SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

CHRISTINE OWEN, individually, derivatively as a shareholder of ROHM Services Corporation and RHH Mendon Properties, Inc., and as executor of the Estate of Barbara A. Hurlbut, Plaintiff, – against – ROBERT W. HURLBUT and HURLBUT HEALTH CONSULTING, LLC, Defendants.	Index No. E2022010777 Hon. Christopher S. Ciaccio

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

As an officer and director of ROHM Services Corporation ("ROHM"), Robert W. Hurlbut ("RWH") owed the corporation and its shareholders fiduciary duties of loyalty and care. He was required to operate ROHM for the benefit of its shareholders and was prohibited from engaging in unfair self-dealing and from diverting corporate assets or opportunities for personal gain. Given that the Barbara Hurlbut Marital Trust owned ROHM, RWH was obligated to operate the business to generate income for his mother, Barbara Hurlbut, as the lifetime income beneficiary of the Marital Trust, and to protect ROHM's value for Christine Owen as a remainder beneficiary of the Marital Trust and a beneficial shareholder of ROHM.

Instead, the undisputed facts show that RWH breached his fiduciary duties of loyalty and care to ROHM, to the Marital Trust, to Barbara, and to Owen, by, among other things:

- Operating ROHM on a near "breakeven" basis between 2017 and 2019, using the company's assets to enrich himself and his nursing home businesses rather than to generate income for the Marital Trust to distribute to Barbara;
- Further enriching himself by paying himself double the market-rate compensation for his management services, essentially causing ROHM to foot the bill for RWH's efforts to manage his separate nursing home businesses;
- Causing ROHM to enter into services agreements with his nursing homes that failed to compensate ROHM for the full range of services it provided, failed to collect any revenue for licensing ROHM's valuable intellectual property, and failed to protect ROHM against arbitrary termination;
- Causing HHC to take over ROHM's entire business—including its workforce, files, trademarks, goodwill, know-how, and more—in January 2020, without obtaining

the requisite shareholder approval and without paying fair-market value to ROHM for its intangible assets; and

- Continuing to engage in self-dealing since 2020, including by collecting "rent" and other charges from ROHM after its entire business was taken, and allowing HHC to misappropriate ROHM's trademark and website without compensation. (Indeed, *while this motion was pending*, HHC filed an application to re-register ROHM's trademark as its own.)

There is much still to uncover about the full extent of RWH's wrongdoing and the damages he caused to ROHM, to Barbara's estate, and to Owen. Yet, RWH admits the core conduct at issue. RWH admits that he deliberately operated ROHM as a breakeven entity so that he could realize all profits in his own nursing home businesses, thereby depriving ROHM of profits it otherwise would have earned. RWH's exorbitant compensation is beyond dispute because it can be proved through documentary evidence, including ROHM's federal income tax returns. And RWH admits that HHC took over ROHM's business in January 2020, yet paid ROHM nothing for its workforce, files, intellectual property, website, goodwill, know-how, or other intangible assets. Accordingly, this Court should grant Owen's cross-motion for partial summary judgment as to liability on these issues and award partial damages on Owen's faithless servant doctrine claim, which requires disgorgement of salary for periods of time in which an employee engaged in self-dealing. Owen concedes that the remainder of the damages owed by RWH for self-dealing cannot be determined as a matter of law at this early stage.

The Court should also deny Defendants' motion for summary judgment. Defendants fail to meet their initial prima facie burden because they ignore much of the misconduct alleged in Owen's verified complaint and focus only RWH's self-serving affidavit. Unlike Owen's cross-

motion—which is premised on admissions, documentary evidence, and other undisputed facts—Defendants' motion is premised on RWH's conclusory assertions, which are both hotly disputed and have not been tested through the discovery process. Thus, even if Defendants could meet their initial burden, their motion must still be denied because Owen both raises triable issues of material fact and has demonstrated a need to obtain disclosure under CPLR 3212 (f).

STATEMENT OF FACTS

The pertinent facts are set forth in Plaintiff's verified amended complaint ("Compl.") and in the accompanying affidavit of Christine Owen ("Owen Aff."), expert affidavit of Terence L. Griswold ("Griswold Aff."), and affirmation of Kelly S. Foss ("Foss Aff.").[1] Plaintiff also relies upon admissions from RWH's affidavit dated April 10, 2023 (Doc. 88) ("Hurlbut Aff.").

A. ROHM Services Corporation

During his lifetime, Robert H. Hurlbut ("RHH") owned numerous skilled nursing facilities (the "Hurlbut Nursing Homes") (Compl. ¶¶ 10-13; Hurlbut Aff. ¶¶ 8, 12). Each of the Hurlbut Nursing Homes was formed as a separate limited liability company (Owen Aff. ¶ 5). RHH also owned a number of real-estate investment companies, only some of which held real estate assets on which the Hurlbut nursing homes were situated (Owen Aff. ¶¶ 5-7).

RHH formed ROHM Services Corporation ("ROHM") to serve multiple purposes. One of its purposes was to serve as a home office to the Hurlbut Nursing Homes, providing management, administrative, and back-office support (Compl. ¶¶ 12,14; Owen Aff. ¶¶ 6-7). Another of its purposes was to provide booking and property management services to various real estate holding and rental companies (Owen Aff. ¶¶ 6-7).

[1] Unless otherwise indicated, citations to "Ex." are to the exhibits to the Foss Affirmation. All bold-italics emphasis is added unless otherwise noted.

ROHM entered into services agreements with each Hurlbut Nursing Home (Hurlbut Aff. Ex. I). While these agreements specified *some* of the services that ROHM provided (including standard accounts payable, accounts receivable, and debt collection), in practice, ROHM provided many additional services such as annual budget review, preparation of financial statements, accounting services, tax preparation, purchasing, management of vendors and suppliers, overseeing quality of care for nursing home residents, overseeing regulatory compliance, providing nurse and certified nursing aide training, handling all Medicare and Medicaid reporting, providing support for Department of Health inspections, providing broad-based marketing of the Nursing Homes under the overarching brand Hurlbut Health Communities, assisting with the hiring of strategic personnel, management of all payroll and employee benefits, serving as a corporate office, information-technology services, courier services, interior design and maintenance, management of building exterior appearance and maintenance, landscape design and maintenance, running the employee uniform and dress code program, and development of project-specific budgets associated with all of the foregoing services (*see generally* Owen Aff. [providing far greater detail]).

At all times relevant to this case, ROHM had its offices located at 740 East Avenue in Rochester, New York (Owen Aff. ¶ 7). It employed approximately 33 employees at any given time (*id.* ¶ 40).

B. The Barbara Hurlbut Marital Trust

Following RHH's death in 2013, RHH's interests in numerous real estate holding and rental properties, together with his 100% ownership interest in ROHM (the company managing those entities), passed first to RHH's estate and then to the Marital Trust (Ex 1, Compl. ¶ 25; Owen Aff. ¶¶ 10-14). A 2014 appraisal report by Stonebridge Business Partners found that ROHM's fair-market value as a going concern as of the date of RHH's death was $855,000 (Ex. 4).

