including but not limited to payroll records, revenue statements and transfers of stock.

The plaintiff Gail Barouh is currently a 4.33% shareholder in the closely held corporation, Barouh Ethan Allen Corporation [the "Corporation"], which was originally formed in 1955 by the plaintiff's father, Victor Barouh, who recently died in October of 2008 (R. Barouh Aff., ¶¶ 7, 9-11; Cmplt.,¶ 3).

The Corporation's prior success was primarily attributable to sales derived from the popular typewriter correction tool known popularly as "Ko-Rec-Type" – a product originally invented by Victor, which has now apparently been rendered largely obsolete by the widespread use of computer-based, word processing programs (R. Barouh Aff., ¶¶ 8-11).

In January of 2001, the plaintiff commenced a similar "derivative" action requesting, *inter alia*, dissolution of the Corporation and alleging corporate waste, and oppressive conduct by her father and other members of the Board as then constituted and composed (Pltff's Aff., Exhs., "B," "D," "E"; [2001 Cmplt.,¶¶ 7, 8, 10-19, 26 [a]-[j], 27).

The 2001 action was ultimately settled and dismissed with prejudice pursuant to a so-called "Settlement Agreement and General Releases," dated August, 2002 (Pltff's Aff., Exhs., "D," "E").

In accord with the settlement, Victor Barouh agreed to purchase most of the plaintiff's then outstanding stock in exchange for $349,197.00, leaving her with some 50,000 remaining shares in the Corporation (Agreement, ¶ 1).

It was further agreed that the plaintiff's 50,000 shares were to be placed in a voting trust to be controlled by Victor until: (1) the sooner of either his death or incapacity; or (2) any attempt by Victor to convey the shares to a third party (Agreement, ¶¶ 2, 3[i], [iii]). Victor also paid the plaintiff an additional, $700,000.00 as part of the underlying settlement (Agreement, ¶ 2).

Lastly, the settlement – in connection with which neither side admitted any wrongdoing (Agreement, ¶ 9) – provided in sum that each party agreed and covenanted not to sue the other, and unconditionally released, resolved and settled, any and all claims – known and unknown – between them existing prior to and up to the date of the agreement (Agreement, ¶¶ 9-10).

More recently, and within days of her father's 2008 demise, the plaintiff made a shareholder demand pursuant to BCL § 624, for various corporate documents, books, and records, which the plaintiff contends were belatedly delivered (G. Barouh Aff., ¶¶ 12-14, Exhs., "F", "G";).

On November 3, 2008, and in light of Victor's recent death, a special shareholders' meeting was conducted upon 10 days' prior notice – at which the plaintiff's proxy representative was present (G. Barouh Aff., ¶¶ 8-9, Exh., "E").

At the meeting, the current defendants – including Richard Barouh – the plaintiff's brother, were elected to the corporation's board of directors by a 99% vote, including votes cast without objection by the plaintiff's proxy, Jason Ablove, Esq., who never voiced any specific objections or proposed that the plaintiff should be considered for a Board position (Defs' Brief at 7-8; R. Barouh Aff., ¶¶ 8-9, 117-118; Cmplt.,¶¶ 5, 61-65).

Notably, Richard Barouh, who is also currently serving as the Corporation's vice-president, owns approximately 55% of the Corporation's stock and is sole trustee of non-party, "the Victor Barouh Trust," which holds some 8.7% of the Corporation's shares (R. Barouh

Aff., ¶¶ 4-5; Cmplt.,¶¶ 5, 60-65).

The plaintiff, who was not present at the November shareholder meeting, nevertheless contends that after the defendants were elected to the Board, the other shareholders "were immediately thereafter made to leave" – a claim disputed by Richard Barouh, who advises that the meeting was uneventfully ended in due course and without objection simply because all relevant business had been fully completed (G. Barouh Aff., ¶ 16; R. Barouh Aff., ¶¶ 117-120).

A Board meeting was then conducted at which the newly elected board voted, *inter alia,* to: (1) "liquidate" the Corporation; and (2) authorize the issuance of a partial dividend to each of the Corporation's shareholders in the amount of $28.00 per share – a sum which the plaintiff contends was unexplained and allegedly inadequate in light of what she claims is the Corporation's $54.7 million in equity value (G. Barouh Aff., ¶¶ 3, 6, 16-18; Cmplt.,¶¶ 24-28[a]).

