SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 37

----------X

NANCY SHUNKUEN NG, individually and derivatively on behalf of ASQUARED GROUP, INC., as Successor in interest to KYOTO RESTAURANT, INC., and KYOTO DINING GROUP INC.,

Plaintiff(s),

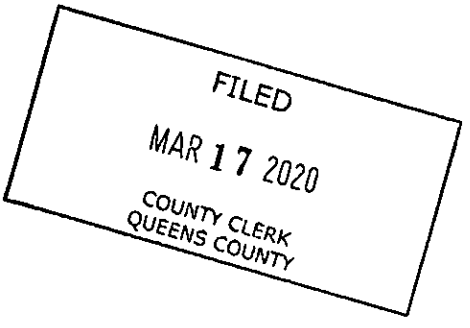
-against-

ASQUARED GROUP, INC., as Successor in interest to KYOTO RESTAURANT, INC., and KYOTO DINING GROUP INC., XYP CORP., a fictitious corporation name intending same to be a successor in interest to ASQUARED GROUP, INC d/b/a MIRA SUSHI, a/k/a MIRA SUSHI & IZAKAY, and ANDY LEE,

Defendants.

DECISION AND ORDER
Index No. 714168/2016

ORDER GRANTING DAMAGES AND OTHER FEES AFTER INQUEST



----------X

Papers Numbered.....NYSCEF Doc. Nos. 42, 44, and 45

The plaintiff, Nancy Shunkuen Ng ["Ms. Ng"], individually and derivatively on behalf of Asquared Group Inc. ["Asquared"], as Successor in Interest to Kyoto Restaurant, Inc. ["Kyoto] and Kyoto Dining Group, Inc. ["Kyoto Dining"], filed the instant lawsuit against the defendants, alleging that defendant, Andy Lee ["Mr. Lee"] misappropriated the assets of two closely held corporations, of which she was a shareholder. She seeks compensatory and punitive damages against Mr. Lee and his codefendants, as well as attorney's fees, disbursements, and costs. Based upon the failure of the defendants to file a timely answer, another Judge of this Court, in a decision and order, dated February 21, 2018, and entered on February 27, 2018, granted the plaintiff a default judgement against them pursuant to CPLR 3215(a). An inquest was ordered in this case on the issue of damages.

On May 7, 2019, this case was administratively referred to this Court for that inquest. The plaintiff, Mr. Lee, and their respective attorneys appeared for that hearing. Ms. Ng testified on her own behalf; Eddie Choi ["Mr. Choi"] testified for the plaintiff. Mr. Lee was called as a witness by the plaintiff. Michael Yim ["Mr. Lim"] testified for the defense. No other witnesses were called by either side. Both parties submitted papers in support of their respective positions on September 27, 2019. The Court reserved decision in this case. The following opinion constitutes the Court's decision and order in this case. [1]

Initially, the Court credits the testimony given by Mr. Ng and Mr. Choi. To the extent that the testimony of Mr. Yim and Mr. Lee was inconsistent with that given by the plaintiff and Mr. Choi, this Court declines to credit Mr. Lee and his witness. The Court concludes that the plaintiff has proven her entitlement to damages, attorney's fees, and expenses from Mr. Lee and his codefendants, in an amount as set forth in this decision and order.

According to the evidence presented at the hearing, Mr. Choi and Mr. Lee entered into a written partnership agreement in October 2004 for the ultimate purpose of forming two closely-held corporations that would do business as Japanese restaurants in Queens County, New York. In February 2009, the parties formed a corporation called Kyoto Dining. Thereafter, in January 2010, the original partnership was converted into a corporation, at which time, Kyoto was formed. Two written shareholder agreements were executed by both Mr. Choi and Mr. Lee on April 21, 2010 with respect to Kyoto and Kyoto Dining.

---

[1] Effective January 2020, this Court was transferred out of Supreme Court and assigned back to Criminal Court. Given that this Court is no longer "temporarily assigned to Supreme Court," a jurisdictional predicate must exist for this Court to entertain the issues contained in this inquest. That predicate is contained in Section 26(k) of Article 6 of the New York State Constitution, which provides the triggering mechanism by which this Court may fulfill its obligation to render a decision in this case. It expressly provides as follows:

> While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned. **After the expiration of any temporary assignment, as provided in this section, the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he or she was assigned with respect to matters pending before him or her during the term of such temporary assignment.**

N.Y. Const. art. 6, § 26(k)(emphasis added); *see also People v. Yannicelli*, 40 AD2d 564, (2nd Dept. 1972), aff'd 34 NY2d 61 (1974); *In re Marcus B.*, 95 AD3d 15 (1st Dept. 2012); *Prudential Lines, Inc. v. Firemen's Ins. Co. of Newark, N. J.*, 109 Misc2d 281 (1981).

Based upon the terms of the April 2010 shareholder agreements and his investment of more than $100,000.00, Mr. Choi acquired a 25% interest in these two incorporated restaurants. Mr. Lee, who invested a great deal more money in this venture, acquired a 75% interest in both restaurants, and, thus, became the majority shareholder in both corporations.

In 2012, however, Mr. Choi, who had other business interests requiring him to do extensive traveling throughout China, transferred his interest in these two corporations to the plaintiff, who is his mother.

For several years, Mr. Choi and, thereafter, his mother received financial returns from Mr. Lee on their investment. By January 2015, however, this defendant stopped making payments to the plaintiff. The plaintiff and her son later learned that, in April 2013, this defendant formed a new corporation called Asquared, which continued to operate both Kyoto and Kyoto Dining as restaurants. They then discovered that Mr. Lee had dissolved Kyoto Dining and Kyoto as corporations on the respective dates of January 15, 2014 and February 20, 2014. Specifically, Mr. Lee transferred all of the assets of both Kyoto and Kyoto Dining, first to Asquared, and then to Stellar 153, Inc. ["Stellar"]. The sale to Stellar took place on October 1, 2016. The net effect of these transfers was that this defendant was now in exclusive control of both restaurants and the plaintiff, who was never financially compensated for these two transfers, was now "frozen" out of both corporations.

The plaintiff contends that the transfers were in violation of the shareholder agreements, which expressly provided that the unanimous approval of all shareholders was required for such a decision. More important, the plaintiff argues that, by virtue of the defendant's conduct, as outlined above, he breached the fiduciary duty he owed to both her and the two corporations. At the hearing, Mr. Lee conceded that he sold Asquared to his father's girlfriend, the principal owner of Stellar, for $300,000.00, $250,000.00 of which was an interest-free promissory note.

The plaintiff requests both compensatory damages in the amount of $135,208.98, plus interest and costs, and punitive damages in the amount of $50,000,000.00. The plaintiff further requests attorney's fees in the amount of $42,345.00, and disbursements (that is, expenses) in the sum of $2,805.98.

Counsel for Mr. Lee contends that the plaintiff is entitled to no more than $75,717.03 in damages. He further argues that neither punitive damages nor legal fees should be awarded in this case. The Court disagrees with the

arguments made by the defense.

