SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ESTHER J. O'MAHONY and KEN FOLEY, individually and on behalf of DUBCORK INC., a New York Corporation, d/b/a SMITHFIELD and SMITHFIELD NYC,

Plaintiffs,

-against-

GAVIN WHISTON, THOMAS MCCARTHY, KIERON SLATTERY, MOXY RESTAURANT ASSOCIATES, INC., and DUBCORK INC. d/b/a SMITHFIELD, SMITHFIELD NYC and SMITHFIELD HALL,

Defendants.

Index No.: 652621/2014

JENNIFER G. SCHECTER, J.S.C.

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Plaintiffs Ken Foley and Joanne O'Mahony respectfully submit this post-trial brief and request that the Court enter judgment in their favor in the amount described below.

This Court articulated the issues requiring trial in its October 4, 2019 Decision and Order on the parties' respective cross-motions for summary judgment ("Decision") [Dkt.369].

The trial was conducted on Microsoft Teams between January 5 and 19, 2022, with all direct testimony presented by affidavit except for the testimony of Liliana Cruz Lopez, Defendants' witness, who was deposed, but declined to testify for Defendants at trial. With Plaintiffs' consent, her deposition testimony was admitted into evidence. Plaintiffs called five witnesses and Defendants called nineteen.

PRELIMINARY STATEMENT

The evidence adduced at trial demonstrates that it is not necessary to invoke the "corporate opportunity" doctrine to hold Individual Defendants Gavin Whiston, Thomas McCarthy, and Kieron Slattery liable for breach of fiduciary duties. The evidence conclusively establishes that Defendants appropriated the tangible and intangible assets of Dubcork and proceeded to carry on the business for which Dubcork had been formed in their newly formed corporation, Moxy Restaurant Associates, Inc. S*ee Glenn v. Hoteltron Systems, Inc.*, 74 N.Y.2d 386, 391-392 (1989). Under a corporate opportunity analysis of these facts, Defendants are also liable because the opportunity to continue Smithfield belonged to Dubcork and was usurped by Defendants.

Defendants' waiver and acquiescence defenses fail because Defendants' multiple assertions of disclosures were proven false and because even if true, they would be inaccurate and misleading disclosures insufficient as a matter of law to be a basis for waiver. Further, Defendants' transferal of Dubcork's assets to Moxy constitutes waste, and waste is not waivable. In any event,

the uncontroverted evidence shows that Plaintiffs knew nothing about what Defendants had done and so they couldn't have "knowingly" waived their rights to object to Defendants' actions.

The trial evidence establishes that Defendants' "defenses" were based on an implausible Rube Goldberg-like construct of blatantly false and often contradictory factual representations, including that (a) they had started a "new bar;" (b) the original Smithfield was forced to close by the landlord**,** Dubcork was dissolved and liquidated and only then did Defendants set out to open a "new bar;" (c) the net leasehold sale proceeds were distributed and Defendants invested in the "new bar," but Ken wouldn't have wanted to; (d) Defendants didn't take any of Dubcork's furniture, fixtures and equipment ("FFE") to the new bar because they had purchased a fully equipped restaurant; (e) Defendants were contractually obligated under the Stipulation of Settlement with the landlord to remove all of Dubcork's FFE when Smithfield closed; (f) they didn't have time, so they moved everything into storage; otherwise it would have been abandoned; (g) the FFE had no value and everyone could take whatever they wanted; (h) they took only the sign to the new bar for nostalgic purposes [Dkt. 336] (this testimony changed several times to conform to what they learned Plaintiffs could prove); (h) Defendants put the POS system into storage and it was "pretty much abandoned;" then they unabandoned and reused some of it at the "new bar;" and (i) when Smithfield closed, the Smithfield name and all of the Smithfield social media sites and email addresses were available, so they took them *de novo* for Moxy.

Defendants' defenses easily qualified as frivolous under Rule 130 (c)(3) as being based on demonstrably false material factual statements, and (c)(2) as being undertaken primarily for delay and to prolong the resolution of this case.

Defendants' many forms of waste and the damages Plaintiffs sustained were also established at trial.

I. THE INDIVIDUAL DEFENDANTS VIOLATED THEIR FIDUCIARY DUTIES BY, AMONG OTHER THINGS, USURPING DUBCORK'S OPPORTUNITY TO RELOCATE AND CONTINUE THE SMITHFIELD BUSINESS

A. The Opportunity to relocate and continue Smithfield Belonged to Dubcork

1. **The Evidence shows Individual Defendants were not seeking to open a "new bar;" they were seeking to relocate and continue Smithfield.** It is uncontroverted that when Defendants unilaterally agreed to sell the Dubcork leasehold in June 2013, they began simultaneously looking for a new location for Smithfield. They purported to act for Dubcork. But when it came time to sign a lease and key money agreement in December 2013, they formed Moxy and diverted the new location for Moxy. They did this while they were officers, directors, and majority shareholders of Dubcork.

"A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business.")." *Matter of Greenberg*, 206 A.D.2d 963, 964 (1st Dept 1994). There is no doubt that the 138 West 25th Street lease was essential to Dubcork's existence <u>and</u> logically and naturally adaptable to its business. Dubcork had an active interest, not just a tangible expectancy, in this opportunity because Defendants were negotiating it for Dubcork.

The facts are uncontroverted. A month after Dubcork opened Smithfield for business on March 30, 2012, its landlord approached it about selling its leasehold so the site could be redeveloped. The landlord offered to move Smithfield to a new location on the same block at its expense. Whiston, McCarthy, Slattery, and Foley (the "partners"), acting together, decided that this was impractical and negotiated for the landlord to pay Dubcork enough money so they could relocate Smithfield on their own [Foley Direct ¶¶30-57]. As Whiston explained in an October 14,

2012, email to the landlord: "**We just want the resources to be able to recreate what we have worked so hard to build.**" [P47 at p.3; see also J38, P90, TT1030-1].

They negotiated to be able to take Dubcork's FFE with them and asked the landlord to pay for "[d]econstruction costs associated with the removal of fixtures and equipment etc. [and] [s]torage of said items for 12 months" [P208]. Initially, the landlord agreed to this [P48], but then negotiations stalled. The landlord then resorted to litigation and the litigation was resolved by execution on June 25, 2013, of a Stipulation of Settlement between 215 West 28th Equities, LLC, as landlord, and **Dubcork, Inc., d/b/a/ Smithfield**, as tenant.

The Stipulation provided for the landlord to pay Dubcork $1.9 million and return its $123,600 security deposit, in exchange for Dubcork closing Smithfield by midnight on January 1, 2014 and delivering vacant possession by January 15, 2014. Defendants were explicitly permitted to take whatever FFE they wanted. [J1, ¶5 ("[Dubcork] may remove such improvements, fixtures and/or Personal Property that it desires from the Premises prior to the Vacate Date notwithstanding any provision in the Lease to the contrary") and ¶17 ("Petitioner waives any rights under the Lease to require [Dubcork] leave any fixtures or installations intact in the Premises upon its surrender thereof.").

