SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

----------X

DAVID MOYAL, derivatively on behalf of GROUP IX, INC.,

Plaintiff,

- v -

STU SLEPPIN, BOB TEEMAN and TELECOM SWITCHING, INC.,

Defendants.

----------X

Index No.	601973/2007
Trial Dates	Oct. 16-20, 2017
Post-Trial Submissions	Feb. 09, 2018

BRANSTEN, J.

OPINION OF THE COURT

Before the Court are Plaintiff David Moyal's derivative claims, brought on behalf of Group IX, Inc. ("Group IX" or the "Company"), for breach of fiduciary duty and unjust enrichment, and Defendants Stu Sleppin's, Bob Teeman's (collectively the "Individual Defendants"), and Telecom Switching, Inc.'s ("TSI") counterclaim for unjust enrichment.

This bench trial commenced on October 16, 2017 and concluded on October 20, 2017.[1] In this nonjury trial, the Court determined both issues of fact and questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony and generally determined the reliability of the witnesses' testimony. *See Horsford v.*

[1] The trial was not held on October 18, 2017.

Bacott, 32 A.D.3d 310, 312 (1st Dep't 2006), *aff'd*, 8 N.Y.3d 874 (2007). The Court also considered the interest or lack of interest in the case and the bias or prejudice of the witnesses. *See People v. Ferguson*, 178 A.D.2d 149, 149 (1st Dep't 1991).

I. PROCEDURAL HISTORY

Plaintiff commenced this action by Summons and Complaint filed on June 13, 2007.[2] On or about July 20, 2007, Defendants moved to dismiss the Complaint in its entirety. By Decision and Order dated October 10, 2007, Justice Moscowitz granted Defendants' motion without prejudice and allowed Plaintiff to replead. On November 9, 2007, Plaintiff filed his First Amended Complaint, which contained nine causes of action, both individually and derivatively, for (1) breach of the Shareholders' Agreement, (2) breach of the joint venture, (3) breach of fiduciary duty, (4) a derivative claim for breach of fiduciary duty, (5) fraud, (6) an accounting, (7) a derivative claim for unjust enrichment, (8) constructive trust, and (9) breach of the non-compete agreement.

On December 27, 2007, Defendants moved to dismiss the First Amended Complaint. By Decision and Order, dated June 27, 2008, this Court granted Defendants' motion to dismiss in part, dismissing Plaintiff's claims for breach of the joint venture, breach of fiduciary duty, an accounting, and constructive trust. The Court denied Defendants' motion to dismiss Plaintiff's claims for breach of the Shareholders'

[2] This case was initially assigned to the Honorable Karla Moscowitz.

Agreement, derivative claim for breach of fiduciary duty, fraud, and derivative claim for unjust enrichment. Defendants filed their Answer to the Amended Complaint on July 3, 2008 and alleged a counterclaim against Plaintiff for unjust enrichment.

On June 23, 2011, Defendants moved for summary judgment dismissing Plaintiff's remaining claims and granting judgment for Defendants on their counterclaim. By Decision and Order, dated May 30, 2012, this Court granted Defendants' motion dismissing Plaintiffs' claims and denied the motion on Defendants' counterclaim. Plaintiff subsequently appealed this Court's decision. By Decision and Order, dated December 3, 2013, the First Department modified this Court's May 30, 2012 Order and reinstated Plaintiff's derivative claims for breach of fiduciary duty against Defendants Teeman and Sleppin and unjust enrichment against TSI.

This matter was to be tried by a jury in November 2015. On October 14, 2015, Defendants moved to strike Plaintiff's jury demand and Plaintiff cross-moved to re-assign the case to another justice for trial. (Motion Seq. 013.) By Decision and Order dated November 4, 2015, this Court denied Defendants' motion and Plaintiff's cross motion. On appeal, the First Department modified this Court's November 4th Decision and Order and struck Plaintiff's jury demand. (NYSCEF No. 241.)

