To be Argued by:
KELLY S. FOSS
(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 PLAINTIFF-RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

Between 2017 and his resignation in 2022, Robert W. Hurlbut ("RWH") was a director and the chief executive officer of ROHM Services Corp. ("ROHM"). At the time, 100% of ROHM's outstanding shares were owned by a marital trust. RWH owed a fiduciary duty to operate ROHM for the benefit of the trust's beneficiaries, including his mother, Barbara Hurlbut ("Barbara"), and his sister, Christine Owen ("Owen"). That meant that RWH was required to operate ROHM in a manner that would at least attempt to generate profit and maximize shareholder value. And if RWH caused ROHM to enter into any transactions in which RWH himself had an interest (so-called self-interested transactions), RWH's fiduciary duty of loyalty required that RWH ensure that any such transactions were entirely fair to ROHM.

RWH did not do that. Instead of fulfilling his fiduciary duties, RWH ignored them and abused his position as a director and officer of ROHM to enrich himself and his other businesses at the expense of ROHM's beneficial shareholders. RWH's scheme involved three parts.

First, between 2017 and 2019, RWH repeatedly caused ROHM to undercharge its clients—skilled nursing facilities owned by RWH—for its services. Unrebutted expert testimony establishes that ROHM charged RWH's businesses under-market rates for its services. RWH admits that he operated ROHM on a "breakeven" basis, which did not generate any substantial profit for ROHM's shareholders. In other

words, RWH operated ROHM in a way that was designed not to maximize ROHM's shareholder value, but to maximize the value of RWH's other businesses. RWH's entry into these self-interested transactions—which fell fall short of meeting the applicable "entire fairness" standard—constituted a breach of RWH's fiduciary duty.

Second, RWH paid himself outsized compensation for his role as president of ROHM. The uncontroverted expert testimony shows that RWH's compensation far exceeded a reasonable compensation based on industry benchmarks. What is more, ROHM paid RWH as if he were a full-time ROHM employee, when, in fact, RWH split his time between ROHM and numerous other business interests.

Third, in late 2019, RWH simply stole ROHM's business out from under the marital trust. In 2017, RWH formed Hurlbut Health Consulting LLC ("HHC") as a business owned solely by himself. In late 2019, RWH caused his nursing homes to terminate their contracts with ROHM and hire HHC instead. Because HHC was nothing but an empty shell and had no means to fulfill those contracts, RWH used his position as president of ROHM to transfer to HHC all of ROHM's assets—its personnel, its office space, its files, its intellectual property, its website, its furniture, its computers, and so on—without compensation. This allowed HHC to carry on ROHM's business under a new name and under RWH's sole ownership, but without providing any compensation to the marital trust or its beneficiaries.

Owen filed this action to pursue direct claims on behalf of herself and her mother's estate, as well as derivative claims on behalf of ROHM. Defendants moved to dismiss. Supreme Court converted Defendants' motion to dismiss into a pre-discovery motion for summary judgment. Owen cross-moved for partial summary judgment. Supreme Court issued an Order (i) granting Owen's cross-motion as to liability on Owen's claims related to Defendants' 2019 misappropriation of ROHM's assets; (ii) granting Owen's cross-motion as to liability on Owen's faithless servant doctrine claim based on RWH's excessive compensation; and (iii) granting Defendants' summary judgment to the extent of dismissing Owen's claims based on ROHM's undercharging of RWH's businesses between 2017 and 2019.

On the first two issues, Supreme Court got it right. Owen met her burden of showing that that RWH breached his fiduciary duties by misappropriating ROHM's assets and by overpaying himself. In response, Defendants failed to raise any triable issue of fact to show that these self-interested transactions were entirely fair to ROHM's beneficial shareholders.

As to the third holding, Supreme Court erred. RWH bore the burden of proving the entire fairness of these self-interested transactions between ROHM and his wholly owned nursing homes. RWH failed to do so. The fact that ROHM, in the past, operated on a "breakeven" basis is irrelevant. Once ROHM's ownership was transferred to the marital trust, RWH had a duty to operate the business for the

benefit the marital trust beneficiaries. He was not entitled to use ROHM solely as a means of generating profit for his skilled nursing facilities—something he frankly admits to having done.

Accordingly, this Court should affirm Supreme Court's order to the extent that it granted partial summary judgment in favor of Owen and should reverse to the extent that it granted partial summary judgment in favor of Defendants.

QUESTIONS PRESENTED

Question 1. Whether Supreme Court correctly held that Owen has standing to pursue direct and derivative causes of action.

Answer. Yes. Supreme Court properly held that Owen has standing to pursue her derivative claims under Business Corporation Law ("BCL") section 625(a) because Owen was a remainder beneficiary of the marital trust, which was the 100% owner of ROHM's shares at the time of the underlying transactions, thus giving Owen standing as a beneficial shareholder. Owen independently has standing because her ROHM shares were subsequently transferred to her by operation of law pursuant to her late father's will. Finally, Owen satisfied the requirements of BCL section 626(c) by demonstrating her efforts to induce the successor trustee to bring a derivative action and the futility of demanding that RWH pursue a derivative action against himself.

Question 2. Whether Supreme Court correctly held that RWH is liable as a matter of law for breach of fiduciary duty based upon his (i) misappropriation of ROHM's assets to HHC and (ii) decision to overcompensate himself, and whether Supreme Court correctly directed RWH to disgorge his salary during his period of disloyalty.

Answer. Yes. Supreme Court correctly held that Owen established her entitlement to judgment as a matter of law by showing that RWH misappropriated ROHM's tangible and intangible assets and paid himself excessive compensation between 2017 and 2019. RWH failed to raise a triable issue of fact to show that these self-interested transactions were entirely fair to ROHM's beneficial owners (*i.e.*, his mother and sister). Supreme Court also properly directed RWH to disgorge his salary during this period under the faithless servant doctrine, leaving the remainder of the damages to be later determined.

Question 3. Whether Supreme Court erred in dismissing Owen's claims premised upon RWH's decision to operate ROHM as a breakeven entity between 2017 and 2019 in a way that was deliberately designed to enrich RWH's separate businesses and to avoid generating significant value for ROHM and its shareholders (the "undercharging claims"); and whether, conversely, Supreme Court should have awarded Owen partial summary judgment on these claims, finding RWH liable as a matter of law for having diverted profits from ROHM to his other businesses.

Answer. Yes. Supreme Court erred in dismissing, and failing to grant Owen partial summary judgment as to liability with respect to, the undercharging claims. RWH frankly admits that, as president of ROHM, he caused ROHM to enter into numerous self-interested transactions with his wholly owned skilled nursing facilities between 2017 and 2019. He deliberately structured those transactions to avoid generating any profit for ROHM and to maximize benefits to his other businesses. Defendants failed to meet their burden of establishing the entire fairness of these self-interested and deliberately one-sided transactions between RWH and his skilled nursing facilities during this time period. At the very least, triable issues of fact preclude the summary dismissal of the undercharging claims, and Owen should be entitled to obtain disclosure concerning these transactions.

COUNTERSTATEMENT OF THE CASE

A. ROHM Services Corporation

During his lifetime, Owen's and RWH's father Robert H. Hurlbut ("RHH") owned certain skilled nursing facilities (the "Hurlbut Nursing Homes") (R. 31-33, 232, 418). Each of the Hurlbut Nursing Homes was formed as a separate limited liability company (R. 418). RHH also owned a number of real-estate investment companies, some of which held real estate assets on which the Hurlbut nursing homes were situated (R. 418-419).

RHH formed ROHM Services Corporation ("ROHM") to serve multiple purposes. One of its purposes was to function as a home office to the Hurlbut Nursing Homes, providing management, administrative, and back-office support (*id*.). Another purpose was to provide bookkeeping and property management services to various real estate holding and rental companies (*id*.).

ROHM entered into services agreements with each Hurlbut Nursing Home (R. 315-363). These agreements specified certain services that ROHM provided, including standard accounts payable, accounts receivable, and debt collection (*id*.). In practice, ROHM provided various additional services such as annual budget review, preparation of financial statements, accounting services, tax preparation, purchasing, management of vendors and suppliers, and other services (R. 427-432). ROHM's office was located at 740 East Avenue in Rochester, New York (R. 419). It employed between 20 and 33 people at any given time (R. 456).

B. The Barbara Hurlbut Marital Trust

In 2009, RHH executed a Will (R. 655-676). Article V of the Will created a marital trust for the benefit of his surviving spouse, Barbara (*id*.). The Will provided that Barbara was entitled to all marital trust income during her lifetime and was also a permissible principal beneficiary (R. 658). The Will directed that, upon Barbara's death, the remaining principal be distributed in equal parts to RWH and Owen as residual beneficiaries (R. 659).

RHH died in March 2013 (R. 625). At the time, RHH had already transferred ownership of the Hurlbut Nursing Homes to his adult children, RWH and Owen (*id*.). But RHH still owned 100% of ROHM at the time of his death (R. 420, 626). Thus, ROHM's shares passed first into RHH's estate and then into the marital trust (R. 454, 626). A 2014 appraisal report found that ROHM's fair-market value as a going concern as of the date of RHH's death was $855,000 (R. 522-595).

RHH's Will nominated Mary E. Ross and Jerald J. Rotenberg (the "Original Trustees") as co-trustees of the marital trust (R. 674). The Original Trustees delegated some of their authority to RWH, who served as the "president" of the marital trust (R. 682-683). In that role, RWH oversaw marital trust finances and administration (*id*.). RWH was a *de facto* trustee of the marital trust between at least January 1, 2016 and May 20, 2020 (R. 1489-1491).