In May 2013, Whiston and McCarthy began looking for space for what they called the "new Smithfield." [P119]. McCarthy explained in a July 2013 email that there was an urgency to getting the new Smithfield open when the old one closed, stating "we'll lose all clubs if we are not open on or before Jan 1st." [P112].

Defendants stated they were looking for space for Smithfield and used Dubcork d/b/a Smithfield's marketing materials in their search. These materials indicated that they were looking to replicate Smithfield [P119]. They explained to one prospective landlord that: "The Smithfield

currently occupies approximately 8,000 square feet and **intend to relocate** to 144 West 27th Street" (emphasis supplied) [P114].

On September 16, 2013, Defendants submitted a proposal to the landlord at 138 West 25th Street on behalf of "Smithfield" [P119, P119A]. It was substantially the same proposal that the partners had submitted to build the original Smithfield in 2011 (except O'Mahony was deleted).

On November 13, 2013, Larry Rader, Dubcork's lawyer, told Andrea Lawrence, general counsel to Dubcork's new landlord, HAP Investments, that "**Dubcork is relaunching in a new space**. **the [leasehold sale] money is needed to rent and build that space.**" (sic) (emphasis supplied) [P123].

On December 6, 2013, McCarthy wrote to Lawrence asking for a few months' extension on the vacate date for Smithfield, "**[j]ust enough time to get 25st open so we wouldn't lose our fan base**." (emphasis supplied) [P126, p.3].

Only after HAP rejected this request did Defendants finalize the deal for the West 25th Street space. On December 18, 2013, they told Dubcork's employees in a meeting (to which Foley and O'Mahony were not invited) that Smithfield would be closing on December 31 [TT1298:6-21; P128]. December 18 is also when they announced Smithfield's closing on the internet [P7].

They formed Moxy on December 19, 2013 [P130], and caused Moxy to sign the lease for the 138 West 25th Street premises [J3] and an agreement to buy out the tenant of that space [J2].

Defendants closed Smithfield at midnight on January 1st and vacated the space on January 15, 2014. They moved Dubcork's FFE, including its point-of-sale system ("POS") into storage, and when the new premises were ready, they moved whatever they could use to the new location [P152; P154; TT1062, 1063:8-14, 1068:16-22].

2. **Defendants used Dubcork's funds to pay for the West 25th Street lease and key**

money. Under the Stipulation of Settlement, the balance of the leasehold sales proceeds was not payable until January 16, 2014, after Dubcork had surrendered possession. But Defendants needed to pay the West 25th Street lease deposit before then, so they asked Dubcork's landlord to release it **to Dubcork** ahead of time [P123]. The landlord agreed and on January 6, 2014, Dubcork d/b/a Smithfield entered an Amended Stipulation of Settlement [P136] which provided for the early release of $70,200 of Dubcork's money. These Dubcork funds were wired to Rader's trust account and he transferred the funds to the new landlord as the security deposit for Moxy [P133].

On January 16, 2014, Dubcork received the balance of the leasehold sales proceeds, and the Individual Defendants used these Dubcork funds to pay the $500,000 in key money for Moxy [P139].

3. **Defendants misappropriated Dubcork's tangible and intangible assets for the new Smithfield.** Defendants took whatever tangible assets belonging to Dubcork they decided they could use in the relocated Smithfield, placed them in storage until the new premises were ready, and then moved them to the new Smithfield [P152; P200, TT1068:16-22].

Defendants also took Dubcork's intangible assets. After Smithfield closed, Defendants continued to use the Smithfield website, Facebook page, and other social media sites, as well as Smithfield's email addresses, without interruption as if Smithfield were still functioning. On May 20, 2014, they renamed the Smithfield Facebook page "Smithfield Hall," [P245B]; but it mainly continued to be referred to as just "Smithfield." [*see* TT1039:6-19]; (presumably they did the same with the other social media sites).

When Defendants changed the name to Smithfield Hall, photos of Smithfield Tavern from 2012 and 2013, were renamed as being of Smithfield Hall. Thus, on the internet, Smithfield became one bar having existed since 2012 and called Smithfield Hall [P245B].

Defendants made every effort to transfer Dubcork's goodwill to the new Smithfield and Moxy [P245B, P257, P248, P248C]. This was of paramount importance. Smithfield was a "monster" of success almost as soon as it had opened [P165].

Dubcork received nothing for any of its assets.

Defendants' breach of their fiduciary duties was so all-encompassing and egregious that liability can be found without resorting to the corporate opportunity doctrine. *See Glenn v. Hoteltron Systems, Inc.*, 74 N.Y.2d at 391-392. ("Schachter, in complete disregard of his fiduciary duty to the Ketek corporation, seized all of the corporate assets of Ketek, … and then proceeded to carry on the business for which Ketek was formed under the Hoteltron name."). This is misappropriating a corporate business by those who are its guardians.

A corporate opportunity analysis is not necessary, but substantially these same facts have been held to be a breach of the corporate opportunity doctrine. *See Greenberg,* 206 A.D.2d at 964 ("The record establishes that Greenberg unilaterally seized the tangible and intangible assets of Madison Cabinet, transferred them to his new corporation, Meyer's Cabinet, and used that new entity as the vehicle for usurping the corporate opportunities of Madison Cabinet, in breach of his fiduciary duty to Madison Cabinet and its other shareholders." *See* also *Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008] ("secretly establishing a competing entity and acquiring the property at issue" was a violation); *Stavroulakis v Pelakanos*, 218 Misc. LEXIS 429, *28 [Sup Ct, NY County 2018] "This [corporate opportunity] doctrine is violated where, as here, a director secretly forms a new entity and transfers the corporation's entire business to that entity.").

4. **Defendants promoted the new Smithfield as a continuation of the original Smithfield to the entire world, except this Court**. Defendants openly and notoriously publicized to everyone that the new Smithfield was the same bar as the old one [TT1058:15-26],

while simultaneously misrepresenting to the Court that it was a new and different bar.

Before Individual Defendants shut Smithfield, they put out an announcement on their website and Facebook page stating that "we'll be back….watch this space.… For more information, email us at hello@smithfieldnyc.com." [TT1048:17-19; *see* P7 and P138]. After Smithfield closed, emails from Smithfield customers sent to hello@smithfieldnyc.com or gavin@smithifeldnyc.com were responded to by Gavin, using gavin@smithfieldnyc.com, telling them about the new location for Smithfield [P132, P135, P137].

Dubcork's POS vendor was informed that "Smithfield has a new location a few blocks away on 25th Street [*see* TT1064:15-24].

On May 19, 2014, Kieron gave an online interview about the relocation of Smithfield [P203]. The graphic accompanying the article contained the original Smithfield logo and photos of the old bar. It said **Smithfield would be opening soon** on West 25th Street and that "We had a bunch [of soccer team supporters' clubs] in the old Smithfield and we expect that they will come back to us once we reopen." [*Id.*].

