To Be Argued By:
ELAINE PLATT
(Time Requested: 15 Minutes)

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Appellate Case Nos.: 2023-01485 2023-03634 2023-04151

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

Plaintiff-Respondents,

-against-

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

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This is an Appeal of three Decisions issued in the same action.

The first Decision under Appeal is the Decision issued after trial.

That Decision bifurcated the attorney fee application. The other two Decisions under Appeal addressed the attorney fee award, and the separate Judgment for the attorney fee.

BACKGROUND FACTS

In 2011, Plaintiff Foley and the three individual Defendants, agreed to form a business venture, Dubcork, Inc., to operate a sports bar under the name of Smithfield Tavern.

The parties each invested $50,000 to fund the business, making a total initial capitalization of $200,000. This amount proved to be hugely inadequate to fund the cost of renovating the space and the other expenses needed to launch the opening of Smithfield Tavern. Dubcork needed to raise $800,000 in additional funding, which it did mostly in the form of high interest loans. Even though the bar was very popular, it was never able to make ends meet.

Dubcork fell behind in its rent for several months, and Dubcork's landlord initiated a lawsuit to evict it. The landlord was particularly aggressive, because it wanted to sell the building to a developer who intended to demolish it, and to do that, it needed to evict Dubcork.

The litigation was very costly, and brought Dubcork to the brink of bankruptcy.

The landlord and Dubcork eventually entered into a Stipulation of Settlement which provided that Dubcork would cease doing business by January 1, 2014, and would vacate the premises altogether by January 15, 2014. The landlord, in consideration, agreed to pay Dubcork $1.9 million.

The Defendants were relieved to have achieved this Settlement. Defendants had come to believe that they had bitten off more than they could chew in taking on such a huge project of the scale of Smithfield Tavern, and that without this Settlement, they would have likely gone bankrupt and lost their entire cash investment and all return for their hard efforts.

Without premises to operate in, or a license to sell liquor, Dubcork ceased to exist as a viable entity. Defendants proceeded to use the Settlement money to pay off all of Dubcork's debts, to return all investments, and then to distribute the balance, pro rata, to each of the investors. Each of the Defendants, and the Plaintiffs, received the precise same amount in the distribution, $197,600. Dubcork's accountant filed a final tax return, and issued K-1's.

After the terms of the Settlement Agreement had been agreed upon, and it was known with certainty that Smithfield Tavern would soon be closing, the three individual Defendants started to look for a location for a new venture. Each of the

Defendants then took $150,000 of the $197,000 that they'd received, and invested it into Moxy. The Plaintiffs, on the other hand, kept for themselves all of the $197,600 that they had received.

In August of 2014, Plaintiffs initiated this lawsuit, alleging Defendants' financial fraud and misappropriation of Dubcork's assets. The causes of action were both personal (shareholder oppression), and derivative (theft of corporate opportunity).

The case went to trial in January of 2022, and the Decision after trial was issued in February 2023. This Decision directed that a separate fee application be made, and the Decision on the fee application was issued in June of 2023.

THE DECISIONS UNDER APPEAL

The Decision After Trial

The Court held that the new business that the Defendants started five months after Smithfield Taven had closed, was an opportunity that belonged to Dubcork, and that all of its profits for ten years should be awarded to Dubcork.

Defendants herein Appeal for the following reasons:

> - Defendants learned of the opportunity using their own independent resources, developed through their 25 years of industry experience. The opportunity was not presented to them in their capacity as an agent of Dubcork;
> - It was always agreed between the parties that the Defendants could operate other sports bars and pursue other investments;
> - No cash from Dubcork was used to fund Defendants' new bar;

- Plaintiffs knew of Defendants' intention to start a new bar for eight months before it opened, and said nothing; and
- The Court erred in its calculation of Dubcork's cash revenue, and then held the Defendants to be personally liable for all cash revenues that they couldn't account for. The Court's calculation was larger than reality, because it included tips and taxes in its calculation. This was improper.

The Decision on the fee award.

- The fee award was issued pursuant to BCL 626(e), which only covers services in derivative claims. But the Court awarded fees for services on the personal claims as well, in violation of the American Rule.
- The fee award greatly exceeded the amount of the derivative shareholder's actual legal expense. The standard under BCL 626(e) is "reimburse." It's a perversion of BCL 626(e) to give the Plaintiffs a huge profit on its legal fee award.

ARGUMENT

POINT I

THE PORTION OF THE ATTORNEY FEE AWARD ATTRIBUTAL TO SERVICES PERFORMED IN FURTHERANCE OF PLAINTIFFS' INVIDIUAL CLAIMS, SHOULD NOT BE ALLOWED, AND THE ATTORNEY FEE AWARD SHOULD BE RECALCULATED

New York follows the "American Rule". The American Rule provides that every party, winners and losers alike, each pay their own legal fees, except when there is a contract or an applicable statute that provides otherwise. [See *Sage Svs v Liss*, 39 NY 3d 27, NY Ct of Appeals, (2022); and *Continental Indus Group v Ustuntas*, 211 AD3d 601, First Dept, (2022)] The fee award in this case was made pursuant BCL 626(e). See page 11 of the February 15, 2023 Decision after trial, (Dkt. 1096), which says "Plaintiffs shall submit a fee application for reimbursement of their reasonable fees and expenses from Dubcork (BCL 626(e)]" (Emphasis supplied). On page 2 of the Decision, Justice Schechter states: "Plaintiffs are entitled to a fee award for creating a corporate benefit."

BCL 626(e) makes it clear that fee shifting is only permitted for services rendered **to the corporation.** Indeed, Justice Schechter made clear, at page 5 of the Decision, that "the fee award will be owed by Dubcork". Clearly, Dubcork would not owe a fee except for services performed for its benefit.

This case involved both individual claims and corporate (derivative) claims.

The services performed in furtherance of the individual claims were not performed for Dubcork's benefit, and are not awarded under BCL 626(e).

The services performed in furtherance of the individual claims, because they are not covered by any contractual or statutory exception, are therefore governed by the American Rule. Each party, winner or loser alike should pay its own legal fees.

A. Plaintiffs' Counsel Failed to Meet its Burden to Establish the Number of Hours Expended in Furtherance of the Derivative Claims

Plaintiffs' counsel's timesheet (Dkt. 1106) lists all of his hours devoted to this litigation, and in no way distinguishes which services were for the derivative claims, and which were for the individual claims. These intermingled billing records (for the recoverable derivative claims and the non-recoverable individual claims) makes it impossible for the Court to determine how much is claimed for just the services which were in furtherance of the derivative claims.

In *Mansfield Realty v Mansfield LLC*, 2023 NY Slip Op 31419, S. Ct. NY County 2023, Plaintiff's counsel submitted timesheets that combined entries for 2 different cases (both done for the same client), and the entries failed to differentiate between the two actions. The Court held that the attorney bears the burden of proof in establishing the number of hours expended in the action before him. The billing records before him intermingled billing records for two different matters. Consequently, the Court could not determine whether the fees sought in the case before him were reasonable, and therefore the recovery of any fee must be denied.

In the instant case, there are over 1,000 documents on the Supreme Court docket; there are additionally three appellate dockets; and eleven depositions. In all, there were more than 20,000 pages in the case record. A large number of the documents (and the depositions) contained mixed content, addressing both individual and derivative claims.

It's not reasonable to expect that the Defendants should have to go through every page in the record, to assess how much time was spent on derivative claims. This was the obligation of Plaintiff's counsel, and he did not meet his burden.

B. The Amount of Time Billed for Services in Furtherance of the Individual Claims, is Substantial

The trial Court's Decision of June 30, 2023, (Dkt. 1122) does not deny the concept that only services on derivative claims should be awarded. But the Court nonetheless denied a fee reduction from the amount sought, declaring that the amount of legal time spent in service to the personal claims was too "trivial" to warrant any adjustment.

The Decision reads:

> The Court rejects defendants' argument that a substantial reduction due to work on the direct claims is warranted… the work performed was overwhelmingly focused on the derivative claims.

This Decision flies in the face of indisputable evidence, that is, the actual documents on the case docket. These documents, written by Plaintiffs' counsel, and billed for by Plaintiffs' counsel, objectively demonstrate that a substantial amount of the time that was billed for, was spent on services in support of Plaintiffs' personal claims.

Notably, the Court itself, in its February 15, 2023 Decision after trial, (Dkt. 1096), stated:

> The immaterial facts <u>to which the parties devoted much of their attention</u> (such as their relative contributions to the bar and interpersonal disputes) have no bearing on the relevant legal issues. (Emphasis supplied)

It's important to note that the June 30th Decision seems to limit the definition of personal claims to the single claim for repayment of Foley's loan to Dubcork.