On October 6, 2009, RHH executed a Will disposing of his assets upon his death (Ex. 2). Article V of RHH's Will created a Marital Trust for the benefit of his surviving spouse, Barbara Hurlbut ("Barbara"). Barbara was entitled to all Marital Trust income during her lifetime and was also a permissible principal beneficiary (*id.* §§ V.D.1, V.D.2). The Will directed that, upon Barbara's death, the remaining principal be distributed in equal parts to RWH and Owen as residual beneficiaries (*id.* § V.D.4).

RHH died in March 2013 (Ex. 1, Compl. ¶ 16). At the time, RHH had already transferred ownership of the Hurlbut Nursing Homes to RWH and Owen, with RWH as the majority owner in control of each entity and to Owen as the minority, passive owner of each entity (*id.* ¶ 15; Owen Aff. ¶ 10). ROHM was 100% owned by RHH at the time of his death (*see* Compl. ¶ 11).

RHH's Will nominated Mary E. Ross and Jerald J. Rotenberg (the "Original Trustees") as co-trustees for the Marital Trust (Ex. 2 § XX). According to RWH, the Original Trustees delegated some of their authority to RWH, who served as the "president" of the Marital Trust (Ex. 3 at 69:2–70:16). In that role, RWH oversaw the finances and administration of the Marital Trust (*id.*). As recently held in a related Surrogate's Court matter, RWH was a *de facto* trustee of the Marital Trust between at least January 1, 2016 and May 20, 2020 (Foss Aff. Ex. 87).

C. 2016 Asset Purchase Agreement

Following RHH's death, RWH purchased from RHH's estate all the real estate holding companies leasing property to the Nursing Homes (Owen Aff. ¶ 66). In 2016, RWH purchased Owen's minority ownership interests in the Hurlbut Nursing Homes (Ex. 1, Compl. ¶ 26; Doc. 89). RWH did not, however, purchase ROHM, whose shares continued to be wholly owned by the Marital Trust (Ex. 1, Compl. ¶ 25). After the 2016 transaction, Owen resigned from ROHM, while RWH continued to serve as ROHM's president (*id.* ¶¶ 23, 28). As of December 31, 2016, RWH

was the sole owner of all the Hurlbut Nursing Homes and associated real-estate companies, whereas the Marital Trust was the sole owner of ROHM.

D. RWH engages in self-dealing between 2017 and 2019

After his father's death, RWH admits that he continued to operate ROHM as a "break-even proposition" (Doc. 88, RWH Aff. ¶¶ 24, 34). RWH also admits that he arranged for ROHM to enter into and perform under service agreements with his nursing homes (*id.* ¶ 44 & Ex. I). Each of those service agreements required ROHM, in exchange for a flat annual fee from the nursing home, to perform certain limited services, including accounts payable, accounts receivable, preparation and negotiation of purchasing bids, audit review, and debt collection services (*see* Doc. 97). Nothing in ROHM's services agreements required the nursing homes to pay for the additional services being performed by ROHM for the nursing homes and described in Owen's affidavit (*see* Griswold Aff. ¶¶ 36-42). Each of the service agreements could be terminated without any fee if the nursing home provided 30 days' notice before the end of the annual term (Doc. 97). Under these agreements, ROHM had a materially lower level of profitability than other similarly sized office administrative services companies. ROHM's operating margins were only 1.1% in 2017, 2.1% in 2018, and 3.0% in 2019, compared with an industry average net operating margin of 18.7% (*id.* ¶¶ 33, 43-49).

Had ROHM charged fair-market value for its services—untainted by RWH's self-dealing—its fees would have been approximately 20% to 30% higher, which would have resulted in higher operating margins of 18% to 25% (Griswold Aff. ¶¶ 62-63). These numbers are also in line with the Detailed Appraisal Report of the Common Shares of ROHM Services Corporation, Rochester, New York, as of March 4, 2013, by StoneBridge Business Partners, which report noted that industry-standard rates (5% of revenues) were 25% higher than what ROHM was charging (only 4% of revenues) (Ex. 4). Indeed, the available evidence shows that in January 2020,

immediately after taking over the entire business, RWH increased the rates he was charging his nursing homes by 31.3% (*id.* ¶¶ 53-60). RWH's determination to have his nursing homes pay far higher rates after having ensured that those payments would line his own pockets, rather than going to his mother as the income beneficiary of the Marital Trust, speaks volumes. Had RWH arranged for ROHM to charge 20% more in fees between 2017 and 2019, ROHM would have generated approximately $600,000 per year in profits, all of which would have been payable to Barbara as income of the Marital Trust (*id.* ¶ 63). Charging 30% more in fees would have generated more than $900,000 per year in Marital Trust income for Barbara (*id.*).

During this time period, RWH paid himself annual salaries which significantly exceeded comparable salaries for similarly situated businesses in the industry based upon benchmark information (Griswold Aff. ¶¶ 67-85). Based on the federal income tax returns filed by ROHM for the years 2017, 2018, and 2019 (Foss Aff. Exs. 73-75), ROHM paid RWH total compensation in the amounts of $550,000, $590,073, and $554,000 for those years, respectively. The evidence shows that these amounts encompassed salary not only for RWH's employment with ROHM, but also for RWH's employment at the various nursing home and real estate holding companies (*see* Griswold Aff. ¶¶ 84-85; *see also* Ex. 4 [StoneBridge Report] at 17-18). Thus, rather than paying himself from his nursing homes, RWH paid himself out of ROHM's already artificially deflated profit margin—profits which otherwise would have been Marital Trust income owed to his mother. The salary RWH compensated himself equated to 17.3% of sales in 2017, 18.5% of sales in 2018, and 18.4% of sales in 2019, compared to an industry standard in the range of 7.5% of sales *for a full-time* executive (Griswold Aff. ¶¶ 73, 81). Even assuming RWH worked for ROHM full time and did not separately work as an executive for his nursing homes, a conservative reduction of his salary to between 7% and 9% of sales would have dropped an additional $210,000 to $300,000

per year in profits to ROHM's bottom line—resulting in approximately $850,000 to $1 million in additional income to Barbara from the Marital Trust for the period 2017-2019 (*id.* ¶¶ 81-83).

Meanwhile, RWH was also profiting from ROHM's intellectual property at ROHM's expense. In or around 2010, ROHM developed the HURLBUT CARE COMMUNITIES trademark, which it owned and registered with the U.S. Patent and Trademark Office in 2012 (Foss Aff. ¶¶ 85-86 & Ex. 80). ROHM used the trademark in advertising and marketing materials, developing goodwill in the brand (Owen Aff. ¶¶ 36, 50). RWH apparently allowed his Hurlbut Nursing Homes to use ROHM's registered trademark without any licensing agreement or royalties paid to ROHM in return (Foss Aff. ¶ 93).