II. MOTIONS *IN LIMINE*

Prior to trial, both Plaintiff and Defendants filed motions *in limine* to preclude evidence (Motion Sequences 016 & 017 respectively).[3]

A. Defendants' Motion *in Limine*

Defendants filed a motion to preclude Plaintiff from offering the expert testimony of Scott C. Chandler at trial. Defendants argue Chandler's testimony should be precluded because he is unqualified to testify as an expert and Plaintiff's CPLR 3101(d) expert disclosure was deficient.

Defendants assert Chandler's conclusion on the cost of rack space in New York was not based on personal knowledge or record evidence. Defendants further argue that Chandler lacked an understanding of Group IX's business. Specifically, Defendants assert Chandler did not address that Group IX's facility did not have a back-up generator, ignored that 20 amps of electricity was included in each customer's initial rack rate, and analyzed circuits and lines that Group IX did not sell.

Nevertheless, at trial, "it falls to the opponent to the testimony to bring out weaknesses in the expert's qualifications and foundational support on cross-examination." *Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998). "Any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of

[3] The parties previously filed motions *in limine* on October 20, 2015 (Motion Sequences 014 & 015). These motions are denied as moot.

the testimony." *Bd. of Managers of 195 Hudson St. Condo. v. 195 Hudson St. Assoc., LLC*, 63 A.D.3d 523, 524 (1st Dep't 2009). Therefore, Defendants' motion to preclude based on Chandler's qualifications as an expert is denied.

Defendants also argue Plaintiff's CPLR 3101(d) disclosure was deficient because it failed to disclose any of the opinions Chandler would be proffering at trial. Pursuant to CPLR 3101(d), a party "shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." Although Plaintiff never disclosed the underlying data, Plaintiff disclosed the topics of Chandler's testimony. The statute does not require disclosure of every fact and detail of the opinion. Thus, the Court finds Plaintiff's expert disclosure was sufficient.

For the foregoing reasons, Defendants' motion *in limine* is denied.

B. Plaintiff's Motion *in Limine*

Plaintiff filed a motion to preclude (1) evidence or testimony relating to Defendants' counterclaim to recover alleged "advances on profit," (2) evidence or testimony relating to allegations that Plaintiff stole electricity from Group IX, (3) Defendants' expert testimony, and (4) documents Defendants have not previously produced in this litigation.

1. *Evidence Relating to Defendants' Counterclaim*

Plaintiff argues any evidence or testimony relating to the alleged "advances on profit" should be precluded because Defendants lack standing to assert the Counterclaim. Plaintiff argues that any claim for unjust enrichment would belong to Group IX and not the Individual Defendants. However, Plaintiff failed to raise standing as an affirmative defense in his Answer to the Counterclaim or in opposition to Defendants' motion for summary judgment. Accordingly, Plaintiff waived the defense of lack of standing. *See Centaur Props., LLC v. Farahdian*, 29 A.D.3d 468, 468 (1st Dep't 2006) (holding defendant waived its claim that plaintiff lacked standing). Therefore, Plaintiff's motion to preclude evidence relating to Defendants' counterclaim is denied.

2. *Evidence Relating to Claims of Electricity Theft*

Next, Plaintiff seeks to preclude evidence regarding allegations that Plaintiff diverted electricity from Group IX to another business located in the building. These claims were addressed in a separate action captioned *Group IX, Inc. v. Next Printing & Design, et al.*, Index No. 601034/2007 (Sup. Ct. N.Y. Cnty.) (the "Next Printing Action"). The Next Printing Action was voluntarily discontinued pursuant to a Stipulation of Discontinuance with Prejudice, dated June 22, 2012. (NYSCEF No. 280.) The Stipulation explicitly provides it "is not an admission of liability, and cannot be used in any litigation for any reason . . . ." (*Id.* ¶ 5.) The Court will not permit these claims to be relitigated.