C. 2016 Purchase and Sale Agreement

In 2016, RWH and Owen entered into a Purchase and Sale Agreement, pursuant to which RWH purchased Owen's minority ownership interests in the Hurlbut Nursing Homes (R. 47-230, 626). As part of that transaction, Owen resigned from ROHM (R. 234). Thus, at the end of 2016, RWH became the sole owner of all the Hurlbut Nursing Homes and associated real-estate companies, whereas the marital trust remained the sole owner of ROHM (R. 441, 626, 1166).

D. RWH engages in self-dealing between 2017 and 2019

RWH admits that, after his father's death, he continued to operate ROHM as a "break-even proposition" (R. 35-36). RWH also admits that he arranged for ROHM to enter into and perform under service agreements with his nursing homes (R. 38, 315-363). Each such agreement required ROHM, in exchange for a flat annual fee, to perform certain limited services, including accounts payable, accounts receivable, preparation and negotiation of purchasing bids, audit review, and debt collection (R. 315-363). Although ROHM performed additional services, the services agreements did not require the nursing homes to pay for those additional services (R. 315-363; 458-459). Each of the service agreements could be terminated without any fee upon only 30 days' notice before the end of the annual term (R. 315-363).

Under RWH's watch, ROHM had a materially lower level of profitability than other similarly sized office administrative services companies. ROHM's operating margins were only 1.1% in 2017, 2.1% in 2018, and 3.0% in 2019, compared with an industry average net operating margin of 18.7% (R. 456-457). According to Owen's unrebutted expert evidence, had ROHM charged fair-market value for its services, its fees would have been approximately 20% to 30% higher, which would have resulted in higher operating margins of 18% to 25% (R. 463).[1] This would have

[1] This is confirmed by the fact that in January 2020, immediately after taking over the entire business, RWH increased the rates he was charging his nursing homes

resulted in approximately $600,000 to $900,000 per year in additional profit available to be distributed to the marital trust's income beneficiary (RWH's mother, Barbara) and would have also increased ROHM's value for its beneficial shareholders (R. 464).

Between 2017 and 2019, RWH paid himself annual salaries which significantly exceeded comparable salaries for similarly situated businesses in the industry based upon benchmark information (R. 465-468). ROHM paid RWH total compensation in the amounts of $550,000 in 2017, $590,073 in 2018, and $554,000 in 2019 (R. 467). Even if RWH had been devoting his full-time efforts to ROHM, which he undisputedly was not (R. 469-470), these amounts would have been high. RWH's compensation was equal to between 17.3% and 18.5% of sales during this time period, compared to an industry standard in the range of 7.5% of sales for a full-time executive (R. 465-467). Thus, ROHM was paying RWH an inflated full-time salary, effectively compensating him for his work not only on behalf of ROHM but also on behalf of his Hurlbut Nursing Homes.

RWH also profited from ROHM's intellectual property at ROHM's expense. In 2012, ROHM registered the trademark Hurlbut Care Communities with the U.S. Patent and Trademark Office ("USPTO") (R. 611-612, 1381-1382). ROHM used the

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by 31.3% (R. 462-463).

trademark in advertising and marketing materials, developing goodwill in the brand (R. 424-425, 430-431, 611-612). Between 2017 and 2019, RWH allowed his Hurlbut Nursing Homes to use ROHM's registered trademark without any licensing agreement or royalties paid to ROHM in return (R. 615-616).

E. RWH forms HHC

In 2017, RWH formed Hurlbut Health Consulting, LLC ("Hurlbut Health" or "HHC") (R. 693-697). RWH owns 100% of the membership interest in Hurlbut Health (R. 628).

F. RWH considers purchasing ROHM from the Marital Trust

As of 2019, ROHM had multiple tangible and intangible business assets. It leased office space from 740 East Avenue Associates, LLC (the "Landlord"), an entity owned by RWH (R. 717-729). ROHM had written services agreements with the various Hurlbut Nursing Homes (R. 315-363). ROHM also owned various physical assets, including furniture and computer equipment (R. 731-767). ROHM also owned intangible assets, including the Hurlbut Care Communities trademark, the hurlbutcare.com website domain, and associated goodwill (R. 611, 616, 1381-1382, 1422-1424, 1425-1479). ROHM had a workforce of approximately 33 employees, as well as files and know-how (R. 427, 455, 470).

In early 2019, RWH planned to purchase ROHM from the marital trust. First, RWH's attorneys reached out to attorneys for the marital trust to confirm that the

marital trust owned 100% of ROHM (R. 705). Shortly thereafter, counsel for the Original Trustees commissioned ValuQuest LLP to perform a valuation of ROHM, indicating that the purpose of the report was to allow RWH to buy all of ROHM's shares from the marital trust for fair-market value (R. 708-713). As of April 2019, ValuQuest was in the process of gathering documentation in preparation for completing the valuation for a buyout (R. 714-715).

By July 2019, however, RWH had abandoned his plan to *buy* ROHM from the marital trust and had conceived of a plan to simply *take* ROHM's business and transfer it to his wholly-owned entity HHC. An email from ROHM's controller to ROHM's outside accountants references "the ROHM/HHC change" (R. 716).

G. RWH takes over ROHM's business using HHC as of January 2020

RWH's scheme to steal ROHM's business and convert it to HHC took place in stages. In August 2019, ROHM employees compiled copies of its service agreements (R. 768-769). In November 2019, RWH executed documents terminating all of ROHM's service agreements (R. 770-796). Shortly thereafter, a ROHM employee told ROHM's outside accountants, Bonadio & Co. LLP ("Bonadio"), that "[w]e are moving forward with changing our home office from ROHM to Hurlbut Health Consulting effective [January 1, 2020]," admonishing Bonadio to "[p]lease keep this information confidential, as we have not told the staff here at ROHM yet" (R. 797). She later reiterated to Bonadio to "keep this information very confidential while you

are here this week" for purposes of an audit because "[t]his change has not yet been communicated to the staff at ROHM" (R. 798-800).

Despite not even knowing about the change on December 9, 2019 (R. 797), all of ROHM's employees resigned from their employment effective December 31, 2019 and were immediately hired by Hurlbut Health the following day, with their accrued vacation days still intact (R. 801-802). ROHM's employee 401(k) plan was simply renamed the Hurlbut Health 401(k) plan (R. 803-805). At that time, there was also a plan for Hurlbut Health to arrange a "buyout of moveable equipment from ROHM," effective as of January 1, 2020 (R. 806). As explained below, this particular plan was not immediately implemented.

As of January 1, 2020, RWH caused both ROHM and Hurlbut Health to enter into new leases with the Landlord (R. 854-879). ROHM, despite now having no business, no employees, and no assets, continued to pay the Landlord—a real estate business owned by RWH—$2,000 in rent for the privilege of occupying the same premises as HHC (R. 854). In June 2020, RWH appeared for a deposition in an unrelated matter and testified that ROHM was "defunct" as of January 2020, and that "Hurlbut Health Consulting" had "replaced ROHM" (R. 684).

Despite ROHM's ownership of a federal registration for the Hurlbut Care Communities mark, RWH continued to use the mark as the brand for his nursing homes (R. 612-615, 1383-1421). He never paid anything to ROHM for his use of

ROHM's trademark (R. 615). In April 2023, RWH re-applied for the same trademark under HHC, and allowed ROHM's trademark registration to be cancelled in June 2023 (R. 612-615, 1383-1421). RWH also allowed HHC to simply take over ROHM's domain registration and website (R. 616-617, 1422-1486).

H. RWH hid information about the takeover of ROHM from the incoming Trustee of the Marital Trust

In May 2020, the Surrogate's Court entered an Order appointing Tompkins Community Bank ("Tompkins") as the interim successor trustee of the marital trust (R. 395). The Order provided that, "notwithstanding the interim nature of its service, [Tompkins] shall have full authority as Trustee of the Barbara Hurlbut [m]arital [t]rust" (R. 396). Accordingly, after its appointment, Tompkins took steps to locate the assets owned by the marital trust and to determine the value of those assets.

In July 2020, RWH directed Bonadio not to cooperate with Tompkins' requests for information (R. 886 ["Rob, *Tompkins gets nothing from you either*"]; R. 894 [a Bonadio representative, at RWH's direction, agreed not to respond to Tompkins' request for information: "Sounds good. I'm ghosting him"]). Throughout January 2021, RWH again directed Bonadio not to cooperate with Tompkins' requests for information (R. 898 ["*Don't answer them. None of their business*"; "*DON[']T give it to him. I forbid it!!!!!!*"]; R. 901[RWH: "*Screw Tompkins*"]; R. 903 [further email exchanges in which RWH directed Bonadio not to cooperate with

Tompkins' requests: "ROHM is still none of their business. *Tompkins has no right to this information*."]).

In response to RWH's lack of cooperation, Tompkins filed a petition in Surrogate's Court seeking discovery pursuant to SCPA section 2103. In its petition, Tompkins stated that its efforts "to understand the value and the assets" of the marital trust had been hampered "due to a lack of cooperation" by RWH (R. 906-920).

