O'Mahony v Whiston
2023 NY Slip Op 30482(U)
February 15, 2023
Supreme Court, New York County
Docket Number: Index No. 652621/2014
Judge: Jennifer G. Schecter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** 54

Justice

---X

ESTHER O'MAHONY, KEN FOLEY,

Plaintiffs,

- v -

GAVIN WHISTON, THOMAS MCARTHY, KIERON SLATTERY, MOXY RESTAURANT ASSOCIATES, INC., DUBCORK INC D/B/A/ SMITHFIELD TAVERN, SMITHFIELD NYC, SMITHFIELD HALL NYC,

Defendants.

---X

INDEX NO. 652621/2014

DECISION AFTER TRIAL

This case concerns disputes among the owners of an Irish soccer bar. Summary judgment was denied by order dated October 4, 2019 (Dkt. 369, *affd* 189 AD3d 583 [1st Dept 2020]). The trial was held in January 2022 (*see* Dkts. 1084-1093) and post-trial briefs were filed in April 2022 (Dkts. 1083, 1094). The immaterial facts to which the parties devoted much of their attention (such as their relative contributions to the bar and interpersonal disputes) have no bearing on the relevant legal issues. This case is not about who worked what shifts or jazz night. Instead, what actually matters--this is principally a derivative action regarding the rights of the old bar rather than those of its minority owners--is that after a dispute with the bar's landlord resulted in a lucrative lease buyout, the bar reopened a few blocks away.

Indeed, the credible evidence established that it was essentially the same bar with the same name (Smithfield), theme and core clientele (an Irish bar catering to soccer fans). There is abundant evidence that this is exactly what defendants intended (*see, e.g.*, Dkt. 727 at 3 ["we just want the resources to be able **to recreate** what we have worked so hard to build"]; Dkt. 765 at 2 ["We just want an opportunity to recreate **what we already have**"]; Dkt. 785 at 2 ["The Smithfield currently occupies approximately 8,000 square feet and intend **to relocate** to 144 West 27th Street"]; Dkt. 806 at 1 ["**Dubcork is relaunching** in a new space"]; Dkt. 866 at 1 [advertising "**new location** of Smithfield Hall"], 3 [expressing hope that patrons from "Old Smithfield" will "come back" when they "reopen"] [emphasis added]; *see also* Dkt. 1094 at 12 [explaining why "on the internet, Smithfield became one bar having existed since 2012 and called Smithfield Hall"]). The majority owners of the old bar, however, using Dubcork assets opened the new bar under a new corporation (Moxy), thereby misappropriating a corporate opportunity of the corporation that owned the old bar (Dubcork), effectively cutting out plaintiffs, its minority owners (*see Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 389 [1989] [defendants "proceeded to carry on the business for which Ketek was formed under the Hoteltron name"]).

DECISION AFTER TRIAL

"An agent may not divert or exploit for his own benefit an opportunity that is an asset of his principal. Nor may he make use of the principal's resources or proprietary information to organize a competing business. It would be a breach of fiduciary duty if an agent of a corporation secretly established a competing entity so as to divert opportunities away from his principal" (*American Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92, 99 [1st Dept 2000]; *see Matter of Greenberg*, 206 AD2d 963, 964 [1st Dept 1994] [fiduciary "may not appropriate corporate assets or opportunities to himself or to a new corporation formed for that purpose"]). The court finds that Dubcork had a tangible expectancy of owning the relocated version of its bar that was presented to the public as a continuation of the same bar (*see Alexander & Alexander of N.Y., Inc. v Fritzen*, 147 AD2d 241, 247 [1st Dept 1989]). The settlement proceeds from the landlord were sufficient to open the new bar so Dubcork could have availed itself of the opportunity to own the new bar.