When a plaintiff moves for a default judgment, "a defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability." *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 (1985); *see also Abbas v Cole*, 44 AD3d 31 (2nd Dept. 2007). As a general rule, "an allegation of damage is not a traversable allegation and, therefore, a defaulting defendant does not admit the plaintiff's conclusion of damages." *Amusement Bus. Underwriters v American Intl. Group, supra* 66 NY2d at 880; *see also Abbas v Cole, supra*, 44 AD3d at 33. Accordingly, "[w]here there has been a default in appearing or answering, or summary judgment has been granted on the issue of liability and an inquest directed, it is still necessary to present proof of damages." *Paulson v Kotsilimbas*, 124 AD2d 513, 514 (1st Dept. 1986).

As a threshold matter, in light of the allegations in the plaintiff's complaint, before this Court may even consider the type of and amount of damages that may be awarded in this matter, a determination must first be made whether or not the plaintiff or the corporations of which she was a shareholder is entitled to such an award. In the Court's view, such a determination is a necessary prerequisite to an award of damages. Certainly, the default judgment established that the defendant, *inter alia*, breached the fiduciary duty that he owed to both the corporations and any respective shareholders. It did not, however, necessarily establish the plaintiff's entitlement to damages in her own right. Thus, before this Court may award damages to the plaintiff directly, she must first establish that she has an individual claim against the defendant for breaching the fiduciary duty he owed to her.

This additional requirement at an inquest is hardly a novel concept. For example, in an action to recover damages for pain and suffering arising from a motor vehicle accident under the No-Fault statute (*see* Insurance Law § 5101), the Second Department has held that unless "the defaulting defendant has, in effect, conceded the issue of serious injury after same has been pleaded and raised by the plaintiff...[such] plaintiff must demonstrate at the damages inquest proof of a serious injury before there can be any recovery for pain and suffering arising from a motor vehicle accident." *Abbas v Cole, supra*, 44 AD3d at 32-3. In this case, Mr. Lee and his codefendants, by defaulting, admitted liability; they did not, however, necessarily, admit the person or entity entitled to the damages award. Accordingly, unless conceded by a defendant, before any recovery can be made at an inquest on damages, a plaintiff must present independent proof of those aspects of a cause of action that are integral to or inextricably intertwined to

the award of damages. Certainly, the identity of the recipient legally entitled to damages is an issue that is integral or inextricably intertwined to a cause of action.

Even if the logic of *Abbas v Cole* does not extend to the matter before this Court, there is another reason to require the plaintiff to present independent proof that she has an individual claim in this case. In *Abrams v Donati*, the Court of Appeals noted that "[f]or a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." *Abrams v Donati*, 66 NY2d 951, 953 (1985); *see also Citibank, N. A. v. Plapinger*, 66 NY2d 90, n. * (1985). This Court recognizes that the above-quoted language appears, at first blush, to invoke the principles of standing. In that respect, it should be noted that, in passing over a shareholder's cause of action, the Court of Appeals has, on occasions, specifically relied upon the principles of standing, or the lack thereof, as the basis for its decision. *See Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 424; *see also Glenn v Hoteltron Sys.*, 74 NY2d 386 (1989); *see also Citibank, N. A. v Plapinger, supra* 66 NY2d at 90, n. *; *see also Bibbo v Arvanitakis*, 145 AD3d 657 (2nd Dept. 2016); *Wolf v Rand*, 258 AD2d 401, 403 (1st Dept. 1999).

Nevertheless, in dismissing the shareholder's action in *Abrams v Donati*, the Court of Appeals, citing its prior decision in *Greenfield v Denner* with approval, also stated that "allegations of which confuse a shareholder's derivative and individual rights will...be dismissed." *Abrams v Donati*, *supra* 66 NY2d at 953; *see also Greenfield v. Denner, supra*, 6 NY2d at 867–69; revgd on dissenting opn of Brietel, J), *supra* 6 AD2d at 270-71. As a result, it can be argued that a shareholder's lawsuit against a corporation, in which the existence of an individual cause of action based upon the wrongful conduct of the board of directors or another shareholder is not properly pleaded, is subject to dismissal for a failure to state a cause of action. *See Greenfield v Denner*, 6 NY2d 867, 867–69 (1959), revgd on dissenting opn of Brietel, J), 6 AD2d 263, 270 (1st Dept. 1959); CPLR 3211(a)(7). The Court acknowledges that, even in *Greenfield v Denner,* it is not clear which analysis is the correct one.

Ultimately, determining the proper analysis to be employed in a shareholder lawsuit can make a great deal of difference after the issuance of a default judgment. On the one hand, a plaintiff's alleged lack of standing to commence an action is a defense that can be waived if not properly raised by a defendant. *See Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 241-42 (2nd Dept. 2007). Thus, Mr. Lee's failure to assert standing timely in an

answer, arguably, precludes him from having it considered at this stage of the action. *See Wells Fargo Bank Minn., N.A. v Mastropaolo, supra* 42 AD3d at 241-42. On the other hand, to the extent that a shareholder's individual cause of action against a corporation is, arguably, subject to dismissal under CPLR 3211(a)(7), such a claim may potentially be raised at any time. Specifically, as the Fourth Department has held, "[t]he objection that the pleading fails to state a cause of action is jurisdictional and consequently nonwaivable (6 Carmody-Wait 2d, Pretrial Motions to Dismiss, s 38.34, p. 404)." *Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 80 (4th Dept. 1973).

In the end, the Court concludes that decisions such as *Greenfield v Denner*, *Citibank, N. A. v Plapinger*, and *Abrams v Donati*, involve elements of both the principles of standing and a failure to state a cause of action. *See Greenfield v. Denner, supra*, 6 NY2d at 867–69; revgd on dissenting opn of Brietel, J), *supra* 6 AD2d at 270; *see also Citibank, N. A. v Plapinger, supra* 66 NY2d at 90, n. *; *Abrams v Donati*, *supra* 66 NY2d at 953; *compare* CPLR 3211(a)(3) with CPLR 3211(a)(7); *Cf. Bibbo v Arvanitakis*, 145 AD3d 657. For this reason, the Court concludes that, notwithstanding Mr. Lee's failure to file an answer in this case or appear on the issue of liability, he is not necessarily precluded from raising this issue as a predicate for dismissal in the future. *See eg. Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 (1997); *cf. Iacovangelo v Shepherd*, 5 NY3d 184 (2005); *Addesso v Shemtob,* 70 NY2d 689 (1987); *see also Feinstein v Bergner*, 48 NY2d 234, 241 (1979); *McDonald v Ames Supply Co.*, 22 NY2d 111 (1968); *Cadlerock Joint Venture, L.P. v Kierstedt*, 119 A.D.3d 627 (2nd Dept. 2014). Accordingly, the prudent course of action for this Court to take is to address this issue at this time.

