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New York Supreme Court

Appellate Division—First Department

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.

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

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Plaintiffs-Respondents Esther J. O'Mahony ("O'Mahony") and Ken Foley ("Foley"), individually and derivatively on behalf of Dubcork, Inc. ("Dubcork"), submit this brief in opposition to the appeal of Defendants-Appellants Gavin Whiston ("Whiston"), Thomas McCarthy ("McCarthy") Kieron Slattery ("Slattery") (together, the "Individual Appellants") and Moxy Restaurant Associates, Inc. ("Moxy").

PRELIMINARY STATEMENT

This is an appeal of a very large number of the trial court's factual findings. Appellants do not specifically identify the issues on this appeal, but they give seven "reasons" for the appeal and include 16 separate "POINTS" and many subpoints in their brief.

On its surface, this is a very simple and straightforward breach of fiduciary duty case, involving misappropriation of a corporate opportunity, corporate waste, and a failure to account for corporate assets. As the trial court determined, the majority shareholders of Dubcork, Inc., the owner of the Smithfield bar, without telling the minority shareholder anything about what they were doing, caused Dubcork to sell the leasehold for the Smithfield premises back to its landlord for $1.9 million, closed Smithfield, and then reopened a new Smithfield a few blocks away. They placed title to the new Smithfield in a newly formed entity, Moxy, in which they were shareholders, and the minority shareholder was not.

The majority shareholders diverted Dubcork funds and assets to themselves, and failed to account fully for the proceeds of the leasehold sale or the cash they admitted failing to report on Dubcork's books or tax returns. They moved many of Dubcork's physical assets to the new Smithfield and to another restaurant, Lunasa, owned in part by Whiston, and appropriated all of Dubcork's intangible assets for the new Smithfield. They also failed to pay back money lent to Dubcork by Foley for the construction of the original Smithfield.

At trial, Appellants asserted virtually every conceivable defense to Respondents' claims and asserted facts that they claimed supported each of these defenses. These "facts" were often contradicted by their own statements, directly contrary to the documentary evidence, or unsupported by anything in the record.

After a two-week bench trial, the court found the testimony of Appellants and their expert witness not to be credible. It repeatedly cited to the documentary evidence in rejecting Appellants' version of the facts and their proffered defenses.

Now, Appellants bring the same factual assertions and defenses before this Court and seek a different result. However, the trial court's decision rested on a fair interpretation of the evidence and appropriate credibility determinations. It should not be disturbed.

THE ORDERS UNDER APPEAL

After a bench trial held over the first two weeks of January 2022, and submission of post-trial memoranda in April 2022, the Hon. Jennifer G. Schecter, J.S.C., issued her Decision After Trial, dated February 15, 2023 (Record on Appeal ("R") 3-15), finding Appellants liable for misappropriation of corporate opportunity, failure to account for and waste of, corporate assets, and failure to repay funds loaned to them by Foley. The court also determined that Respondents were entitled to recover reasonable attorneys fees and expenses pursuant to BCL § 626(e) and directed Respondents to file a fee application, including the time and expense records of Respondents' counsel, Samuel Goldman & Associates ("SGA").

On April 11, 2023, the Supreme Court entered a Judgment, pursuant to the Decision After Trial, awarding Dubcork approximately $5.2 million in damages on the derivative claims, and Foley approximately $150,00 on his direct claims, including prejudgment interest. This Judgment is not being appealed and it is not in Appellants' Record on Appeal; it is Dkt. 1103 in the lower court proceeding, Index. No. 652621/20140. (Unless indicated otherwise, all references to "Dkt." refer to documents filed in the lower court proceeding.)

On June 30, 2023, after reviewing Samuel Goldman's affirmation of merit, SGA's time and expense billing records and Appellants' Memorandum of Law in Opposition to Plaintiffs' Application for an Attorney's Fee Award, the trial court

issued an Order (R17-18) awarding Respondents $1.8 million in attorneys' fees and expenses.

On July 5, 2023, Respondents submitted a proposed judgment pursuant to the June 30, 2023 Order.

On July 24, 2023, Appellants filed a motion, by order to show cause, seeking an order "denying or modifying" the proposed judgment (R10908).

On August 1, 2023, the trial court issued its Decision & Order on Motion (R21) denying Appellants' motion as an improper motion to reargue based on arguments not previously raised in the case.

On August 15, 2023, the Supreme Court entered a Judgment awarding Respondents $1.8 million in legal fees and expenses to be paid by Dubcork. This Judgment is also not being appealed and is not in Appellants' Record on Appeal (it is at Dkt. 1124).

Appellants do not explicitly identify what they are appealing. But from context, it appears they are appealing the February 15, 2023, June 30, 2023, and August 1, 2023 Decisions, but not the two Judgments. The Decision on what Appellants call the "separate Judgment for the attorney fee." (Appellants' Brief ("AB") at 1) appears to be the August 1, 2023 Decision rejecting Appellants' motion for an order "denying or modifying" Respondents' proposed judgment on the fee award. Appellants do not mention that this is what the August 1, 2023 Decision was.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Appellants do not include a statement of the questions presented on this appeal, but Respondents will do so to help frame the issues before this Court.

1. Is the Trial Court's determination that Appellants are liable for misappropriation of Dubcork's corporate opportunity to continue to own and operate the Smithfield bar and restaurant supported under any fair interpretation of the evidence?

2. Is the Trial Court's determination that Respondents did not waive or acquiesce in the misappropriation of Dubcork's corporate opportunity supported under any fair interpretation of the evidence?

3. Is the Trial Court's determination of the amount of Dubcork's damages under the misappropriation of corporate opportunity claim, supported under any fair interpretation of the evidence?

4. Is the Trial Court's determination that Appellants are liable for punitive damages and fixing the amount of such damages an abuse of discretion?

5. Is the Trial Court's determination that Respondents are liable for a failure to account for and waste of, Dubcork's assets, and of the amount of such damages, supported under any fair interpretation of the evidence?

6. Is the Trial Court's determination that Appellants are each liable to repay Foley's $86,397 loan, supported under any fair interpretation of the evidence?

7. Did the Trial Court abuse its discretion in determining the amount of the award of reasonable attorneys' fees and expenses?

8. May a party raise new claims or causes of action for the first time on appeal?

COUNTERSTATEMENT OF BACKGROUND FACTS

Foley, Whiston, McCarthy and Slattery formed Dubcork on April 20, 2011, to own and operate a bar and restaurant [R2867-2872]. They agreed that they would be equal shareholders. Each of them wound up with a 20% share interest in Dubcork, after they sold 20% to various investors. Foley's shares were nominally held by O'Mahony, who is now his wife [R9157].

On or about June 24, 2011, Dubcork entered into a lease for a small building at 215 West 28th Street in Manhattan to house the bar and restaurant, which they named Smithfield [R9195, R2878-2192].

Although the four founders were supposed to be equal partners [R9193], Whiston and McCarthy took complete control of Dubcork's management and finances from the outset [R9195]. As discovery would later reveal, they used that control to commit massive looting and waste of corporate funds and other assets. They claimed that they maintained no records of basic financial information, such as shareholder's capital contributions, loans, or corporate assets.

Whiston and McCarthy began abusing their fiduciary duties even before Smithfield opened. The four founders of Dubcork had agreed to each make a $50,000 capital contribution to the corporation, but documentary evidence showed that Whiston contributed only $10,000; he claimed he didn't have more and didn't want to borrow [R9195-9197, R2873, R2874, R2913]. McCarthy moved himself and his family into the fourth floor of the Smithfield space and they all ate their meals at the bar [R9146, R9093].

In contrast to Whiston, Foley said he had more money and could put in additional funds [R2873]. It was agreed that Foley's "extra investment" would be treated as a loan and repaid within one year and before any other funds were paid to the shareholders [R9138]. Tom and Gavin promised this to Foley personally [R9197, R2873]. All in all, Foley put almost $140,000 into Smithfield, more than Whiston, McCarthy and Slattery combined [R9187-9188; 9197]. This loan was never repaid.

In April 2012, just a few weeks after Smithfield opened, the founders were approached by Dubcork's landlord, seeking to acquire its leasehold so the property could be demolished and incorporated in a development site [R9168]. Foley was included in the initial communications regarding the buyout, which contemplated that the landlord would build Dubcork a new Smithfield or would pay for it to relocate Smithfield [*see, e.g.*, R2929-2930]. These negotiations lapsed, and when

they resumed a few months later, Foley was left out and provided with no information regarding the buyout discussions or the eviction proceedings commenced by the landlord [R9167-9168; *see also,* R2991-2914, R3008—3010, R3028, R3029-3030, R9221].