The credible evidence did not prove that plaintiffs' inaction constitutes waiver or ratification. On the contrary, the evidence bore out that defendants lied to plaintiffs on multiple occasions about what was happening with the bar and the settlement proceeds (*see* Dkt. 369 at 5-7). The court credits plaintiffs' testimony that they were unaware of what was really going on with the new bar. The relevant inquiry is not whether plaintiffs individually would have invested in Moxy had they been given the opportunity (*see Bankers Trust Co. v Bernstein*, 169 AD2d 400, 401 [1st Dept 1991] ["to establish that corporate opportunity was improperly diverted it need not be proved that the corporation would have availed itself of the business opportunity but for the defendant's acts"]). Rather, the question is whether plaintiffs' conduct amounts to a waiver that precludes them from asserting a derivative claim that Dubcork was deprived of that opportunity.

Waiver "is the intentional relinquishment of a known right" that "must be clear, unequivocal and deliberate" (*Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). Because the fiduciary defendants never provided candid and materially nondeceptive disclosure about Moxy, plaintiffs never had the opportunity to make a fully-informed decision based on all of the material facts about the plans for the new bar. Thus, plaintiffs did not waive or ratify defendants' conduct (*cf. Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993] ["Ackerman **fully disclosed** his intention to bid on the subject apartment to the board which consented by voicing no objection] [emphasis added]; *see* Dkt. 369 at 14 ["If plaintiffs were not aware of the material facts about the New Bar, perhaps because they were misled by the Individual Defendants, then they cannot be said to have waived (or waived on behalf of Dubcork) the right to participate"]).

For the reasons that follow, the court finds that (1) Dubcork is entitled to judgment for the lost value of the opportunity to own Moxy, including punitive damages; (2) the majority owners are surcharged for amounts for which they were unable to account and are liable for other corporate waste; and (3) Foley is entitled to repayment of his loan. While sanctions are denied notwithstanding significant troubling conduct both before and during trial (*see, e.g.,* Dkt. 1094 at 38-39), plaintiffs are entitled to a fee award for creating a corporate benefit.

Corporate Opportunity Damages

Dubcork is entitled to disgorgement of the value of Moxy, including its increased value, since it should have been given the opportunity to own the new bar (*105 E. Second St. Assoc. v Bobrow*, 175 AD2d 746 [1st Dept 1991] ["The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct"], *accord Herman v Herman*, 162 AD3d 459, 460 [1st Dept 2018]; *see 67-69 St. Nicholas Ave. Hous. Dev. Fund Corp. v Green*, 206 AD3d 521, 522 [1st Dept 2022]; *see also Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408 [1st Dept 1990]).

Having carefully reviewed the experts' reports and trial affidavits and having had the opportunity to assess credibility on cross-examination, the court finds defendants' expert, John Johansen, to be unpersuasive. He makes definitive assertions (e.g., about "everyone's understanding") on disputed issues and often does not cite record evidence to support them (*see* Dkt. 945 at 145), proffers opinions on contested issues (the truth of which he could not know since they turn on witness credibility) that were eventually disproven (*see id.* at 146 ["Plaintiffs expert states that Plaintiffs loaned Dubcork $86,600 and Defendants did not pay the loan back to Plaintiffs. This is not a true statement; this was a cash loan and Plaintiffs were given cash payments to pay the loan back"]), and recklessly speculates on matters about which he is unfamiliar (*see id.* at 148 [opining that he "is sure" about Moxy's unreported cash even though he admits he "did not review the analysis"]). His trial testimony also made clear that his analysis was predicated on evidence that, as will be discussed, is insufficient to prove what happened to the unreported cash (*see* Dkt. 1091 at 166-68).

An expert who testifies recklessly, whose testimony comes across as advocacy and not as reliable professional opinion, lacks credibility, particularly where, as here, his opinions are undermined by the credible evidence. The court finds that Johansen is not a reliable expert witness and does not credit his testimony. The only takeaways from Johansen are his admissions that "Dubcork did underreport its cash sales" and that there were no "formal records" showing what happened to the cash and the defendants were only relying on "emails and depositions" (*id.* at 171), as well as his agreement in his rebuttal report, discussed below, about the amount of Dubcork's unreported cash.

