SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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GARY GANZI, CLAIRE BREEN, and GARY GANZI and CLAIRE BREEN, as Attorneys-in Fact for the Estate of CHARLES COOK, Individually and Derivatively on Behalf of Nominal Defendants JUST ONE MORE RESTAURANT CORPORATION and JUST ONE MORE HOLDING CORPORATION,

Plaintiffs,

Redacted 11/13/18

-against-

WALTER GANZI, JR. and BRUCE BOZZI, SR.,

Index No.: 653074/2012

Defendants,

DECISION AFTER
NON-JURY TRIAL

and

JUST ONE MORE RESTAURANT CORPORATION, a New York corporation, and JUST ONE MORE HOLDING CORPORATION, a New York corporation,

Nominal Defendants.

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MASLEY, J.:

This action concerns allegedly improper transactions and practices of the majority shareholders of closely-held family businesses: Just One More Restaurant Corp. (JOMR), which owned the now-shuttered, renowned New York City establishment, the original Palm Restaurant (Restaurant); and Just One More Holding Corp. (JOMH), which owned real property at which the Restaurant was located. The actions challenged by plaintiffs Gary Ganzi (Gary), Claire Breen (Claire), and the Estate of Charles Cook (Cook's Estate) occurred decades after the ownership and management of the businesses had been passed down the family trees to the defendants, Bruce Bozzi Sr. (Bruce) and Walter Ganzi, Jr. (Wally), plaintiffs' cousin.

The issues at trial surrounded the derivative claims of breach of fiduciary duty raised on behalf of JOMR and JOMH by plaintiffs, minority shareholders of those corporations, and defendants assertion of laches, statute of limitations, and acquiescence. The derivative breach of fiduciary claims against defendants, as the majority shareholders of JOMR, fall into two general categories relating to undervaluation of JOMR's intellectual property assets, and challenge: (1) JOMR's issuance of below market rate license agreements to restaurants and related entities owned in whole or in part by defendants; and (2) JOMR's issuance of a below market rate agreement granting exclusive licensing/sublicensing rights to its valuable intellectual property assets to defendants' wholly-owned management company, and the transactions that occurred thereunder. The trial also addressed plaintiffs' derivative claim that defendants, majority shareholders of JOMH, breached their fiduciary duties by leasing JOMH's real property to JOMR for below market rates.

Background

In 1926, Pio Bozzi (Pio) (Bruce's grandfather) and John Ganzi (John)(grandfather of Wally, Gary, Claire, and the late Charles Cook) founded the Restaurant. (Palm time line, Defendants' Exhibit [DX] 78). John, a renowned chef who once worked at the 21 Club, had a "larger than life personality" and hobnobbed with celebrities while Pio managed the finances. (Gary Ganzi Trial Affidavit (TA) ¶¶ 50, 51, 53). They ran the Restaurant as a family business with their wives Mary Bozzi (Mary) and Adele Ganzi (Adele). (Statement of Agreed Upon Facts, Nov. 6, 2017 [SAUF] ¶ 2). The Restaurant became known as a steakhouse and famous for caricatures on its walls, contributed by cartoonist customers who exchanged their cartoons for meals and signature dishes such surf and turf. (DX 78; Gary ¶53). Eventually, ownership of the Restaurant took its corporate form in JOMR, with the founders splitting the shares. (DX 1).[1]

JOMR held its first meeting on April 8, 1933. (*Id.*). By 1963, Adele, Mary and their sons, Walter and Bruno, were JOMR's four officers and directors. (September 30, 1963 Board Minutes, DX 2). At the February 10, 1971 meeting, called to discuss a Management Report dated October 26, 1970, the board (1) agreed to institute an accounting system and internal financial controls; (2) agreed to reimburse officers for entertaining customers; and (3) adopted salaries for the officers and managers. (Minutes, DX 6). The officers and directors present were: Walter, president, Mary, vice president, Bruno, treasurer and Adele, secretary. (*Id.*). Also present for the meeting were Bruce and Wally, noted as managers at the time, and JOMR's accountant, Ralph Thomson. Another meeting was held on September 15, 1971 to adjust salaries. (Minutes, DX 79). At the February 9, 1972 board meeting, called to discuss the effective controls instituted the year before as well as the 25% increase in volume, salaries were approved for officers and managers. (Minutes, DX 8). For example, Adele and Mary each earned $23,125, defendants earned $35,625 each as part-time managers, and their fathers earned $44,250 each.[2] (DX 8 and plaintiffs' exhibit (PLX) 82; *See also* Bruce Tr 600:3 to 7).[3] The officers remained the same as well as the

[1]Ownership of the real property also took a corporate form with the founders each splitting the shares in 1946, according to the JOMH filing with the NYS Secretary of State.

[2]The value of Adele's salary today is $142,035.33. dollarshttps://www.bls.gov/data/inflation_calculator.htm

[3]For 1972, the family salary draw from JOMR totaled $206,000.

managers and accountant; all were present. (*Id.*). Upon Bruno's death, a shareholder meeting was held on May 15, 1974. (DX 79). A board and shareholder meeting was called on April 30, 1976 to discuss the liquidation of the employees' pension plan. (Minutes, DX 21 and 79). Present at the meeting were officers Walter, Bruce, Louise Bozzi, and Victor Ganzi, as attorney (Wally's brother), and Thomson. (*Id.*). Adele, secretary, and Wally, a shareholder, were noted as absent. (*Id.*). A meeting was held in 1986 to address the liquor license. (Minutes, PLX 82). Until this litigation,[4] there is no evidence of any JOMR corporate meetings called thereafter. (Bruce Tr 579:26 to 580:6; 581:1 to 5; Gary TA ¶142; and Joy Jones, Esq. Tr 671:14 to 672:16).