On June 25, 2013, Whiston, McCarthy and Slattery agreed to sell the Dubcork leasehold for $1.9 million, with Dubcork receiving a $126,000 deposit towards the purchase price [R9168, R1932]. The agreement, which was memorialized in a Stipulation of Settlement [R1932-1950] resolving the eviction proceeding, provided that they would close Smithfield by December 31, 2013, and vacate the premises by January 15, 2014. They did not tell Foley or O'Mahony anything about the lawsuit, the Stipulation, or the sale [R9169; R98].

Even before the agreement was signed, Whiston, McCarthy and Slattery had already started looking for a new space, in which (using their own words) they could "recreate" Smithfield [R9168, R3067].

Moxy was incorporated on December 19, 2013 [R3217-3221], when the lease for the new space at 138 West 25th Street [R1973-2015] was ready to be signed. McCarthy, Whiston, Slattery, and a Dubcork investor named David Massey, were each given 25% shareholder interests in Moxy. O'Mahony/Foley were given nothing and not even told about the new lease, the formation of Moxy, or the plans to reopen Smithfield [R9221-9224].

McCarthy, Whiston and Slattery used $70,200 of Dubcork's leasehold sales proceeds to pay the security deposit for the 138 West 25th Street lease [R9181, R3231-3233, R3227-3229]. They then used $500,000 more of the proceeds to acquire the interest of the tenant, Chelsea Manor NYC, LLC, in the premises [R9224, R1951-1972] and $165,000 more to give themselves $55,000 bonuses/sales commissions each [R9224, R3241]. Foley was not told about these payments and received no funds at this time [R9221-9224].

On December 31, 2013, Smithfield ceased operations [R9171]. The Individual Appellants took possession of all of Dubcork's assets, including its furniture, movable fixtures, equipment and inventory [R963]. They paid Dubcork nothing for them and moved some to Lunasa and some to the new Smithfield (after placing them in storage while the new Smithfield was being built out) [R9173-9175].

Meanwhile, Foley and O'Mahony found out on social media in mid-December that Smithfield would be closing at the end of the year [R9222-9223]. In January they found out, again on social media, that the leasehold had been sold [R9224]. Foley and O'Mahony immediately started emailing Whiston and McCarthy for the details of the sale, the disposition of Smithfield's assets, and repayment of the $86,000 loan. Whiston and McCarthy ignored these emails [R9225-9226].

On January 23, 2014, shortly after the sale of the leasehold had been reported on the internet, McCarthy emailed Foley, falsely telling him that the proceeds had just been received and had not yet cleared the bank; he stated that the accountant would distribute the net proceeds after all bills and taxes were paid and directed him to contact the accountant if he had any questions [R9224, R3240]. On February 27, 2014, McCarthy wrote and lied again to Foley: "Hi Ken we are getting 50G each tomorrow as a starter till the tax situation is finalized…" [R3248]. These statements were blatantly untrue. In early and mid-January, Appellants had already used over $750,000 of Dubcork's leasehold sales proceeds to pay the security deposit and key money for the new Smithfield space and to pay themselves $165,000 in bonuses [R3239, R3283, R3241, R9225, R3248].

O'Mahony received a check dated February 24, 2014, for $50,000 and another dated April 24, 2014, for $142,677 [R9225]. Neither was accompanied by any explanation as to how the payments had been computed, how much the leasehold had been sold for, or what had happened to the rest of the proceeds and Dubcork's assets [R9184, R9225].

After Smithfield closed, Smithfield's social media sites continued to function and promoted the coming reopening of Smithfield at a new location [R3225]. In May, 2014, Individual Appellants reopened Smithfield using the same logo, website

(www.smithfieldnyc.com), Facebook, Instagram and Twitter pages, email addresses (i.e., hello@smithfieldnyc.com, Gavin@smithfieldnyc.com) [R9158-9159], computerized point of sale ("POS") system, sign, crest, elaborate and unique custom-built beer towers, and other furniture, fixtures and equipment ("FFE") they had taken from Smithfield. *See* R9173-9178 for a list of items taken that were able to be identified by Respondents. This list is extensive, but not complete, as there are other valuable items, such as two Chesterfield chairs the disposition of which Respondents have been unable to determine. (In his direct testimony, Whiston had only acknowledged taking the sign [R963-964]. In their post-trial brief and their brief on this appeal, Appellants acknowledged taking much more, but far less than what Respondents had proven at trial.)

The Individual Appellants explicitly promoted the bar as a continuation of Smithfield and continued marketing to Smithfield's soccer booster clubs directly on the Smithfield website (*see* www.smithfieldnyc.com/fan-clubs/) [R9171-9173]. The bar's Facebook page showed pictures of the old Smithfield and the new one interchangeably, deeming them all pictures of Smithfield.

When Foley and O'Mahony found out about the new Smithfield, they protested immediately [R9224-9227]. They hired an attorney, and after the attorney's demand letter went unanswered, they commenced this litigation in August 2014, just two months after the new Smithfield had opened [*Id.*].

STANDARDS OF REVIEW

"The fact-finding determination of a court should not be disturbed on appeal unless its conclusions could not have been reached under any fair interpretation of the evidence, particularly where the findings of fact rest largely on the credibility of witnesses." *D.S. 53-16-F Assoc. v Groff Studios Corp.*, 168 A.D.3d 611, 611 (1st Dep't 2019) (citing *Thoreson v Penthouse Intl.*, 80 N.Y.2d 490 (1992)).

"Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts." *Nardelli v Stamberg*, 44 N.Y.2d 500, 503 (1978). The purpose of punitive damages is to discourage similar conduct in the future. *Ferguson v. City of New York*, 73 A.D.3d 649, 651 (1st Dep't 2010).

"The issue of whether and to what extent to award attorney['s] fees…is an issue addressed to the discretion of the [trial court] in the exercise of its equitable powers." *Seinfeld v. Robinson*, 246 A.D.2d 291, 300 (1st Dep't 1998) (citations and internal quotation marks omitted). Accordingly, the Appellate Division reviews a fee award according to an "abuse of discretion" standard. *Mountbatten Equities v. New York State Div. of Hous. & Community Renewal*, 226 A.D.2d 128, 130 (1st Dep't 1996).

ARGUMENT

POINT I

THE TRIAL COURT'S DETERMINATION THAT APPELLANTS MISAPPROPRIATED DUBCORK'S CORPORATE OPPORTUNITY SHOULD NOT BE DISTURBED

The trial court determined that Whiston, McCarthy, and Slattery had misappropriated Dubcork's corporate opportunity, in that "the credible evidence established that [the new Smithfield] was essentially the same bar with the same name (Smithfield), theme and core clientele (an Irish bar catering to soccer fans)." [R3]. The trial court supported its findings by citing to the evidence (with emphasis in the original):

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

[defendants "proceeded to carry on the business for which Ketek was formed under the Hoteltron name"]). [*Id.*].

Clearly, a fair interpretation of the evidence – just a small portion of which was cited in the trial court's opinion – supports the trial court's conclusion that Appellants misappropriated Dubcork's business opportunity. This finding should not be disturbed.

In their appeal, Appellants advance the same version of the facts that the trial court had rejected as not supported by the credible evidence [*see* Appellant's Brief ("AB") POINTS VII and VIII].

Appellants claim that the Individual Appellants were not acting in their capacity as directors of Dubcork when they were seeking to open the new bar [AB at 19-20]. But, they then contradict this statement by admitting that the documentary evidence "did speak of recreating Smithfield Tavern" [AB at 24]. They try to explain this by asserting that the communications about recreating Smithfield were to the landlord of the old bar. So, in effect they are saying that when communicating with the landlord, they were acting as directors of Dubcork, but when they were simultaneously looking for new space, they were acting in their individual capacities. This defies credulity. One does not need to observe the demeanor of the witnesses to conclude that this is not credible.

