SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

CHRISTINE OWEN, individually and derivatively as a shareholder of ROHM Services Corporation and RHH Mendon Properties, Inc., and as Executor of the Estate of Barbara A. Hurlbut,

Plaintiff,

— against —

ROBERT W. HURLBUT and HURLBUT HEALTH CONSULTING, LLC,

Defendants.

DECISION

Index No. E2022010777

(Motion Nos. 3 and 5)

Appearances:

HARRIS BEACH PLLC, Pittsford, New York (*Kelly S. Foss and Kyle D. Gooch*) for Plaintiff CHRISTINE OWEN, individually and derivatively as a shareholder of ROHM Services Corporation and RHH Mendon Properties, Inc., and as Executor of the Estate of Barbara A. Hurlbut

PULLANO & FARROW PLLC, Rochester, New York (*Langston D. McFadden and Christian N. Valentino*) for ROBERT W. HURLBUT and HURLBUT HEALTH CONSULTING, LLC

(Ciaccio, A.S.C.J.)

In this shareholder derivative action, plaintiff Christine Owen seeks, among other things, damages from her brother, the defendant Robert W. Hurlbut, alleging that he breached his fiduciary duty in destroying the value of ROHM Services Corporation, a corporation of which he was president and in which plaintiff had a beneficial interest (and of which she is now a shareholder). She has also named as a defendant Hurlbut Health Consulting, LLC, claiming that her brother formed it to take over ROHM Services Corporation's functions and clients, making it jointly liable.

The defendants moved to dismiss pursuant to various subsections of CPLR 3211 (a), and the court indicated it would treat the motion as one for summary judgment pursuant to CPLR 3211 (c). Subsequently the plaintiff cross-moved for partial summary judgment.

The court has considered the parties' filings in NYSCEF as follows:

- In support of the defendants' motion to dismiss, NYSCEF #s 87-102 and Reply Submission #120, and in further support of the motion NYSCEF #s 256-271;

- In opposition, plaintiff's submissions NYSCEF #s 111-113, 135, 223, and 230;

- In support of the plaintiff's motion for summary judgment, NYSCEF #s 124-223 and 229-236; and

- In opposition to the cross-motion for summary judgment, defendants' submissions NYSCEF #s 256-271.

BACKGROUND

Plaintiff Christine Owen ("Christine") and defendant Robert W. Hurlbut ("Bob") are the only children of Robert H. Hurlbut ("Robert") and his wife Barbara. Bob passed away in 2013, having accumulated substantial wealth stemming from his formation, ownership, and management of skilled nursing facilities in the Rochester area.

Before expiring Robert transferred his ownership in the skilled nursing facilities to his children, with Bob receiving a majority interest and Christine a minority interest.

Robert's Will poured the assets of his estate into the Barbara Hurlbut Marital Trust ("Marital Trust") for the benefit of his wife Barbara, with his children each as a 50% residual beneficiary.

Mary E. Ross and Jerald J. Rotenberg, longtime advisers to Bob, were nominated and appointed as trustees of the Marital Trust. After their appointment the trustees assigned power of attorney to Robert, who thereafter acted as a *de facto* trustee.[1] In May 2020 the trustees resigned, and Tompkins Trust Company was named successor trustee of the Marital Trust.

Barbara died on August 20, 2020.

Included in the assets held by the Marital Trust were the shares of ROHM Services Corporation ("ROHM"), which Bob had formed in 1971 to perform "back-office" administrative services for his nursing homes. It is undisputed that during Bob's life ROHM was operated on a "break-even" basis and showed minimal or no profit. It is not contested that such an arrangement was common in the industry and had certain tax advantages.

During his lifetime Robert made his son Bob the president of ROHM, and Bob continued the practice of operating ROHM on a similar "break-even" basis, charging the skilled nursing

[1] See Decision and Order of Surrogate's Court dated January 25, 2022 (File No. 2013-663/H), NYSCEF # 95.

facilities "[j]ust enough to cover the costs and expenses of running ROHM" (Deposition of Robert W. Hurlbut, June 24, 2020). Christine held director positions at ROHM as well and was employed managing various aspects of the business.

