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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS-RESPONDENTS

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REBUTTAL OF PRELIMINARY STATEMENT

The Brief of Christine Owen ("Owen') acts as a "Respondent's Brief" to the Appellate Brief of Robert W. Hurlbut ("Hurlbut") and Hurlbut Health Consulting, LLC ("HHC"), in which Hurlbut and HHC seek reversal of the Supreme Court's (Hon. Christopher S. Ciaccio, ASJ) Decision and Order denying Hurlbut's and HHC's motion for dismissal based on a lack of standing, and in which Hurlbut and HHC seek reversal of the Supreme Court's Decision and Order granting summary judgment to Owen and determining as a matter of law: that the compensation ROHM paid Hurlbut as president of ROHM being "excessive"; that Hurlbut misappropriated and underpaid for assets of ROHM; and that these actions caused Hurlbut to be deemed a "faithless servant" and, therefore, should disgorge the salary he earned from ROHM for the period of 2017-2019 in the amount of $1,694,073. Point I and Point II, below, will act as Hurlbut's and HHC's "Reply Brief" regarding the issues raised by them in their initially filed Appellants' Brief.

In addition, Owen's Brief acts as a "Cross-Appellant's Brief" relating to Owen's cross-appeal in which she seeks reversal of the Supreme Court's Decision and Order granting summary judgment to Hurlbut and HHC relating to Owen's claim that that between 2017 and 2019 Hurlbut undercharged the nursing homes that utilized ROHM for the administrative services provided to the nursing homes. In addition, Owen argues that the Supreme Court should have granted Owen

summary judgment on this issue. Point III, below, will act as Hurlbut's and HHC's "Respondents' Brief" to the issues raised by Owen in her "Cross-Appellant's Brief".

Clearly, there are two very different versions of events surrounding the skilled nursing homes' decision to terminate their business relationship with ROHM, which caused ROHM to have very-little-to no value. With respect to the three issues that the Supreme Court granted Owen summary judgment, these two very different versions of events warrant a reversal of the Supreme Court's Decision relating to these issues as a trial is necessary given the material issues of fact.

With respect to Owen's cross-appeal, the Supreme Court correctly determined that summary judgment in Hurlbut's and HHC's favor was warranted given the history and purpose of ROHM as a "break even" company as created by Owen's and Hurlbut's father, Robert H. Hurlbut ("RHH"), and operated as such for decades (even when Owen and Barbara Hurlbut were officers of ROHM), coupled with the fact that Hurlbut's testimony cannot be rebutted concerning the fact that the skilled nursing homes would have never paid "market rates" for "back office" administrative services if ROHM attempted to increase the rates for the reasons stated in the Supreme Court's Decision (R, 22-23), and that for a trier of fact to

determine otherwise would be an act of rank speculation and contrary to the irrefutable testimony, which is impermissible to defeat summary judgment.

COUNTER-QUESTION PRESENTED RELATING TO OWEN'S CROSS APPEAL (QUESTION 3)

Counter-Question 3. Whether the Supreme Court correctly granted Hurlbut and HHC summary judgment relating to Owen's claims that the nursing homes would have paid significantly increased rates to ROHM if ROHM significantly increased the rates being charged to the nursing home despite ROHM's longstanding purpose and history as a "breakeven entity"?

Answer. Yes, the Supreme Court correctly granted Hurlbut's and HHC summary judgment and correctly determined that there were no material questions of fact on this issue given ROHM's history and purpose and the sole owner of the nursing homes who had sole authority over this decision has testified that the homes would never have paid ROHM "market rates" under the circumstances, and for a trier of fact to determine otherwise would have the trier of fact participating in rank speculation, which is impermissible and insufficient to defeat a motion for summary judgment.

COUNTERSTATEMENT OF FACTS RELEVANT TO OWEN'S CROSS APPEAL

Given that the parties to this appeal have each set forth their version of the material facts, in significant detail, in their respective Briefs already submitted to

this Court, Hurlbut and HHC will not merely repeat facts, again, here in this Brief. Instead, Hurlbut and HHC rely on the facts as set forth in their initial Brief, and will merely apply facts within the "Legal Argument" section of this Brief and cite to the Record.

LEGAL ARGUMENT

POINT I

OWEN HAS FAILED TO DEMONSTRATE THAT EACH OF THE IDENTIFIED PLAINTIFFS HAVE STANDING AND HAS FURTHER FAILED TO DEMONSTRATE THAT THE COMPLAINT CONTAINED THE REQUISITE STATUTORY ASSERTIONS TO AVOID DISMISSAL OF THE COMPLAINT

Hurlbut and HHC largely rely upon the law and the application of the facts as asserted in their initial Appellate Brief, as Hurlbut's and HHC's position on this issue is fully stated in their initial Brief and have nothing further to add after reviewing Owen's Brief.