Over time, the ownership and corporate management of the Restaurant passed down the family tree to the founders' grandchildren-- the parties here. (SAUF ¶ 2, NYSCEF Doc. No. [Doc] 201; *see also* Doc 94). As relevant here, Bruce and Wally began working at the Restaurant in the 1960s, before either had an ownership interest in JOMR. (Gary TA ¶ 64). Meanwhile, they were running their own restaurants: Wally's and Bruce's Pussycat. (Gary TA ¶66 and 67). By the late-1970s, defendants had each obtained a minority interest in JOMR, and, by the late-1990s, defendants were the majority shareholders of JOMR; defendants' majority ownership of JOMR continued throughout all times relevant to the issues presented at trial, including the six-year period, starting September 1, 2006, preceding initiation of the action. (Bruce Tr 580: 24-26; Gary TA ¶ 86 and 87).

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[4]A shareholder vote was taken in 2015 to close the Restaurant, over plaintiffs' objections. (Gary TA ¶142).

The parties to this derivative action[5] are shareholders of JOMR and JOMH through gifting, purchasing, and inheriting capital stock from family members. At the time of trial, Gary and Claire together owned 10% of JOMR's capital stock and 16 2/3% of JOMH's capital stock; Cook's Estate also held a 10% share of JOMR and 16 2/3% share of JOMH. (Wally trial affidavit [TA] ¶¶ 12; Gary TA ¶¶ 10, 38, 86, 87, 88). It is undisputed that defendants control JOMR and JOMH as majority shareholders: Bruce owns 50% of JOMR and 50% of JOMH; Wally owns 30% of JOMR and 16 2/3% of JOMH. (Wally TA ¶¶ 17-19; Gary TA ¶¶ 10, 38, 86-88; Bruce, trial tr [tr] 580:24-26). In addition, Wally is CEO of JOMR and Bruce is CEO of JOMH.[6]

JOMR holds its valuable intellectual property (Palm IP);[7] at the time of trial, the Restaurant has closed and JOMR's sole remaining asset is the Palm IP. (Gary TA ¶ 142). The Palm IP includes a series of trademarks and service marks, design elements of the Restaurant–such as its menu, food quality choices and methods of preparation–and the Restaurant's decor, display of certain photographs, artistic caricatures, sketches, cartoons, and other elements. (*See generally* Report of Pamela

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[5] Three of plaintiffs' direct claims were summarily dismissed. (NYSCEF Doc. No. [Doc] 173). While certain direct claims survived summary judgment, plaintiffs' evidence at trial, and plaintiffs' pre-trial and post-trial memoranda, address only their derivative claims; accordingly, this decision does not consider the direct claims, which are deemed abandoned.

[6] The court takes judicial notice of JOMR's and JOMH's filing with the NYS Secretary of State.

[7] At trial, defendants assert that they created the Palm IP, aside from the Palm name, independent of JOMR and for use in defendants' Palm-branded expansion restaurants. The contested ownership of the Palm IP is addressed below in the court's findings of fact and discussion.

O'Neill, November 2, 2017 [O'Neill Report]; *See also* Nov. 6, 2017, credible testimony of SSP vice president, Pat Murray). In 1984, the Palm's trademark – a palm tree – was registered in JOMR's name. (Wally TA ¶ 51 and Bokhart Ex 14, Schedule of Palm trademark registrations).

When JOMR was converted to an S-Corporation in 1986, each shareholder received a K-1 each year reporting on their share of the profit and loss of JOMR. (SAUF ¶8 and DX 141). The shareholder's share of JOMR's profit or loss was reported in the space for "Ordinary Business Income (loss)" and the income that JOMR had received from the license fees from each of the other Palm restaurants or other sources was not separately recorded from the corporation's ordinary income or loss in the space for "Royalties." (*Id.*).

The Restaurant's success[8] and the Palm IP were first exploited in 1972 when the first of many new Palm-branded restaurants (New Palms) opened in Washington, D.C. (DC Palm).[9] (Wally TA ¶ 26). Since 1972, New Palms have opened worldwide, and, at the time of trial, defendants have an ownership interest in numerous New Palms and their associated business entities; thus, defendants have used the Restaurant and the

[8] The court rejects defendants' testimony that the Restaurant was not successful until defendants took over. (Wally TA ¶13, 15; Bruce TA ¶8, 20; Bruce Tr 594:10 to 595:18). The handsome salaries paid to the family, even when they no longer worked at the Restaurant, and board minutes showing success and increasing volume, document otherwise, long before defendants' took control. (DX8, PLX 82).

[9] The DC Palm was established by 20 or more investors, including defendants. The license agreement for New Palms, and the annual flat-fee payment for the use of Palm IP, was first used in connection with the DC Palm.

Palm brand to create an empire of Palm-branded businesses.[10] (Operating Statements 2002 to 2016, Doc 242). It is undisputed that all of the New Palms entered license agreements with JOMR, from the 1970s to 2011, which identified JOMR as the licensor and owner of "long established, famous and valuable service marks used in connection with the operation of distinctive, high quality restaurants," and that JOMR had "devised and developed certain confidential know-how relating to the management and operation of restaurants, including business practices, unique recipes, and formulae"; under those agreements, the New Palms agreed to pay JOMR an annual licensing fee of $6,000 "for the use of [JOMR's] Licensed Trademark and . . . know-how." (Licenses, e.g. DX 42-51, 82, 123). The $6,000 annual fee was imposed for all New Palms in which defendants had an ownership interest, regardless of when those restaurants first opened, for over 40 years. (SAUF ¶¶ 6, 7). At issue at the trial are 54 license agreements, which all include the $6,000 fee, entered between JOMR and the New Palms owned by defendants: 26 licenses in 2007, backdated to January 1, 2004 (2007

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[10] Per stipulation, since 2006, Bruce and Wally have been officers and directors or members of the following Palm-related companies, in addition to JOMR and JOMH: Atlanta Palm Food Corporation; Atlantic City Palm, LLC; LA Downtown Palm, LLC; Palm Beverly Hills Restaurant; Boston Palm Corporation; Charlotte Palm Corporation; Chicago Palm, Inc.; Coral Gables Palm Restaurant, LLC; The Dallas Palm Restaurant, Inc.; Denver Palm Corporation; Palm Management Corporation; Palm Management Corp D/B/A James Lane Café at the Hedges; Palm Restaurant of Houston, Inc.; Palm Management Corp; D/B/A Palm Restaurant at The Hunting Inn; Palm Airport, LLC (does not operate a restaurant); Palm Restaurant of Las Vegas, Inc.; Palm UK LLC (does not operate a restaurant); The Los Angeles Palm, Inc.; Miami Palm Restaurant, Inc.; Nashville Palm Restaurant, LLC; Northbrook Palm, LLC; Palm Orlando Corporation; Palm West Corporation; Palm Restaurant of Philadelphia, Inc. (until 2016); Palm Philadelphia Restaurant, LLC (from 2016); Palm Restaurant Puerto Rico Corporation; Palm Restaurant, Inc.; San Antonio Palm Restaurant, Inc.; San Diego Palm, LLC; Tampa Palm Restaurant, LLC; Palm New York Downtown, LLC; Palm Tyson's Too, Inc.; The Washington Palm, Inc. (Doc 242).