On February 18, 2021, Tompkins, through counsel, again contacted Bonadio to request information and documents concerning marital trust assets, including ROHM, noting that Tompkins as successor trustee was "still trying to confirm the underlying assets of the trust and the valuations" (R. 926). A Bonadio representative forwarded the request to RWH, inquiring, "Let me know how you want me to reply" (*id*.). RWH's response: "No reply. None of his business. The bank has everything from [Harter Secrest], there [sic] just to [sic] lazy to do it" (*id*.).

On February 16, 2021, Tompkins amended its discovery petition to clarify that it was seeking an order compelling RWH, Bonadio, and others to "provide documents and information regarding Trust assets including but not limited to … books, records, … evidence of value, tax returns, evidence of acquisition and disposition of assets" (R. 934-949). On March 22, 2021, Tompkins explained that it still needed "business records for any business owned … by the Trust," including

ROHM (R. 952). Tompkins further noted that Bonadio had still not provided documents related to the value of ROHM (*id*.).

On March 23, 2021—two days before the hearing on Tompkins' discovery petition—RWH finally consented to allow Bonadio to provide a response to counsel for Tompkins's inquiries about Trust assets (R. 954). The following day, Bonadio provided Tompkins with a link to an electronic file-sharing site where Bonadio had uploaded certain documents in response to Tompkins' requests (R. 958).

I. HHC belatedly documents its taking of certain tangible ROHM assets

In April 2021, RWH was under a court order to produce all of ROHM's books and records, as well as any "records of the acquisition, sale or disposition of assets" of ROHM, to Tompkins as successor trustee for the marital trust (R. 990-996). RWH not only failed to comply with this directive, but, during this time, he actively participated in a scheme to create an Asset Purchase Agreement to belatedly document the purported "sale" of ROHM assets as of January 1, 2020, more than a year earlier (R. 1050-1059).

The process began with Bonadio preparing a 37-page asset depreciation report (R. 731-767). HHC employees then prepared a summary of physical assets to be purchased from ROHM, which included moveable equipment, computer equipment, and a vehicle (R. 997-1043). The asset report did not list, or attempt to ascribe any value to, ROHM's workforce, files, trademark, website domain, goodwill, know-

how, or other intangible aspects of ROHM's operations (R. 997-1043). Although the report listed ROHM's office lease and related improvements as assets of ROHM, a later email clarified that HHC would not purchase them from ROHM because such assets allegedly had "no value to HHC and are considered sunk costs to ROHM" (R. 1044-1045).[2]

On May 25, 2021, as its president, RWH caused ROHM to enter into an Asset Purchase Agreement pursuant to which ROHM sold to HHC movable equipment, furniture, filing cabinets, computer equipment, and vehicle for a total of $85,538.19 (R. 1050-1059). The agreement did not contain any provision for the purchase of ROHM's ongoing business, its workforce, its trademark, its website, its leasehold interests or improvements, or its goodwill. And despite conveying ROHM's filing cabinets and computers to Hurlbut Health, the agreement provided ROHM with no compensation for the files contained within those filing cabinets and computers (*id*.). The agreement purported to be effective as of January 1, 2020 (R. 1050), which corresponds with the effective date of HHC's earlier takeover of ROHM's entire

[2] Despite not paying ROHM any money for the purportedly sunk costs of the leasehold improvements, HHC did in fact acquire a leasehold interest in 740 East Avenue, including use of all improvements paid for by ROHM (R. 456, 855-866, 867-879, 1044-1045). Further, RWH, as sole owner of the Landlord, appears to have assessed a $25,000 penalty against ROHM for RWH's own decision to end ROHM's lease in order to open up the space for RWH's entity HHC (R. 1260).

business operation and lease. RWH executed the Asset Purchase Agreement on behalf of ROHM as its president (R. 1054).

Even though Tompkins served as trustee of the marital trust, which owned 100% of ROHM's shares, RWH did not seek Tompkins' permission to enter into the Asset Purchase Agreement before signing it on behalf of both the buyer and seller on May 25, 2021 (R. 1200). Upon information and belief, RWH took no affirmative steps to disclose the Asset Purchase Agreement to Tompkins. Indeed, Tompkins did not even learn of its existence until November 2021, when the marital trust's accountant mentioned it during a phone call with Tompkins's attorney (*id*.).

J. RWH resigns and the Marital Trust distributes ROHM's shares

In May 2022, RWH resigned from all officer and director positions he held at ROHM, leaving ROHM without any officers or directors (R. 243, 1139, 1173). ROHM remained 100% owned by the marital trust through September 2022, when Tompkins distributed the shares to RWH and Owen in accordance with RHH's Will (R. 635-636).

K. Procedural History

Owen commenced the underlying action, individually, derivatively as a shareholder of ROHM and RHH Mendon Properties, Inc., and as executor of the Estate of Barbara A. Hurlbut, asserting twenty causes of action (R. 231-266).

Defendants moved to dismiss Owen's First through Fourteenth, Nineteenth, and Twentieth causes of action pursuant to CPLR 3211(a)(1), (3), (7), and (10) (R. 28-29). By order dated and entered June 23, 2023, Supreme Court, Monroe County (Hon. Christopher S. Ciaccio) converted Defendants' motion to dismiss into a motion for summary judgment pursuant to CPLR 3212 (R. 409-411). Owen cross-moved for partial summary judgment (R. 412-415).

In a Decision dated November 2, 2023 and by Order dated and entered November 30, 2023, Supreme Court, Monroe County (Hon. Christopher S. Ciaccio) granted in part and denied in part the parties' summary judgment motions (R. 8-27).

First, as a threshold issue, Supreme Court held that, as a matter of law, Owen had standing to commence the derivative action as a "holder of a beneficial interest" in ROHM pursuant to BCL section 625 (a) and because Owen's shares in ROHM had devolved upon her by operation of law (R. 17). Supreme Court also held that Owen satisfied the pre-suit demand requirement of BCL section 626 (c) (R. 17-18) and that her claims were timely (R. 27).

Second, Supreme Court granted Defendants' motion in part, dismissing Owen's claims premised on ROHM's undercharging of the skilled nursing facilities between 2017 and 2019 (the "Undercharging Claims") (R. 22-23). Supreme Court held that although Owen "had presented admissible proof that the 'market rate' for an administrative service company such as ROHM was higher than what ROHM

was paid … it is speculative that ROHM would have been hired at that rate" (R. 22). Supreme Court denied the remainder of Defendants' motion (R. 21).

Third, turning to Owen's motion, Supreme Court also held, as a matter of law, that RWH breached his fiduciary duty owed to ROHM and its shareholder, the marital trust (R. 20-21). Supreme Court granted partial summary judgment in favor of Owen and against RWH as to liability on Owen's causes of action premised upon the allegation that RWH received excessive compensation from ROHM between 2017 and 2019 (the "Excessive Compensation Claims") (R. 23-24). Supreme Court held that Owen had "established that [RWH] paid himself more than the 'industry norm' for 'comparable businesses'… [and RWH] provide[d] no response as to why he paid himself the allegedly excessive compensation for the years 2017-2019," warranting judgement as a matter of law as to liability (R. 24).

Fourth, Supreme Court granted partial summary judgment in favor of Owen as to liability on Owen's causes of action premised upon the allegation that Defendants misappropriated (or underpaid for) intangible and tangible assets of ROHM (the "Misappropriation Claims") (R. 24-25). Supreme Court held "it is undisputed that ROHM had value, embodied at least partly by the items listed above [*i.e.*, ROHM's workforce, its files, its know-how, its goodwill, its trademarks, and all other intangible assets that made ROHM a valuable business] and that [RWH] failed to pay anywhere near the value placed upon the business …" (R. 24). Supreme

Court noted that "the bottom line is that [RWH] paid very little for ROHM's assets, and certainly nowhere near the valuations. In no way was the transaction at arm's length" (*id*.).

Fifth, Supreme Court granted partial summary judgment in favor of Owen and against RWH as to damages on Owen's fourth cause of action for disgorgement of RWH's compensation for the period from 2017 through 2019 under the faithless servant doctrine in the amount of $1,693,073 (R. 25-26).

ARGUMENT

POINT I

SUPREME COURT CORRECTLY HELD THAT OWEN HAS STANDING TO COMMENCE THE DERIVATIVE ACTION.

Supreme Court correctly held that Owen has standing to pursue claims in this action on behalf of herself individually, derivatively on behalf of ROHM, and in her capacity as the executor of Barbara's estate. This Court should affirm Supreme Court's denial of Defendants' motion for summary judgment based upon alleged lack of standing.

A. Owen has standing to assert derivative claims on behalf of ROHM.

A shareholder's right to bring a derivative action to pursue a recovery on behalf of a corporation is governed by BCL section 626. Contrary to Defendants' suggestion, Owen has statutory standing for two independent reasons: (1) during the relevant time period of 2017 through 2022, Owen was at all times a beneficial

shareholder of ROHM by virtue of her status as a beneficiary of the marital trust; and (2) Owen subsequently became the legal owner or her shares by operation of law under RHH's Will. In their appellate brief, Defendants ignore these bases for standing entirely. Further, contrary to Defendants' suggestion, Owen complied with BCL section 626 (c) because further efforts to secure action by ROHM's board would have been futile.