Appellant's claim that they were not acting for Dubcork and not seeking to recreate Smithfield is also contrary to a mountain of evidence to the contrary. This

includes not just emails with the old landlord, but also emails with investors, potential investors, prospective landlords, brokers, vendors and customers of Smithfield and among Appellants themselves. *See*, for example, the email dated July 9, 2013, among Whiston, McCarthy, and Dubcork investor, Keith Duval, re potential investor's involvement in a "new Smithfield;" [R3102]; the email dated August 22, 2013 from Bill Zorzy, the real estate broker, to McCarthy enclosing a counterproposal to a leasing proposal from "The Smithfield" and stating "The Smithfield currently occupies approximately 8,000 square feet and intend to relocate to 144 West 27th Street" [R3104]; the email dated October 3, 2013, from Zorzy to McCarthy and Whiston "re Smithfiled" (sic), enclosing a term sheet for the West 25th Street space [R3197]; the emails to Smithfield customers advising them of Smithfield's relocation [R3314; R3230, R3236]; and McCarthy's August 25, 2013 email to Whiston about the 138 West 25th space, stating "At 13,400 per month, we'll be open in a month and not lose our football following." [R3107]. Smithfield's football following belonged to Dubcork, and the goal was to take it with them to the new Smithfield.

See also the September 16, 2013, proposal submitted, through Zorzy, to the landlord at 138 West 25th Street from "Smithfield" stating that their objective was to recreate Smithfield at this location [R3182-3196]. This proposal was substantially the same proposal that Dubcork had submitted in 2011 to the landlord of the original

Smithfield, except that O'Mahony's name had been deleted (compare it to Dubcork proposal at R2821-2833). Appellants' claims that they were not acting for Dubcork are clearly not credible.

Contrary to Appellants' assertion [AB at 23-24], the opportunity to open the new Smithfield was essential to Dubcork's survival. Smithfield ceased operations not because the landlord forced it to close, but because the landlord paid Dubcork $1.9 million to do so. As the trial court noted, this was more than enough money to open a new Smithfield, which is exactly what Appellants did, hiding their plans from Respondents. Further, and contrary to their assertions [AB at 24], Appellants used exclusively Dubcork's funds to secure the space for the new Smithfield.

Appellants' repeated factual assertions that they did not use Dubcork's assets to open the new Smithfield [AB POINT VIII] is also contradicted in their own brief and by a large quantum of documentary evidence. Appellants admit that "[w]hat Defendants did take from Dubcork was some used furniture (that would otherwise have been abandoned), and the "soft assets" (website, logo, etc.)" [AB at 26] – as if absconding with even these Dubcork assets was okay. These admissions grossly understate what Respondents were able to prove Appellants took, and Appellants were in any event responsible for all of Dubcork's assets, which disappeared while they were in control of the company.

Appellants also state, "no cash from Dubcork was used to create the new bar."

[AB at 26, AB POINT VII], but the documentary evidence shows that this is not true. Appellants used $600,000 from Dubcork's leasehold sales proceeds to fund the new Smithfield, while placing its ownership in Moxy.

Under this Stipulation, the balance of the leasehold sale proceeds was not payable until January 16, 2014, after Dubcork had surrendered possession. But Defendants needed to pay the West 25th Street lease deposit before then, so they asked Dubcork's landlord to release it to Dubcork ahead of time [R3202-3205]. The landlord agreed and on January 6, 2014, "Dubcork d/b/a Smithfield" entered an Amended Stipulation of Settlement [R9181, R3231-3233] which provided for the early release of $70,200 of Dubcork's funds. These funds were wired to Dubcork's attorney's trust account and transferred by him to the West 25th Street landlord to pay Moxy's security deposit [R3227-3229].

On January 15, 2014, Dubcork vacated the Premises, surrendered the lease and received a check for $1,533,217.76, representing the balance of the leasehold sale proceeds, and another for $123,600, representing the return of Dubcork's security deposit [R2834]. Whiston and McCarthy caused $529,800 of these Dubcork funds to be deposited in the accounts of Whiston, McCarthy, Slattery, and Massey and simultaneously transferred out $500,000 to Moxy, which used these funds to pay for the lease buyout of the West 25th Street tenant. O'Mahony and Foley received no funds at this time and were not told of these payments [R3239,

R3246, R3247, R9181-9182].

Appellants state that "Gavin Whiston testified that the Stipulation of Settlement required that they deliver the premises 'broom clean,' which is defined as devoid of any personal property." They state that the Stipulation contained a draconian penalty clause: that they would forfeit their $1.9 million buyout, if they failed to deliver the premises 'broom clean.'" [AB at 30]. Whiston's testimony and Appellants' unfounded embellishment are both demonstrably false. The Stipulation [at R1932-1950] explicitly states that Dubcork was permitted to take whatever furniture, fixtures and equipment it wanted. *See, e.g., id.* ¶ 5 ("[Dubcork] may remove such improvements, fixtures and/or Personal Property that it desires from the Premises prior to the Vacate Date notwithstanding any provision in the Lease to the contrary"); ¶ 16 ("Prior to the Vacate Date, [Dubcork] shall remove such items of its personal property, furniture, fixtures and equipment, etc. which it desires"); and ¶17 ("Petitioner waives any rights under the Lease to require [Dubcork] leave any fixtures or installations intact in the Premises upon its surrender thereof."). In fact, in the initial negotiations, Whiston had insisted that the landlord pay for 12 months of storage of Dubcork's FFE so they could be preserved and relocated the new Smithfield, and the landlord had agreed to this [R9165]. The contention that the landlord insisted that a building it intended to demolish be delivered "broom clean" is laughable.

Appellants' statement that "Plaintiffs knowingly abandoned all interest in the furniture and inventory" [AB at 32], is not just untrue, it is bizarre and shows a callous disregard for the facts that this property belonged to Dubcork and that Appellants were charged with the duty to protect and preserve it. Moreover, Appellants do not claim that they told Foley or O'Mahony that the bar was closing or that they were taking all of the FFE or inventory for themselves. Foley and O'Mahony had no right to take any of Dubcork's FFE or inventory for themselves, just as Whiston, McCarthy and Slattery had no such right. Not taking FFE or inventory that didn't belong to them and that they didn't know was being stolen by Individual Appellants was not an abandonment.

Appellants admit that after Smithfield closed, Appellants continued to use Dubcork's website, and its Twitter, Instagram, and Facebook accounts for the new Smithfield, and eventually transferred them to Moxy. They claim they had been abandoned [AB at 33], without noting that they, as the company's directors, had an obligation not to abandon them. A director cannot "abandon" a company asset and then take it for himself or for his new company. This is, by any definition, theft.

Appellants egregiously miscite *Bonanni v. Horizons Invs.,* 2016 NY Slip OP 50281 (Sup Ct NY Cty), which is in any event irrelevant to our case. Respondents sued for misappropriation of corporate opportunity damages and proved their damages. They were not under an obligation to prove the value of each of the assets

stolen by Appellants. *Bonanni* was referring to theft of individual corporate assets claims.

Appellants' statement that "[n]o customers were taken from Dubcork" [AB at 34] is belied by the considerable documentary evidence showing the opposite. Smithfield customers were told that Smithfield "will be reopening on 25th Street in 4-5 weeks." [R3225] and that "we have a new place on 25th street we hope to have open within a couple of months" [R3230]. For months, Whiston wrote many emails to Smithfield customers steering them to the new location [R3314; R3230, R3236].

Appellants' argument that Smithfield is a common name [AB at 34] is irrelevant to the fact that they stole Dubcork's business named Smithfield. As for the sign and the crest or logo, Appellants admit they took them [AB at 35; R961]. Since they had no right to do so, this is theft. The sign and crest helped promote the fact that the bar was a continuation of the original Smithfield.

"Operating Style" [AB at 36-40] is a red herring. Nowhere does the Decision refer to "operating style." It is just an excuse for Individual Appellants to argue once again that they contributed all of the value to Smithfield and Respondents contributed none. This is irrelevant to this issue as to whether they misappropriated Dubcork's corporate opportunity. Even if, arguendo, they were right that they created all of the value in Dubcork and Foley had created none, they would still have no right to steal Dubcork's business and strip Foley of his 20% interest in it.

Appellants "fundamental fairness" argument [AB at 40] is another red herring, and a peculiar one. "Fundamental fairness" requires that those who misappropriate corporate opportunities, loot and waste corporate assets, and do not pay back loans pay the full measure of damages that they caused according to law. "Fundamental fairness" requires that Appellants pay back the innocent investors who didn't know Appellants were misappropriating Dubcork's Smithfield business.

Appellants continued to use the exact same Smithfield Facebook page for the new Smithfield as the original one, and on it, they treated the new Smithfield and the old as the same bar [R2715]. They continued to use Smithfield's email and other social media accounts seamlessly to promote the new Smithfield [R3230, R3236]. In social media, they presented the new Smithfield and the old as the same bar, and they continued to use photographs of the old bar on Smithfield's Facebook page, after the new Smithfield opened. The new and old Smithfield were presented as one bar which had existed since 2012 [R4715].