Licenses); and 28 licenses in 2011, backdated to January 1, 2010 (2011 Licenses). (DX 82; *see* SAUF ¶ 19 to 15). Gross revenue for New Palms from 2006 to 2017 was $1.5 billion. (Gary TA ¶16; DX 97).

Additionally, it is undisputed that defendants own 100% of the Palm Management Corporation (PMC), which was formed in 1975. (DX 20; Gary TA ¶¶ 3, 11). In 2006, Bruce and Wally each earned salaries of $[redacted] million. (PLX 21 at 6911 to 6912). From 2006 to 2016, their salaries were not less than $[redacted] million each. (Tr 588:24-26). In 2006, Wally charged PMC $[redacted] in travel, lodging, meals and entertainment, while Bruce charged PMC $[redacted] (PLX 21 7138 and 7140).

Charles Ganzi (father of Gary and Claire)(Charlie) was a certified public accountant and a partner of the accounting firm Fisher & Baker (F&B) of which Thomson was also a partner. (Gary TA ¶68). There were no other employees. (F&B tax returns, DX 135). Beginning in the 1970s, F&B prepared JOMR's financial statements and tax returns. (F&B time sheets 1965 to 1983, DX 135). The detailed time sheets demonstrate that Thomson provided the actual services to JOMR. (*Id.*). In the 1970s, F&B did accounting work for the New Palms and, beginning in 1976, PMC until all were moved to DC in 1985. (*Id.*, DX 75, 96 and 193, and Wally TA ¶21). In 1970, a F&B Report concluded that Palm had been grossly mismanaged for some time, there was " rather considerable vacuum at the management level," and that it provided a "near perfect 'textbook' example of how not to manage a restaurant." (DX 5). The Report also suggested that, if not for the Palm's large sales volume and "unrealistically low rent," the Restaurant would have already gone bankrupt. (SAUF ¶3). In 1989, Charlie evaluated JOMR's 1987 accounts and found a $50,000 discrepancy. (DX 33-

38, 40 and 41). In 2004, Charlie invoiced JOMR for professional services to prepare a 2003 financial report. (DX 71).

In 1982, defendants' trademark attorney warned them that the $6,000[11] flat fee "may be deemed quite modest in a few years" and "[m]ost franchise contracts provide for a payment of a percentage of gross sales rather than a flat fee" and that they should consider "a royalty provision." (DX 25 at 6).

In 2007, PMC and JOMR entered into a Master License Agreement (MLA) through which PMC acquired the "exclusive, worldwide, royalty bearing, sub-licensable license" to the Palm IP for an annual flat payment of $12,000. (DX 104 and SAUF ¶ 17). Bruce signed the MLA for JOMR and CFO James Longo signed for PMC. (Gary TA ¶22). Under the MLA, PMC entered into sublicense agreements for the use of Palm IP with third parties for at or near market rate value, as opposed to the $6,000 flat fee paid by the New Palms.

In 2008, PMC entered an agreement with SSP America (SSP), a business that operates airport food outlets, which sublicensed the right to use the Palm IP to establish the Palm Bar and Grille at John F. Kennedy Airport (JFK Palm) in exchange for annual royalty payments to PMC of % of gross sales up to $ million and % above $ million at the JFK Palm (SSP License). (PLX 3). SSP paid an initial $ license fee to PMC, and, since 2010, more than $ million in royalties under the SSP License. (*Id.*). PMC also entered an agreement in 2008 with TJX under which TJX is granted the use of Palm IP to create Palm-branded household goods for retail stores in exchange

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[11]In today's dollars, the fee is equivalent to $16,061.87. https://www.bls.gov/data/inflation_calculator.htm

for licensing fees and annual royalty payments calculated as a percentage of TJX's gross revenues for that Palm product line (TJX License). (*See* PLX 5-11). From 2007 to 2016, PMC has paid JOMR $120,000 under the MLA while PMC received $_ , from SSP and TJX. (Gary TA ¶32 and DX 134).

Plaintiffs allege in the complaint that defendants engaged in a decades-long pattern of exploiting JOMR's greatest asset—the Palm IP—to benefit defendants' own businesses (i.e., by licensing Palm IP to the New Palms for below market rates), and by improperly entering the MLA between JOMR and PMC and using the MLA to divert substantial revenue from JOMR to PMC. Plaintiffs further allege that defendants breached their fiduciary duties to JOMH, which owned the real estate in New York City at which the Restaurant and its offices were located, by leasing the space at below market level rates to JOMH's detriment. Defendants assert statute of limitations, laches, and acquiescence defenses. (Doc. 4).

This court, in its February 11, 2016 decision and order, granted defendants' motion for partial summary judgment insofar as three direct claims—the fifth, eighth, and tenth causes of action—were dismissed. (*See Ganzi v Ganzi*, 2016 WL 613815 [Sup Ct, NY County 2016] [Oing, J.] [Doc 173]). Notably, this court found that issues of fact exist as to: (a) when the limitations period for certain license agreements began tolling; (b) whether defendants were prejudiced by laches; and (c) whether the 2011 Licenses are enforceable. (See id). On appeal, the Appellate Division unanimously affirmed the decision and noted that issues of fact exist as to whether plaintiffs suffered from the allegedly improper licensing agreements which were executed within the applicable limitations period. (*Ganzi v Ganzi*, 144 AD3d 510, 510 [1st Dept 2016]).