By letter dated November 4, 2008, the plaintiff was notified of the Board's action relative to the liquidation and issuance of partial dividends. The November 4 letter – signed by Board President Robert Barouh – also included a check for $1.4 million in partial shareholder dividends attributable to the plaintiff's 50,000 shares (4.33% interest)(Pltff's Exh., "Q").

According to the plaintiff, the documents she ultimately received in response to her BCL § 624 demand allegedly revealed that the defendants had wrongfully transferred corporate funds and assets without proper consideration and/or wasted shareholder funds (G. Barouh Aff., ¶¶ 12-14; Exhs., "F").

More particularly, the plaintiff claims, *inter alia*, that: (1) in July of 2008, Robert Barouh, in alleged violation of unidentified by-laws, authorized by unilateral resolution, the sale of the Corporation's "profitable" Canadian affiliate/holdings, which sale, the plaintiff claims, should have resulted in unspecified, "significant" financial gains to the Corporation (G. Barouh Aff.,¶¶ 21[c]-22; Cmplt.,¶¶ 20[a], 28[c]); (2) some $4 million from a corporate account at "First Clearing" was allegedly not accounted for on the Corporation's balance sheets (G. Barouh Aff.,¶ 14[b]; Cmplt.,¶ 20[b]); (3) the 2006 balance sheet showed that a separate corporate entity called "O.S. Easton Corp." – allegedly dominated by Richard Barouh – owed the Corporation $48,350.00 – increased from $12,000 in 2006; when for reasons unstated it "should not owe the Corporation money"(G. Barouh Aff.,¶ 14[c]; Cmplt.,¶ 20[c]); (4) the 2007 balance sheet

allegedly undervalued buildings and improvements owned by the Corporation consisting of a "city block" in Brooklyn at only $7.4, when it was allegedly worth – upon the plaintiff's information and belief, some $30 million (G. Barouh Aff.,¶ 14[d]; Cmplt.,¶ 20[d]); and (5) the 2007 balance sheet omits reference to a Corporation-owned property located on Wyeth Avenue in Brooklyn (G. Barouh Aff.,¶ 14[e]; Cmplt.,¶ 20[e]).

The plaintiff's submissions also identify as improper, a series of real estate transfers – most of which arose and between 1979 and 2000 and therefore substantially predated the existence of the current Board as well as the 2002 settlement (G. Barouh Aff., ¶15; Cmplt.,¶ 21). Specifically, the plaintiff claims that the Corporation allegedly and improperly conveyed, among other properties, the so-called Brooklyn, "Pound Ridge" property allegedly now worth over $20 million, to Victor without consideration (G. Barouh Aff., ¶15[a]; Cmplt.,¶ 21[a]) – and/or transferred several other properties without proper shareholder notice and for less than a fair value (G. Barouh Aff., ¶15; Cmplt.,¶ 21).

Based upon these and other alleged claims of wrongdoing, the plaintiff has commenced the within derivative action and simultaneously moved by order to show cause for an order: (1) temporarily restraining the defendants from, *inter alia,* distributing, dissipating, wasting and/or devaluing the Corporation's assets; (2) appointing a temporary receiver; and (3) permitting the plaintiff to inspect and copy stated corporate records and documents (*see*, D. Wabnik Aff., "Schedule of Documents * * *").

Upon submission of the plaintiff's order to show cause, this Court struck the restraining order, and directed service of the underlying papers upon the defendants, who have now served opposing papers disputing and denying the plaintiff's allegations of misconduct.

The matter is now before the Court in connection with the plaintiff's underlying application for a preliminary injunction and/or the appointment of a temporary receiver. Those branches of the plaintiff's application are denied.

It is settled that the purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual (*Dixon v. Malouf* ___AD3d___, 2009 WL 943955 [2nd Dept. 2009];

EdCia Corp. v. McCormack, 44 AD3d 991; *Weinreb Management, LLC v. KBD Management,*

Inc., 22 AD3d 571). "Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously" (*Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 *see, Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236, 241 [1992]).

