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

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

PRELIMINARY STATEMENT

Between 2017 and 2019, ROHM was owned by the Marital Trust.[1] That meant that ROHM's president had a legal duty to operate the business for the benefit of the Marital Trust's beneficiaries—namely, RWH's elderly mother, who was entitled to all Marital Trust income during the pertinent time period. Instead, RWH admittedly operated ROHM as a "break even" entity, meaning that he charged his Hurlbut Nursing Homes just enough in management fees to cover ROHM's expenses and to pay himself. That meant that RWH maximized his own profits at the expense of ROHM's beneficial shareholders—a classic case of self-dealing and breach of fiduciary duty.

Supreme Court erred in dismissing Owen's claims to the extent they are based on RWH's operation of ROHM as a breakeven entity between 2017 and 2019 (the "Undercharging Claims"). Defendants bore the burden to establish the entire fairness of the self-interested transactions between ROHM and the Hurlbut Nursing Homes. Defendants do not even acknowledge their burden, which their pretextual, post-hoc justifications fall far short of satisfying.

Defendants next attempt to flip the entire fairness standard on its head, suggesting that Owen had the burden to affirmatively prove that the challenged

[1] Capitalized terms have the meanings ascribed to them in the Brief for Plaintiff-Respondent-Appellant ("Pl. Br.") (Doc. 24).

transactions were unfair. Owen has no such burden. Yet, even if she did, it would be amply satisfied here because the uncontroverted record evidence establishes that ROHM did not charge fair-market rates for the services it provided to the Hurlbut Nursing Homes between 2017 and 2019.

This Court should therefore reverse Supreme Court's order dismissing the Undercharging Claims and should grant summary judgment in favor of Owen as to liability[2] on those claims. Alternatively, at a minimum, this Court should reinstate the Undercharging Claims so that Owen can present them to a jury.

ARGUMENT

OWEN IS ENTITLED TO JUDGMENT AS MATTER OF LAW AS TO LIABILITY ON THE UNDERCHARGING CLAIMS, OR, AT A MINIMUM, REINSTATEMENT OF THOSE CLAIMS.

A. Defendants improperly flip the entire fairness standard on its head.

It is well settled Court of Appeals precedent that self-interested directors who engage in interested transactions bear the burden to "prove good faith and the entire fairness" of the transaction (*Alpert v 28 Williams St. Corp*., 63 NY2d 557, 568 [1984]; *see also Marx v Akers*, 88 NY2d 189, 202 [1996]). Defendants do not deny

[2] RWH's argument that the decision underlying this appeal is "inconsistent" (Doc. 27, p. 6) lacks merit. Owen moved for partial summary judgment *as to liability only*, with damages to be determined at a later date. Therefore, when Supreme Court stated that a hearing would be required to determine, for example, the reasonableness of RWH's salary (R. 23-24), Supreme Court was referring to a determination as to the quantum of damages, not liability.

that the challenged transactions—between RWH's Hurlbut Nursing Homes, on the one hand, and ROHM, on the other—were self-interested. Yet, Defendants' reply brief does not even attempt to grapple with the entire fairness standard, not once mentioning "good faith" or "entire fairness" (Doc. 27). Instead, Defendants attempt to flip the entire fairness standard on its head, and place all blame on Owen. They accuse Owen of (1) ignoring the history and purpose of ROHM; (2) engaging in speculation as to whether the nursing homes would have paid ROHM higher rates; and (3) failing to complain in earlier years "about the 'break-even' arrangement" (Doc. 27, Def. Reply Br. at Point III). At no point do Defendants seek to demonstrate RWH's good faith or the entire fairness of his self-interested transactions to the Marital Trust beneficiaries.

As set forth in her opening brief, Owen does not dispute that ROHM may have been set up in the 1970s as a break-even entity. This was at a time when ROHM and the Hurlbut Nursing Homes were collectively under the ownership and control of the parties' father, the late Robert H. Hurlbut, who owed himself no fiduciary duties. He could therefore direct and realize his profits as between the multiple businesses he owned. Unlike his father, RWH assumed fiduciary obligations to his mother and sister (*see* EPTL § 11-2.1 [a] [1], [g]; *Matter of Hubbell's Will*, 302 NY 246, 255–256 [1951]; *Alpert*, 63 NY2d at 568). RWH therefore assumed the burden of proving that his decision to continue directing ROHM's profits to himself was entirely fair

to his sister and mother. Under these circumstances, it is no wonder that he wishes to avoid even mentioning the entire fairness standard.

