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

CANAL PRODUCTIONS, INC., **PLAINTIFF,** **-- against --** **GRAHAM CHASE ROBINSON** **DEFENDANT.**	**Index No. 654711/2019**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STAY, MOTION TO DISMISS, AND/OR MOTION TO STRIKE

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PRELIMINARY STATEMENT

This lawsuit, brought by Canal Productions, Inc. ("Canal"), is an act of unlawful retaliation. In the weeks and days before Canal filed this Complaint, Ms. Robinson informed her former employer, Canal, and its owner, Robert De Niro, through counsel, that she was contemplating bringing a lawsuit against them for, *inter alia*, employment discrimination and wage-and-hour violations under federal, state, and New York City law. In response, Canal retaliated and struck first by filing this preemptive lawsuit and naming Ms. Robinson as a defendant. Filled with false and prejudicial allegations, this action is designed to inhibit Ms. Robinson from pursuing her claims and to punish her for objecting to Canal and De Niro's illegal employment practices.

Ms. Robinson has now filed a federal lawsuit against Canal and De Niro, which is currently pending in the Southern District of New York. That lawsuit challenges the filing of this state court proceeding as unlawful retaliation and describes the employment discrimination to which Canal and De Niro subjected Ms. Robinson. Given the pending federal action, this state court proceeding should be stayed under CPLR 2201 until a final judgment is reached in the federal action or, in the alternative, dismissed in favor of the federal action under CPLR 3211(a)(4). This relief is critical in order to conserve judicial resources, prevent the waste and duplication of effort, and avoid potentially inconsistent rulings, particularly in the event that the Southern District of New York holds that the instant lawsuit is retaliatory.

In the alternative, or in addition, this Court should strike a host of improper allegations advanced by Canal. First, Paragraphs 1 and 2 of Canal's Prayer for Relief should be stricken as excessive; the purported damages alleged in this case come nowhere close to the $6 million sought. Second, Canal's request to recover attorneys' fees and costs should be stricken, as there is no basis for such an award here. Third, the Court should strike Canal's accusations that Ms. Robinson

engaged in "[b]inging, [l]oafing, and [t]heft of [t]ime" under CPLR 3024(b). These inflammatory accusations are scandalous and prejudicial – so much so that they "went viral." The allegations are also irrelevant to Canal's claims: there is no case law holding that purportedly watching television during work gives rise to liability under any of the legal theories Canal advances.

The Court should also dismiss with prejudice Canal's claim of fraud, which falsely accuses Ms. Robinson of inaccurately reporting her vacation days. The assertion that Ms. Robinson took nearly half a year's worth of vacation days on the sly is inherently implausible, and Canal does not, and cannot, plead justifiable reliance on Ms. Robinson's purported representations. The claim is therefore subject to dismissal under CPLR 3211(a)(7) for failure to state a claim. Moreover, the vaguely pled claim fails to satisfy the heightened pleading standard for fraud under CPLR 3016(b); among the deficiencies in this claim, Canal does not, and cannot, identify any days where Ms. Robinson claimed to be working and actually was not.

For these reasons, as discussed further below, the Court should issue an order staying this state court proceeding until final judgment is reached in the federal action or, in the alternative, dismissing this state court action in its entirety in favor of the action pending in federal court. In the alternative, or in addition, the lawsuit should be significantly pruned by striking Paragraphs 1, 2, and 5 of Canal's Prayer for Relief, striking the section of Canal's complaint entitled "Binging, Loafing, and Theft of Time," and dismissing Canal's fraud claim with prejudice.

ARGUMENT

I. THIS LAWSUIT SHOULD BE STAYED PENDING THE CONCLUSION OF THE PENDING FEDERAL ACTION, OR, IN THE ALTERNATIVE, DISMISSED IN FAVOR OF THE FEDERAL ACTION

A. This Lawsuit Should Be Stayed Pursuant to CPLR 2201 Until the Federal Action Concludes

1. The Standard for Granting a Stay under CPLR 2201

CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." A stay is appropriate where, *inter alia*, it will "avoid duplication of effort and waste of judicial resources" and "avoid[] the risk of inconsistent rulings." *See Asher v. Abbott Labs*, 763 N.Y.S.2d 555, 556 (1st Dep't. 2003).