On July 8, 2014, Whiston, using gavin@smithfieldnyc.com, responded to a customer who had booked a party at Smithfield in 2013 and was looking to do the same in July 2014: "Thanks for the email and considering Smithfield Hall as the venue for your happy hour. We are no longer located on 28th Street but we have moved to a smaller venue on 25th between 6th and 7th." [P158].

On Twitter, there was considerable buzz about the reopening of Smithfield. Defendants retweeted posts congratulating Smithfield on reopening. [P218].

On LinkedIn, Slattery, to this day, claims that he has been working for Smithfield continuously from March 2012 until the present [P267]. Cruz Lopez claims to have worked for Smithfield from May 2012 to July 2016 [Dkt. 1020].

Yet, to this Court, Defendants presented the new Smithfield as a "new bar" and not a continuation of Smithfield [P135, P137, P138]. They claimed that Smithfield was a common name, so when the old Smithfield closed, they were free to take it. [Slattery Direct, Dkt. 985 ¶7]. They claimed the domain name, smithfieldnyc.com, was available after the old Smithfield closed, so they took it [Slattery Direct, Dkt. 985 ¶8]. These statements were proven false at trial.

When given the opportunity to explain how the new Smithfield business differed from the old Smithfield business, Whiston dissembled and could not give a single example. [TT1061:11-12].

5. **Whatever rights Defendants may have had to open other bars, this did not give them the right to appropriate the Smithfield opportunity.** *See* Atlantis Mgt. Group II LLC v. Nabe, 2022 N.Y. Misc. LEXIS 608, *14 (Sup. Ct. N.Y.Cty., J.G. Schecter, J.S.C., 2022] ("Plaintiff urges that pursuant to § 10.2 of the OA, it was specifically permitted to enter into a competitive business activity. That ignores allegations that plaintiff did not merely enter a competitive business; rather, it--a member of the Company-- took a "corporate opportunity" for itself which ended the Company's business.").

6. **Defendants breached their fiduciary duties by not obtaining board and shareholder approval and by not obtaining Plaintiffs' written consent.** BCL §909(a) provides that board and shareholder approval is required whenever a corporation attempts a disposition of all or substantially all the assets other than in the ordinary course. BCL §910 provides that a shareholder who does not assent has the right to receive payment of the fair value of his or her shares through an appraisal proceeding, as provided by BCL § 623. The purpose of the statute is to protect the interests of minority shareholders by preventing them "from being forced to sell at unfair values imposed by those dominating the corporation" (*Matter of Cawley v SCM Corp.*, 72

NY2d 465, 471 [1988] and "prevent[ing] a corporation from disposing of a major portion of its property without obtaining prior" shareholder approval (*Dukas v Davis Aircraft Prods. Co*., 131 AD2d 720, 721 [2d Dept 1987]). A violation of Section 909 (a) may give rise to, inter alia, a claim for monetary damages by an aggrieved shareholder, particularly where the directors and officers of a corporation have engaged in conduct violative of their fiduciary obligations. *Collins v. Telcoa Int'l Corp.*., 283 A.D.2d 128, 132-33 (2d Dept 2001).

Defendants violated BCL §909(a) by not obtaining board and shareholder approval of the leasehold sale and disposition of substantially all Dubcork's assets. Whiston admitted this [TT970:12-972:2]. Accordingly, Defendants are liable for damages.

Defendants are also liable for damages for violating their agreement that unanimity would be required for any agreement to sell the leasehold. Documentary evidence shows that the partners appointed Whiston as their "spokesman" in dealings with the landlord, without giving him any decision-making power [TT958:7-14]; unanimous written consent was required to approve any transaction [P33]. Whiston acknowledged this. On October 15 at 8:58 PM, Whiston stated: "We still have to get Ken on board, as I can't send it out until we do." [J39; TT1023:18-21]. Later in the conversation, Whiston said: "I'm still waiting agreement e-mail from Joanne." [TT1024:12-18; J39].

Yet, when negotiations resumed around March 2013, Whiston acted without informing or consulting Foley (and most likely, Slattery) [P45; P77]. In contrast to his earlier efforts to keep everyone informed and get their approval in writing, there were no written communications with Foley from then on. Whiston admitted he never even told Foley that the negotiations had started up again [TT1408:25-1409:3].

II. THERE WAS NO WAIVER OR ACQUIESCENCE BY PLAINTIFFS

Defendants' "waiver" and "acquiescence" arguments fail because their allegations underlying them are demonstrably untrue and because even if true, they would not constitute a waiver or acquiescence. Further, one cannot waive acts of corporate waste, which is what Defendants' heist of the Smithfield assets and business was.

"[I]t is settled law that waste or a gift of corporate assets are void acts and cannot be ratified by a majority of stockholders. The rationale for the rule is that "[an] unconscionable deal between directors personally and the corporation they represent could not become conscionable merely because most of the stockholders were either indifferent or actually in sympathy with the directors' scheme." *Aronoff v. Albanese*, 85 A.D.2d 3 (2d Dept.1982). Since transferring Dubcork's assets and business to Moxy constituted waste, Plaintiffs could not approve it by consent or waiver, even if they wanted to.

It is well established that, when a fiduciary, in furtherance of its interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make 'full disclosure of all material facts.'" *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279-280 (1st Dept 2002). Moreover, the beneficiaries of the fiduciary relationship are entitled to rely on the fiduciary's "representations and his complete, undivided loyalty" and were not required to perform "independent inquiries." *Frame v Maynard,* 83 A.D.3d 599, 602 (1st Dept 2011).

Defendants alleged disclosures to Plaintiffs have been demonstrated to be untrue; but, even if true, they would not constitute full disclosure. Defendants claim they told Foley that they were looking to open a "new bar." McCarthy testified that "**The Plaintiffs Knew That We Were Planning to Open a New Bar and Acquiesced** … Ken and JoAnne knew that we were looking at spaces to open a new bar. Both Kieron and I had told him that." [McCarthy heading before ¶29].

This would not constitute full disclosure; in fact, it is misleading disclosure and thus, cannot serve as a basis for a waiver.

Kim Rubino's testimony does not help Defendants. She stated that Foley had told her he didn't want to go to the new bar and that she knew it was his choice by the way he "scoffed" [TT 1314:6-10]. If this is true, it is not inconsistent with Foley seeking a buyout and it does not support a waiver.

McCarthy claims that Foley told him he wanted to be bought out just a few weeks after Smithfield opened and that Foley reiterated this in many other conversations with him [McCarthy Direct ¶¶ 25-28].

According to Foley, it was McCarthy who told him about two months after Smithfield opened that he would have to accept a buyout because he wasn't coming to the "new bar." They negotiated over several weeks and agreed that $675,000 would be a reasonable price for his shares, but there was no agreement reached [Foley Direct ¶¶149 -150, 235-7].