While Hurlbut certainly denies any liability, Owen's assertion that if she could not bring claims then Hurlbut "would escape all accountability" is not a basis to determine legal standing. During the timeframe of the alleged wrongdoing, the Trustees of the Marital Trust (Mary Ross, Esq., and Jerry Rotenberg, CPA) had a right (as Trustees of the owner of ROHM at the time) to pursue Hurlbut for any alleged liabilities, but the Trustees (as fiduciaries) made the decision to not pursue Hurlbut, presumably because they were very aware of the history and purpose of

ROHM, the limited value of ROHM due to the fact that ROHM's purpose was to serve the nursing homes as a "break-even" company, the salary being paid to Hurlbut, the fact that the skilled nursing homes had no duty to ROHM or the Marital Trust, and the fact that the Marital Trust was also utilizing ROHM for the purposes of the significant administrative needs of the Marital Trust (free of charge for a significant period of time until the Trustees insisted on paying $6,000 per month to ROHM) (R, 35).

POINT II

OWEN HAS FAILED TO DEMONSTRATE AN ABSENCE OF TRIABLE ISSUES OF FACT ON THE ISSUES THAT THE SUPREME COURT INCORRECTLY GRANTED OWEN SUMMARY JUDGMENT

Hurlbut's and HHC's Appellate Brief identified material issues of fact requiring a trial that were ignored by the Supreme Court when rendering its Decision as identified in Hurlbut's and HHC's initial Brief, which: granted Owen's cross-motion for summary judgment relating to the issue of Hurlbut's salary; granted Owen's cross-motion for summary judgment relating to the issue of Hurlbut's actions after the nursing home clients lawfully terminated their business relationship with ROHM and the Supreme Court determined as a matter of law that Hurlbut misappropriated and/or underpaid for the company's assets; and which granted Owen's cross-motion for summary judgment and declared that Hurlbut

acted as a "faithless servant" as a matter of law thereby requiring him to disgorge his salary from 2017-2019 (R, 25-26).

In addition, it is Hurlbut and HHC's position that the Supreme Court's Decision was inconsistent, requiring a reversal, due to the fact that the Court declared that Hurlbut's salary (which was consistent with the salary paid to Hurlbut when Owen and Barbara Hurlbut were officers of ROHM and aware of his salary) to be "excessive", but then asserted that the Court did not know what a "reasonable salary" would have been and required a hearing to determine the reasonableness of the salary paid to Hurlbut (R, 23-24) and, similarly, declared that Hurlbut "underpaid" for assets of ROHM but then asserted that the Court did not know what price Hurlbut should have paid for assets of ROHM and required a hearing to determine a reasonable price for ROHM's assets (R, 24-25).

Owen continues to conveniently ignore the crucial fact that the nursing homes owed no duties to ROHM or the Marital Trust, and as soon as the nursing homes lawfully decided to terminate their business relationship with ROHM due to Owen's anticipated 50% ownership of ROHM (which would cause the homes to be in violation of New York's Public Health Law), such termination by the nursing homes triggered a sequence of events, including the fact that ROHM had very few other paying clients and could not afford payroll, had no means to continue operations, and causing ROHM very little value and limited assets (R, 2153).

While Owen continues to attempt to place the entirety of the blame on her brother, Owen also conveniently continues to ignore the history and purpose of ROHM, the fact that Owen (and Barbara Hurlbut) acted as officers of ROHM for years and continued to operate ROHM in the manner that Owen's father operated ROHM.

Nothing in Owen's Brief changes the undeniable fact that the termination was necessary to avoid violation of New York's Public Health Law, which was a driving factor in terminating their business relationship with ROHM. The content of Owen's Brief on this issue demonstrates that Owen still does not understand why the nursing homes had to terminate its business relationship with ROHM. Owen incorrectly argues that so long as the nursing home had a licensed operator at the home, ROHM did not have to be controlled by a licensed operator. See Owen Brief at pp. 45-46. The Supreme Court in its Decision acknowledged that it is not contested that it was "common in the [nursing home] industry" for these "back office" administrative service companies (owned by the same owners of the nursing homes) to help operate the homes and did so on a "break even" basis (R, 15). Given that these "back office" administrative service companies assist in the operation of the nursing homes, the Department of Health permits such "back office" administrative service companies to assist in the operation of the homes so long as the "back office" company is owned by the owner of the nursing homes

and is controlled by a licensed operator. In other words, because the Public Health Law requires the individual(s) charged with the responsibility for the general administration of a nursing home to be licensed, see 10 NYCRR 415.26; Public Health Law § 2895-a, any "back office" administrative company assisting in the operations of a nursing home must be controlled by the owner of the homes and a licensed operator (R, 2148-53). 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 Site, the nursing homes recognized Barbara's declining health and the increased tensions between Hurlbut and Owen and, as a result, the nursing homes lawfully terminated their relationship with ROHM to avoid Owen being in "control" of ROHM as 50% owner.. (R, 2148-53).