By Purchase and Sale Agreement dated August 30, 2016, Bob purchased Christine's ownership interest in the nursing homes. Bob continued to serve as president of ROHM. As part of the Agreement, Christine resigned from all positions she held at ROHM. As president of ROHM Bob continued to contract with the skilled nursing facilities (that he owned) and paid himself a salary.

ROHM remained 100% owned by the Marital Trust through September 2022, when the shares were distributed equally to Bob and Christine.

In 2017 Bob formed an entity known as Hurlbut Health Consulting, LLC ("Hurlbut Health").

ROHM continued to perform administrative services for the Hurlbut skilled nursing facilities until December 31, 2019, when all ROHM employees resigned their employment and were immediately rehired, with their accrued vacation intact, by Hurlbut Health. It is undisputed that Hurlbut Health was formed with the express purpose of performing administrative and "back-office" functions for the skilled nursing homes, the same functions that ROHM had been performing. Hurlbut Health also leased space previously occupied by ROHM. At around the same time the Hurlbut skilled nursing facilities terminated their contracts with ROHM.

The ROHM 401(k) plan was renamed as the "Hurlbut Health Consulting, LLC 401(k) plan."

In May 2021 Hurlbut Health purchased, pursuant to an "Asset Purchase Agreement," the physical assets owned by ROHM for a total purchase price of $85,538.19. Bob signed for the seller, ROHM, as president. A vice-president of Hurlbut Health, one Bridgett M. Chasko, signed for the buyer.

In May 2022 Bob resigned from all officer and director positions he held at ROHM, leaving ROHM without any officers or directors. ROHM, such as it was, remained 100% owned by the Marital Trust through September 2022, when the shares were distributed by the successor trustee to Bob and Christine.

An appraisal done of ROHM by Stonebridge Business Partners Associates and requested by Bob as executor of the Estate of Robert H. Hurlbut calculated "fair market value" of $855,000.00 as of March 4, 2013 (NYSCEF # 132).

In 2021 Stonebridge Business Partners performed another appraisal of ROHM, this time at the request of the temporary administrator appointed to attend to the affairs of the Estate of Barbara Hurlbut. "Fair market value" in 2021 was calculated to be $737,000.00 (NYSCEF # 130).

Based on that appraisal, the tax return for the Estate of Barbara Hurlbut, filed in 2021, reflects a valuation of $737,000.00 (NYSCEF # 257).

The intermediate accounting of Tompkins showed a valuation of $959,000.00 (NYSCEF # 265).

RHH Mendon

RHH Mendon was formed by Bob in 1996 to hold certain real property in the Town of Mendon. Ownership was transferred to the Marital Trust in 2014, and Bob and Christine each purchased 30 shares of Class A voting common stock, out of a total of 100 shares. In 2021

Bob was a director and president of RHH Mendon between May 2014 and July 2022.

From the time it was formed, RHH Mendon contracted with ROHM to perform administrative services. The contract ended at the end of 2019, when RHH Mendon retained Hurlbut Health.

STANDING

As a preliminary matter, defendant Bob has moved to dismiss the entire action on the ground that the plaintiff Christine Owen ("Christine") does not have "capacity to sue," i.e., standing, under CPLR 3211 (a) (3).

That motion is denied.

Contrary to the defendant's argument, Christine has brought the action not solely in her individual capacity but derivatively on behalf of ROHM and RHH Mendon (*see* Amended Complaint, paragraph "4").

Moreover, it is well-settled that as the remainder person of the assets of the Marital Trust, which include the shares of ROHM, she is deemed the "holder of a beneficial interest" pursuant to Business Corporation Law § 625 (a) (*see Schoellkopf v Mar. Tr. Co. of Buffalo,* 267 NY 358, 362 [1935]).

Also, she satisfies an alternative requirement that her interest - her remainder interest in the Trust, which owned the shares of ROHM - "devolved upon (her) by operation of law," meaning she inherited it (*see Pessin v Chris-Craft Indus., Inc.*, 181 AD2d 66, 72 [1st Dept 1992]).