Appellants told Dubcork's POS vendor that Smithfield had a new location a few blocks away and that they would be using Dubcork's POS system (back-office server, iPads, iPad swipes, sales terminals, printers, etc.) at the new Smithfield, after placing it temporarily in storage until the new space was ready [R2818, R3299-3303; R963 (Whiston acknowledged they took everything to storage)]. They informed the POS vendor that Smithfield is opening again in a new location [R2819-2820] and

told it to erase the Dubcork POS data in May 2014 [*Id.*], after they could reasonably have expected litigation with Respondents. The POS vendor confirmed to Appellants: "you asked me to clear out the old sales history" [R3297; R3]. Dubcork's accountant counseled Appellants not to produce the POS data even if it could be recovered because they would be "critical to proving you stole money." [R3489, 3490]. Appellants apparently listened to his advice, producing only a few POS statements accidentally that were attached to emails.

Defendants made every effort to transfer Dubcork's goodwill to the new Smithfield and Moxy [R2939-2943, R4715, R4968-4970, R4741-4746, R4749, R9180]. *See*, for example, emails from McCarthy to Dubcork's landlord on December 3, 2013, asking to be permitted to extend December 31, 2013 closing date "[j]ust enough time so we can get 25st open so we don't lose our fan base" [R3212] and "Our loyal customers and fan clubs that call Smithfield home will have no place to go should we vacate on January 15th, hence our reputations will be destroyed amongst the football community in NYC as we will lose the trust of all of the fan clubs." [R3211]. They advertised that Smithfield would be opening soon at 215 West 25th Street [R4750, R4751] and Smithfield customers were told it "will be reopening on 25th Street in 4-5 weeks" [R3225] and that "we have a new place on 25th street we hope to have open within a couple of months" [R3230]. Whiston admitted that they broadcast to the world that it was the same bar [R1041].

It is simply not credible for Appellants to claim that they did not seek to retain and exploit the enormous Smithfield goodwill and value of its clientele. Smithfield was, as McCarthy said, a "monster," from day one [R2017], and it would have been against all common sense not to try to retain the Smithfield goodwill in the move [R9200]. As Slattery said in a March 20, 3016 email to McCarthy and Whiston, they were successful in this effort: "We recreated the monster that was the old Smithfield." [R3399-3400].

Appellants took Smithfield's soccer team supporters' clubs with them to the new Smithfield [R2838-2847]. On May 19, 2014, Kieron gave an online interview about the relocation of Smithfield [R3512-3516]. The graphic accompanying the article contained the original Smithfield logo and photos of the old bar. It said Smithfield would be opening soon on West 25th Street and that "We had a bunch [of soccer team supporters' clubs] in the old Smithfield and we expect that they will come back to us once we reopen." [*Id.*].

On LinkedIn, Slattery stated that he has been working for Smithfield continuously from March 2012 until the present [P267]. Appellants' witness, former employee Lilyana Cruz Lopez, stated she had worked for Smithfield from May 2012 to July 2016 [R9994-9995].

Appellants claim that Smithfield was a common name, so when the old Smithfield closed, they were free to take it. They argued that the domain name,

smithfieldnyc.com, was available after the old Smithfield closed, so they took it. These statements were proven false at trial. Defendants use of the name and domain name were continuous and simply carried over to the new Smithfield [R1061-1063].

Whatever rights Defendants may have had to open other bars, this did not give them the right to appropriate the Smithfield opportunity. *See Atlantis Mgt. Group II LLC v. Nabe*, 2022 N.Y. Misc. LEXIS 608, *14 (Sup. Ct. N.Y.Cty., J.G. Schecter, J.S.C., 2022] ("Plaintiff urges that pursuant to § 10.2 of the OA, it was specifically permitted to enter into a competitive business activity. That ignores allegations that plaintiff did not merely enter a competitive business; rather, it - a member of the Company - took a "corporate opportunity" for itself which ended the Company's business."). As the trial court determined based on a fair interpretation of the evidence, the opportunity to reopen and continue operating Smithfield belonged to Dubcork, and it was misappropriated by Appellants when they placed ownership of the new Smithfield in Moxy.

POINT II

THE TRIAL COURT'S REJECTION OF RESPONDENTS' ACQUIESENCE AND WAIVER ARGUMENTS SHOULD NOT BE DISTURBED

The trial court explicitly rejected on credibility grounds, Appellants' arguments that Respondents waived Dubcork's right to continue as owner of Smithfield or acquiesced in Appellants' misappropriation:

> The credible evidence did not prove that plaintiffs' inaction constitutes waiver or ratification. On the contrary, the evidence bore out that defendants lied to plaintiffs on multiple occasions about what was happening with the bar and the settlement proceeds (*see* Dkt. 369 at 5-7). The court credits plaintiffs' testimony that they were unaware of what was really going on with the new bar. …
>
> Waiver "is the intentional relinquishment of a known right" that "must be clear, unequivocal and deliberate" (*Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). Because the fiduciary defendants never provided candid and materially nondeceptive disclosure about Moxy, plaintiffs never had the opportunity to make a fully-informed decision based on all of the material facts about the plans for the new bar. Thus, plaintiffs did not waive or ratify defendants' conduct (citation omitted). (*cf. Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 [1st

This decision is based on a fair interpretation of the evidence, and it should not be disturbed.

Again, one does not need to resort to credibility determinations to conclude that Appellants' factual assertions are not believable. It is impossible for Appellants to simultaneously argue that they told Respondents that they were opening a "new bar" and claim that based on this disclosure, Respondents waived or acquiesced in their opening of a "new Smithfield." Of course, Respondents dispute that they told them anything about what they were doing – not about a new bar and not about a new Smithfield.

Remarkably, Appellants claim waiver and acquiescence while acknowledging that they did not make full disclosure [AB at 42]. Not surprisingly, they provide no case law supporting the contention that a waiver can be based on a failure to respond

to "rumors," even though there had been no disclosure. Appellants had a duty of disclosure and to claim a waiver while admitting to no disclosure is frivolous.

Indeed, there was no waiver or acquiescence because as soon as Respondents found out about the new Smithfield, they vehemently objected and commenced this action shortly thereafter.

Thus, on June 16, 2014, approximately one month after the new Smithfield opened, O'Mahony wrote to Richard Stampfel, Dubcork's accountant, with copies to Whiston, McCarthy, and Slattery:

> [A]ny attempt by my other partners to exclude me from a proper settlement of Dubcork Inc/Smithfield, and the use of proceeds from the sale of Dubcork Inc/Smithfield to incorporate a new business will be resisted. [R2194]

This is an assertion of rights, and the opposite of a waiver. None of them responded.

On July 10, 2014, Respondents' attorney, Dilli Bhatta, sent a demand letter addressed to Appellants asserting misappropriation of Dubcork's corporate opportunity and other fiduciary duty breaches [R9185, R2729-2730]. Appellants again did not respond, and so in August 2014, Respondents commenced this litigation.

As the trial court noted, not only didn't Appellants not make full disclosure, they lied to Respondents to cover up what they were doing. Respondents first learned that Dubcork was closing from an announcement on the

internet on December 18, 2013, and they first learned the lease had been sold from an article on the internet in mid-January 2014 [R9222-9224].

On January 23, 2014, after the sale of the leasehold had been reported on the internet, McCarthy emailed Foley, falsely telling him that the proceeds had just been received and had not yet cleared the bank; he stated that the accountant would distribute the net proceeds after all bills and taxes are paid and directed him to contact the accountant if he had any questions [R9224, R3240].

Appellants tell this Court that McCarthy was not lying, he was just misinformed [AB at 43], but this cannot possibly be true. McCarthy certainly knew that he, together with Whiston and Slattery, had caused Dubcork to pay $570,000 to secure the new Smithfield space for Moxy and to pay $165,000 in bonuses to themselves.

Appellants also tell the Court that McCarthy was lying but that "this information had nothing to do with the new bar. The misinformation was about the timing of the receipt of the settlement proceeds." [AB at 43]. This too is untrue. The failure to disclose had everything to do with the new Smithfield. Truthful disclosure would have required that Appellants reveal that they had already spent $570,000 of Dubcork's funds on the new Smithfield.

Defendants went to significant lengths to deceive Foley and O'Mahony. Ultimately, O'Mahony received two checks totaling only $192,000,

unaccompanied by any explanation, calculation, or cover letter [R9187]. On May 3, 2014, O'Mahony wrote to Whiston, McCarthy and Slattery stating: "Hey folks simple question; when am I getting the rest of my money?" [R3574-3576]. McCarthy responded, "[t]here will be one more small check from a tax rebate which we should get in the next month. Following that we will be getting a full breakdown from accountant that will be sent to all of us." [*Id.*]. Later, she received another $5,000 as her share of a tax refund. No "full breakdown" was ever provided [R9146].