That said, plaintiffs have the burden of proving the value of the lost corporate opportunity. Rejection of defendants' expert testimony does not mean that the court must necessarily accept all of plaintiffs' expert testimony (*Mejia v JMM Audubon, Inc.*, 1 AD3d 261, 262 [1st Dept 2003] [finder of fact is "not required to accept one expert's testimony over that of the other, but was entitled to accept or reject either expert's position in whole or in part"]), especially when it comes to corporate valuation (*see In re Appraisal of Dole Food Co.*, 114 A3d 541, 557 [Del Ch 2014]; *see also In re Cellular Tel. Partnership Litig.*, 2022 WL 698112, at *23 [Del Ch Mar. 9, 2022]). While plaintiffs' expert, Alan Blass, was more credible than Johansen, the court does not agree with some of his conclusions.

Blass opined that between 2014 and 2019, Moxy made $1,480,118 in profits, and he estimated the present value of Moxy's net income over the following five years to be $5,753,500 (Dkt. 941 at 3, 21). Plaintiffs could have argued for disgorgement of the present value of Moxy's perpetual profits and sought disgorgement of its terminal value. They did not. Limiting their request to five years is certainly reasonable.

The $1,480,118 amount is based on Moxy's records, including its tax returns, showing gross sales and goodwill, plus an amount to account for Blass' opinion that "Moxy underreported its cash sales by approximately 15%" (*see id.* 18-20). Blass then made revenue projections for the next five years based on past performance, discounted to present value (*see id.* at 21). The court credits Blass' conclusion that, similar to what occurred at Dubcork, Moxy underreported its cash sales by 15% (*see id.* at 19).

The court, however, is unpersuaded that there was further underreporting of sales from private parties. The court also is unpersuaded that all unreported cash was necessarily profit since, as at Dubcork, it seems plausible that some of that cash may have been used to pay expenses. Absent a developed record on this issue, the court takes a much more conservative approach than Blass on the impact of the underreporting and merely concludes that net income was underreported by 15%.

Moreover, given the devastating effect of the pandemic on the restaurant industry in Manhattan, the court finds Blass' revenue projections are too rosy, particularly the $1.5 million net income projection for each of the final four years, which is based on assumptions about adjusted net income that the court does not accept and which is significantly higher than the reported net income in the pre-pandemic years. Indeed, a major flaw in plaintiffs' case is the absence of any industry-specific expert testimony about the state of indoor sports bars or the restaurant industry generally (*see DFC Global Corp. v Muirfield Value Partners, L.P.*, 172 A3d 346, 381 [Del 2017] ["Nor can we find in the record any evidence supporting a reasonable inference that DFC was actually primed for a new, extended period of high growth beyond the projection period in the March Projections that already implied robust growth. The absence of evidence here is not surprising given that the petitioners did not present an industry expert, rely upon management testimony, or even point to analyst commentary on the likely growth of the payday lending industry in the markets where DFC operated"]). While extrapolations based on past performance are useful (*see Indeck Energy Servs., Inc. v Merced Capital, L.P.*, 200 AD3d 455 [1st Dept 2021]), an important component of projecting the performance of a business is an assessment of the state of the relevant market and whether it is expanding, stagnant or in decline. Financial projections also typically address whether a company's growth rate is expected to meet, exceed, or lag behind the industry based on similarities or differences between it and its competitors. That was not done here. Competing analyses about growth rates and evaluations of the assumptions on which they are based are often some of the most significant contested variables in litigation over revenue projections.

While the absence of this information is not fatal in this case (particularly given the weakness of defendants' rebuttal case and the fact that defendants, remarkably, do not meaningfully address the valuation of Moxy in their post-trial brief despite it being the biggest source of potential damages), the court will not simply assume that an indoor dining business' prospects are necessarily better than before the pandemic (*see DFC*, 172 A3d at 386 [assumptions about outsized growth must be based on the company's "business and industry" and rejecting such assumptions where "the record has nothing of that kind in it"]). This uncertainty, along with plaintiffs' failure to meaningfully address the issue, impels the court to take a conservative approach to forecasting Moxy's prospects. The court finds that the record only supports a projection based upon Moxy's reported net income, which was greatest in 2019 right before the pandemic ($350,000), and that a discounted projection of average annual net income of $300,000 is all the record can support.