The Decision reads:

> The direct claim for repayment of the loan was, both logically and based on the court's experience in discovery, responsible for a relatively trivial amount of work. (Dkt. 1122)

But the individual claims exceed mightily the singular claim for repayment of Foley's loan. The Plaintiffs individually claimed minority suppression in the form of being prevented from receiving work shifts; that they did not receive the pay that they did earn, because Defendants gave them empty pay envelopes; that the jazz nights that Foley wanted to have held were shut down by Defendants in order to create a "hostile environment," intended to force Foley out of Dubcork; that Plaintiffs weren't reported to, and weren't included in any meetings or decisions; that the leasehold was sold without their knowledge and consent; that Defendants breached their duty to Plaintiffs by accepting the low sales price that they did; and that Plaintiff's did not receive their pro rata share of the final distribution of Dubcork's cash.

C. A Sampling of Documents

Defendants presented the Court with an examination of seven documents on the case docket, each filed at determinative stages of the litigation. The seven sampled documents were: the Third Amended complaint; Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment; the trial Affidavit of Foley's testimony; the trial Affidavit of O'Mahoney's testimony; the transcripts of the first two days of trial; and Plaintiffs' post-trial brief.

Applying the percentages of the pages that addressed the personal claims, to the total number of pages in these documents, to the amount that Plaintiffs' counsel billed for these documents, it can be seen that Plaintiff's counsel billed for services addressed to the personal claims, nearly **$200,000** ($197,781), from **just these seven documents** alone, (out of more than 1,000 documents on the Court docket).

These are the sampled documents:

> - Third Amended Complaint, at Dkt. 227, with 19 pages total, 12 of which, in whole or in part, addressed personal claims (63% addressed personal claims). $19,000 was billed for preparing this document; that's $11,970 billed for personal claims.
>
> - Summary Judgment Memorandum, at Dkt 292, with 24 pages total, 15 of which, in whole or in part, addressed personal claims (62% addressed personal claims). $170,295 was billed for preparing this document; that's $105,582 billed for personal claims.
>
> - Foley's Trial Affidavit, at Dkt. 943, with 107 pages total, 54 of which, in whole or in part, addressed personal claims (50% addressed personal claims). $34,000 was billed for preparing this document; that's $17,000 billed for personal claims.
>
> - O'Mahoney's Trial Affidavit, at Dkt. 942, with 17 pages total, all 17 of which, in whole or in part, addressed personal claims (100% addressed personal claims). $8,900 was billed for preparing this document; that's $8,900 billed for personal claims.

- First day of trial, at Dkt. 1084, with a total of 167 pages, 106 of which, in whole or in part, addressed personal claims (63% addressed personal claims). $11,350 was billed for time spent attending the trial, $7,150 of which is for time addressed to personal claims.

- Second day of trial, at Dkt. 1085, with a total of 173 pages, 128 of which, in whole or in part, addressed personal claims (73% addressed personal claims). $6,900 was billed for time spent attending the trial, $5,037 of which is for time addressed to personal claims.

- Post-trial brief, at Dkt. 1094, with a total of 39 pages, 12 of which, in whole or in part, addressed personal claims (30% addressed personal claims). $140,475 was billed for preparing this document; $42,142 of which is for addressing personal claims.

The average percentage of pages addressing Plaintiffs' personal claims appearing in these seven documents is **63%.**

To characterize the inclusion of time spent furthering the individual claims as "trivial," is clearly wrong, and the fee award should be recalculated.

The issue is not which claims were the most important, nor which claims resulted in the largest judgment.

The issue is "what is Plaintiffs' counsel billing for? On what did he devote his time?"

And to the extent that his timesheets reflect services rendered to promote Plaintiffs' personal claims, he should not be awarded a judgment pursuant to BCL 626(e).

POINT II

THE FEE AWARD SHOULD BE LIMITED TO THE AMOUNT THAT PLAINTIFFS HAVE BEEN OBLIGATED TO EXPEND

"Reasonable attorney's fees" is the cap, not the measure, of a fee award under BCL 626(e).

"Reimbursement" is the standard, so "actually incurred" is the measure.

"An award of attorneys' fees in a shareholders' derivative suit is to **reimburse** the plaintiff for expenses **incurred** on the corporation's behalf." (Emphasis supplied). *Board of Mgrs of the 28 Cliff St. Condominium v. Maguire*, 191 AD3d 25, First Dept, 2020.

See also *Glen v Hoteltron Systems*, 74 NY2d 386, NY Ct. of Appeals, 1989: "Business Corporation Law 626(e) provides that a successful plaintiff in a shareholders' derivative action may **recoup** legal expenses and attorneys' fees from the proceeds of a judgment" (emphasis supplied); and in *Hall v Middleton*, 2022 NYLJ Lexis 2698, S. Ct. NY County, 2023, the Court held: "Since plaintiff has created a corporate benefit by prevailing on his derivative claim, he is entitled to **reimbursement** from the Company of his **reasonable** costs and legal expenses" (Emphasis supplied).

In the case at bar, Plaintiffs' fee obligation to their attorney, Mr. Goldman, was determined by their written engagement agreement, which limited Plaintiffs' fee obligation to 30% of whatever Plaintiffs received, plus necessary disbursements.

Plaintiffs' share of the judgment is approximately one million dollars, so his fee obligation is approximately $300,000.00, plus necessary disbursements.

If in fact Mr. Goldman rendered services of value in excess of $300,000.00, that was a risk that Mr. Goldman incurred when he made this form of contractual fee arrangement (as opposed to a straight hourly fee arrangement); and indeed, Mr. Goldman chose this form of fee arrangement intentionally, as an inducement to the Plaintiffs to retain him, so that he might have the opportunity to earn money on their cause of action.

BCL 626(e) was not designed to enable an attorney to receive more than he contracted for; nor was it intended to give the plaintiffs a profit on their expenditure of legal fees.

The attorney fee award at issue, gives Plaintiffs first draw on Dubcork's judgment in an amount more than a million dollars in excess of their actual fee obligation. This is a perversion of BCL 626(e).

POINT III

THE "DISBURSEMENTS" ALLOWED IN THE FEE AWARD SHOULD BE SIGNIFICANTLY REDUCED

Mr. Goldman claimed $185,743 in disbursements, which the trial Court allowed in full in the fee award.

The $185,743 was comprised of $144,375 for an expert witness fee, and $41,300 for printing Appellate briefs, and for deposition transcripts.

The Alan Blass Invoice

Alan Blass was the expert witness engaged by Mr. Goldman, to aid the Plaintiffs in assessing damages.

Mr. Blass submitted an invoice, (Dkt. 1108) which was prepared in April of 2023, more than a year after the trial. This invoice stated that he had worked for 481.25 hours between 12/2/16 and 1/12/22, totaling an amount due of $144,375.

Yet at the trial, held on 1/10/22, he testified under oath, that his amount due was about $50,000.

See Dkt. 1086, at pages 535-536:

> Q: How many hours have you put in so far to this case?
> A: I haven't calculated all the hours, but I am due something more than $50,000 at this point.
> Q: How much… have you been paid so far?
> A: $10,000
> Q: So $40,000 is owed to you?

This testimony was made on January 10, 2022.

The only time entries on the April 2023 invoice, that were after the trial date, (between 1/10/22 and 1/12/22), totaled just $3,825.

It should be highly questionable how "something more than $50,000" became $144,375, when he prepared this invoice. This invoice was prepared only after receiving the favorable court decision in this case, and notably, Blass had never prepared any prior invoices during the more than five year span of his engagement.

Further, the quality of several of his time entries warrant objection, and should be either reduced, or disallowed altogether. Many tasks listed an excessive number of hours to perform, or were described in an unacceptably vague manner.

Notwithstanding the methodology of the analysis, the total should not much exceed $50,000, the amount Blass testified to, under oath, at trial.

And the final amount should be proportionally reduced, to the extent that it addresses Plaintiff's personal claims, as opposed to the derivative claims. This would include all time spent analyzing the payroll (Blass claimed 12.50 hours for "payroll analysis"), and the final distribution (Blass's expert report addressed O'Mahoney's claim that she did not get her distributive share of the $1.9 million payment for the lease.)

Even Mr. Blass's testimony at trial, which was 175 pages, [See Dkt. 1086], contained 47 pages devoted exclusively to plaintiff's personal claims (28%).

Plaintiffs' Other Disbursements

Plaintiff has not provided any receipts for the $41,300 in expenses it claims.

A lawyer must submit bills or receipts substantiating an expense in order to recover them within a Court awarded attorney fee [*Mendez v Radec Corp*, 2012 US Dist Lexis 15706 W.D.N.Y.]

Plaintiff lists an expense on 6/1/18 for $4,753.50, for printing an appellate brief, and another two bills on 9/26/18, each also for printing an appellate brief, of $6,690.97 and $836.59, $7,527.46 total.