Defendants argue they are not attempting to relitigate the electricity issue. Rather, Defendants argue they seek to use the facts underlying the Next Printing Action to demonstrate that Plaintiff has unclean hands and breached his own fiduciary duties to Group IX. Even if the Court permitted Defendants to proffer evidence relating to the stolen electricity claims, Defendants' proposed trial exhibit list does not contain any exhibit from which the Court could draw any inference of electricity theft. There are no electrical bills, meter readings, invoices or other documents that could be introduced as evidence of stolen electricity. Therefore, Plaintiff's motion to preclude evidence relating to allegations that Plaintiff stole electricity from Group IX is granted.

3. *Defendants' Expert*

Plaintiff argues Defendants' expert testimony should be precluded because Defendants failed to provide adequate expert disclosure. Plaintiff asserts Defendants failed to identify an expert witness until the eve of the first trial date, in October 2015.

In order to preclude a party from using a witness based on a late disclosure under CPLR 3101(d), an adverse party must prove "prejudice" as well as "willfulness." *See Martin v. TBTA*, 73 A.D.3d 481, 482 (1st Dep't 2010). Defendants argue Plaintiff cannot argue it suffered any prejudice because Plaintiff has known about Defendants' expert for over two years. In addition, Defendants argue Plaintiff failed to serve Defendants with a demand for expert discovery. Accordingly, the Court finds there was no prejudice to Plaintiff and Plaintiff's motion to preclude Defendants' expert is denied.

4. *Documents Not Previously Produced in Discovery*

Finally, Plaintiff argues Defendants' proposed exhibit list contains documents that Plaintiff specifically requested during discovery, but Defendants never produced. These documents include Group IX invoices, certain banking account statements, and a newly-fabricated general ledger for Group IX. As an initial matter, Defendants agreed to use the general ledger proffered by Plaintiff. Thus, Plaintiff's motion to preclude the general ledger is moot.

At trial, Defendants proffered the following exhibits that were subject to Plaintiff's motion to preclude: Group IX invoices for RTS Plus LLC (Defendants' Exhibit ("DX") JJ) and Group IX invoices for Next Encounter Inc. (DX LL).[4] Pursuant to CPLR 3126, if a party "refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusals as are just." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Glob. Strat Inc.*, 22 N.Y.3d 877, 880 (2013).

To invoke the drastic remedy of preclusion, the Court must determine that the offending party's lack of cooperation with disclosure was "willful, deliberate, and contumacious." *Holliday v. Jones*, 36 A.D.3d 557, 557 (1st Dep't 2007). Defendants

[4] In his motion *in limine*, Plaintiff sought to preclude the following exhibits from Defendants' list of proposed trial exhibits: Exhibits II, JJ, KK, LL, MM, NN, OO, PP, TT, UU, VV, and WW. Of those documents, Defendants only sought to introduce Exhibits JJ and LL at trial. Accordingly, the Court will limit its analysis of Plaintiff's motion to preclude to those two exhibits.

assert the Group IX invoices were produced during discovery. Defendants further argue that even if the documents were not produced, Group IX's sales journal was produced, which shows all customers and payments made by those customers pursuant to the customer invoices. Plaintiff fails to substantiate his claim that Defendants failed to produce the documents during discovery or that any failure to produce was willful and deliberate. Therefore, Plaintiff's motion to preclude Defendants' Exhibits JJ and LL is denied.

For the foregoing reasons, Plaintiff's motion *in limine* is granted in part, such that Defendants' are precluded from proffering evidence related to their claim that Plaintiff stole electricity from Group IX, and otherwise denied.[5]

III. WITNESSES

At trial, the Court heard testimony from the following witnesses: (1) Plaintiff David Moyal, Treasurer and shareholder of Group IX; (2) Defendant Stu Sleppin, President and Chief Executive Officer of Group IX; (3) Defendant Bob Teeman, Executive Vice President of Group IX and sole owner of Defendant TSI; (4) non-party Peter Golomb, Secretary of Group IX; (6) Scott C. Chandler, Plaintiff's expert, and; (7) Erik Levitt, Defendants' expert.

[5] Notwithstanding the Court's rulings on the motions *in limine*, the Court permitted the parties to raise objections to the admissibility of evidence when it was presented at trial.

