Plaintiff's Claims are Not Derivative in Nature.

Under Ohio law, as well as Arizona law, Parrett's claims clearly are direct and not derivative in nature. The seminal Ohio decision on this issue is *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989), where the Ohio Supreme Court held, "claims of a breach of fiduciary duty alleged by minority shareholders against shareholders who control a majority of shares in a close corporation, and use their control to deprive minority shareholders of the benefits of their investment, may be brought as individual or direct actions and are not subject to the provisions of Civ. R. 23.1 [regarding derivative suits]." *Id.* at 219 (emphasis added). The court explained the rationale for its holding as follows:

> [I]f we require a minority shareholder in a close corporation, who alleges that the majority shareholders breached their fiduciary duty to him, to institute an action pursuant to Civ. R. 23.1, then any recovery would accrue to the corporation and remain under the control of the very parties who are defendants in the litigation. Thus, a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery."
>
> Where majority or controlling shareholders in a close corporation breach their heightened fiduciary duty to minority shareholders by utilizing their majority control of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit, such breach, absent a legitimate business purpose, is actionable. Where such a breach occurs, the minority shareholder is individually harmed. When such harm can be construed to be individual in nature, then a suit by a minority shareholder against the offending majority or controlling shareholders may proceed as a direct action.

Id. (emphasis added); *accord*, *Yackel v. Kay*, 642 N.E.2d 1107, (Ohio Ct. App. 1994); *Cousins v. Brownfield*, 615 N.E.2d 1064 (Ohio Ct. App. 1992).

Here, NCFE, like the corporation in *Crosby*, is a close corporation because there are only six shareholders: four individuals, including Parrett and three of the individual

Defendants, Lance Poulsen, Barbara Poulsen, and Donald Ayers; the other two shareholders are: ??? The Beacon Group, LLC, Focus Value Fund and the JPMorgan entities ???, are also Defendants, whose officers, Thomas Mendell and Harold Pote, along with the Poulsens and Ayers, sit on and control NCFE's six-member board of directors, who are also Defendants; and the sixth shareholder is Pharos Capital Group, LLC, an investor shareholder, who votes its shares with Poulsen.

As in *Crosby*, Parrett's Complaint is replete with allegations and claims of breaches of fiduciary duty by all of these Defendants, both directly and in conspiracy with each other. Parrett also alleges that JPMorgan committed its own breaches of fiduciary duty and directly participated in and aided and abetted the breaches of fiduciary duty committed by the NCFE shareholder-director-officer Defendants. More importantly, if Parrett's claims were considered derivative, "any recovery would accrue to [NCFE] and remain under the control of the very parties who are defendants in the litigation. Thus, a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery."

Thus, under *Crosby*, Parrett clearly has the right to maintain this action directly and her claims are not derivative in nature because, as the primary case that Defendants cite, ??? *Weston v. Weston Paper & Mfg. Co.*, 658 N.E.2d 1058 (Ohio 1995), ??? in addition to the fact that NCFE has only a handful of shareholders, no other shareholder is similarly situated and that negates the cardinal requirement for maintaining a derivative action. As *Weston* explains:

We hold that the Westons do not have a direct cause of action under *Crosby*

> for the simple reason that Weston Paper is not a close corporation as was the case in *Crosby*. There was only a handful of shareholders in *Crosby*. Weston Paper has about one hundred shareholders and in March 1991 had 361,533 shares of outstanding stock. Moreover, every other shareholder is situated similarly to appellants and could bring the same action. As we noted in *Crosby*, "if the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation, then the complaining shareholder has a direct action."

Id. at 1060 (emphasis added).

Contrary to Defendants' misrepresentation of Arizona law, Parrett also has the right to maintain a direct action against Defendants and her claims are not derivative in nature under the law of this State. *See, e.g.*, *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821 (Ariz. Ct. App. 2001) (shareholder's claims against third parties for fraud, devaluation of stock and stock options); *Johnson v. Gilbert*, 621 P.2d 916 (Ariz. Ct. App. 1980) (co-shareholder's claim against third party for its breach of contract with the corporation); *see also Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 917 P.2d 222 (1996) (vacating 183 Ariz. 148, 157, 901 P.2d 1178, 1187 (Ct. App. 1995) where the Court of Appeals had held that individual shareholders in a corporation lacked standing to sue for recovery of individual damages that arose solely from acts that caused identical damages to their corporation, thereby reducing the value of their stock).

Finally, in regard to Defendants' assertion that because of the nature of Parrett's Complaint, her claims affect the assets of the bankruptcy estate, *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2nd Cir. 1986), holds otherwise. In that case, a non-debtor sued the president and sole shareholder of the bankrupt corporation to recover misappropriated assets arising out of his fraudulent misrepresentations made on behalf of the corporation.

The defendant there, like the Defendants here, argued that such a claim was property of the bankruptcy estate, but the court disagreed. For the same reason, Parrett's claims do not affect the Ohio bankruptcy estates.