O'Mahony made numerous additional requests for information, all of which Whiston and McCarthy ignored.

O'Mahony responded: "What about my $84,000 investment?" [*Id.*]. Defendants didn't respond. On June 11, 2014, she wrote: "Hi folks, I was wondering when I'm going to receive my 20% of ALL Smithfield inventory?" [*Id.*]. A few minutes later, she wrote again: "Hi folks, I meant 25%." Defendants did not respond, but Slattery mocked her by telling Whiston and McCarthy "Let's just give her the address and bill for the Bronx – it's all hers." [R3306-3307].

O'Mahony wrote: "Next question: did ADG build the new Smithfield?" Appellants did not respond. Her question demonstrates that Appellants had left Respondents suspended in time, with no updates since the October 2012 proposal by the then landlord, ADG, to build them a "new Smithfield" [R972].

Foley testified to this [R9183].

On June 12, 2014, O'Mahony wrote to Dubcork's accountant, Richard Stampfel, with a copy to Appellants: "Hi Richard, I want to see a copy of every single thing ADG sent to DUBCORK INC./Smithfield." [R3308]. This shows that Respondents did not know that ADG had sold its interest in the property and that Defendants had agreed one year earlier to sell the lease to its successor *Id.* O'Mahony's request was ignored.

Even after Foley and O'Mahony had commenced this action, Whiston, McCarthy and Slattery refused to give Foley and O'Mahony any information about what had happened to the sales proceeds or how the new Smithfield had been financed [R9184]. Only in discovery did Respondents find out that Individual Appellants had used $70,200 of Dubcork's money to pay the deposit for the new space and $500,000 to pay the key money for that space [*Id.*].

Only in 2016, after two years of litigation and under court order to account for the leasehold sales proceeds, did Appellants produce a patently false and inaccurate disclosure document called "Final financial breakdown of Dubcork Inc." ("FFB") [R9236-9441, R2848-2859]. The FFB did not disclose that the leasehold had sold for $1.9 million or that Dubcork had received a $126,000 deposit on the signing of the Stipulation. It misleadingly stated that $170,000 in free rent was not cash. Much of the rest of the FFB is false, misleading, and unsupported by company

records [R9236-9441]. They paid Massey, a 10% shareholder in Dubcork who they upgraded to 20% of Moxy, $221,000, while Foley, a 20% shareholder received $192,0000. It is frivolous for Defendants to claim a waiver or acquiescence to this transaction when they did not even make full disclosure two years after the fact and while under court order.

POINT III

THE TRIAL COURT'S DETERMINATION OF THEFT OF CORPORATE OPPORTUNITY DAMAGES SHOULD NOT BE DISTURBED

The trial court awarded Dubcork $2,820,417 in damages on Dubcork's theft of corporate opportunity claim, consisting of $733,728 of Moxy's reported net income, $110,059 for Moxy's unreported net income, $476,630 for reported goodwill and $1.5 million for five years of Moxy's estimated future profits [R7].

Appellants appeal only one aspect of this damages determination: the $476,630 awarded for stolen goodwill [AB POINT X]. Appellants contend that this goodwill was acquired not from Dubcork, but from Chelsea Manor [R1951-1972]. They point to the fact that $475,000 of the $500,000 that Moxy paid to Chelsea Manor, was allocated to "goodwill" for tax purposes and that this is where the goodwill came from. Appellants assert that "[n]one of the 'goodwill' was created during Defendants' operation of Smithfield Hall, and none of it belongs to Dubcork under any theory." [AB at 45]. This uncategorical statement is unsupported by any references to the record or any legal authority. It is also nonsensical and frivolous.

"Goodwill" is defined as "the value of a trade or business attributable to the expectancy of continued customer patronage," . . . "[t]his expectancy may be due to the name or reputation of a trade or business or any other factor." IRS Regs. Sec. 1.197-2(b)(1). Goodwill may be based on such factors as "the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality." IRS Rev. Rul. 59-60.

Appellants did not reopen Chelsea Manor so as to capitalize on the continued patronage of its customers; they shut it down. They did not use the name Chelsea Manor; they used the name "Smithfield" so they could capitalize on the continued patronage of Smithfield's customers based on the prestige and renown of Smithfield among soccer bar patrons, the ownership of the Smithfield brand name and a record of successful operation at the original Smithfield. The goodwill on Moxy's books could only have come from Dubcork.

POINT IV

THE TRIAL COURT'S PUNITIVE DAMAGES AWARD SHOULD NOT BE DISTURBED

The trial court imposed $100,000 each in punitive damages on Whiston, McCarthy, and Slattery for their "egregious breach of fiduciary duty (*see Don Buchwald & Assoc., Inc. v Rich*, 281 A.D.2d 329, 330 (1st Dep't 2001])" and because "[t]he evidence established that defendants' conduct was intentional,

deliberate and fraudulent. They concealed material information and diverted assets despite their fiduciary status and lied about doing so." [R7] The court said it would have imposed greater punitive damages to deter future wrongdoing, but for the fact that "disgorgement is already a powerful deterrent and this amount, based on the trial record, is significant to these individual defendants." [*Id.*].

On appeal, the Appellants raise the same arguments as they did on the misappropriation of corporate opportunity claim [AB POINT XIII]. As demonstrated above, the evidence amply supports the court's decision to impose punitive damages. This determination should not be disturbed.

POINT V

THE TRIAL COURT'S DETERMINATIONS OF CORPORATE WASTE DAMAGES SHOULD NOT BE DISTURBED

The trial court found that Appellants' accounting was a "mess" and that it was "untimely, incomplete and unreliable." [R8]. Appellants never submitted a proper accounting, despite having many years to prepare one. They never submitted a statement of accounts and verifiable backup, and their multiple submissions were self- contradictory and unsupported by proper evidence [R10-11].

The court found that Dubcork had made $903,445 in unreported cash sales, a number which Appellants and their expert had initially agreed with, but then disputed at trial [R9]. The court gave Appellants credit for $153,500 in loan repayments and $95,274 in other expense payments out of the unreported cash, and

concluded that $648,551 of unreported cash was unaccounted for [R10-11].

The court found Whiston liable for only $28,000 of the $40,000 in shortfall of his capital contribution, and McCarthy liable for only $73,672.91 of the $105,247.02 in payments made by Dubcork to pay his personal credit card bills. The court made an equitable determination that some of the 1,045 generic receipts produced by Appellants probably reflected some Dubcork expenses and gave Whiston and McCarthy 25% discounts on Whiston's capital contribution shortfall and McCarthy's payment of personal credit card bills with Dubcork funds. The court did this notwithstanding the fact that it noted that the receipts could have been expenditures for another bar or for personal expenses [R12-13].

The trial court did this also notwithstanding its negative determinations regarding Appellants' credibility and its statement that Appellants' spoliation of Dubcork's POS data warranted an adverse inference.

> By failing to maintain and produce clear records, defendants are essentially relying on their credibility by asking the court to trust them about the meaning and reliability of the records they managed to cobble together. That is difficult to do. The court did not find defendants to be particularly credible based on observing their demeanor during cross-examination and the fact that they repeatedly lied to plaintiffs about money in the past. Their shifting calculations and explanations provided across the various iterations of the accountings also severely undercut their credibility. … [D]efendants have only themselves to blame for their shoddy recordkeeping and destruction of documents. As previously discussed, if they did not timely provide the requisite proof they will be surcharged (Dkt. 369 at 12; see Dkt. 468 at 4 [conceding shortfall]). Thus, while adverse inferences due to their spoliation of the POS system are warranted, since defendants have the burden to

> account, their destruction of records has the same practical effect of a spoliation sanction – that is, they are liable for amounts for which they lack records. [R8-9]

The court also found the testimony of Appellants' expert, John Johansen, CPA, not to be credible.