Thus, the court finds that Dubcork shall recover $733,728 of Moxy's reported net income (Dkt. 941 ¶ 161), an additional 15% of that amount ($110,059) to account for unreported cash, $476,630 in reported goodwill (*id.* ¶ 165), and $1.5 million ($300,000 x 5) in projected net income. The corporate-opportunity damages accordingly total $2,820,417. Whiston, McCarthy and Slattery are personally liable for breaching their fiduciary duty of loyalty and Moxy is liable for aiding and abetting.

The court also finds that punitive damages are warranted for this egregious breach of fiduciary duty (*see Don Buchwald & Assoc., Inc. v Rich*, 281 AD2d 329, 330 [1st Dept 2001]). The evidence established that defendants' conduct was intentional, deliberate and fraudulent. They concealed material information and diverted assets despite their fiduciary status and lied about doing so. "Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). The court finds that Whiston, McCarthy and Slattery shall each be held liable for $100,000 in punitive damages and declines to impose greater punitive damages since disgorgement is already a powerful deterrent and this amount, based on the trial record, is significant to these individual defendants.

The court rejects plaintiffs' argument that a direct damages award is warranted here. A derivative claim is a corporate asset; thus, recovery goes to the company (*Glenn,* 74 NY2d at 392, *accord Mohinani v Charney*, 208 AD3d 404, 405 [1st Dept 2022] ["The fact that plaintiffs were the only other members of LHC does not obviate the requirement that a claim of misappropriation of funds owed to LHC be brought derivatively. Any injury is to LHC, and any damages must be recovered by LHC"]). The court is unconvinced that this is the rare case where an individual recovery is warranted (*see Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], at *13 [Sup Ct, NY County 2018] [collecting cases]; s*ee also Baker v Sadiq*, 2016 WL 4375250, at *3 n 3 [Del Ch Aug. 16, 2016] [discussing differing considerations in approving direct investor settlements rather than awarding investor-level remedies]). Dubcork was never dissolved. It is still registered as an active corporation. Its recovery on the judgment should be a part of that process and should factor into the final proper liquidation of its assets. A derivative recovery also moots the question of which of the plaintiffs really owns the shares (*see* Dkt. 369 at 3 n 1). Moreover, since the fee award (which presumably will be substantial given the length of the litigation and the result achieved) will be owed by Dubcork, absent a derivative recovery plaintiffs would not be able to enforce that award (*see Glenn*, 74 NY2d at 393).

Of course, the parties are free to settle as they wish (*see Baker*, 2016 WL 4375250, at *2). In fact, an investor-level settlement could greatly benefit defendants since it could be based on plaintiffs' pro rata interest plus attorneys' fees. This would avoid plaintiffs having to pursue derivative enforcement efforts and drastically limit the amounts of money that the individual defendants and Moxy owe under the judgment. But absent an agreement, judgment will be entered in favor of Dubcork.

<u>The Accounting</u>

The accounting is a mess. As plaintiffs explain, it was untimely, incomplete and unreliable (Dkt. 1094 at 25-27; *see Matter of Johnson*, 166 AD3d 1435, 1436 [3d Dept 2018] [where plaintiffs carry their burden of demonstrating that the accounting "is inaccurate or incomplete," the burden shifts to defendants "to prove, by a preponderance of the evidence, that the account is accurate and complete"]). Plaintiffs therefore ask the court to strike the accounting.

As discussed at trial (Dkt. 1090 at 13 ["My ruling was if it was in the November or December accounting then it is properly the subject of the testimony here. If it is not, then it has no basis"]), the court will only consider crediting amounts set forth in the version submitted in late 2020 (Dkts. 414, 468) and its supporting documentation (Dkts. 415-432, 470-482), and not any additional amounts set forth in the different versions belatedly submitted shortly before and during trial (*see* Dkt. 1081 at 3-7 [showing differences between different versions]). The court also will not consider backup that was not provided during discovery, such as explanations in Whiston's trial affidavit that were not previously disclosed (Dkts. 972, 1043 [notarized version that, despite representation to the court, contains additional substantive changes]; *see* Dkt. 1081 at 2 [addressing problematic changes]). Defendants were warned on countless occasions about the consequences of violating the court's discovery orders (Dkts. 242, 276, 277; *see* Dkt. 90 [noting "extreme delay" caused by defendants' failure to comply with ESI obligations]; *see also* Dkt. 369 at 9 n 9 [noting defendants' history of discovery violations and warning of the consequences of failing to properly account for the unreported cash]). Likewise, documents that were only provided as part of the 2017 document dump but were not produced as part of the initial 2016 disclosures or with the ESI production that was made after a responsiveness review was conducted were not admitted into evidence (Dkt. 610 at 7; *see* Dkt. 189 [holding that document dump was improper and ordering defendant to reproduce ESI after a responsiveness review]).