Accordingly, to establish entitlement to a preliminary injunction, a movant must demonstrate a clear right to relief which is plain from the facts alleged (*Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 AD3d 612, 613; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334, 335), and further show that: (1) a likelihood of success on the merits; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]; *Doe v. Axelrod*, 73 NY2d 748, 750 [1988]; *Dixon v. Malouf, supra*; *Omakaze Sushi Restaurant, Inc. v. Ngan Kam Lee*, 57 AD3d 497 *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073; *EdCia Corp. v. McCormack, supra*).

Conclusory, vague or conjectural allegations "are insufficient to satisfy the burden of demonstrating irreparable injury" (*Khan v. State University of New York Health Science Center at Brooklyn*, 271 AD2d 656, 657 *see, EdCia Corp. v. McCormack, supra*; *Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 AD3d 420, 421; *Matos v. City of New York*, 21 AD3d 936, 937; *Neos v. Lacey*, 291 AD2d 434, 435; *Golden v. Steam Heat, Inc.*, 216 AD2d 440, 442).

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v. Axelrod, supra*, at 750; *Gluck v. Hoary*, 55 AD3d 668).

With these principles in mind, and balancing the potential impact of withholding the remedy as against the injury which its presence might inflict (*Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC, supra,* at 421; *Massapequa Water Dist. v. New York SMSA Ltd. Partnership*, ___Misc3d___, 2008 WL 779259 [Supreme Court, Nassau County 2008]), the Court concludes that the plaintiff has failed to sustain her burden of establishing entitlement to the drastic provisional relief sought.

A review of the record establishes that the plaintiff's claims are primarily based upon

speculative, often temporally remote and largely unsubstantiated allegations of misconduct, which the defendants have effectively rebutted through the submission of various affidavits containing detailed, explanatory analyses of the transactions which the plaintiff has identified (*cf., DaSilva v. DaSilva*, 225 AD2d 513, 513 *see*, *Owen v. Hamilton*, *supra*, at 457).

Typifying the qualitatively inconclusive nature of the plaintiff's claims are the allegations advanced with respect to the plaintiff's lead claim relative to the 2008 sale of Barouh-Canada, Ltd.

According to the brief paragraph devoted to this assertion, the sale was unilaterally authorized by Robert Barouh in 2005, as Executive vice-president, in violation of unstated and unattached corporate by-laws — which sale was also purportedly suspect based on a single, unelaborated allegation that the company was allegedly "profitable" in 2006 and 2007 (G. Barouh Aff., ¶ 14[c]; Cmplt.,¶ 20[a]).

In response, codefendant Danielle Chester, Barouh-Canada's former president, has detailed with particularity the circumstances and rationale underlying the sale, advising, *inter alia*, that both the Corporation and Barouh-Canada had, of late, sustained business reverses in the five to seven-year period preceding the sale, attributable to: (1) technology changes negatively impacting upon Barouh products in general, including Kor-Rec-Type, toner cartridges and printer consumables sold in Canada (D. Chester Aff.,¶¶ 2-3); (2) substantial order declines from identified customers (Staples and Grand & Toy) and correspondingly deflated sales affecting the ultimate viability of the company (D. Chester Aff.,¶¶ 4-5); (3) additional burdens sustained by virtue of Barouh-Canada's increasingly obsolete inventory, which if unsold, would have to be maintained and stored by defendant Corporation at additional and significant expense (D. Chester Aff.,¶¶ 9-10); and (4) attendant labor expenses in the form of forced severance payments of some $3 million under Canadian Law, which the company would incur if the company simply closed its doors and discharged its labor force *en masse* (D. Chester Aff.,¶ 8 *see*, Richard Barouh Aff., ¶¶ 40-53; Robert Barouh Aff., ¶¶ 6-12).

Despite these circumstances, and the allegedly negative attributes of the company, the defendants advise that they were ultimately able to negotiate a sale whose terms addressed these key concerns and which, according to the defendants, resulted in an after-tax distribution to the

Corporation exceeding some $11 million (D. Chester Aff.,¶¶ 12-13; Robert Barouh Aff., ¶¶17-19). Moreover, according to Richard Barouh, the sale was made in accord with the specifically cited and applicable by-laws and later ratified by the Board (R. Barouh Aff., ¶¶ 44-51) – a claim which has not been rebutted in the plaintiff's reply brief.