There is no merit to Defendants' suggestion that they can avoid liability by relying on RWH's self-serving assertion that the Hurlbut Nursing Homes would not have agreed to pay higher rates to ROHM (Doc. 27, Def. Reply Br. at 2, 25). One cannot avoid liability for a self-interested transaction so easily. Under *Alpert*, the entire fairness of the transaction must be demonstrated, including both procedural fairness ("fair dealing") and substantive fairness ("fair price") (63 NY32d at 572). RWH's assertion that the Hurlbut Nursing Homes would have taken their marbles and gone home if faced with any higher of a price establishes neither the fairness of the procedure nor the fairness of the price. Moreover, RWH's self-serving assertion is disproven by the fact that when Hurlbut Health took over for ROHM in 2020, it began charging rates that were about 30% higher than those previously charged by ROHM (R. 462-463)—demonstrating both that ROHM had been undercharging and that the Hurlbut Nursing Homes were willing to pay higher rates.[3]

Defendants' argument about ROHM's purported lack of an "expectancy" in its customer relationship with the Hurlbut Nursing Homes (Doc. 27, Def. Reply Br. at 27) similarly misses the mark. The doctrine of "corporate opportunity" is about

[3] Defendant's unsupported assertion that the Original Trustees "were aware" that RWH was running ROHM as a "break-even" enterprise (*id*., p. 12) fails for the same reasons (*see also* Doc. 24, Pl. Br. at 56).

distinguishing between opportunities that belong to a corporation (thus precluding corporate fiduciaries from exploiting those opportunities for their own separate benefit) and those that are too intangible to warrant any such protection (*see Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246–248 [1st Dept 1989]). ROHM's customer relationships with the Hurlbut Nursing Homes were plainly corporate opportunities belonging to ROHM, as evidenced by the existence of service contracts (R. 315-363). The corporate opportunity doctrine has nothing to do with transactional fairness. Defendants' reliance on *Moser v Devine Real Estate, Inc. (Florida)*, which did not involve self-interested transactions or the application of the entire fairness standard (42 AD3d 731, 731 [3d Dept 2007] [analyzing misappropriation of corporate opportunities by an independent contractor]), is therefore misplaced.

Defendants bore the burden of proving the good faith and entire fairness of the self-interested transactions. The record contains no evidence whatsoever that RWH adopted any process at all to simulate arms' length-transactions, or otherwise adopt a "fair dealing" process as required. Nor is there any record evidence that RWH arranged for ROHM to receive a "fair price" as required. Instead, RWH simply asserts that he was entitled to charge whatever he wanted for ROHM's services because he was the "sole decision-maker" for the Hurlbut Nursing Homes (Doc. 27,

Def. Reply Br. at 25). This argument makes a mockery of the entire fairness standard and demonstrates why Owen is entitled to summary judgment as to liability.

B. RWH admits that he acted out of his own self-interests, without regard for those to whom he owed fiduciary duties.

RWH's brief contains astonishing admissions that between 2017 and 2019, he utilized his position to unfairly enrich himself to the detriment of ROHM and the beneficiaries of the Marital Trust: his elderly mother and sister.

RWH admits, as he must, that after he transferred ROHM's entire business to his wholly owned entity HHC, he arranged for his Hurlbut Nursing Homes to pay HHC management fees that were 31.3% higher than the fees they had paid to ROHM (Doc. 27, Def. Reply Br. at p. 26). In her opening brief, Owen pointed out that RWH was willing to pay those higher rates only after ensuring that he, rather than his mother and sister, would receive the profits (Doc. 24, Pl. Br. at 57-58). Rather than trying to explain the entire fairness of this choice, RWH doubles down, frankly admitting that he was willing to pay higher rates so as those profits lined his own pockets, writing:

> "the money being paid to HHC comes from the nursing homes Hurlbut [o]wns and HHC is solely owned by [RWH], 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"

(Doc. 27, Def. Reply Br. at 26-27 [further arguing that RWH benefitted himself with a tax advantage]). RWH offers no explanation whatsoever for the blatantly false representation he made in his original affidavit: that he operated HHC as a break-even entity (R. 42 [falsely attesting under oath that HHC was operating "using a similar 'breakeven proposition' that ROHM utilized for decades"]).

RWH further admits that part of the management fees the Hurlbut Nursing Homes paid ROHM between 2017 and 2019 was "intended to pay [RWH] as owner and controller of the [Hurlbut Nursing Homes]" (Doc. 27, Def. Reply Br. at 13-14). In other words, RWH admittedly used the self-interested service-fee arrangement to subsidize his own compensation. This shows that RWH set the management fee rates with the express purpose of paying and enriching himself, while ensuring that there would be effectively no profits to benefit ROHM's beneficial shareholders, including his sister and his elderly mother, to whom he owed fiduciary duties of care and loyalty.

As supposed support for setting ROHM's rates as low as he wanted, RWH argues that he was permitted to terminate those services contracts with ROHM at any time. But he himself is to blame for ROHM's lack of any standard contractual protections against abrupt termination (R. 460). As RWH admits, "some of these services agreements were signed when RHH owned the nursing homes" (*id.* at 9)—*i.e.*, prior to RWH assuming his fiduciary duties to his mother and sister. Although

RWH admittedly modified the services rates on an annual basis, he chose to leave all of the other provisions in place (Doc. 27, Def. Reply Br. at 9-10).