The tape recording of the November 27 meeting (made by Whiston in secret and not produced in discovery), shows that Foley asked for a buyout, but by the end of the meeting, the partners had reconciled and decided to place their differences behind them. According to Foley, for the next couple of months, he was able to organize and bartend at parties, and he thought things had changed [Foley Direct ¶¶184].

Putting aside for the moment who had suggested a buyout, what is clear is that asking for or negotiating for a buyout of his shares is not a waiver of anything. The parties can continue their negotiation and reach an agreement, but unless and until an agreement is reached, the shareholder continues to own his shares and cannot be involuntarily deprived of them.

In the context of seeking or negotiating a buyout, Foley could say whatever he wanted about wanting out of Smithfield, and this could not be deemed a waiver. They could buy him out or not, but they couldn't force him out. Foley explained: "Defendants could have come to us and tried to consummate a deal at that price or another price – but they could not get rid of me *involuntarily* for $192,000," as they tried to do [*Id.* ¶150].

As Judge Shirley Werner Kornreich explained in *RSSM CPA LLP v Bell*, 2017 N.Y. Misc. LEXIS 40, *41-42 (2017): "A waiver is the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. … An intention to waive must be "unmistakably manifested," cannot be inferred from "doubtful or equivocal" acts and should not be lightly presumed. It is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from silence. The party raising the defense of waiver has the burden of proving it (citations omitted)."

Asking or negotiating for a buyout is the opposite of a "voluntary and intentional abandonment" of rights as a shareholder. It is an affirmance of those rights and an indication that one would surrender them for a mutually agreed price. Wanting out of Smithfield in the context of discussing a buyout cannot be construed as an "unmistakably manifestation" of the abandonment of Foley's rights as a shareholder.

Defendants knew that if they couldn't reach a buyout agreement with Foley, there were legal means for them to get rid of a partner [Whiston Direct ¶35], but they elected not to go this route. Instead, Whiston claimed that he "was told that the only requirement is that we give the partner we want to separate from, a truly fair share of the corporation's assets. And we certainly did that here. Ken got precisely what we got" [*Id*].

There is no such procedure, and it is inconceivable that anyone would have told him this. The concept that $192,000 was a "truly fair share of the corporation's assets" is also an absurdity. Defendants took all the assets for themselves, including Dubcork's considerable goodwill, and gave Foley a woefully inadequate payment for his shares – ostensibly a share of only one of Dubcork's assets, its lease, which had become fortuitously valuable. Moreover, Defendants' determination of what Plaintiffs received was unilateral and fraudulent in many respects. Defendants, as majority shareholders had fiduciary obligations to "to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with scrupulous good faith" *Feldmeier v Feldmeier Equip., Inc.,* 164 A.D.3d 1093, 1099 (4th Dept 2018). They obviously violated these obligations by forcing Foley out.

The facts show that within weeks after Smithfield opened for business on March 30, 2012, Whiston and McCarthy began trying to force Foley out. These acts would easily give rise to a claim of shareholder oppression. Foley complained about this in a June 6, 2012, email to the other partners [J6]. That Foley was being forced out was easily visible to Smithfield's general managers, Robbie York and Sean Dillon [Dillon Aff ¶15, York Aff¶40].

Foley testified at great length about how as soon as Smithfield opened, Whiston and McCarthy began to frustrate his "reasonable expectations" in investing in and joining the Smithfield venture [Foley Direct ¶¶172-215]. He explained how Whiston had prevented him from assuming the job the partners had agreed would be his at Smithfield (booking, supervising, and bartending at parties and events) [*Id.*]. He explained how they rigged the compensation system so he could not earn a living and how they set up an opaque compensation system that enabled them

to pay him whatever they wanted [*Id.* ¶¶216-228; 231-232]. He elaborated on many other instances of oppression and explained how they made the atmosphere at Smithfield "toxic" for him. All of this is supported by documentary evidence. If Foley wanted out, it was because of Defendants' oppressive acts, and this cannot be a waiver because it was not "voluntary."

Moreover, Plaintiffs responded immediately and aggressively after they perceived that they were being mistreated. They sent numerous emails demanding information and threatening litigation if their demands were not addressed. They started this litigation promptly after Defendants ignored their demands. Given these facts, Defendants' claim of an acquiesce (or laches) could not have been in good faith.

Plaintiffs testified that they learned that Dubcork was closing from an announcement on the internet on December 18, 2013, and that the lease had been sold also on the internet in mid-January 2014 [TT285:5-11]. They reacted immediately with a series of emails to Defendants and Dubcork's accountant seeking information on what Defendants had done and demanding their rights.

These emails show that Plaintiffs were clueless as to what had just happened to their interest in Smithfield and they disprove Defendants' testimony that they had made multiple disclosures to Plaintiffs and Plaintiffs "knew" about the leasehold sale and new bar.

Perhaps even more so, Defendants' failure to respond to Plaintiffs' repeated requests for information with anything but a few untrue statements, disproves their allegations of disclosures to Plaintiffs. Their responses demonstrate that they were intent on hiding what they had done even after they had completed the leasehold sale and new lease transactions. It destroys the credibility of their testimony that they were making disclosures earlier on.

On January 23, 2014, McCarthy emailed Foley, telling him that the proceeds had just been received and had not yet cleared the bank [Dkt. 290 at 62]. He stated that the accountant

would distribute the net proceeds after all bills and taxes are paid and directed us to contact the accountant if he had any questions [Dkt. 290, page 64]. This was untrue because Defendants had already distributed $600,000 to pay for the Moxy space and to pay themselves a total of $165,000 in bonuses.

Foley wrote back to McCarthy the same day asking about "my extra investment." [J21]. McCarthy did not reply.

On February 27, 2014, McCarthy again wrote to Foley, stating that: "We are getting $50G each as a starter till the tax situation is finalized" [Dkt. 290 at 68]. This too was untrue; $600,000 had already been distributed.

Ultimately, O'Mahony received two checks totaling $192,000, unaccompanied by any explanation or cover letter – nothing stating what this was for or how it had been calculated.

On May 3, 2014, O'Mahony wrote to Gavin, Kieron, and Tom stating: "Hey folks simple question; when am I getting the rest of my money?" [P217]. This is certainly not an acquiescence.

McCarthy responded "There will be one more small check from a tax rebate which we should get in the next month. Following that we will be getting a full breakdown from accountant that will be sent to all of us." [*Id.*]. No "full breakdown" was ever provided and no other disclosure.

O'Mahony wrote: "What about my $84,000 investment?" [*Id.*]. Defendants didn't respond.

On June 11, 2014, she wrote: "Hi folks, I was wondering when I'm going to receive my 20% of ALL Smithfield inventory?" [***Id.***]. A few minutes later, she wrote again: "Hi folks, I

meant 25%." Defendants did not respond, but Slattery mocked her by telling Whiston and McCarthy "Let's just give her the address and bill for the Bronx - it's all hers." [**P154**].

O'Mahony wrote: "Next question: did ADG build the new Smithfield?" This demonstrated that Defendants had left Plaintiffs suspended in time, with no updates since the October 2012 proposal by the landlord to build them a "new Smithfield." Foley testified as much [Foley Direct ¶137]. Nobody responded.

