To be Argued by:
CHRISTIAN N. VALENTINO
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

CHRISTINE OWEN, Individually and derivatively as a shareholder of ROHM Services Corporation and RHH Mendon Properties, Inc.,

Plaintiff-Respondent-Appellant,

– and –

TOMPKINS COMMUNITY BANK, as Successor Trustee to the Marital Trust f/b/o Barbara Hurlbut under the Last Will and Testament of Robert H. Hurlbut,

Intervenor-Plaintiff,

– against –

ROBERT W. HURLBUT and HURLBUT HEALTH CONSULTING, LLC,

Defendants-Appellants-Respondents.

Docket No.: CA 24-00787

BRIEF FOR DEFENDANTS-APPELLANTS-RESPONDENTS

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PRELIMINARY STATEMENT

This case is a civil dispute between a brother and sister arising from their father's creation of a company in 1971, which was created for the sole purpose of providing him with a "home office" that would be utilized as the central location to provide administrative services to the numerous skilled nursing homes that the father owned. The "home office" acted to provide financial efficiencies to the father's skilled nursing home business (partly by charging the skilled nursing homes less than "market rates" for the services provided), and also provided tax advantages to him. This "home office" was always meant to "breakeven", and the brother and sister were aware of the history and purpose of this "home office" and received benefits and advantages for years due to this arrangement, including receiving a salary from this business entity over the years.

After the father's death, the nursing homes were transferred to the brother and sister (with the brother as the majority owner and the sister as the minority owner), but this "home office" business entity was transferred to a Marital Trust established by the father's testamentary documents. After the father's death, the brother and sister continued to operate this "home office" consistent with its history and purpose (*i.e.*, to provide administrative services for the nursing homes and charging the nursing homes less than "market rates"), and the brother and sister (along with their mother) acted as officers to this entity.

The brother always worked more on the skilled nursing home business through this "home office", which was reflected in the brother's salary paid by the "home office" (as compared to the salary being paid to the sister), which the sister and mother approved as officers. Eventually, the sister wanted out of the skilled nursing home business, and she voluntarily sold her ownership interest in the skilled nursing homes, and within the Purchase and Sale Agreement there was nothing requiring the skilled nursing homes now owned entirely by brother to continue to utilize the "home office" company. Ultimately, a number of years later the skilled nursing homes chose to no longer utilize the services of the "home office" owned by the Marital Trust, as was their right to do so as an independent entity.

This decision by the skilled nursing homes caused the "home office" (an asset of the Marital Trust) to have very little value. After the death of their mother, ignoring the history and purpose of the "home office" company and ignoring the fact that the skilled nursing homes were not required to continue utilizing the "home office" company, the sister commenced legal action against her brother alleging numerous causes of action largely based on allegations of breach of fiduciary duty and breach of loyalty and seeking to disgorge the salary her brother earned from the "home office' company.

QUESTIONS PRESENTED

1. Whether the Supreme Court erred by denying the Defendants-Appellants' motion for dismissal based on a lack of standing when the alleged causes of action were brought by a plaintiff "individually" where there was an absence of any binding contractual or other legal duty owed to the individual by the named Defendants?

   Answer: Yes, the Supreme Court erred by failing to dismiss the causes of action alleged by the Plaintiff-Respondent in her individual capacity.

2. Whether the Supreme Court erred by denying the Defendants-Appellants' motion for dismissal based on a lack of standing when the alleged causes of action were brought by a plaintiff "derivatively as shareholder" of a company and as "Executor" of an Estate when the plaintiffs were not shareholders at the time of the alleged wrongdoing and the defendant was not an officer of the company at the time the Complaint was filed and where the plaintiff's Complaint failed to set forth with particularity the efforts of plaintiff to secure the initiation of such action by the board or the reasons for not making such effort?

   Answer: Yes, the Supreme Court erred by failing to dismiss the causes of action alleged by the Plaintiff-Respondent "derivatively as shareholder" and as "Executor" of the Estate.

3. Whether the Supreme Court erred by failing to dismiss the causes of action or by failing to award summary judgment to the Defendants-Appellants where the

documentary evidence demonstrates that the history and purpose of the company at issue to operate as a "break even" company, coupled with the fact that the company's only client (that did not owe any duties to the company or its shareholder) decided to terminate its business relationship with the company, is what caused the company to lose its value and its employees?

Answer: Yes, the Supreme Court erred by failing to dismiss the Plaintiff-Respondent's causes of action against the Defendants-Appellants.

4. Whether the Supreme Court erred by granting Plaintiff-Respondent's cross-motion for summary judgment on the issues of whether the defendant's salary was "excessive", whether the defendant misappropriated or underpaid for assets of the company, and whether he acted as a "faithless servant" requiring him to disgorge two years' salary?

   Answer: Yes, the Supreme Court erred by granting Plaintiff-Respondent's cross-motion for summary judgment where there was evidence shows that the history and purpose of the company was to "break even", where the company's only client lawfully terminated its business relationship with the company, and where there is evidence that the plaintiff previously approved a similar salary to be paid to defendant for years as officer and other facts that raise a question of fact that would preclude summary judgment.

STATEMENT OF FACTS

Robert W. Hurlbut ("Hurlbut") and Christine Owen ("Owen") are siblings and the son of Robert H. Hurlbut ("RHH") (R, 31). During his lifetime, RHH owned numerous skilled nursing homes (R, 31). After RHH's death, Hurlbut and Owen each possessed a percentage of ownership in each skilled nursing facility previously owned by RHH (R, 31). However, on or about August 30, 2016, Owen voluntarily sold to Hurlbut her ownership interests in each of the skilled nursing homes previously owned by RHH (R, 31).

In addition to RHH owning numerous skilled nursing facilities, during his lifetime RHH formed a corporate entity named ROHM Services Corporation ("ROHM") in 1971 (R, 33; R, 2177). Robert Nasso, CPA, the longtime tax advisor and accountant for RHH, ROHM, and Hurlbut (who also provided tax advisor and accountant services to the Marital Trust), confirmed the history and purpose of ROHM and how it operated, and further described RHH's vision of having a "home office" to provide administrative services to his chain of nursing homes (R, 2177). The sole purpose of ROHM as created by RHH was to provide services to RHH's skilled nursing homes in exchange for a fee every month, but the established fee was to be set at a rate to make ROHM a "break-even proposition" so that RHH (and eventually Hurlbut and Owen) did not have to pay significant taxes on any earnings of ROHM (R, 33;R, 2177-78). ROHM was never created to be a "profit-making

activity" as it was only formed in order to improve administrative processes and increase efficiencies for the nursing homes and related entities (R, 2177). In addition (and importantly from a tax and accounting perspective), ROHM was set up by RHH as a "C-corporation", and because of this fact, the primary reason for keeping the income low was to minimize the income tax burden (since C-corporations can result in double taxation) (R, 2177-78). Another reason for ROHM to be a "breakeven" company was to avoid any potential regulatory risk of transferring profits from the nursing homes to a related party, which would be problematic to the nursing homes due to applicable laws that govern and regulate nursing homes and their owners (R, 2178)

RHH operated ROHM (and Hurlbut and Owen operated ROHM when they were officers of ROHM) by charging each of the nursing homes a monthly fee, and the fee was based on the bed-size of the home, and there was an agreed upon formula to calculate the fee paid by each skilled nursing facility (R, 33-34). Owen was an officer of ROHM for approximately 23 years or more and, by virtue of her role as an officer (no matter how many years she served in that capacity), Owen was familiar with the structure of ROHM and the fees it charged to and received from the skilled nursing homes (R, 34).

RHH died on March 4, 2013 (R, 34). RHH's Last Will and Testament created a Marital Trust for the benefit of RHH's surviving spouse, Barabra Hurlbut ("Marital

Trust"), and upon Barbara's death Hurlbut and Owen were each to receive fifty percent (50%) of the Marital Trust assets (R, 34; R, 2178). RHH's Will designated Mary E. Ross, Esq. ("Ross") and Jerald J. Rotenberg, CPA ("Rotenberg") as Trustees for the Marital Trust (collectively "Trustees"), and they were duly appointed as Trustees after RHH's death (R, 34). The Marital Trust was ultimately funded in early 2014 (R, 34). After RHH's death, ROHM became wholly owned by the Marital Trust (with RHH's wife, Barbara Hurlbut, as the income beneficiary and Hurlbut and Owen as the 50/50 residuary beneficiaries of the Marital Trust) (R, 34; R, 2178).

After RHH's death, Barbara Hurlbut, and her children, Hurlbut and Owen, were all officers of ROHM, and they jointly continued to operate ROHM the way RHH operated ROHM, which was primarily to provide administrative services to the nursing homes owned by Hurlbut and Owen, with the homes paying ROHM a monthly fee set by ROHM with the same understanding that RHH employed, which was to operate ROHM to be a "break-even proposition". (R, 35;R, 2178). The Trustees were aware of this, Owen was aware of this (as she was present during many of the ROHM corporate meetings when finances were discussed, and Hurlbut was aware of this (R, 35; R, 2178). Neither Barbara Hurlbut nor Owen ever objected to continuing to utilize ROHM as a "break even" company (R, 2178).