In this case, the plaintiff has brought both derivative and individual actions against Mr. Lee and his codefendants. Given, however, that she is, in fact, requesting that any ensuing damages be awarded to her directly, not to Asquared as the successors to the two dissolved corporations, the Court must first determine whether or not "the thrust of the plaintiff's action is to vindicate her personal rights as an individual and not as a stockholder." *See Federico v Brancato*, 144 AD3d 965, 966 (2nd Dept. 2016)("The Supreme Court did not err in dismissing the first, third, and fifth causes of action, which were derivative causes of action, since the thrust of the plaintiff's action is to vindicate her personal rights as an individual and not as a stockholder on behalf of CGS."); s*ee also Glenn v Hoteltron Sys., supra* 74 NY2d 386, 392. As explained in this opinion, the Court concludes that the plaintiff is seeking to vindicate her personal rights as an individual, thus entitling her to an award of damages.

The Court first concludes that the plaintiff properly pleaded an individual cause of action in her complaint. The Court further finds that she presented sufficient proof at the inquest in support of such an individual action. Specifically, in *Abrams v Donati*, the Court of Appeals expressly noted that there are exceptions to the rule that a lawsuit by a shareholder for a wrong against a corporation must be in the from of a derivative action. *See Abrams v. Donati, supra* 66 NY2d at 953. "Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged *(General Rubber Co. v Benedict*, 215 NY 18 [director of parent corporation who acquiesced in the misuse of funds of its subsidiary; action by parent maintainable]; *Hammer v Werner*, 239 App Div 38 [issuance of treasury stock to directors at an inadequate price and without affording plaintiff the right to purchase his proportionate part; individual action maintainable])." *Id.* Nevertheless, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Id.*

Simply stated, for a plaintiff to recover damages in his/her individual capacity, a Court must determine whether or not the harm is to the corporation or rather to the individual shareholder. *See Craven v. Rigas*, 85 AD3d 1524 (3rd Dept. 2011), appeal dismissed, 17 NY3d 932 (2011); *Sakow v Waldman*, 124 A.D.3d 860 (2nd Dept. 2015). Stated another way, where "there is direct damage personal to plaintiff, he[/she] may...sue in his[/her] individual capacity. *Greenfield v. Denner, supra* 6 NY2d at 867, revd on dissenting opn by Brietel, J), 6 AD2d at 69. In the words of the Second Department in *Bibbo v Arvanitakis*:

> In order to determine whether a cause of action is personal or derivative, "the pertinent inquiry . . . 'is whether the thrust of the plaintiff's action is to vindicate his [or her] personal rights as an individual and not as a stockholder on behalf of the corporation' " (*Craven v Rigas*, 85 AD3d 1524, 1527, 926 NYS2d 693 [2011], q*uoting Albany-Plattsburgh United Corp. v Bell*, 307 AD2d 416, 419, 763 NYS2d 119 [2003]). An individual action may be maintained where the injury alleged is to the plaintiff and recovery would go to the plaintiff (*see Serino v Lipper*, 123 AD3d 34, 39-40, 994 NYS2d 64 [2014]).

Bibbo v Arvanitakis, supra 145 AD3d at 660.

The Court finds that the plaintiff presented adequate proof at the inquest that she comes within an exception recognized by *Abrams v Donati* and its progeny. *See Venizelos v Oceania Maritime Agency, Inc.*, 268 AD2d 291 (1st Dept. 2000); *see also Fellner v Morimoto*, 52 AD3d 352, 352–54 (1st Dept. 2008). First, by virtue of the default judgment, Mr. Lee conceded that he was the majority shareholder of these two entities and that he breached a fiduciary duty to the plaintiff in this case. It is well-settled that "[b]ecause the power to manage the affairs of a corporation is vested in the directors and majority shareholders, they are cast in the fiduciary role of "guardians of the corporate welfare." *Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 562–74,(1984) *see also Leibert v. Clapp*, 13 NY2d 313, 317 (1963); *Case v. New York Cent. R.R. Co.*, 15 NY2d 150, 156 (1965); *Armentano v Paraco Gas Corp.*, 90 AD3d 683 (2nd Dept. 2011).

Stated another way, "[m]embers of a board of directors of a corporation "owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly." *Armentano v Paraco Gas Corp., supra* 90 AD3d at 686.; *see also Schwartz v Marien*, 37 NY2d 487, 491 (1975); *see Alpert v 28 Williams St. Corp.,supra* 63 NY2d at 569; *Goldberg v Goldberg, supra* 139 AD2d at 696-697). "Given the defendant's position of trust in the two corporations, he was obligated to the plaintiff - a shareholder - "to adhere to fiduciary standards of conduct and to exercise [his] responsibilities in good faith when undertaking any corporate action..." *Alpert v. 28 Williams St. Corp., supra* 63 NY2d at 567.

Furthermore, the proof at the inquest, established that Mr. Lee breached this fiduciary obligation independent of the duties he owed to the company since the "sole purpose and effect of his transactions with respect to [dissolving Kyoto and Kyoto Dining]....was to steal from plaintiff[]..." *Venizelos v Oceania Maritime Agency, Inc., supra* 268 AD2d at 292. In sum, the plaintiff pleaded in sufficient detail and presented sufficient facts at the inquest that the instant actions by this defendant were undertaken as part of a scheme to freeze her out of her ownership interest in both Kyoto and Kyoto Dining, without any compensation. *See Id*; *see also SBE 44 Wall, LLC v. New 44 Wall St., LLC*, 2013 N.Y. Misc. LEXIS 4011, 2013 NY Slip Op 32104(U) (S. Ct. 2013). In other words, this defendant intended to and did, in fact, steal from the plaintiff. Thus, it is rather clear that the defendant's conduct was aimed directly at the plaintiff. For this reason, the plaintiff's damages are direct, not derivative. *See Id* at 291; *compare Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 128 (2nd Dept. 2001) with *Gordon v Credno*, 102 AD3d 584 (1st Dept. 2013) and *Wolf v Rand, supra* 258 AD2d at 404-05.

Accordingly, to the extent that the default judgment did not establish that the plaintiff was directly damaged by the Mr. Lee's breach of his fiduciary duty, the Court finds that the plaintiff presented sufficient evidence at the inquest in support of this issue. Given that the plaintiff presented adequate proof that she was directly damaged by this defendant's breach of the fiduciary duty that he owed her, not only did she plead a cause of action sufficient to survive a dismissal under CPLR 3211(a)(7), but she also established her entitlement to damages in this case.

In reaching this conclusion, the Court is quite aware of "the rule requiring that damages generally be awarded to the corporation in suits brought by shareholders, even when the corporation is closely held..." *Wolf v Rand*, 258 AD2d at 403; *see also Venizelos v Oceania Maritime Agency, Inc., supra* 268 AD2d at 292. The underlying purpose of this rule "is to prevent impairment of the rights of the corporation's creditors whose claims may be superior to those of the innocent shareholder." Where, however, the exception exists allowing a shareholder to bring an individual cause of action, that concern, in the view of this Court, is not a stumbling block to a plaintiff's right to recover damages directly from a defendant. For all of these reasons, the Court concludes that the plaintiff has a right to seek damages from the defendant.