On June 12, 2014, O'Mahony wrote to Dubcork's accountant, Richard Stampfel, with a copy to the Defendants: "Hi Richard, I want to see a copy of every single thing ADG sent to DUBCORK INC./Smithfield." She had an absolute right to this. Her request was ignored. [***Id.***].

On June 16, 2014, she wrote to Stampfel, with copies to Whiston, McCarthy, and Slattery [J24]:

> [A]ny attempt by my other partners to exclude me from a proper settlement of Dubcork Inc/Smithfield, and the use of proceeds from the sale of Dubcork Inc/Smithfield to incorporate a new business will be resisted.

Nobody responded. This belies Defendants' contention that they thought what they had done was legally permissible.

Whiston testified that he never responded to any of O'Mahony's emails because "crazy is crazy" and because he did not consider her his business partner [TT999:26-1000:8].

On July 10, 2014, Plaintiffs' attorney, Dilli Bhatta, sent a demand letter addressed to Defendants, asking for information and threatening litigation. Defendants again did not respond and in August 2014, Plaintiffs commenced this litigation.

Defendants continued to try to hide the details of the leasehold sale and relocation of Smithfield in this litigation. They did not respond to discovery demands until threatened with sanctions. They did not provide any information on what had happened to the leasehold sales proceeds

until 2016, only after being ordered to do so by this Court [TT1095:15-20].

Even then, in 2016, they produced a patently false and inaccurate disclosure document called "Final Financial Breakdown." ("FFB") [P10]. Astoundingly, it did not disclose the total sales price for the leasehold, or the $126,000 deposit paid on signing of the Stipulation. It misleadingly stated that $170,000 in free rent was not cash [TT1101:22-1103:20]. Much of the rest of the FFB is false, misleading and unsupported by company records [TT1103:23-1109:21]. Somehow, they paid Massey, a 10% shareholder $221,000, while Foley, a 20% shareholder received $192,0000. It is farcical and frivolous for Defendants to claim a waiver or acquiescence to this transaction.

The three Individual Defendants' testimony that they made frequent and continuous disclosures to Plaintiffs is also disproven by the fact that they frequently contradicted their prior deposition testimony in which they had testified to almost no communications with Foley. Whiston testified as to no written communications with Foley, but also that he had sent texts and emails none of which were produced in discovery. Slattery testified to a conversation with Foley in June 2012, that he hadn't mentioned in his direct testimony. The documentary evidence supports Foley's testimony that Defendants stopped communicating with him and O'Mahony not long after the November 27, 2012, meeting, during which Defendants purported to make up with Foley and start afresh [1453:23-26].

In their summary judgment motion, Defendants argued that "rumors' – not direct communications – put Plaintiffs on notice that Defendants were planning a "new bar." [Dkt. 295, page 13]. In Whiston's direct testimony, he mentioned the rumors and that "some staff members spoke to JoAnne about this, as early as September 2013." [¶31]. This is false. The trial testimony established that there was no disclosure by Defendants before December 18, 2013, and that all rumors prior to that time could not have been reliable. Rubino testified that

"rumors" started on December 18 and that there were no communications about Smithfield closing or a new bar opening before that [TT1298:6-21].

It is inconceivable that Defendants would have even mentioned rumors if there had been direct communications. Perhaps Defendants realized that their "rumors" argument was not a very good one, so they started "remembering" direct communications – many of them, all the time. They were unable to point to a single document supporting their allegations of disclosures.

III. DEFENDANTS' EXPERT TESTIMONY AND REPORT SHOULD BE STRICKEN

Plaintiffs made an in limine motion to strike Defendants' expert reports [Dkt, 586], and the Court deferred decision on this motion pending the trial. Plaintiffs submit that the testimony of Defendants' expert, John E. Johansen, only confirmed that his testimony should be stricken.

At trial, Plaintiffs were able to show that Defendants' expert, did not apply the professional standards applicable to damages forensic work. The AICPA Statement on Standards for Forensic Services provides that a professional providing such services must "[o]btain **sufficient relevant data** to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed" [TT1565:22-1566:9]. Johansen admitted that he relied substantially on what Whiston had told him [TT1525:2-10]. As such, he was nothing more than a mouthpiece for Whiston, seeking to introduce Whiston's statements as expert testimony, and this testimony should be stricken.

IV. DEFENDANTS' "ACCOUNTING" SHOULD BE STRICKEN

Defendants filed their so-called "accounting" on November 5, 2020 [Dkts 413-432]. It was not a proper accounting because it did not contain any statements of account and used "receipts" not produced in discovery. It also contained many unsigned affidavits. On December

14, 2020, they filed a "supplemental accounting" purporting to rely only on produced receipts [Dkts 468-482].

On January 14, 2021, Plaintiffs moved to have Defendants' "accounting" stricken on multiple grounds [Dkts. 485-498]. On June 29, 2021, Plaintiffs renewed this motion as part of their in limine motions [Dkt. 586]. The Court reserved decision on these until after the trial [Dkt 610].

Foley addressed the accounting and many of its deficiencies in his Trial Affidavit [¶¶419-460]. Among the items he pointed out is that there were major discrepancies between the "accountings" and the documents produced by Defendants purporting to contain the same information. He showed how the numbers kept changing and Plaintiffs submit that this undermines the veracity of the entire "accounting."

At trial, Whiston filed a separate affidavit purporting to be an accounting [Dkt. 972], and each of the Individual Defendants included a "Personal Accounting" in their trial affidavits Defendants [Dkt. 972, 979, 982, 987]. They were filed so Defendants could argue that they were entitled to "offsets" because of loans to Dubcork or other payments for Dubcork's benefit. These personal accountings are improper and should be stricken as not having been included in the prior accountings. The "offsets" should be rejected as not having been raised previously in this case – not in a counterclaim and not anywhere else.

The "personal accountings" include references to deposit slips and checks, without attaching copies (as they should have). They also include alleged cash loans to Dubcork and cash payments for the benefit of Dubcork for which there is no backup provided or even claimed. See, for example, McCarthy's claim to have made around $68,000 in cash loans to Dubcork or payments for Dubcork - $6,000, $23,000, $17,477.18 and 21,804.86 [Dkt. 988]. There is nothing

to substantiate this.

Elaine Platt, Defendants' counsel, stated the Whiston accounting affidavit was identical to the accounting, and a debate broke out in court over this [TT1221:10-22]. Platt's assurances turned out to be not quite accurate and she had to backtrack. She argued that the Court had directed Defendants to provide additional accounting items, and this is what they did. The Court disagreed, stating "You were supposed to account for everything." [TT1226:5-7]. The Court stated that it wouldn't consider anything that was not included in the earlier accountings [TT1225:23-26].

Pursuant to this discussion, Plaintiffs sent the Court overnight a chart showing all the discrepancies in Defendants' multiple accounting filings [Dkt. 1081]. This chart illustrates clearly how the accountings kept changing and cannot be "accurate and complete" – as the Court required in its Decision. This analysis included the three Personal Accountings.