E. RWH considers purchasing ROHM from the Marital Trust

In 2017, RWH formed Hurlbut Health Consulting, LLC ("Hurlbut Health") (Ex. 5; Ex. 6). Upon information and belief, despite the fact that Hurlbut Health was formed using the time and efforts of employees of ROHM (*see* Exs. 10, 11, 19; Ex. 1, Compl. ¶ 49), RWH took 100% of the membership interest in Hurlbut Health (*see* Ex. 1, Compl. ¶ 42).

Documentary evidence shows that in 2019, RWH originally planned to purchase ROHM from the Marital Trust. Peter Abdella of Harter Secrest & Emery LLP, attorneys for the Original Trustees, asked Bonadio affiliate ValuQuest LLP to perform a valuation of ROHM for this purpose (Ex. 9). On March 26, 2019, in response to a question regarding the identity of the client, Mr. Abdella specified that the Marital Trust was the "client" requesting the valuation, but that "[w]e could add [RWH] on as the client too since I don't think [he] is disputing that he will pay the Trust for the value of the stock per the valuation" (*id.*). Two days later, on March 28, 2019, Mr. Abdella urged ValuQuest to move quickly on the requested valuation report, writing: "Is there any way that we could get the report earlier than April 26? I spoke with Bob yesterday and he was pushing me on the timing" (*id.*).

In April 2019, ValuQuest was in the process of gathering documentation in preparation for completing a valuation (Ex. 10). By July 2019, however, the documentary evidence suggests that RWH had abandoned his plan to *buy* ROHM from the Marital Trust and had conceived of a plan to simply *take* ROHM's business and reform it as Hurlbut Health. This is demonstrated by an email from ROHM's controller to Bonadio that references "the ROHM/HHC change" (Ex. 11).

During this time period, ROHM employed somewhere between 20 and 33 people (Ex. 3 at 130:23–131:4; Owen Aff. ¶ 39). ROHM leased office space at 740 East Avenue from 740 East Avenue Associates, LLC ("740 East"), an entity owned by RWH (Ex. 12). ROHM had written services agreements with the various Hurlbut Nursing Homes (Ex. 13). ROHM also owned various physical assets, including furniture and computer equipment (Ex. 14). ROHM also owned intangible assets, including the HURLBUT CARE COMMUNITIES trademark, the hurlbutcare.com website domain, and associated goodwill (Foss Aff. ¶ 85, 94, 96 & Exs. 80, 84, 85).

F. Instead, RWH takes over ROHM's business using HHC as of January 2020

In early 2019, RWH began making moves against his sister. In March 2019, he filed a lawsuit against her, accusing her of spending too much money on the care of their mother (Owen Aff. ¶ 88). By the fall and winter of 2019, RWH had laid the groundwork for HHC to take over ROHM's business—including its contracts, employees, and files—without paying fair-market value to the Marital Trust.

In August 2019, ROHM employees compiled copies of its service agreements (Ex. 15). On November 29, 2019, RWH executed documents terminating all of ROHM's service agreements (Ex. 16). Ten days later, on December 9, 2019, a ROHM employee named Katie Snyder informed Bonadio that "[w]e are moving forward with changing our home office from ROHM to Hurlbut Health Consulting effective [January 1, 2020]," admonishing Bonadio to "[p]lease keep this information confidential, as we have not told the staff here at ROHM yet" (Ex. 17). On December 11,

2019, ROHM employee Snyder reiterated to Bonadio to "keep this information very confidential while you are here this week" for purposes of an audit because "[t]his change has not yet been communicated to the staff at ROHM. Only myself, Bridgett, Bob and Chris Hill are aware of this change" (Ex. 18).

All employees of ROHM then resigned from their employment effective December 31, 2019 and were immediately hired by Hurlbut Health the following day, with their accrued vacation days still intact (Ex. 19). ROHM's employee 401(k) plan was simply renamed the Hurlbut Health 401(k) plan (Ex. 20). At that time, there was also a plan for Hurlbut Health to arrange a "buyout of moveable equipment from ROHM," effective as of January 1, 2020 (Ex. 21). As explained below, the plan was not immediately implemented.

As of January 1, 2020, RWH caused both ROHM and Hurlbut Health to enter into new leases with 740 East Ave (Exs. 17, 24, 25). ROHM, despite now having no business, no employees, and no assets, continued to pay 740 East, a real estate business owned by RWH, $2,000 in rent for the privilege of occupying the same premises as HHC (*see id.*)

The first time ROHM was raised in connection with the litigation between RWH and Christine was in March 2020, after Owen's counsel had discovered that RWH had been paying $6,000 per month out of the Marital Trust bank account to ROHM (Owen Aff. ¶ 88). In June 2020, RWH appeared for a deposition at which he caused consternation by testifying that ROHM was "defunct" as of January 2020 (Ex. 3 at 129:7-14; Owen Aff. ¶ 90). RWH further stated that "Hurlbut Health Consulting" had "replaced ROHM" (Ex. 3 at 129:17-23).

Despite ROHM's ownership of a federal registration for the HURLBUT CARE COMMUNITIES mark, RWH continued to use the mark as the overarching brand for his nursing homes (Foss Aff. ¶¶ 87-92 & Exs. 81-83). He never paid anything to ROHM in connection with his use

of ROHM's trademark (*id.* ¶ 93). Indeed, on April 17, 2023, just one week after filing this very motion, RWH re-applied for the same trademark under Hurlbut Health Consulting, and he allowed ROHM's trademark registration to be cancelled in June 2023 (*id.* ¶¶ 87-92 & Exs. 81-83). RWH also allowed HHC to simply take over ROHM's domain registration and website (*see* Foss Aff. ¶¶ 94-98 & Exs. 84-86).

G. RWH hides information about the takeover from the incoming Trustee

Meanwhile, in May 2019, the Original Trustees had petitioned to resign their positions as trustees of the Marital Trust (Ex. 64). Although RHH's Will nominated RWH and Owen to serve as successor trustees, Owen opposed RWH's appointment given the parties' acrimonious relationship. Instead, Owen asked the Surrogate's Court to appoint Tompkins as trustee (Ex. 26).

In May 2020, the Surrogate's Court (Hon. John M. Owens) entered an Order granting the Original Trustees' motion to resign, and, over RWH's objection, appointing Tompkins as "sole successor Trustee on an interim basis but with no set term and until such time as the Court may appoint one or more co-Trustees" (Ex. 27). The Order further provided that, "notwithstanding the interim nature of its service, [Tompkins] shall have full authority as Trustee of the Barbara Hurlbut Marital Trust" (*id.*).