In addition to ROHM providing administrative services to the nursing homes, it was agreed amongst the Trustees and ROHM (wholly owned by the Marital Trust) that ROHM would provide the following services to the Marital Trust: check writing, oversight, basic accounting, perform year-end audits, reconciliation, and other possible administrative services (R, 35). From approximately 2014 through 2017, ROHM received no payment from and charged no fee to the Marital Trust for the aforementioned services (R, 35).

According to Rob Nasso, CPA (the longtime tax advisor and accountant to RHH and ROHM), it appeared that towards the end of RHH's life and after his death, Hurlbut was doing the most work and spending the most amount of hours to operate ROHM (as compared to Barbara Hurlbut and Owen) (R, 2178-79). As a result, Hurlbut's salary from 2013 (before RHH's death) through 2016 (the year that Owen sold her ownership interest in the nursing homes to Hurlbut), Hurlbut's salary was higher than Owen's salary (R, 2178-79). Hurlbut's and Owen's respective salaries for these years (which the officers of ROHM, including Barbara Hurlbut and Owen, routinely approved), were as follows:

Year	Hurlbut's Salary	Owen's Salary
2013	$450,000	$ 90,000
2014	$547,000	$187,000
2015	$562,000	$194,000
2016	$550,000	$190,000

(R, 2178-79).

Eventually, Owen wanted nothing to do with the skilled nursing facility business and, on or about August 30, 2016, Owen voluntarily sold her ownership interest in the various nursing homes previously owned by RHH to Hurlbut (R, 35). As part of the process of her selling her ownership interest in the nursing homes to Hurlbut, Owen signed a General Release, dated November 9, 2016, releasing Hurlbut from any and all liability for any alleged actions or omissions occurring at any time on or prior to the Closing Date (upon information and belief, August 30, 2016) (R, 35;R, 38;R, 312). Owen signed a General Release, dated November 9, 2016, releasing Hurlbut from any and all liability for any alleged actions or omissions occurring at any time on or prior to the Closing Date (upon information and belief, August 30, 2016) (R, 35;R, 38;R, 312).

Notably, nowhere within the Purchase and Sale Agreement transferring Owen's ownership interest in the skilled nursing homes to Hurlbut is there any provision requiring the skilled nursing facilities, now owned wholly by Hurlbut, to continue to utilize ROHM for ROHM's benefit or for the Marital Trust's benefit (R, 43). In other words, each of the skilled nursing homes owned by Hurlbut were free to choose to utilize ROHM or not (R, 43). Regardless, for a period of time, ROHM continued to provide services to the skilled nursing homes in exchange for the previously agreed upon fee, and ROHM further continued to provide services to the Marital Trust (R, 44). After Owen voluntarily sold her interest in the skilled nursing

homes previously owned by RHH to her brother, Hurlbut, Hurlbut's annual salary from ROHM stayed consistent with years' past (which the Officers of ROHM, including Barbara Hurlbut and Owen routinely approved), including and, more specifically, were as follows:

Year	Hurlbut's Salary
2017	$550,000
2018	$590,073
2019	$554,000

(R, 2179). The Trustees of the Marital Trust never objected to Hurlbut's salary or Owen's salary from 2013 through 2019 (as one or more of the Trustees attended Board Meetings when budget and salary were discussed and did not object) (R, 2147-73).

In or around February 2018, the Trustees of the Marital Trust requested that ROHM begin charging the Marital Trust for the services ROHM provided to the Marital Trust, and it was ultimately agreed that ROHM would charge the Marital Trust $6,000 per month for its services (R, 35).

In 2019, for a variety of reasons, the skilled nursing homes wholly owned by Hurlbut (which are indisputably separate legal entities from ROHM) determined that it would be in their best interests to no longer utilize ROHM for their administrative service needs and to prevent any issues in the future that could negatively affect the nursing home's operations (R, 41). Given these legitimate concerns, the skilled

nursing homes took the actions necessary to cease utilizing ROHM through a notification of non-renewal, effective January 1, 2020, at which time there would be a termination of any and all services agreements previously entered into by the various skilled nursing homes and ROHM (R, 41).

Given that the large bulk of ROHM's income was related to the services provided to the skilled nursing homes, all of which gave notice to ROHM that they were no longer utilizing ROHM for administrative services, ROHM would be unable to continue operating and employing its employees (R, 41). Once it was determined by the nursing homes that they were no longer going to utilize ROHM (which was their prerogative), as owner of the nursing homes Hurlbut was required to search elsewhere for a company to provide the same services for the nursing homes (R, 42).

Hurlbut created a company called Hurlbut Health Consulting ("HHC") to provide services for the nursing homes (and to act as the "home office" for the skilled nursing facilities) using a similar "breakeven proposition" that ROHM utilized for decades (R, 42; R, 2180).

Regardless of whether HHC existed or not, the nursing homes chose to no longer utilize ROHM due to Hurlbut's very real concern about how Owen could negatively affect the operations of the various skilled nursing homes (R, 42-43). HHC did in fact hire many (if not all) of the employees of ROHM (all of whom resigned or needed to be terminated by ROHM due to the lack of income being

generated after the skilled nursing homes gave notice of their termination of their business relationship with ROHM) (R, 42). Notably, Hurlbut specifically set up HHC to generate taxable income that could be used for the pass-through entity tax election process (R, 2180). This was a unique tax opportunity that LLCs and S-corporations could now utilize to be able to pay and deduct State taxes on an individual's personal tax return (R, 2180). Because Hurlbut's other companies were all sole-proprietorships, HHC is the only company owned by Hurlbut that could take advantage of this New York State program (R, 2180). Given these facts, the way HHC operates was necessarily different than how ROHM operated as the tax rules applied to HHC were different than the tax rules previously applied to ROHM (R, 2180-81). The Court even noted that Owen did not contest the fact that forming and utilizing ROHM to perform "back-office" administrative services for Hurlbut's skilled nursing homes was common in the skilled nursing homes world and had certain tax advantages (R, 15.)

After the nursing homes determined that they no longer desired to utilize ROHM and knowing that ROHM would not be able to pay its employees without the income from the skilled nursing facilities, as officer of ROHM Hurlbut authorized the sale of ROHM's tangible assets to HHC in the amount of $85,538.19 and such assets were sold to HHC, upon information and belief for fair market value (R, 42;R, 2180).

On August 20, 2020, Barbara Hurlbut died, which resulted in the need to dissolve the Marital Trust (R, 241).

With respect to the value of ROHM, Rob Nasso as the longtime tax advisor and accountant for ROHM, identified the only formal valuations of ROHM over the years: a valuation completed at the time of RHH's death, which occurred in 2013 ($855,000); a valuation completed at the time of Barbara Hurlbut's death, which occurred in 2014 (for the purposes of filing the required Estate Tax returns) ($737,000) (so the Estate of Barbara Hurlbut reported to the IRS that ROHM only had a value of $737,000); the Accounting recently filed by the original Co-Trustees of the Marital Trust, Jerry Rotenberg and Mary Ross ($959,000); and the Accounting recently filed by the Successor Trustee of Tompkins Bank ($959,000) (R, 2179). Rob Nasso (as the longtime tax advisor and accountant for ROHM) provided testimony that the consistent valuation of ROHM over the years was reasonable based on the net tangible assets in the company at the date of the valuation given the history and purpose of ROHM and the fact that ROHM was always a "break even" company that was meant to provide administrative services to the Hurlbut nursing homes, and that (other than also providing administrative services to the Marital Trust) ROHM's purpose was to act as the "home office" for the nursing homes, and that the moment that the nursing homes ceased utilizing ROHM, ROHM would have had very little purpose and relatively little value (since ROHM's income was almost

exclusively generated by the nursing homes and one of the most significant assets of ROHM that was included in the formal valuations was the life insurance policy on Bob's life which was owned by ROHM) (R, 2179-80).

ROHM was owned by the Marital Trust until September of 2022, at which time the shares of ROHM were distributed by the Successor Trustee of the Marital Trust (Tompkins) to Hurlbut and Owen (R, 16).

PROCEDURAL HISTORY

Owen, individually, derivatively as a shareholder of ROHM, and as Executor of the Estate of Barbara Hurlbut commenced a legal action against Hurlbut and HHC, in which Owen alleged eighteen causes of action against Hurlbut and eight causes of action against HHC[1] (R, 231-66). Hurlbut and HHC filed a motion to dismiss the causes of action pursuant to various subsections of CPLR 3211(a), but the Court *sua sponte* and in accordance with CPLR 3211(c) advised the parties that the Court was converting Hurlbut's motion for dismissal as a motion for summary judgment. Owen, then, cross-moved for partial summary judgment related to the numerous causes of action alleged in the Complaint.