2. This Lawsuit Was Filed as an Act of Retaliation

As detailed in the pending federal action, Ms. Robinson's counsel sent communications to Canal's counsel on July 31, 2019, August 1, 2019, August 2, 2019, and August 13, 2019, asserting that Ms. Robinson had discrimination claims against Canal and its owner, Robert De Niro, and was willing to pursue these claims in litigation. *See* Affidavit of Graham Chase Robinson ("Robinson Aff.") Exs. A-D. To that end, her counsel asked Canal's counsel if he was authorized to accept service of process on behalf of De Niro and Canal. *See* Robinson Aff. Ex. A. Canal responded with a preemptive strike, rushing to this Court (on a Saturday) and filing this lawsuit accusing Ms. Robinson of wrongdoing. *See* Robinson Aff. Ex. E (complaint filed on Saturday, August 17, 2019). The complaint is filled with false accusations that had not been raised with Ms. Robinson before her resignation. *See* Robinson Aff. ¶ 7. The federal complaint describes this sequence of events in detail and asserts three claims of retaliation arising from the filing of this lawsuit. *See* Robinson Aff. Ex. F ¶¶ 42-46, 60-71 (count alleging retaliation in violation of the New York City Human Rights Law), 90-97 (count alleging retaliation in violation of the New York Labor Law), 98-105 (count alleging retaliation in violation of the Fair Labor Standards Act).

As explained in the pending federal action, De Niro had previously threatened retaliatory action against Ms. Robinson if she were ever to leave Canal. These threats included telling Ms. Robinson that he would give her a "bad recommendation" if she left. *See* Robinson Aff. Ex. F ¶

33. By filing this lawsuit through Canal, De Niro made good on his threats and has ruined Ms. Robinson's professional reputation. *See* Robinson Aff. Ex. F ¶¶ 47-48. Given the circumstances surrounding Canal's filing of this lawsuit, it would be just for this Court to stay this action while the federal action proceeds and there is discovery concerning Canal's motives in filing this action.

3. Staying This Lawsuit Will Conserve Judicial Resources

There will be a massive waste of judicial resources if Canal is permitted to pursue this state court proceeding while Ms. Robinson awaits a determination from the Southern District of New York that this lawsuit is an act of unlawful retaliation. The New York Supreme Court would have to adjudicate discovery disputes, motion practice, and otherwise preside over this litigation, while the entire lawsuit could later be found to be retaliatory by the Southern District of New York. Meanwhile, the retaliatory lawsuit would have its desired effect on Ms. Robinson if she was forced to divert her attention away from her federal court claims of discrimination and retaliation and instead expend time and resources defending herself in this action.

4. Staying This Lawsuit Will Avoid Inconsistent Rulings

Staying the state court proceedings is also imperative because it "avoids the risk of inconsistent rulings." *See Asher v. Abbott Labs*., 763 N.Y.S.2d at 556. Here, the Southern District of New York will be called upon to determine whether this state court action is retaliatory. "[C]haos would result" if this Court proceeded in adjudicating Canal's state law claims on the merits, only for the Southern District of New York to rule that this entire state court action was an unlawful act of retaliation. *See Theatre Confections, Inc. v. Cate Enters*., 385 N.Y.S.2d 237, 240 (Justice Ct. of N.Y., Orange Cty., June 10, 1976) (staying state court proceedings where a federal court in a parallel proceeding was deciding the defendant's motion to preliminarily enjoin the state court action). Granting a stay would avoid this result.

5. Staying This Lawsuit Promotes the Interests of Comity and Judicial Efficiency

The principles of comity and judicial efficiency further warrant a stay because there is "substantial overlap of claims and parties" between the two actions. *See Lauria v. Kriss*, 46 N.Y.S.3d 790, 790–91 (1st Dep't. 2017) (citation omitted). Adjudication of the state action will "necessarily involve going over the same grounds covered in the Federal action[] and result in a duplication of effort and a consequent waste of court time." *See id*.; *see also Barron v. Bluhdorn*, 414 N.Y.S.2d 15, 16 (1st Dep't. 1979) (ordering a stay of a state court action pending resolution of a related federal court action on the basis that "the prejudice caused to defendants by duplication of effort is obvious."). Here, the pending federal action involves both of the parties to this state court proceeding. Therefore, having this case proceed in the meanwhile would cause substantial duplication, including the potential for multiple depositions from the same witnesses, duplicative discovery requests, and overlapping motion practice. Consequently, this case should be stayed until final judgment is entered in the federal action.