The defendants' affiants have similarly addressed with analogous particularity, most of the plaintiff's remaining claims and assertions, by either credibly explaining at this juncture, the rationale, purpose and objectives underlying the actions challenged and/or by identifying certain factual errors, misconceptions or inaccuracies made by the plaintiff in construing the corporate documents and balance sheets she has relied upon.

In particular, the defendant Richard Barouh – a CPA – has averred that the plaintiff's second claim, which alleges that the Corporation has failed to account for a $4 million "First Clearing" brokerage account (G. Barouh Aff., ¶ 14[b]), is predicated upon a misreading of the corporate records, *i.e.*, Barouh has explained that the relevant balance sheets and "Quick Book" program entries, when properly construed, "reflect corresponding aggregate rolling deposits and/or transfer entries" which, upon incorporation of offsetting impact, establish a true cash balance of $571,780.19 on the 2006 Balance Sheet and $446,854.74 balance on the 2007 Balance Sheet. Accordingly, there was never was a $4 million amount in the "First Clearing" brokerage account as alleged by the plaintiff (R. Barouh Aff., ¶¶ 55-61 *see also,* Costello Supp. Aff., in Opp., ¶¶ 19-20). The plaintiff has not submitted an accounting opinion which substantively addressess the defendants' analytical assertions in this respect.

Additionally, the defendants have asserted that the balance sheet amounts owed to the Corporation by O.S. Eaton Corp – an entity allegedly created and wholly owned the late Victor Barouh for viable specific business purposes (R. Barouh Aff.,¶¶ 67-68) – are no more than routinely existing,"accounts receivable" entries of relatively nominal value ($12,000 in 2006 and $48,350 in 2007), attributable to difficulties experienced by Eaton due to the declining value of the Kor-Rec-Type product – receivables which, according to Barouh, the Board in its business judgment, may elect to "write off" as uncollectible or, alternatively, pursue through the institution of legal proceedings (R. Barouh Aff.,¶¶ 62-74 *see also*, G. Barouh Aff., ¶ 14[c]).

The plaintiff's unelaborated claim with respect to the Corporation's alleged improper

valuation of a Brooklyn "city block" it owns as worth only $7.4 million – is not indicative of any specific wrongdoing – at least not as vaguely depicted by the plaintiff here (Cmplt.,¶ 20[d]; G. Barouh Aff., ¶ 14 [d]).

Although the plaintiff claims upon information and belief, that the property is worth some $30 million (G. Barouh Aff., ¶ 14 [d]) – a figure which apparently represents the plaintiff's own, unsubstantiated opinion – the defendants note that the property has not yet been offered for sale; that the $7.4 million figure represents the cost of the buildings and improvements only, that it is not a full, property valuation; and that when the property is sold, it will be conveyed for whatever value the market will bear at the time of the sale (R. Barouh Aff., ¶¶ 77-82).

Similarly, the defendants have asserted – with no meaningful reply from the plaintiff – that: (1) contrary to the plaintiff's contentions, the so-called Wyeth Avenue, Brooklyn property was not omitted from the 2007 Balance sheet, but rather, is noted thereon and valued at $3.6 million (R. Barouh Aff., ¶¶ 85-88); (2) that the plaintiff was not entitled under BCL § 624 to certain documents she requested relating to her late father's private sale of stock to Andrea Barouh (the plaintiff's sister)(R. Barouh Aff., ¶¶ 90-93); and (3) that pursuant to the Corporation's by-laws, the Board was authorized to declare dividends whenever in its "absolute discretion" it "may deem it" advisable to do so, with no attendant written duty to provide a specific explanation as to how the amounts declared were calculated or computed (*see,* Defs' Exh., "E", "By-Laws," ¶ 33, at 31). Significantly, while the plaintiff's order to show cause also seeks direct relief as against Richard Barouh as "Trustee of the Victor Barouh Trust" (OSC,¶ 4), Richard has not been named in his capacity as Trustee; nor has the Trust itself been named as a party to the action.