[1] Some of the causes of action in the Complaint were related to another company, RHH Mendon Properties, Inc., but that company and those causes of action are not the subject of any part of the Decision and Order being appealed.

After considering the parties' respective submissions and after oral argument, the Court issued a Decision, dated November 2, 2023, and the subsequent Order, dated November 30, 2023 (R, 8-13). Hurlbut and HHC are now appealing portions of the Court's Decision and subsequent Order.

ARGUMENT

POINT I

HURLBUT'S AND HHC'S MOTION FOR DISMISSAL OF OWEN'S COMPLAINT SHOULD HAVE BEEN GRANTED AS OWEN, INDIVIDUALLY, AS A CURRENT SHAREHOLDER OF ROHM, AND AS THE EXECUTOR OF THE ESTATE OF BARBARA HURLBUT LACKED STANDING TO SUE HURLBUT AND HHC

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (3) the party asserting the cause of action has not legal capacity to sue…." CPLR § 3211(a). Where a motion to dismiss is based on a party's lack of legal capacity or standing to sue, the critical issue in determining standing is "whether the party has suffered an injury in fact, which is an actual legal stake in the matter being adjudicated and ensures that the parties seeking review has some concrete interest in prosecuting the action." Kenney, 41 Misc. 3d 1225(A) (quoting Raske v. Next Mgt., LLC, 40 Misc. 3d 1240[A] (N.Y. Sup. Ct., NY Cnty., 2013)); see also CPLR 3211(a)(3).

In the present case, Owen's filed Complaint identifies three separate plaintiffs: (1) Owen, individually; (2) Owen, derivatively as a current shareholder of ROHM;

and (3) Owen, as Executor of the Estate of Barbara A. Hurlbut". (R, 231). Thus, each of these plaintiffs needs to be reviewed in terms of standing, and for any identified plaintiff that does not have standing, that plaintiff should be dismissed from the lawsuit.

In the Court's Decision, the Court erred by denying in its entirety Hurlbut's and HHC's motion for dismissal based upon lack of standing. The Court failed to address each of the identified plaintiffs separate and apart from each other, which was error. The Court further erred by denying Hurlbut's and HHC's motion for dismissal of all of the causes of action based upon each of the identified plaintiff's lack of standing.

A. Owen, in Her Individual Capacity, Lacks Standing to Sue the Named Defendants on the First Through Twelfth and the Nineteenth Causes of Action.

In the present case, one of the plaintiffs identified in the Complaint is Owen "individually" (R, 231). However, each of the alleged causes of action, with the exception of the Thirteenth through Eighteenth and the Twentieth causes of action are based upon alleged actions and omissions of Hurlbut "as a director or officer of ROHM." (R, 246-59). The First through Twelfth and the Nineteenth causes of action within the filed Amended Complaint, however, fail to assert that Hurlbut, as director or officer of ROHM, or that HHC owed a duty to Owen in her individual capacity (R, 246-55;R, 258). To the extent that any language within the Complaint could be

interpreted to allege such a duty between Hurlbut as director or officer of ROHM and Owen, or between HHC and Owen, such an allegation is contrary to the applicable law as it is not alleged that Owen had any contractual relationships with ROHM or with HHC that form the basis of the lawsuit.

The only alleged contract between Hurlbut (in his individual capacity) and Owen (in her individual capacity) referenced in the Complaint or that is the subject of this legal proceeding is the Purchase and Sale Agreement in which Owen voluntarily sold her ownership interests in the skilled nursing homes to Hurlbut (R, 47-230), which is only the alleged subject of the Twentieth cause of action. However, as more fully discussed below, this contract was fulfilled by Hurlbut when he paid Owen the purchase price for her ownership interest and cannot form the basis for Owen's lawsuit related to allegations of breach of fiduciary and loyalty.

Given the absence any binding contractual or other legal duty owed to her individually by Hurlbut as director or officer of ROHM or by HHC that would give her standing to sue Hurlbut as officer or director of ROHM or to sue HHC in her individual capacity, the First through Twelfth and the Nineteenth cause of action as brought by Owen in her individual capacity should have been dismissed as a matter of law.

B. **Owen Lacks Standing to File a Shareholder Derivative Action Against Hurlbut Since She Was Not a Shareholder at the Time of the Alleged Wrongdoing and Hurlbut Was No Longer an Officer/Director of ROHM at the Time the Complaint Was Filed Against Him as Officer/Director.**

In the present case, one of the plaintiffs identified in the Complaint is Owen "derivatively as shareholder of ROHM" (R, 231).

"An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates." BCL § 626(a). "In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law." BCL § 626(b). "In any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." BCL § 626(c).

In Murray v. Empire Ins. Co., 175 A.D.2d 693 (1st Dept. 1991), one of the plaintiffs was not a shareholder at the time of the actions of which the plaintiff complained and, as a result, the Court in Murray held that a particular plaintiff lacked standing to challenge any of the transactions and dismissed the plaintiff's complaint. Other plaintiffs mentioned in the Murray case were shareholders for certain aspects of the transactions and not at other points and, as a result, the Court in Murray held

that if a plaintiff was not a shareholder at the time of the alleged transaction, that particular plaintiff lacked standing on that particular issue.

In the present case, prior to RHH's death, ROHM was wholly owned by RHH (R, 33, 232). As a result of his death and the content of his Will, one hundred percent (100%) of the shares of ROHM were bequeathed to the Marital Trust (R, 233). The terms of the Marital Trust provided that upon Barbara's death, the Marital Trust shall distribute the principal of the Marital Trust assets in equal shares to Owen and Hurlbut (R, 243). However, the Marital Trust did not transfer ownership of said shares until September 8, 2022 (R, 244). As a result, Owen did not possess a legal right to file a derivative shareholder until September 8, 2022 (and the alleged actions and omissions that Owen complains of were allegedly done prior to her being a shareholder). Yet, Hurlbut was no longer an officer/director of ROHM when Owen became a shareholder, and the alleged actions and omissions that form the basis of her alleged causes of action occurred years before Owen became a shareholder. Like the plaintiffs that were not shareholders at the time of the alleged wrongdoing in Murray, supra, Owen lacks standing to bring a derivative shareholder claim against Hurlbut and HHC for alleged actions or omissions that occurred before she was a shareholder, and Owen should suffer the same fate as the Murray plaintiffs, which is a dismissal of the Complaint (particularly, the First through Twelfth and the Nineteenth causes of action).

To the extent that Owen was lawfully assigned the Marital Trust Trustee's right to commence a shareholder derivative action on behalf of ROHM as of September 8, 0222 (since the Marital Trust was the sole shareholder at the time of the alleged wrongdoing, Owen has failed to adhere to the requirements of BCL §626. In any shareholder derivative action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such 20mply20n by the board or the reasons for not making such effort." BCL § 626I.

In the present case, the filed Amended Complaint fails to set forth with particularity the efforts of Owen to secure the initiation of such action by the board or the reasons for not making such effort (R, 231-66). Hurlbut resigned as officer and/or director of ROHM on May 13, 2022 (R, 243). Since then, neither Tompkins (as Successor Trustee when the Marital Trust owned 100% of the shares of ROHM) nor Owen (after she was assigned her shares of ROHM on September 8, 2022) have taken any actions permitted by applicable New York State law to appoint board members or officers or directors to ROHM. As a result, Owen lacks standing through the Assignment of Claims form to commence a shareholder derivative claim due to her lack of efforts to take the appropriate actions to appoint board members for the purposes of initiating such an action. Owen's failure to include this required information is fatal to her Complaint and, as a result, her Complaint should have

been dismissed as a matter of law as Owen failed to adhere to the statutory requirements of BCL § 626I.

C. Owen, as Executor of the Estate of Barbara Hurlbut, Lacks Standing to File a Shareholder Derivative Action Against Hurlbut Due to the Fact that Neither Barbara Hurlbut Nor the Estate Was a Shareholder of ROHM at the Time of the Alleged Wrongdoing and Hurlbut Is No Longer an Officer/Director of ROHM or RHH Mendon.

In the present case, one of the plaintiffs identified in the Complaint is Owen "as Executor of the Estate of Barbara Hurlbut" (R, 231, 232).

It is undisputed that upon the death of RHH, ROHM was owned entirely by the Marital Trust (R, 234).