She also satisfies the requirement of Business Corporation Law § 626 (c) that the plaintiff in any such action make "efforts" (and detail them in the complaint) to "secure the initiation of such action by the board or the reasons for not making such effort" (*id.*).

Here Christine makes the obvious and indisputable assertion that her brother Bob, the defendant, president of ROHM, and alleged perpetrator of the conspiracy to destroy the value of ROHM, was not about to undertake a shareholder derivative action against himself.

Also, Christine's efforts to induce Tompkins to bring an action were sufficient to satisfy the requirements of Business Corporation Law § 626 (c). The successor trustee petitioned the Monroe County Surrogate Court for advice and direction, exhibiting before this action was commenced its reluctance to bring an action against Bob.

MOTION and CROSS-MOTION FOR SUMMARY JUDGMENT

1. Legal Standards

a. Motion For Summary Judgment

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact necessitating a trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 197 AD3d 1008 [4th Dept 2021]; *Oddo v City of Buffalo*, 159 AD3d 1519, 1520 [4th Dept 2018]). The failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212 [b]; *see also Malamas v Toys R Us — Delaware, Inc.*, 94 AD3d 1438, 1438 [4th Dept 2012] [a moving party must affirmatively demonstrate the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof]).

Proof offered by the moving party must be in admissible form. Further, the evidence should be viewed in the light most favorable to the party opposing the motion. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Dix v Pines Hotel, Inc.*, 188 AD2d 1007, 1007 [4th Dept 1992]). Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez*, 68 NY2d at 324; *Mortillaro v Rochester Gen. Hosp.*, 94 AD3d 1497 [4th Dept 2012]). Conclusory and speculative assertions are insufficient to defeat a motion for summary judgment (*Trahwen, LLC v Ming 99 Cent City No.7, Inc.*, 106 AD3d 1467 [4th Dept 2013], *lv dismissed* 21 NY3d 1066 [2013]).

A summary judgment motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]; *Matter of Maloy*, 75 Misc 3d 390, 395-396 [Sur Ct, Monroe County 2022], even when scrutinized "in the light most favorable to the party opposing the motion" (*Goldstein v County of Monroe*, 77 AD2d 232, 236 [4th Dept 1980]; *Nojaim Bros. v CNA Ins. Cos.*, 113 AD2d 109 [4th Dept 1985]).

It is "the earmark of summary judgment that the court is confined to determining whether an issue of fact exists as a matter of law" (*Phillips v Kantor & Co.*, 31 NY2d 307, 315 [1972]).

In determining whether summary judgment is appropriate, the court should view the evidence in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

b. Breach of Fiduciary Duty

The essence of Christine's complaint is that Bob breached the fiduciary duty he owed to ROHM as its president, and the duty he owed to the Barbara Hurlbut Marital Trust, of which he was *de facto* trustee and self-appointed president.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684-685 [2d Dept 2011]).

The "... directors of a corporation 'owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly'" (*id.* at 685, quoting *Schwartz v Marien*, 37 NY2d 487, 491 [1975]).

The fiduciary duty of loyalty imposes on corporate directors an obligation not to "assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation ... as they [directors] owe the corporation their undivided and unqualified loyalty" *Foley v D'Agostino,* 21 AD2d 60, 66–67 [1st Dept1964]). Accordingly, directors should not be permitted to "profit personally at the expense of the corporation, [n]or must they allow their private interests to conflict with corporate interests" (*Foley,* 21 AD2d at 67; *Higgins v New York Stock Exch., Inc.*, 10 Misc 3d 257, 278 [Sup Ct, New York County 2005]).

With regard to the scope of Bob's obligations to the Marital Trust (and to the extent it is different than or greater than the duty owed by a corporate officer), it has been held that the duty of a fiduciary of a trust is "broad" and covers "every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person 'in such close relation [to the fiduciary] * * * that possible advantage to such other person might * * * consciously or unconsciously' influence the fiduciary's judgment" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Albright v Jefferson County Natl. Bank,* 292 NY 31, 39 [1944]).