The Court next proceeds to the issue of damages. It is well-established that, at an inquest, a "plaintiff is required to establish the extent of the damages that he[/she] sustained." *Godwins v Coggins*, 280 AD2d 582, 582-83 (2nd Dept. 2001); *see also Syrkett v Burden*, 176 AD2d 938 (2nd Dept. 1991); *Paulson v Kotsilimbas*, 124 AD2d 513 (1st Dept. 1986); *Wine Antiques v St. Paul Fire & Mar. Ins. Co.*, 40 AD2d 657 (1st Dept. 1972), *affd* 34 NY2d 781 (1974). In this case, the plaintiff's proof of damages is set forth in two Shareholder Agreements that were executed by both the plaintiff and defendant on April 21, 2010 with respect to Kyoto Dining and Kyoto. The two agreements were admitted into evidence as Plaintiff's exhibits. Both agreements provided a formula for establishing the value of the shares in Kyoto and Kyoto Dining in the event of a sale or a buyout. Specifically, the pertinent provision reads as follows:

> That the price of the capital stock of each Shareholder or the value of the business of the Corporation to be sold pursuant to this Agreement shall be determined in the following manner: The hundred percent (100%) value of the corporation for the sale amongst the shareholders to the public shall be 2.75 times the average of the gross sale of the last twelve months from the Notice Date or as close to that date as possible.

The testimony regarding the value of the shares in the respective restaurants came from Mr. Choi, who was not only Mr. Lee's original partner in the subject restaurants, but still continues to be his business associate in two other New York City restaurants. Mr. Choi was in possession of the credit card processing receipts of both Kyoto and Kyoto Dining from October 2015 to September 2016 prior to the transfer of the restaurants to Stellar. The credit card receipts for that time period totaled $1,888,009.12. When this amount is divided by 12, it comes out to be $157,334.09, which is the average monthly credit card sales for the 12-month period prior to the transfer to Stellar. Mr. Choi further testified that the average cash receipts for these two restaurants is approximately 20% of the credit card receipts, a percentage, this witness explained, that is accepted in the industry as a method for calculating cash transactions. Mr. Choi testified that the cash receipts for the two restaurants averaged $39,333.52 monthly or $472,002.28 annually. Thus, according to the plaintiff the combination of the credit card and cash receipts totals $196,667.62. When this figure is multiplied by the agreement formula of 2.75, "the price of the capital stock of each Shareholder or the value of the business of the Corporation to be sold" the sum is $540,835.95. Given that the plaintiff owned a 25% share in the two corporations, the value of her investment in the two business is $135,208.98.

Mr. Lee's attorney, who, apparently, does not disagree with the formula set forth in the shareholder agreement or the plaintiff's calculations, nevertheless, contends that the plaintiff's average gross sales erroneously includes tips, sales tax, and credit card fees. As a result, the defendant argues, the plaintiff has "over-calculat[ed]" the buyout number by 25% to 30%. According to the defense, once tips, sales tax, and credit card fees are deducted from the plaintiff's figure of $135,208.98 sales, the value of the plaintiff's investment is "no more than $94,644.29."

In addition, Mr. Lee's attorney contends that cash transactions must be excluded in light of the plaintiff's inability to provide documentary evidence in support of these purchases at the restaurants. According to the defense, in the absence of sufficient proof as to the cash sale transactions, the figure of $94,644.29 must be further deducted by an additional 20% or $18,927.26. Based upon defense counsel's calculations, the maximum amount recoverable by plaintiff pursuant to the shareholder agreement is $75,717.03.

The Court rejects defense counsel's arguments.

With respect to the determination of compensatory damages, the Court

recognizes that "New York law does not countenance damage awards based on [s]peculation or conjecture." *Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 87 (1st Dept. 2012). In this case, however, proof of the sales transactions - both by credit card and cash - were within the exclusive control of Mr. Lee, who failed to provide the plaintiff's son with these bank statements and other financial statements. See *Eden Park Health Servs., Inc. v Estes*, 2 AD3d 1186, 1186–88 (3rd Dept. 2003). It should also be noted that Ms. Ng testified that she never once received a financial statement from Mr. Lee with respect to these restaurants. More important, this defendant refused to comply with the requests to examine the corporate bank accounts and expense records.

Notwithstanding that the evidence utilized by the plaintiff to support both credit card sales and cash receipts was less than ideal, it is well-established that "[s]ignificant leeway is granted to a court in making a fair approximation of the loss occasioned by a breach of fiduciary duty." *Herman v Feinsmith*, 39 AD3d 327, 328 (1st Dept. 2007), *citing Oshrin v Hirsch*, 6 AD3d 352, 353-354 (1st Dept. 2004); *see also Venizelos v. Oceania Maritime Agency, Inc., supra* 268 AD2d at 292. Indeed, as noted by the First Department in *Wolf v Rand*:

> Since the breach of fiduciary duty was proved, the court may be accorded significant leeway in ascertaining a fair approximation of the loss (*see, Milbank, Tweed, Hadley & McCloy v Boon*, 13 F3d 537, 543), as contrasted with the more precise, compensatory, standard of a contract or tort case (*Diamond v Oreamuno*, 24 NY2d 494, 498), so long as the court's methodology and findings are supported by inferences within the range of permissibility (*Whitney v Citibank*, 782 F2d 1106, 1118), which is the case herein. After all, "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated" (supra, at 1118).

Wolf v Rand, supra 258 AD2d at 402-03.

Initially, it is significant to note that, in his memorandum of law following the inquest, the attorney for Mr. Lee, in effect, conceded that the plaintiff was entitled to no more than $75,717.03, the numerical figure he assigns to credit card transactions, minus the deductions discussed above. Under the circumstances of this case, the Court is satisfied that the figures provided by the plaintiff and her son at the inquest provided reasonably certain proof as to the profits that were generated from these two restaurants. The calculations were hardly unreasonable when viewed from the perspective that they relate to restaurants in

New York City that have been in business for at least 10 years, and continue to be in operation. Equally important, the Court concludes that the plaintiff sufficiently proved there was a causal connection between the defendant's conduct and her losses. *See Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 219 AD2d 214, 224 (1st Dept. 1996). The Court finds that the amount proven by the plaintiff as compensation for Mr. Lee's breach of his fiduciary duty toward her is within reason and neither the result of speculation, conjecture, or imagination. *See Matter of Rothko*, 43 NY2d 305, 323 (1977); *see also Herbert H. Post & Co. v. Sidney Bitterman, Inc., supra* 219 AD2d at 224;*Wathne Imports, Ltd. v PRL USA, Inc., supra* 101 AD3d at 87. [2]

Accordingly, upon review of the evidence submitted at the inquest, the Court finds that the plaintiff has carried her burden of proof with respect to compensatory damages in this case and awards the plaintiff damages in the amount of $135,208.98, plus costs and interest, as discussed below.