For the same reasons stated above related to Owen "individually" and as "derivatively as a shareholder of ROHM", the First through Twelfth and the Nineteenth causes of action should be dismissed. In addition, Neither Barbara Hurlbut nor her Estate was ever a shareholder of ROHM during the timeframe of the alleged wrongdoing, and Barbara Hurlbut did not have a beneficial interest in the shares of ROHM since she only had the right to income from the Marital Trust during her lifetime. In the event that Barbara Hurlbut believed that the Trustees of the Marital Trust were not adhering to their fiduciary duties or if Barbara Hurlbut or the Estate of Barbara Hurlbut had any valid claims related to the Marital Trust administration, Barbara Hurlbut or her Estate would necessarily have to file a complaint against the former or current Trustees of the Marital Trust for breach of

fiduciary duty and the failure to comply with the terms of the Marital Trust. Barbara Hurlbut has not done so.

Given the above, the First Through Twelfth and the Nineteenth causes of action alleged by Owen "as Executor of the Estate of Barbara Hurlbut" should be dismissed as a matter of law.

POINT II

HURLBUT'S AND HHC'S MOTION FOR DISMISSAL OF OWEN'S COMPLAINT SHOULD HAVE BEEN GRANTED BASED UPON THE DOCUMENTARY EVIDENCE AND DUE TO THE ABSENCE OF THE FORMER TRUSTEES WHO WERE AWARE OF THE ALLEGED ACTIONS OF HURLBUT AS PRESIDENT OF ROHM

In the alternative, in the event that the Court determines that any of the identified plaintiffs possessed legal standing to sue Hurlbut and HHC for all or a portion of the alleged causes of action, it is Hurlbut's and HHC's position that the First through Twelfth, the Nineteenth, and the Twentieth causes of action should be dismissed as dismissal is warranted based upon the documentary evidence, which demonstrates the fact that the skilled nursing homes that previously utilized ROHM had no legal obligations or duties to continue utilizing ROHM and that the skilled nursing homes were not required to and would not have paid an increased price for services, which are facts that Owen blindly ignores (despite the contrary undisputed history and purpose of ROHM and despite the prior Trustees' expressed or implied consent to keep ROHM a "break even" company) as such documentary evidence

would preclude the alleged causes of action against Hurlbut and HHC based upon alleged breaches of fiduciary duty as an officer of ROHM.

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or … (7) the pleading fails to state a cause of action…; or (10) the court should not proceed in the absence of a person who should be a party." CPLR § 3211(a).

On a motion to dismiss for failure to state a cause of action, the Court shall grant such a motion when the pleadings' four corners do not manifest any cause of action cognizable at law. CPLR § 3211(a)(7). "While factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration." Kenney v. Immelt, 41 Misc. 3d 1225(A) (N.Y. Sup. Ct., New York Cnty. 2013). Where the motion to dismiss is based on documentary evidence pursuant to CPLR § 3211(a)(1), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. Kenney, 41 Misc. 3d 1225(A) (quoting Leon v. Martinez, 84 N.Y.2d 83, 88 (1994)).

The First through Twelfth, the Nineteenth, and the Twentieth alleged causes of action against Hurlbut and HHC are based on Owen's apparent misunderstanding and/or the false premise that the skilled nursing homes had a legal duty or obligation

to continue to use ROHM as a vendor for administrative services after Owen voluntarily sold her ownership interest in the nursing homes to Hurlbut. Simply stated, and based upon the documentary evidence, there was no such duty or other legal obligation owed by Hurlbut's skilled nursing homes and, as a result, the First through Twelfth and the Nineteenth and Twentieth causes of action based upon this misunderstanding and/or false premise should be dismissed as a matter of law.

In the present case, RHH formed ROHM in 1971 as a "home office" with the sole purpose to provide administrative services to his chain of nursing homes for efficiency purposes and as a "break-even" company so that RHH did not have to pay significant taxes or double taxation on any earnings of ROHM and to avoid any potential regulatory risk of transferring profits from the nursing homes to a related party, which would be problematic to the nursing homes due to the laws that govern and regulate nursing homes and their owners (R, 33; R, 2177-78). RHH operated ROHM (and Hurlbut and Owen operated ROHM when they were officers of ROHM) by charging each of the nursing homes a monthly fee, and the fee was based on the bed-size of the home, and there was an agreed upon formula to calculate the fee paid by each skilled nursing facility (R, 33-34). After RHH's death, Barbara Hurlbut, and her children, Hurlbut and Owen, were all officers of ROHM, and they jointly continued to operate ROHM the way RHH operated ROHM, which was primarily to provide administrative services to the nursing homes owned by Hurlbut

and Owen, with the homes paying ROHM a monthly fee set by ROHM with the same understanding that RHH employed, which was to operate ROHM to be a "break-even proposition". (R, 35;R, 2178). Owen was an officer of ROHM for approximately 23 years or more and, by virtue of her role as an officer (no matter how many years she served in that capacity), Owen was familiar with the structure of ROHM and the fees it charged to and received from the skilled nursing homes (R, 34). The Trustees were aware of this, Owen was aware of this (as she was present during many of the ROHM corporate meetings when finances were discussed, and Hurlbut was aware of this (R, 35; R, 2178). Neither Barbara Hurlbut nor Owen ever objected to continuing to utilize ROHM as a "break even" company (R, 2178).

Eventually, Owen wanted nothing to do with the skilled nursing facility business and, on or about August 30, 2016, Owen voluntarily sold her ownership interest in the various nursing homes previously owned by RHH to Hurlbut (R, 35). As part of the process of her selling her ownership interest in the nursing homes to Hurlbut, Owen signed a General Release, dated November 9, 2016, releasing Hurlbut from any and all liability for any alleged actions or omissions occurring at any time on or prior to the Closing Date (upon information and belief, August 30, 2016) (R, 35;R, 38;R, 312). Owen signed a General Release, dated November 9, 2016, releasing Hurlbut from any and all liability for any alleged actions or

omissions occurring at any time on or prior to the Closing Date (upon information and belief, August 30, 2016) (R,35;R,38;R,312).

In 2019, for a variety of reasons, the skilled nursing homes wholly owned by Hurlbut (which are indisputably separate legal entities from ROHM) determined that it would be in their best interests to no longer utilize ROHM for their administrative service needs and to prevent any issues in the future that could negatively affect the nursing home's operations (R, 41). Given these legitimate concerns, the skilled nursing homes took the actions necessary to cease utilizing ROHM through a notification of non-renewal, effective January 1, 2020, at which time there would be a termination of any and all services agreements previously entered into by the various skilled nursing homes and ROHM (R, 41).

Given that the large bulk of ROHM's income was related to the services provided to the skilled nursing homes, all of which gave notice to ROHM that they were no longer utilizing ROHM for administrative services, ROHM would be unable to continue operating and employing its employees (R, 41). Once it was determined by the nursing homes that they were no longer going to utilize ROHM (which was their prerogative), as owner of the nursing homes Hurlbut was required to search elsewhere for a company to provide the same services for the nursing homes (R, 42).

It appears that in an effort to defeat the fact that the documentary evidence demonstrates the history and purpose of the creation and operation of ROHM

demonstrates that the sole purpose of ROHM was to operate as a break-even proposition, Owen added the Twentieth cause of action based upon the Purchase and Sale Agreement that was voluntarily signed by Owen when she sold her ownership interest in ROHM to Hurlbut. However, that document only serves to provide further documentary evidence that the nursing homes owed no duty to ROHM or to the Marital Trust. With respect to the Twentieth cause of action in the Complaint, Owen in her individual capacity alleges a cause of action based upon an alleged implied covenant of good faith and fair dealing stemming from the Purchase and Sale Agreement between Hurlbut and Owen.

An27mplyed covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement. Singh v. City of New York, 189 A.D.3d 1697, 1700 (2nd Dep't 2020). "'Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promise would be justified in understanding were included.'" Id. (quoting Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1999)). "This embraces a pledge that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Id. "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual

relationship.'" Id. (quoting Murphy v. American Home Prods. Corp., 58 N.Y.2d 293 (1983)).

In Singh, supra, the plaintiff sued the named defendants based upon the implied covenant of good faith and fair dealing, amongst other causes of action. The defendants moved pursuant to CPLR 3211 to dismiss the complaint, and the plaintiff opposed the motion. The Singh trial court denied the defendants' motion to dismiss the cause of action based upon an alleged implied covenant of good faith and fair dealing; however, the Appellate Division reversed the trial court on this issue. The Appellate Division in Singh held that, based upon the content and language of an agreement, where no reasonable person in the position of the plaintiff would believe that the defendant would act or refrain from acting in any manner in order to guarantee the value of what was bargained for in the agreement, dismissal pursuant to CPLR 3211 is warranted. In Singh, the Court determined that the evidence submitted by the defendants in support of the CPLR 3211 motion demonstrated that the "facts" alleged by the plaintiff "were not facts at all" and, therefore, dismissed the plaintiffs' cause of action for an alleged breach of the implied covenant of good faith and fair dealing.