Accordingly, the claims at issue in this trial were the following causes of action: (1st) breach of fiduciary duty by executing self-dealing agreements with the New Palms, derivatively for JOMR; (2nd) breach of fiduciary duty by charging third-party companies below market value royalty rates, derivatively for JOMR; (3rd) breach of fiduciary duty by undervaluing real estate, derivatively for JOMH; and (4th) diversion of corporate opportunity, derivatively on behalf of JOMR.[12]

Plaintiffs now contend that the trial evidence establishes that defendants breached their fiduciary duties in that they:

(1) engaged in self-interested, self-dealing transactions that severely undervalued JOMR assets by licensing Palm IP to defendants' New Palms for an annual fee of $6,000; expert evidence established the market rate, per the near-universal business practice, is a percentage of licensee's sales or revenue, and assets comparable to the Palm IP command 5% rates;

(2) deprived JOMR of market rate value for the exclusive right to license Palm IP to third parties by entering the MLA for an undervalued fee of $12,000, and diverted substantial licensing deals away from JOMR to PMC; and

(3) leased JOMH's real property to JOMR for undervalued rental rates and inequitably distributed sale proceeds to JOMH's shareholders based on a 2006 evaluation of 837 Second Avenue that concluded that the market rent was $233,000. (SAUF ¶19).

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[12] As noted above, this decision does not address plaintiffs' abandoned direct claims, including the following causes of action: (6th) breach of fiduciary duty in charging third parties below market royalty rates; (7th) breach of fiduciary duty in undervaluing real estate; and (9th) oppression of minority shareholders of JOMH.

Plaintiffs assert the limitation period is six years; thus, JOMR should recover those damages which accrued after September 1, 2016, including the 54 agreements in the 2007 and 2011 Licenses, the MLA, and the SSP and TJX Licenses. Plaintiffs argue that defendants failed to establish any affirmative defense at trial.

Defendants contend that the trial evidence establishes that:

(1) defendants, through PMC for the New Palms, developed the valuable Palm IP elements, including the logo, the menu, recipes, and décor;

(2) the family members all knew about, and supported, the New Palms and the lack of objection shows that prior JOMR shareholders consented to the New Palms' licensing arrangements; alternatively, plaintiffs' predecessors in interest always knew that Palm IP was used by defendants in the New Palms for defendants' benefit, and that JOMR did not share in the success of the New Palms, constituting knowledge of the license arrangements;

(3) JOMR's past shareholders implicitly consented to the licensing arrangement each time defendants opened a New Palm;

(4) Charlie, from whom plaintiffs inherited certain JOMR shares, had knowledge of the license agreements because he was an accountant for family businesses, including JOMR, and was involved with family-member shareholders' financial affairs; thus, Charlie's knowledge of, and lack of objection to, the New Palms' licenses bars plaintiffs' challenges;

(5) the 2007 and 2011 Licenses accrued outside of the limitation period when each New Palm first opened; and

(6) defendants are prejudiced by laches because the Dead Man's statute

prohibits them from testifying as to conversations with deceased family members/JOMR shareholders as to consent and knowledge.

Findings of Fact and Conclusions of Law

The court, having before it now all trial evidence, makes the following findings of fact and conclusions of law. Any evidence not addressed in this decision is deemed irrelevant to the issues and is afforded no weight.

These findings of fact and conclusions of law are framed by the bedrock legal principle, and "inflexible rule," that fiduciaries:

> "cannot exercise the corporate powers for their private or personal advantage or gain. The law stringently and rigorously forbids to them the use or disposition of the funds or assets of the corporation for their individual enterprises or acquisition, and for any misfeasance or breach of duty or trust resulting in damage to the corporation they are subject to be called to account by the corporation in the appropriate action." (*Pollitz v Wabash R. Co.*, 207 NY 113, 124 [1912]).

The court finds Gary credible. In addition to his precise testimony, consistent with his education and training as an engineer and patent attorney, his testimony was logical and often corroborated by documentary evidence. (Gary TA ¶6).

As majority shareholders of JOMR, with a combined 80% ownership, and officers,[13] defendants are corporate insiders who owe fiduciary duties to JOMR. The court finds that JOMR owned the Palm IP—including the name, logo, trademarks, service marks, design elements of the restaurants such as menu, recipes, food quality choices, methods of preparation, and decor, the display of certain photographs,

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[13]While Wally is currently documented by the Secretary of State as JOMR's CEO, Bruce's corporate position in JOMR, if any, is unknown since 1976 when his position as JOMR's Treasurer was recorded.

characteristic caricatures, sketches, cartoons and/or other design elements—and JOMR was, and is, entitled to fair market value for any use of Palm IP assets. Notably, the first license agreement executed by JOMR for the use of Palm IP in connection with a New Palm restaurant—the 1972 license for the DC Palm—identifies the Palm name, unique recipes, logo, and know-how, among other things; thus, the 1972 license for the DC Palm contradicts defendants' contention that JOMR owned only the Palm name, not the entirety of the Palm IP.

The court rejects Wally's self-serving testimony, unsupported by any credible evidence, that defendants created the Palm IP. The credible evidence establishes that the Palm IP was the key to the success of defendants' business ventures. Their non-Palm restaurant ventures, Bruce's Pussycat and Wally's, were unsuccessful. Further, the quick succession of opening New Palms after 1972—including the Palm Too restaurant, in 1973, across the street from the original Restaurant, and the Los Angeles Palm in 1975—demonstrate that the Palm name, brand, and overall Palm IP were valuable assets belonging to JOMR before defendants had majority ownership of JOMR, and that exploiting the Palm IP was the key to defendants's success.