After its appointment, Tompkins took steps to locate the assets owned by the Marital Trust and to determine the value of those assets. Beginning in July 2020 and continuing through March 2023, RWH repeatedly directed Bonadio not to cooperate with Tompkins' requests for information about the Marital Trust, including specific requests for information about ROHM (see Ex. 28 [July 2020 email instructing Rob Nasso of Bonadio not to cooperate with Tompkins: "Rob, ***Tompkins gets nothing from you either***"]; Ex. 29 [November 2020 email in which RWH's counsel declined to provide ROHM's financial statements, tax returns, and valuation reports to Tompkins]; Exs. 30 [Nasso, at RWH's direction, agrees not to respond to Tompkins' request for information: "Sounds

good. ***I'm ghosting him***"]; Ex. 31 [January 2021 email exchanges in which RWH again directed Nasso not to cooperate with Tompkins' requests for information: "***Don't answer them. None of their business***"; "***DON[']T give it to him. I forbid it!!!!!!***"]; Ex. 32 [RWH: "***Screw Tompkins***"]; Ex. 33 [further email exchanges in which RWH directed Nasso not to cooperate with Tompkins' requests: "ROHM is still none of their business. ***Tompkins has no right to this information***."]).

H. HHC belatedly documents its taking of certain tangible ROHM assets

On April 12, 2021, the Surrogate's Court issued an Order directing RWH to "produce or cause to be produced" various categories of documents, including:

> ***All books and records*** including … ***business records*** for any business owned … by the [Marital] Trust, and ***records of the acquisition, sale or disposition of assets***, of any entities owned … by the [Marital] Trust … with respect to … ROHM Services Corporation ….

(Ex. 44 & 44-A, Pinker Aff. ¶ 3 [d]). In addition, RWH was directed to produce or cause to be produced "[a]ll Bonadio ... work product relating to the valuation of ROHM Services Corporation" (*id.* ¶ 3 [f]). Thus, as of April 12, 2021, RWH was under a court-imposed obligation to produce (or cause to be produced by others) all business records of ROHM, all records relating to the value of ROHM, and all records concerning the sale or disposition of any of ROHM's assets.

RWH not only failed to comply with the Surrogate's Court Order,[2] but actively participated in a scheme to create and execute an Asset Purchase Agreement, which purportedly documents ROHM's sale of its assets to HHC as of January 1, 2020 (Ex. 48). The process for preparing the Asset Purchase agreement was as follows. First, Bonadio prepared a 37-page asset depreciation report (Ex. 14). HHC employees then prepared a summary of the assets to be purchased from

[2] Notwithstanding this clear directive from the Surrogate's Court, RWH did not disclose to Tompkins business records associated with Defendants' misappropriation of ROHM's assets (*see* Foss Aff. Ex. 68 [Gooch Aff.]; Foss Aff. Ex. 69 [Radin Aff.]).

ROHM, which included moveable equipment, computer equipment, and a vehicle (Ex. 45). The asset report did not list, or attempt to ascribe any value to, ROHM's workforce, files, trademark, website domain, goodwill, know-how, or other intangible aspects of ROHM's operations (*see id.*). With respect to ROHM's leasehold interests in 740 East Avenue, although the report listed these as assets, a later email clarified that HHC would not purchase certain leasehold and land improvements from ROHM because such assets allegedly had "no value to HHC and are considered sunk costs to ROHM" (Ex. 46).[3]

On May 25, 2021, RWH caused ROHM to enter into an Asset Purchase Agreement with HHC in which ROHM sold only the remaining movable equipment, furniture, filing cabinets, computer equipment, and vehicle for a total of $85,538.19 (Ex. 48). The agreement did not contain any provision for the purchase of ROHM's ongoing business, its workforce, its trademark, its website, or its goodwill. And despite conveying ROHM's filing cabinets and computers to Hurlbut Health, the agreement provided ROHM with no compensation for the files contained within those filing cabinets and computers (*see id.*). The agreement purported to be effective as of January 1, 2020 (*id.*), which corresponds with the effective date of Hurlbut Health's takeover of ROHM's entire business operation and lease. RWH executed the Asset Purchase Agreement on behalf of ROHM as its president (*id.*).

RWH did not seek Tompkins' permission to enter into the Asset Purchase Agreement before signing it on behalf of both the buyer and seller on May 25, 2021 (Ex. 69 [Radin Aff.]). Upon information and belief, RWH took no affirmative steps to disclose the Asset Purchase Agreement

[3] Despite not paying ROHM any money for the purportedly sunk costs of the leasehold improvements, HHC did in fact acquire a leasehold interest in 740 East Avenue, including use of all improvements paid for by ROHM. Further, RWH, as sole owner of 740 East, appears to have assessed a $25,000 penalty against ROHM for RWH's own decision to end ROHM's lease in order to open up the space for RWH's entity HHC (Ex. 47 at TCB00007616).

to Tompkins. Indeed, Tompkins did not even learn of its existence until November 2021, when the Marital Trust's accountant mentioned it during a phone call with Tompkins's attorney (*id.* ¶¶ 14–15).

LEGAL STANDARD

Summary judgment is appropriate where there is no material of issue of fact to be tried and judgment may be directed as a matter of law (CPLR 3212 [b]). To prevail, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A movant's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The burden then shifts to the nonmoving party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). "[M]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018] ["conclusory and speculative allegations" were insufficient to avoid summary judgment]). However, summary judgment should be denied where "facts essential to the opposition may exist but cannot ... be stated" because a party has not had the opportunity to obtain disclosure (CPLR 3212 [f]).

Summary judgment can be "a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources" (*Matter of Suffolk County Dep't of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]). Yet, it is also "a drastic remedy" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]) because it "deprives a litigant of his or her day in court" (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d

757, 759 [2d Dept 2019]). In determining whether summary judgment is appropriate, the court should view the evidence in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]).

ARGUMENT

Defendants' motion for summary judgment—which is premised entirely upon the untested, self-serving assertions of RWH—must be denied, as Defendants fail to meet their prima facie burden of establishing their entitlement to judgment as a matter of law. Moreover, Owen has amply demonstrated both (i) the existence of triable issues of material fact concerning RWH's conduct as president of ROHM and (ii) her need to obtain discovery of material facts within Defendants' exclusive possession. As a result, Owen's claims cannot be dismissed without affording her both discovery and an opportunity to try her claims on the merits. Defendants' motion should therefore be denied in its entirety.

By contrast, Owen's cross-motion seeks to narrow the issues in dispute. It is based solely on the *undisputed* facts appearing in the record through RWH's own admissions or based on facts established from documentary evidence. These undisputed facts are sufficient, standing alone, to resolve at least some of the issues in this case in Owen's favor at this early stage, allowing the parties to narrow and focus their efforts going forward.