Therefore, there were no nefarious intentions behind the nursing homes' decisions to terminate the business relationship with ROHM. These facts create a question of fact requiring a trial to allow a trier of fact to determine whether the nursing homes had an absolute right to terminate the business relationship, thereby causing ROHM to have little-to-no value and triggered a series of events towards closing down ROHM (as opposed to Owen's position that Hurlbut created a "scheme to steal ROHM").

In her Brief, Owen has failed identify any real other corporate opportunity for ROHM after the nursing homes lawfully terminated the business relationship with ROHM. Owen's suggestion within her Brief that Hurlbut's nursing homes would continue to utilize ROHM if Hurlbut just resigned and ROHM secured "new management" to take over ROHM's business, including a "duly qualified nursing home operator" is rank speculation and absurd. For this to happen, Hurlbut would have had to agree to give up control over his own nursing homes, which would be a violation of the Public Health Law.

In addition, Owen mis-states the facts as they relate to the service agreements between ROHM and each of the separate nursing homes. Contrary to Owen's assertions, the separate nursing homes did not enter into service contracts on an annual basis – not when RHH owned the homes, not when Owen and Hurlbut owned the homes, and not when Owen and Barbara Hurlbut served as officers of ROHM. Upon information and belief, Owen is referring to the fact that each year there was a new calculation as to the monthly payment owed by each of the homes based upon the number of beds and other factors (R, 33-34, 2147-56), which did not require a new services agreement being negotiated and/or signed each and every year. The Services Agreement themselves go back as far as 1998 and notably some of these services agreements were signed when RHH owned the nursing homes: Avon (02/16/2006); Conesus (12/12/2006); Hamilton Manor

(01/01/2016); Hornell Gardens (01/01/2019); The Hurlbut (10/16/2002); Latta Road East (01/01/2016); Latta Road West (01/01/2016); Newark Manor (1998); Penfield Place (02/16/2006); Seneca Nursing & Rehab (01/01/2019); The Shore Winds: (01/01/2019); Woodside Manor (02/16/2006). (R, 3315-63). This further demonstrates the fact that ROHM was always operated in the same manner to service the nursing homes at a break-even rate (not a market rate), which was the way ROHM was operated when RHH owned the homes, when Owen and Hurlbut owned the homes, and continued after Hurlbut was the sole owner of the homes. Thus, the fact that Hurlbut did not re-negotiate the contracts does not demonstrate a breach of fiduciary duty, as to assume that the nursing homes would have accepted re-negotiated terms would be an act of rank speculation which, as discussed above, is impermissible. In fact, given that the nursing homes would need to be able to promptly terminate their business relationship with ROHM if ROHM was ever controlled by someone other than Hurlbut, it is definitive that the nursing homes would not have accepted revised terms to these agreements, which have been in existence for decades (R, 2150-53).

Once ROHM's most significant clients (the nursing homes) were gone, ROHM could not operate and had little-to-no value. Once inoperable, Hurlbut then paid for a number of the assets that ROHM had no use for, including furniture (desks, credenzas, chairs, bookshelves, filing cabinets), electronics (computers,

servers, tablets, printers, and related equipment), and a vehicle (2017 Honda CRV) for a total purchase price of $85,538.19. Notably, there has been no argument by Owen that this purchase price of $85,538.19 for the identified assets purchased by Hurlbut was unreasonable or unfair.

Owen also ignores the fact that the employees of ROHM were not required to stay at ROHM, nor could they, as ROHM could not afford to make payroll without the nursing homes' monthly payments. Ignoring for a moment that it is undisputed that ROHM could not afford payroll after the nursing homes terminated their business relationship with ROHM, Owen argues that ROHM could have continued to operate as a "property manager" because it had clients that owned property. See Owen Brief at p. 33-34. Upon information and belief, Owen is referring to the fact that ROHM provided services for RHH Mendon, which was yet another company previously owned by RHH, and then was transferred from RHH's Estate to the Marital Trust (R, 634). As a result, ROHM was, again, providing a benefit to the Marital Trust and acting to provide administrative services to the Marital Trust, and did not have a list of other property-owning clients paying significant fees to ROHM.

