STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

WHITE MANAGEMENT CORP., M & W FOODS, INC., LOG JAM OF GLENS FALLS, INC., BOUNTIFUL BREAD, INC., PLATTSBURGH TACO INC., KODIAK CREAMERY, INC., NORPCO RESTAURANT, INC., ALBANY-PLATTSBURGH UNITED CORP., CCB REALTY LLC and DAVID R. WHITE

Plaintiffs,

Index #904783-20

-against-

RAY E. ALEY, III,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW

Dated: September 6, 2022

DANIEL J. CENTI
Feeney and Centi
Attorneys for plaintiffs
127 Great Oaks Boulevard
Albany, New York 12203
(518) 452-3710

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PRELIMINARY STATEMENT

On our cross-motion, we seek partial summary judgment establishing as a matter of law on plaintiffs' First Cause of Action that defendant engaged in a series of acts constituting a breach of fiduciary duty to M & W Foods ("M & W"), and Plattsburgh Taco Inc. (Plattsburgh Taco"). The amount of damages on the First Cause of Action are left for trial as explained in the Affidavit of David R. White [par. 38] filed herewith. On our Third Cause of Action, plaintiff is seeking summary judgment on behalf of M & W establishing that by his misconduct defendant acted as a faithless servant, has forfeited from June 16, 2019 onward the compensation paid or payable to him by such company, which consequently is entitled to a monetary award together with determination defendant has forfeited the deferred compensation due January 1, 2023. Plaintiffs M & W, Plattsburgh Taco and White Management oppose also defendant's motion to dismiss our Second Cause of Action for Accounting.

White Management has joined in these motions not just because defendant's culpable conduct concerned data created, maintained and entrusted to defendant by White Management, but because defendant's compensation was in the first

instance paid by White Management, which was in turn reimbursed by the responsible entity M & W. [Affidavit of David R. White, pars. 3-4] Consequently, White Management joins in our motions in case such is necessary for complete relief to be afforded to plaintiffs. Unless stated otherwise herein, references to Exhibits are those annexed to the Affirmation of Daniel J. Centi filed herewith.

POINT I. DEFENDANT BREACHED HIS FIDUCIARY DUTY TO PLAINTIFFS M & W FOODS, INC. AND PLATTSBURGH TACO INC.

In the usual case, a cause of action for breach of fiduciary duty has three elements: 1) existence of a fiduciary relationship 2) misconduct by defendant, and 3) damages caused by conduct of the defendant. Kurtzman v. Bergstol, 40 AD3d 588 (Second Dept. 2007); Parekh v. Cain, 96 AD3d 812, 816 (Second Dept. 2012). (Although, see discussion below of the third "element.")

As a shareholder, director and officer of plaintiffs M & W and Plattsburgh Taco), defendant was a fiduciary of such entities. Additionally, he was a family member standing in a fiduciary relationship with the other family members in co-owned business ventures. Braddock v. Braddock, 60 AD3d 84,88 (First Dept. 2009) Directors and Officers of a corporation owe a fiduciary duty to the corporation itself. Yu Han Young v. Chiu, 49 AD3d 535, 536 (Second Dept. 2008). In a close corporation, as in our case, a shareholder too has a fiduciary duty

to the corporation. Defendant has conceded defendant's fiduciary relationship with M & W and Plattsburgh Taco. [Affirmation W. Nolan, par. 13]

A fiduciary is subject to the most stringent standard of conduct. Utmost good faith and honesty is of course required of them. However, "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Fender v. Prescott, 101 AD2d 418 (First Dept., 1984), affd. 64 NY2d 1079 (1985), quoting Chief Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464. This fiduciary duty is one requiring "their undivided and unqualified loyalty to the corporation." Howard v. Carr, 222 AD2d 843 (Third Dept. 1995).

Defendant engaged in a course of misconduct. He betrayed a duty of trust, through a series of communications and improper disclosures to third parties. The disclosures included proprietary and confidential information of the plaintiffs M & W and Plattsburgh Taco. The conduct was willful. It was clandestine, though he was as a fiduciary strictly obligated to make full disclosure of all material facts at all times. He did so for his own personal interest, without any benefit whatsoever to these two plaintiffs.