The evidence establishes that, before this action was filed, JOMR's last board and shareholder meeting occurred in 1976, and there is no evidence that any corporate meeting, properly noticed or not, occurred ever since;[14] however, the pre-1976 meeting

[14] Purported family discussions at a kitchen table in the 1970s do not constitute properly-noticed corporate meetings; in any event, there are no records from Adele's kitchen reporting that defendants were present. Even if those meetings occurred, they do not bear on the 2007 and 2011 Licenses. (Bruce Tr 580:12 to 23). Likewise, PMC meetings are not a substitute for JOMR meetings. (*See* Wally TA ¶35).

notices and minutes show that the parties' predecessors understood corporate formalities. (DX 21, 79).

The court also finds that defendants had notice that the $6,000 license fee was becoming an issue as of 1982, when trademark counsel advised them that the $6,000 license fee was not the industry-norm and would be deemed unreasonably modest in only a few years, and that the rate could raise red flags and render the transactions vulnerable to shareholder challenges. (DX 25, at 6). The court also finds, however, that there is no credible evidence that demonstrates that Charlie, his sister, Lorraine Cook, or plaintiffs were aware of the 2007 or 2011 Licenses or the fees they contained.

While Charlie worked with JOMR's books and records, Ralph Thompson was JOMR's accountant according to corporate minutes as early as 1970 and the detailed time sheets corroborate that Charlie's contribution to the F&B Palm account was minimal.

The court gives no weight to defendants' testimony that the $6,000 fee was instituted to help pay the JOMR salaries of the Ganzi and Bozzi parents and grandmothers.[15] The more logical explanation for the license agreement and flat fee is that the numerous investors in the DC Palm demanded those provisions. In any event, it is obvious and undeniable that the flat-fee $6,000 annual payment for the use of

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[15] The DC Palm agreement was instituted in 1972, years after John and Pio passed away in 1963 and 1946, respectively. (Gary TA ¶55 and Family Tree, PLX 77). Further, in 1972, the Restaurant paid salaries to many family members, not all elderly; Adele, Bruno, Bruce, Walter, Wally, and Mary all earned salaries that totaled $206,000 together. The fee in 1972—a single annual $6,000 payment—amounts to only 3% of the salary expenditures for 1972; a negligible contribution, at best. That the payments continued long after their deaths undermines defendants' credibility.

JOMR's valuable trademarks, service marks, and "know-how" allowed the New Palms to earn greater revenues, at the expense of JOMR, especially considering that the $6,000 fee was applied for all New Palms in which defendants had ownership interests, without change, from 1972 onwards, spanning more than 40 years.

As defendants were on notice, since 1982, that a JOMR shareholder could challenge the licensing arrangement as undervaluing Palm IP and harming JOMR, a six-year look-back period was always a risk. (CPLR 213; DX 25, at 6). Even if the court were to find that defendants were prejudiced by the timing of plaintiffs' challenge and the six-year statute of limitations—which it does not—defendants assumed and perpetuated that known risk in causing JOMR to issue licenses to each New Palm, without changing the $6,000 fee, for over 40 years.

Defendants' self dealing is also exemplified by the JOMR-PMC service agreement of January 1, 2010, pursuant to which JOMR paid PMC $[ ] per month plus bonuses to Wally and Bruce of up to $[ ] per year. (Gary TA ¶135 and PLX 12. See also DX 31, 32, 217). There was no corporate formality, no independent management, and thus, no fair negotiation of these payments. Defendants have treated JOMR as their own without any regard to other shareholders.

It is undisputed that the family was proud of Wally and Bruce and they had much to be proud of. However, defendants impermissibly collapse this family pride with knowledge that JOMR had rights in its name and that Bruce and Wally were using the name for their own benefits, not JOMR's. Family pride is not a defense and does not give rise to knowledge of how that success was achieved and that it was unfair to JOMR.

Discussion of Plaintiffs' Claims

The court is compelled to find in favor of plaintiffs as to the first cause of action, the derivative claim for breach of defendants' fiduciary duty to JOMR by executing self-dealing, undervalued license agreements with defendants' New Palms. Plaintiffs have established the existence of a fiduciary relationship, misconduct by defendants, and damages directly caused by defendants' misconduct. (PJI 3:59). Defendants do not dispute that they owed JOMR fiduciary duties arising from their majority ownership. The issuance of the 2007 and 2011 Licenses for fees grossly favoring defendants' New Palms' interests over those of JOMR, depriving JOMR of fair market value for the valuable Palm IP, is a textbook example of fiduciary misconduct.

Corporate formalities ceased being followed when defendants took over JOMR. There was no corporate action, notice, or meeting to ratify any of the licenses at issue here, and no votes were cast by disinterested directors or shareholders of JOMR regarding those decisions. That JOMR is a closely-held corporation which began as an informal family affair does not excuse defendants from complying with their fiduciary obligations to JOMR and fellow shareholders. (*See Global Mins and Metals Corp v Holme*, 35 AD3d 93, 98 [1st Dept 2006]).

Accordingly, the burden is on defendants to establish that the license agreements were fair and reasonable to JOMR. (BCL § 713 [b]). Defendants have not satisfied that burden. All expert testimony established that the per-restaurant, annual flat-rate fee is not fair or reasonable. By all accounts, similar licensing fees in the restaurant industry are calculated as a percentage of sales. Even defendants' expert, Christopher Bokhart, testified that comparable rates for similar restaurants are calculated as a percentage of gross sales: Smith & Wollensky, 2%; Capital Grille, 2.2%; Morton's, 2.7%; Del Frisco's and Sullivan's, 1.8%; Ruth's Chris, 2.3%. Plaintiffs' expert, Pamela O'Neill, found comparable rates of: 5.5% for Capital Grille; 3.3% for Long Horn Steakhouse; and 3.7% for Morton's. Since 2006, the period at issue here, gross revenue at the New Palms owned by defendants totaled $1.5 billion. Therefore, JOMR would have earned significantly more for the licenses even at the lowest comparable rate, 1.8%, identified by Bokhart.

Furthermore, defendants were aware, in 1999, that Palm IP licenses were then valued at or around [redacted]: the rate at which the Mexico Palm restaurant was charged annually. The court finds, however, that the most relevant rate, undisputably negotiated at arm's length in 2008 between PMC and SSP for the SSP License for the JFK Palm, is [redacted] annually. Those rates demonstrate that the figures identified by plaintiffs' experts are more reliable and comparable to the fair market rate of Palm IP licenses; the court finds the rates identified by plaintiffs' experts are reasonable and fair.