1. Supreme Court correctly held that Owen has derivative standing as a beneficial shareholder of ROHM.

Supreme Court properly held that Owen has standing to assert derivative claims on behalf of ROHM because she has been, at all relevant times, a beneficial shareholder of ROHM (R. 17). BCL section 626 (a) provides that "[a]n action may be brought in the right of a domestic ... corporation to procure a judgment in its favor, by a holder of shares ... of the corporation or of a beneficial interest in such shares ..." (emphasis added). Thus, "[o]ne who is an equitable owner of shares of stock in the corporation at the time of the commencement of the suit and at the time of the transactions of which she complains has the legal capacity to sue on behalf of the corporation" (*Law v Alexander Smith & Sons Carpet Co*., 271 AD 705, 706 [1st Dept 1947]). As this Court has recognized, such equitable ownership includes a party who is a beneficiary of a trust that held stock in the defendant corporation (*see Schlegel v Schlegel Mfg. Corp*., 23 AD2d 808, 808 [4th Dept 1965] ["It is familiar law that an equitable owner of shares of stock in a corporation has legal capacity to sue on

behalf of the corporation. Furthermore, a beneficiary of a trust, such as this plaintiff, has standing to bring such an action."]; *Cassata v Cassata*, 148 AD2d 944 [4th Dept 1989] ["Plaintiff was the beneficiary of a trust holding stock in defendant corporation and thus, was entitled to institute a shareholder derivative action."]).

It is undisputed that Owen and her mother Barbara (whom Owen now represents as executrix) were beneficiaries of the marital trust at all relevant times. Thus, when the events that are the subject of the underlying litigation occurred between 2017 and 2021, Owen was a beneficial owner of ROHM's stock. For this reason alone, Supreme Court correctly held that Owen has standing.

2. Owen has derivative standing because she inherited her ROHM shares under RHH's Will.

Supreme Court also correctly held that Owen has standing because her shares in ROHM devolved on her by operation of law (R. 17). BCL section 626 (b) provides two ways by which a person can establish standing to bring a shareholder derivative claim. First, plaintiff can show she was "a holder at the time of bringing the action and that [s]he was such a holder at the time of the transaction of which [s]he complains" (BCL § 626 [b]). Second, plaintiff can show that "h[er] shares or h[er] interest therein devolved upon h[er] by operation of law" (*id*.). Defendants ignore the latter entirely.

Where "shares are acquired through a will or intestacy, they devolve by operation of law since neither the decedent nor recipient had any control over the

death" (*Pessin v Chris-Craft Indus., Inc*., 181 AD2d 66, 71 [1st Dept 1992]). Here, Owen inherited her shares under RHH's Will, which directed that, upon Barbara's death, the trustees should, after paying any required estate taxes, distribute the remaining principal in equal parts to RWH and Owen as residual beneficiaries of the marital trust (R. 659). In September 2022, in accordance with this provision of RHH's Will, Tompkins, as trustee of the marital trust, distributed the shares of ROHM and RHH Mendon in equal parts to Owen and RWH (R. 635-636).

Because Owen's shares in ROHM devolved upon her by operation of law via RHH's Will, she has standing under BCL section 626 (b) to commence a shareholder derivative action, including as to transactions and occurrences that occurred before she received the shares (*see Pessin*, 181 AD2d at 71; *Shui Kam Chan v Louis*, 303 AD2d 151, 152 [1st Dept 2003] [holding that the plaintiff had standing to bring derivative claims after she received shares from her husband's estate]; *Salter v Columbia Concerts, Inc*., 191 Misc 479, 480 [Sup Ct, NY County 1948] [holding that stock passed by will to decedent's executor had devolved by operation of law, thus enabling the executor to pursue derivative action]).

Indeed, Owen is the only party who could pursue claims on behalf of ROHM. Barbara has passed away. And the marital trust is no longer a shareholder of ROHM, having distributed all of its shares to Owen and RWH (R. 635-636). Tompkins, as trustee of the marital trust, has also assigned to Owen all claims related to the shares

she received (R. 244, 441, 636). That leaves only Owen and RWH as the two remaining shareholders who have an interest in ROHM. If Owen cannot bring these claims, then RWH would escape all accountability for his self-dealing, mismanagement, and breaches of fiduciary duty.

3. Owen has adequately pleaded facts showing attempts to have ROHM bring these claims itself would have been futile.

Supreme Court correctly held that Owen satisfied the pre-suit demand requirement for derivative actions (R. 17-18). BCL section 626 (c) requires that "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." As the Court of Appeals has explained, this requirement "relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses" (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]). A plaintiff is excused from making a demand on the board of directors where it would be futile to do so (*id*.). Courts have held that a demand would be futile when a majority of the board is interested in a disputed transaction, or where the board did not fully inform themselves about a challenged transaction, or when the challenged transaction is egregious on its face (*id*.). Courts have also held that a demand is futile where the board of directors had been deadlocked for a period of time (*Lauer v Schoenholtz*, 106 AD2d 551, 552 [2d Dept 1984]).

In her amended complaint, Owen alleges that she made efforts over a two-year period, through proceedings in Surrogate's Court, to encourage Tompkins to initiate action on behalf of ROHM against Defendants, at a time when Tompkins was the record owner of 100% of ROHM's shares (R. 636-637). Tompkins, concerned about maintaining neutrality with respect to the marital trust's beneficiaries, elected to instead petition the Surrogate's Court for advice and direction concerning whether to pursue the claims; before Tompkins received a ruling on that petition, it opted instead to distribute the shares, with the explicit intent of allowing Owen to pursue the claims directly (R. 243, 635, 1087-1104, 1201).

Owen has also adequately alleged facts demonstrating that, after her receipt of the shares, any further attempts to make a pre-suit demand upon ROHM's board of directors would have been futile. To begin with, ROHM has no board of directors, as Defendants acknowledge (Appellants' Brief at 20). Because no board of directors exists, there are no disinterested directors to whom Owen might make such a demand. This alone is sufficient reason to excuse the demand as futile.

This Court should reject Defendants' meritless suggestion that Owen was required to seek appointment of new directors for the purpose of making a pre-suit demand. Such efforts would themselves obviously have been futile. Owen and RWH each own 50% interests in ROHM, which meant that the resulting board would be deadlocked. As alleged in the amended complaint, "the shareholders of ROHM …

are so divided that the votes required for the election of directors cannot be obtained" (R. 648). Defendants never offered any evidence or argument to the contrary.

B. Owen has standing to bring direct claims against Defendants on her own behalf and on behalf of Barbara's estate.

In addition to having standing to pursue derivative claims, Owen also has standing to assert direct claims against RWH for breach of fiduciary duty and against HHC for aiding and abetting a breach of fiduciary duty. Defendants assert, without any support or authority, that Owen "fail[ed] to assert that [RWH], as director or officer of ROHM, or that HHC owed a duty to Owen in her individual capacity" (Appellants' Brief at 16). But RWH, in his capacities as a *de facto* trustee of the marital trust and as president of ROHM, owed fiduciary duties to the marital trust's beneficiaries. Owen may assert direct claims because RWH's breaches of his fiduciary duties, which were aided and abetted by HHC, injured her directly, by reducing the amount of money that would have been paid to the marital trust, of which Owen is and was a beneficiary (*see Gjuraj v Uplift Elevator Corp.*, 110 AD3d 540, 541 [1st Dept 2013] [holding that a minority shareholder of a closely held corporation had standing to assert both direct and derivative claims for breach of fiduciary duty because "defendants' freezing him out of the corporation and failing to pay him his share of the profits harmed him individually"]).

To the extent such individual claims accrued in favor of Barbara as the lifetime income beneficiary of the marital trust, those claims are now possessed by her estate

and are asserted by Owen in her capacity as executor (R. 624). And to the extent that the fiduciary duties were owed to the trustee of the marital trust in connection with the marital trust's ownership ROHM shares, such claims devolved upon Owen by operation of law when the shares were distributed to her in accordance with RHH's Will and were expressly assigned to her by Tompkins (R. 244, 441, 636).

Furthermore, as Defendants appear to concede (Appellants' Brief at 17), Owen also has direct standing to pursue her claim for breach of the implied covenant of good faith and fair dealing against RWH individually (twentieth cause of action). Owen and RWH are parties to the Purchase and Sale Agreement (R. 47-230, 626, 650). As a party to the contract, it is axiomatic that Owen has standing to assert a claim for breach of an implied obligation of the contract.

POINT II

SUPREME COURT CORRECTLY HELD THAT, AS A MATTER OF LAW, RWH BREACHED HIS FIDUCIARY DUTY TO ROHM AND ITS SHAREHOLDERS.

As correctly held by Supreme Court, RWH bore the burden to show the entire fairness of the self-interested transactions between ROHM and his other businesses (R. 21). And Supreme Court correctly concluded that RWH failed to meet his burden under the "entire fairness" test, and was liable as a matter of law for breach of fiduciary duty (*id*.).

Directors and officers of corporations owe fiduciary duties of loyalty and care to their shareholders (*see Alpert v 28 Williams St. Corp*., 63 NY2d 557, 568 [1984]). Generally, the actions of directors and majority shareholders are protected by the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). The presumption of the business judgment rule does not apply, however, when the director or officer of a corporation engages in a self-interested transaction (*see Alpert*, 63 NY2d at 570; *Lippman v Shaffer*, 15 Misc 3d 705, 711 [Sup Ct, Monroe County 2006]). "Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally" (*Marx v Akers*, 88 NY2d 189, 202 [1996]). Where such self-interest exists, the burden shifts to the self-interested director to "prove good faith and the entire fairness" of the transaction (*Alpert*, 63 NY2d at 570).