2. Bob's Motion For Summary Judgment

Across twenty causes of action and an array of differing theories, Christine alleges essentially that Bob, as president of ROHM, and in breach of his fiduciary duty to ROHM and its shareholder, the Marital Trust, eviscerated the value of ROHM by misappropriating its assets, including but not limited to its trademark, by undercharging the Hurlbut skilled nursing homes for its services, selling ROHM's assets (to Hurlbut Health) for less than market value, giving himself excessive compensation, and creating a company (Hurlbut Health) that competed with ROHM, all causing damage to ROHM and to Christine as the holder of a beneficial interest in the Marital Trust which was the owner of the shares of ROHM until they were distributed to Bob and Christine.

In his affidavits (NYSCEF #s 9, 88 and 267) Bob concedes that he did much of what Christine alleges caused the value of ROHM to dissipate into nothing. As president (and owner) of the Hurlbut skilled nursing facilities he ceased to retain ROHM to perform back-office and administrative services. He fired ROHM's employees (as president of ROHM) and rehired them as president of Hurlbut Health. He assumed control over the pension plan. After resigning as president of ROHM, he failed to notify Christine that a ROHM-owned trademark, Hurlbut Health Communities, had lapsed, and then instructed his attorneys to re-register the trademark in the name of Hurlbut Health. He sold for a minimal amount ROHM's physical assets – such as they were, desks, computers and chairs - to Hurlbut Health. He directed Hurlbut Health to lease space occupied by ROHM. He did nothing to market ROHM's services to other facilities and/or entities. While president of ROHM, he created Hurlbut Health, and the inference can be reasonably drawn - it is indisputable - that he did so intending that it would take over the services provided by ROHM. As president of ROHM, he paid himself generously.

He did all of this, he does not deny, to remove his sister Christine, with whom he had a bitter and fractious relationship (as Christine says, Bob considered her "totally incompetent … and should stay out of his area") (Affidavit of Christine Owen, NYSCEF # 125, paragraph 71) from having any role to play in the operation of the Hurlbut skilled nursing facilities. Although she had resigned from the positions she held with ROHM before and after her father's death, it was inevitable that once Barbara died, the Marital Trust would distribute the shares of ROHM to Bob and Christine equally, giving Christine then a role to play in the management of the company (and the leverage to exact a purchase price for her ownership share).

Nonetheless, in a broad attack on the underlying theory of the amended complaint (but not against the individual causes of action) that Bob breached his fiduciary duty to ROHM and its shareholder, Bob argues that he is entitled to summary judgment dismissing the amended complaint as a matter of law because as president and owner of the Hurlbut skilled nursing facilities – the only nursing homes which ever utilized the services of ROHM - he had sole and unfettered discretion to discontinue using ROHM to perform back-office and other services and instead to have those services performed by a company over which he had sole control.

Also, he asserts that he had no obligation to pay more for services that had been provided for cost since 1979, in fact, it would have been a tax disadvantage - and a net loss to the nursing home corporation - not to form and utilize a new company, which he did, Hurlbut Health (*see* Nasso Affidavit, NYSCEF # 270).

In other words, Bob asserts that in paying ROHM only enough to cover its expenses, and then in deciding to terminate ROHM's services to the nursing homes and defenestrating ROHM – poaching its employees, taking client information, assuming control of the pension plan, appropriating its trademark, etc. – he did not breach his fiduciary duty to ROHM because he had every right – in his distinct and separate role as president of the Hurlbut skilled nursing facilities – to do so, even an obligation. Given that no agreement he made obligated him to continue to retain ROHM's services, let alone at more than cost, he raises the question, why would he as president and owner of the Hurlbut skilled nursing facilities ever pay ROHM market rates for its services, when he had not been doing so since becoming president of ROHM,[2] and his father never did?