By failing to maintain and produce clear records, defendants are essentially relying on their credibility by asking the court to trust them about the meaning and reliability of the records they managed to cobble together. That is difficult to do. The court did not find defendants to be particularly credible based on observing their demeanor during cross-examination and the fact that they repeatedly lied to plaintiffs about money in the past. Their shifting calculations and explanations provided across the various iterations of the accountings also severely undercut their credibility. It is unclear if defendants failed to originally give the accounting the attention it deserved--which is consistent with the extreme degree to which they resisted providing an accounting (*see* Dkt. 408); whether it was only the trial that impelled them to take the exercise more seriously; or if they simply are not entirely sure about what happened to all of the money. Regardless, defendants have only themselves to blame for their shoddy recordkeeping and destruction of documents. As previously discussed, if they did not timely provide the requisite proof they will be surcharged (Dkt. 369 at 12; *see* Dkt. 468 at 4 [conceding shortfall]). Thus, while adverse inferences due to their spoliation of the POS system are warranted, since defendants have the burden to account, their destruction of records has the same practical effect of a spoliation sanction--that is, they are liable for amounts for which they lack records (*Polish Am. Resource Corp. v Byrczek*, 270 AD2d 96 [1st Dept 2000] ["While defendant claims that he did not personally make the cash withdrawals and therefore cannot account for them, all obscurities and doubt created by the failure to keep clear and accurate records are to be resolved against him"], *accord Grgurev v Licul,* 203 AD3d 624 [1st Dept 2022]).

Despite many problems with the accounting and plaintiffs' compelling argument that the court has ample legal ground to disregard all of it, the court finds that it would be inequitable to summarily surcharge defendants for absolutely everything. It really does seem like some amount of the disputed money was validly spent. The problem, of course, is that we cannot know how much they really spent because they kept terrible records and compounded that problem by failing to comply with the court's discovery orders.

Plaintiffs' most significant objection is the failure to account for $903,445 in unreported cash sales. The court rejects defendants' recent suggestion that this amount is overstated, which is inconsistent with their own expert report (Dkt. 945 at 146 ["Plaintiffs' expert claims that Dubcork underreported its' cash sales in 2012 & 2013 by $903,445 which represents 20% of total sales. **We agree with this analysis**; Dubcork did underreport its' cash sales but we dispute the fact that damages resulted from this underreporting of cash"] [emphasis added]; *see also* Dkt. 414 at 7 n 1 ["Actually, the cash revenue was a little bit more"]). In other words, while there was disagreement about whether the unreported cash was used for valid corporate purposes, there was no disagreement among the experts prior to trial about the <u>amount</u> of unreported cash, and thus there is no legitimate basis to dispute defendants' obligation to account for this amount of money. The court rejects defendants' attempt to disclaim this concession at trial. Thus, the court credits Blass' opinion that "Dubcork underreported its cash sales by approximately 20%" (Dkt. 941 at 7). He credibly explained why his estimations were affected by defendants' destruction or failure to produce essential corporate records (*id.* at 2), that "Daily POS reports ... would have provided [him] with a complete record of the reported receipts of Dubcork" but that "the data containing these reports was destroyed in the transition from Dubcork to Moxy" and that he was not provided "daily cash reports showing the daily unreported cash receipts ... despite ample evidence that such receipts were significant and that records of such receipts were maintained" (Dkt. 928 at 8). Yet, based on the records that were provided, he was still able to "estimate that Dubcork underreported its cash sales by approximately $903,445" (*id.* at 13). As noted, defendants' rebuttal report agreed "with this analysis."