B. In the Alternative, This Lawsuit Should Be Dismissed Pursuant to CPLR 3211(a)(4)

1. The Standard for Dismissal under CPLR 3211(a)(4)

CPLR 3211(a)(4) authorizes dismissal where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." CPLR 3211(a)(4) "vests a court with broad discretion" in considering whether to dismiss an action. *Whitney v. Whitney*, 440 N.E.2d 1324 (1982). Dismissal is authorized where there is "substantial," even if not complete, identity of parties and claims. *Syncora Guar. Inc. v. J.P. Morgan Sec. LLC*, 970 N.Y.S.2d 526, 532–33 (1st Dep't. 2013). Substantial identity "generally is present when at least one plaintiff and one defendant is in common in each action." *Morgulas v. J. Yudell Realty, Inc*., 544 N.Y.S.2d 597, 599 (1st Dep't. 1990). Where "both suits arise out of the same subject

matter or series of alleged wrongs," dismissal is appropriate. *Syncora Guar. Inc. v. J.P. Morgan Sec. LLC*, 970 N.Y.S.2d at 533 (citing *Cherico, Cherico & Assoc. v. Midollo*, 886 N.Y.S.2d 914 (2d Dep't. 2009)). Here, both suits involve the two parties to this action: Graham Chase Robinson and Canal Productions, Inc. Also militating in favor of dismissal is the fact that the federal court action "is more comprehensive" than the state court action, because it includes an additional party, Robert De Niro. *See AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 922 N.Y.S.2d 288, 288 (1st Dep't. 2011). As noted in the pending federal action, Canal Productions, Inc. is De Niro's corporate alter ego. *See* Robinson Aff. Ex. F. ¶ 3.

2. This Preemptive Lawsuit Should Be Dismissed

Courts have held that dismissal under CPLR 3211(a)(4) is particularly warranted where a state court action has been filed preemptively by a plaintiff to whom the defendant "clearly communicated the threat of federal court litigation." *Higginson v. Linden Capital, L.P.*, 2013 N.Y. Slip Op 31836(U) at *9 (Sup. Ct. N.Y. Cty. Aug. 2, 2013) (dismissing preemptively filed state court action in favor of the federal court action initiated by the state court defendants). Here, Ms. Robinson communicated the threat of federal court litigation when her counsel asserted that she had federal claims against Canal and asked whether the company's lawyer was authorized to accept service of a lawsuit. *See* Robinson Aff. Ex. A (identifying Ms. Robinson's potential claims under the Civil Rights Act of 1964 and the Fair Labor Standards Act and asking if Canal's counsel was authorized to accept service of process).

Canal's response was to file this state court proceeding – just days after Ms. Robinson's prior counsel further detailed her claims. *See* Robinson Aff. Ex. D (email of August 13, 2019 alleging hostile work environment and a "completely sexist work environment sponsored and created by Mr. De Niro utilizing the employment platform of Canal Productions[]"). This lawsuit

was commenced "defensively, almost immediately after receiving a [communication] threatening suit" from Ms. Robinson's counsel. *See Thor Gallery at Beach Place, LLC v. Standard Parking Corp.*, 2012 NY Slip Op 50112(U) at * 3 (Sup. Ct. N.Y. Cty. Jan. 11, 2012) (dismissing state court action in favor of federal court action where the state action was filed "preemptively, to obtain an inequitable advantage."). Thus, dismissal pursuant to CPLR 3211(a)(4) is appropriate.