Owen ignores the fact that the Marital Trust derived a significant benefit from Hurlbut as President causing ROHM to perform all of the necessary operations of the Marital Trust, which were significant and which Hurlbut had

ROHM provide free of charge to the Marital Trust for years[1] (until the Trustees of the Marital Trust finally insisted on paying a fee to ROHM of $6,000 per month for the services provided to the Marital Trust) (R, 35-36). Again, the Trustees (Mary Ross, Esq. and Jerry Rotenberg, CPA, who served as such until May 20, ,2020) were aware of ROHM's operations as a "break-even" company, the salary paid to Hurlbut, and that the Marital Trust derived a benefit by utilizing ROHM to provide services to the Marital Trust and to RHH Mendon, which was owned by the Marital Trust (R, 35).

A. The Supreme Court incorrectly determined as a matter of law that the salary paid to Hurlbut was "excessive" where there were questions of fact precluding summary judgment requiring a hearing.

Hurlbut and HHC largely rely upon the content of their initial Appellate Brief on this issue, and it is their continued position that given the facts of this case, as detailed in their initial Brief, there are certainly a question of fact as to the reasonableness (or fairness) of the salary paid to Hurlbut by ROHM for the years in question. Ironically, Owen and Barbara Hurlbut previously and as officers of ROHM for decades approved (or did not object to) the salaries paid by ROHM to Owen and to Hurlbut by ROHM, which were determined by the amount of work

[1] Owen and Hurlbut had an agreement that they could issue payments from the Marital Trust for Barbara Hurlbut up to $45,000.00 each and every month so that she was properly taken care of and, as a result, did not need any additional income as there was sufficient assets in the Trust to make such payments. (R, 2118-21).

each of them performed (R, 2150-51, 2176-82). Presumably, Owen and Barbara Hurlbut deemed such salaries to be reasonable compensation for the years they were officers of ROHM, but now Owen is suing her brother asserting that his salary from 2017-2019 was "excessive" despite the fact that what Hurlbut was paid as a salary in 2017, 2018, and 2019 was consistent with his prior salaries approved by them.

Certainly, ROHM, which has been servicing multiple Hurlbut Family-owned nursing homes since ROHM was created by RHH, and since Owen, Barabara Hurlbut, and Hurlbut were officers, should be considered as a "comparable company" when determining whether the salary paid to ROHM's President is reasonable (or fair). Notably, because ROHM was always operated as a "break-even" company, the goal was for the nursing home clients to pay into ROHM enough assets to pay for all of the administrative services needed by said nursing homes, including paying salaries of ROHM's officers who were also owners of the nursing homes (who assisted with the operation of the homes through ROHM, the "home office" as created by Owen's and Hurlbut's father). In other words, ROHM's income each year was dictated by the needs of the nursing homes by applying a calculation based upon the number of beds and other factors. (R, 34). Undoubtedly, a portion of the payment calculation made by the nursing homes and

ROHM were intended to pay Hurlbut as owner and controller of the homes his annual salary.

Given the facts of this case, a trier of fact should be permitted to determine the reasonableness (or fairness) of Hurlbut's salary paid by ROHM from 2017-2019 to Hurlbut's salary paid by ROHM from after RHH's death and during the years Owen and Barbara Hurlbut were officers of ROHM and approved Owen's and Hurlbut's salaries. ROHM is a "back office" administrative service provider to nursing homes, specifically, for decades prior to 2017. Therefore, a jury should be permitted to compare the salaries paid to ROHM's president in the past to the salary paid to Hurlbut for the years 2017-2019 to determine whether Hurlbut's salary during that timeframe was "excessive." Even the Hon. Christopher S. Ciaccio admitted within his Decision that the Court was not aware of what salary would be "reasonable" requiring a hearing. There is certainly a question of fact on this issue requiring a trial to determine whether Hurlbut's salary was reasonable.

With regard to the Court's determination of an alleged breach of fiduciary duty as it pertains to Hurlbut's salary, whether Hurlbut was treating the individual shareholders fairly is a question of fact, especially when one takes into consideration how unfair it is that Owen and Barbara Hurlbut as officers of ROHM for years previously authorized (or at least did not object to) the salary paid to Hurlbut (and to Owen) prior to Owen's sale of her interest in the nursing homes

(R, 2150-51), only to subsequently commence a lawsuit against Hurlbut alleging that his salary from 2017-2019 is now somehow "excessive" even though it was consistent with what he was paid prior to 2017.