To meet their burden on a challenge, conflicted directors or officers must introduce evidence sufficient to show the "efforts taken to simulate arm's length negotiations" (*see Alpert*, 63 NY2d at 570). The doctrine of entire fairness involves inquiry into the deal's fair process and fair price: fair process "concerns timing, structure, disclosure of information to independent directors and shareholders, how

approvals were obtained, and similar matters[,]" whereas fair price is "measured by whether independent advisors rendered an opinion or other bids were considered ...." (*Matter of Kenneth Cole Prods., Inc. Shareholder Litig.*, 27 NY3d 268, 275 [2016], citing *Alpert*, 63 NY2d at 570–571).

As set forth in detail below, Supreme Court correctly held that RWH and HHC misappropriated and underpaid for ROHM's assets, and RWH unilaterally approved his own excessive compensation. Given RWH's breaches of fiduciary duty, Supreme Court properly ordered RWH to disgorge all executive compensation for the years 2017, 2018, and 2019. Quite tellingly, Defendants' brief does not once mention the entire fairness standard. Instead, Defendants focus first on a meritless argument regarding the Public Health Law as a purported justification for Defendants' actions. Similarly, Defendants set forth a contrived tax estoppel argument. Such arguments fall far short of establishing the entire fairness of RWH's self-dealing.

A. Supreme Court correctly held that RWH and HHC misappropriated and underpaid for ROHM's assets.

Supreme Court correctly held that Owen was entitled to summary judgment as to liability on her claim that Defendants misappropriated certain ROHM assets and underpaid for others.

It is well established that:

> "An agent may not divert or exploit for his own benefit an opportunity that is an asset of his principal. Nor may he make use of the principal's resources or proprietary

> information to organize a competing business. It would be a breach of fiduciary duty if an agent of a corporation secretly established a competing entity so as to divert opportunities away from his principal"

(*Am. Baptist Churches v Galloway*, 271 AD2d 92, 99 [1st Dept 2000] [internal quotations omitted]; *see also RCSUS Inc. v SGM Socher, Inc*., 2022 NY Slip Op 30926[U], *13 [Sup Ct, NY County 2022] [granting summary judgment on liability for unfair competition where defendant wrongfully diverted the plaintiff's business to itself]; *J-K Apparel Sales Co., Inc. v Jacobs*, 189 AD3d 1011, 1013 [2d Dept 2020] [affirming summary judgment for mismanagement and diversion of corporate assets under BCL § 720 because the defendant diverted assets to himself that belonged to the plaintiffs]).

In *Greenberg v Greenberg*, this Court held that a derivative plaintiff was entitled to summary judgment as to liability for his claims for breach of fiduciary duty and misappropriation of corporate assets (206 AD2d 963, 963 [4th Dept 1994]). In *Greenberg*, the defendant had "unilaterally seized the tangible and intangible assets of Madison Cabinet, transferred them to his new corporation, Meyer's Cabinet, and used that new entity as the vehicle for usurping the corporate opportunities of Madison Cabinet, in breach of his fiduciary duty to Madison Cabinet and its other shareholders" (*id*. at 964). In pertinent part, the plaintiff established, and the defendant failed to refute, that the defendant had:

> "unilaterally discontinued the business of Madison Cabinet after incorporating Meyer's Cabinet; that he appropriated the fixtures and tools of Madison Cabinet for use by Meyer's Cabinet; that Meyer's Cabinet occupies the same space that Madison Cabinet had occupied; and that Meyer's Cabinet does business using the same employees, the identical telephone number, and like stationery as that used by Madison Cabinet"

(*id*.). On these facts, this Court held as a matter of law that the defendant's actions constituted a misappropriation of the tangible assets and goodwill of the original corporation (*id*. at 965).

Similarly, in *Lirosi v Elkins*, the Second Department held that the defendant breached his fiduciary duty to the shareholders of two entities after transferring all assets of the ongoing corporations to a new corporation (89 AD2d 903, 905 [2d Dept 1982]). The new corporation "was initially capitalized with only the assets—equipment, inventory, accounts (customer lists) and good will"—of the old corporations and "all of the employees of those companies became the initial working force of the new corporation" (*id*.). The Second Department specifically noted that only the defendant and the newly formed corporation derived any benefit from the transfer and that the defendant did not meet his burden of proving the entire fairness of the transaction, warranting summary judgment on liability for breach of fiduciary duty (*id*. at 906).

The facts of this case are substantially the same. It is undisputed that RWH took ROHM's entire business and continued the same business under the name

HHC. In January 2020, the same employees, working out of the same offices at 740 East Avenue, using the same computers and equipment, continued to provide the same services for the same clients as they had been doing back in December 2019. The only difference was that their paychecks and 401(k) statements now read "Hurlbut Health Consulting, LLC" instead of "ROHM Services Corporation." Everything else—the service agreement terminations, the resignations, the rehiring, the Asset Purchase Agreement—were just parts of RWH's scheme, which he had planned for months, to change the ownership of the business from the marital trust to himself without paying for it.

Defendants failed to raise any triable issue of fact as to the entire fairness of these transactions. For example, RWH argues that the Hurlbut nursing homes were permitted to terminate their services contracts with ROHM at any time. To the extent that was true, it was only because RWH engaged in self-dealing with his nursing homes and failed to negotiate any standard contractual protection for ROHM that one might normally see in similar circumstances involving co-dependent businesses, such as longer contractual terms, buyout provisions, early termination fees, and lengthier notice provisions (R. 460).

But even assuming the Hurlbut nursing homes had the right to terminate ROHM's services, RWH was not permitted to abuse his position as a ROHM insider to steal the business and reformulate it under a new name. In theory, if RWH had

decided that he no longer wanted to do business with ROHM, he might have resigned from his position as ROHM's president and spent months or years building a replacement management company from scratch, switching his nursing homes over when the new company was ready. Meanwhile, ROHM, under new and independent management, could have sought replacement clientele to keep its business alive. With sufficient advance notice, ROHM—an established management company with decades of experience overseeing real estate investment properties as well as nursing homes—undoubtedly could have continued its business in at least some fashion.

But building a new management business from scratch would have been burdensome, expensive, and time-consuming for Defendants. So instead, they used a shortcut, simply taking ROHM over by putting a new name on the door. Defendants thus kept the business running without interruption, using the same staff, the same offices, the same equipment, the same files, the same branding, the same website, and the same institutional knowledge. If Defendants wanted all of those advantages, they were required to pay for their fair-market value.

Moreover, the record establishes that Defendants misappropriated ROHM's intellectual property, including its website and its federal registration for the Hurlbut Care Communities mark. This conduct alone supports summary judgment in Owen's favor on liability for breach of fiduciary duty, corporate waste, self-dealing, and usurpation of corporate opportunities (*Stavroulakis v Pelakanos*, 58 Misc 3d

1221[A], 2018 NY Slip Op 50180[U], *9–17 [Sup Ct, NY County 2018] [granting plaintiff summary judgment as to liability for claims sounding in breach of fiduciary duty based on corporate waste, self-dealing, and usurpation of corporate opportunity, trademark infringement, and aiding and abetting breach of fiduciary duty where all of company's assets, including intellectual property, were transferred to new corporation by self-interested officers for no consideration; the court noted that the defendants took all of the company's assets and left the "plaintiff with equity in an empty shell corporation"]; *Kurtzman v Bergstol*, 40 AD3d 588, 589 [2d Dept 2007] [affirming summary judgment on claims for conversion and misappropriation of corporate assets where defendant-fiduciary prevented plaintiff from receiving share of profit distributions and finding trial court should have also granted summary judgment for plaintiff on claims sounding in breach of fiduciary duty]; *Davydov v Zhuk*, 23 Misc 3d 1129[A], 2009 NY Slip Op 51003[U], *1-2 [Sup Ct, Kings County 2009] [plaintiff sustained his burden to demonstrate entitlement to summary judgment as to liability for causes of action sounding in unjust enrichment; conversion of corporate assets, corporate business opportunities, and goodwill; breach of fiduciary duty; fraud; waste; and an accounting where defendant admitted that he opened and maintained a competing business using assets of plaintiff and defendant's shared business]).

In sum, Supreme Court correctly held that Owen was entitled to summary judgment as to liability on her claims related to the misappropriation of ROHM's assets, including breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, corporate waste, usurpation of corporate opportunities, conversion, unjust enrichment, constructive trust, and BCL section 720.

B. Supreme Court correctly held that RWH unilaterally approved his excessive executive compensation in breach of his fiduciary duty to ROHM.

Supreme Court correctly held that Owen had "established that [RWH] paid himself more than the 'industry norm' for 'comparable businesses"' (R. 24). Notably, the Court observed that RWH "provide[d] no response as to why he paid himself the allegedly excessive compensation for the years 2017-2019" (*id*.).

"Directors who approve their own compensation bear the burden of proving that the transaction was fair to the corporation" (*Marx*, 88 NY2d at 204, n.6; *see also Lippman*, 15 Misc 3d at 712 [noting that "directoral self-compensation decisions lie outside the business judgment rule's presumptive protection" and that "receipt of self-determined benefits is subject to an affirmative showing [by the self-interested director] that the compensation arrangements are fair to the corporation."]).