In making this award, the Court rejects the defense contention that the pending action against Mr. Lee in Federal Court by employees of the two Kyoto restaurants to recover, *inter alia*, unpaid overtime compensation, should act to reduce the damages to be awarded Ms. Ng in this state action. First, it is undisputed that neither Ms. Ng nor her son is a defendant in that federal action. To the extent that the award to the plaintiff in this case acts as an obstacle to any

---

[2] With respect to the requisite burden of proof in this case, the Court is aware of the different burdens of proof that apply to the various issues of damages in this case. *See eg. Hutt v Lumbermens Mut. Cas. Co.*, 95 AD2d 255 (2nd Dept. 1983). In this case, the Court, in determining compensatory damages, expenses, and attorney's fees in this case, will utilize the standard of reasonable certainty. As to punitive damages the Court will apply the clear and convincing standard. *Compare Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74 (2nd Dept. 2007); and *Chiara v Dernago*, 128 AD3d 999 (2nd Dept. 2015) with *In re Seventh Judicial Dist. Asbestos Litig.*, 190 AD2d 1068 (4th Dept. 1983); *see also* PJI 1:64. It should be noted that, even where the clear and convincing standard applies, the Second Department has held that this "standard relates only to the quality and not the quantum of proof (see Lilly, Introduction to the Law of Evidence, § 15, p 42; 4 Benders' NY Evid, § 183.03)...[and that] '[p]roof may be required to be clear and convincing without transcending the rule of preponderance' (Roberge v Bonner, 185 NY 265, 268)." *See Hutt v Lumbermens Mut. Cas. Co., supra* 95 AD2d at 258. "Thus, in cases where the standard is applicable, the proper jury 'instruct[ion] [is] that to make out a preponderance, the evidence should be clear and convincing.'" *Id* (citations omitted). Notwithstanding the decision in *Hutt v Lumbermens Mut. Cas. Co.*, this Court has utilized the charge contained in PJI 1:64 to determine whether or not the plaintiff has established her entitlement to punitive damages by clear and convincing evidence.

award in the federal action, that is an issue that should be directed to the District Court Judge presiding over that action. But more important, by dissolving these two corporations and freezing the plaintiff out of her financial investment, Mr. Lee is hardly in a position to argue that he is legally entitled to be indemnified in the Federal lawsuit. His conduct in this case, insofar as he is concerned, amounts to a waiver of such rights that may exist under the contracts.

The plaintiff also requests an award of punitive damages. In her complaint, she requests that the award for such damages be set at no lower than fifty million dollars. As a threshold matter, the Court notes that the plaintiff has alleged seven causes of action in her complaint against Mr. Lee, the first of which is for breach of his fiduciary duty toward the plaintiff, the fourth of which is for unjust enrichment against the plaintiff. The first cause of action is a tort, for which punitive damages are available regardless of whether a defendant's conduct is directed at the rights of the public or a private individual. *See Giblin v Murphy*, 73 NY2d 769, 770–73 (1988); *see also Sherry See Assocs. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 (1st Dept. 2000). The fifth action is, however, one sounding in contract. *See Held v Kaufman*, 91 NY2d 425, 431 (1998); *cf. Abiele Contracting, Inc. v New York City Sch. Const. Auth.*, 91 NY2d 1, 6 (1991); *Matter of Estate of Cohen*, 83 NY2d 148, 154 (1994).

As a general rule, punitive damages are unavailable in breach of contract actions involving only private rights. *See New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 (1995); *see also Rocanova v Equitable Life Assur. Soc'y*, 83 NY2d 603 (1994). Nevertheless, where a component or nature of a cause of action involves the breach of a fiduciary duty, it is irrelevant whether the rights of the public as opposed to a private individual are implicated by a defendant's conduct. *See Giblin v Murphy, supra* 73 NY2d at 772; *see also Wolf v Rand, supra* 258 AD2d at 404-05. In either case, punitive damages may be imposed.

As an initial matter, the Court notes that a claim for punitive damages must be proven by clear and convincing evidence. *See Chiara v Dernago, supra* 128 AD3d at 1003; *see also Randi A.J. v Long Island Surgi-Center, supra* 46 AD3d at 74; PJI 1:64; *cf. Prozeralik v Capital Cities Communications,* 82 NY2d 466, 479 (1993); *compare In re Seventh Judicial Dist. Asbestos Litig., supra* 190 AD2d at 1068. In addition, "punitive damages are not mandatory....[;] the awarding of punitive damages is discretionary with and should be reviewed by "the dispenser of justice." *Lyke v Anderson,* 147 AD2d 18, 28 (2nd Dept. 1989((*citations omitted*). Such damages are "only available in the extreme case where the defendant has been shown to have been motivated by actual malice or to have acted in such a reckless, wanton or criminal manner so as to indicate a conscious

disregard of the rights of others." *Id* at 31; *see also Miller v Cattaviani*, 119 AD2d 864 (3rd Dept. 1986). Stated somewhat differently, "punitive damages are permitted when the defendant's wrongdoing is not simply intentional but "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 (2007); *see also Walker v Sheldon*, 10 NY2d 401, 404 (1961); *Rocanova v Equitable Life Assur. Socy. of U.S., supra* 83 NY2d at 613.

In the end, "punitive damages may be sought when the wrongdoing was deliberate 'and has the character of outrage frequently associated with crime.'" *Prozeralik v Capital Cities Communications, supra* 82 NY2d at 479 (citations omitted). Thus, "[t]he misconduct must be exceptional." *Ross v Louise Wise Servs., Inc. supra*, 8 NY3d at 489. This standard is met "when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights." *Id* at 489; *citing Sharapata v Town of Islip*, 56 NY2d 332, 335 (1982) (citations and internal quotation marks omitted).

In distinguishing punitive from compensatory damages, the Court of Appeals, in *Ross v Louise Wise Servs., Inc.*, noted that "[c]ompensatory damages are intended to have the wrongdoer make the victim whole...and [to provide] fair and just compensation commensurate with the injury sustained." *Ross v Louise Wise Servs. Inc., supra, Inc.*, 8 NY3d at 489. Punitive damages, however, "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. *Id; see also Walker v Sheldon*, 10 NY2d 401, 404 (1961); *see Krohn v New York City Police Dept.*, 2 NY3d 329, 335 (2004); *Sharapata v Town of Islip*, 56 NY2d 332, 335 (1982). Equally important, "[s]ubjecting a wrongdoer to punitive [or exemplary] damages serves to deter future reprehensible conduct." *Ross v Louise Wise Servs., Inc. Supra*, 8 NY3d at 489.