But there was only one appeal in this case in which Plaintiff filed a brief. (Case No. 12019-05104). Plaintiff's brief in that appeal was filed on 5/27/20, and his Reply brief was filed on 8/21/20. This was nearly two years after the 6/1/18 and 8/26/18 expense dates, and at a time when the printing of briefs was suspended because of the pandemic.

Without a receipt presented, there's nothing to support Plaintiff's assertion that the $12,000 in printing bills that he got in 2018, were for this case.

Plaintiff lists as costs for Deposition transcripts from Renig Reporting: 10/26/23 $880; 11/23/21 $572; 12/16/21 $478; 1/18/233 $646.75, and not only does he fail to provide invoices, he doesn't even identify which witnesses were deposed. The parties in this case were all deposed in 2018. In 2021 the Court ordered that Defendants' Witnesses must be made available for Deposition. Mr. Goldman was obligated to pay for their Depositions in the first instance, but Defendants were obligated to reimburse him, and they did! [Please notice the time entry on Mr. Goldman's timesheets for 11/23/21 where he acknowledges receipt of payment from Defendants for the depositions.] Without receipts (or at least the names of the individual who were deposed), we have no idea if the costs of these four depositions are a part of our case, or whether Mr. Goldman has already been reimbursed for their costs.

Further, the reporter costs for deposing the Defendants apply to both the individual claims and the derivative claims. For example, at Whiston's Deposition he was asked many questions about Foley's work assignments (part of his individual claim). Plaintiff has failed to demonstrate what portion of these expenses is attributable to the derivative claims. So these costs should be disallowed altogether, or at a minimum, recalculated to reflect the portion attributable to the derivative claims.

POINT IV

THE DEFENDANTS SHOULD NOT BE LIABLE FOR THE REPAYMENT OF THE FOLEY LOAN

It is undisputed that Foley made a loan to Dubcork. The parties did dispute whether or not the loan had ever been repaid. What was never disputed is the fact that the loan was made entirely to Dubcork, and not to any of the individual Defendants. Therefore Dubcork, not any of the individual Defendants, should be liable to repay the loan.

The Court held the individual Defendants to be personally liable, on a veil-piercing theory, notwithstanding that Dubcork is perfectly capable of paying its own debt.

The Court described Dubcork as “an empty shell unable to repay the loan” (See page 11 of the February 15, 2023, Decision, Dkt. 1096); But this description is belied by the trial Court’s own decision which awarded Dubcork several million dollars. Just as the Court has provided that Plaintiff would have Judgment against Dubcork (and <u>not</u> against the individual Defendants) for its attorneys’ fees, so should the Court have provided that Plaintiff would have Judgment against Dubcork (and not the individual Defendants) for the amount of its loan.

POINT V

THE OBLIGATION TO REPAY FOLEY’S LOAN SHOULD BE REDUCED BY $17,279, TO REFLECT PLAINTIFFS’ EXCESS DISTRIBUTION

The Court held that the $86,397 loan was never paid, and that it should have been paid when Defendants made Dubcork’s cash distribution. If Defendants had made this payment at that time, there would have been $86,399 less cash to distribute. Therefore, Plaintiffs received $17,279 more in its distributive share than it would have gotten, had the loan been paid at that time, and reduced the pool from which the distributions were made.

Given that the Court has ordered that this payment be made now, the Defendants (or Dubcork) should at least be given a credit for Plaintiffs’ oversized distribution ($17,279).

POINT VI

DEFENDANTS' LIABILITY TO DUBCORK SHOULD BE ADJUSTED TO REFLECT THE $197,000 DISTRIBUTION THAT O'MAHONEY HAS ALREADY RECEIVED

It is undisputed that Defendants caused a distribution of Dubcork's cash to be made, with each 20% shareholder (the Plaintiff and each of the individual Defendants) receiving $197,000.

It is also undisputed that Plaintiffs retained their cash payment for their personal use, while Defendants reinvested their payments to fund the opening of the new bar (Moxy, d/b/a, Smithfield Hall). The Court has determined that the new bar was an opportunity that belonged to Dubcork, and has made an award to Dubcork of all past and projected future profits of this new bar. After Dubcork receives this award, it must pay Plaintiffs' legal fee award, and the remainder will be distributed, pro rata, to Dubcork's shareholders.

It is not equitable that Plaintiffs should receive 20% of the profits of the new bar, while retaining the $197,000 distribution that it previously received from Dubcork, while Defendants had to give up their $197,000 distributions from Dubcork, in order to create the new bar (which has generated the profits that Dubcork is now to receive.)

Stated a different way, the Court has ruled that Moxy is a successor corporation to Dubcork [See Decision, Dkt. 1096]. So in effect, Defendants returned their cash distributions to Dubcork, while the Plaintiffs retained theirs. So when Dubcork makes a further cash distribution, it should be taken into account that Plaintiffs have already received $197,000 more than the other shareholders, and this uneven distribution should be leveled.

At a minimum, Defendants should get back the cash distribution that they received from Dubcork (at the time that Plaintiffs received their $197,000), so that all the parties will have each received an equal distribution from Dubcork.

Therefore, the cash award to Dubcork should be reduced by an amount equal to 80% of the initial cash distribution ($788,000), so that each shareholder will have received the same pro rata distribution from Dubcork as Plaintiffs have already received.

POINT VII

DEFENDANTS' ACQUISITION OF CHELSEA MANOR WAS NOT A THEFT OF DUBCORK'S OPPORTUNITY

A. Defendants Learned About Chelsea Manor Using Their Personal, Independent Resources, and Did Not Learn About it in Their Capacity as Managers of Dubcork

After the stipulation settling the lawsuit with their landlord was signed, Defendants knew that Smithfield Tavern would soon be closing. At this point the Defendants set out to look for a new enterprise to start. Defendants used only their own resources: their personal resumes and broker contacts (developed during their

25 years in the bar industry) to identify the opportunity to purchase Chelsea Manor. The opportunity to purchase Chelsea Manor was not presented to them in their capacity as a director or officer of Dubcork.

> See *Venturetek, LP v Rand Publ Co*, 2006 NY Misc Lexis, 4024, S. Ct. NY County, 2006:
>
> > "Each of the four companies was directed to the owners through their involvement with the information publishing business. They were not directed to them as owners/directors of the company… A director is not liable when he was presented the opportunity in a capacity other than as a director or officer of the plaintiff corporation."

Theft of corporate opportunity occurs when an employee of a company pursues an opportunity for himself, when the corporation he works for, had a "tangible expectancy" of that opportunity.

Dubcork did not have a "tangible expectancy" of purchasing Chelsea Manor. Indeed, Dubcork had no contact whatsoever with Chelsea Manor.

Bill Zorzy testified that Gavin Whiston contacted Zorzy, whom he had known from prior dealings in the industry, and had asked Zorzy to look for sites for himself. Zorzy further testified that he did not regard Whiston to be acting in a representative capacity for Dubcork, but rather was acting in his individual capacity, for his own self (Dkt. 962). Thereafter, Zorzy introduced Whiston to Chelsea Manor. Dubcork never had any involvement of any kind with Chelsea Manor, and hence could not have had a tangible expectancy of acquiring that property.

B. The Defendants Did Not Have a Duty to Present the Chelsea Manor Opportunity to Dubcork

Moreover, the individual Defendants did not have a duty to present the Chelsea Manor opportunity to Dubcork.

The initial Agreement between the parties, and its continuance thereafter, provided that the individual Defendants could operate competing sports bars. This agreement for "non-exclusivity" permits the Defendants to acquire other businesses on their own, with no obligation to present these opportunities to Dubcork. See *Alexander & Alexander v Fritzen*, 147 AD2d 241, First Dept, 1989, holding that there is no diversion of corporate opportunity where the parties understood that the employee would simultaneously pursue other interests, even ones related to, or in direct competition with the business of the corporation.

> "There is no corporate opportunity claim when the corporation previously permitted defendant to pursue personal opportunities falling within the corporation's line of business."

The First Department said that a corporate opportunity would not exist where:

> "At the beginning of the employment… the parties understand or is it reasonable to conclude that the parties understood, that the employee would simultaneously pursue other interests." (Emphasis supplied)

See also *Grammas v Charla*, 53 AD2d 660, 384 N.Y.S. 2d 871 (2d Dept, 1976) (holding that no corporate opportunity was diverted as the employment agreement between the parties "did not require the latter to give [the plaintiff] his full and undivided attention. It was never contemplated that [the defendant] would refrain from outside activities…”).

See also *Lee v Manchester Real Estate & Constr, LLC*, 2014 NY Slip Op 20675(U), S. Ct. NY County, 2014, holding that there was no theft of corporate opportunity claim, because the corporation’s operating agreement permitted the Plaintiff to compete within the real estate business during her period of employment.