I. OWEN IS ENTITLED TO PARTIAL SUMMARY JUDGMENT AS TO LIABILITY BASED ON RWH'S ADMISSIONS OF SELF-DEALING.

A. RWH cannot meet his burden to prove good faith and the entire fairness for each of his self-interested transactions.

Directors and officers of corporations owe fiduciary duties of loyalty and care to their shareholders (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 [1984]). Generally, the actions

of directors and majority shareholders are protected by the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). The presumption of the business judgment rule does not apply, however, when the director or officer of a corporation engages in a self-interested transaction (*Lippman v Shaffer*, 15 Misc 3d 705, 711 [Sup Ct, Monroe County 2006]). "Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally" (*Marx v Akers*, 88 NY2d 189, 202 [1996]). Where such self-interest exists, the burden shifts to the self-interested director to "prove good faith and the entire fairness" of the transaction (*Alpert*, 63 NY2d at 570; *see also Tsui v Chou*, 2021 NY Slip Op 31221[U], *19 [Sup Ct, NY County 2021] [board's decisions to hire a management company wholly owned and operated by a self-interested board member was not subject to deference under the business-judgment rule and the burden shifted to the self-interested members to prove the entire fairness of the transaction]).

Conflicted directors or officers must introduce evidence sufficient to show the "efforts taken to simulate arm's length negotiations" (*see Alpert*, 63 NY2d at 570). The doctrine of entire fairness involves inquiry into the deal's fair process and fair price: fair process "concerns timing, structure, disclosure of information to independent directors and shareholders, how approvals were obtained, and similar matters[,]" whereas fair price is "measured by whether independent advisors rendered an opinion or other bids were considered ...." (*Matter of Kenneth Cole Prods., Inc. Shareholder Litig.*, 27 NY3d 268, 275 [2016], citing *Alpert*, 63 NY2d at 570-571).

Here, as a matter of law, RWH cannot establish the entire fairness of the transactions between ROHM and his nursing homes, for multiple reasons. First, RWH admits to intentionally

operating ROHM as a break-even entity between 2017 and 2019 so that it would not generate any significant annual income for Barbara or any long-term return on investment for ROHM's sole shareholder, the Marital Trust. As explained in the Griswold affidavit, ROHM significantly undercharged for its services between 2017 and 2019 compared to market benchmarks. What is more, ROHM appears to have provided many services beyond what was required by the services agreements—essentially providing these services for free to the Hurlbut Nursing Homes.

In the factually analogous case of *Ganzi v Ganzi*, the Court found that defendants engaged in a "textbook example of fiduciary misconduct" by executing self-dealing undervalued licensing agreements that grossly favored defendants' wholly owned new corporate interests and deprived the original corporation, JOMR, of fair market value for such agreements (2018 NY Slip Op 32961[U], *17 [Sup Ct, NY County 2018]). The Court highlighted that although "JOMR is a closely-held corporation which began as an informal family affair, [such fact] does not excuse defendants from complying with their fiduciary obligations to JOMR and fellow shareholders" (*id*.). The Court specifically found that defendants had not satisfied their burden to establish that the license agreements were fair and reasonable to JOMR where JOMR charged an annual flat-rate pursuant to the licensing agreements, but other comparable entities calculated such licensing fees as a percentage of gross sales (*see id*. at *17-18). Similarly, the Court found that defendants breached their fiduciary duty to the related real estate entity, JOHM, by charging below market rent on an annual basis (*see id*. at *19).

Second, RWH admits that on an annual basis, he entered into service contracts with his own nursing homes without building in any protections for ROHM with respect to termination of those agreements. Indeed, due to the lack of any protections in the contracts he himself arranged, RWH admits that he arranged for his nursing homes to cancel the contracts for no fee, and with

only 30 days' notice, thereby rendering ROHM defunct and (he claims) without the funds necessary to sustain the business while marketing to new customers. As explained in the Griswold affidavit, in similar situations involving co-dependent businesses, one would expect the parties to negotiate protections such as cancellation fees, buyout provisions, or lengthy notice periods to protect one co-dependent business from the devastating effects of a short-notice termination, as occurred here. As ROHM's President, RWH failed to negotiate standard contractual protections on its behalf, and then exploited his own failures to take advantage of ROHM and its shareholder.

Third, documentary evidence demonstrates that RWH arranged for his nursing homes to make continuous use of a trademark belonging to ROHM, without ensuring that ROHM would receive any royalties. All of these facts are admitted or undisputed, and warrant granting Owen partially summary judgment on liability (*see Tsui*, 2021 NY Slip Op 31221[U], *19 [defendants in derivative action breached fiduciary duties by hiring management company owned by self-interested board member, failed to show how the transaction was in best interest of corporation, and failed to show that board members took actions to simulate an arms-length transaction]; *Genger v Genger*, 2016 NY Slip Op 30602[U], *11 [Sup Ct, NY County 2016] [plaintiff entitled to summary judgment as to liability for breach of fiduciary duty where defendant's actions resulted in plaintiff's loss of shares and undermined the estate planning intent of the parties' parents]).

Fourth, as a matter of law, Defendants cannot show procedural fairness with respect to the challenged transactions. Under New York law, the sale or disposition of "all or substantially all" of the assets of a corporation requires both notice to each shareholder of record and approval by a two-thirds majority of shareholders (BCL § 909 [a] [2], [3]). To preserve shareholder rights, New York courts have demanded strict compliance with these mandatory procedures (*see Bear Pond Trail v Am. Tree Co.*, 61 AD3d 1195, 1195-1197 [3d Dept 2009] [affirming judgment declaring

transaction null and void for failure to comply with Section 909]). Here, not only did RWH fail to obtain approval from Tompkins, the Trustee of the Marital Trust and the sole record shareholder of ROHM, but, as described above, RWH took extensive efforts to hide his conduct from Tompkins—even going so far as to violate a court-issued discovery order to hide the Asset Purchase Agreement for several months. As further indisputable evidence of the procedural unfairness of the transaction, RWH arranged re-register ROHM's trademark to Hurlbut Health without even telling Owen, let alone seeking her consent (Foss Aff. ¶ 89 & Ex. 83; Owen Aff. ¶ 95). Owen and her attorneys discovered this most recent conversion only days ago by searching records of the U.S. Patent and Trademark Office.

B. RWH unilaterally approved his excessive executive compensation in breach of his fiduciary duty to ROHM resulting in corporate waste.

"Directors who approve their own compensation bear the burden of proving that the transaction was fair to the corporation" (*Marx*, 88 NY2d at 204, n.6; *see also Lippman*, 15 Misc 3d at 712 [noting that "directoral self-compensation decisions lie outside the business judgment rule's presumptive protection" and that "receipt of self-determined benefits is subject to an affirmative showing [by the self-interested director] that the compensation arrangements are fair to the corporation."]).