B. The Supreme Court incorrectly determined as a matter of law that Hurlbut misappropriated or underpaid for company assets where there were questions of fact precluding summary judgment requiring a hearing.

Hurlbut and HHC largely rely upon the content of their initial Appellate Brief on this issue, and it is their continued position that given the facts of this case, as detailed in their initial Brief, there are certainly a question of fact as to the reasonableness (or fairness) of Hurlbut's actions once the nursing homes (which owed no duties to ROHM or to the Marital Trust or to Owen) determined that they had to terminate their business relationship with ROHM (and for good and lawful reasons) (R, 2150-53). It is undisputed that ROHM's purpose and history was to act as the "home office" for the several nursing homes owned by the Hurlbut family over the years, and that the income received by ROHM was generated largely by payments by the nursing homes to ROHM for "back office" administrative services. It is undisputed that once the nursing homes gave lawful notice to ROHM that they were no longer going to utilize ROHM, ROHM could not make payroll. This business relationship termination then triggered a string of events that was unavoidable (as ROHM no longer had the clients that kept ROHM operational).

While Owen's Brief attempts to assign a nefarious intention by Hurlbut on everything that occurred, and Owen refuses to be held accountable for her actions and omissions as a prior officer of ROHM, the facts related to this issue certainly raise a question of fact requiring a trial on whether or not Hurlbut misappropriated or underpaid for ROHM's assets after the nursing homes terminated the business relationship with ROHM.

The formal valuations of ROHM over the years were as follows: (1) a valuation completed at the time of RHH's death in March of 2013 ($855,000); (2) a valuation completed at the time of Barbara Hurlbut's death (for the purposes of filing the required Estate Tax returns)($737,000); (3) the Accounting recently filed by the original Co-Trustees of the Marital Trust, Jerry Rotenberg and Mary Ross ($959,000) (R, 2179). In addition, the longtime tax advisor and accountant for RHH and ROHM over the years, Robert Nasso, CPA, submitted an affidavit and asserted that he provided documents and information to the valuation consultants (StoneBridge), and he has reviewed the initial valuation at RHH's date of death (2013) and the subsequent amount reported at Barbara Hurlbut's date of death (2020) referenced in the paragraph above and they appear 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 (R,

2179-80). Notably, and as raised in Hurlbut's and HHC's initial Brief, Owen as Executor of the Estate of Barbara Hurlbut have filed and relied upon the Estate's Estate Tax Return filing and have asserted to the IRS and NYS Dept. of Taxation and Finance that ROHM's valuation at the time of Barbara Hurlbut's death in 2020 was $737,000 (not the multi-millions of dollars that Owen and the Estate are now claiming ROHM was worth). As a result, Owen should be precluded from now asserting in this lawsuit that ROHM actually has a value of multi-millions of dollars.

It is undisputed that Hurlbut purchased furniture, electronics, and a vehicle from ROHM for $85,538.19 (R, 240). These items were certainly only a portion of the valuations of ROHM, but it appears that the Supreme Court determined as a matter of law that Hurlbut misappropriated or underpaid for assets of ROHM because the $85,538.19 is much less than the pretty-consistent valuation of ROHM over the years in the $737,000 to $959,000 range. However, the Court failed to recognize the fact that a significant portion of the "value" of ROHM was the value of the life insurance policy ROHM owned on Hurlbut's life. (R, 1776).

Owen also argues that there was misappropriation because of an alleged diversion of a corporate opportunity; however, such a position completely ignores the string of cases cited by Hurlbut in the initial Appellate Brief that 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, it is undeniable that the "third-party" (in this case, the skilled nursing homes owned and controlled by Hurlbut) would not have done business with ROHM unless Hurlbut remained in complete control of ROHM, and once the nursing homes anticipated that Owen could soon become 50% owner of ROHM and, therefore, interfere with the operations of the nursing homes through interfering with the services provided by ROHM to the homes, ROHM did not have an expectancy in a continued corporate opportunity. Therefore, Hurlbut did not misappropriate this corporate opportunity as the nursing homes' allegiance was lawfully required to be to Hurlbut, not to ROHM.

Owen appears to rely upon two cases in support of her position as Owen used them as rule illustrations in her Brief; Greenberg v. Greenberg, 206 A.D.2d 963 (4th Dep't 1994) and Lirosi v. Elkins, 89 A.D.2d 903 (2d Dep't 1982). However, such reliance is misplaced as these cases are easily distinguishable.