Further, those branches of the plaintiff's application and complaint which rely upon allegedly improper transfers which predate the 2002 settlement and the installation of the current Board, are unpersuasive as probative submissions in support of the application, *i.e.*, the temporally remote claims with respect to the allegedly improper transfer of properties occurring in, *inter alia*, 1979, 1989, 1996, 1999 and 2000 (Cmplt., ¶ 21[a]-[e]; G. Barouh Aff.,¶ 15[a]-[e], 35 [*see*, 2nd cause of action]).

The defendants have demonstrated that some of these transactions were known to, and

raised by, the plaintiff during the pendency of the 2001 action (*see,* Pltff's Exh., "C" at 17, 18-19); that some qualify as claims which the signatories to the 2002 settlement agreed to relinquish; that the claims themselves are predicated upon unsubstantiated and speculative assertions; and that they are arguably stale or otherwise time-barred as substantive claims at this juncture (*see,* Defs' Brief at 14-15; ¶ 11a; R. Barouh Aff., ¶¶ 94-116).

It also bears noting that a number of the plaintiff's claims seek, and are solely compensable through, an award of money damages (*see*, 1st , 4th, 5th, 7th-9th causes of action)(*see generally*, *EdCia Corp. v. McCormack*, 44 AD3d 991;*White Bay Enterprises, Ltd. v. Newsday, Inc.*, 258 AD2d 520, 521).

The plaintiff's further claim that the Court should now restrain the defendants from proceeding with the dissolution of the Corporation has been improperly raised for the first time in a reply brief (Pltff's Reply Brief at 5)(*e.g. Costello v. Zaidman*, 58 AD3d 593), and is nowhere listed among the specific elements of relief demanded in the original order to show cause. The Court notes that in support of her receivership claim, the plaintiff actually cites the impending dissolution as a reason supporting her entitlement to the appointment of a receiver (G. Barouh Aff., ¶ 24).

Lastly, and in sum, the record otherwise fails to support the conclusion that the equities balance in the plaintiff's favor, *i.e.*, the plaintiff has not shown "that the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict upon the defendant[s]" (*Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, *supra*, at 421 *see also*, *Sinensky v. Weiner,* 44 AD3d 646; *Massapequa Water Dist. v. New York SMSA Ltd. Partnership, supra*).

Nor for similar reasons, has the plaintiff demonstrated her entitlement to the substantially more intrusive and extreme remedy of temporary receivership – which would divest, *pendente lite,* the new board of its authority and power to operate the business – the same Board for which the plaintiff's own proxy originally voted (*see generally, Vardaris Tech, Inc. v. Paleros Inc.*,49 AD3d 631, 632; *In re Armienti*, 309 AD2d 659, 661).

Significantly, since receivership is a drastic remedy, courts will "'exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and

withholding of possession of property from a party without an adjudication on the merits' " (*Application of Androtsakis*, 139 AD2d 471, 472, *quoting from, Hahn v. Garay*, 54 AD2d 629, 629-630 *see, North Fork Preserve, Inc. v. Kaplan*, 31 AD3d 403, 406 *Secured Capital Corp. of N.Y. v. Dansker*, 263 AD2d 503, 504; *Modern Collection Associates, Inc. v. Capital Group*, 140 AD2d 594; *Ronan v. Valley Stream Realty Co.*, 249 AD2d 288, 290; CPLR 6401[a]; BCL § 1202 *cf.*, BCL §§ 1113, 1115).

The remedy "requires a detailed evidentiary showing" (*Trepper v. Goldbetter*, 205 AD2d 363, 364; *Scharff v. SS & K Partnership*, 187 AD2d 645, 646) – not the largely unsubstantiated and inconclusive claims of wrongdoing advanced here (*Vardaris Tech, Inc. v. Paleros Inc., supra; Lee v. 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379, 380; *Harmon v. Marks*, 175 AD2d 44, 45; *Modern Collection Associates, Inc. v. Capital Group, Inc.*, 140 AD2d 594)(G. Barouh Aff., ¶¶ 22-25).