In the present case, the Twentieth cause of action for an alleged breach of an implied covenant of good faith and fair dealing is identified as being based upon a Purchase and Sale Agreement between Hurlbut and Owen, dated August 30, 2016,

in which Owen voluntarily agreed to sell to Hurlbut her ownership interests in the skilled nursing homes as well as $3,000,000 worth of Owen's residual interest of the Marital Trust (R, 35-36;R, 258-59). Clearly, by the content of the paragraphs contained within the Twentieth cause of action and by the content of the Purchase and Sale Agreement, this is a claim by Owen in her individual capacity and against Hurlbut in his individual capacity. Thus, this cause of action does not and cannot extend to Owen as a shareholder of ROHM, nor does it or can it extend to Owen as the Executor of the Estate.

A review of this Purchase and Sale Agreement, documentary evidence that supports Hurlbut's and HHC's motion to dismiss pursuant to CPLR 3211(a)(1), clearly demonstrates that none of the current allegations against Hurlbut concerning his alleged actions as officer or director of ROHM would cause Owen to be deprived of the right to receive the benefits of this Purchase and Sale Agreement. The Purchase and Sale Agreement identified a purchase price for Owen's share of the homes, and Hurlbut has complied with the payments required by the Purchase and Sale Agreement (R, 32;R, 297). The fruits of this contract were the sales price for Owen's interest in the homes (which she received) and the price Hurlbut agreed to pay for $3,000,000 of Christine's residual interest (in other words, Owen already received an advance on her residual interest, which Hurlbut paid at the closing). This P&S Agreement in no way required the skilled nursing homes (which Owen

voluntarily sold) to continue to utilize ROHM or require the skilled nursing homes to pay increased rates.

In addition, it is undisputed that at the time that Owen voluntarily sold her interest in the nursing homes previously owned by her father, Owen was aware that ROHM was always utilized as a "breakeven" company that only served the nursing homes, first by her father and then by Hurlbut and Owen. Thus, as in Singh, supra, and based upon the content and language of the Purchase and Sale Agreement, coupled with Owen's undisputed knowledge that ROHM was always used as a "breakeven" company, no reasonable person in Owen's position would believe that Hurlbut would act or refrain from acting in any manner that would guarantee that the skilled nursing homes would forever continue to utilize ROHM or begin to pay ROHM higher rates for the services being provided (since it would neither negatively affect her sale price for her interest in the skilled nursing homes nor the sale price for $3,000,000 of her residual interest in the Marital Trust, which were the fruits of the agreement).

Given the above, similar to the alleged facts in Singh, supra, the "facts" alleged by Owen in an effort to support the Twentieth cause of action are not facts at all and contradicted by the documentary evidence and, therefore, the Twentieth cause of action should be dismissed as a matter of law.

In addition, in the present case, RHH created ROHM in 1971 for the purpose of providing back-office, administrative, and management services to skilled nursing home facilities owned by RHH (R, 33-34, 2176-82). ROHM was always operated as a break-even proposition (R, 36). Upon RHH's death, the shares of ROHM were transferred to the Marital Trust (R, 34). The former Trustees of the Marital Trust (Mary Ross and Jerry Rotenberg) were professionals that provided services to RHH and counseled RHH in the operation of ROHM (R, 37). Mary and Jerry acted as the Trustees of the Marital Trust after RHH's death, which owned 100% of the shares of ROHM upon RHH's death, and they served as Trustees until May 20, 2020 (R, 37), which is the timeframe of the alleged wrongdoing that is the subject of Owen's Complaint. Mary and Jerry, with the full knowledge of the history and purpose of ROHM (and fully aware of any alleged conflict Bob may have had as sole owner of the homes and as director and officer of ROHM once Christine sold her interest in the skilled nursing facilities to Bob), expressly and/or implicitly authorized the rates being charged by ROHM as a "break even" company during their tenure as Trustees of the Marital Trust (through May 20, 2020) (R, 35-37). However, Owen (who has allegedly secured her right to bring a shareholder derivative action through an Assignment from Tompkins, the Successor Trustee of the Marital Trust Trustee) is now taking a position that would directly contradict decisions and authorizations previously made by the original Trustees of the Trust (R, 38;R, 302- 11), which cites

to the Hon. Christopher S. Ciaccio's prior Decision & Order in another, but related, legal proceeding between Owen and Hurlbut (holding that where the Trustees of the Marital Trust took no actions to address financial decisions related to Marital Trust assets, there is a presumption that the Trustees determined such financial decisions to be reasonable given the Trustees' fiduciary obligations). Therefore, if the Court determines that there is standing for Owen in any capacity to bring this lawsuit against Hurlbut, and Hurlbut was operating ROHM as a "break even" company with the Trustees' consent and approval, then the Court should not proceed In the absence of the former Trustees who determined such financial decisions to be reasonable, namely Mary Ross and Jerry Rotenberg as parties to this proceeding (since the Assignment provided by the Successor Trustee is essentially causing the current shareholder to take a contrary position as the prior shareholder who authorized the operation of ROHM).

POINT III

HURLBUT'S MOTION FOR SUMMARY JUDGMENT PURSANT TO CPLR 3212 SHOULD HAVE BEEN GRANTED AS THE SKILLED NURSING HOMES THAT UTILIZED ROHM OWED NO DUTY TO ROHM OR TO THE MARITAL TRUST AND, THEREFORE, HURLBUT DID NOT BREACH HIS DUTIES TO ROHM

After Hurlbut and HHC filed its motion for dismissal pursuant to CPLR 3211(a), the Court *sua sponte* and pursuant to CPLR 3211(c) converted the filed motion to a motion for summary judgment.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form." Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980) (quoting CPLR 3212(b)). "On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" Zuckerman, 49 N.Y.2d at 562 (quoting N.Y. CPLR 3212(b)). To oppose the motion, the non-movant "must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established." Kohler v Barker, 2013 NY Slip Op 32447(U) (Sup. Ct., Suffolk Cnty. Oct. 1, 2013) (citing Castro v. Liberty Bus Co., 79 A.D.2d 1014 (2d Dep't 1981)).

In the present case, Hurlbut and HHC have established through the submitted proof in evidentiary form that sufficiently warranted the Court as a matter of law to direct judgment in Hurlbut's and HHC's favor in relation to the First through Twelfth, Nineteenth, and Twentieth cause of action given that Owen failed to raise any material issue of fact since it is undisputed that the skilled nursing homes originally owned by RHH, and then subsequently owned by Hurlbut and Owen, and then subsequently owned by Hurlbut (after Owen voluntarily sold her ownership interest to Hurlbut) are legal entities separate and apart from ROHM, and they should be treated as such. More specifically, under the circumstances, the homes needed to

terminate their business relationship with ROHM, and would never pay ROHM "market rates" given the history and purpose of ROHM (of which Owen was fully aware).

A. The Skilled Nursing Homes that Previously Utilized ROHM Were Not Obligated to Continue Utilizing ROHM and, in Fact, the Statutes and Regulations that Governed the Skilled Nursing Homes Required the Homes to Terminate Their Business Relationship with ROHM to Ensure that the Homes Would Continue to Be Controlled and Operated by Hurlbut, the Owner and Licensed Administrator.

Owen's causes of action against Hurlbut and HHC ignore the undeniable fact that the applicable and relevant New York State statutes and regulations require the skilled nursing homes at issue to be controlled and operated by the owner of the nursing homes and a licensed Administrator of the skilled nursing facilities.

Skilled nursing homes (like the ones in this litigation) are regulated by 10 N.Y.C.R.R. § 415.26. Responsibility for the operation of a for-profit nursing home lies with its owner. 10 N.Y.C.R.R. § 415.26. The person in charge of the day-to-day management of a nursing home is called the administrator, and the administrator is appointed by the owner. Id. More specifically, the regulations provide, "No nursing home shall operate unless it is under the supervision of an administrator who hold a currently valid nursing home administrator's license and registration . . . issued pursuant to Article 28-D of the Public Health Law. 10 N.Y.C.R.R. § 415.26(a)(1).

"[N]o person shall practice or represent himself as a nursing home administrator unless he is licensed by the board and registered by the department

pursuant to the provisions of this article. N.Y. Pub. Health Law § 2895-a. A "Nursing home administrator" means "an individual who is charged with and has responsibility for the general administration of a nursing home whether or not such individual has an ownership interest in such home and whether or not his functions and duties are shared with one or more individuals." Id.