Defendants assert that the unreported cash was either deposited into Dubcork's checking account or used to repay loans, pay for advertising and pay salaries and wages (Dkt. 414 at 2). They originally claimed "the total cash payments on account of Dubcork's loans was $462,500" (*id.* at 4), but they did not submit clear documentation at trial. The court sustains plaintiffs' objection in part to the extent set forth in their post-trial brief. Plaintiffs explain:

"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 and because Tynan testified that this was paid for construction costs and not a loan repayment.

The alleged $86,600 they claim they paid Foley is also not listed. McCarthy testified that he had no recollection of repaying that loan" (Dkt. 1094 at 32).

Next, defendants seek credit for $187,508 in cash deposits (Dkt. 1043 at 3) by submitting bank records (Dkt. 419). While defendants appear to have abandoned an earlier higher deposit total (*see* Dkt. 1081 at 4), plaintiffs explain that the real problem is not the amount or the proof, but the fact that cash deposits are part of Dubcork's <u>reported</u> cash and thus are not a proper source of accounting for the unreported cash. The court agrees. Defendants can certainly try to show, for instance, that cash revenues that were not reported on the tax returns were used to repay loans. But the notion that such cash was deposited into Dubcork's bank account is implausible, as that would defeat the purpose of trying to keep the cash off the books. Thus, trying to account for some of the unreported cash by relying on deposit records appears to be double counting the reported cash and the court does not credit this portion of the accounting.

Turning now to the actual explanations of expenses, defendants claim they "paid $120.00 a week, in cash, for advertising in First Touch Magazine" and provided "51 receipts for $120 each, totaling $6,120" (Dkt. 414 at 5; *see* Dkt. 420). The court accepts this portion of the accounting but sustains plaintiffs' objection to the attempt at trial to increase the amount at $11,160 (Dkt. 1094 at 31; *see* Dkt. 1043 at 3).

The accounting also claims that cash was paid (1) to Foley's jazz band; (2) to Michael Callahan, the superintendent; (3) for 40% of the wages of the kitchen staff; (4) to Robbie York, the bar manager; (5) to Goldwyn Bantic, the doorman/bouncer; and (6) to temporary workers (Dkt. 414 at 6). Plaintiffs point out that to support these expenditures defendants submitted "four reports" with "six different numbers" (*see* Dkt. 1081 at 3). The court will credit what is consistent across the accountings and substantiated by contemporaneous documentation that was properly and timely produced during discovery. Thus, the court credits $7,000 paid to Foley (Dkt. 414 at 5; *see* Dkt. 471), $20,088 paid to Bantic (Dkt. 414

at 6; *see* Dkt. 473), and $4,230 paid to temporary workers (Dkt. 414 at 6; *see* Dkt. 474). Furthermore, notwithstanding defendants' admitted failure to provide the backup for the payments to the kitchen staff during discovery (*see* Dkt. 468 at 3), the court credits the $63,956 in cash payments based on the parties' stipulation to "add kitchen staff receipts as exhibits" (Dkt. 636; *see* Dkt. 414 at 6; *see also* Dkt. 472). Thus, the court sustains plaintiffs' objections to this portion of the accounting in part to the extent that the court will credit payments totaling $95,274.

The court also sustains plaintiffs' objections to the claimed $133,534.83 in cash reimbursements of expenses that were not included in the original accounting and for which defendants did not submit credible proof (*compare* Dkt. 414 at 7, *with* Dkt. 1043 at 5).

In total, the court finds that defendants have properly accounted for $254,894 ($153,500 + $6,120 + $95,274). Thus, Whiston, McCarthy and Slattery are surcharged $648,551 for unreported cash ($903,445 - $254,894).

The other significant portion of the accounting pertains to payments and credits made to Whiston and McCarthy (*see* Dkt. 414 at 7-8). Whiston received $50,000: "a $40,000 credit towards his capital contribution; a $7,000 check, and $3,000 in cash" (*id.* at 7). Based on plaintiffs' concession, the court credits defendants' contention that "the $7,000 check and $3,000 cash were on account of a $10,000 loan that Mr. Whiston made to Dubcork" (*id.*; *see* Dkt. 1094 at 28 [admitting Dubcork's records show $10,000 check from Whiston]). Plaintiffs, however, object to Whiston claiming the other $40,000 as a credit towards his unpaid capital contribution based on him supposedly having made nearly 150 payments totaling approximately this amount in expenses for the bar (*see* Dkts. 428, 429; *see also* Dkts. 475, 476). Dubcork's books and records do not reflect that Whiston's capital contribution was funded based on his payment of the bar's expenses, and plaintiffs aver that the pile of receipts submitted is suspect (*see* Dkt. 944).