For example, in *Lippman v Shaffer*, the Monroe County Supreme Court (Judge Fisher) granted a plaintiff's motion for summary judgment on an excessive compensation claim where the record showed that the defendant approved and received two "severance" payments although he remained employed by the corporation and the corporation had no contractual obligation to make such payments (15 Misc 3d at 715). The Court further noted that the defendants' proffered tax-based rationale did not meet the entire fairness standard (*id*. at 716), and rejected the defendant's self-serving claims that the plaintiff had received a similar severance payment in the past without

objection, and that the defendant was merely taking an advance severance of equal amount (*id.*). Accordingly, the Court ordered the moneys paid to the defendant to be returned to the corporation (*id*. at 717, citing *Gerdes v Reynolds*, 281 NY 180, 185 [1939] [directors required to restore to the corporation excessive salaries]; *see also Zutrau v Ice Sys., Inc.*, 38 Misc 3d 1235[A], 1235A, 2013 NY Slip Op 50392[U], *8 [Sup Ct, Suffolk County 2013] [president and majority shareholder of corporation improperly diverted corporate assets in the form of bonuses, thereby depriving the corporation of profits]; *O'Mahony v Whiston*, 2023 NY Slip Op 30482[U], *10 [Sup Ct, NY County 2023] [defendants did not carry their burden to prove that bonuses they paid themselves passed entire fairness scrutiny where defendants proffered "multiple pretextual justifications" and committed corporate waste by buying out a lease to form a competing business]).

Here, RWH was paying himself in excess of $550,000 per year in his role as president of ROHM, even though the entire business only brought in about $3 million per year in revenue. As demonstrated by the expert affidavit of Terence L. Griswold, that amount was plainly excessive, given that (i) RWH was taking home between 17.3% and 18.5% of ROHM's revenues, which far exceeds the industry norm of 7% to 9% as reflected in datasets of comparable businesses; (ii) RWH did not devote his entire efforts to ROHM's business, but was also the president of numerous other nursing home operating entities and real estate entities, meaning that his salary from ROHM should have been adjusted downward accordingly (Griswold Aff, Point V.B). The unfairness of RWH's compensation is compounded by the fact that RWH failed to run ROHM in a way that provided any meaningful value to its shareholders; as noted above, RWH was admittedly using ROHM as a means of generating value for his wholly owned businesses.

Given these facts, the Court should grant partial summary judgment to Owen as to RWH's liability on this issue. It is not necessary for the Court to fix the precise amount by which RWH's

compensation was excessive because, as explained below, RWH is required to disgorge his entire compensation for his period of disloyalty (*see* Point I.D).

C. Defendants misappropriated ROHM's assets to HHC.

The undisputed facts establish that Defendants took ROHM's assets and used those assets to set up HHC in its place. For the reasons explained below, Owen is entitled to summary judgment as to liability on her claims related to the misappropriation of ROHM's assets, including breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, corporate waste, usurpation of corporate opportunities, conversion, unjust enrichment, constructive trust, and BCL § 720.

"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" (*Am. Baptist Churches v Galloway*, 271 AD2d 92, 99 [1st Dept 2000] [internal quotations omitted]; *see also RCSUS Inc. v SGM Socher, Inc*., 2022 NY Slip Op 30926[U], *13 [Sup Ct, NY County 2022] [granting summary judgment on liability for unfair competition where defendant wrongfully diverted the plaintiff's business to itself]; *J-K Apparel Sales Co., Inc. v Jacobs*, 189 AD3d 1011, 1013 [2d Dept 2020] [affirming summary judgment for mismanagement and diversion of corporate assets under BCL § 720 because the defendant diverted assets to himself that belonged to the plaintiffs]).

In *Greenberg v Greenberg*, the Fourth Department held that a derivative plaintiff was entitled to summary judgment as to liability for his claims for breach of fiduciary duty and misappropriation of corporate assets (206 AD2d 963, 963 [4th Dept 1994]). The record in *Greenberg* established that the defendant had "unilaterally seized the tangible and intangible assets of Madison Cabinet, transferred them to his new corporation, Meyer's Cabinet, and used that new

entity as the vehicle for usurping the corporate opportunities of Madison Cabinet, in breach of his fiduciary duty to Madison Cabinet and its other shareholders" (*id*. at 964). In pertinent part, the plaintiff established, and the defendant failed to refute, that the defendant had:

> "unilaterally discontinued the business of Madison Cabinet after incorporating Meyer's Cabinet; that he appropriated the fixtures and tools of Madison Cabinet for use by Meyer's Cabinet; that Meyer's Cabinet occupies the same space that Madison Cabinet had occupied; and that Meyer's Cabinet does business using the same employees, the identical telephone number, and like stationery as that used by Madison Cabinet"

(*id*.). Accordingly, the Fourth Department held that the defendant's actions constituted a misappropriation of the tangible assets and goodwill of the original corporation (*id*. at 965).

Similarly, in *Lirosi v Elkins*, the Second Department held that the defendant breached his fiduciary duty to the shareholders of two entities after transferring all assets of the ongoing corporations to a new corporation (89 AD2d 903, 905 [2d Dept 1982]). The new corporation "was initially capitalized with only the assets—equipment, inventory, accounts (customer lists) and good will"—of the old corporations and "all of the employees of those companies became the initial working force of the new corporation" (*id*.). The Second Department specifically noted that only the defendant and the newly formed corporation derived any benefit from the transfer and that the defendant did not meet his burden of proving the entire fairness of the transaction, warranting summary judgment on liability for breach of fiduciary duty (*id*. at 906).

The same outcome is warranted here. It is undisputed that Defendants took ROHM's entire business and continued the same business under the name HHC. In January 2020, the same employees, working out of the same offices at 740 East Avenue, using the same computers and equipment, continued to provide the same services for the same clients as they had been doing back in December 2019. The only difference was that their paychecks and 401(k) statements now read "Hurlbut Health Consulting, LLC" instead of "ROHM Services Corporation." Everything

else—the service agreement terminations, the resignations, the rehiring, the Asset Purchase Agreement—were just parts of RWH's scheme, which he had planned for months, to change the ownership of the business from the Marital Trust to himself *without paying for it*.

RWH's self-serving explanations fail to establish fairness. He argues that the Hurlbut nursing homes were permitted to terminate their services contracts with ROHM at any time. To the extent that was true, it was only because RWH engaged in self-dealing with his nursing homes and failed to negotiate any standard contractual protection for ROHM that one might normally see in similar circumstances involving co-dependent businesses, such as longer contractual terms, buyout provisions, early termination fees, and lengthier notice provisions (*see* Griswold Aff. ¶ 49).

But even assuming that the Hurlbut nursing homes had the right to terminate ROHM's services, RWH was not permitted to abuse his position as a ROHM insider to steal the business and reformulate it under a new name. In theory, if RWH had decided that he no longer wanted to do business with ROHM, he might have resigned from his position as ROHM's president and spent months or years building a replacement management company from scratch, switching his nursing homes over when the new company was ready. Meanwhile, ROHM, under new and independent management, could have sought replacement clientele to keep its business alive. With sufficient advance notice, ROHM—a long-time management company with decades of experience managing real estate investment properties as well as nursing homes—undoubtedly could have continued its business in at least some fashion.