In the present case, given the applicable statutes and regulations reference above, ROHM as the administrative service provider for the nursing homes would be deemed to be an operator of the skilled nursing homes and, therefore, ROHM must be controlled by the owner and an administrator who holds a currently valid nursing home administrator's license and registration issued pursuant to Public Health Law, Article 28-D, and such administrator shall be identified as an administrator to the homes for which it provides services (R, 2147-54). While Hurlbut was an officer/President of ROHM, Hurlbut (the owner of the nursing homes and a licensed Administrator of the nursing homes) was in control of ROHM and as a result the skilled nursing homes were not in violation of the above-referenced statutes and regulations (R, 2147-54). Since Owen was not an owner of the skilled nursing homes and not a licensed Administrator, once Barbara Hurlbut died and the Marital Trust would be required to transfer ownership of ROHM to Hurlbut and Owen, each as 50% owner, had the skilled nursing homes not terminated its relationship with ROHM, by law, the skilled nursing homes would no longer be

controlled by Hurlbut (as Owen could utilize her 50% ownership in ROHM to obstruct or interfere with the operations of the skilled nursing facilities) which would be in violation of the statutes and regulations referenced above and subjecting the skilled nursing homes to heavy fines and other significant penalties (R, 2147-54). Thus, once Barbara Hurlbut's health started to deteriorate and Hurlbut's relationship with Owen was starting to be contentious, the skilled nursing homes were required to act to ensure that they were always controlled by the owner and a licensed Administrator, and the skilled nursing homes did act (R, 1170-71;R, 41;R, 31-33; 2147-54).

Owen has failed to raise any triable issue of fact disputing that the nursing homes are regulated by the referenced statutes and regulations. Owen has failed to refute the fact that the nursing homes that served as the primary revenue-generating clients of ROHM not only had the freedom to take their business elsewhere, but that the skilled nursing homes had to adhere to the statutes and regulations that govern their existence and to monitor Barbara Hurlbut's health and whether Hurlbut was and would remain "in control" of ROHM. Given the very serious nature of the Public Health Law regulations and the Department of Health's continuous and aggressive oversight of the skilled nursing homes in New York State, the skilled nursing homes recognized Barbara Hurlbut's declining health and the increased tensions between

Hurlbut and Owen and, as a result, the skilled nursing homes lawfully terminated their relationship with ROHM.

Owen does not refute the fact that most of the income generated by ROHM was paid into ROHM from the skilled nursing homes, but she appears to ignore the undeniable fact that once the skilled nursing homes terminated their relationship with ROHM, ROHM could not make payroll or function. Owen also ignores the fact that the employees of ROHM were not required to stay at ROHM, nor could they if ROHM could not afford to pay them. Once the skilled nursing homes terminated the business relationship, ROHM had little-to-no value as their most significant client was gone.

B. Because the Skilled Nursing Homes Were Required by Law to Be Controlled and Operated by Hurlbut, Hurlbut and HHC Did Not Usurp Any Corporate Opportunities from Owen Because ROHM By Law Could Not Continue to Control or Operate the Skilled Nursing Homes After Barbara Hurlbut Died.

Owen's asserted causes of action within her filed complaint are largely based upon an alleged misappropriation of corporate opportunity (R, 246-59). However, based upon the controlling law applicable to the operation of nursing homes, referenced above, Hurlbut as owner of the skilled nursing homes was required to take the action necessary to avoid Owen (who was not a licensed administrator) from being able to control the operations of the nursing homes through her anticipated 50% ownership of ROHM upon Barbara Hurlbut's death.

An allegation of misappropriation of corporate opportunity requires that the corporation has an expectancy in the opportunity. See Moser v. Devine Real Estate, Inc., 42 A.D.3d 731, 735-36 (3d Dep't 2007); see also Alexander & Alexander of NY, Inc. v. Albert G. Ruben & Co. (NY), Inc., 147 A.D.2d 241 (1st Dep't 1989). Evidence that a third-party would not have done business with a corporation, but only the employee of officer individually, is sufficient to preclude a finding that a corporate opportunity existed for purposes of a claim alleging usurpation of corporate opportunity and warrants dismissal. Moser, 42 A.D.3d at 735-36.

In the present case, there should be no dispute that the skilled nursing homes originally owned by RHH, and then subsequently owned by Hurlbut (as majority owner) and Owen (as minority owner), and then subsequently solely owned by Hurlbut (after Owen sold her ownership interest to Hurlbut) are legal entities separate and apart from ROHM, and they should be treated as such. The documentary evidence demonstrates that, in 2019, given the nursing homes' legitimate concerns about how their continued use of ROHM could negatively affect their operations in the near future (and violate applicable law), the nursing homes took the actions necessary to cease utilizing ROHM and sent letters to ROHM on November 29, 2019 notifying ROHM of the non-renewal of the services provided by ROHM, which would be effective as of January 1, 2020, at which time there would be a termination of any and all services agreements previously entered into

by the parties (R, 41;R, 364). Given that the large bulk of ROHM's income was derived from the services provided to the skilled nursing facilities, all of which gave notice to ROHM that they were no longer utilizing ROHM for administrative services, ROHM would be unable to continue operating and employing its employees (R, 41).

Owen also fails to address the fact that ROHM did not have a legitimate expectancy in the business opportunity provided by the nursing homes. Not only does the history and purpose of ROHM demonstrate that ROHM was always utilized as a "breakeven" proposition (when it was created by RHH and when Owen was a director/officer of ROHM) and, therefore, ROHM's shareholders and the beneficiaries of the Marital Trust could not expect that ROHM would be operated to earn a profit, under no circumstances can Owen present any evidence that the nursing homes (after she sold her interest in them to Hurlbut) would have forever continued to utilize ROHM.

In addition, given the statutory regulations cast upon the skilled nursing facility, ROHM did not have a legitimate expectancy in the business opportunity provided by the skilled nursing facility since, by law, the skilled nursing homes could no longer utilize ROHM and, as a result, ROHM lost the large majority of its income and ROHM could not continue to operate as it then currently existed, as it had little-to-no other clients.

The documentary evidence submitted by Hurlbut and HHC in support of its motion for summary judgment showing that the skilled nursing homes owed no duty to ROHM or to the Marital Trust, coupled with the statutes and regulations requiring the nursing homes to terminate its business relationship with ROHM are certainly sufficient for the Court to grant summary judgment to Hurlbut and LLC with respect to the First through Twelfth, Nineteenth, and Twentieth causes of action and to preclude a finding that a corporate opportunity existed for purposes of Owen's claims alleging usurpation of corporate opportunity by Hurlbut and HHC.

Owen's submissions in opposition to the motion for summary judgment failed to raise a material question of fact as to whether Owen had a legitimate expectancy in the business opportunity provided solely by the skilled nursing homes for which ROHM provided services, as those homes had no duties to ROHM or to the Marital Trust, and by law they needed to be controlled by Hurlbut, and they further needed to ensure that Owen could not hinder their operations as the 50% owner of ROHM after Barbara's death. While Owen is alleging that Hurlbut breached his fiduciary duty, Owen's allegations blatantly ignore the fact that it was the skilled nursing facilities' independent decision to no longer utilize ROHM that caused ROHM to lose its clients and have to rid itself of its employees.

Like the outcome in Moser, supra, dismissal of the First through Twelfth, Nineteenth, and the Twentieth causes of action is warranted as there was no lawful

expectation had by ROHM or the Marital Trust that Hurlbut's skilled nursing homes would be required to continue to utilize ROHM or pay increased rates (as the homes did not any duty to ROHM or the Marital Trust).

C. Owen Ignores the Undisputed History and Purpose of ROHM to Operate as a "Breakeven" Company for the Skilled Nursing Homes Only and that the Skilled Nursing Homes Owed No Duty to ROHM or the Marital Trust and, as a Result, Summary Judgment in Favor of Hurlbut and HHC Is Warranted.

As discussed above in POINT II related to Hurlbut's and HHC's motion for dismissal pursuant to CPLR 3211, Owen's Complaint blatantly ignores the history and purpose of the creation of ROHM, the fact that the skilled nursing homes owed no duty to ROHM or to the Marital Trust, and the fact that the nursing homes had to terminate their business relationship with ROHM or else would deemed to be in violation of laws and regulations applicable to the operations of the nursing home and requiring Hurlbut to be in total control of his nursing homes.

The documentary evidence presented to the Court in support of Hurlbut's and HHC's motion is referenced above and will not be repeated here. Such evidence certainly supports Hurlbut's and HHC's motion for summary judgment pursuant to CPLR 3212, and Owen has failed to raise any triable issues of fact relating to ROHM's history and purpose, and the fact that she as officer of ROHM previously approved operating ROHM as a "break even" company, the fact that the nursing homes did not owe any duty to ROHM and to the Marital Trust, and that the

applicable laws and regulations required the homes to terminate its business relationship with ROHM to avoid violating applicable law, all of which preclude a finding that Hurlbut and HHC usurped any corporate opportunities as a result of the independent decisions of the nursing homes.

POINT IV

IN THE EVENT THAT THE APPELLATE COURT DENIES DISMISSAL/SUMMARY JUDGMENT OF OWEN'S COMPLAINT, OWEN'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED IN ITS ENTIRETY

In the event that dismissal or summary judgment is not granted to Hurlbut and HHC related to the First through Twelfth, Nineteenth, and Twentieth causes of action, this Court should determine that the Supreme Court's granting of portions of Owen's cross-motion for partial summary judgment was in error given the fact that Hurlbut and HHC certainly raised questions of material fact requiring a trial related to those issues. As discussed above, the facts provided by Hurlbut and HHC that explain the history and purpose of ROHM and the independent nature of the nursing homes and their lack of duty to ROHM or the Marital Trust warrants a denial of Owen's motion for partial summary judgment.