However, Bob's own reply submissions concede that ROHM had value somewhere between $737,000 (the amount claimed on the Barbara Hurlbut Estate tax return) and $959,000 (the amount identified as fair market value in the Intermediate Accounting filed by Tompkins. Thus, in admitting that he failed to compensate the Marital Trust for having eviscerated ROHM of its assets and ability to operate, Bob has not met his burden of establishing that he did not breach his fiduciary duty to ROHM (and as *de facto* trustee of the Marital Trust, to the Trust itself), and did not cause "direct damage" (*Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684-685 [2d Dept 2011]) to ROHM (and ultimately to Christine, the holder of a beneficial interest in the Marital Trust and eventually to the shares of ROHM).

As the transactions between the skilled nursing facilities and ROHM were self-interested transactions (*see Marx v Akers*, 88 NY2d 189, 202 [1996]), Bob has a burden to show the "entire fairness" of the transaction (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 570 [1984]). He has not done so.

In underpaying for ROHM's assets, Bob committed "misconduct" sufficient to qualify as a breach of the "duty to single-mindedly pursue the interests of those to whom a duty of loyalty is owed" and constituted the "promotion of personal interests which are incompatible with the superior interests of their corporation ..." (*Birnbaum v Birnbaum*, 73 NY2d at 466; *Foley v D'Agostino,* 21 AD2d at 66–67).

Thus, upon review of "all the papers and proof submitted" (CPLR 3212[b]), the motion for summary judgment dismissing the amended complaint is denied, as Bob has not met his burden demonstrating entitlement to judgment as a matter of law that he did not breach his fiduciary duty to ROHM in underpaying for ROHM's assets.

To be clear, Christine claims (as discussed below) damages far in excess of the valuation in the estate tax return. She claims that Bob had a fiduciary duty to not only leave ROHM and its assets, such as they were, alone, but to charge, as president of the Hurlbut skilled nursing facilities, for the services of ROHM at a market rate, which would have generated profits in the millions of dollars and would have ultimately resulted in a market value of as much as $7,950,784 in 2019.

[2] Tellingly, Christine never complained about the "break-even" arrangement when she was a minority owner of the skilled nursing facilities and drawing a salary from ROHM and otherwise benefitting from the arrangement with ROHM as an owner of the nursing homes.

3. *Christine's Motion For Partial Summary Judgment*

Christine requests partial summary judgment[3] on the following theories: 1) that between 2017 and 2019 Bob undercharged the Hurlbut nursing homes for services provided by ROHM; 2) that the compensation he paid himself as president of ROHM was excessive; 3) that he misappropriated (and underpaid for) intangible and tangible assets of ROHM; and 4) that because he was a "faithless servant," he should at the least disgorge the salary he earned from ROHM for the period 2017-2019, in the amount of $1,694,073.

a. **Claim that Bob as President of ROHM undercharged the Hurlbut nursing homes (i.e., operated it as a break-even entity)**

As to the claim that Bob (as president of ROHM) undercharged the Hurlbut skilled nursing facilities for services, Christine has not established her entitlement to judgment as matter of law, and partial judgment on that issue is denied. She has presented admissible proof that the "market rate" for an administrative service company such as ROHM was higher than what ROHM was being paid by the Hurlbut skilled nursing facilities, however, it is speculative that ROHM would have been hired at that rate.

The essential question is the one raised by Bob in his motion: did his fiduciary obligations as president of ROHM obligate him as president of the Hurlbut skilled nursing homes (and to which he owed a fiduciary duty), to "charge" a higher, market-based rate?

The record submitted in support of the motion is devoid of any fact-based evidence which creates on its face an obligation on Bob as president of the Hurlbut skilled nursing facilities to hire ROHM.

Note the way in which Christine has framed the issue, which does not make economic sense: Bob is liable as president of ROHM because ROHM, a vendor of administrative services, did not charge the skilled nursing homes a market rate. Yet, it is common sense and experience that vendors do not have the luxury to pick and choose the rates they want to charge. They first secure a contract to render services based on a proposed rate, a concept with which every lawyer would be familiar. If the prospective client does not like the price, he will go elsewhere for services.

Which is exactly what Bob has said he would have done. Certainly (to employ a simple thought experiment) if Bob had not been the president of the Hurlbut skilled nursing homes, ROHM, "charging" a market rate which the Hurlbut homes had not paid in their entire existence, would never have been retained to perform those services. A new company would have been created (which Bob did), offers of employment would have been extended to the ROHM employees (which Bob did), and payments would likely have continued at a break-even basis.