In Greenberg, supra, the defendant unilaterally seized the tangible and intangible assets of Madison Cabinet (the old company), transferred them to his new corporation, Meyer's Cabinet, and used the new company as the vehicle for usurping the corporate opportunities of the old company, in breach of his fiduciary duty to Madison Cabinet and its other shareholders. In the present case, ROHM did not have a lawful expectation of the corporate opportunity for the reasons stated above, and the skilled nursing home clients of ROHM lawfully provided the required notice to ROHM before severing their relationship with ROHM, which caused ROHM to have little-to-no value and ROHM could not even afford payroll as the homes created most of ROHM's income. ROHM was no longer operational, and Hurlbut then purchased specified assets of ROHM for those assets' fair market value.

In Lirosi, supra, the defendant started a new corporation and slowly started transferring assets from the old corporation to the new corporation to directly compete with the old. The Lirosi case is different from the facts in the present case as there is no indication in the Lirosi case that the clients had a lawful allegiance to the defendant and, therefore, Lirosi misappropriated a corporate opportunity while the old corporation still had value and the financial ability to operate. Again, in the present case, once the nursing homes terminated their business relationship with ROHM, there was no reasonable expectancy in any corporate opportunity as the

homes owed no duty to ROHM or the Marital Trust and lawfully had to follow the nursing homes' licensed operator and owner to avoid violation of New York's Public Health Law.

Owen's argument that ROHM could have secured other nursing home clients blatantly ignores the fact that ROHM could not afford payroll once the nursing homes lawfully terminated their business relationship with ROHM, and further ignores the reality that these "back office" administrative services companies that are created by nursing home owners to provide services to their collection of nursing homes need to be owned and/or controlled by the owner of the same nursing homes (and they cannot be controlled by non-owner/non-Administrator) (R, 2148-49).

With respect to the issue of any trademark owned by ROHM, the Court appointed Tompkins as Successor Trustee in June of 2020 (R, 239) and Hurlbut resigned as officer of ROHM on May 13, 2022 (R, 243). Tompkins assigned ownership of ROHM to Owen and Hurlbut on September 8, 2022 (R, 244). Upon Hurlbut's resignation (which he had a right to do), he was merely a 50% owner of ROHM, as was Owen (which means they had the same legal authority over ROHM at that time). ROHM's trademarks did not expire until June of 2023 (more than a year after Hurlbut resigned as President of ROHM. Hurlbut obviously did not have lawful authority to renew the trademark after his resignation as President of

ROHM, and Owen had just as many rights as 50% owner of ROHM as Hurlbut did at that time, and Owen decided not to take any action with regards to any trademarks owned by ROHM (R, 2154). In any event, the trademark was specific to the operation of Hurlbut's nursing homes, which were no longer clients of ROHM, limiting the value of said trademark. When Hurlbut saw that the trademark owned by ROHM expired (which is public record), Hurlbut purchased the trademark (R, 2154). Owen (or anyone else for that matter) had the lawful right to purchase the expired trademark (R, 2154). This is not a misappropriation, and Hurlbut did not "steal" a trademark that had expired and was available for anyone to purchase.

With regards to the Court's determination of an alleged breach of fiduciary duty as it pertains to Hurlbut's actions after the nursing homes lawfully terminated their business relationship with ROHM, including what Hurlbut paid for specified assets of ROHM, whether Hurlbut was treating the individual shareholders fairly is a question of fact. The Hon. Christopher S. Ciaccio even admitted in his Decision that a hearing was necessary to determine the value of ROHM. (R, 26). Similar to the salary issue, this inconsistent Decision which asserts that the Court does not know the value of ROHM, but then declares that Hurlbut misappropriated or underpaid for the assets warrants a reversal of the Court's Decision as a trial is

necessary to determine whether Hurlbut misappropriated or underpaid for certain assets.

C. The Supreme Court incorrectly determined as a matter of law that Hurlbut acted as a "faithless servant" thereby requiring him to disgorge his salary from 2017-2019 where there were questions of fact precluding summary judgment requiring a hearing.

Hurlbut and HHC largely rely upon the content of their initial Appellate Brief on this issue, and it is their continued position that given the facts of this case, as detailed in their initial Brief, there are certainly a question of fact as to whether Hurlbut acted as a "faithless servant" thereby requiring him to disgorge his salary earned from 2017-2019, and a trial is necessary on this issue and the other issues referenced above.