In this case, the Court finds that the plaintiff presented clear and convincing evidence at the inquest in support of her claim for punitive damages. *See Chiara v Dernago, supra,* 128 AD3d at 1003. The evidence established that the misconduct by Mr. Lee contained the appropriate level or "character of spite, malice or evil motive," sufficient to warrant an award of punitive damages in this case. *Ross v Louise Wise Servs., Inc. supra*, 8 NY3d at 489, *citing Wilson v City of New York*, 7 AD3d 266, 267 (1st Dept. 2004). As a majority shareholder, Mr.

Lee owed a fiduciary duty to other shareholders to protect their financial investments. Instead, he breached that duty by engaging in outright fraud when he dissolved the corporations without first informing the plaintiff or her son and obtaining the plaintiff's consent, and then merging them into Asquared, a corporation in which neither the plaintiff nor her son had any interest. This defendant's subsequent sale of Asquared to Stellar for such a devalued price provided further proof of his deceptiveness and deceit.

In sum, the Court concludes that Mr. Lee stole from the plaintiff by "usurping her ownership interest" in two corporations. *Stein v McDowell*, 74 AD3d 1323, 1326 (2nd Dept. 2010). This surreptitious and devious type of behavior was committed by this defendant solely for his own personal gain. Proof of this conduct clearly and convincingly demonstrated a "high degree of moral culpability" "or wanton dishonesty." *See Giblin v Murphy, supra* 73 NY2d at 772; *see also Stein v McDowell, supra* 74 AD3d at 1326; *Williams v Coppola*, 23 AD3d 1012, 1013 (4th Dept. 2005). On this record, the Court, therefore, concludes that an award of punitive damages is permitted and, in the exercise of this Court's discretion, warranted.

After due consideration, the Court, in the exercise of its discretion, awards the plaintiff punitive damages in the amount of $700,000.00, a portion of which represents the plaintiff's investment in the two restaurants. In the view of the Court, this sum will accomplish the following: First it will allow the plaintiff and her son to recoup their investment and invest elsewhere. Second, it will act to deter the defendant from acting deviously and wantonly dishonest regarding the other business concerns that he has with the plaintiff and her son, the original owner of Kyoto and Kyoto Dining. Third, it will deter Mr. Lee from engaging in similar conduct with respect to other people who seek to go into business with him. Finally, it will punish this defendant for engaging in such devious, deceptive, and financially harmful conduct.

The plaintiff is also requesting legal fees in this case. "Under the 'American rule,' to which this State adheres (*see, eg.*, *Chapel v Mitchell*, 84 NY2d 345), the prevailing litigant ordinarily cannot collect its reasonable attorneys' fees from its unsuccessful opponents (*see, Alyeska Pipeline Co. v Wilderness Socy.*, 421 US 240, 247 (1975); *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491)." *Hunt v Sharp*, 85 NY2d 883, 885 (1995). The exceptions to this rule are only when the "award is authorized by agreement between the parties, statute or court rule." *Chapel v Mitchell*, 84 NY2d 345, 348 (1994). For instance, legal fees are expressly permitted by statute in New York City in a proceeding to foreclose a tax lien certificate on real property, *See* New York City Admin. Code § 11-335; *see*

also NYCTL 1996-1 Trust v Stavrinos Realty Corp., 113 AD3d 602 (2nd Dept. 2013); *NYCTL 1998-1 Trust v. Oneg Shabbos, Inc.*, 37 AD3d 789 (2nd Dept. 2007); *see eg. RAD Ventures Corp. v. Artukmac*, 31 AD3d 412, 414 (2nd Dept. 2006); *Cascade Mushroom Co. v Aux Delices Des Bois, Inc.*, 293 AD2d 305, 306 (1st Dept. 2006); 22 NYCRR § 130-1.1.

In this case, the shareholder agreements expressly contained a provision that if it is "necessary [for one party] to retain and utilize legal counsel to enforce this Agreement, the prevailing part shall be entitled to all costs incurred, including legal expenses." *See Hunt v Sharp, supra* 85 NY2d at 885; *Chapel v Mitchell, supra* 84 NY2d at 345; *see also Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 (1989); *Emigrant Mtge. Co., Inc. v Karpinski*, 76 AD3d 1044 (2nd Dept. 2010); *Crispino v Greenpoint Mortg. Corp.*, 2 AD3d 478 (2nd Dept. 2003) *Vacation Vill. Homeowners' Ass'n v Mordkofsky*, 254 AD2d 650 (3rd Dept. 1998). Thus, given that an award of attorney's fees was expressly contracted by the parties, it is enforceable.

In addition, it should be noted that, in terms of imposing damages in this case, the Court's focus has been on the defendant's breach of his fiduciary duty, misconduct that was directed at the plaintiff, not the corporation. Accordingly, it is not necessary to determine whether or not the basis of an award of attorney's fees is also permitted within the meaning of, for example, Business Corporation Law § 623(h)(7). *See eg. Napoli v Carrano*, 109 AD2d 828 (2nd Dept. 1985). *Cf.* Business Corporation Law § 722 (a).

In light of the damage award in this case, the Court, in its discretion, deems it unnecessary to dissolve the subject corporation and/or impose a constructive trust. This is especially so given that the plaintiff's complaint does not contain a cause of action to dissolve Asquared pursuant to Business Corporation Law § 623(a). Instead, the main thrust of the plaintiff's action is for money damages as a result of the defendant's breach of his fiduciary duty. *See eg. Collins v Telcoa Int'l Corp.*, 283 AD2d 128, 130-31, 133 (2nd Dept. 2001).

Given that attorney's fees are authorized in this case, the Court must determine the amount to be awarded. The plaintiff requests that legal fees and disbursements be set in the amount of $45,150.98, $42,345.00 of which constitutes attorney's fees, and $2,805.98 of which constitutes disbursements. In his affirmation in support of the instant request, counsel has provided this Court with a copy of the retainer agreement between himself and the plaintiff. In addition, counsel has submitted a detailed record of the time he spent on this case, the legal services he provided, and his rate of compensation, which is

$450.00 hourly.

It is well-settled that "[a]n award of attorney's fees should bear "a reasonable relation to the time and effort expended by the plaintiff's attorney in the ...action." *Mfrs. & Traders Trust Co. v Dougherty*, 11 AD3d 1019, 1019-1020 (4th Dept. 2004), *quoting Green Point Sav. Bank v Tornheim*, 261 AD2d 360, 360 (2nd Dept. 1999). In setting such an award, a court must consider "such factors as the customary fee charged for similar services." *Id* at 1020; *see also Morgan & Finnegan v Howe Chem. Co.*, 210 AD2d 62, 63 (1st Dept. 1994). A court must take into account that a fee arrangement between an attorney and his/her client is merely "indicative of what is a reasonable fee, it is not determinative." *Id.* In the end, the party seeking the award of attorney's fees must provide the court with "sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered." *NYCTL 1998-1 Trust v Oneg Shabbos, Inc., supra* 37 AD3d at 791. As noted by the Second Department, there "must be a sufficient affidavit of services, detailing the hours reasonably expended...and the prevailing hourly rate for similar legal work in the community." *SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986, 988 (2nd Dept. 2006)(*citations omitted*); *see also YCTL 1998-1 Trust v Oneg Shabbos, Inc., supra* 37 AD3d at 791.