As to the second cause of action for breach of fiduciary duty by entering the MLA at a flat annual rate of $12,000 for PMC's exclusive right to sublicense Palm IP, the same analysis applies. The self-interested transaction gave JOMR's greatest asset, the Palm IP, to defendants' wholly-owned business, PMC, for a grossly-undervalued flat annual fee, establishing another plainly self-interested transaction which constitutes breach of defendants' fiduciary duties to JOMR to further their own interests.

Likewise, the court finds for plaintiffs as to the fourth cause of action for diversion of corporate opportunities. Under the MLA, defendants, through PMC, diverted JOMR's corporate opportunities to issue the SSP and TJX Licenses, and deprived JOMR of the revenue from those substantial transactions. Indeed, rather than reap the benefits of those license agreements, JOMR collected a paltry $12,000 flat annual fee from PMC. Had JOMR received fair market value for the exclusive right to sublicense Palm IP to third parties, that rate would, by all accounts, dwarf the $12,000 annual flat fee. A more obvious example of the breach of a fiduciary's duty of loyalty is difficult to envision.

As to the derivative claim for breach of fiduciary duty by defendants' undervaluing the real estate at 837 Second Avenue, the court is compelled to find in favor of plaintiffs. The evidence establishes that defendants owed a fiduciary duty to JOMH as its majority shareholders, and that they breached those duties by causing JOMH to charge below market rate rent of $63,233 annually. The property was appraised as commanding rental value of $223,000 annually as of November 1, 2006. (SAUF ¶ 19). In 2016, the rental value had climbed to $597,325. (Gary TA ¶ 144). The building sold for $5.9 million in 2015. (Gary TA ¶143). Therefore, plaintiffs have demonstrated that JOMH was harmed by defendants' misconduct.

<u>Discussion of Defendants' Defenses</u>

Defendants have the burden to prove their defenses. (*Lion Brewery of New York City v Loughran*, 223 AD 623, 625 [1st Dept 1928]). The affirmative defenses of acquiescence, statute of limitations, and laches are intended to ensure fairness in human affairs by preventing a party from defending alleged misconduct that occurred decades earlier—here, spanning back 40 years—when the "evidence has been lost, memories have faded and witnesses have disappeared." (*Blanco v American Tel. & Tel. Co.*, 689 NE2d 506, 513 [1997]). Nevertheless, defendants have failed to satisfy their burden of demonstrating facts necessary to support their affirmative defenses.

Statute of Limitations

The limitation period for claims of breach of fiduciary duty is six years. (CPLR 213). The 54 valid and enforceable agreements that comprise the 2007 and 2011 Licenses each fall within the six-year limitations period; they are not excepted from the applicable limitation period by virtue of the fact that substantially similar licenses were originally issued by JOMR to the corresponding New Palms when each establishment first opened years earlier. As this court previously ruled, this action is timely and the breach of fiduciary duty claims are not barred if the 2011 Licenses are valid and enforceable. The parties have stipulated to the validity and enforceability of the 2007 and 2011 Licenses. (SAUF ¶¶ 13-15). Further, the MLA, SSP License, and TJX License were all entered within the six-year limitation period.

The court rejects defendants' contention that each claim for the 2007 and 2011 Licenses accrued when the corresponding restaurant opened. Defendants' argue that the claims are barred because plaintiffs cannot establish any new harm; that argument is inapplicable and unsupported by any law authority by defendants. This court already rejected this argument when it ruled that "if the 2010 agreements are indeed valid, then the alleged harm results from the agreements entered into at that time, albeit it mirrors the alleged harm resulting from the earlier agreements." (Doc 173 at 15). The Appellate Division also rejected this argument in affirming this court's decision denying defendants' motion to summarily dismiss the first cause of action as time-barred, and finding that there are "triable issues relating to the harm [plaintiffs] suffered from the allegedly improper licensing agreements . . . executed within the limitations period." (*Ganzi*, 144 AD3d at 511). Thus, defendants' theory that new or incremental harm is necessitated has been rejected by this court, and that decision affirmed on appeal, and this court will not, again, entertain the meritless argument.

Moreover, the statute of limitations "on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role." (*AccessPoint Med LLC v Mandell*, 106 AD3d 40, 45 [1st Dept 2013]). Since defendants are fiduciaries of the corporation, and there is no evidence of them repudiating, the statute of limitations as to equitable relief was tolled. Such a rule reasonably rejects the idea that defendants are protected by the statute of limitations because they have been taking for themselves JOMR's corporate opportunity of a fair and reasonable rate for such a long time. Such reliance on the statute of limitations would be antithetical to equity and is inapplicable to the facts here.

Laches

Defendants assert that this action is barred by laches because plaintiffs or plaintiffs' predecessors in interest knew about the license agreements with the New Palms since 1972; thus, defendants argue that it is unfair now, after 40 years, to challenge those transactions.

Preliminarily, a laches defense is not available to a fiduciary unless the fiduciary openly repudiates the relationship. (*Matter of Barabash*, 31 NY2d 76, 82 [1972]). Defendants are fiduciaries and there is no evidence that they ever repudiated their fiduciary relationship; therefore, their laches defense applies, if at all, as a defense to only plaintiffs' fourth cause of action alleging diversion of corporate opportunity.

To establish a valid defense of laches, defendants must prove that plaintiffs delayed in bringing this action subsequent to the accrual of their causes of action within the statutory limitations period, and that defendants were prejudiced by the delay. As to plaintiffs who became shareholders in 2010, they could not have acted sooner, particularly given that litigation in Surrogate's Court was necessitated to obtain corporate information to which they were entitled. Further, the fourth cause of action for diversion of corporate opportunities pertains to only the 2007-2008 SSP and TJX Licenses, there is no evidence that plaintiffs or their predecessors in interest were aware of the details of the SSP or TJX Licenses, and, therefore, defendants cannot establish that there was delay in bringing the action after accrual of that claim.