> Having carefully reviewed the experts' reports and trial affidavits and having had the opportunity to assess credibility on cross-examination, the court finds defendants' expert, John Johansen, to be unpersuasive. He makes definitive assertions (e.g., about "everyone's understanding") on disputed issues and often does not cite record evidence to support them (*see* Dkt. 945 at 145), proffers opinions on contested issues (the truth of which he could not know since they turn on witness credibility) that were eventually disproven (*see id.* at 146 ["Plaintiffs expert states that Plaintiffs loaned Dubcork $86,600 and Defendants did not pay the loan back to Plaintiffs. This is not a true statement; this was a cash loan and Plaintiffs were given cash payments to pay the loan back"]), and recklessly speculates on matters about which he is unfamiliar (*see id.* at 148 [opining that he "is sure" about Moxy's unreported cash even though he admits he "did not review the analysis"]). His trial testimony also made clear that his analysis was predicated on evidence that, as will be discussed, is insufficient to prove what happened to the unreported cash (*see* Dkt. 1091 at 166-68).
>
> An expert who testifies recklessly, whose testimony comes across as advocacy and not as reliable professional opinion, lacks credibility, particularly where, as here, his opinions are undermined by the credible evidence. The court finds that Johansen is not a reliable expert witness and does not credit his testimony. The only takeaways from Johansen are his admissions that "Dubcork did underreport its cash sales" and that there were no "formal records" showing what happened to the cash and the defendants were only relying on "emails and depositions" (*id.* at 171), as well as his agreement in his rebuttal report, discussed below, about the amount of Dubcork's unreported cash. [R5]

In contrast, the trial court credited and relied upon many aspects of Mr. Blass' testimony, although it did not agree with all of his conclusions [R5]. Judge Schecter stated:

> [Mr. Blass] credibly explained why his estimations were affected by defendants' destruction or failure to produce essential corporate records (*id.* at 2), that "Daily POS reports ... would have provided [him] with a complete record of the reported receipts of Dubcork" but that "the data containing these reports was destroyed in the transition from Dubcork to Moxy" and that he was not provided "daily cash reports showing the daily unreported cash receipts ... despite ample evidence that such receipts were significant and that records of such receipts were maintained" (Dkt. 928 at 8). Yet, based on the records that were provided, he was still able to "estimate that Dubcork underreported its cash sales by approximately $903,445" (*id.* at 13). As noted, defendants' rebuttal report agreed "with this analysis." [R9].

Appellants challenge most, if not all of the court's adverse determinations relating to the accounting.

The Unreported Cash. Appellants argue that their expert erred in agreeing that the unreported cash was $903,433 (sic) [AP POINT XVI, at 52]. They contended that Johansen "changed his methodology" in his second expert's report [AB at 53], but ignored the trial court's admonition that the only changes that would be permitted in the supplemental expert's reports would be updates of numbers. The change of methodology was impermissible.

Johansen also applied his "new methodology" in his trial affidavit and claimed that the unreported cash was $561,000 [Dkt. 963; AB at 55]. Johansen was supposed

to be unbiased in his expert analysis, but he used of the word "we," which indicates he was acting not as an expert, but as Appellants' advocate.

Johansen gave as the basis for his new conclusion an assertion that it was "industry practice" that tips and taxes were paid out of unreported cash [R9556]. But he gave no actual proof that this was "industry practice," or that Appellants had followed this "industry practice."

Whiston's testimony, cited by Appellants [AB at 55], does not state that tips were paid from unreported cash, and in fact this would not be logical, since the whole purpose of not reporting cash is to keep it without paying taxes. Logically, tips would be paid from reported cash – cash receipts that would be taxable income unless offset by expenses, such as tips.

As for sales tax, it is not plausible that Appellants charged customers for sales tax on sales that they didn't report, but somehow still reported this sales tax, but not the underlying sales, on their books and tax returns. Thus, Johansen's last-minute effort to change his report is not credible.

Appellants also argue that the "unreported cash" should be reduced by the amount of the "reported cash" [AB at 54]. As court explained, this too is illogical:

> [T]he notion that such cash was deposited into Dubcork's bank account is implausible, as that would defeat the purpose of trying to keep the cash off the books. Thus, trying to account for some of the unreported cash by relying on deposit records appears to be double counting the reported cash and the court does not credit this portion of the accounting. [R10].

Cash Payments for Business Expenses from Unreported Cash. The trial court examined each of Appellants' claims of cash expenditures and decided them based upon its analysis of the credible evidence. Its determinations should not be disturbed.

The trial court gave Appellants credit for $254,894 [R11], consisting of $153,500 in loan repayments [R10], $6,120 in payments to First Touch for advertising [R10] and $95,274 in payments to employees [R10-11]. Thus, Whiston, McCarthy and Slattery were charged $648,551 for unaccounted for unreported cash ($903,445 - $254,894).

The court rejected Appellants other claims that almost all of the unreported cash was used to pay expenses. It noted that, "Plaintiffs point out that to support these expenditures defendants submitted 'four reports' with 'six different numbers' (*see* Dkt. 1081 at 3)" [this was part of the trial record, but not included in the record on appeal], but that it would give Appellants credit for claimed expenditures of unreported cash that were "consistent across the accountings and substantiated by contemporaneous documentation that was properly and timely produced during discovery" [R10].

The court sustained Respondents' objections to $133,534.83 in claimed cash reimbursements of expenses that "were not included in the original accounting and

for which defendants did not submit credible proof (compare Dkt. 414 at 7, with Dkt. 1043 at 5)" [R11].

The trial court gave Appellants credit for repayment of the $60,000 "mafia loan" [R10]. Appellants are mistakenly appealing the denial of this claim.

The court explained why it had rejected the claim of repayment of a $155,000 loan to Bryan Tynan: "The alleged $155,000 loan repayment to Brian Tynan is excluded because it was not listed in the email listing Dubcork loans and because Tynan testified that this was paid for construction costs and not a loan repayment" [*Id.*].

It also explained why it had rejected Appellants claim for a credit for repaying the $86,600 Foley loan, stating that the "alleged $86,600 they claim they paid Foley is also not listed [in the email listing Dubcork's loans]. McCarthy testified that he had no recollection of repaying that loan" (Dkt. 1094 at 32) [R10]. Appellants do not appeal this decision.

As for the alleged $98,000 in payments to Michael Callahan and Robbie York, Appellants failed to prove that these expenses were paid from unreported cash – as opposed to reported cash. As already noted, it is not plausible that a business would pay expenses from unreported cash, since the entire goal is to keep unreported cash without paying taxes. Appellants did not even make an effort to show that these expenses were "consistent across the accountings and substantiated by

contemporaneous documentation that was properly and timely produced during discovery" [R11].

The trial court rejected Appellants argument that Appellants should not be liable for $70,500 inventory that was not accounted for.

> Defendants are also liable for misappropriating $70,500 of Dubcork's inventory (*see* Dkt. 941 at 14-15). It is axiomatic that managers of a company have a duty to maximize the recovery of a company's assets when winding it down. While strategic decisions about how to best monetize assets are protected by the business judgment rule, simply walking away with the inventory is not. Failing to compensate the company for any remaining liquor is corporate waste. [R12].

Defendants appeal this not by showing that they accounted for the inventory, but by pointing to Slattery's anecdotal testimony that there was not much inventory left after the end of 2013, and that some went back to suppliers [AB POINT XI]. The trial court's decision should not be disturbed.

Appellants claim that the trial court erred in not giving Whiston credit for the $40,000 shortfall in his capital contribution [AB POINT XII]. The contemporaneous documentary evidence shows that Whiston only contributed $10,000 of the $50,000 capital contribution he was obligated to make to Dubcork; he said he didn't have the money and wouldn't borrow it [R9195-9197, R2873, R2874, R2913]. At trial, Whiston, who was in charge of Dubcork's books and records, did not produce any financial records showing he had paid any part of this $40,000.

Nowhere in the documents produced by Appellants and referred to in their brief does it state that the referenced expenditures were by Whiston of his personal funds in payment of his capital contribution. Nowhere does Liliana Cruz Lopez say this. Dkt. 446, which Appellants cite to, merely states "Gavin $39,802.17" in a long list of expenses paid by Dubcork. The obvious meaning of this entry is that Dubcork paid Whiston $39,802.17. Appellants contention that this sum, unlike all the others on the chart, was actually paid by Whiston for Dubcork is implausible, as is the unsupported assertion that it was paid by him as his capital contribution. If Whiston had paid $40,000 towards his capital contribution, undoubtedly he would have listed it in Dubcork's books. As noted the trial court determined that Whiston was liable for $28,000 as the shortfall in his capital contribution [R12].

Appellants incorrectly claim that the court made a $5,000 mathematical error [AB at 51]. The error is Appellants and is a result of them asserting that the court gave them credit for the $65,000 Massey loan, when it gave them credit for the $60,000 Mafia loan [R10].