After examining the affirmation by counsel submitted in this case in support of her request for attorney's fees, the Court finds that the plaintiff has met her burden of establishing the reasonable value of the legal services that were rendered on her behalf. First, the affirmation submitted in support of the plaintiff's request establishes that the attorney she retained has been practicing law for many years and specializes in commercial litigation. In addition, the issues involved in this case were fairly complex and required an experienced attorney knowledgeable in this area. The hourly rate of $450.00 charged by counsel is, therefore, quite reasonable and, based on the Court's experience, is the customary fee charged for similar legal services. Plaintiff's counsel's affirmation also contains a detailed account of the legal services that were rendered to the plaintiff as well as the time that was expended in this matter.

After reviewing the affirmation and upon due deliberation, the Court concludes that counsel has sufficiently established the legal services he rendered on the plaintiff's behalf in this matter as well as the value of that legal representation. The Court, therefore, finds the request to be reasonably based. Accordingly, the Court concludes that, on this record, there is a reasonable and sufficient basis for setting an award of legal fees in the amount of $42,345.00.

In making this determination, the Court notes that it has done so without either papers from the defense and/or a hearing. Under the circumstances of this case, there is nothing improper in the decision of this Court's to reach this issue without the defense's input. Mr. Lee has been on notice since the start of this litigation that a request for attorney's would be made in this case. Specifically, the verified complaint, filed in October 2016, contained a request for such fees. Thus, this defendant was clearly on notice from the outset of this case that the plaintiff would be making such a request. Equally important, in defense counsel's memorandum, dated, September 26, 2019, he indicated that he would first wait for the plaintiff's submission before responding to the request for attorney's fees. As noted above, to date, no such papers on this issue has ever been filed with the Court.

Accordingly, the Court awards attorney's fees to the plaintiff without hearing from the defendant or conducting an evidentiary hearing on this issue. Under the circumstances of this case, it is obvious "that the [defendant has] neither objected to the court's [implicit] decision to resolve the motion for an award of an attorney's fee on the papers submitted, nor requested an evidentiary hearing on the issue." *See Messinger v Messinger*, 24 AD3d 631, 632 (2nd Dept. 2005); *see also Bengard v Bengard*, 5 AD3d 340 (2nd Dept. 2004). In other words, by failing to respond to the plaintiff's request for attorney's fees, Mr. Lee has waived his right to be heard in this matter, whether by papers, a hearing, or both. *See Id.*

The plaintiff also requests disbursements that were incurred for litigating this matter. The Court has examined the plaintiff's documentary proof underlying her request for disbursements in the amount of $2,805.98. "Unlike costs, disbursements cannot be recovered without proof that the expenses were actually incurred." *Nat'l Granite Title Ins. Agency, Inc. v Cadlerock Properties Joint Venture*, LP, 17 AD3d 551 (2nd Dept. 2005); *see also* CPLR 8301. Although the plaintiff's proof could, arguably, have been more explanatory, the Court accepts that such expenses were necessary for the litigation of this case. Accordingly, the plaintiff's request for disbursements in the amount of $2,805.98 is granted.

With respect to interest on the award of compensatory and punitive damages, attorney's fees, and expenses, the Court is guided by the late Professor Siegel's practice commentaries, which provide as follows:

> The CPLR provides three distinct periods for interest on money obligations. The first, governed by CPLR 5001, is interest on the cause of action from the time it accrues until the time of verdict or decision. The second,

> governed by CPLR 5002, is interest on the verdict or decision until judgment is entered on it. And the third, governed by CPLR 5003, is interest on the judgment until it is paid. The rate of interest is the subject of CPLR 5004. Interest in the second and third categories attaches uniformly to all money obligations once reduced to verdict or judgment, including money awards incidental to equitable relief.

Siegel 2008 Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C5001.1; *see also Rohring v. City of Niagara Falls*, 84 NY2d 60 (1994).

As an initial matter, prejudgment -- or more accurately, preverdict – interest under CPLR 5001 is not permitted in claims for personal injury or punitive damages. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5001:2; *see also Rohring v City of Niagara Falls*, 84 NY2d 60, 69 (1994); *Stassou v. Casini & Huang Constr., Inc.*, 14 AD3d 695 (2nd Dept. 2005). Given, however, that the tort of breach of a fiduciary duty is not a personal injury action, preverdict interest is permitted under CPLR 5001. *See Resnick v Socolova*, 5 AD3d 125 (1st Dept. 2004); *see also* Siegel, NY Prac § 411, at 719-723 (5th ed 2011). CPLR 5001 authorizes a plaintiff to receive "interest on the claim from accrual until a verdict or a decision establishing liability..." Siegel, Practice Commentaries, *supra,* at C5001.4 Thus, the plaintiff is first entitled to preverdict interest, on the award of compensatory damages, at the rate of 9% from the date the cause of action accrued until February 21, 2018, the date of the issuance of the default judgment, which established the defendant's liability in this case. *See* CPLR 5001; *see also* CPLR 5004.

CPLR 5001(c) further provides that "the amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded."

Inasmuch as preverdict interest is permitted in this matter, the Court must figure out the manner in which it is to be calculated. CPLR 5001(b) provides that "[i]Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." CPLR 5001(b). This statute further provides that "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." *Id.* In sum, except as provided by CPLR 5001(b), preverdict interest on the cause of action is to be

calculated from its accrual date until the verdict or decision establishing liability. *See* CPLR 5001; *See* Siegel, NY Prac § 411, at 720 (5th ed 2011); *see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 (1984); *see also Otto v Otto*, 150 AD2d 57, 65 (2nd Dept. 1989). Figuring out the date from which interest should be calculated is not, however, always so easily ascertainable under the law.

In awarding preverdict interest in this case, the Court notes that October 1, 2016, which is the date that Mr. Lee sold the business to Stellar, appears to be an appropriate point in time from which to set the accrual date of the plaintiff's cause of action. In truth, the cause of action may have accrued earlier than this date. Nevertheless, the plaintiff offers the date of October 1st as the date when her loss was fully realized. *See Torres v. Freed*, 124 AD3d 525, (1st Dept. 2015). On this record, the Court cannot precisely pinpoint the accrual date in this case. As a result, the date suggested by the plaintiff is in accordance with CPLR 5001(b), which permits a court to use a single reasonable intermediate date from which to calculate pre-judgment interest, is, in the Court's view, more than reasonable. *See* CPLR 5001(b); *see also* Siegel, NY Prac § 411, at 720 (5th ed 2011).