Respecting one of the acts of misconduct, i.e. the June 18, 2019 furnishing to Santana of 170 pages of plaintiffs' Debt Schedules, defendant alleges now, after two years of litigation, that it was an accident. [Affidavit Ray Aley, par. 56] Acknowledging the seriousness and sensitivity of the Debt Schedules, he testified

he never would have purposely sent them to Santana. He says now that he had intended to delete them. Obviously then, he did not check his email attachment just prior to sending it. He states also "I was in a rush when I sent the June 18 emails. We were scheduled to board a flight to bring my daughter to her college orientation at 5:00 a.m. the next morning, and we were behind in packing. I do not recall checking the email once it was sent." [Affidavit Ray Aley, par. 44] The Court should not accept as a matter of law defendant's proferred explanation for the transmission to Santana of the Debt Schedules. However, even if it were true, this fiduciary breached his duty of care to plaintiffs.

As to him, "all corporate responsibilities must be discharged in good faith and with 'conscientious fairness, morality and honesty in purpose' ... Also imposed are the obligations of candor…and of good and prudent management of the corporation." Alpert v. 28 Williams Street Corp., 63 N.Y.2d 557,569 (1984). The aforesaid June 18, 2019 act of defendant, as well as all the other improper disclosures herein, were not fair to plaintiffs, were not in their interests at all. His obligation of candor was treated contemptuously by him. This June 18, 2019 email, as well as all the other communications at issue, were clandestine, the opposite of truthful and complete disclosures to plaintiffs.

His entire course of conduct did not constitute "good and prudent management of the corporation." Defendant was pursuing personal interests,

accompanied by a visceral dislike of David R. White. Defendant expressed such disdain graphically in another of his emails to Santana and Hirshon, calling his co-shareholder a "prick", "heartless", and that he was "stealing" M & W and Plattsburgh Taco from his own daughter and defendant. [Affidavit of David R. White, par. 29 and Exhibit V] Although White previously had some arguments with defendant, he did not suspect that his son-in-law had such intense feelings of hatred towards him, as evidenced by this June 16, 2019 email. [Affidavit David R. White, par. 29] These feelings apparently justified in his mind to do whatever he wanted with proprietary and confidential information, and to disparage White in his trade or business – which constitutes defamation *per se*. Rossi v. Attanasio, 48 AD3d 1025, 1027 (Third Dept. 2005). Defendant engaged in intentional misconduct or, at the very least, rank carelessness and gross negligence. Yet, defendant brazenly argues that as a matter of law he did not breach his fiduciary duty to plaintiffs.

Defendant offers various excuses for divulging to Santana and Hirshon information that they should have not received, including the Weekly Sales Reports of M & W and Plattsburgh Taco in Exhibits B, E, F and G. We have addressed by evidence all of his excuses. [See Affidavit David R. White, pars. 14-16, 33-35,37; Affidavit of Tawnya Hanson; Affirmation of Daniel J. Centi, pars.7-9]. We won't repeat our treatment here.

However, we best emphasize one critical piece of evidence created by defendant himself. As David R. White points out in paragraph 19 of his Affidavit, Exhibit W is a February 24, 2019 email defendant sent to Santana when Santana was proposing to buy the entire Dunkin Donuts network, or in other words, before White became the intended purchaser in April 2019. In the attachment, defendant utilized a spreadsheet from a Weekly Sales Report prepared by Tawnya Hanson. He was careful, prior to sending it, to redact therefrom the information of M & W's KFCs and Plattsburg Taco's Taco Bell, while retaining the DunkinDonuts information. Then, he even added more Dunkin information in a spreadsheet that he created. [Exhibit I, Transcript R. Aley, pp. 41-44] Exhibit W powerfully illustrates that defendant redacted information when he wanted to do so. More importantly to this case, however, Exhibit W proves also this fiduciary recognized his obligation to protect financial information of plaintiffs, and that neither Santana nor anyone else should receive M & W and Plattsburgh Taco information, that in his words, "didn't need to be shared." [Exhibit I, Transcript R. Aley, pp. 183-184]

Unquestionably, defendant caused injury to movants while seeking personal opportunities with third party Santana. The pecuniary injury included: his use of the time, equipment and resources of plaintiff M & W, such as the email system of White Management, a cost share of which was charged by White Management to M & W and Plattsburgh Taco; and his misuse of proprietary data

of M & W and Plattsburgh Taco compiled and preserved by White Management for their benefit and at their cost. [Affidavit David R. White, pars. 3-4; Affidavit of John Peek, pars. 5-8] All of these items are recoverable as damages. 30 FPS Productions, Inc. v. Livolsi, 68 AD3d 1101 (Second Dept. 2009).