3. The Fact That Canal Was "First to File" Is Not Dispositive

Where an action is "vexatious, oppressive or instituted to obtain some unjust or inequitable advantage," courts should not allow the action to proceed simply because it was filed first. *L-3 Comms. Corp. v. SafeNet Inc.*, 841 N.Y.S.2d 82, 88 (1st Dep't. 2007) (citing *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 660 N.Y.S.2d 568, 572 (1st Dep't. 1997)). Indeed, the fact that an action was commenced first "is not controlling," especially where, as here, "commencement of the competing actions has been reasonably close in time." *Flintkote Co. v. Am. Mut. Life Ins. Co.*, 480 N.Y.S.2d 742, 745 (2d Dep't. 1984); *see also San Ysidro Corp. v. Robinow*, 768 N.Y.S.2d 191, 193 (1st Dep't. 2003) (noting that priority in filing "is not necessarily dispositive, particularly where both actions are in the earliest stages of litigation.").

While Canal filed the state court action first, Ms. Robinson's federal complaint was filed less than two months later, and both cases "are in the earliest stages of litigation." *See id.* at *9. Canal "should not be rewarded for [its] precipitous filing" shortly after "learning of [Ms. Robinson's] intention to bring an action." *See White Light Prods.*, 660 N.Y.S.2d at 575. If this state court action were allowed to proceed, it would "creat[e] disincentives to responsible litigation," and instill "fear of preemptive strike." *See Higginson*, 2013 NY Slip Op 31836(U) at *8. Rather than permitting such an unjust result, the Court should dismiss this case pursuant to CPLR 3211(a)(4).

II. PORTIONS OF THE COMPLAINT SHOULD BE STRICKEN

A. Portions of Canal's Prayer for Relief Should Be Stricken

1. Canal's Request for $6 Million Should Be Stricken as Clearly Excessive

In any event, this Court should strike Paragraphs 1, 2, and 5 of Canal's Prayer for Relief. It is well established that courts may strike a prayer for a relief (also called an *ad damnum* clause) where the relief sought is "clearly excessive and unattainable." *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1538 (S.D.N.Y. 1985).

First, Canal's request for "not less than $3 million" in disgorgement of Ms. Robinson's compensation is clearly excessive. Compl. Prayer for Relief ¶ 1. Canal's allegations indicate that Ms. Robinson earned approximately $475,000 during the three-year statute of limitations period applicable here.[1] *See* Compl. ¶ 17 (alleging income of $175,000 in 2017, $225,000 in 2018, and a $300,000 per year payrate for 2019, which would translate to approximately $75,000 for the approximately 3 months in 2019 before Ms. Robinson resigned). Accordingly, the $3 million figure is grossly out of line with any amount Canal could conceivably recover. Therefore, the Court should strike Paragraph 1 of Canal's Prayer for Relief as "clearly excessive and unattainable." *See Lumbard*, 621 F. Supp. at 1538; see also *Quinn v. Straus Broad. Grp., Inc.*, 309 F. Supp. 1208, 1210 (S.D.N.Y. 1970) (striking *ad damnum* clause of $500,000 as "clearly excessive" where plaintiff's maximum potential recovery was $50,000).

Canal's request for an *additional* $3 million in monetary damages for "the value of the funds and property [purportedly] misappropriated by Defendant" is similarly unsupportable. Compl. Prayer for Relief ¶ 2. Canal alleges the purported misappropriation of property worth less

[1] Canal seeks "monetary damages" for its faithless servant claim, and where, as here, a party seeks a "purely monetary" remedy for a breach of fiduciary duty, a three-year limitations period applies. *See Levy v. Young Adult Inst., Inc.*, 103 F. Supp. 3d 426, 434 (S.D.N.Y. 2015) (citing CPLR 214(4)).

than $300,000.[2] Therefore, Canal's demand for $3 million in damages dwarfs its best-case recovery by a factor of 10. Thus, Paragraph 2 of Canal's Prayer for Relief is clearly excessive and should be stricken.