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[3] Christine's motion for partial summary judgment previously was granted in part, to the extent that it sought summary judgment on the Thirteenth through Eighteenth Causes of Action in the Amended Complaint (*see* Order, NYSCEF # 282).

Christine argues that whether Bob would have authorized higher rates for ROHM's services is "entirely beside the point." The court disagrees and concludes that that is exactly the point at issue. It is not hypothetical to discern what Bob would have done. It is known what he would have done because he has stated such in his affidavit. Moreover, Bob as president of ROHM had no authority to force the Hurlbut skilled nursing homes (even though Bob was the president of those facilities) to pay more for its services.

Moreover, as a matter of law, Bob as *de facto* trustee and as president of ROHM had a duty to maximize the profits of ROHM, but Bob as president of the skilled nursing facilities had a duty to maximize the profits of the skilled nursing facilities. The duties of Bob as president of ROHM did not require him as president of the skilled nursing facilities to retain ROHM to perform its administrative services. Nothing in the Purchase and Sale agreement by which Bob purchased Christine's nursing home interest (a transaction in which Christine was represented by Harris Beach) obligated Bob as president of the nursing homes to continue to retain ROHM. Nor did any provision of the Will, which obligated the trustees (and the *de facto* trustee) to operate ROHM for the benefit of Barbara and the residual beneficiaries, explicitly obligate Bob in his role as president of the skilled nursing facilities, to continue to retain ROHM.[4]

On the issue of whether it was a breach of fiduciary duty for Bob to continue paying for ROHM's services on a break-even basis, the issue would need to be framed for the factfinder like this: would Bob Hurlbut, the president of the Hurlbut skilled nursing facilities, have retained ROHM to perform administrative services at a market-based rate?

No evidence having been presented on which the factfinder could answer that question in the affirmative, even giving the benefit of every reference to Christine, the motion for summary judgment is denied, and judgment as a matter of law is granted to Bob dismissing those causes of action (or claims for damages) premised on the "market rates" that the Hurlburt nursing homes should have been paying to ROHM between 2017-2019.

One final note. Christine makes the point that Bob would have paid more because he is paying more in revenue to Hurlbut Health than he paid to ROHM in fact, 31.3% higher. The point carries no weight, because the money being paid to Hurlbut Health comes from the nursing homes Bob owns, thus it is his own money. He is, for some unstated reason, paying Hurlbut Health, and thus himself (as the owner of Hurlbut Health) more, which is irrelevant as to whether he would have paid ROHM more during the years in question. Since the payments to Hurlbut Health were made after ROHM's services to the skilled nursing facilities were terminated, the extent of the payments is irrelevant.

b. <u>Claim that the compensation Bob paid himself as president of ROHM was excessive</u>

[4] The Twentieth Cause of Action claims that an obligation to operate ROHM profitably arose out of the "implied covenant of good faith and fair dealing" inherent in the Purchase and Sale Agreement of 2016 by which Bob purchased Christine's interest in the skilled nursing facilities. Buried in a paragraph entitled "standing" is Bob's request for an Order dismissing that cause of action. The court denies the motion, as Christine clearly has standing as an individual to sue on the alleged "covenant." Whether the cause of action survives a motion addressed more specifically to its substance is left to a future decision.

Clearly, Christine has established that Bob paid himself more than the "industry norm" for "comparable businesses," although what constitutes a "comparable business" is not stated. In this unique situation, the revenue to pay Bob came from the Hurlbut skilled nursing facilities owned by Bob. In fact, they were solely owned by Bob, so in effect, he was paying himself from his own funds. How this benefitted Bob is nowhere explained.

One would think, given the explanation of how ROHM was operated in relation to the Hurlbut skilled nursing facilities, that if Bob wanted to achieve a break-even point, he could simply have paid less to ROHM. If that were for some reason not feasible, and the additional revenue had to be paid (for perhaps some tax benefit?) to ROHM by the Hurlbut nursing facilities, then it would be a reasonable inference, and one justifying judgment as a matter of law, that less could have been paid to Bob as President and more to the ROHM shareholder (i.e., the Marital Trust).