Moreover, when a breach of fiduciary duty occurs, rules for calculating such damages are relaxed, and "the court may be accorded significant leeway in ascertaining a fair approximation of the loss,…as contrasted with the more precise, compensatory, standard of a contract or tort case,…so long as the court's methodology and findings are supported by inferences within the range of permissibility" (internal citations omitted). Wolf v. Rand, 258 AD2d 401, 402 (First Dept. 1999). However, the demonstration of those damages are left for trial, and their computation is not part of this motion.

In that regard, damages for pecuniary loss are not required for a claim of breach of fiduciary duty. In Diamond v. Oreamuno, 24 NY2d 494 (1969), defendants, corporate officers and directors, allegedly breached fiduciary duty to the corporation by a sale of some of their stock in the corporation. They had allegedly done so based upon insider information. The Court stated:

> It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. (See, e.g., Matter of People (Bond & Mtge. Guar. Co.), 303 N.Y. 423, 431, 103 N.E.2d 721,

> 725; Wendt v. Fischer, 243 N.Y. 439, 443, 154 N.E. 303, 304; Dutton v. Willner, 52 N.Y. 312, 319.) This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court declared many years ago (Dutton v. Willner, 52 NY 312, 319, Supra), 'to Prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.' (Emphasis supplied.) 24 NY2d at 498.

The corporation in Diamond had not suffered pecuniary loss. Rather, the focus was any profits the defendants had made from engaging in the misconduct. In our case, defendant claims not to have profited from his misconduct. However, because he was a fiduciary, and engaged in conduct not to be tolerated by the corporation whether by him or anyone else working for the corporation, the making of a monetary award to movants as sought is quite consistent with the concerns of the Court of Appeals in Diamond. "Although the corporation may have little concern with the day-to-day transactions in its shares, it has a great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock." 24 NY2d at 500. Misconduct is misconduct, whether it concerns making money from selling the corporation's stock or giving away the corporation's proprietary and/or confidential information while trying to profit in another manner.

Additionally, we are not seeking on this motion a determination on punitive

damages claimed on our first cause of action because "[w]hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts." Nardelli v. Stamberg, 44 NY2d 500 (1978).

POINT II. AS A FAITHLESS SERVANT, DEFENDANT FORFEITED HIS RIGHT TO COMPENSATION FROM M & W FOODS AND PLATTSBURGH TACO

In addition to being a shareholder, Vice-President, and Director of M & W and Plattsburgh Taco, defendant was the District Manager for the numerous M & W restaurants including Dunkin Donuts and a Taco Bell. Defendant has acted in a manner not consistent with his trust, and not performed his duties with utmost good faith and loyalty to plaintiffs M & W and Plattsburgh Taco. Therefore, he is not only liable to account for all his transactions, but must forfeit his right to compensation from these corporations. Lamdin v. Broadway Surface Adv. Corp., 272 NY 133 (1936); Western Elec. Co. v. Brenner, 41 NY2d 291 (1977).

Unquestionably, due to his obligation of loyalty to his employer, "an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." Western Electric Company v. Brenner, 41 NY2d 291, (1977), citing Lamdin v. Broadway Surface Adv. Corp., 272 N.Y. 133, 138 (1936). In Lamdin, a disloyal employee sued his employer for the balance of salary owed

to him. After a jury found for plaintiff employee, the Trial Court dismissed the complaint notwithstanding the jury's verdict, but the Appellate Division reversed reinstating the jury's verdict. The Court of Appeals, however, reversed the Appellate Division, stating that "Not only must the employee or agent account to his principal for secret profits, but he also forfeits his right to compensation for services rendered by him if he proves disloyal."