A. Owen's Cross-motion Seeking Summary Judgment on Whether Hurlbut's Salary as President of ROHM Was Excessive Should Have Been Denied.

In response to Owen's cross-motion for partial summary judgment, the Supreme Court held that Hurlbut's salary as President of ROHM was "excessive"

(R, 14-27). Such a determination by the Supreme Court was error as there were certainly facts within the record that raise a material question of fact as to whether Hurlbut's salary as President of ROHM was "excessive", and such an issue of fact should be determined by a jury after hearing all of the facts.

In the present case, the salary earned by Hurlbut as President of ROHM was consistent with the amount of work performed by Hurlbut for the company, as which was demonstrated by prior years' salary, consistent year-after-year, and that was part of the financial information and/or budget projections discussed at the annual meetings, at which Owen was present and approved. In her affidavit, Owen, herself, identified a wide range of services she believed were provided by ROHM to the nursing homes (R, 421-32). Owen explained that:

> [M]y father formed ROHM as a multi-purpose management and bookkeeping entity. ROHM … provided management and bookkeeping services for the [nursing homes]. ROHM also provided property management and bookkeeping services for the [nursing home real estate entities], and later provided similar services to various other entities in which my father held an interest, including RHH Mendon and multiple other real estate holding companies. In other words, ROHM was the flagship enterprise upon which virtually all the other entities owned by my father depended to operate their businesses.

(R, 419).

With the significant role and voluminous tasks performed by ROHM, it is entirely reasonable and fair for Hurlbut to have been compensated in the amounts he

was paid. In addition, according to the sworn testimony of the longtime tax advisor and accountant to RHH and ROHM, it appeared through his work with his clients that towards the end of RHH's life and after his death Hurlbut was doing the most work and spending the most amount of hours (as compared to Barbara Hurlbut and Owen) to operate ROHM (R, 2178-79). As a result, Hurlbut's salary from 2013 (before RHH's death) through 2016 (the year that Owen sold her ownership interests in the skilled nursing homes to Hurlbut), Hurlbut's salary was higher than Owen's salary (R, 2178-79). In addition, Hurlbut's and Owen's respective salaries for these years (which the Officers of ROHM, including Owen and Barbara Hurlbut routinely approved), were as follows:

Year	Hurlbut's Salary	Owen's Salary
2013	$450,000	$ 90,000
2014	$547,000	$187,000
2015	$562,000	$194,000
2016	$550,000	$190,000.

(R, 2178-79). Notably, the Court noted in its Decision that "[T]ellingly, [Owen] never complained about the 'break even' arrangement when she was a minority owner of the skilled nursing homes and drawing a salary from ROHM and otherwise benefitting from the arrangement with ROHM as an owner of the nursing homes." (R, 21).

As referenced above, eventually, Owen wanted nothing to do with the skilled nursing facility business and, on or about August 30, 2016, Owen voluntarily sold

her ownership interest in the various skilled nursing homes previously owned by RHH to Hurlbut (R, 35). As part of the process of her selling her ownership interest in the skilled nursing homes to Hurlbut, Owen signed a General Release, dated November 9, 2016, releasing Hurlbut from any and all liability for any alleged actions or omissions occurring at any time on or prior to the Closing Date (upon information and belief, August 30, 2016) (R, 35;R, 38;R, 312). After the sale, for a period of time, the nursing homes chose to continue to utilize ROHM to provide services to the nursing homes in exchange for the previously agreed upon fee, and ROHM further continued to provide services to the Marital Trust (R, 44). In conjunction with the homes choosing to continue to utilize ROHM for the exact same services it was providing before Owen sold her interests in the nursing homes, Hurlbut's annual salary from ROHM stayed consistent with years' past (which the Officers of ROHM, including Barbara Hurlbut and Owen had previously and routinely approved), which more specifically was as follows:

Year	Hurlbut's Salary
2017	$550,000
2018	$590,073
2019	$554,000

(R, 2179). Compare these years' salaries to the salaries from the prior years, which were approved by Owen. In addition, notably, the Trustees of the Marital Trust never objected to Hurlbut's salary or Owen's salary from 2013 through 2019.

Despite these facts, the Supreme Court inexplicably held that "[c]learly, [Owen] has established that [Hurlbut] paid himself more than the 'industry norm' for 'comparable businesses', although what constitutes 'comparable business' is not stated." (R, 24). This statement by the Court, alone, demonstrates that summary judgment should not have been awarded as it is conclusory and admits that the Court's Decision that the salary was excessive was being compared to unknown "comparable businesses." How can it have been clearly established that ROHM paid Hurlbut more than the "industry norm" for "comparable businesses" when the record is void of what constitutes "comparable business"?

The Court's Decision relating to this issue also blatantly ignores the long history of similar salary payments to Hurlbut by ROHM over several years, many of which Owen expressly approved as an officer of ROHM. Certainly, ROHM is a "comparable business" to itself so-to-speak, as from 2013 through 2016, ROHM was paying Hurlbut a set salary for being President of ROHM. ROHM was still acting as the "home office" and providing administrative services to the same nursing homes before and after Owen's sale of her interest in the homes to Hurlbut. Thus, if the salary Owen and the other officers previously approved when she partially owned the homes was consistent with Hurlbut's salary after Owen sold her interest in the homes, then arguably the post-sale salary is reasonable in the industry as the history of Hurlbut's salary is evidence that a jury should be able to consider.

The Court also asserts in its Decision that since Owen alleged that Hurlbut's salary was excessive (even though it was consistent with what Owen approved as an Officer of ROHM) and Hurlbut "provides no response as to why he paid himself" the salary established for the years 2017-2019, then his silence results in summary judgment against him (and that the amount of the damages will need to be determined at a trial). The Court erred in this conclusion as whether or not Hurlbut, himself, explained "why" he was paid the salary he was paid, as long as the Record before the Court contains sufficient facts that raise an issue of fact as to whether his salary was "excessive" (which it does as identified above), Owen's cross-motion for summary judgment on this issue should have been denied. There is certainly a question of fact for a trier of fact to determine.

At a minimum, a jury should be permitted to hear that Owen approved a similar salary for Hurlbut for years after RHH died that was consistent with the salary of which she is now complaining as "excessive" and where ROHM continued to provide the same administrative services to the same nursing home clients after Owen sold her ownership interest in the homes to Hurlbut. Hurlbut has sufficiently raised a triable issue of fact on this issue warranting a denial of Owen's cross-motion for summary judgment on this issue.

B. Owen's Cross-motion Seeking Summary Judgment on Her Allegation that Hurlbut Misappropriated (and Underpaid for) Assets of ROHM Should Have Been Denied.

In response to Owen's cross-motion for partial summary judgment, the Supreme Court held that Hurlbut's salary as President of ROHM was "excessive" (R, 14-27). In its Decision, the Supreme Court correctly asserts that "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)." (R, 25). The Court further asserts that "[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." (R, 25).

Despite this statement by the Court in its Decision, the Court inexplicably determined that summary judgment against Hurlbut was warranted as to liability on the cause of action claiming "underpayment" for ROHM assets. In one sentence, the Court asserts that there may be no market for ROHM's services, which would clearly affect the fair market value, but then determines as a matter of law that Hurlbut "underpaid" for ROHM assets. These statements are contradictory and, as a result, the Court's summary judgment award on this issue should be reversed.

It is undisputed that, as discussed above, after the skilled nursing homes determined that they no longer desired to utilize ROHM and knowing that ROHM would not be able to pay its employees without the income from the skilled nursing

facilities, Hurlbut (as officer of ROHM) authorized the sale of ROHM's tangible assets to HHC in the amount of $85,538.19 and, upon information and belief, such assets were sold to HHC for fair market value (R, 42;R, 2180).

HHC did in fact hire many (if not all) of the employees of ROHM (all of whom resigned or needed to be terminated by ROHM due to the lack of income being generated after the skilled nursing homes gave notice of their termination of their business relationship with ROHM) (R, 42). However, Owen has not presented any facts demonstrating that ROHM had any other income-generation ability to keep ROHM a viable business after the nursing homes chose to terminate its business relationship with ROHM or that ROHM could afford to keep its employees.

The Court's Decision granting Owen summary judgment on this issue blatantly ignores the undisputed fact that once the skilled nursing homes chose to no longer utilize ROHM (other than the Marital Trust paying ROHM $6,000 per month for administrative services), there was no business to be had, ROHM had little-to-no income and could not survive, could not afford payroll and would lose most of its employees (which is what occurred). In the Court's Decision, the Court correctly determined that the skilled nursing homes owned by Hurlbut had no legal obligation to continue to utilize ROHM, and the undisputed facts are that the skilled nursing homes lawfully gave notice to ROHM that they were no longer going to utilize ROHM. R. 41, 364-93.