At the time of the formation of Dubcork, all of the parties knew that Tom McCarthy and Gavin Whiston owned and operated another sports bar named Lunasa, and that they intended to continue their operation of Lunasa during their stewardship of Dubcork.

See deposition of O’Mahoney (Dkt. 301), at page 20:

> Q: Was McCarthy also partners with Whiston in a different bar?
> A: Yes
> Q: What bar was that?
> A: Lunasa

And at page 24:

> Q: Your understanding was that Gavin was not going to have a job [at Dubcork]?
> A: …Mostly he was going to concentrate on his own bar, Lunasa.

Further, Plaintiffs expected that the Defendants might become involved in other bars even *after* forming Dubcork.

See testimony of O'Mahoney at pages 458-459:

> "Q: Did you know that some of the defendants were involved in the ownership of Lunasa?
> A: Lunasa, yes.
> Q: So did you ever think that the bar that Dubcork opened would be the last bar they would ever be involved in?
> A: No."

Certainly "it is reasonable to conclude that the parties understood that (the Defendants) would simultaneously pursue other interests."

Gavin Whiston, David Massey, Erik Manning, and Bill Zorzy, all testified to the common practice of people in the bar industry to be involved in the ownership of multiple bars, each with different partners.

For example, Erik Manning testified to currently having ownership interests in eight bars; that he was President of one of them; and that the partners varied from bar to bar. (Dkt. 961)

Similarly, Dave Massey testified that he has current ownership interests in eight different bars, varying from 20% to 50%, and that he is the manager of two of them. (Dkt. 953)

Further, this particular opportunity (Chelsea Manor) was not essential to the viability of Dubcork. [See *2 Girl ACCYS v Larrea*, 2020 WL5439527, S. Ct. NY County, 2020) holding that a claim for diversion of corporate opportunity must show that the loss of the opportunity threatened the viability of the company.] In the instant case, Smithfield Tavern was forced to cease operations as a condition of the settlement of the lawsuit with Dubcork's landlord. The Tavern had no lease, no place to operate, and had lost its liquor license. Literally, Dubcork would have to start all over again: (find a new location, do a build-out, apply for permits and licenses, get community Board approvals, develop clientele, etc.), before it could resume operations again. Eighty percent of the shareholders of Dubcork opted for an immediate pro rata distribution of all of Dubcork's cash, and a dissolution of Dubcork[1], rather than to go through this process.

The Defendants' purchase of Chelsea Manor had no impact on the viability of Dubcork.

POINT VIII

DUBCORK'S ASSETS WERE NOT USED TO OPEN THE NEW BAR

The February 13, 2023 Decision says that "the bar reopened a few blocks away… it was essentially the same bar" and then cites as evidence to support this tenent, the emails at Dkts. 727, 765, and 806, which did speak of recreating Smithfield Tavern.

But the letters at Dkts. 727, 765, and 806, were all written to Dubcork's landlord, as part of their negotiations for the landlord to buy out Dubcork's lease.

[1] Dubcork ceased all operations and filed a final tax return. Unbeknownst to the Dubcork shareholders, their accountant failed to file a dissolution form with the secretary of state, so Dubcork in fact was never dissolved. But the shareholders had wanted to dissolve it, and thought that they had.

The essence of these negotiations was for the landlord to provide Dubcork with the resources to "recreate" Smithfield Tavern.

But these negotiations failed; litigation ensued; and the litigation ended with a cash settlement that required nothing more of the landlord than to pay $1.9 million, regardless of what the shareholders of Dubcork could do (or not do) with that amount of money.

As previously described, all of the cash of Dubcork (after paying all outstanding debts), was distributed, pro rata, to Dubcork's shareholders. Defendants, with their share of the distribution in hand, set out to open a new bar. They did not set out to recreate Smithfield Tavern. (Indeed, they intentionally looked for a bar that was much smaller. See trial testimony of Bill Zorzy, Dkt. 962).

The Decision is correct in that they did set out to create "an Irish bar catering to soccer fans". (Decision, Dkt. 1096) That is what they do. In their more than 25 years in the bar industry, they have created five Irish soccer bars: Nevada Smiths, Lunasa, Smithfield Tavern, Smithfield Hall, and Long Acre Tavern, each of which had a distinct character.

To lump all Irish soccer bars together as "essentially the same bar" (Decision, Dkt. 1096) displays a fundamental lack of understanding of the soccer bar industry, and is just plain wrong.

The Decision goes on to say that the Defendants, "using Dubcork's assets, opened the new bar," holding this to be a misappropriation of corporate opportunity.

It is not fair or accurate to hold that the new bar's launching was dependent on the usurpation of Dubcork's assets. First and foremost, no cash from Dubcork was used to create the new bar. What Defendants did take from Dubcork, was some used furniture (that would have otherwise been abandoned), and the "soft assets" (website, logo, etc.). If these assets had any value to the defunct Dubcork, then Defendants should pay that value. But they should not have to pay all of the profits for 10 years of a new venture that was funded entirely by the Defendants (60%) and other investors (40%), and whose success was determined entirely by the labors and talent of the Defendants.

The Decision goes on to say, "the Settlement proceeds from the landlord were sufficient to open the new bar, so Dubcork could have availed itself of the opportunity to own the new bar." In fact, that is not accurate. Even taking into account the $197,500 that was distributed to the Plaintiffs, Defendants still had to raise additional funds to create Smithfield Hall.

Defendants could not have known at the time that they received the Settlement proceeds, just how much money they would need to open a new bar. First, they'd have to find a site that they thought that they could make money in. Only then could they determine how much money they'd need to get the bar operational. This would depend on the size of the site, and the condition.

Even if the Settlement proceeds were sufficient to open a new bar, the Defendants were not obligated to use these funds to open a new bar. The Defendants (60% shareholders), and the other investors (20% shareholders) all wanted their cash to be distributed to them immediately. The other investors did not want their funds to be held by Dubcork for an indeterminate amount of time, pending the launching of a new venture. Indeed, it took six months from the time that Smithfield Tavern closed until Smithfield Hall opened. If Dubcork had held onto the investors' funds all this time, the investors would not have been able to earn any return on their funds for more than half a year. Also, these investors had signed on to an offering of Smithfield Tavern, a venture of a described size and prospect for revenue streams. (For example, Smithfield Tavern had party spaces, whereas Smithfield Hall does not.) The investors wanted to wait for a new venture to be presented to them, before deciding whether or not to invest in it. They wanted to make their own evaluation as to risk and potential reward.

The Decision says that when Defendants opened their new bar, they "effectively [cut] out Plaintiffs." (Decision, Dkt 1096) What the Decision neglects to mention, is that the plaintiffs received **$197,500** before they were "cut out".[2]

A. No Funds Were Diverted from Dubcork to Moxy

1. ***All of Dubcork's money was used to pay Dubcork's business expenses, or distributed to Dubcork's shareholders.***

Trial Exhibits D46-D89, R 5170-5416, are Dubcork's bank statements from June of 2013, through to August 2014, (the last month that the account was maintained).

Dkt. 300 is the report prepared by John Johanson, CPA, ABV, CFP, MBA, the independent forensic accountant retained by the Defendants ("Johanson Report").

Reference is made to Exhibit G of this report, which summarizes each and every deposit made to Dubcork's account, and every check written on Dubcork's account, during the period December 1, 2013, through August 31, 2014. This chart shows that every check written on Dubcork's account was either for a business expense of Dubcork, or a payment to the shareholders of Dubcork. And the contents of this chart can be verified by reference to the actual bank statements.

[2] The Plaintiffs invested $50,000; then acted as passive investors; and just two and a half years later, got back $250,000! ($50,000 for a "manager salary" with no work obligation, and $197,000 cash distribution.) They got a 500% return on their money… not bad for being "cut out".

2. ***Independent identifiable funds were used to form Moxy, that were sufficient to cover the costs of launching Moxy; no funds from Dubcork were used or needed.***

Reference is made again to Dkt. 300, the Johanson Report. Exhibit 1 to this report are copies of pages from the Moxy ledger, showing the initial set up costs for Moxy, and showing the money invested and loaned to Moxy. Exhibit H to this report is a chart prepared by Mr. Johanson, which, by relying on the data in Exhibit 1, reflects all the capital contributions and loans made at the inception of Moxy, and all the expenditures made to launch Moxy. Exhibit H clearly shows that Moxy had more than enough money from identified contributions and loans, to cover all the expenses needed to launch Moxy. No funds from Dubcork were used or needed.

3. ***Dubcork's funds were not used "to pay the expenses of obtaining the new location"***

After the sale of Dubcork's leasehold, the business of Dubcork came to an end.