Likewise, the payments to McCarthy were purportedly to repay a loan, cash and credit card expenditures (Dkt. 414 at 8). Plaintiffs challenge $105,247.02 that Dubcork spent to pay off McCarthy's personal credit card bill (Dkt. 1094 at 29). Like Whiston, McCarthy submitted receipts to show that he was being reimbursed for corporate expenses (Dkts. 431, 432; *see* Dkts. 477-482). Those receipts are also problematic (Dkt. 944; *see* Dkt. 1094 at 29-30 ["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"]).

The accounting lacks an explanation by Whiston and McCarthy of the receipts. Even a categorical explanation of each type of receipt (e.g., what was typically purchased for the bar from each store) without an explanation of each item purchased would have given some credence to the possibility that these were corporate expenses. Instead, the court has a barebones accounting and disorganized piles of receipts that could relate to Dubcork, another bar, or personal expenses. Many of the receipts are difficult or impossible to read (*see, e.g.*, Dkt. 428 at 3, 5, 8, 62, 84, 91, 113, 123). And while some of the receipts could plausibly have been for items used in a bar (though it is impossible to know which bar without citing to corresponding bookkeeping or POS records), others, such as receipts from a food market in Pennsylvania (Dkt. 245 at 728) or for parking (Dkt. 480 at 27), are more suspect.

The whole point of an accounting is that plaintiffs and the court should not have to guess; the fiduciary is obligated to explain and justify the use of money. There are many ways this could have been done. Had defendants simply maintained clear corporate records, they would not have had any difficulty proving that they were really making payments for the bar. They have only themselves to blame for lacking credible proof.

Yet, having reviewed the receipts and having assessed defendants' credibility, the court cannot conclude that none of the receipts were actually for payments made for the bar. Certainly, the court cannot give defendants credit for everything as the receipts were not presented in a manner that credibly documents the validity of the expenses. However, because the accounting is equitable in nature, despite the terrible recordkeeping and accounting, the court will still credit 30% of the expenses based on review of the receipts, which indicate a likelihood that such amount must have really been for the bar. Thus, Whiston is liable for $28,000 and McCarthy is liable for $73,672.91.

<u>Other Corporate Waste</u>

Defendants have not carried their burden of proving that the $55,000 bonuses they paid themselves withstand entire fairness scrutiny (Dkt. 369 at 6 n 5; *see SantiEsteban v Crowder*, 92 AD3d 544, 546 [1st Dept 2012]). They decided to give themselves money for working on the buyout and proffered multiple pretextual justifications (*see* Dkt. 1083 at 38-39). Defendants do not cite any authority supporting their claim that majority shareholders can award themselves extra compensation for negotiating a buyout of a lease when they did not disclose that amount to the minority and when they engaged in misconduct in connection with the buyout to form a competing business. Perhaps had defendants been forthright an argument could be made to justify the bonuses, but under these circumstances the process by which they were awarded was not fair (*see Matter of Kenneth Cole Prods., Inc., Shareholder Litig.,* 27 NY3d 268, 275 [2016]). Thus, even if the amounts are fair they are impermissible. There also is no basis to offset these payments with arbitrary credits for supposedly uncompensated time. This claim is not supported by credible evidence and is just another post hoc rationale that smacks of an attempt to obtain a "distribution of surplus earnings under guise of additional salaries" (*Aronoff v Albanese*, 85 AD2d 3, 5 [2d Dept 1982]).

Defendants are also liable for misappropriating $70,500 of Dubcork's inventory (*see* Dkt. 941 at 14-15). It is axiomatic that managers of a company have a duty to maximize the recovery of a company's assets when winding it down. While strategic decisions about how to best monetize assets are protected by the business judgment rule, simply walking away with the inventory is not. Failing to compensate the company for any remaining liquor is corporate waste.