Given that the skilled nursing homes had the right to terminate its business relationship with ROHM (and owed no duty to ROHM), coupled with the fact that the history and purpose of ROHM was solely to provide administrative services to the nursing homes, once the homes terminated the business relationship the "value" of ROHM and its assets would clearly be affected. Thus, there is a question of fact at a minimum of whether Hurlbut underpaid or misappropriated ROHM's assets based upon its valuation.

In Owen's submissions to the Court on the issue of valuation of ROHM, she submits the testimony of a proffered "expert" (R, 449-477). Notably, although there are significant questions about the "valuations" he sets forth, one of the most glaring issues is that the proffered "valuation" by the purported "expert" directly contradicts the valuation placed on ROHM by the Estate of Barbara Hurlbut (a plaintiff in this action) and by Owen as the Executor of the Estate of Barbara Hurlbut.

With respect to the "value" of ROHM for the purposes of calculating damages, if any, the doctrine of tax estoppel precludes Owen and the Estate of Barbara Hurlbut from taking a position on valuation in this litigation that is inconsistent with the valuation placed on ROHM for the purposes of the Federal and New York State Estate Tax returns filed by the Estate of Barbara Hurlbut, which was used to calculate the Estate Tax owed by the Estate (and was paid by the Marital Trust).

Tax estoppel "applies where… the party seeking to contradict the factual statements as to ownership in the tax returns signed the tax returns, and has failed to assert any basis for not crediting the statements." PH-105 Realty Corp. v. Elayaan, 183 A.D.3d 492, 492-493 (1st Dep't 2020). For example, "the income reported on one's income tax forms is considered the final word as to the amount of income received that year: a litigant cannot later argue that he or she actually received more." Shyer v. Shyer, 68 Misc.3d 1218(A) (Sup. Ct., N.Y. Cnty. 2020) aff'd as modified 187 A.D.3d 674 (1st Dep't 2020); see also Naghavi v. NY Life Ins. Co., 260 A.D.2d 252 (1st Dep't 1999) (holding that the plaintiff was precluded from asserting that his income was more than that which he had declared on his tax returns)).

The New York Court of Appeals formally embraced the doctrine of tax estoppel in Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 (2009). In this case (a divorce case), the husband had previously disclosed in a federal tax return that $1.8 million received pursuant to a stock buyout agreement was business income, not investment income. Subsequently, he claimed during the divorce that those same proceeds should be characterized as from the sale of stock he owned in prior marriage, in order to shield that money from distribution in the divorce. The Court of Appeals held that the husband was estopped from making this argument because the Court, could not "as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of

perjury on income tax returns." Id. At 422. Succinctly put, "a party to litigation may not take a position contrary to a position taken in an income tax return." Id.; see Meyer v. Ins. Co. of Am., 1998 WL 709854 (1st Dep't 1999).

In the present case, Owen and the Estate of Barbara Hurlbut appears to allege in her submissions to this Court that ROHM has a value of anywhere from $2,079,213 to $7,950,784 (R, 475). However, the Estate of Barbara Hurlbut has already prepared and filed its Federal and New York State Estate tax returns under penalty of perjury to the United States Government (the IRS) and New York State (the Department of Taxation and Finance) that the value of ROHM is $737,000, and the Estate of Barbara Hurlbut paid Estate Tax (using funds of the marital Trust) based upon the representation by the Estate under penalty of perjury that ROHM had a value as of the date of death of Barbara Hurlbut of $737,000 (R, 1556-57; R, 1564-1725.) In addition, Owen has consented to the Administrator c.t.a.'s Intermediate and Final Accounting, which identifies the amount of Estate taxes paid, which was partially based on the ROHM having a limited value of $737,000 (R, 1556-57; R, 1724-1725).

Given the above, Owen and the Estate of Barbara Hurlbut are precluded from taking a position in this litigation that contradicts the valuation that the Estate of Barbara Hurlbut reported to the Federal and New York State Taxing agencies due to the doctrine of tax estoppel, as Plaintiff has secured a financial advantage by

reporting a much lower valuation amount for ROHM to the government, but is now pursuing Hurlbut and HHC for damages, punitive damages, and seeking legal fees by alleging that ROHM is worth as much as eight times more than what the Estate reported to the government.

Not only does the doctrine of tax estoppel prevent Owen from taking a position contrary to and inconsistent with the valuation that was reported to the government for tax purposes, Owen's purported expert's testimony fails to acknowledge the inconsistencies with the position already taken by Owen, the Estate of Barbara Hurlbut (and, The Marital Trust) as any increased in value will result in a significant increase In estate taxes owed, of which Owen would owe 50% of the tax liability as 50% residuary beneficiary of the Marital Trust.

Notably, all formal valuations of ROHM since RHH's death identify the value of ROHM as less than $1,000,000, as the people valuing the C-Corp knew and understood the history and purpose and the fact that ROHM was created and operated for the purposes of the skilled nursing facilities (R, 1556-58; R, 1564-2141).

Clearly, given the above, there is a question of fact for the trier of fact as to the value of ROHM and its tangible assets after the skilled nursing homes lawfully chose to terminate its business relationship with ROHM. As a result, the Court's

Decision granting summary judgment to Owen on this issue was in error and should be reversed.

C. **Owen's Cross-motion Seeking Summary Judgment Declaring that Hurlbut Was a "Faithless Servant" and Directing Hurlbut to Disgorge the Salary he Earned from ROHM for the Period of 2017-2019 Should Have Been Denied**.

In response to Owen's cross-motion for partial summary judgment, the Supreme Court held that Hurlbut was a "faithless servant" as a matter of law and, as a result, directed Hurlbut to disgorge the salary he earned from RHOM for the period of 2017-2019 (R, 14-27).

As discussed above, Owen allegations that Hurlbut breached his duty of loyalty (amongst the other alleged causes of action of a similar nature) are all based upon the decision of the independent skilled nursing homes to no longer utilize ROHM and the resulting negative economic consequences to ROHM.

Given the undisputed facts demonstrated by the documentary evidence discussed above, the skilled nursing homes owed no duties to ROHM or the Marital Trust and once they made the determination that they were no longer going to utilize ROHM, Hurlbut's actions as director or officer of ROHM had no negative effect on ROHM or the Marital Trust. In fact, Hurlbut was able to secure assets for ROHM by selling the used equipment and other property for which ROHM no longer had a need (R, 42).

Given the above, while it is Hurlbut's position that the causes of action against him should be dismissed as a matter of law, in the event that the Court determines otherwise, given all of the material triable facts referenced above that will not be repeated herein under this subheading, summary judgment on this issue was in error and a trier of fact should be permitted to hear all of the facts and determine whether Hurlbut acted as a "faithless servant" under the circumstances as the Court granting summary judgment on this issue and requiring Hurlbut to disgorge his salary as a result of the Court's Decision on this issue was in error and should be reversed.

CONCLUSION

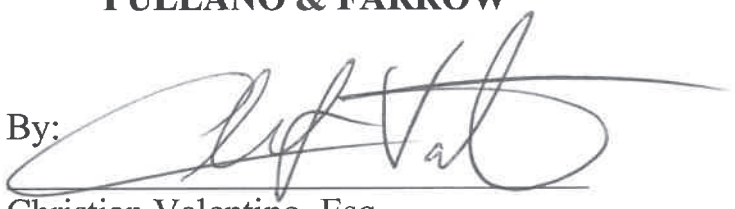
For all foregoing reasons, the Defendants-Appellants respectfully requests that this Court reverse the Supreme Court's Decision and Order in so far as it denied Defendants-Appellants motion for dismissal (converted by the Court to a motion for summary judgment) of the Plaintiff-Respondent's First through Twelfth, Nineteenth, and Twentieth causes of action, and so far as it granted the Plaintiff-Respondent's cross-motion for summary judgment relating to the issues of the Defendant-Appellant's salary (the Court incorrectly determined as a matter of law that it was "excessive" where there were questions of fact precluding summary judgment), the Defendant-Appellant's "misappropriation" or underpayment for the company's assets (the Court incorrectly determined as a matter of law that the Defendant-Appellant misappropriated or underpaid for company assets where there

were questions of fact precluding summary judgment), and that the Defendant-Appellant acted as a "faithless servant" thereby requiring him to disgorge two years of salary (the Court incorrectly determined as a matter of law that the Defendant-Appellant acted as a "faithless servant" where there were questions of fact precluding summary judgment), together with such other and further relief as the Court deems just and proper in the Defendants-Appellants' favor.

Dated: September 30, 2024
Rochester, New York

Respectfully submitted,

PULLANO & FARROW

By: 

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