The Court notes that in their opposing papers, the defendants also advise that they have now formed an "Independent Litigation Committee", chaired by former Presiding Hempstead Supervisor Gregory Peterson, which committee will be charged with reviewing "all of the issues raised by the plaintiff in this litigation" including any "prospective acquisitions and/or divestitures"(Costello Reply Aff., ¶¶ 37-40, Exh., "A" [Dec. 30, 2008 Board Resolution])(*Katz v. Renyi*, 282 AD2d 262, 263). Moreover, the defendants have submitted the affidavits of all the Corporation's remaining shareholders (except the plaintiff) – who advise, *inter alia*, that they categorically oppose the plaintiff's current application; that she does not represent their interests; and that her intent is solely to further her own personal agenda – as allegedly evidenced by the fact that no one other than the plaintiff herself secured any material benefit from the 2001 proceeding (*e.g.*, Evan Barouh Aff., ¶¶ 5-9; D. Chester Aff.,¶¶ 5-9).

Lastly, although the order to show cause nominally demands – without citation to specific statutory authority (OSC, ¶ 4) – that the defendants permit the plaintiff to inspect and copy corporate documents and materials, her supporting papers offer no specific argument relating to this branch of the application.

The plaintiff has, however, attached an extensive, 82-part request for documents which contains broadly framed, open-ended demands seeking materials ranging in scope from: (1) a

temporally and topically unqualified demand for "all files relating to Dr. Gail Barouh" (Item "73"); to (2) a demand for codefendant "Richard Barouh's CPA license"(Item "65")(Wabnik Aff., Exh., "A").

Although a shareholder has both a statutory and common law right to examine corporate documents (BCL § 624; *Dwyer v. DiNardo & Metschl, P.C.*, 41 AD3d 1177, 1178; *Smith v. Calvary Baptist Church*, 35 AD3d 749, 750; *Dyer v. Indium Corp. of America*, 2 AD3d 1195, 1196; *Wisniewski v. Polish and Slavic Center, Inc.*, 309 AD2d 869; *Troccoli v. L & B Contract Industries, Inc.*, 259 AD2d 754, 755), access is generally limited to relevant, necessary and/or statutorily enumerated documents, and then only "so long as the inspection is sought in good faith and for a proper purpose" (*Dyer v. Indium Corp. of America, supra*; *Troccoli v. L & B Contract Industries, Inc., supra; Tatko v. Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, 918-919 *see, Niggli v. Richlin, Machinery, Inc.*, 257 AD2d 623).

Neither BCL § 624 nor applicable common law principles authorizes unlimited access to "all" documents in a corporation's possession – as effectively requested by the plaintiff's annexed demand (*cf.*, *Smith v. Calvary Baptist Church, supra*; *Troccoli v. L & B Contract Industries, Inc., supra*, at 755). Nor is the right of shareholder inspection to be employed as a substitute for – or as a means of accelerating or circumventing– the normally applicable pre-trial disclosure devices which would available to the parties as the action progresses.

Under these circumstances, the matter shall be set down for a conference before the undersigned on May 20, 2009, at 9:30 A.M., during which the Court will consider: (1) the extent of any further document access permissible and appropriate under the common law and/or BCL § 624; and (2) the scheduling of further discovery pursuant to CPLR article 31 in the underlying action.

With respect to the former issue dealing with document access under BCL § 624, the plaintiff shall be prepared at the conference to, *inter alia*, identify: (1) the additional documentary materials sought; (2) the reasons why the documents have been sought; and (3) the statutory and/or common law authority establishing her entitlement to inspect the materials which have been identified.

The Court has considered the additional claims advanced by the plaintiff and concludes

they are lacking in merit.

Accordingly, it is,

ORDERED that the plaintiff's order to show cause for stated injunctive, for the appointment of a receiver, is denied, and it is further,

ORDERED that in accord with the above, the matter shall be set down for a conference before the undersigned on May 20, 2009, at 9:30 A.M., during which the Court will consider: (1) the extent of any further document access permissible and appropriate under the common law and/or BCL § 624; and (2) the scheduling of further discovery pursuant to CPLR article 31 in the underlying action.

The foregoing constitutes the decision and order of the Court.

Dated: April 20, 2009

J.S.C.