The Supreme Court based its Decision on the Court's determination that Hurlbut paid himself an "excessive" salary (which, for the reasons stated above is a question for the trier of fact), that Hurlbut "terminated the employees" of ROHM (which ignores the fact that ROHM could not make payroll after the nursing homes lawfully gave notice to ROHM that they were terminating the business relationship), that Hurlbut "took over the pension plan" (assets which ultimately belonged to the employees), and that Hurlbut "appropriated the trademark" (which, as explained above, expired when Hurlbut was no longer an officer of ROHM). (R, 25-26). The Court's Decision ignores that ROHM's value was diminished to little-to-nothing when the nursing homes (who owed no duty to ROHM or the Marital

Trust) lawfully terminated their business relationship with ROHM. These issues all present questions of fact for a trier of fact, and summary judgment was incorrectly awarded by the Supreme Court on this issue.

Nothing in Owen's Brief demonstrates an absence of material fact sufficient to award Owen summary judgment on the issue of the alleged breach of fiduciary duty, and the Supreme Court's Decision on this issue should be reversed.

POINT III

THE SUPREME COURT WAS CORRECT IN GRANTING HURLBUT AND HHC SUMMARY JUDGMENT RELATING TO OWEN'S CLAIM THAT BETWEEN 2017 AND 2019 HURLBUT AS PRESIDENT OF ROHM "UNDERCHARGED" THE NURSING HOMES THAT UTILIZED ROHM FOR "HOME OFFICE" ADMINSITRATIVE SERVICES DUE TO THE UNDENIABLE CONCLUSION THAT OWEN'S CLAIM THAT ROHM WOULD PAY "MARKET RATES" IS PURELY SPECULATIVE AND AGAINT THE IRREFUTABLE EVIDENCE, WHICH IS IMPERMISSIBLE TO DEFEAT SUMMARY JUDGMENT

It is well-settled law that a jury's participation in "rank speculation" to arrive at a verdict is contrary to law and will be set aside on appeal. See, e.g., Baudenbach v. Schwerdtfeger, 224 A.D. 314 (3d Dep't 1928). Similarly, motions to set aside a verdict and for judgment as a matter of law will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial. Thomas v. County of Westchester, 222 A.D.3d 799 (2d Dep't 2023)(citing Blair v. Coleman, 211 A.D.3d 671, 672 (2d Dep't

2022)(emphasizing that a jury verdict must be based on more than mere speculation or guesswork to survive a motion to set aside the verdict or for judgment as a matter of law).

In the present case, the Supreme Court granted Hurlbut and HHC summary judgment relating to Owen's claim that, despite the well-established history and purpose of ROHM to operate as a breakeven company for the benefit of the skilled nursing homes, Hurlbut as President of ROHM should have charged the nursing homes "market rates" for the services ROHM was providing to the homes (R, 23). The Supreme Court in its Decision correctly noted that "[i]t is not contested that such an arrangement [i.e., operating numerous nursing homes through a company performing "back-office" administrative services that was meant only to "break-even" and show minimal or no profit] was common in the industry and had certain tax advantages" (R, 15). The Supreme Court noted that Owen "never complained about the 'break-even' arrangement when she was a minority owner of the skilled nursing facilities…." (R, 21).

The Supreme Court correctly determined that the way in which Owen has framed this issue in her Complaint and subsequent arguments does not make economic sense because "it is common sense and experiences that vendors do not have the luxury to pick and choose the rates they want to charge" and, instead, "[t]hey first secure a contract to render services based upon an proposed rate" and

"[i]f the prospective client does not like the price, he will go elsewhere for services." (R, 22). The Court in finding in favor of Hurlbut and HHC on this issue correctly determined that it is completely speculative that the skilled nursing homes owned by Hurlbut would have paid "market rates" for services and, frankly, it is "not hypothetical to discern what [Hurlbut] would have done" and the history of the skilled nursing homes at issue (when Owen's father owned the homes, then when Owen and Hurlbut owned the homes, and then when Hurlbut solely owned the homes) never paid fair market rates for the services provided by ROHM (and there were tax reasons for this) (R, 22-23).

Owen has not produced any evidence to raise a material question of fact to demonstrate that a jury determination in favor of Owen on this issue would be anything but rank speculation, which is not permitted. Owen cannot produce any witness to rebut the testimony of Hurlbut who is the sole owner of the nursing home clients of ROHM and therefore is the sole decision-maker for the homes, who irrefutably testified that his homes would not pay increased rates to ROHM, as to do so would not make any financial sense (as also noted by the Hon. Christopher S. Ciaccio in his Decision) (R, 22-23). Hurlbut's testimony on this issue is not only irrefutable, but consistent with the undisputed purpose and history of ROHM as established by Owen's father and as operated by Owen's father, by

Owen and Hurlbut, and by Hurlbut (which was always approved by the officers of ROHM, including Owen and Barbara Hurlbut).