All of Dubcork's funds, after paying business expenses, outstanding loans and return of investments, was distributed, pro rata, to the shareholders.

Plaintiffs alleged that "Dubcork's funds were used to pay the expenses of obtaining the new location." This statement is false.

It is true that Defendants took a short-term advance of $70,200, in order to pay the security deposit on the 25th Street lease. But Defendants repaid this loan in full six weeks later. The loan in no way impacted or diminished the amount of Plaintiffs' distributive share of Dubcork funds.

Foley acknowledged that he personally did not put any cash into MOXY, but claims that "his corporation" (Dubcork) did, and because of this cash from Dubcork, he has a claim for the future and past profits of MOXY.

But when examining him further about the details of this cash from Dubcork (Dkt. 1084, transcript 78, 82, 83, 86-89), he describes only the advances that the Defendants took from their distributive shares, that were all repaid in full six weeks later, (by reductions in the amounts of Defendants' distributive shares). In fact, Defendants provided absolutely no evidence that any cash from Dubcork was used to fund MOXY.

B. Furniture and Equipment

Gavin Whiston testified that the Stipulation of Settlement (Dkt. 889), required that they deliver the premises "broom clean," which was defined as devoid of any personal property. The Stipulation contained a draconian penalty clause: that they would forfeit their $1.9 million buy-out, if they failed to deliver the premises "broom-clean."

They had just two weeks to empty the space. So they packed up everything as fast as they could, and moved everything to a storage facility.

When the lease on the storage facility expired, they had to decide whether they wanted to take all, some, or none of what was stored there. Anything that they didn't take would be abandoned.

Contrary to the implication of the decision, that they took "everything", they took very little. Their new premises were one third the size of Smithfield Tavern, and came fully furnished and equipped. They had neither the need, nor the space, to take "everything".

They did take a few items. Kieron Slattery prepared a list of every item that they did take, along with its original purchase price. (Dkt. 982)

4 Ikea tables		$600.00
5 CBS lights		$1,875.00
Old "Smithfield" sign		$2,000.00
"215" address sign		$300.00
5 x 55 LED	@ $1,800 each new	$9,000.00
10 x 46	@ $1,200 each new	$12,000.00
4 x 32	@ $400 each new	$1,600.00
2 x 46 Plasma	@ $400 each new	$800.00
4 x 42	@ $1,000 each new	$4,000.00
4 x Big Tables	@ $1,200 each new	$4,800.00
5 x Small Tables	@ $1,000 each new	$5,000.00
Chairs		$7,500.00 new
Speakers		$10,000.00 new
Amps		$10,000.00 new

Slattery estimates that the 2014 market value of the items that they took, would average at 20% of the original cost.

It's true that Defendants didn't pay for what they took. They thought it was abandoned property, and they knew that had they not taken these items, that those items most certainly would have been destroyed.

And Plaintiffs had knowingly abandoned all interest in the furniture and inventory.

See O'Mahony deposition, (Dkt. 301), at page 107:

> Q: Did you ever ask your partners whether you could come by and take any inventory or anything else from the bar?
> A: No.

See Foley's deposition (Dkt. 286), at pages 174-177:

> Q: Did you know what was going to be the last day of business for Dubcork?
> A: I found out about two weeks before…
> Q: Did you show up on the last day?
> A: No.
> Q: Did you help in moving things out of the premises?
> A: No.
> Q: Did you ask to have anything that was in the premises?
> A: No. …
> Q: Did you ask to have anything that was in the inventory?
> A: No.
> Q: You never said "I'd like that fixture, I'd like that bottle of liquor," you never asked for anything?
> A: Not to my knowledge…
> Q: Do you know if any furniture was left behind?
> A: I don't know…
> Q: If anything was left, what do you think would have happened to it?
> A: …I believe when stuff is left after vacating it becomes the property of the new landlord.

C. Website, Twitter, and Facebook Accounts

After Smithfield Tavern had closed, Smithfield Hall continued to use the Tavern's website, Facebook, and Twitter accounts (just changing the handles).

These sites had been abandoned, as Dubcork had ceased to pay the hosting fee.

Legally significant, Plaintiffs have never ascribed any specific value to these intangible assets.

See *Bonanni v Horizons Invs*, 2016 NY Slip Op 50281 S.Ct. New York County 2016, where Plaintiff's claims for misappropriation of the corporation's assets were dismissed because:

> "Plaintiffs have failed to establish the value of any of the assets that were transferred from the corporation to the new company…"

D. Customers

Kieron Slattery's testimony (Dkt. 982) distinguishes between "Fan Clubs" and other customers. He testified that they lost most of the other customers because the 25th Street location wasn't convenient for them, and because the 25th Street location didn't have spaces where private parties could be held.

As for the fan clubs, the relationships that he, Tom and Gavin had with them, were not developed at Smithfield Tavern. They were developed at Nevada Smiths. They brought the clubs to the Tavern, and ultimately some of these clubs also went to 25th Street. But this was achieved only because of the hard work and quality of service that Kieron gave to the clubs. The clubs did not transfer automatically or immediately. Tremendous effort on Kieron's part was needed. (See trial testimony of Kieron Slattery, Dkt. 982, paragraphs 9-16). No customers were "taken" from Dubcork.

E. The Name "Smithfield"

Dubcork never trademarked the name "Smithfield," and indeed they could not have. Kieron Slattery explained in paragraphs 7 and 8 of his trial testimony (Dkt. 982), that the name "Smithfield" is ubiquitous, and in common use throughout NYC, the US, Dublin, Belfast, and London. He testified:

> - There are 20 Smithfield's (Towns/Places) in the USA including 1 in New York State
> - Smithfield foods is one of the largest meat producers in the world and is headquartered at Smithfield, VA. www.smithfieldfoods.com
> - Smithfield is a famous market area in Dublin
> - Smithfield is a famous market area in London
> - Smithfield is a market in Belfast
> - Smithfield was a bar in New York City
> - https://smithfieldgourmetbakery.com
> - https://smithfieldinn.net
>
> There had been another bar at 115 Essex Street called "Smithfield" that named itself after the market in Dublin and used the exact same www.smithfieldnyc.com url.

F. The Sign

Gavin Whiston explains [Dkt. 1046], at paragraph 38:

"Plaintiffs point out that we took the Smithfield sign with us to the new bar.

a) Firstly, it would have been abandoned had we not. Certainly no one would want to purchase our old sign.
b) Secondly, the sign was hung on the wall inside Smithfield Hall, like a piece of art… actually like a piece of nostalgia. The sign was not hung outside and used to attract people to enter. You'd have to already be inside the bar, in order to see the sign. In fact, we paid $2,500 for a new sign that we did hang outside our door."

G. Logo

Kieron Slattery testified (Dkt. 982, at paragraph 19):

> "The crest, well that's all it was, a crest at the end of the day. It's not worth anything really. I mean who's going to buy it? Absolutely no one. Who's going to copy it? Anyone that wants to as it had NO copyright. Just check out our local professional women's soccer team, Gotham FC of the NWSL. The top of their crest is a ringer for ours. None of the features on our crest are original. We just stuck "Hall" on it."

And at paragraph 18:

> "The crest was worked on by Newgraphic and myself. The shape is a pretty standard crest, and many sports clubs also use similar crests https://www.customsportslogo.com/template-crests. The images in it are all standard, and have no copyright. The crown that we came up with was inspired by the statue of liberty and was recently used by a women's professional soccer team when they rebranded, as we have no copyright on any of the images singularly or as a whole.
> https://en.wikipedia.org/wiki/NJ/NY_Gotham_FC. Nothing was ever trademarked or copyrighted, indeed the images we used were mostly gathered from other crests. This is how it's done. The crest has no dollar value, and would have been abandoned. We did

> change it slightly with the addition of "Hall". Ultimately, we felt that throwing it away would have been such a waste.

H. Design

Kieron Slattery's trial Affidavit says, at paragraph 25-27, (Dkt. 982):

> Plaintiff says that we replicated the "look" of the old bar, creating a reproduction of its space. Nothing could be further from the truth. To be sure, the new bar has the distinctive features that any sports bar has, like a plethora of TV's, etc. But within the class of sports bars, the Tavern, and the Hall, have wildly disparate looks and ambiance.
>
> The four story building on 28th Street was an old manufacturing building, which had a very rustic-industrial feel to it, which is something we wanted to showcase with our design. It had a lot of "character", as they say: exposed cracked brick, visible steel girders, red brick façade, original windows on some floors, creaky stairs, and floorboards. It was an old, decrepit building that we fell in love with.
>
> The 25th street building, by contrast, is a well-maintained 12 story beauty built in 1911 but modernized through the years. The space we took over, has a very modern club theme, much different than the industrial-rustic vibe of 28th street.
>
> It should be pointed out that both spaces were designed by Gavin Whiston, and tailored to suit his personal aesthetic. Nothing was copied from the Tavern. Both the Tavern and the Hall were spaces that had been bestowed with Whiston's enormous design talents… his personal design talents.