The chart shows that every time Defendants tried to or had to provide numbers such as for Dubcork cash income, loans, and cash expenditures, they came up with different numbers. The accounting must be rejected as not accurate and complete.

Moreover, the evidence shows that Defendants never drew the line between corporate assets and personal assets. McCarthy expressed his belief that corporate assets were there for the taking. He claimed he moved into the top floor at Smithfield because it was free, and anyone could have taken it [McCarthy Direct ¶36-39]. Similarly, Defendants claimed that when Dubcork closed, its assets were abandoned, and anyone could have taken them [TT1231:18-21]. The evidence shows they helped themselves freely to Dubcork's cash and kept no records [TT1142:9-12].

Now that the trial has been completed, we will never get a complete and accurate statement as to what happened to Dubcork's assets. But, per the Decision, Defendants should be held accountable for all assets they failed to account for.

V. THE DAMAGES CALCULATED BY BLASS SHOULD BE ADOPTED BY THE COURT WITH ONLY A FEW MODIFICATIONS

Plaintiffs' expert, Alan I. Blass, CPA, CFE, produced a trial affidavit containing his calculation of Plaintiffs' damages [Dkt. 941]. Given the proof of Defendants' waste, diversion of assets, and that the "difficulty faced in calculating damages is attributable to the defendant[s'] misconduct," a level of uncertainty concerning Blass' approximation of the loss is permissible. *Wolf v Rand*, 258 AD2d 401, 402-403 [1st Dept 1999]. Blass prepared his damages estimate in accordance with existing precedent. *See Cortes v 3A N. Park Ave Rest Corp*., 46 Misc. 3d 670, 693 (Sup. Ct. Kings Cty. 2014).

Blass' damages calculation is broken down into four parts: (A) While Dubcork was operating, (B) the lease surrender payment, (C) while Moxy was operating, and (D) Moxy's future income. He concluded that Plaintiffs' damages were **$3,624,614**. Plaintiffs submit that Blass's damage calculation is consistent with precedent, well-reasoned, and should be accepted by the Court, with just a few modifications to reflect information not fully available to Blass at the time of his reports. These are explained below:

A. Whiston is Liable to Pay Dubcork $40,000 to cure the deficit in his capital contribution. The evidence adduced at trial shows that Whiston only contributed $10,000 out of his agreed capital contribution of $50,000. Dubcork's bank records and general ledger show only a $10,000 check from Whiston [P17]. Whiston claims he made the balance of his contribution by buying $39,800 of goods for Dubcork and deeming this his capital contribution. He claimed that this contribution was evidenced by a bunch of generic receipts and a spreadsheet prepared by Cruz Lopez, of Dubcork expenses that she sent to Dubcork's accountant on December 28, 2013, a couple of days before the bar closed. This spreadsheet listed Whiston's name next to the number $39,802.17, and he claimed that this was his capital contribution. But this amount was listed in a

chart of expenses paid by Dubcork. The only possible conclusion is that these were expenses reimbursed by Dubcork to Whiston. If they were capital contributions, they should have (and undoubtedly would have) been marked as such. Cruz Lopez, instead of having dispositive testimony (as Ms. Platt had represented), had no information supporting Whiston's claim. [Dkt. 1017].

It is not plausible that Whiston would have made his $40,000 capital contribution via unreimbursed expenditures and not made sure that this was reflected on the company's books or at least in separate writing memorializing this. In any event, he is liable because he kept no records.

Finally, none of Whiston's "receipts" would qualify for reimbursement anyway. This is shown in Addendum A to Foley's trial affidavit, an analysis of these receipts.

Blass did not include this in his damages calculation. At the time, it was unclear whether Whiston could back up his claim regarding the $40,000.

B. McCarthy is liable to reimburse Dubcork for $105,247.02 - not $134,008 as Blass had calculated - in personal credit card bills paid by Dubcork. Plaintiffs have reduced the amount computed by Blass of $134,081 to this number to reflect that, after investigation, payments to Sovereign Bank and Santander that were originally assumed to be credit card payments were in fact payments on loans to Dubcork.

Defendants produced piles of generic receipts, but never produced the credit card bills that had been paid by Dubcork. This is not sufficient to prove that the personal credit card bills paid by Dubcork were for business expenses.

Defendants' efforts to justify the payment by Dubcork of McCarthy's personal expenses fails for other reasons. Defendants changed the receipts they claimed were credit card receipts after the Court ruled that only receipts timely produced in discovery could be used and the same receipts

were originally produced as receipts for construction expenses.

Finally, virtually all the "receipts" are deficient as receipts qualifying for reimbursement of business expenses by Dubcork. This is shown in **Addendum B** to Foley's affidavit.

C. The $393,986 in Cash Remaining in Dubcork's Bank Account as of Dubcork's Final Tax Return as of March 31, 2014, was expended afterward and should not be included in the damages calculation. Blass's damages calculation included this amount in cash that was shown on Dubcork's Final Tax Return dated March 31, 2014. [Dkt. 941, page 15]. Its General Ledger as of that date shows the same amount [P232-C]. Defendants claim they spent this entire sum on Dubcork expenses which cleared the bank after March 31. If this is true, they should not have filed a Final Tax Return on that date.

In any event, Blass did not have information on the checks which cleared after that date. Looking at the post-March 31 bank statements, it appears that most of the funds remaining in Dubcork's account were spent on legitimate business expenses afterward. The questionable expenditures are small and not worth pursuing.

If the Court is willing to accept the premise that expenses were paid after the final tax return was filed, Defendants should get credit for this sum.

D. Defendants must reimburse Dubcork for the $126,000 down payment received on the leasehold sale and the $170,000 in free rent. Defendants did not disclose the $126,000 in the Final Financial Breakdown and misrepresented the $170,000 as not being the equivalent of cash. Plaintiffs have determined that much of these funds were distributed by Defendants to themselves as increased compensation and bonuses, but there is no way for Plaintiffs to fully account for them. In any event, it is Defendants' burden to account for them – and they deliberately tried to hide these amounts. Mr. Blass' analysis of the FFB did not include them.

E. **Blass did not value goodwill separately; there was no need to. “**Goodwill is an intangible asset of a business, corresponding in this context to what a buyer would pay for the business, over and above its value as a mere sum of tangible assets …” *Congel v Malfitano*, 31 N.Y.3d 272, 292-293 (2018). Its value was subsumed in Blass’ valuation of the Smithfield enterprise on the income method.

VI. AT TRIAL, DEFENDANTS FAILED TO ESTABLISH THAT ANY OF THEIR CLAIMED UNREPORTED CASH EXPENSES WERE PROPER

A. The Individual Defendants are Liable to Pay Dubcork $903,000 for the unreported cash they admit taking in but have been unable to account for.