The faithless servant doctrine has been stated clearly by the Court of Appeals as follows:

> One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary (Restatement, Agency 2d, § 469). Nor does it make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent (citations omitted, underlining added). Feiger v. Iral Jewelry, Ltd., 41 NY2d 928, 929 (1977).

In his Memorandum of Law, defendant argues that his misconduct was not substantial and thus forfeiture does not apply. However, he does not explain how it was not substantial, this course of conduct spanning about six weeks and which was secretive, even to the point of defendant utilizing his private personal email account when he was still had use of the White Management email system. Defendant does not explain how the mandate of the Court of Appeals quoted above, is not applicable to him, to wit: "an employee is prohibited from acting in

any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." Western Electric Company v. Brenner, *supra*, at 295.

Defendant next argues that the payments under the Deferred Compensation Agreement are immune because they were made after the misconduct ended, and M & W agreed to make the payments, and that his services thereunder could be terminated only for cause of criminal conviction. However, the governing period of forfeiture is from date misconduct commenced onward. Also, the law allows for complete and permanent forfeiture of payments made that defendant would otherwise be entitled to receive regardless of the type of agreement specifying the payment obligation. The payments could be post retirement benefits or, as here, deferred compensation.

Also, the fact that the Deferred Compensation Agreement provides for defendant's termination only for cause of a certain type of conviction is a separate matter and not relevant. A termination of employment might occur with minimal financial impact if most of the agreement was near completion anyway, and would not in any event affect compensation received after the misconduct but prior to the termination, or require defendant to provide services after the termination.

Moreover, this is certainly not a case in which the parties attempted in their Agreement to specifically exclude or even address possible forfeiture as a

Faithless Servant. At the moment the Deferred Compensation Agreement was signed on September 19, 2019, David R. White was aware of one, and only one improper disclosure, i.e. the Debt Schedules of Exhibit D. [Affidavit of David R. White, pars. 30-32; Affirmation of Daniel J. Centi, pars. 17-23] However at the same moment of signing, defendant knew he had engaged in at least five additional improper disclosures to Santana and Hirshon - Exhibits B, C, E, F and G. Yet defendant, knowing White had been upset about the disclosure of Exhibit D, did not disclose to White the additional five disclosures, or try to protect himself against possible forfeiture as a Faithless Servant, and all our other claims in this case, by way of a release or otherwise in the Agreement. Instead of speaking up in that regard, he chose to remain silent, taking his chances that the extent of his misconduct would never be discovered by White. His decision has consequences.

In City of Binghamton v. Whalen, 141 AD3d 145 (Third Dept. 2016), defendant had stolen from his employer and was sued for breach of fiduciary duty. Supreme Court had granted summary judgment on liability but not on the issue of damages. The Appellate Division modified, by reversing the partial denial of summary judgment for plaintiff and granting the motion in its entirety. The Court rejected the reasoning of Supreme Court that defendant's earlier "unblemished" years of service to plaintiff created an issue of fact on liability, quoting from Feiger. The Court rejected also the idea that forfeiture of compensation should be

apportioned to the disloyal acts, or in other words, that damages should be limited to compensation received during the period of disloyalty. Rather, the defendant was held to have forfeited all compensation received from the time the culpable conduct commenced.

In William Floyd Union Free School District v. Wright, 61 AD3d 856 (Second Dept. 2009), plaintiff sued two former employees for breach of fiduciary duty due to theft. Plaintiff was awarded summary judgment in Supreme Court on liability and its request for monetary relief, including forfeiture of defendants' post retirement insurance benefits (health, life and dental) which plaintiff had previously agreed to pay under in their employment contracts. However, Supreme Court had limited the forfeiture of insurance benefits to 10 years. Cross appeals were taken. The Appellate Division affirmed summary judgment on liability, but ruled Supreme Court had erred in limiting such forfeiture for 10 years, stating at 859:

> Where, as here, defendants engaged in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine. (Underlining added.)