2. Canal's Request for Attorneys' Fees and Costs Should Be Stricken as Baseless

Canal's request to recover "reasonable costs and attorneys' fees incurred in prosecuting this lawsuit" is baseless. Compl. Prayer for Relief ¶ 5. As the Court of Appeals has emphasized, "a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC,* 3 N.Y.3d 592, 597 (2004). But Canal does not identify any statute or agreement entitling it to recover attorneys' fees or costs, and none applies. Therefore, Canal's demand for attorneys' fees and costs should be stricken. *Panish v. Panish*, 808 N.Y.S.2d 325, 327 (2d Dep't. 2005) (granting motion to strike demand for attorneys' fees where no statutory basis or agreement providing for recovery of attorneys' fees existed); *Cty. of Orange v. Travelers Indem. Co*., No. 13-CV-06790 NSR, 2014 WL 1998240, at * 4 (S.D.N.Y. May 14, 2014) (granting motion to strike request for attorneys' fees and costs from *ad damnum* clause where no basis for recovery of attorneys' fees was alleged).

B. The Section of the Complaint Entitled "Binging, Loafing, and Theft of Time" Should Be Stricken as Scandalous and/or Prejudicial

[2] Canal alleges dollar losses totaling $256,495.35. *See* Compl. ¶¶ 28–31 (alleging purported losses of $4,875.50); *id.* ¶ 37 (alleging purported losses of $12,696.65); *id.* ¶39 (alleging purported losses of $3,000); *id.* ¶ 42 (alleging purported losses of $8,923.20); ¶ 43 (alleging purported losses of $32,000); ¶ 48 (alleging purported losses of $125,000); *id.* ¶ 54 (alleging purported losses of $70,000). Canal also alleges unspecified losses relating to purported dog sitting expenses, a handbag, and smartphones (*id*. ¶ 23), but these in no way support an overall demand for $3 million.

1. The Standard for Striking Scandalous and/or Prejudicial Allegations under CPLR 3024(b)

CPLR 3024(b) permits a court to "strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." A motion to strike will be granted where information is inserted into a pleading that is not "relevant to [plaintiff]'s claims" but "could serve to prejudice [defendant]." *Matter of Albany Law Sch. v. N.Y. State Off. of Mental Retardation & Dev. Disabilities*, 915 N.Y.S.2d 747, 747 (3d Dep't. 2011). Where allegations are prejudicial and may not ultimately be admissible, granting a motion to strike "avoid[s] the prejudice that would result to an adverse party by requiring that party to prepare to meet damaging allegations that may not be relevant at all." Connors, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3024.

2. The Section of Canal's Complaint Entitled "Binging, Loafing, and Theft of Time" Is Scandalous and/or Prejudicial under CPLR 3024(b)

The section of Canal's complaint entitled "Binging, Loafing, and Theft of Time" should be stricken as scandalous and/or prejudicial under CPLR 3024(b). Designed to grab headlines and embarrass Ms. Robinson, the section accuses her of spending "astronomical amounts of times [*sic*]" binge-watching Netflix.[3] Compl. ¶¶ 57–58. As a result of these accusations, Ms. Robinson has been pilloried in the media. *See* Robinson Aff. Ex. F ¶¶ 11, 48. Canal's allegations are per se "reproachful or capable of producing harm without justification." *See Beverage Mktg. USA Inc. v. S. Beach Beverage Co.*, 577 N.Y.S. 2d 145, 146 (2d Dep't. 2006) (internal citation omitted). These accusations are also prejudicial because they "cause harm to [Ms. Robinson] and [are] not necessary to the challenged pleading." *See id*. Accordingly, these allegations should be stricken.

[3] To the extent that this section also contains separate allegations that Ms. Robinson paid for food using Canal's American Express card, it merely repeats allegations included elsewhere in the Complaint. *See* Compl. ¶¶ 35–37. Accordingly, this section of the Complaint should be stricken in its entirety.

3. The Section of Canal's Complaint Entitled "Binging, Loafing, and Theft of Time" Is Unnecessary under CPLR 3024(b)

Moreover, the false allegations are "unnecessary" within the meaning of CPLR 3024(b) because they are irrelevant to each of the causes of action asserted in the Complaint. *See* Connors, Practice Commentary, McKinney's Cons Laws of N.Y., Book 7B, CPLR 3024 ("In general, we may conclude that 'unnecessarily' means 'irrelevant.'"). There is no case law holding that purportedly watching television at work can give rise to faithless servant liability, constitute a breach of the duty of loyalty, or support a claim for conversion or fraud.