For example, in *Lippman v Shaffer*, the court granted a plaintiff's motion for summary judgment on an excessive compensation claim where the record showed that the defendant approved and received two "severance" payments although he

remained employed by the corporation and the corporation had no contractual obligation to make such payments (15 Misc 3d at 715). The court further noted that the defendants' proffered tax-based rationale did not meet the entire fairness standard (*id*. at 716), and rejected the defendants' self-serving claims that the plaintiff had received a similar severance payment in the past without objection, and that the defendant was merely taking an advance severance of equal amount (*id.*). Accordingly, the court ordered that the moneys paid to the defendant be returned to the corporation (*id*. at 717, citing *Gerdes v Reynolds*, 281 NY 180, 185 [1939] [directors required to restore to the corporation excessive salaries]; *see also Zutrau v Ice Sys., Inc.*, 38 Misc 3d 1235[A], 1235A, 2013 NY Slip Op 50392[U], *8 [Sup Ct, Suffolk County 2013] [president and majority shareholder of corporation improperly diverted corporate assets in the form of bonuses, thereby depriving the corporation of profits]; *O'Mahony v Whiston*, 2023 NY Slip Op 30482[U], *10 [Sup Ct, NY County 2023] [defendants did not carry their burden to prove that bonuses they paid themselves passed entire fairness scrutiny where defendants proffered "multiple pretextual justifications" and committed corporate waste by buying out a lease to form a competing business]).

Here, RWH was paying himself in excess of $550,000 per year in his role as president of ROHM, even though the entire business only brought in about $3 million per year in revenue. As demonstrated by the uncontroverted expert

affidavit of Terence L. Griswold, that amount was plainly excessive, given that (i) RWH was taking home between 17.3% and 18.5% of ROHM's revenues, which far exceeds the industry norm of 7% to 9% as reflected in datasets of comparable businesses; and (ii) RWH did not devote his entire efforts to ROHM's business, but was also the president of numerous other nursing home operating entities and real estate entities, meaning that his salary from ROHM should have been adjusted downward accordingly (R. 465-470). Even assuming RWH devoted full-time efforts to ROHM alone (which he did not), based upon a comparison to industry benchmark data, Owen's expert opined that ROHM overpaid RWH by between $850,136 and $1,037,678 between 2017 and 2019 (R. 466-470). The unfairness of RWH's compensation is compounded by the fact that RWH deliberately ran ROHM in a way that generated no meaningful value to its shareholders; as noted above, RWH was admittedly using ROHM to instead generate value for his wholly owned businesses.

The record is devoid of evidence that RWH's salary was reasonable or fair. Indeed, RWH was silent as to the work he performed for ROHM in exchange for the facially excessive salary (R. 2147-2156). RWH did not offer any witness with any personal knowledge or expert opinion as to the entire fairness of his compensation. Indeed, the record contains no evidence at all regarding what exactly RWH was doing for ROHM between 2017 and 2019 (other than taking its assets and drawing a salary).

On appeal, RWH simply asserts in conclusory fashion, and without any support, that his salary was "consistent with the amount of work performed by [RWH] for the company" and that "it is entirely reasonable and fair for [RWH] to have been compensated in the amounts he was" (Appellant's Brief at 43-44). Such conclusory assertions cannot defeat summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"]; *Lodge II Hotel LLC v Joso Realty LLC*, 155 AD3d 1631, 1631 [4th Dept 2017]; *Trahwen, LLC v Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013]).

On this record, Supreme Court correctly held that RWH failed to raise any triable issue of fact as to Owen's claim that RWH breached his fiduciary duty by paying himself excessive compensation. It was his burden to submit proof of entire fairness, and he supplied no such evidence.

C. Supreme Court properly ordered RWH to disgorge his salary for the years 2017 through 2019 under the faithless servant doctrine.

Supreme Court held that "the series of repeated actions taken by [RWH] to diminish ROHM's value to nothing constituted a breach of [RWH's] fiduciary duty as president of ROHM …." (R. 26). Thus, Supreme Court granted partial summary judgment on Owen's faithless servant doctrine cause of action and ordered RWH to disgorge his compensation for the years 2017 through 2019 (*id*.).

An employee is required to exercise the utmost good faith, including a duty of loyalty, toward his employer (*see generally Murray v Beard*, 102 NY 505, 508 [1886]). Accordingly, New York's strict application of the faithless servant doctrine "mandates the forfeiture of all compensation, whether commissions or salary, where … one who owes a duty of fidelity to a principal is faithless in the performance of his services" (*Soam Corp. v Trane Co*., 202 AD2d 162, 163–164 [1st Dept 1994]; *see also Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017]). A faithless employee forfeits compensation even when "the services were beneficial to the principal or … the principal suffered no provable damage as a result of the breach of fidelity by the agent" (*Feiger v Iral Jewelry, Ltd*., 41 NY2d 928, 928-929 [1977]; *see also Diamond v Oreamuno*, 24 NY2d 494, 498 [1969] [describing policy rationale behind forfeiture rule which is to dissuade breaches "by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates."]).

An employee may be held liable to disgorge benefits received under the faithless servant doctrine where the employee has usurped a corporate opportunity or actively stolen from the employer (*see Linder v Innovative Commercial Sys. LLC*, 41 Misc 3d 1214, citing *Mar. Fish Prods., Inc. v World-Wide Fish Prods., Inc*., 100 AD2d 81, 88 [1st Dept 1984] [employee usurped corporate opportunities]; *Dawes v J. Muller & Co*., 176 AD3d 473, 474 [1st Dept 2019] [plaintiff entitled to summary

judgment on a faithless-servant claim against the decedent because the decedent breached his duty of loyalty, requiring disgorgement of fees received]; *Bon Temps Agency v Greenfield*, 184 AD2d 280, 281 [1st Dept 1992][A], 2013 NY Slip Op 51695[U], *6 [Sup Ct, NY County 2013] [reversing motion court and granting partial summary judgment to the plaintiff where defendant "acted in a manner inconsistent with her employment with the plaintiff and failed to exercise the utmost good faith and loyalty in the performance of her duties," where the defendant established a competing company while still employed by the plaintiff]; *see also Consol. Edison Co. v Zebler*, 40 Misc 3d 1230[A], 2013 NY Slip Op 51354[U], *5 [Sup Ct, NY County 2013] [granting summary judgment and ordering the defendant-employee to forfeit all of the salary and benefits received during the 26-month period of disloyalty]; *Natl. Union Fire Ins. Co. of Pittsburgh, PA v Razzouk*, 2022 NY Slip Op 31276[U], *8 [Sup Ct, NY County 2022] [granting summary judgment and awarding damages in the amount of the defendant's full compensation during the period of dishonesty]).

Having acted as a faithless servant in multiple ways between 2017 and 2019, RWH must disgorge all benefits he received during that time period. His compensation is undisputed (R. 1266-1324). Accordingly, Supreme Court correctly ordered RWH to disgorge his salary in the aggregate amount of $1,694,073 (R. 25-26 [2017: $550,000; 2018: $590,073; 2019: $554,000]).

D. RWH's arguments on appeal entirely fail to establish the entire fairness for each of his self-interested transactions.

Strikingly, on appeal, RWH does not even acknowledge the entire fairness standard, let alone attempt to explain how he met it. RWH made no effort to simulate arms-length transactions, and he offered no evidence that the process or substance of the resulting transactions were entirely fair to ROHM and its beneficial owners. The record establishes that Supreme Court correctly applied the entire fairness doctrine.

First, RWH admits that on an annual basis, he entered into service contracts with his own nursing homes without building in any protections for ROHM (R. 30-46, 2147-2156). Indeed, due to the lack of any protections in the contracts he himself arranged, RWH admits that he caused his nursing homes to pay only enough to cover ROHM's costs, and to cancel the contracts for no fee and with only 30 days' notice, thereby rendering ROHM defunct and (he claims) without the funds necessary to sustain the business while marketing to new customers (*id*.). The unrebutted affidavit of Owen's expert explains that, in situations involving co-dependent businesses, one would expect the parties to negotiate protections such as cancellation fees, buyout provisions, or lengthy notice periods to protect one co-dependent business from the devastating effects of a short-notice termination, as occurred here (R. 449-477). The documentary evidence further demonstrates that RWH arranged for his nursing homes to make continuous use of ROHM's trademark without putting into place any

contracts and without ensuring that ROHM would receive any royalties (R. 440, 1391-1421).

In these ways, ROHM's president RWH thus failed to negotiate standard contractual protections on its behalf, and then he exploited his own failures to take advantage of ROHM and its beneficial shareholders for his own benefit. Because these facts are admitted or undisputed, they warrant granting Owen partial summary judgment as to liability (*see Tsui*, 2021 NY Slip Op 31221[U], *19 [defendants in derivative action breached their fiduciary duties by hiring management company owned by self-interested board member; they failed to show how the transaction was in best interest of corporation, and failed to show that board members took actions to simulate an arms-length transaction]; *Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], 2018 NY Slip Op 50180[U], *9–17 [Sup Ct, NY County 2018] [granting plaintiff summary judgment for breach of fiduciary duty where all of company's assets, including intellectual property, were transferred to new corporation by self-interested officers for no consideration]).

Second, as a matter of law, Defendants cannot show *procedural* fairness. Under New York law, the sale or disposition of "all or substantially all" of the assets of a corporation requires both notice to each shareholder of record and approval by a two-thirds majority of shareholders (BCL § 909 [a] [2], [3]). To preserve shareholder rights, New York courts have demanded strict compliance with these

mandatory procedures (*see Bear Pond Trail v Am. Tree Co.*, 61 AD3d 1195, 1195-1197 [3d Dept 2009] [affirming judgment declaring transaction null and void for failure to comply with Section 909]). Here, not only did RWH fail to obtain approval from Tompkins, the Trustee of the marital trust and the sole record shareholder of ROHM, but, as described above (*see supra* pp. 14-16), RWH took extensive efforts to hide his conduct from Tompkins—even going so far as to violate a court-issued discovery order to hide the Asset Purchase Agreement for several months. The procedural unfairness of the transaction is further demonstrated by RWH's actions in arranging for ROHM to let its federal trademark registrations lapse so that the same marks could be registered by HHC, all without Owen's knowledge or consent (R. 440, 611-616).