I. "Operating Style"

The Decision contends that the Defendants simply "relocated" the business that was operating on 28th Street (Smithfield Tavern), to 25th Street (Smithfield Hall). The Court reasoned that if this is the exact same business, just with a different location, that Dubcork should still own it.

There are a few flaws in this reasoning.

Firstly, each of the Defendants had to contribute $150,000 to launch the business on 25th Street. Dubcork did not contribute any money.

Second, it's difficult to understand how the operation on 25th Street could be considered the same business that was on 28th Street, when the space was only one-third the size, and did not have rooms for private events (a significant portion of the business at 28th Street).

What 25th Street did have, was the application of the Defendants' talents, contacts, and industry experience, that they had used to launch and operate Nevada Smith's, Lunasa, and Smithfield Tavern.

The Plaintiffs had claimed, and apparently the Court was persuaded, that Dubcork had ownership of Defendants' personal "operating style." Defendants reject this notion.

Plaintiffs put into evidence the proposal that Defendants had given to prospective landlords, to describe the use that they would make of the site if granted a lease. Plaintiffs said that this proposal is evidence that Defendants wanted to replicate Smithfield Tavern. Defendants contend that it's evidence only that they want to establish a sports bar of the quality of Nevada Smiths, Lunasa and Smithfield Tavern.

Gavin Whiston wrote the proposal, and he testified that this was his intention.

Plaintiffs said that Defendants did actually relocate Smithfield Tavern to 25th Street. They made this allegation on what they describe as the appearance and ambiance of the bar. Yet the Plaintiffs acknowledged that they have never even been inside 25th Street… that their conclusions are based solely on seeing pictures on the internet.

Robbie York testified (Dkt. 1093) that he did visit 25th Street, but only one time, and that he stayed in one place, near the door, the entire time that he was there. His submitted testimony (Dkt. 939) said that 28th Street had a "unique" style… so unique that it should be considered as a valuable asset, and that this unique style was replicated on 25th Street. Yet when Mr. York was shown a dozen pictures of 28th Street, 25th Street, and several other sports bars in NYC, he could not point to any unique aspect of 28th Street that could create this allegedly valuable asset.

See the trial testimony of Gavin Whiston (Dkt. 979) where he testifies as to why Plaintiffs should have no claim on Dubcork's operating style:

> Perhaps the most outrageous of Plaintiff's claims, is that we stole *their* operating style.
>
> Plaintiffs had no operating style. Tom, Kieron, and I were the operations of the Tavern, and its "style" was our style.
>
> Smithfield Tavern was launched with the skillset, talent, experience, and effort of the three of us. The Paintiffs did nothing! They in no way contributed to the "operating style" of the Tavern.

> Let's take a brief review of all that had to be done to launch Dubcork, and let's see who did it.
>
> - Set up audio and TV equipment – Kieron
> - Cultivate supporter clubs – Kieron and Tom
> - Designing the space – Gavin
> - Finding investors – Tom, Gavin, Kieron
> - Assembling a professional team of architects, engineers, contractor, and liquor license attorney – Gavin
> - Obtaining loans – Tom, Gavin
> - Graphic design logo, website, and social media – Kieron
> - Developing the menu – Gavin, Kieron, Tom
> - Cultivating beverage vendors – Gavin, Kieron
> - Staffing – Gavin, Kieron
>
> Dubcork's "operating style" is the talents and expertise of the Defendants. This was not created at Dubcork. Defendants brought their talents and industry experience to Dubcork, to set up and operate Smithfield Tavern. Dubcork never owned the talents and expertise of the Defendants, and Dubcork should have no claim on them

When Dubcork ended, Defendants started a new venture that they found by contacting brokers whom they knew from their industry experience. The listing "Chelsea Manor" was not presented to them in their capacity as officers of Dubcork, but as a response to their affirmative efforts of outreach to the brokers. And the listing for "Chelsea Manor" was not presented to them uniquely; the owner had given the listing to several brokers, who in turn, had given it to several customers. [See *Lee v Manchester Real Estate*, 20014 NY Slip Op 30675, S. Ct. NY County, 2014. The Court applied criteria as to whether the property at issue was a corporate opportunity. The Court said: While not dispositive, it is relevant that the offering [was] sent to the other members in the industry."]

Now Plaintiffs accuse Defendants of stealing an "asset" of Dubcork, which they describe as Dubcork's "operating style"; and have persuaded the trial Court that in forming Moxy, Defendants were trying to "recreate" Dubcork's bar.

J. Fundamental Fairness should permit the Defendants to engage in future expertise without forever having to give Dubcork the fruits of their capital, efforts, and expertise.

Surely Defendants, as some point in time, should have right to develop a new business without involving the Plaintiffs or Dubcork. Surely Dubcork should not forever own Defendants' talents, experience, industry contacts, and expertise.

And what about the other shareholders in Moxy, who own 40% of the stock of Moxy? If all the profits of Moxy are given to Dubcork, what becomes of their return on investment?

This Decision is antithetical to fundamental fairness.

POINT IX

PLAINTIFFS' ACQUIESCENCE EFFECTED A WAIVER OF THEIR RIGHT TO OBJECT

Plaintiffs acknowledge that in December of 2013, that they knew about Defendants' new bar (they claim that Kim Rubino told them on December 22nd). And in fact, there is ample evidence that they had heard rumors to this effect months earlier, in October of 2013. Indeed, the Complaint itself, [R 10,980] in paragraph 29, states that in October "O'Mahony began to hear from other employees that Smithfield was going to relocated to another location, and that a new Smithfield would be built."

Plaintiffs acknowledge that they said and did nothing; that they just waited for the Defendants to come to them. The new bar didn't open until May of 2014. Yet for 7 months, Plaintiffs simply acquiesced. [Dkt. 1085, Transcript pages 302-303]

See the Deposition of O'Mahoney (Dkt. 301) at pages 314-315:

> Q: Now, in about… September of 2013 when you knew… that there was to be a new place, did you make any efforts to tell your partners that you were interested in being part of that new place?
> A: I did not.

And at pages 391-392:

> Q: So you… heard from staff in August or September of 2013 that the other three guys, not you… had found a new space. Tell me what you heard.
> A: …that there is new location going on and that they are going to be working in the new location.
> Q: So in August or September you heard from the staff that a new location had been found and some of them said that they were going to be working there?
> A: Yes.
> Q: You stated… that even after you heard this from the staff, that you did not personally approach any of the Defendants?
> A: No.
> Q: You never questioned them about it, you never sent them an email about it?
> A: No.

And at pages 708-710:

> Q: Didn't the staff at the bar talk about the fact that the business was sold?
> A: Yes.
> Q: This would have been the same people who told you that the Defendants were moving to a new location, correct?
> A: Yes.
> Q: Who were some of these people that told you that?
> A: One would be Kim Rubio; and also the head chef, Paul Geary. [They both said they were] going to the new Smithfield.

Ken Foley testified similarly (Dkt. 286) at page 564:

> Q: When did you first hear rumors that the three Defendants were going to open a new bar of their own?
> A: I think it was around September 2013.

Both of the Plaintiffs testified that they knew about Defendants' plans to open a new bar seven full months before the new bar opened, and never said anything to any of the Defendants about it.

McCarthy testified: (Dkt. 987):

> Ken and JoAnne knew that we were looking at spaces to open a new bar. Both Kieron and I had told him that. He said to Kieron (sardonically) "Good luck," and he told me that he had no further interest in being in the bar business.
> We held a meeting of December 2013, all of the staff, to announce that the Tavern would be closing. After the meeting, Ken outright asked one staff member, Kim Rubino, if she would be working at the "new bar[33]."
> Yet neither Ken nor JoAnne, at any time, ever said anything about our plans for a new bar, to any of us.

---

[3] Kim Rubino testified to the same, that on December 22, 2013, Foley approached her and asked if she would be working at the "new bar." [Dkt. 955]

The Decision stated that Plaintiffs' inaction did not constitute waiver, because the Defendants lied to them "about what was happening with the bar." The Court cites "Dkt. 369, pages 5-7," as evidence of this.

First of all, McCarthy wasn't "lying." He had been misinformed, so he passed on misinformation. But he believed what he was saying at the time.

Of note, this misinformation had nothing to do with the new bar. The misinformation was about the timing of their receipt of the settlement proceeds.