Furthermore, the challengers must have a clear indication of the facts giving rise to the legal action before the laches clock begins to tick. (*Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 319-20 [1956]). Here, absent any evidence that corporate formalities were followed after 1984, the court cannot find what JOMR or its shareholders knew or did not know; rather, the lack of defendants' compliance with corporate formalities at the relevant time demonstrates that JOMR's shareholders were effectively denied knowledge and input as to JOMR's business. (*See Tiemo v Puglisi*, 279 AD2d 836, 839 [3d Dept 2001]). In fact, defendants testified that they did not know that JOMR owned the Palm IP prior to this litigation. (Bruce Tr 561-563).

Defendants' evidence that Charlie was aware of the licensing agreements for New Palms in 1989 is inapplicable, as Charlie did not become a JOMR shareholder until 1995, at the age of 80. Even if he did, acquiesce to, or ratify, defendants' self-dealing license agreements, that acquiescence does not extinguish the rights of other shareholders who are not precluded by that acquiescence—i.e., Cook's Estate and its predecessors in interest. (*Diamond v Diamond*, 307 NY 263, 266 [1954]). Thus, the court rejects defendants' laches contentions as to JOMR and JOMH, and, for the same reasons: though Charlie was a JOMH shareholder beginning in 1972, and he was aware of the JOMH rental agreements, his ratification of rental rates does not bar these claims.[16] (Gary TA ¶81).

Defendants have also failed to establish they sustained any unfair prejudice from a delay in commencing this action. The court rejects defendants' assertion that they would have acted differently if the family had objected, and that they are harmed in that the family shareholders of past are no longer alive to testify as to their consent to the license arrangements. None of defendants' uncorroborated testimony is adequate to establish prejudice that would support their defenses, and the court does not find prejudice on the basis of defendants' unreliable conjecture as to how they would have acted if things were different. (*See Tri-State Environmental Contracting, Inc. v M.H. Kane Const., Inc.*, 25 AD3d 436, 437 [1st Dept 2006]). Further, defendants were not materially or meaningfully prejudiced by the dead man's statute. *(Harley Davidson, Inc. v O'Connell*, 13 F Supp 2d 271, 282 [ND NY 1998]). Indeed, they benefitted greatly from the ancient document rule which permitted them to enter hundreds of pages of Charlie's documents, and which opened the door to testimony as to Charlie's statements. (Victor TA ¶23-26; tr 961, 963-964). Finally, defendants "cannot credibly claim that [they] suffered inequity" where all evidence demonstrates that they

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16 The court rejects defendants' assertion that other family members, including Adele, Lorraine, and Cook, could divine the $6,000 license fee from K-1 tax forms. In any event, those license fees are not at issue in the fourth cause of action for corporate diversion. Accordingly, the court can make no determination that full knowledge of all relevant facts was had by each of plaintiffs' predecessors in interest.

"indisputably profited enormously from [the] purported" improper conduct. (*Explorers Club, Inc. v Diageo PLC*, 45 Misc 3d 434, 440-441 [Sup Ct, NY County 2014]). Here, defendants were not harmed; rather, their businesses were engorged with millions of dollars of additional revenue at JOMR's expense for 40 years.

Acquiescence, Implied Ratification, and Equitable Estoppel

Acquiescence is a defense to torts, including business torts; the principal takes two forms: implied ratification (PJI 4:15) and equitable estoppel. In either form, the acquiescence of a shareholder's predecessor-in-interest may be binding on that shareholder's successors. (*Bangor Punta Operations, Inc. v Bangor & A.R. Co.*, 417 US 703, 710 [1974]). Acquiescence is particularly applicable to a close corporation, as opposed to a publicly-traded corporation, as there is an expectation to object affirmatively to an improper action. (*Pinnacle Consultants v Leucadia Nat'l Corp.*, 94 NY2d 426, 433 [2000]). Nevertheless, acquiescence in any form is not a defense to the breach of fiduciary duty claims alleged here. (*See Petrella v Metro-Goldwyn-Mayer, Inc.*, 572 US 663, 675 [2014]). Defendants reliance on *Sakow v 633 Seafood Restaurant, Inc.* (25 AD3d 418 [1st Dept 2006]) is misplaced. In *Sakow*, the shareholder-plaintiff objected to the board's decision to increase board member compensation; however, that case was a derivative action raised after the challenged board action occurred—that is, outside of the statute of limitations—and the relief sought was equitable (accounting claim), not legal. In any event, corporate waste, a wrong to the company, as established here, repeatedly, cannot be ratified. *(Aronoff v Albanese*, 85 AD2d 3, 4 [2d Dept 1982]).

Further, while defendants have not even established the facts to demonstrate a valid implied ratification defense, that defense is totally inapplicable here in the absence of evidence that plaintiffs or their predecessors in interest had sufficient knowledge of the transactions at issue–that is, the 2007 and 2011 Licenses being issued, the MLA, or the SSP and TJX Licenses, or the rental agreements during the limitation period. Likewise, without evidence that plaintiffs' predecessors knew of the particular transactions, estoppel is inapplicable here. A party may be found to have acquiesced to a matter when she remained silent despite the opportunity and duty to act; however, "[t]he duty to speak is not necessarily a legal obligation to do so but it is founded upon a sense of justice and fair play invoked by the Courts to compel a man to act when in all good conscience an honest man would have acted." (*Simmons v Westwood Apartments Co.*, 46 Misc 2d 1093, 1096-1096 [Sup Ct, Onondaga County 1965]).

Charlie, a minority shareholder and predecessor-in-interest, first obtained standing to object to any JOMR agreements in 1995 when he became a shareholder; accordingly, Charlie's actions or inactions in 1986 and 1991 are immaterial. The court also, again, rejects defendants' legally-unsupported contention that Charlie's knowledge can be imputed to Adele and Lorraine because he prepared their taxes.