Furthermore, Canal fails to assert the factual predicates needed to support the allegations against Ms. Robinson relating to purported binge-watching. Notably, Canal does not, and cannot, allege that Ms. Robinson had exclusive access to the company's Netflix account or that Ms. Robinson was the person who accessed the videos in question; instead, Canal only passively states that episodes of television "were accessed" on the relevant dates. *See e.g.* Compl. ¶ 58. This is plainly insufficient, and the allegations should be stricken.

III. CANAL'S FRAUD CLAIM SHOULD BE DISMISSED WITH PREJUDICE

Canal's fourth cause of action should be dismissed under CPLR 3211(a)(7) for failure to state a claim and/or for failure to plead fraud with the requisite particularity under CPLR 3016(b).

A. Canal's Fraud Claim Should Be Dismissed Pursuant to CPLR 3211(a)(7) for Failure to Allege Justifiable Reliance

1. Justifiable Reliance is an Essential Element of a Fraud Claim

One of the "essential element[s] of a cause of action for fraud" is justifiable reliance. *Basis Yield Alpha Fund Master v. Stanley*, 23 N.Y.S.3d 50, 54 (1st Dep't. 2015). To advance a claim of fraud, a party must plead not only that it "reasonably believe[d] that the representation [was] true, but [it] must also [have been] justified in taking action in reliance thereon." *Lanzi v. Brooks*, 388

N.Y.S.2d 946, 948 (3d Dep't. 1976). In order to plead justifiable reliance, a plaintiff must have taken "reasonable steps to protect itself against deception." *DDJ Mgmt., LLC v. Rhone Group LLC*, 905 N.Y.S.2d 118, 122 (2010). If a party could confirm the accuracy (or inaccuracy) of a representation through the exercise of reasonable diligence, "he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 583 N.Y.S.2d 478, 479 (2d Dep't. 1992) (internal citation omitted) (holding that failure to "secur[e] available documentation" rendered reliance on defendant's representation to be "unreasonable as a matter of law"); *see also, e.g., JPMorgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 411 (S.D.N.Y. 2004) (dismissing fraud claim for failure to plead justifiable reliance where "a reasonable lender of equivalent experience should have inquired further" into defendant's financial statements).

2. Canal's Fraud Claim Does Not Allege Justifiable Reliance and Should Be Dismissed

Canal's fraud claim must be dismissed under CPLR 3211(a)(7) for failure to state a cause of action because Canal fails to allege, and cannot plausibly allege, justifiable reliance. The gravamen of Canal's fraud claim is that Ms. Robinson purportedly claimed to have taken less than one (1) week of vacation in five years, including no vacation since 2015, while purportedly actually taking nearly twenty (20) weeks of vacation during this period. This is inherently implausible. Canal was keenly aware of Ms. Robinson's schedule at all times, as Robert De Niro insisted that she be available to him around the clock as part of her job. *See, e.g.*, Robinson Aff. Ex. F ¶¶ 26-27. If Ms. Robinson had actually taken the amount of vacation alleged in the Complaint, Canal would have known and could not have justifiably relied upon a representation that Ms. Robinson had taken little vacation or none at all. Thus, the claim fails.

Beyond the inherent implausibility of the claim, Canal cannot establish justifiable reliance because of its own admission about how it identified the purported fraud. Canal contends it detected the purported fraud by completing an internal "review of various books and records" after Ms. Robinson resigned, including reviewing "[Ms. Robinson's] emails." Compl. ¶¶ 20, 49. In other words, Canal's allegations indicate that it had, all along, purported email evidence concerning Ms. Robinson's vacations. Thus Canal "ha[d] the means available . . . of knowing . . . the truth" concerning Ms. Robinson's vacation dates, and its failure to "make use of those means" bars any fraud claim. *See Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 583 N.Y.S.2d at 479 (citing *Schumaker v. Mather*, 30 N.E. 755, 757 (1892)). Thus, Canal's fraud claim is fatally deficient and should be dismissed with prejudice.