But building a new management business from scratch would have been burdensome, expensive, and time-consuming for Defendants. So instead, they used a shortcut, simply taking ROHM over by putting a new name on the door. Defendants thus kept the business running without interruption, using the same staff, the same offices, the same equipment, the same files, the same

branding, the same website, and the same institutional knowledge. If Defendants wanted all of those advantages, they were required to pay for them by obtaining approval from the Marital Trust and paying the fair-market value of ROHM.

What is more, the facts establish that RWH allowed HHC to misappropriate ROHM's intellectual property, including its HURLBUT CARE COMMNITIES trademark and its website, along with any intellectual property that ROHM owned as of 2019. This conduct alone warrants summary judgment in Owen's favor on liability for breach of fiduciary duty, corporate waste, self-dealing, and usurpation of corporate opportunities (*Stavroulakis v Pelakanos*, 58 Misc 3d 1221[A], 2018 NY Slip Op 50180[U], *9–17 [Sup Ct, NY County 2018] [granting plaintiff summary judgment as to liability for claims sounding in breach of fiduciary duty based on corporate waste, self-dealing, and usurpation of corporate opportunity, trademark infringement, and aiding and abetting breach of fiduciary duty where all of company's assets, including intellectual property, were transferred to new corporation by self-interested officers for no consideration; Court specifically noted that defendants took all of the company's assets and left "plaintiff with equity in an empty shell corporation"]; *Kurtzman v Bergstol*, 40 AD3d 588, 589 [2d Dept 2007] [affirming summary judgment for on claims for conversion and misappropriation of corporate assets where defendant-fiduciary prevented plaintiff from receiving share of profit distributions and finding trial court should have also granted summary judgment for plaintiff on claims sounding in breach of fiduciary duty]; *Davydov v Zhuk*, 23 Misc 3d 1129[A], 2009 NY Slip Op 51003[U], *1-2 [Sup Ct, Kings County 2009] [plaintiff sustained his burden to demonstrate entitlement to summary judgment as to liability for causes of action sounding in unjust enrichment; conversion of corporate assets, corporate business opportunities, and goodwill; breach of fiduciary duty; fraud; waste; and an

accounting where defendant admitted that he opened and maintained a competing business using assets of plaintiff and defendant's shared business]).

The Court should confer a constructive trust over the tangible and intangible assets diverted to HHC, thereby allowing ROHM to recover those assets (*see Blaustein v Pan Am. Petroleum & Transp. Co*., 293 NY 281, 300 [1944]; *see also Ault v Soutter*, 167 AD2d 38, 47 [1st Dept 1991] [affirming imposition of constructive trust where officer usurped corporate opportunity]). "The purpose of a constructive trust is to restore a particular asset to the plaintiff, and it may be used to recover misappropriated assets and any property into which misappropriated assets have been converted. Thus, a transferee receiving corporate assets with knowledge of the diversion is liable as a constructive trustee" (*Revankar v Tzabar*, 16 Misc 3d 1127[A], 2007 NY Slip Op 51590[U], *7 [Sup Ct, Kings County 2007] [cleaned up], citing *Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 213-214 [2d Dept 1979]).

D. RWH's compensation must be disgorged as a matter of law under the faithless servant doctrine and returned to ROHM.

An employee is required to exercise the utmost good faith, including a duty of loyalty, toward his employer (*see generally Murray v Beard*, 102 NY 505, 508 [1886]). Accordingly, New York's strict application of the faithless servant doctrine "mandates the forfeiture of all compensation, whether commissions or salary, where … one who owes a duty of fidelity to a principal is faithless in the performance of his services" (*Soam Corp. v Trane Co*., 202 AD2d 162, 163-164 [1st Dept 1994]; *see also Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017]). A faithless employee forfeits compensation even when "the services were beneficial to the principal or…the principal suffered no provable damage as a result of the breach of fidelity by the agent" (*Feiger v Iral Jewelry, Ltd*., 41 NY2d 928, 928-929 [1977]; *see also Diamond v Oreamuno*, 24 NY2d 494, 498 [1969] [describing policy rationale behind forfeiture rule which is to dissuade

breaches "by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates."]).

An employee may be held liable under the faithless servant doctrine where the employee has usurped a corporate opportunity or actively stolen from the employer (*see Linder v Innovative Commercial Sys. LLC*, 41 Misc 3d 1214[A], 2013 NY Slip Op 51695[U], *6 [Sup Ct, NY County 2013], citing *Mar. Fish Prods., Inc. v World-Wide Fish Prods., Inc*., 100 AD2d 81, 88 [1st Dept 1984] [employee usurped corporate opportunities]; *see also Dawes v J. Muller & Co*., 176 AD3d 473, 474 [1st Dept 2019] [plaintiff entitled to summary judgment on a faithless-servant claim against the decedent because the decent his breached duty of loyalty, requiring disgorgement of fees paid to the decedent]; *Bon Temps Agency v Greenfield*, 184 AD2d 280, 281 [1st Dept 1992] [reversing motion court and granting partial summary judgment to the plaintiff where defendant "acted in a manner inconsistent with her employment with the plaintiff and failed to exercise the utmost good faith and loyalty in the performance of her duties," where the defendant established a competing company while still employed by the plaintiff]; *Consol. Edison Co. v Zebler*, 40 Misc 3d 1230[A], 2013 NY Slip Op 51354[U], *5 [Sup Ct, NY County 2013] [granting summary judgment and ordering the defendant-employee to forfeit all of the salary and benefits received during the 26-month period of disloyalty]; *Natl. Union Fire Ins. Co. of Pittsburgh, PA v Razzouk*, 2022 NY Slip Op 31276[U], *8 [Sup Ct, NY County 2022] [granting summary judgment and awarding damages in the amount of the defendant's full compensation during the period of dishonesty]).

Having acted as a faithless servant in multiple ways between 2017 and 2019, RWH must disgorge all benefits he received during that time period. While many aspects of Owen's damages

must await further discovery (*e.g.*, to fix the precise amounts for undercharging the nursing homes, or the proper prices for use and ultimate taking of ROHM's trademark), the disgorgement of RWH's salary may be determined on this motion record. RWH's compensation is established based on the documentary evidence, including ROHM's tax returns (Exs. 73-75). Owen therefore seeks summary judgment solely as to this element of damages in the aggregate amount of $1,694,073.

Year	2017	2018	2019	Aggregate
Compensation	$550,000	$590,073	$554,000	$1,694,073

E. Owen is entitled to summary judgment on her claims for accounting, inspection of records, and dissolution of ROHM and RHH Mendon.