Accordingly, with respect to compensatory damages, the Court awards the plaintiff damages in the amount of $135,208.98, plus preverdict interest under CPLR 5001, at the rate of 9%, to be computed by the Clerk of the Court, from October 1, 2016, until February 21, 2018, the date the default judgment was issued in this case, and at which time, the defendant's liability was established. *See* CPLR 5001(a)&(b); *see also* CPLR 5004.

Under the law, however, the plaintiff is not entitled to preverdict interest on the award of the attorney's fee and expenses or disbursements. *See* CPLR 5001; *see also Pickett v Gibbs*, 80 AD3d 592 (2nd Dept. 2011); *Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 797 NYS2d 456 (2nd Dept. 2005). And, as noted above, she is not entitled to preverdict interest on punitive damages.

Insofar as compensatory damages is concerned, interest is also permitted under CPLR 5002, which provides that prejudgment "[i]nterest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment." CPLR 5002. Here, the defendants were found to be liable to the plaintiff on February 21, 2018, the date the default judgment was issued in this case against the defendant. *See Rokina Opt. Co. v Camera King, supr* 63 NY2d at 730 (1984); *see also Otto v Otto, supra* 150 AD2d at 65. Accordingly, with respect to the award of $135,208.98 in compensatory damages, the plaintiff is awarded interest from February 21, 2018, until judgment

is entered in this case. Interest shall be at the rate of 9%, and is to be computed by the Clerk. *See* CPLR 5002; *see also* CPLR 5004.

In addition, although preverdict interest under CPLR 5001 is not permitted with respect to punitive damages, attorney's fees, and disbursements, such prejudgment interest is permitted under CPLR 5002. With respect to prejudgment interest under CPLR 5002, such interest commences on the date that a verdict or decision granting such items is granted until judgment is entered in this case. *See Bd. of Managers of 25th Charles St. Condo. v Seligson*, 126 AD3d 547 (1st Dept. 2015). This decision in *Bd. of Managers of 25th Charles St. Condo. v Seligson*, however, does not entail that interest under CPLR 5002 as to attorney's fees, punitive damages, and disbursements is to be computed from the date of the decision of this Court granting these requests. After reviewing various decisions by the Court of Appeals and Appellate Divisions, the Court concludes that the date that the defendants were originally held liable to the plaintiff in this case is the determinative point upon which to measure interest on these issues.

As explained by the First Department concluded, "[a]ttorney fees are not damages for breach of any substantive provision of a contract or substantive property right. Rather, they represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined." *Solow Mgmt. Corp. v Tanger*, 19 AD3d 225, 226–27 (1st Dept. 2005). Here, the underlying action or proceeding was determined on February 21, 2018, the date the defendant's liability was established in this case. This First Department's reasoning is in conformity with holdings of the Court of Appeals and other Departments of the Appellate Divisions that conclude that interest under CPLR 5002 should be computed from the date of jury verdict or a decision on liability. *See Grobman v Chernoff*, 15 NY3d 525 (2010) *see also Rohring v City of Niagara Falls*, 84 NY2d 60 (1994); *Love v State*, 78 NY2d 540 (1991); *Gunnarson v State*, 70 NY2d 923 (1987); *Mahoney v Brockbank*, 142 AD3d 200, 200–06 (2nd Dept. 2016); *Van Nostrand v Froehlich*, 44 AD3d 54 (2nd Dept. 2007); *See Stassou v Casini & Huang Constr., Inc.*, 14 AD3d 695 (2nd Dept. 2005) *Delulio v 320-57 Corp.*, 99 AD2d 253, 256 (1st Dept. 1984); *see also Deborah S. v Diorio*, 160 Misc2d 210, 211 (App. Term 1994).

As noted, the date the liability of Mr. Lee and his codefendants was established in this case was February 21, 2018, when the default judgment was issued. This date, therefore, is the starting point for calculating interest under CPLR 5002. Accordingly, with respect to the plaintiff's award of punitive damages

in the amount of $700,000.00, legal fees in the sum of $42,345.00, and disbursements in the amount of $2,805.98, the plaintiff is awarded interest from February 21, 2018 until judgment is entered in this case. Interest shall be at the rate of 9%, to be computed by the Clerk from February 21, 2018 until judgment is entered in this case. *See* CPLR 5002; *see also* CPLR 5004.

The plaintiff is also awarded interest at the rate of 9% on the total award of $880,359.96 from the time the judgment is entered until it is paid. Once the entire award is paid, it is incumbent upon the plaintiff to apply to the clerk for the interest calculation pursuant to CPLR 5003. *See* CPLR 5003; *see also* CPLR 5004.

Finally, the plaintiff is awarded costs in this case pursuant to CPLR 8101. The Clerk of the Court is directed to calculate both costs and interest in this case, the latter to be calculated as set forth in this decision and order.

Accordingly, as set forth in this decision and order, the plaintiff is awarded compensatory damages in the amount of $135,208.98, plus interest pursuant to CPLR 5001 and 5002. The plaintiff is also awarded punitive damages in the amount of $700,000.00, attorney's fees in the sum of $42,345.00, and disbursements in the amount of $2,805.98, together with interest pursuant to CPLR 5002. Finally, as provided by CPLR 5003, the plaintiff is awarded interest on the total award of $880,359.96 from the time the judgment is entered until it is paid.

It is hereby:

ORDERED that the plaintiff, Nancy Shunkuen Ng, is awarded compensatory damages in the amount of $135,208.98, together with interest under CPLR 5001, at the rate of 9% annum, to be calculated from October 1, 2016 until February 21, 2018; and it is further

ORDERED that, pursuant to CPLR 5002, the plaintiff, Nancy Shunkuen Ng, is awarded interest on the award of $135,208.98, at the rate of 9% annum, to be calculated from February 21, 2018 until judgment is entered in this case; and it is further

ORDERED that the plaintiff is awarded punitive damages in the amount of $700,000, together with interest under CPLR 5002, at the rate of 9% annum, to be calculated from February 21, 2018 until judgment is entered in this case; and it is further

ORDERED that the plaintiff is awarded legal fees in the amount of $42,345.00, together with interest under CPLR 5002, at the rate of 9% annum, to be calculated from February 21, 2018, until judgment is entered in this case; and it is further

ORDERED that the plaintiff is awarded disbursements in the amount of $2,805.98, together with interest under CPLR 5002, at the rate of 9% annum, to be calculated from February 21, 2018, until judgment is entered in this case; and it is further

ORDERED that, pursuant to CPLR 5003, the plaintiff is awarded interest at the rate of 9% on the total judgment of $880,359.96 from the time the judgment is entered in this until it is paid by the defendant, Andy Lee; and it is further

ORDERED that the plaintiff is awarded costs in this case; and it is further

ORDERED the Clerk of the Court is directed to calculate both interest and costs in this case; and it is further

ORDERED that the Clerk of the Court is directed to enter this decision and order as a judgment.

This constitutes the decision and order of this Court.

Dated: March 13, 2020

Salvatore J. Modica

FILED
MAR 17 2020
COUNTY CLERK
QUEENS COUNTY