B. Canal Fails to Satisfy the Heightened Pleading Standard for Fraud under CPLR 3016(b) because its Complaint Lacks Sufficient Detail

1. CPLR 3016(b) Establishes a Heightened Pleading Standard for Fraud

CPLR 3016(b) sets forth a heightened pleading standard for fraud, requiring that "the circumstances constituting the wrong shall be stated in detail." "[C]omplaints based on fraud . . . which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed." *Lanzi v. Brooks*, 388 N.Y.S.2d at 948 (citing *Block v. Landegger*, 354 N.Y.S.2d 430 (1st Dep't. 1974); *Meltzer v. Klein*, 285 N.Y.S.2d 920 (2d Dep't. 1967)). Failure to plead fraud with specificity prevents the defendant from "know[ing] the allegations being leveled against [her], a *sine qua non* for the fairness of any lawsuit." *Thakoopersaud v. Nat'l City Bank et al.*, No. 12-CV-30960CBAVMS, 2013 WL 12358477, at *7 (E.D.N.Y. Aug. 3, 2013).[4]

[4] While *Thakoopersaud* was decided under the federal rules, the "heightened pleading standard under CPLR 3016(b) and FRCP 9(b) are effectively the same." *Phoenix Light SF Ltd. v. Ace Sec. Corp.*, No. 650422/2012, 2013 N.Y. Slip Op. 50653(U) at *4 (Sup. Ct. N.Y. Cty. Apr. 24, 2013) (internal citation omitted).

2. Canal's Allegations of Purported Fraud Lack the Detail Required by CPLR 3016(b)

Canal fails to satisfy the heightened pleading standard for fraud with its "[b]are allegations of fraud." *See Penna v. Caratozzolo*, 516 N.Y.S.2d 788, 789 (2d Dep't. 1987). Canal fails to identify a single date when Ms. Robinson allegedly took the vacation days for which she later sought to be reimbursed. By failing to identify the days on which Ms. Robinson allegedly took vacations for which she later purportedly sought reimbursement, Canal fails to "explain *why* the [purported] statements were fraudulent." *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (emphasis added).

Additionally, Canal fails to identify critical components of the alleged misstatements. It is well established that "fraud allegations ought to specify the time, place, speaker, and content of the alleged misrepresentation." *DiVittorio v. Equidyne Extractive Indus., Inc*., 822 F.2d 1242, 1247 (2d Cir. 1987); *see also, e.g., Curtis & Assoc's, P.C. v. Law Offices of David M. Bushman Esq.*, 758 F. Supp. 2d 153, 176 (E.D.N.Y. 2010) ("the plaintiff must identify the fraudulent communications, their contents, who made the communications, where and when the communications were made, and why the communications were fraudulent."). By contrast, Canal does not identify the dates, method, or recipients of the alleged communications, and Canal does not quote the purported misrepresentations. Canal's conclusory allegations fall short of CPLR 3016(b)'s particularity requirement, and its fraud claim should be dismissed with prejudice.

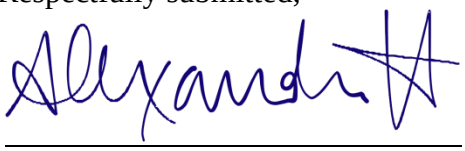
CONCLUSION

This lawsuit is retaliatory, abusive, and deficient. The Court should issue an order staying this proceeding until final judgment is entered in the federal action, or in the alternative, dismissing this action in its entirety in favor of the action pending in federal court, so that the Southern District of New York may adjudicate Ms. Robinson's claims of retaliation in due course. Staying this

lawsuit, or dismissing it, would conserve judicial resources, prevent the waste and duplication of efforts, and avoid inconsistent rulings. In the alternative, or in addition, the Court should prune Canal's lawsuit by striking its clearly excessive request for $6 million and its baseless request for attorneys' fees and costs, contained in Paragraphs 1, 2, and 5 of Canal's Prayer for Relief. This Court should also strike Canal's allegations that smear Ms. Robinson by accusing her of "Binging, Loafing, and Theft of Time." Finally, Canal's Fourth Cause of Action ("Fraud") should be dismissed with prejudice, as Canal does not, and cannot, plead the element of justifiable reliance and other details necessary to support its claim.

Dated: December 16, 2019

Respectfully submitted,



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