Bob provides no response as to why he paid himself the allegedly excessive compensation for the years 2017-2019. In view of his silence on this issue, judgment is granted to Christine, with the actual damages to be determined at trial (*see Kelly v Gonzales-Torres,* 219 AD3d 711 [2d Dept 2023]).

c. Claim that Bob misappropriated (and underpaid for) intangible and tangible assets of ROHM

Christine claims that Bob "simply took ROHM's business without compensation. That included ROHM's workforce, its files, its know-how, its goodwill, its trademarks, and all the other intangible assets that made ROHM a valuable business." (Plaintiff's Reply Memorandum of Law in Further Support of Cross Motion for Partial Summary Judgment NYSCEF # 272, p. 8)

Judgment is granted as to those causes of action premised on the misappropriation and/or underpayment of the assets of ROHM. It is undisputed that ROHM had value, embodied at least partly by the items listed above, and that Bob failed to pay anywhere near the value placed upon the business by the intermediate accounting, by the federal tax return, and by the Stonebridge appraisals.

On the issue of underpayment, Bob's response does not create an issue of fact. That he was under no obligation to pay market rates for ROHM's services does not give rise to the conclusion that he was free to delay the destruction of ROHM and gradually eviscerate it of its value. Even giving Bob the benefit of every possible inference, the bottom line is that he paid very little for ROHM's assets, and certainly nowhere near the valuations. In no way was the transaction at arm's length.

The extent of damages questions is best left to a trier of fact.[5] Evidence may be presented on whether ROHM's services could have been marketed to other entities, as Christine asserts. There is an issue as to whether the valuations of ROHM reflect true market value, considering that the fact that ROHM never showed net income (because it was operated on a "break-even" basis, the reasons for which are detailed in accountant Bob Nasso's Affidavit [NYSCEF # 270]), never served clients other than the nursing homes, and consequently had negligible value – at least no true market value – independent of its service to the nursing homes. As defined by Stonebridge Business Partners, "Fair market value is the logical framework through which an effort is made to determine the price at which the Company's common shares would trade *under the presumption that a market exists* (emphasis added). Here, it seems unlikely at this stage that the presumption can be made that a market exists, as ROHM was never marketed to any other entity. However, the evidence presented at trial may dictate a different conclusion.

But as to the liability on the cause of action claiming underpayment of ROHM assets, judgment on liability is granted.

d. Claim that because he was a "faithless servant," Bob should at the least disgorge the salary he earned from ROHM for the period 2017-2019, in the amount of $1,694,073

It is well-settled that "Under the faithless servant doctrine, which applies when an employee breaches the duty of loyalty owed to the employer, "[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of [their] services is generally disentitled to recover [their] compensation, whether commissions or salary" (*Feiger v Iral Jewelry*, 41 NY2d 928, 928 [1977]; *Vil. Green E. Holdings LLC v Blaakman*, 2023 WL 6528926, *2, 2023 NY Slip Op 05082 [4th Dept Oct. 6, 2023]).

Thus, where an employee "engage[s] in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted" (*City of Binghamton v Whalen*, 141 AD3d 145, 147 [3d Dept 2016], citing *William Floyd Union Free School Dist. v Wright,* 61 AD3d 856, 859 [4th Dept 2009]; *see Royal Carbo Corp. v Flameguard, Inc.,* 229 AD2d 430, 430 [2d Dept 1996]; *Bon Temps Agency v Greenfield,* 212 AD2d 427, 428 [1st Dept 1995]).

"New York's strict application of the faithless servant doctrine "mandates the forfeiture of all compensation ... where ... one who owes a duty of fidelity to a principal is faithless in the performance of his services" (*Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017], citing *Soam Corp. v Trane Co.,* 202 AD2d 162, 163–164 [1st Dept 1994], *lv denied* 83 NY2d 758 [1994]).