Owen attempts to raise a triable issue of fact by arguing that Hurlbut would have permitted his nursing homes to pay increased rates because Hurlbut is now paying more in revenue to HHC (in fact, 31.3% higher); however, and as the Hon. Christopher S. Ciaccio notes in his Decision, Owen's argument carries no weight for several reasons (*e.g.*, the money being paid to HHC comes from the nursing homes Hurlbut Owns and HHC is solely owned by HHC, so it is his own money whether the money stays with the homes or whether the money is paid to HHC, and what Hurlbut decides to pay to HHC after HHC was created is irrelevant as they were made after ROHM's agreements for services to be provided to the nursing homes were terminated) (R, 23).

One fact that the Supreme Court failed to note and which is ignored by Owen in her Brief, which is the driving reason why Hurlbut now permits his nursing homes to pay increased rates to HHC (that was not available to the nursing homes when utilizing ROHM), is contained in the submitted affidavit of Robert Nasso, CPA (who acted as the accountant and tax advisor for RHH, for ROHM, for the nursing homes, and for Hurlbut) (R, 2180). More specifically, as explained in Robert Nasso's affidavit, HHC was specifically set up to generate taxable income that could be used for the pass-through entity tax election process, which was quite

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 (and HHC was the only company owned by Hurlbut that could take advantage of this program, so Hurlbut chose to utilize HHC in this manner (R, 2180). Thus, HHC was set up differently than ROHM as the tax rules that applied to HHC are different than the tax rules previously applied to ROHM (R, 2180-81).

The Moser case, supra, is also applicable here and Owen does not distinguish this case in her Brief. Evidence that a third-party would not have done business with a corporation, but only the employee or 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. 42 A.D.3d 731, 735-36 (3d Dep't 2007). Owen could not have a legitimate expectancy in a business opportunity of charging increased rates to a client that would refuse to pay increased rates. Not only does the history and purpose of ROHM demonstrate there was no legitimate expectancy for a "profit" (as ROHM was always a "break-even" company), but given all the reasons stated by Hurlbut in his submissions and by the Court in its Decision, the nursing homes would have never paid "market rates" to ROHM and, therefore, the Court was correct in dismissing this cause of action as there was no corporate opportunity to be had.

Given the above, Owen's argument that because the skilled nursing homes (wholly owned by Hurlbut) subsequently paid HHC (wholly owned by Hurlbut) higher rates is of no consequence and certainly fails to raise a triable issue of fact. The Hon. Christopher S. Ciaccio, in his Decision, correctly asserted that "even giving the benefit of every reference to [Owen]" the Court appropriately recognizes the reality of the situation and, as a result, correctly granted summary judgment to Hurlbut and HHC and summarily dismissed Owen's causes of action. The Supreme Court's Decision on this issued should be affirmed.

While it is certainly Hurlbut's position that the Court's granting of summary judgment to Hurlbut and HHC on this issue was correct, in the event that this Appellate Division disagrees, Owen's cross-motion seeking summary judgment on this issue should certainly be denied as the above-referenced facts (and the facts asserted in Appellants' initial Appellate Brief) would raise a material question of fact on the issue of whether the nursing homes owned by Hurlbut would have paid "market rates" for "back office" administrative services if ROHM raised the rates.

CONCLUSION

For each foregoing reasons, Defendants-Appellants-Respondents respectfully request that this Appellate Division reverse the Supreme Court's Decision and Order in so far as it: denied Defendants-Appellants motion for dismissal of the Plaintiff-Respondent's First through Twelfth, Nineteenth, and

Twentieth causes of action, for lack of standing; granted Plaintiff-Respondent's cross-motion for summary judgment relating to the issues of the Defendant-Appellant's salary; granted Plaintiff-Respondent's cross-motion for summary judgment relating to the issues of the Defendant-Appellant's alleged "misappropriation" or underpayment for the company's assets; and granted Plaintiff-Respondent's cross-motion for summary judgment and declared that the Defendant-Appellant acted as a "faithless servant" as a matter of law thereby requiring him to disgorge two years of salary.

Defendants-Appellants-Respondents also respectfully request that this Appellate Division affirm the Supreme Court's Decision and Order in so far as it granted Defendants-Appellants-Respondents summary judgment relating to Plaintiff-Respondent-Appellant's claim that, despite the well-established history and purpose of ROHM to operate as a breakeven company for the benefit of the skilled nursing homes, Hurlbut as President of ROHM should have charged the nursing homes "fair market value" for the services ROHM was providing to the homes.

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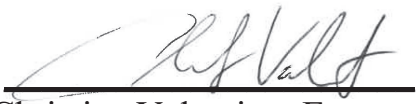
PULLANO & FARROW

By: 

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