1. Accounting and Inspection of Records (ROHM and RHH Mendon)

A shareholder in a close corporation has the right to an accounting (*see Seretis v Fashion Vault Corp*., 110 AD3d 547, 548 [1st Dept 2013]). "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Ctr. for Rehabilitation & Nursing at Birchwood, LLC v S & L Birchwood, LLC*, 92 AD3d 711, 713 [2d Dept 2012]; *Atlantis Mgt. Group II LLC v Nabe*, 2018 NY Slip Op 32460[U], *6 [Sup Ct, NY County 2018] [granting plaintiff's motion for partial summary judgment on its cause of action for an accounting where defendant continually denied plaintiff access to books and records of entity]).

Similarly, "[i]t is well settled that a shareholder has both statutory and common-law rights to inspect the books and records of a corporation if inspection is sought in good faith and for a valid purpose" (*Matter of Dwyer v Di Nardo & Metschl*, P.C., 41 AD3d 1177, 1178 [4th Dept 2007]; *Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055-1056 [1st Dept 2014] [finding good faith and proper purpose for inspection of records when investigating alleged mismanagement and breaches of fiduciary duty by board of

directors]; *Matter of Dwyer*, 41 AD3d at 1178 [affirming shareholder right to inspection of books and records and noting that investigating share value constitutes a proper purpose for inspection under BCL § 624]).

It is beyond dispute that RWH owes Owen an accounting for the time period he controlled ROHM and RHH Mendon, and that Owen is also entitled to inspect all corporate books and records. Therefore, summary judgment is warranted on these causes of action.

2. Dissolution of ROHM and RHH Mendon

Holders of 50% of the voting shares of a corporation may petition for dissolution on the ground that the directors are so divided respecting the management of the corporation's affairs that action by the board cannot be obtained, the shareholders are so divided that the election of directors cannot be obtained, or there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders (*see* BCL § 1104 [a] [1]-[3]). RWH evidently does not oppose dissolution, and therefore this Court should order judicial dissolution, and appoint a referee to wind up both corporations. As previously noted in Owen's earlier papers, a significant part of the windup will be resolution of outstanding claims, and thus severance of the dissolution action would be inappropriate.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

A. Owen has demonstrated that disclosure is needed to test Defendants' self-serving assertions.

As a general rule, a motion for summary judgment should be denied or stayed "[w]here pertinent facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, and may be revealed through pretrial discovery" (*Blue Bird Coach Lines v 107 Delaware Ave.*, 125 AD2d 971 [4th Dept 1986] [reversing trial court's order granting summary judgment dismissing complaint where disclosure demands and a

notice of deposition remained outstanding], citing CPLR 3212 [f]; *see also Drew v J.A. Carmen Trucking Co*., 8 AD3d 1112, 1113 [4th Dept 2004] [holding court should have denied or continued motion for summary judgment to afford the opportunity for depositions]). To oppose a motion for summary judgment under CPLR 3212 (f), the non-moving party must demonstrate that the facts essential to justify opposition to the motion lie within the moving party's exclusive knowledge and control (*see Barreto v City of New York*, 194 AD3d 563, 564 [1st Dept 2021] [holding motion for summary judgment was properly denied as premature]).

Here, Defendants' argument hinges entirely on assertions and counterfactual statements that cannot be accepted at face value without affording Owen an opportunity to obtain discovery. For example, Defendants' response to the undercharging allegations is that the Original Trustees approved the operation of ROHM as a breakeven proposition. To be clear, even if they did purport to approve ROHM's fee structure, such a contention fails to meet Defendants' burden of proving entire fairness. Moreover, Defendants never conclusively established through documentary evidence that such approval actually existed; nor did Defendants offer any sworn affidavit from either of the Original Trustees. Defendants insist that we must simply take RWH's word for it. But that is not how litigation works; one litigant is not simply required to accept the word of another. Rather, Owen is entitled to seek documents about the alleged approval and to depose RWH and the Original Trustees to test the veracity of RWH's self-serving claims.

As to Owen's claims about HHC's takeover of ROHM's business, Defendants' argument is premised entirely on RWH's conclusory assertion, made upon information and belief, that HHC paid fair value for ROHM's assets. As set forth above, this is affirmatively disproven by the motion record, which shows that HHC paid *nothing* for numerous intangible assets of ROHM. Moreover,

even as to the physical assets in the Asset Purchase Agreement, Owen is entitled to seek documents and conduct discovery to test RWH's assertions.

B. Owen has raised triable issues of material fact that preclude summary judgment in Defendants' favor.

As set forth in the Foss Affirmation, Defendants' motion rests entirely on the affidavit of RWH, which makes numerous claims that are disputed and contradicted by Owen's own affidavit and other evidence in the motion record. Such triable issues of fact include: (i) whether Owen knew about or consented to ROHM's breakeven operations before 2017[4]; (ii) whether ROHM was providing extra-contractual services to RWH's nursing homes without charge; (iii) whether the Hurlbut nursing homes could feasibly have taken their business to another management company if RWH had not been able to misappropriate ROHM's business; (iv) whether RWH terminated the services contracts for a legitimate purpose or whether it was simply a scheme to steal ROHM's business; and (v) whether HHC paid fair-market value for ROHM's physical assets (*see* Foss Affirmation ¶¶ 99–101).

III. THE ARGUMENTS RAISED IN OWEN'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT ARE INCORPORATED HEREIN BY REFERENCE.

To the extent that Defendants continue to press the non-merits arguments presented in their motion to dismiss—including their arguments concerning standing, statute of limitations, and joinder of necessary parties—Plaintiff incorporates by reference the Affirmation of Kelly S. Foss dated June 15, 2023, with Exhibit 1 thereto (Doc. 111, 112) and the arguments set forth in Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended

[4] Under New York law, whether Owen consented in the past to such an arrangement is irrelevant as a matter of law, given that RWH would still have the burden of proving the entire fairness of all transactions that took place after Owen left the company's management (*see Lippman*, 15 Misc 3d at 715). Yet, RWH makes these accusations repeatedly, and they are central to his argument that ROHM's post-2017 operations were proper.

Complaint, dated June 15, 2023 (Doc. 113). For the reasons set forth therein, Defendants' non-merits arguments fail because Plaintiff has standing, her claims are timely, and all necessary parties have been joined.

CONCLUSION

The Court should enter an Order: (i) denying Defendants' motion for summary judgment in its entirety; (ii) granting Plaintiff's cross-motion for partial summary judgment for all of the relief sought in the accompanying notice of cross-motion; and (iii) granting such other and further relief as the Court deems just, proper, and equitable.

Dated: Pittsford, New York
July 20, 2023

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CERTIFICATE

The filing user hereby certifies that the foregoing memorandum of law contains 9,887 words, excluding the cover page, tables, signature block, and this certification. In making this certification, the filing user relies upon the word-count feature of Microsoft Word, which was used to create this document. By email dated July 20, 2023, the Court (Hon. Christopher S. Ciaccio, A.J.S.C.) granted Plaintiff's application for an enlargement of the word-count limit to 10,000 words.

Dated: July 20, 2023