The Foley Loan

There is no credible evidence that Foley was ever repaid and the court credits his testimony that he was not. Thus, defendants owe him $86,397. Foley's cut of the settlement proceeds should have included this amount. Whiston, McCarthy and Slattery are personally held liable on a veil-piercing theory since the credible evidence makes clear that they completely dominated Dubcork, abused its corporate formalities and stripped all of its value, transferred money to themselves and made it an empty shell that is unable to repay the loan (*see Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020]). Moxy also is held liable as the alter ego of Dubcork since all of the value that could have been used to repay the loan was transferred to it (*Moss v Garcia-Chamorro*, 110 AD3d 475, 476 [1st Dept 2013], citing *Schumacher v Richards Shear Co.*, 59 NY2d 239, 247 [1983]; *see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176 [1st Dept 2013]).

Other Claims

The court does not find that plaintiffs are entitled to further direct or derivative recovery, as the remaining claims are either uncompelling, not supported by the proof necessary to resolve the questions of fact identified in the summary-judgment decision, inadequately addressed in the post-trial brief, or are subsumed within the damages on the corporate opportunity claim.

Remaining Issues

Plaintiffs shall submit a fee application for reimbursement of their reasonable fees and expenses from Dubcork (BCL § 626[e]; *see Glenn*, 74 NY2d at 393).

Statutory pre-judgment interest is mandatory (*see Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [1st Dept 2007]) and will run from date of the action's commencement since plaintiffs did not propose a specific earlier date (*see Delulio v 320-57 Corp.*, 99 AD2d 253, 255 [1st Dept 1984]), except for the corporate opportunity damages, for which interest will run from the date of Blass' trial affidavit, and for punitive damages, which shall run from the date of this decision (*see id.* at 254).

Accordingly, it is ORDERED that, upon the filing by plaintiffs of a proposed judgment to the Clerk, the Clerk is directed to enter judgment: (1) in favor of Dubcork, Inc. (Dubcork) and against defendants Gavin Whiston, Thomas McCarthy, Kieron Slattery, and Moxy Restaurant Associates, Inc. (Moxy), jointly and severally, in the amount of $2,820,417, with 9% statutory pre-judgment interest from December 14, 2021 to the date judgment is entered; (2) in favor of Dubcork and against Whiston in the amount of $100,000, with 9% statutory pre-judgment interest from the date of this order to the date judgment is entered; (3) in favor of Dubcork and against McCarthy in the amount of $100,000, with 9% statutory pre-judgment interest from the date of this order to the date judgment is entered; (4) in favor of Dubcork and against Slattery in the amount of $100,000, with 9% statutory pre-judgment interest from the date of this order to the date judgment is entered; (5) in favor of Dubcork and against Whiston, McCarthy, and Slattery, jointly and severally, in the amount of $648,551, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (6) in favor of Dubcork and against Whiston in the amount of $28,000, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (7) in favor of Dubcork and against McCarthy in the amount of $73,672.91, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (8) in favor of Dubcork and against Whiston in the amount of $55,000, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (9) in favor of Dubcork and against McCarthy in the amount of $55,000, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (10) in favor of Dubcork and against Slattery in the amount of $55,000, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; (11) in favor of Dubcork and against Whiston, McCarthy, and Slattery, jointly and severally, in the amount of $70,500, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; and (12) in favor of plaintiff Ken Foley and against Whiston, McCarthy, Slattery, and Moxy, jointly and severally, in the amount of $86,397, with 9% statutory pre-judgment interest from August 25, 2014 to the date judgment is entered; and it is further

ORDERED that plaintiffs' claim for their reasonable costs and attorneys' fees is hereby severed and shall continue, plaintiffs shall e-file a fee application (billing records and affirmations of reasonableness) by March 2, 2023, defendants may e-file objections by March 16, 2023, and plaintiffs shall notify the court by email when their fee application is fully submitted.

20230215174947JSCHECTER218F640CD35464FB3D2EFA4DA8F3464

DATE: 2/15/2023 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**