1. **Employee Compensation and Expenses paid in Cash**. Whiston’s Trial Affidavit claims Defendants paid $206,524 in cash salaries and $11,160 in First Touch advertising expenses out of unreported cash. But this claim is contradicted by his deposition testimony that all cash expenses were reported [TT1154:19-1155:11].

Further, Defendants’ claimed cash expenses paid with unreported cash cannot be “accurate and complete.” Every time, they purport to account for unreported cash expenses, they come up with a different number. This too would indicate a failure of proof.

Disturbingly, after filing Whiston’s affidavit after the December 15 deadline – and notarized by Ms. Platt, who was not then registered as a notary – they purported to refile it with no changes and a proper notarization on January 4, 2022 [Dkt. 1036]. The original Whiston Affidavit claimed there were 51 First Touch receipts, for a total of $6,120. The revised one – supposedly with only the notary changed – altered the amount claimed for First Touch to $11,160. This amounted to an alteration of their accounting and was improper for multiple reasons. It was a deliberate effort to deceive the Court.

2. **Loan Repayments to Third Parties.** Defendants claimed they kept no records of loans to Dubcork or repayments of these loans. They introduced affidavits at trial from various individuals claiming they made loans and were repaid in cash. There is no documentation – either from Dubcork or the alleged lenders – to support their testimony. This is not proven by providing records of the loans and repayments. Further, many of these affidavits are not credible since they contradict prior statements by Defendants listing Dubcork's cash loans [TT1191:6-23].

If the Court is willing to accept testimony of third parties in lieu of documentation, then as shown below, **at most** $153,500 of unreported cash was used to pay back loans. This is the amount that is consistent with the sparse documentation of Dubcork's loans. It includes $22,000 to Jimmy Gerding, $10,000 to Dave Massey, $60,000 to Mafia, $42,000 to Agerard Riordan, and $19,500 to John Schneider. Of course, there are no records supporting this sparse documentation, either.

The alleged $155,000 loan repayment to Brian Tynan is excluded because it was not listed in the email listing Dubcork loans (see Foley Direct ¶355) and because Tynan testified that this was paid for construction costs and not a loan repayment. [TT925:9-13].

The alleged $86,600 they claim they paid Foley is also not listed. McCarthy testified he had no recollection of repaying that loan [McCarthy Direct ¶12-13].

3. **Bank Deposits.** Defendants should not receive credit for cash they deposited in the bank, as this cash was reported and not included in the $903,000 of unreported cash in the first place.

4. **Reimbursements.** Whiston claimed that Dubcork spent $133,534.83 in cash reimbursements of expenses. This claim was not previously mentioned, and it was not included in Defendant's "accounting." It should be disregarded.

5. Cash Payments to Defendants and Plaintiffs. Whiston admitted that when there was extra cash, it was divided among the founders. There is substantial documentary evidence supporting this [TT1133:15-25]. Yet, Defendants never included this in their accounting. This obvious omission undermines the credibility of their entire accounting.

6. The Unreported Cash was $903,000 and not $810,000 or $560,000, as Defendants later claimed. During his deposition, Defendants' expert agreed with Plaintiffs that the amount of unreported cash was around $903,000 [TT1526:11-18]. Subsequently, Defendants sought to reduce this amount first to $810,000 and then to $560,000 [Johansen Direct, ¶14]. Both efforts aren't justified.

Defendants first sought to reduce the amount to $810,000 by removing tips from the POS revenues used by Blass in his computations. Their fallacy is that Blass used the ratio of cash revenues (including tips) over total revenues (including tips) to determine the percentage of Dubcork's revenues in the POS system that were cash. He arrived at 20% by subtracting the 6% of cash revenues Dubcork showed on its tax returns from the 26% shown on its POS statements. If Blass would have deducted tips from total revenues (as Defendants suggest), he would also have had to deduct tips from cash revenues in computing the ratio. The result would have been the same.

Next, Defendants seek to reduce the unreported cash further by claiming that $250,000 of it was deposited in the bank. As already noted, this is a fallacious approach since the $903,000 in unreported cash did not include cash deposited in the bank in the first place.

Moreover, it is unclear whether Defendants are wrongly claiming this deduction twice – once as a reduction in unreported cash to $560,000 and then by claiming a further reduction from this amount equal to deposited cash.

B. Defendants are Liable to Reimburse Dubcork for $542, 000 in unrecorded cash from parties and open-bar events. York testified that the "cash from open bars was generally not recorded in the POS system" [Dkt. 939, ¶34] and was reported separately in the managers' reports of daily revenues [P38]. McCarthy reported it separately in his surviving weekly report [J42]. This contradicts Defendants' claim that all cash was reported in the POS system. Defendants destroyed the POS data and POS reports, except for a handful that survived as attachments to emails. They claim that there were buttons in the POS system to record parties and open bars [TT1355:23-26]. but they do not show in the four surviving POS statements that these buttons were ever pressed, or that cash from parties or open bars was recorded. It is their burden of proof, and they fail to meet it.

Blass determined that 10% of total revenues was a reasonable estimate of what the unrecorded in the POS system cash was. He computed this by estimating the number of parties and open-bar events. Defendants have not provided any proof that the number was lower and accordingly, Blass' number should stand.

VII. MISCELLANEOUS DAMAGES ISSUES RAISED AT TRIAL

A. The Individual Defendants are Liable to Repay Dubcork the $165,000 in Aggregate Commissions/Bonuses They Paid Themselves. Defendants concede that they had no right to pay themselves each a $55,000 "bonus/sales commission" from Dubcork's sales proceeds [Whiston Direct ¶8]. But they seek to be awarded "offsets" against this liability by seeking payment for allegedly "uncompensated" work performed from 2011 to 2013. These offsets should be rejected because they were never raised before – not in a counterclaim or anywhere else – and they are well past the statute of limitations for such claims. They are also ludicrous on their face. Defendants were paid for "managing" and "troubleshooting" and all these

items fall into the category of managing and troubleshooting.

These gentlemen should forfeit their compensation under the "faithless servant" doctrine; not be further rewarded by paying baseless wage claims that if true, should have been raised 10 years ago. Plus, the timesheets created by Defendants 10 years after the fact (including for Plaintiffs) are not business records and not credible.

B. All Defendants are Liable to Pay Dubcork $571,000 for the FFE which they are unable to account for, including what they took to Moxy and Lunasa

Defendants admitted they took the Smithfield sign after Defendants had shown they could prove this. Later, they changed what they admitted taking several times to conform to what they saw Plaintiffs could prove [TT954:12-18]. At trial, they purported to survey what they had taken to Smithfield and admitted taking these items [Slattery Direct ¶28-29]. In any event, this is not an accounting of what they took from Dubcork to Moxy 8 years earlier, and it is not an accounting of what happened to Dubcork's FFE. Defendants agreed to compensate Dubcork for the value of the FFE removed to Moxy [*Id.*], which they claimed was not much [*Id.*]. This is insufficient. They are obligated to account for all of Dubcork's FFE, all of it disappeared on their watch. They listed the value of these assets on their tax returns as $571,000 and this is what they should pay to reimburse Dubcork.