POINT VI

THE TRIAL COURT'S FINDING THAT ALL APPELLANTS ARE LIABLE FOR THE REPAYMENT OF FOLEY'S $86,397 LOAN SHOULD NOT BE DISTURBED

The trial court found all Appellants liable for the repayment of the Foley loan, stating that:

> Whiston, McCarthy and Slattery are personally held liable on a veil-piercing theory since the credible evidence makes clear that they completely dominated Dubcork, abused its corporate formalities and stripped all of its value, transferred money to themselves and made it an empty shell that is unable to repay the loan (*see Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020]). Moxy also is held liable as the alter ego of Dubcork since all of the value that could have been used to repay the loan was transferred to it (*Moss v Garcia-Chamorro*, 110 AD3d 475, 476 [1st Dept 2013], citing *Schumacher v Richards Shear Co.*, 59 NY2d 239, 247 [1983]; *see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176 [1st Dept 2013]). [R13].

This finding should not be disturbed.

In Appellants' appeal of this ruling [AB POINT IV], they misquote the trial court's decision,[1] cite no caselaw and resort to illogic. Appellants' argument is truly frivolous: they claim that they should not be liable personally to repay the Foley loan because eight years after they should have repaid it, the court made Dubcork solvent by entering a judgment in its favor against Appellants.

POINT VII

THE TRIAL COURT'S AWARD OF REASONABLE ATTORNEYS FEES AND EXPENSES SHOULD NOT BE DISTURBED

An award of reasonable attorneys' fees is within the sound discretion of the court. *See JK Two LLC v. Garber*, 171 A.D.3d 496, 496-497 (1st Dep't

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[1] Appellants state that "The court described Dubcork as 'an empty shell unable to repay the loan'" when the court actually stated that Appellants "stripped all of its value, transferred money to themselves and made it an empty shell that is unable to repay the loan." [R13].

2019). "In determining what constitutes reasonable attorneys' fees, the court should consider, among other things, the time, labor and skill required, the difficulties involved in the matter, the lawyer's experience, ability and reputation, the amount involved and the results obtained." *S.T.A. Parking Corp. v Lancer Ins. Co.*, 128 A.D.3d 479, 480 (1st Dep't 2015) (*citing Matter of Freeman*, 34 N.Y.2d 1, 9 (1974)). The determination of reasonable attorneys' fees can take into account "whether a party has engaged in conduct or taken positions resulting in delay or unnecessary litigation." *Cohen-McLaughlin v McLaughlin*, 132 A.D.3d 716, 718 (2d Dep't 2015).

After reviewing SGA's billing records and considering the value of the judgment to the company, the trial court awarded $1.8 million in attorneys' fees and expenses to be paid by Dubcork.

SGA had submitted detailed billing records which showed $2,141,612 in time expended and $185,733 in expenses incurred for a total of $2,327,345, over a 10-year period. Thus, the fee and expense award represents an almost 25% reduction from the award sought by Respondents. If the total award is split pro-rata, the fee award is $1,656,351.59 and the expenses award is $143,571.61.

The amount of the recovery on behalf of the corporation was $5,211,976.37 (including pre-judgment interest), so the award is less than one-third of the recovery.

In their brief, Appellants do not mention that the trial court had reduced the fee and expense award by over $500,000. In their opposition to the fee application in the trial court, Appellants had raised every conceivable argument for a reduction, including block billing, vague entries, duplicative entries, excessive time and unnecessary work [R10361-10907]. Appellants attached seven schedules to their brief showing SGA's billing reports and highlighting entries that they claimed fell into one of these categories. They also argued that SGA had spent substantial time on direct claims, but did not show any entries supporting this contention. Instead, they argued that SGA's fee application was deficient because it did not break out separately time spent on direct claims. They argued that SGA's fee award should be reduced by 50% because half of the causes of action in the second amended complaint were denominated as direct claims [*Id.*]. The trial court rejected this argument stating that:

> The work performed was overwhelmingly focused on those derivative claims. 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 and only represents a small percentage of the judgment [R17].

The court reduced Respondents' fee and expense request by around 25%, citing "some excessive billing" and that "the amount sought is excessive relative to the judgment." [R18]. But it stated that "the more drastic reductions sought by defendants are unwarranted." [*Id.*].

After Respondents submitted a proposed judgment for the fee award [Dkt. 1124], Appellants moved for an order "denying or modifying" it [Dkts. 1125, 1126]. But their material arguments were directed not at the proposed judgment, but at the court's decision preceding it. They contended once again that the time spent on direct claims was substantial, claiming that if you counted pages in certain documents filed by Respondents that contain "in whole or in part" anything relating to direct claims, this would show that 63% of the pages in such documents related to direct claims [AB at 8-10]. Yet they did not actually identify these pages and cited no legal authority supporting their methodology.

Appellants also argued that SGA's fee should be reduced to what they said SGA would have received under its retainer letter – which they claim was 30% of the named plaintiffs' share of the recovery by the corporation, or $300,000 [AB POINT II]. However, they did not provide a copy of the retainer letter or any other proof of what they said the retainer stated, nor any legal support for their argument.

The trial court rejected this motion, stating "though not denominated as such, defendants' motion seeks reargument of the fee award. The court will not consider arguments that were not previously made in opposition to the fee application, nor did defendants identify anything that was overlooked (see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27-28 [1st Dept 1992])." [R21].

Appellants appeal the decision on the motion to reargue, and present these same two arguments to this Court, without mentioning that the trial court had rejected them as having been improperly first raised on a motion to reargue.

This Court should not consider these arguments because "no appeal lies from the denial of a motion to reargue." *Avail 1 LLC v Acquafredda Enters. LLC*, 184 A.D.3d 476, 477 (1st Dep't 2020) (citing *Kaplan v U.S. Coal Corp*., 115 A.D.3d 517, 518, (1st Dep't 2014); *Zacharius v Kensington Publ. Corp.*, 167 A.D.3d 452, 453 (1st Dep't 2018) ("Plaintiff's contention that certain specific entries in defendants' time records are excessive is improperly raised for the first time on appeal. In any event, as indicated, the Special Referee did not award defendants' attorneys 100% of the fees they requested.") (citation omitted)).

But these arguments are not just improperly raised in the trial court and in this appeal, they are quintessentially frivolous. They are based on no existing case law or an argument for extension of existing caselaw, nor any identified verifiable facts. Counting pages in selected documents that "in whole or in part" relate to direct claims is also a poor indicator of how much time was spent on direct claims.

Moreover, a substantial portion of the time spent by SGA on this case was spent on trying to address and overcome Appellants' repeated failures to comply with their discovery obligations and their duty to account, as well as their constantly changing factual assertions, repeated untimely "discoveries" of new evidence and

new witnesses [*see* R9154-9155] and their perpetually changing and contradictory "accountings." As the trial court noted, "defendants' discovery conduct was among the most troubling this court has experienced" and that "protracted ESI disputes, a document dump and multiple conflicting accountings are just the tip of the iceberg." [R18].

Appellants list a series of items that they purport relate to direct claims [AB at 8]. They are hard to classify, but the first three (prevented from working shifts, empty pay envelopes, and hostile environment) are not claims pursued in this lawsuit and the last four are elements of derivative claims for breach of fiduciary duties. The only direct claim that was pursued was one for the repayment of the Foley loan. If there were others, the trial court would have had to dispose of them in its decision and there is no mention of them.

Further, "[a]ttorney's fees may be awarded for unsuccessful or 'uncovered' claims where they are 'inextricably intertwined' with claims arising under the fee-shifting statute or where statutory and unrelated common-law claims 'involve a common core of facts or are based on related legal theories.'" *Orser v. Wholesale Fuel Distribs.-CT, LLC*, 65 Misc. 3d 449, 453 (Sup. Ct. Greene Co. 2018) (citing *Quaratino v Tiffany & Co.,* 166 F.3d 422, 425 (2d Cir. 1999) (internal quotation marks and citations omitted). The claim for repayment of the Foley loan was intertwined with the breach of fiduciary duties claims relating to the improper

distribution of the leasehold sales proceeds. A strong argument can be made that this time is also compensable.

As for their other argument, Appellants assert that SGA's retainer letter states that the fee is equal to 30% of Respondents' share of the derivative recovery [AB POINT II]. This argument is based on self-created "legal principals" and unsubstantiated and untrue factual assertions.