Ignoring these issues, Defendants argue on appeal that they cannot be held liable for self-dealing because the Hurlbut Nursing Homes had no legal obligation to "continue to use ROHM as a vendor for administrative services" (Appellants' Brief at 24). This argument misses the point. As explained above, the very fact that the services agreements were able to be terminated at will without adequate notice is itself evidence of improper self-dealing by RWH. But even setting that aside, RWH was acting as a fiduciary of ROHM during this time period, and yet he offered *no evidence* that he engaged in any efforts to ensure that the transactions were fair to ROHM. To the contrary, his entire appellate brief is based upon the premise that

he was acting solely for the purpose of protecting his own interests in his other businesses.

E. RWH's purported justification to terminate the relationship with ROHM due to regulatory requirements of the Public Health Law is entirely insufficient to meet the entire fairness standard.

Supreme Court properly rejected RWH's argument that ROHM could not operate following RWH's resignation because it would lack an operator with a nursing home administrator license under Article 28-D of the Public Health Law. This argument is flatly contradicted by the documentary evidence and fails to raise any triable issue of fact.

First, putting aside the meritless nature of this argument, the sequence of events reveals this argument for what it is: a belated and post hoc rationalization for RWH's earlier actions. ROHM in fact remained controlled by a licensed operator until May 2022, when RWH resigned his position as a director and president of ROHM (R. 1561). It was *years* earlier that RWH concocted a scheme to takeover ROHM and convert its assets to HHC (R. 716 [referring to the ROHM/HHC change; R. 797 [putting plan into effect in December 2019 and January 2020]).

In any event, RWH's justification is irrelevant. Even if RWH had some fear that his future resignation from ROHM could leave the business without a licensed nursing home administrator, he had no right to breach his fiduciary obligations and orchestrate unfair, self-interested transactions between ROHM and HHC. Moreover,

Defendants' argument is inherently flawed because ROHM, as a management company, did not require a licensed operator. In fact, it is nursing home administrators employed by the skilled nursing facilities who must hold the applicable license (*see* 10 NYCRR 415.26; Public Health Law § 2895-a [defining "Nursing home administrator" as "an individual who is charged with and has responsibility for the general administration of a nursing home…"]). Defendants conflate the licensed role of "nursing home administrator" with the separate and distinct back-office administrative services provided by ROHM, which do not require an operator license. The record is clear that the Hurlbut Nursing Homes each employed a nursing home administrator (R. 431), and that ROHM supplied numerous other back office services to the Hurlbut Nursing Homes for which no license was required (*e.g.*, real estate and property management, landscaping design and maintenance, interior design and appearance, dining room experience, marketing, employee uniforms and dress codes, vendor management and budgeting, CFO services, accounts payable and receivable, purchasing, management of vendors and suppliers, payroll and benefits support, IT services, courier services, etc.) (R. 421-432). Accordingly, Defendants flawed argument should be rejected on the merits.

Even assuming ROHM could not provide any services to the Hurlbut Nursing Homes without a licensed nursing home operator, it had many options. Had RWH

simply resigned from ROHM in 2019 before the self-interested transactions, the marital trust could have hired new management to take over ROHM's business, including a duly qualified nursing home operator. Or ROHM could have shifted its focus away from nursing home management to real-estate management—an entirely separate set of marketable services that its employees were qualified to administer and that was not subject to the Public Health Law at all. But neither the marital trust nor ROHM could exercise these options because RWH simply took ROHM's entire business apparatus—its staff, its files, its computers, its equipment, its office space—and converted it to use by HHC. He deliberately rendered the business defunct and the record is completely devoid of evidence that RWH attempted in any way to protect ROHM's business. In short, Supreme Court correctly held that RWH failed to meet his burden to demonstrate the entire fairness of the transactions in dispute.

F. Defendants' tax-estoppel argument is meritless.

Defendants' argument that Owen's estimated value of ROHM is precluded by the doctrine of tax estoppel from challenging the true value of ROHM's assets is unavailing for multiple reasons.

First, the time periods at issue do not match. Owen's expert opines as to the value of ROHM as of December 31, 2019—just *before* RWH and HHC took ROHM's business assets. By contrast, the estate tax return on which RWH and HHC rely valued ROHM as of August 2020, nine months *after* RWH and HHC had already

stolen ROHM's assets and rendered ROHM defunct. Indeed, the valuation upon which the estate tax return was completed specifically valued ROHM on the assumption that it was no longer operating as a going concern (R. 488-518). Because Defendants had already rendered ROHM defunct and stolen ROHM's workforce, files, goodwill, and other assets by August 2020, the value in the estate tax return is significantly lower than the December 2019 going concern value of ROHM.

Second, even if the time periods matched, Owen retains her right to argue that ROHM would have been worth more than reported on the estate tax return had RWH and HHC not engaged in unlawful conduct to devalue it (*see Shyer v Shyer*, 2020 NY Slip Op 51023(U), 2020 NY Misc LEXIS 5477, *17 [Sup Ct, NY County 2020] ["Tax estoppel prevents someone … from reporting income on tax returns and then arguing in court that he or she received none; it does not prevent someone, however, from arguing that he or she should have received more, but for some illegal act."]). In other words, Owen's position in this action is not inconsistent with the estate's 2020 tax return.

Second, as a matter of law, the doctrine of tax estoppel does not prevent a taxpayer from asserting ownership rights over an asset, even if that asset was omitted from a previous tax filing (*Angiolillo v Christie's, Inc.*, 185 AD3d 442, 443 [1st Dept 2020] [holding that heirs were not estopped from arguing that the decedent had ownership rights in a diamond as a result of their failure to include the diamond's

value in tax filings following the decedent's death because "the omission of an asset leaves all questions in regard to it open"]). Thus, to the extent that the StoneBridge valuation report upon which the estate tax return was based failed to value certain intangible assets of ROHM, such as its trademarks, the doctrine of tax estoppel cannot be used to bar ROHM's claim of ownership over those assets now.

Third, the doctrine of tax estoppel is equitable in nature. Applying tax estoppel here would only allow Defendants to benefit from their own misconduct—a manifestly inequitable result. Leading up to the filing of the estate tax return they now seek to invoke, Defendants deliberately withheld evidence from Barbara Hurlbut's estate, from Owen, and from Tompkins concerning ROHM's value, its intangible assets, and HHC's takeover of ROHM's business. They did so despite being under a court order to disclose that information (R. 990-996). Tompkins did not even learn of the Asset Purchase Agreement until November 2021 (R. 1200), only a few days before StoneBridge published its detailed appraisal report (R. 488-518), which Barbara's temporary executor used as the basis for the estate tax return (R. 1556). Although RWH had openly testified that ROHM was defunct by mid-2020 (R. 684), it was not until mid-to-late 2022 when Owen began to discover the nature and extent of RWH's self-dealing transactions through its review of documents produced by Bonadio in response to a subpoena (R. 1193-1194). To this

day, Defendants continue to withhold necessary documents that would bear upon ROHM's valuation; (R. 465, 470, 475).

After having successfully hidden necessary information, Defendants now seek to benefit from their own wrongdoing by invoking the doctrine of tax estoppel to preclude further litigation as to ROHM's value. Yet, tax estoppel is not an inexorable statutory command, but an evidentiary rule created by the courts through their equity powers (*see Matter of Cusimano v Strianese Family LP*, 2011 NY Slip Op 34206(U), 2011 NY Misc LEXIS 7328, *13 [Sup Ct, Nassau County 2011]). Defendants' attempt to invoke this equitable principle here runs headlong into the equitable maxim that a court will not permit a party to take advantage of his own wrong (*see e.g. General Stencils, Inc. v Chiappa*, 18 NY2d 125, 127–128 [1966]; *Campbell v Thomas*, 73 AD3d 103, 104 [2d Dept 2010]; *Erbe v Lincoln Rochester Trust Co.*, 13 AD2d 211, 214 [4th Dept 1961]).

POINT III

SUPREME COURT ERRED IN HOLDING THAT OWEN HAD NOT ESTABLISHED ENTITLEMENT TO JUDGMENT AS MATTER OF LAW ON THE UNDERCHARGING CLAIMS.

Supreme Court erred by dismissing Owen's claims to the extent they were based on RWH's operation of ROHM as a breakeven entity between 2017 and 2019 (the "Undercharging Claims"). Instead, Supreme Court should have granted Owen partial summary judgment on these claims as to liability. During this time period,

Owen submitted proof that the large majority of ROHM's revenue came from services contracts with entities owned by RWH, and that the rates RWH charged were far below market value (R. 449-477). As explained above (*see* Point II), because these transactions were unquestionably self-interested, RWH bore the burden of raising a triable issue as to the "entire fairness" of those transactions to ROHM. Although Supreme Court correctly identified the entire fairness standard, it failed to correctly apply that standard to Owen's Undercharging Claims.