Defendant argues also that the Deferred Compensation payments were not made to defendant as an employee during June or July 2019 when the misconduct occurred. Again, the relevant period for forfeiture is from date of misconduct onward; and the type of compensation, deferred or otherwise, retirement or

otherwise, wages or benefits, are not relevant. In any event, White Management's Chief Financial Officer John Peek states unequivocally herein that the deferred compensation payments have indeed been made to defendant as an employee. [Affidavit of John Peek, pars. 3-4]

Also, defendant argues in his Memorandum of Law (p. 14) that "most importantly, Plaintiffs were well aware of Ray's communications with Santana when the Stock Purchase Agreement and Deferred Compensation Agreement were executed, but never raised any issues with respect to the emails at any point prior to the closing date on either." Again, this is an astounding misstatement of fact, inasmuch as plaintiffs knew of only one of the emails when such Agreements were signed, i.e. the June 18, 2019 transmission of plaintiffs' Debt Schedules. (And defendant denied that.) As demonstrated on this motion, that was the only email known to plaintiffs even when this lawsuit commmenced. Defendant's course of conduct was pieced together only through depositions of non-parties Hirshon and Santana, no help from defendant's disclosures and testimony. [Affidavit of David R. White, pars. 30-32; Affirmation of Daniel J. Centi, pars. 17-23]

Finally, defendant argues that certain of the compensation paid to defendant related to the first quarter of 2019; however, that is not accurate. [Affidavit of David R. White, par. 37]

As a result, plaintiff M & W is entitled to summary judgment establishing

its Third Cause of action under the faithless servant doctrine, and that an award be made to such plaintiff against defendant as requested in the Affidavit of David R. White filed herewith.

III. DENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND CAUSE OF ACTION FOR ACCOUNTING SHOULD BE DENIED.

As a matter of equity, plaintiffs' claim for accounting should not be dismissed because defendant has not fully accounted.

Plaintiffs duly served upon defendant a demand for accounting. [Exhibit Q] We then sued the case. The existence of an adequate remedy at law is not a bar to accounting when a fiduciary relationship exists. Koppel v. Wien Lane & Malkin, 125 AD2d 230 (First Dept. 1986). Defendant is a fiduciary. Also, an officer or director of a corporation can always be sued by the corporation to account for his conduct for "the neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge' or "The … transfer to others…of corporate assets due to any neglect of, or failure to perform, or violation of his duties." Business Corporation Law, section 720.

An accounting is an equitable remedy. We urge the Court not to dismiss this claim because defendant has never fully accounted. Again, he failed to disclose most of the acts of misconduct in response to our discovery demands and

at his deposition. They were revealed later through subpoenas of nonparty witnesses Hirshon and Santana. When we moved to serve our Second Amended Complaint to ensure that all those recently revealed acts be included, opposing counsel Gabriella Levine requested to continue the deposition of David R. White concerning those new allegations. The undersigned so stipulated and stated that we too wanted to continue defendant's deposition regarding the new allegations. [Affirmation of Daniel J. Centi, pars. 28-29]

Those depositions never took place because of defendant's current motion which stayed all disclosure. Hence, defendant, by his earlier concealment of improper communications with Hirshon and Santana, has evaded any examination about them; and he asks the Court now to accept whatever he says by way of explanation of those acts taking place. Full accounting of his conduct has not been made by defendant. Defendant's motion to dismiss this claim should be denied. Indeed, his deceitful avoidance of being deposed about so much of our case should by itself result in denial of his motion for summary judgment in its entirety.

CONCLUSION

Wherefore, plaintiffs respectfully request as follows:

1. Partial Summary Judgment on our First Cause of Action in favor of plaintiffs M &W Foods, Inc. and Plattsburgh Taco Inc. against

defendant determining defendant's breach of fiduciary duty to such plaintiffs;

2. Summary Judgment on our Third Cause of Action in favor of plaintiff M & W Foods, Inc. establishing that defendant as a faithless servant of said Corporation has forfeited all compensation paid or payable to him from June 16, 2019 onward, and for a monetary award in favor of plaintiff M & W against defendant, as calculated by David R. White in his Affidavit submitted herewith, in amount of $550,186.36, and determination that defendant has forfeited the deferred compensation payment due January 1, 2023;
3. Denial of defendant's motion for summary judgment, together with such other and further relief the Court deems just and proper.

CERTIFICATION OF WORD COUNT

I hereby certify pursuant to Rule 17 of 20 NYCRR 202.70 (g) that the total word count for the foregoing according to the word processing system used herein is 4,141.

Dated: September 6, 2022

Daniel J. Centi