Appellants announce that "'Reasonable attorney's fees' is the cap, not the measure, of a fee award under BCL 626(e)" and "'Reimbursement' is the standard, so 'actually incurred' is the measure." [AB at 11]. These "principles" are contrary to the extensive body of case law that exists relating to attorneys' fee awards. BCL 626(e) authorizes the Court to award "reasonable expenses, including reasonable attorneys fees"– there is no mention of "actually incurred" or "reimbursement." The fee is charged to the corporation benefitting from the derivative action, and its purpose is to incentivize counsel to undertake actions on behalf of the corporation. Limiting the fee award to what the named plaintiff agreed to pay under its retainer letter for a recovery by the named plaintiff would defeat the purpose of the statute. Often, the amount recovered by the named plaintiff is negligible, whereas the amount recovered by the corporation is substantial.

Moreover, Appellants do not provide a copy of the retainer agreement and their assertions of what it contains are false. In fact, the contingency fee is based on

anything recovered and not plaintiffs' share of the recovery, as Appellants contend. This Court can also take judicial notice that it is inconceivable that a law firm bringing a derivative action on behalf of a corporation would limit its recovery to the plaintiffs' share of the recovery.

Contrary to Appellants' allegation [AB at 4], Respondents will not be making a "huge profit" on the fee award.

Respondents contend that the Blass invoice should be reduced because at trial Blass testified, "I haven't calculated all the hours, but I am due something more than $50,000 at this point" [AB POINT III, at 13]. From this Appellants ask this Court to conclude that Blass' hours were not much more than $50,000. There is nothing in Blass' statement that supports such a conclusion, especially since he said he hadn't calculated the hours. Further, Appellants do not explain why the 25% reduction the court granted on Blass' time is insufficient to cover all of their other claims. In fact, they do not even acknowledge that the trial court reduced Blass' fee by 25%, so their request is remarkably disingenuous and could be considered frivolous.

As for the non-Blass disbursements, Appellants raise a litany of complaints, but nowhere mention the trial court's 25% reduction in the expense award or why this was insufficient to account for them [AB at 16-17]. These arguments should also be considered frivolous – seeking relief that had already been granted and not disclosing this fact.

Mendez v. Radec Corp., 2012 US Dist Lexis 15706 WDNY, which Appellants refer to, appears to be a miscite. *Mendez v. Radec Corp*., 907 F. Supp. 2d 353, 2012 U.S. Dist. LEXIS 157066, 2012 WL 5389138, does not stand for the proposition that bills and receipts are required to be submitted with expense records.

POINT VIII

DEFENDANTS' CLAIMS RAISED FOR THE FIRST TIME ON THIS APPEAL SHOULD BE REJECTED

Defendants raise three claims for the first time on this appeal. They seek (a) a reduction of $17,239 in their obligation to repay the Foley loan "on account of Plaintiff's excess distribution" [AB POINT V]; (b) an "adjustment" of their liability to Dubcork on account of the "$197,000 distribution that O'Mahony has already received" or $197,000 for each of the Individual Appellants or a $788,000 reduction in the amount of the award to Dubcork [AB POINT VI]; and (c) a setoff for Appellants' uncompensated time in emptying Smithfield [AB POINT XIV].

These claims should be summarily denied as improperly raised. Even if they are viewed as arguments, and not claims, they should be rejected because the issues were unpreserved, and their resolution involves fact issues not raised below. *Caminiti v Extell W. 57th St. LLC*, 166 A.D.3d 440, 441 (1st Dep't 2018). They should also be rejected because they are completely devoid of merit.

Appellants contend that had they repaid the Foley loan in 2014, there would have been $86,399 (sic) less in cash to distribute, so they should get a credit for the

$17,279 less that Foley would have received in distributions – again had they repaid the loan [AB at 17]. This argument is very strange, indeed. They are looking for a credit for not repaying the loan! Moreover, Appellants have produced no evidence that they actually paid Foley/O'Mahoney 20% of the net profits of Dubcork and have never claimed that they did; only that they gave them what they considered to be their "fair share." [AB at 57].

They also have never accounted fully for Dubcork's revenues or the leasehold sales proceeds.

Finally, if and when Appellants repay the Foley loan with interest as required under the April 11, 2023 Judgment, this will reduce the cash available for distribution to the shareholders – including Foley – at that time. If they were to get a credit now and then pay the Judgment, they would in essence be receiving a double credit. Thus, the claim is not just strange, it has no basis in law or in fact, and is truly frivolous.

As for the claimed "$197,000 adjustment" that the Appellants are seeking [AB POINT VI], this claim is new and it is also disingenuous. This credit is for the $192,000 Respondents received out of the leasehold sales proceeds and the $5,000 they received as their share of a tax refund.

Appellants never accurately and completely accounted for the leasehold sales proceeds. They cannot seek a credit for money they did pay without fully accounting for the entire proceeds. According to Blass, Dubcork should have paid Respondents

$321,524 out of the proceeds [R9114]. If there is a truing up, Foley should receive another $130,000 from Appellants. The trial court never addressed this issue.

Appellants pursue this untimely and frivolous claim by upping the ante – not once, but twice. Appellants claims that they should receive "at a minimum" $197,000 for each of them so that they would have received the same amount as Foley [AB at 18-19]. In other words, they want each of the three Individual Appellant tortfeasors to be repaid the funds they used to breach their fiduciary duties to Dubcork and then some. No caselaw, no facts, no logic – just a fantastic wish that does not belong in an appeal to this Court.

But Appellants do not stop there. They state that what they should really get is a reduction of $788,000 in the misappropriation of corporate opportunity damages due Dubcork – claiming a setoff of $197,000 for each of the three of them and the 20% non-party shareholders [*Id.*]. Again, what they are really saying is that since they got caught stealing Dubcork's business opportunity, they should get back the money they used to steal the opportunity and then some. Once again, no caselaw, no facts, no logic – just a fantastic wish that does not belong in a proper appeal.

Lastly, Appellants' claim that they should be compensated for the extra work they did while stealing the Smithfield business from Dubcork [AB POINT XIV]. They claim that they had to work 12-hour days for 14 straight days to deliver the Smithfield premises "broom clean," as required by the Stipulation of Settlement with

the landlord. As already demonstrated, they did not have an obligation to leave the premises broom clean – but they did need time to despoil Dubcork and misappropriate all of its assets.

There is surely no legal precedent that states that a court should award extra compensation to business owners who did "extra work" while they were breaching their fiduciary duties. In fact, the opposite is true. Had Individual Appellants caused Dubcork to pay them for this work, these payments would have been subject to disgorgement. *See Excelsior 57th Corp. v. Lerner, et al.*, 160 A.D.2d 407 (1st Dep't 1990); *People v. Ernst & Young LLP*,114 A.D.3d 569 (1st Dep't 2014). The court could also have applied the "faithless servant doctrine," under which Appellants would forfeit all of their compensation while they were in dereliction of their fiduciary duties over the past decade. *Barasch & McGarry, PC v. Marcowitz*, 2022 N.Y. Misc. LEXIS 2106 (Sup. Ct. N.Y. Cty 2022) (*citing Feiger v Iral Jewelry, Ltd.*, 41 N.Y.2d 928 (1977) ("One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"); *Art Capital Group, LLC v Rose*, 149 A.D.3d 447, 449 (1st Dep't 2017) ("New York's strict application of the faithless servant doctrine mandates the forfeiture of all compensation . . . where . . . one who owes a duty of fidelity to the principal is faithless in the performance of his services") (citations and quotations omitted).

Appellants' citation to Dkt. 1060 is improper as it is a text of settlement discussions between Foley and Whiston. It is not in evidence in this case, and it is not relevant to the issues at bar. This is yet another effort by Appellants to besmirch Respondents and misguidedly claim that "equity" is in their favor.

Appellants' new claims seeking to be rewarded for breaching their fiduciary duties, demonstrate a complete lack of comprehension of those duties or of the wrongfulness of their conduct. So does their admission that they didn't do everything perfectly, in which they only admit to not holding a shareholders meeting and that they never paid Dubcork for what they took from it [AB at 56].

At the same time that they show no understanding of how pernicious their conduct was, they continue to attack Foley and O'Mahony with false allegations and argue that because they did everything and Foley did nothing, "equity" requires that the court find for them [AB at 56-57]. Respondents believe that these types of scurrilous factual allegations (and Respondents' necessary responses thereto) are what the trial court was referring to when it spoke about the "immaterial facts to which the parties devoted much of their attention." [R3].

Respondents' arguments seeking compensation for breaching their fiduciary duties and arguing that equity supports them, indicate that the punitive damages awarded by the trial court is insufficient to deter them from engaging in similar conduct in the future.

CONCLUSION

This appeal should be denied in all respects.

Dated: December 13, 2023

Respectfully submitted,

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