In *Ganzi v Ganzi*, the court found that defendants engaged in a "textbook example of fiduciary misconduct" by executing self-dealing undervalued licensing agreements that grossly favored defendants' wholly owned new corporate interests and deprived the original corporation, JOMR, of fair market value for such agreements (2018 NY Slip Op 32961[U], *17 [Sup Ct, NY County 2018]). The Court highlighted that although "JOMR is a closely-held corporation which began as an informal family affair, [such fact] does not excuse defendants from complying with their fiduciary obligations to JOMR and fellow shareholders" (*id*.). The Court specifically found that defendants had not satisfied their burden to establish that the license agreements were fair and reasonable to JOMR where JOMR charged an annual flat-rate pursuant to the licensing agreements, but other comparable entities calculated such licensing fees as a percentage of gross sales (*see id*. at *17–18). Similarly, the Court found that defendants breached their fiduciary duty to the related

real estate entity, JOHM, by charging below market rent on an annual basis (*see id*. at *19).

Defendants incorrectly focus on the fact that the parties' father RHH set up ROHM in the 1970s as a breakeven entity. Owen does not dispute that when her father owned ROHM and the Hurlbut Nursing Homes, he was, of course, free to operate his companies as he saw fit and to realize profits in whichever entity he chose, so long as he did not run afoul of any tax rules or the Public Health Law. Even after transferring ownership of the Hurlbut Nursing Homes to his children, RHH continued to be perfectly entitled to operate ROHM (in which he retained a 100% interest) in whatever manner he chose, including directing all profits to the nursing homes (and thus his children). In other words, because one does not owe a fiduciary duty to oneself, RHH was free to operate ROHM on a breakeven basis.

That changed when ROHM's ownership was transferred to the marital trust. At that point, the trustees of the marital trust (including RWH as *de facto* trustee) were duty bound to administer the trust assets "with due regard to the respective interests of income beneficiaries and remaindermen" (EPTL § 11-2.1 [a] [1]). The fiduciary duties owed by a trustee generally include a duty to ensure that the assets held in trust are productive and produce income (*see Matter of Hubbell's Will*, 302 NY 246, 255–256 [1951]). Any net profits generated by ROHM would have been deemed part of the trust's income and would have gone to Barbara as lifetime income

beneficiary (*see* EPTL § 11-2.1 [g]). In addition, RWH, as a director and officer of ROHM, owed fiduciary duties of care and loyalty to the corporation (*see Alpert v 28 Williams St. Corp.,* 63 NY2d 557, 568 [1984]).

It is undisputed that, between 2017 and 2019, the marital trust owned 100% of ROHM's stock. It is also undisputed that the trustees were required to pay all net income generated by the marital trust's assets to Barbara Hurlbut during her lifetime (R. 658). And it is undisputed that RWH, as president of ROHM and as a *de facto* trustee of the marital trust, caused ROHM to enter into self-interested transactions with RWH's wholly owned Hurlbut Nursing Home businesses at rates that were deliberately designed to cause ROHM to "break even," *i.e.*, to avoid generating any income for the marital trust and for Barbara. RWH cannot, and does not even attempt to, meet his burden of proving that this scheme was entirely fair. Contrary to Supreme Court's holding, RWH was not permitted to use a marital trust asset—ROHM—solely to enrich himself while generating no income for the marital trust. Accordingly, there being no triable issue of fact as to "entire fairness," Owen is entitled to partial summary judgment on liability for undercharging.

Defendants appear to argue on appeal that even if RWH's operation of ROHM as a break-even entity between 2017 and 2019 had been wrongful and unfair, Owen allegedly "expressly and/or implicitly authorized" the arrangement (Appellants'

Brief at 31). This argument is wholly unsupported by the record and otherwise lacking in merit.

As a threshold matter, Defendants do not cite any legal authority in support of their alleged defense—no governing statute, case law, background legal principles—nothing. To defeat summary judgment on the basis of an unpleaded defense, Defendants must specify what defense they are asserting, cite some legal authority to support its existence, and present admissible evidence sufficient to raise a triable issue of fact as to the viability of that defense. Defendants apparently expect Owen and this Court to try to determine whether and how its arguments fit into any recognized defense.

Defendants appear to be invoking a defense sounding in ratification. However, ratification "requires full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language" (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418, 1420 [4th Dept 2015], quoting *Rocky Point Props. v Sear-Brown Group, Inc.*, 295 AD2d 911, 913 [4th Dept 2002]).

Here, RWH noted Owen had previously served as a director of ROHM and, as such, attended board meetings in 2015 and 2016 in which ROHM's "financials were discussed" (R. 2150). RWH attached to his affidavit an unsigned script for ROHM's January 2015 board of directors meeting (R. 2157-2169) and the minutes

of a joint board and shareholder meeting that took place in January 2016 (R. 2170-2175). Preliminarily, neither of the documents relied upon by RWH relates to the transactions forming the basis of Owen's claims (which occurred between 2017 and 2019). Regardless, the vague documents invoked by RWH reflect neither Owen's and Barbara's "full knowledge" that RWH was operating ROHM as a break-even entity to enrich RWH's other businesses, nor their unequivocal assent to such arrangement. At most, the meeting minutes reflect that the board discussed a vague, high-level budget that offered only a summary of the expected corporate income and expenses (R. 2160). Thus, Defendants' evidence falls far short of establishing a defense of ratification.

Moreover, neither the documentary evidence nor RWH's affidavit shows that Owen and Barbara had anything close to "full knowledge of the material facts relating to the transaction[s]" between ROHM and the Hurlbut Nursing Homes (*DiPizio Constr.*, 134 AD3d at 1420). The budget that Owen purportedly approved contained a single line-item for "service fees" and a single line-item for all "Operating expenses," with no detail as to either category (R. 2160). That is fully consistent with Owen's uncontroverted testimony that she never made any decisions about how ROHM charged for its services; did not have access to the corporate books; did not receive monthly operating statements; did not review ROHM's rates; and did not have detailed knowledge about ROHM's operating budget (R. 435).

Similarly, Defendants argue that the Original Trustees "were aware" of his operation of ROHM on a breakeven basis, based solely on RWH's own self-serving statement (Appellants' Brief at 7). Defendants offer no evidence to establish that the Original Trustees had full knowledge of the facts and approved of RWH's continued operation of ROHM (a marital trust asset) on a breakeven basis between 2017 and 2019. Because RWH failed to raise a triable issue of fact to support his apparent ratification defense, summary judgment in Owen's favor is warranted.

Defendants argue that RWH should be insulated from liability because, in his capacity as owner of the Hurlbut Nursing Homes, he never would have authorized higher rates for ROHM's services. That is entirely beside the point. The question presented before the Court is whether RWH breached his fiduciary duty by engaging in self-interested transactions for which he cannot prove good faith and entire fairness. If so, RWH cannot insulate himself from liability by arguing about hypothetical negotiations that might have taken place at arm's length between ROHM under independent management and the Hurlbut Nursing Homes. One can never know the outcome of such hypothetical negotiations because RWH ensured that arm's-length negotiations never took place. Instead, RWH opted to use his positions to unfairly enrich himself.

In any event, the documentary evidence flatly contradicts RWH's self-serving statements. RWH initially stated under oath that HHC was operating "using a similar

'breakeven proposition' that ROHM utilized for decades" (R. 42), evidently unaware that Owen had discovered evidence to the contrary. In fact, immediately after RWH transferred ROHM's business to HHC, he caused HHC to charge fees that were *31.3% higher on average*, generating more than $500,000 in additional revenue (R. 462-463, 596). Confronted with evidence that his prior sworn statement was false, RWH was forced to admit that HHC does in fact charge higher rates than ROHM (R. 2155). His post hoc justification? That through HHC, he can take advantage of more favorable tax treatment with respect to profits he generates (R. 2155). RWH's frantic back peddling only confirms his willingness to pay much higher nursing home management fees when those fees were going back into in his own pocket, as compared to when those fees would have flowed to his elderly mother to whom he owed fiduciary duties of care and loyalty. RWH's explanation—that he changed the rates out of a desire to benefit himself from a tax perspective—only further confirms his self-dealing, lack of regard for those to whom he owed fiduciary obligations, and utter failure to meet the entire fairness standard.

In sum, instead of dismissing Owen's Undercharging Claims, Supreme Court should have granted summary judgment in favor of Owen as to liability on those claims. RWH failed to raise a triable issue as to entire fairness, insofar as he made no attempt to offer any evidence that the process or prices were fair.

At the very least, Supreme Court should have denied Defendants' motion for summary judgment because Owen raised at least a triable issue as to entire fairness. And even if Owen had not raised a triable issue, she should have been given the opportunity under CPLR 3212 (f) to obtain disclosure concerning the self-serving assertions on which Defendants rely, including the assertions about the history of ROHM, the decisions supposedly made by the Original Trustees, and the circumstances surrounding the negotiation of ROHM's rates during the relevant time period.

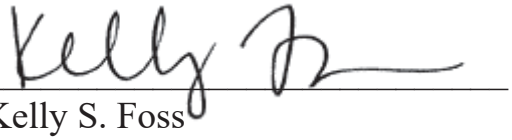
* * *

CONCLUSION

For the foregoing reasons, Owen requests that this Court (1) reverse the November 30, 2023 Order to the extent that it granted RWH and HHC's motion for summary judgment and dismissed Owen's causes of action premised on undercharging by ROHM for services rendered to skilled nursing facilities between 2017 and 2019; (2) otherwise affirm Supreme Court's November 30, 2023 Order; and (3) grant such other and further relief as this Court may deem just and proper.

Dated: November 4, 2024

Respectfully submitted,

By: 

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