In further support of his argument that he could essentially run ROHM however he pleased, RWH continues to improperly invoke the Public Health Law. At first, RWH argued that ROHM was required to be managed by a licensed "operator"—of which he could deprive ROHM by resigning (Doc. 20, Def. Opening Br. at 35). Owen soundly refuted RWH's argument, showing that the services provided by ROHM did not require any such license, and that RWH invoked this argument as an ill-conceived post-hoc rationalization (Doc. 24, Pl. Br. at 45-46). Indeed, ROHM's services agreements with the Hurlbut Nursing Homes included provisions that expressly addressed this issue, stating that: "The parties hereto acknowledge that Rohm is not a licensed operator …. None of the services provided herein … shall constitute the management or acceptance of a responsibility for a facility or licensure under Article 28 of the Public Health Law…." (R. 328). Unable to rebut Owen's arguments, RWH instead tries to move the goalposts. RWH now argues—again without offering any support—that Department of Health requires any back office administrative services to be performed, not merely by a "licensed operator," but by the same licensed operator who owns the nursing homes (Doc. 27, Def. Reply Br. at 7-8)—*i.e.*, himself. Unsurprisingly, RWH cites no authority which supports this self-serving assertion.

For the foregoing reasons, Owen is entitled to partial summary judgment on the Undercharging Claims. At the very least, Supreme Court should have denied Defendants' motion for summary judgment dismissing the Undercharging Claims because Owen raised at least a triable issue as to entire fairness. 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.

C. Even assuming that the burden shifted to Owen, she met her burden through uncontroverted record evidence and expert testimony.

As set forth above, Defendants bore the burden to prove the good faith and entire fairness of the challenged self-interested transactions. Even if that burden shifted to Owen, she amply established that the transactions were unfair to ROHM.

To begin with, Defendants do not dispute that ROHM provided services for which it was never compensated at all. The scope of ROHM's services to the Hurlbut Nursing Homes were set forth in a series of services agreements (R. 315-363). These agreements generally required ROHM to provide "[g]eneral financial services" and "[d]ebt collection services," and other specified services (R. 458). Yet, in reality, ROHM provided many additional services, such as training, marketing, and information technology services (R. 427-432). Owen's expert witness, Terence L. Griswold, opined that, based on his review of ROHM's financial records, ROHM

provided these additional services without compensation (R.458-459). Defendants offered no proof to rebut Griswold's opinion.

In addition, Owen presented unrebutted testimony that ROHM owned certain valuable trademark rights, including a federal registration for the mark HURLBUT CARE COMMUNITIES (R. 1388). RWH allowed his Hurlbut Nursing Homes to use ROHM's intellectual property without paying any licensing fees (R. 459). Despite admitting that the trademarks were valuable to the Hurlbut Nursing Homes (Doc. 27, Def. Reply Br. at pp. 20-21), Defendants offered no evidence to rebut Owen's showing that RWH made no attempt to pay ROHM for the use of its marks.

As for the services that ROHM did charge for, Owen presented unrebutted expert testimony from Mr. Griswold, who opined that an arms-length transaction between ROHM and the Hurlbut Nursing Homes would have resulted in management fees that were 20% to 30% higher (R. 463). Contrary to Defendants' suggestion, this is not mere speculation. It is uncontroverted expert analysis that is supported by record evidence, including (i) industry benchmark data of similar companies (R. 460, 519-521); (ii) a finding in the 2014 valuation report for ROHM, which noted that ROHM charged its customers below-average management fees (R. 534); and (iii) the fact that in 2020 Hurlbut Health actually did charge, and the Hurlbut Nursing Homes did in fact pay, management fees that were more than 30% higher (R. 462-463, 596).

Defendants offered no expert testimony of their own to rebut Mr. Griswold's analysis. Nor do they dispute the underlying facts on which Mr. Griswold's analysis is based. Instead, Defendants rely solely on RWH's self-serving assertion that he would never have paid a fair-market rate for the services his Hurlbut Nursing Homes obtained from ROHM. Defendants' argument not only fails to demonstrate the good faith and entire fairness of the challenged transactions, but constitutes an admission that the rates actually charged were *unfair* because they were sub-market.

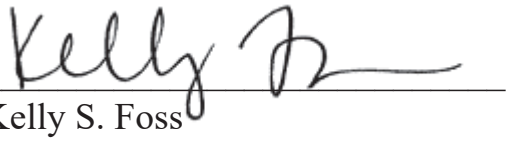
Because Defendants' own concessions and the undisputed facts are sufficient to establish liability, this Court should reverse and direct entry of summary judgment in favor of Owen as to the Undercharging Claims. At a minimum, this Court should reinstate the Undercharging Claims so that they can be tried.

CONCLUSION

For the foregoing reasons, Owen requests that this Court reverse the dismissal of Owen's Undercharging Claims, grant her partial summary judgment as to RWH's liability on those claims, and grant such other and further relief as this Court may deem just and proper.

Dated: January 6, 2025

Respectfully submitted,

By: 

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