While the court does find that Charlie did ratify JOMH's below market rate rent prices in that Charlie was a JOMH shareholder in 1996, 2001, and 2006 when he clearly advocated for the below market rate rent prices. (DX 155, 159-161; *see also* DX 99), that ratification does not suffice because, for ratification to bar a derivative action, the ratification must be unanimous. (*See Capital Wine & Spirit Corp v Pokrass*, 277 AD 184, 188 [1st Dept 1950]). There is no evidence of unanimous ratification among plaintiffs or their predecessors-in-interest at any relevant time as to either JOMH or

JOMR business decisions.

Remedies

JOMR and JOMH are entitled to amounts by which defendants were enriched at the expense of the corporations as follows:

As to the 2007 Licenses and 2011 Licenses (54 license agreements in total), JOMR is entitled to a royalty rate of 5%. (O'Neill TA ¶ 13). Professor David Franklyn, a recognized authority on trademark issues, opined using a weighted average that 5% is the appropriate royalty rate. (*See also* Battersby on Licensing Royalty Rate, DX 120 and 178). This rate is also supported by the SSP License for the JFK Palm.

Pamela O'Neill, an experienced valuation authority, corroborated that 5% is the correct royalty rate. (O'Neill TA ¶ 13). O'Neill's evidentiary basis for that valuation is defendants' own presentations to bankers and public filings. (O"Neill Appendix B). She also compared the Palm IP to other relevant brands. She performed several relief from royalty analyses to determine the implied royalty rate which yields the cost savings of relief from paying royalty payments. (O'Neill TA ¶ 30-31). Her testimony was credible, comparisons are valid and her assumptions and conclusions supported. Therefore, the court adopts the valuation as set forth in the O'Neill Report and trial affidavit and testimony. (*See generally,* O'Neill Report and TA).

The court declines to rely on Christopher Bokhart's unsupported calculations. Aside from mathematical errors identified by O'Neill, Bokhart's assumptions as to revenue, discount rate, and growth were unsupported. (O'Neill TA ¶¶ 42, 44). For example, the 20% growth rate used for five years fails to recognize that the recession in 2007 and 2008. Further, he used a discount rate for the entire company instead of one for intangible assets, failed to adjust for geographic issues such as that there are several Palm-branded restaurants in the New York area, and adjusted Ruth's Chris's rate without an analysis of the services Ruth's Chris provides to franchisees.

The court declines to rely on Scott Roehr's analysis which, as Roehr himself admits, is novel and "unique." (Tr 752:260-753:4; 753:26-754:6). The court observed that during his testimony, he appeared confused by O'Neill's chart C5a. (*Id.*). Roehr admittedly failed to consider that JOMR is an S corporation. (Tr 774:15).

Based on the plaintiffs' experts' evaluations, the court finds that JOMR is entitled to $68,158,000 for the damages arising from the New Palm royalties plus interest. (*See* O'Neill TA Ex C-1).[17]

As to the MLA, PMC usurped JOMR's corporate opportunity to do business with SSP and TJX yielding a loss of $3,146,995. (O'Neill TA Ex C-1). JOMR is entitled to the income since both deals were made within the limitations period beginning in 2006, less any brokerage fee to which PMC would be entitled for arranging the deal, and less the annual $12,000 paid to JOMR. O'Neill opines based on her discussion with a brand licensing agency that JOMR would be entitled to 75% of the SSP and TJX proceeds. Effectively, PMC would take a 25% brokerage fee. This estimated fee is consistent with the 8 to 12% brokerage fee PMC paid to Sela Sales Ltd. for introducing and negotiating the deals.[18] (Gary TA ¶30 and DX 111). Plaintiffs shall have judgment for $3,146,995 plus interest.

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[17]O'Neill prepared C1 using audited statements for 2006 to 2014. She estimated 2015 to 2017 since audited financial were not provided. (O'Neill March 7, 2014 Report and Ex C-13). There is no factual basis to question these historically based estimates.

[18]Effectively, PMC would receive a 13% brokerage fee if Sela's 12% is subtracted from the proposed 25% fee.

As to below market rents, JOMH is entitled to $1,742,000 in damages representing lost rent from November 1, 2006 to the date of the sale of the building with interest. (O'Neill TA ¶¶ 37-38 and Ex C-10). Regardless of whether Charlie acquiesced in the low market rent, thus barring Charlie or his progeny from initiating legal action as to those claims, Cook's Estate certainly had no such legal bar from initiating this action.

After the sale of the building for $5.9 million, defendants paid JOMR $780,000 for loss of its under market lease caused by the sale. (Gary TA ¶151). Plaintiffs are entitled to their share of the proceeds from JOMH's sale of the building.

The 2007 and 2011 Licenses here are clearly impermissible self-interested transactions. Self-interested transactions by corporate fiduciaries are void unless ratified by vote of the disinterested directors or shareholders, or demonstrated by the proponents of that transaction to be entirely fair and reasonable to the corporation. (BCL § 713). For the reasons stated above, plaintiffs have established that the 54 agreements comprising the 2007 and 2011 Licenses were not ratified by disinterested directors or shareholders, and defendants failed to establish that they are fair or reasonable. Accordingly, the court declares that the 2007 and 2011 Licenses between JOMR and the New Palms are void.

Likewise, the court grants plaintiffs' request for an injunction prohibiting defendants from continuing to harm JOMR with below market licenses for the use of Palm IP.

While PMC has paid defendants' legal fees of approximately $ million, PMC has charged JOMR and JOMH creating a liability on their books and records. No legal basis has been provided to the court to support payment of defendants' legal bills by JOMR or JOMH. Having found that defendants breached their fiduciary duties to JOMR and JOMH, defendants shall credit JOMR and JOMH, accordingly.

Pursuant to BCL § 626 (e), plaintiffs are entitled to attorneys' fees. Within 60 days, plaintiffs shall submit an affidavit of services including resumes detailing experience and training to justify hourly rates, invoices, and time sheets. Otherwise, waived. Defendants may object within 30 days thereafter. Otherwise, waived.

Plaintiffs shall submit a judgment including proposed interest calculations on notice within 30 days to the Part Clerk for Part 48 in Courtroom 242.

DATED: November 13, 2018

ENTER:

ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY
J.S.C.