The Court stated: "Because the Defendants never provided materially nondeceptive disclosure about Moxy, Plaintiffs never were able to make a fully informed decision based on all of the material facts about plans for the new bar." The Court concluded: "Waiver is the intentional relinquishment of a known right, that must be clearly unequivocal and deliberate." (Decision, Dkt 1096)

Firstly, O'Mahoney testified that she never had any conversations at all with the Defendants about the new bar. It necessarily follows that if Plaintiffs had no communications with the Defendants, that Defendants could not have deceived or misled them.

But most significantly, the Court is saying that there cannot be an implied waiver from acquiescence. But this is contrary to case law.

If a corporation learns about a business opportunity that it thinks is being diverted by its agent, and acquiesces in the agent's conduct, the corporation has no cause of action. [See *Gladstone v Lynn Dinettes*, 140 AD2d 787, 2nd Dept, 1988; *Miller Mfg v Zeller*, 72 AD2d 338, 1st Dept, 1980; and *Blake v Blake*, 225 AD2d 337, 1st Dept, 1996].

If Plaintiffs knew about Defendants' plans to open a new bar, yet said and did nothing about it, this inaction ("acquiescence") is deemed an implied waiver of their claim. (See *Lee v Manchester Real Estate & Construction*, 118 AD3d 627, First Dept, 2014).

POINT X

THE GOODWILL OF MOXY THAT WAS PURCHASED BY DEFENDANTS SHOULD NOT HAVE BEEN INCLIUDED IN CORPORATE OPPORTUNITY DAMAGES

When calculating the corporate opportunity damages, the Court included Moxy's previous net income; its projected future net income, and "$476,630 in reported goodwill."

This $476,630 should not have been included in the calculation of opportunity damages.

The Defendants paid $500,000 for the acquisition of Chelsea Manor, and as previously discussed, this $500,000 was completely funded by themselves and other investors. None of this $500,000 came from Dubcork.

For the tax benefit of the seller, the $500,000 was broken down as "$475,000 for goodwill" and "$25,000 for furniture, fixtures, and equipment."

None of this "goodwill" was created during Defendants operation of Smithfield Hall, and none of it belongs to Dubcork under any theory.

See Dkt. 297, the Asset Purchase and Sale Agreement of Chelsea Manor, and see again, Dkt. 300, at Exhibit H, the chart prepared by Defendants' accountant, detailing all the expenses of the acquisition of Chelsea Manor.

POINT XI

IT WAS ERROR FOR THE COURT TO HOLD THE DEFENDANTS LIABLE FOR $70,500 IN INVENTORY

Firstly, this $70,500 is a number taken from a tax return that was filed months before Dubcork actually closed, and bore no relationship to the actual inventory that was on hand when Dubcork did close.

Significantly, New Year's Eve came after the tax return was prepared, and a great deal of inventory was consumed that night.

Further, any unopened cartons were returned to the vendors for credit.

Kieron Slattery testified, Dkt. 982, at paragraphs 35-40:

> We had little to no inventory on hand at the time the Tavern shut its doors; and certainly no inventory that could have any commercial value.
> Secondly, because the Hall wasn't going to open for five months after the Tavern's close, certainly food inventory was of no value to anyone.
> And most important, SLA Laws forbid selling beer/liquor from any premises other than the one it was purchased for. (If the SLA came into any establishment and scanned the bar code on a bottle, it would certainly know exactly which bar purchased it.) To repeat

> – there was NO legal way for us to sell any remaining alcoholic inventory.
> The remaining inventory had no value except to the extent that our distributors would accept returns, and provide us with a credit against our outstanding bills.
> Indeed, Scott Ackerman totaled up our final liquor, and made arrangements with Coke Omni, and all the beer companies, to pick up all the empties, and to give us credit for the few full kegs we had left.

POINT XII

THE COURT ERRED IN NOT CREDITING GAVIN WHISTON FOR THE $40,000 OF EXPENDITURES THAT HE MADE ON DUBCORK'S BEHALF

Liliana Cruz, the office manager, testified about the system employed for keeping record of the bar's expenses. (See Dkt. 1017, at pages 89-93). She stated that either Tom, Gavin, Kieron, or Paul Geary (the Chef) would give her receipts for bar expenses; that she would scan the receipts into the computer, and then place the hard copies in the filing cabinet.

She testified that she would prepare expense reports, and send the receipts, via zip drive, to the company's accountant.

She testified (at page 131), about the day that Gavin came in with a large number of receipts and asked her to put them into the system, and to total them.

See Dkt. 446, the expense report that Ms. Cruz prepared that period, indicating "Gavin, $39,802.17."

Gavin Whiston submitted into evidence (Dkt. 427) the expense report that he had prepared and had handed into Ms. Cruz. The report itself listed each expenditure that he had made, identifying the date of the purchase, the vendor, and what was purchased. Attached to the list were the actual receipts themselves. (Dkt. 428)

Gavin had been in charge of decorating the bar, and many of his receipts were for the distinctive items of furniture that he had purchased for the bar. (Several of the receipts had pictures attached of what he had purchased.)

The Court arbitrarily decided to accept only 30% of Gavin's expenses without explaining why. The Court credited Gavin for only $12,000, instead of the $39,802.17 that he'd actually spent, and held him liable for $28,000 (plus interest!) for the deemed deficiency in his capital contribution. This should be rectified.

POINT XIII

PUNITIVE DAMAGES ARE NOT WARRANTED

The Court below held that Defendants' opening a new bar for themselves, and not for Dubcork, was a blatant breach of fiduciary duty, and imposed $300,000 in punitive damages on the Defendants.

As discussed in prior sections of this brief, Defendants always had a right to invest in other bars; the opportunity was not presented to them in their capacity as agents for Dubcork; and 80% of the shareholders of Dubcork wanted a cash distribution and dissolution of Dubcork, and not to have Dubcork pursue any other ventures.

It is respectfully submitted that Defendants did not breach their fiduciary duty by acquiring Chelsea Manor for themselves, and certainly punitive damages are not warranted.

POINT XIV

DEFENDANTS SHOULD HAVE A SET-OFF FOR THEIR UNCOMPENSANTED TIME

The Defendants each worked for two full weeks emptying the bar so that the premises could be delivered "broom clean," as was required by the settlement stipulation (in order to avoid a forfeiture of the $1.9 million payment). They each worked 12 hour days for 14 straight days.

But their salaries stopped on December 31, 2013. Starting in January of 2014, they "did not receive a dime in wages from the company." (Dkt. 979, at paragraph 12 (c).)

Defendants asked for a set-off to their liability to Dubcork, in the amount of their uncompensated time. The uncompensated time was put in, for the most part, both before Smithfield Hall opened its doors, and during the two weeks after the bar had closed.

The Defendants each submitted timesheets (Dkt. 981, 984, and 989) prepared from their personal diaries and recollections, detailing the dates that they worked (for no compensation), and the specific tasks performed on those dates. The totals for the three timesheets is $150,624.79. The portion of this that is attributable to clearing the premises (the first two weeks in January), is $41,520.

The Court did not allow any set-off, holding "this claim is not supported by any credible evidence" (Decision, page 11, Dkt 1096).

Please look at Gavin Whiston's timesheets (Dkt. 981). See the detail of his time entries before the bar opened:

- Back bar layout design
- DOB Permit application
- Chef interviews
- Beer ice bin designs
- Small wares shopping
- Health permit application
- Liquor tastings and selection

Is there any doubt that these tasks were performed? What is not "credible?"

As for the two weeks clearing out the bar, is there *any* question (i.e.: lack of credibility) that this task was performed by the Defendants?

Is there any reason in equity why they should be denied compensation for this labor?

POINT XV

THE COURT FAILED TO CREDIT DEFENDANTS' CASH PAYMENTS FOR BUSINESS EXPENSES

The Court determined that there was $903,445 of unreported cash. The Court gave Defendants credit for $254,894 spent on business expenses, and held Defendants personally liable for the balance of $648,551.

But the Court failed to credit Defendants for $318,000 spent on business expenses that Defendants proved at trial.

A. Salaries of Michael Callahan and Robbie York ($98,000)

Michael Callahan submitted an Affidavit (Dkt. 950), and testified at trial that he was paid $650 a week, in cash, and received a total of $54,000, all cash.

Robbie York testified that his salary was paid in cash (See Deposition of Robbie York, Dkt 307, at page 47).

Robbie received $1,000 a week for 44 weeks, totaling $44,000.

B. Cash payment to the "Mafia" ($60,000)

Foley acknowledged that Dubcork had borrowed money from a predatory lender (whom he referred to as "the Mafia"), and that this loan was repaid with a $60,000 cash payment. (See Deposition of Ken Foley, (Dkt. 286, at page 555).

C. Cash payment to Bryan Tynan ($155,000)

The Court declined to credit the cash payment to Bryan Tynan "because Tynan testified that this was paid for construction costs and not a loan repayment" (Decision, Dkt 1096, page 8).