C. All Defendants are Liable to Pay Dubcork $71,000 as the value of its inventory when Dubcork shut down.

Similarly, Defendants are liable to account for Dubcork's inventory. Defendants gave contradictory statements as to what happened to this inventory and since they failed to account for it, they are liable for the amount the inventory was on Dubcork's books for.

D. All Defendants Are Liable to Repay Plaintiffs' Additional Investment/Loan of $86,397 and other Damages

After years of denying Plaintiffs' claims for repayment of their $90,000 additional investment/loan (claiming first it wasn't made and then that it was made and repaid), McCarthy admitted that he had "no specific memory of paying Ken" [McCarthy Direct ¶13].

Although it was Defendants' obligation to keep complete records, they did not do so. O'Mahony's notebook [J26] provided documentary evidence that the loan of $86,397 had not been repaid. Defendants had the notebook subjected to forensic testing and determined that it was genuine.

As for the possible repayments shown in the notebook, it was clear from the general ledger that the other founders had received the same "loan repayments" and that they were salary payments. [P232, P232A, P232B].

All Defendants are liable for the repayment of the $86,397. It should be repayable out of the funds Dubcork collects in damages from Defendants.

It should be repayable by the Individual Defendants since they had a fiduciary duty to Plaintiffs to deal with them fairly and with the utmost of good faith.

The Individual Defendants should also be liable under an alter ego and veil piercing theory, and Moxy should be liable as the successor to Dubcork as owner of Smithfield.

The equitable doctrine of veil piercing permits courts to "disregard the corporate form" and hold a third party liable for a corporate entity's debts in certain circumstances. *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966). To determine whether to pierce the corporate veil, New York courts apply a two-prong standard that requires proof of both external control and wrongdoing. A plaintiff must show that a third party "exercised complete domination of the corporation in respect to the transaction attacked," and that the third party used its control over the corporation "to commit a fraud or wrong against the plaintiff." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d

135, 141, (1993). “Under New York law, courts may disregard the corporate form "whenever necessary to prevent fraud or achieve equity." *Walkovszky v. Carlton, Id.*. This generalized purpose has been interpreted to require a showing that: (1) the owners exercised complete domination of the corporation with respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. *Morris* at 810-11.

Defendants disregarded the corporate form, by among other things, selling the leasehold without board and shareholder approval, and they used such control to wrongfully strip Foley of his shares in Smithfield.

VIII. PLAINTIFFS ARE ENTITLED TO INTEREST, PUNITIVE DAMAGES, AND REASONABLE ATTORNEYS’ FEES

A. Interest - Pursuant to CPLR 5001, the recovery of interest is appropriate in this action as the individual defendants failed to properly account for the corporation's revenue for several years, during which time they benefitted from the use of the corporation's funds. *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [1st Dept 2007].

B. Punitive damages are recoverable for breach of fiduciary duty, where the breach demonstrates a high degree of "moral culpability" (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]. In *Giblin*, the Court of Appeals affirmed an award of punitive damages where defendants failed to notify plaintiff of certain corporate actions and repeatedly wrongfully diverted corporate assets to themselves and others. It noted that the courts below had “determined that defendants' operation of the business ‘amounted, at least, to willful or wanton negligence and to ‘a wanton or reckless disregard of plaintiff's rights,’ and that they were ‘grossly negligent and reckless.’ (*Giblin v Murphy*, 97 AD2d 668, 670, 671, *supra.*). In our case, punitive damages are appropriate due to Defendants’ wrongful diversion of corporate assets to themselves and Moxy.

C. **Reasonable Attorneys' Fees**. An award of an attorney's fee pursuant to 22 NYCRR 130-1.1, is proper due to Defendants' "frivolous conduct," which was "undertaken primarily to delay or prolong the resolution of the litigation" and involved "material factual statements that are false" (22 NYCRR 130-1.1). *Stein v. McDowell*, 74 AD 3d 1323 (2nd Dept. 2010).

Defendants clearly spoliated evidence [see Dkt. 542] and multiple times demonstrated that they withheld the production of discoverable evidence unless and until they decided they wanted to use it. An example of this is Defendants' disclosure well after the production deadline that there were three tape recordings secretly made by Whiston of meetings with Foley. They disclosed and produced the first one years after the discovery production deadline and only after deciding to use it. They wanted to use a second, but never produced it or the third, even though they had been requested multiple times.

Further, the conduct of Defendants' counsel, Elaine Platt cannot go unnoticed. The trial exposed a persistent lack of regard for the truth by Defendants and their counsel, in statements to this Court, the Appellate Division, and trial witnesses. These included misrepresentations (a) that the tape recording of the November 27, 2012 meeting, and the testimony of Cruz Lopez and Rubino, were "dispositive" of critical issues in this case; (b) that nothing had changed in Defendants' "accounting" filed at trial, or from the first Whiston affidavit to the corrected one, (c) counsel had discovered that Rubino had critical testimony while looking for someone to replace Sean Dillon as a witness regarding his incident with O'Mahony, (d) that counsel had won an appeal of this Court's denial of Defendants' application to permit Rubino to testify; (d) that the Court or its law clerk had made a number of rulings that couldn't be found anywhere (the Court had remarked on this during tria)l. Defendants' appellate brief seeking to overturn this Court's refusal

to let Rubino testify (Appellate Case No.: 2021-04024, Dkt. 3 at 4-5) demonstrates many of these and their total disregard for their obligation to be truthful with the court.

Defendants' counsel repeatedly attempted to testify for her clients, by giving her answers and asking clients if they agreed. At one point she was unhappy with the answers given by a client during cross-examination and asked if she could "re-ask" the same questions – presumably to give her answers.

She also tried to sneak in testimony by Whiston for the first time on redirect that McCarthy had told O'Mahony that a New York State form electing sub-C corporate status related to the sale of the leasehold [TT1408:4-17]. But he admitted that he had no personal knowledge of this. This was a deliberate sneak attack, and the testimony should be disregarded for this reason and because the witness had no personal knowledge.

Had Defendants been remotely truthful with the Court, had they been remotely concerned about Plaintiffs' welfare as they professed to be at trial [TT1686:5-6], there would have been no litigation. Defendants prolonged this case for almost 8 years by what the trial has proven to be a series of deliberately false factual statements – about the facts in this case and involving factual assertions to this Court and the Appellate Division. They took every opportunity to delay resolution of this case and extend their control over Smithfield's profits to the exclusion of Plaintiffs for as long as possible. Rule 130 sanctions are appropriate.

Dated: April 4, 2022

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

The undersigned, counsel to Plaintiffs who has been primarily responsible for the preparation of this Post-Trial Brief, hereby certifies that the number of words in this Brief are 9,966 and the Brief complied with the 10,000 word expanded word limit specified by the Court in its Order dated February 4, 2022 [Dkt. 1078].

Dated: April 4, 2022.

Samuel Goldman

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