Here, judgment has been granted finding Bob liable for a breach of his fiduciary duty to

[5] Robert argues that the equitable doctrine of tax estoppel prevents Christine from proving damages greater than the valuation in the estate tax return, since she signed the return. That argument is rejected, for the reasons stated by Christine.

ROHM and to its shareholder, the Marital Trust. The breach consisted of steps taken that rendered ROHM without any value other than a few desks, computers and chairs, for which Bob paid a fraction of the value set forth in the estate tax return and elsewhere.

It can be easily concluded – in fact the conclusion is inescapable – that rather than simply negotiating to pay the Marital Trust a reasonable amount of money for ROHM back when he purchased the skilled nursing facilities in 2016 and Christine resigned from her positions with ROHM, Bob developed a plan to form a new company, Hurlbut Health, pay himself excessive compensation (so as to not have to distribute any money to the Trust), terminate the employees so as president of the nursing homes he could hire them, take over the pension plan, and then appropriate the trademark.

What ROHM lost in profits or diminished valuation as a result of these acts will be decided by the trier of fact, but it is held here that the series of repeated actions taken by Bob to diminish ROHM's value to nothing constituted a breach of Bob's fiduciary duty as president of ROHM (and as *de facto* trustee of the Marital Trust), regardless of the extent of the damages.

Thus, partial summary judgment is granted on the Fourth Cause of Action, and Bob is ordered to disgorge his compensation for the period 2017-2019 (since the disgorged compensation goes back equally to the shareholders of ROHM, he of course receives back one-half).

4. Bob's Motion to Dismiss on Statute Of Limitations Grounds

The shareholder derivative claims in the amended complaint are timely. "[A] shareholder derivative action, regardless of the theory underlying the claim, is governed by the six-year statute of limitations" (*Toscano v Toscano*, 285 AD2d 590 [2d Dept 2001]; *see also Otto v Otto*, 110 AD3d 620, 621 [1st Dept 2013]; *Rupert v Tigue*, 259 AD2d 946, 947 [4th Dept 1999]).

It is alleged that the wrongs committed against ROHM "are premised upon wrongdoing that occurred after [Christine] resigned as an officer or ROHM, between January 2017 through the time when RWH took the business in 2020 and 2021" (Plaintiff's Memorandum of Law NYSCEF # 113, p. 13).

As for the non-derivative claims for an accounting, constructive trust and unjust enrichment, they are also subject to a six-year limitation period under CPLR 213(1), because they are equitable remedies (*see Loeuis v Grushin,* 126 AD3d 761, 765 [2d Dept 2015] ["The ... cause of action alleging a constructive trust is equitable in nature and governed by a six-year statute of limitations."]).

The Nineteenth Cause of Action for violation of Business Corporation Law 720 has a six-year statute of limitations, and so is timely (*see Rupert v Tigue*, 259 AD2d 946, 946 [4th Dept 1999]).

The Twentieth Cause of Action, breach of the implied covenant of good faith and fair dealing, is also governed by a six-year statute of limitations (*P.S. Fin., LLC v Eureka Woodworks, Inc.*, 214 AD3d 1, 29 [2d Dept 2023]; citing *Ely–Cruikshank Co. v. Bank of Montreal,* 81 NY 2d 399, 403 [1993]; *Aozora Bank, Ltd. v. Credit Suisse Group,* 144 A.D.3d 437 [1st Dept 2016]).

In sum, the First through Twelfth, Nineteenth, and Twentieth Causes of Action are timely.

5. Bob's Motion To Sever The Fifteenth Through Eighteenth Causes Of Action.

This was resolved by the Order of the Court granting summary judgment as to the Thirteenth through Eighteenth causes of action.

6. Bob's Motion to Dismiss Based on Absence of Necessary Parties

The motion is denied. Tompkins moved to intervene, and that motion as been granted (NYSCEF # 282).

CONCLUSION

Accordingly, the motion to dismiss the complaint is denied. The parties are directed to settle the Order.

Dated: 11-2-2023

HON. CHRISTOPHER S. CIACCIO
Acting Supreme Court Justice