What difference does it make what the payment was for? Why should it matter if the payment was for construction work, or for a loan, so long as it was for a legitimate business expense, and it was paid in cash?

Tynan submitted a trial Affidavit (Dkt. 949), saying that he was owed $150,000 for his construction work, and then that debt was converted into a loan. He said that in addition, he loaned another $5,000 to Dubcork. He said that all $155,000 was repaid to him, "entirely in cash."

D. Mathematical (or typographical) error ($5,000)

The Court did credit four cash payments on loans, and said that these added up to $153,500. In fact they added up to $158,500. There was a $5,000 error in calculation.

The loans were:

Gerdling -	$22,000
Riordan -	$42,000
Massey -	$75,000
Schneider -	$19,000
	$158,500

E. The Balance of Unreported Cash not accounted for should be reduced, from $648,551 to $330,551

The $318,000 of substantiated cash expenditures should be set-off against the $648,551 amount of unreported cash that the Court held had an unexplained disposition, and Defendants' liability should be no more than $330,551.

POINT XVI

THE COURT ERRED IN ITS CALCULATION OF DUBCORK'S CASH REVENUE

The parties' "experts" made two rounds of reports.

In the first round, Plaintiffs' expert said that Dubcork's unreported income was $903,433, and Defendants' expert said that this was a reasonable estimate.

Plaintiffs' expert failed to notice the inclusion, and significance, of the modifier "unreported" before "income"; he thought the estimate was to total cash income. Johanson (Plaintiffs' expert) explained, that nationally the industry average cash revenue is 20% of total revenue. As Dubcork's total reported revenue was $4.5 million, a $900,000 cash revenue estimate seemed right on point. Johanson augmented that the 20% figure was an "average," and that the cash percentage differed from bar to bar. In general, the percentage of cash revenue would be lower in upscale bars with meals and expensive drinks, where credit cards would be more likely to be used; and the percentage of cash sales would be higher in bars with less expensive offerings.

At this stage, Johanson had not yet analyzed Dubcork's POS's. After he had this opportunity, he concluded that Dubcork's cash revenue was 18% of its total revenue.

The Court refused to accept Johanson's mia culpa, and held him to his previous acknowledgement that $900,000 was a reasonable estimate for "unreported income."

But all this should be of no matter, because in Plaintiffs' expert's second report, he changed his methodology for computing total cash income (and consequentially for computing unreported cash income) and Johanson directly (and correctly) responded to Plaintiffs' expert in the second round. At trial, both experts did a POS analysis to determine cash income.

Plaintiffs' expert, Alan Blass, divided the "cash" line on the POS report by the "unadjusted receipts" line (which includes tips and taxes), resulting in 26% as the ratio of cash receipts to total income. He then deducted 6%, attributable to the $249,000 of reported income, and concluded that 20% of all income is unreported. He then applied this 20% to the $4.5 million in total sales reported on the tax returns, and concluded that there was $903,445 in unreported income.

Defendants' expert pointed out (Rebuttal report, Dkt. 618, at page 4-5) and trial testimony (Dkt. 963 at pages 1598-1603) that Plaintiffs' expert's calculation is incorrect, because he did not reduce the cash line by the amount of the tips line. He should have divided the cash-net-of-tips amount by the line that says "sales before taxes and tips." This calculates to an 18% ratio. Applying 18% to $4.5 million in reported sales, results in $810,000 total cash. "Unreported sales" is determined by subtracting from the $810,000 cash, the $249,000 of reported income, yielding $561,000 in unreported cash.

Both experts agreed that the amount of total cash (unreported and reported together) should be obtained by utilizing two lines on the POS: divide one into the other, and multiply the resultant ratio by the $4.5 million gross income that appears on our income statement.

The experts differed only as to which two lines on the POS should be employed when making this calculation.

Blass elected to divide the “cash inclusive of tips” line by the “unadjusted receipts” line (includes tips and taxes).

Johanson elected to divide “cash net of tips,” by the “sales before taxes and tips.”

It should be apparent that tips and taxes are not any part of Dubcork’s income, cash or otherwise, and the lines that include them should not be employed in the calculation of Dubcork’s income.

Moreover, the $4.5 million on Dubcork’s income statement that is Dubcork’s reported income, is an amount that is explicitly net of tips and taxes.

Johanson explained (page 5 of his trial Affidavit, Dkt. 963):

> It is industry practice, and certainly the practice at Dubcork, to take out of the cash receipts, the amount of the tips, and to give them over (that night!) to the servers. The tips were not our income. We collected the tips with an obligation to turn them over. This is similar to our collection of taxes. The taxes we collect are not part of our income either.

This practice was echoed in Gavin Whiston's description of the method used to keep track of Dubcork's cash income:

> A large plastic envelope was kept behind the bar each day. Each server and bartender placed their drop in the envelope at the end of their shift, and either the manager or the closing bartender would drop the daily envelope in the big drop safe in the office. The drops included credit card receipts, cash (if there was any after tips were taken), and the employees' shift report. If the workers hadn't taken enough cash to cover their tips, then the manager would take cash from another worker's drop and make a note on their report to show where the cash went.
> Once that was done, the weekly cash expenses would be paid, e.g. Robbie's wages; the loan from the mob; some of the barback's wages; etc. Whatever was left over would be deposited in the bank. (Dkt. 336, pages 1-2)

The trial Court erred in adopting Blass's methodology. The correct determination of Dubcork's total cash income is $810,000, and the unreported cash was $561,000, not $903,000.

The Court gave credit for $254,894 in cash expenditure, and should have additionally given credit for $318,000 more, (See Point XV, supra), totaling $572,894. Add to this the $187,508 of cash deposits to Dubcork's bank account (which was reported), and this totals $760,402.

If we subtract the $760,402 of cash accounted for, from the total cash amount of $810,000, the Defendants' liability for failing to account for the expenditure of Dubcork's cash, should be limited to $48,598.

CONCLUSION

The Defendants acknowledge that they didn't do everything perfectly. For instance, they never held a formal shareholder's meeting to vote on whether to dissolve Dubcork. But they had spoken to 80% of the shareholders and knew what these shareholders wanted. The outcome of any shareholder's meeting would have been a foregone conclusion.

They never paid Dubcork for what they took from Smithfield Tavern – some used furniture, a website, etc. They thought that these were abandoned, so that it was okay to take. And it all had so little value, (indeed a specific value for these assets was never alleged or established).

But these wrongs shouldn't incur a penalty of $5 million! This punishment does not meet the crime.

Foley invested $50,000, and did no work at the bar. Two years later he got $250,000 (a $50,000 salary with no work obligation, and a $200,000 cash distribution). Now on top of that he's to get $5 million more, because the Defendants didn't want to include him in their next venture?

The Defendants had all the expertise; did all of the work; and personally funded Moxy. The Plaintiffs contributed nothing to Moxy. It's not fair to either the Defendants or to the other shareholders in Moxy (40%) to give Foley 20% of all of Moxy's profits.

Foley hated the Defendants; he had fantasies of killing them (Dkt. 1060). The Defendants shouldn't have to include him in every future venture that they have; Foley shouldn't forever be entitled to 20% of the Defendants' labor and expertise.

Defendants could have petitioned to end their partnership, and the Court would have given Foley precisely what he got, $197,000, his fair share of Dubcork's assets. And then there wouldn't have been any issue as to Foley's interest in any of the Defendants' future endeavors. Because Defendants didn't know they could seek a legal partition, should they now be liable for $5 million dollars?

Defendants pray to this Court to consider all the legal arguments set forth in this brief, and to devise an equitable solution:

- to hold that Chelsea Manor was not an opportunity of Dubcork's;
- to hold that when computing cash revenues, that taxes and tips should not be included; and
- to hold that the legal fee award in this case cannot include time spent in service of personal claims; nor can the legal fee award exceed Plaintiffs' actual legal costs.

Dated: New York, New York
September 23, 2023

By:

__ ____

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Appellate Case
No. 2023-01485
No. 2023-03634
No. 2023-04151

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

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants.

1. The index number of the case in the Court below is 652621/2014.

2. Names of the parties are set forth above. The caption was amended on or about June 24, 2015 and January 26, 2018.

3. The action was commenced in the Supreme Court, New York County.

4. This action was commenced on or about August 25, 2014 by the filing of a Summons and Complaint. Issue was joined by service of an Answer on or about October 31, 2014.

5. The nature and object of the action are claims for breach of fiduciary duty, accounting, shareholder oppression, misappropriation, and breach of contract.

6. These appeals are from Decisions and Orders of the Honorable Jennifer G. Schecter, dated February 15, 2023, June 30, 2023 and August 1, 2023.

7. These appeals are being perfected with the use of a fully reproduced Record on Appeal.