Plaintiff offered Scott C. Chandler as an expert witness on colocation. Chandler runs Franklin Court Partners, a Denver, Colorado based boutique consulting firm that specializes in telecommunications. (Tr. 423:16-424:2.) At Franklin Court Partners, Chandler has performed valuation, profitability, and other analyses for colocation facilities. (Tr. 424:17-425:10.) Chandler is familiar with the market for colocation services New York City. Finally, Chandler has provided litigation and arbitration support and has been qualified as an expert for colocation facilities in two prior trials. Chandler was qualified at trial as an expert in colocation, without objection.

Defendants offered Erik Levitt as an expert witness on colocation. Levitt is the CEO of Open Data Services, a commercial Tier II colocation facility in Piscataway, New Jersey, President and CEO of First Point Communications, a nationwide retail telecommunications carrier, and President and CEO of Instream Communications, a nationwide wholesale telecommunications provider. (Tr. 615:8-16.) Levitt has been involved in the telecommunications business since 1990 and has managed and maintained datacenter facilities in various capacities since 1995. (Tr. 615:20-616:3.) Two of the datacenters that Levitt operated were located in New York City. Levitt operated one datacenter located at 75 Broad Street on a day-to-day basis from 2002-2007, as President and Chief Operating Officer of the managed services division of Axis IT. (Tr. 618:7-619:5.) In his capacity as President and COO of Axis IT, Levitt priced rack space, cross-connects, and power at the colocation facility hundreds of times. Levitt was qualified at trial as an expert in colocation, without objection.

Having reviewed the parties' submissions and having reflected upon the evidence submitted at trial, the Court renders the following findings of fact and conclusions of law.

IV. FINDINGS OF FACT

A. Background

This action arises out of a dispute between the shareholders of a colocation business called Group IX. Plaintiff alleges the Individual Defendants breached their fiduciary duty to the Company by using Group IX to benefit their own individually-held companies at Group IX's expense. In their counterclaim, Defendants allege Plaintiff has been unjustly enriched by retaining monthly payments he received from Group IX from August 2002 to February 2007.

1. *The Colocation Business Generally*

A colocation facility is datacenter where businesses can house and operate their computer and telecommunications equipment. (Tr. 32:13-33:3.) This is sometimes referred to as a "Dotcom Hotel." At the time Group IX went into operation, computers were dependent on access to hubs in order conduct their internet businesses. Most of Group IX's customers were involved in prepaid telephone cards or related businesses. Group IX rented rack space to store customers' equipment and also provided ancillary services, such as access to high speed internet connections, cross-connects to large telecommunication carrier hubs, climate control and significant electrical power

necessary to run the sophisticated computer equipment housed on the racks. (*See* Tr. 32:13-33:2; 530:6-9.)

2. *The Shareholders' Agreement*

In 1998, Teeman, Sleppin and non-party Peter Golomb approached Plaintiff with a proposal to start a colocation business that would later be called Group IX. At the time, Plaintiff was a principal of One Two One Varick, LLC, which owned a commercial cooperative unit located on the sixth floor of 121 Varick Street. The parties agreed that Plaintiff would prepare the building for colocation and lease space to Group IX at a below market rate. Then, the Individual Defendants and Golomb would run the business and Plaintiff would be a "silent partner." In September 2000, Group IX signed a commercial lease (the "Lease") with One Two One Varick, LLC to lease one half of the sixth floor of the building (the "Premises").

On October 4, 2000, Plaintiff David Moyal and Shtarkercom LLC, an entity wholly owned by Teeman, Sleppin, and Golomb, entered into a shareholder's agreement for Group IX (the "Shareholders' Agreement"). (Plaintiff's Exhibit ("PX") 1; Tr. 29:3-14.) Pursuant to the Shareholders' Agreement, Plaintiff was a 50% owner of Group IX. Teeman, Sleppin, and Golomb split the remaining 50% through their shares in Shtarkercom LLC.

The Shareholders' Agreement provided that Sleppin would serve as the President and Chief Executive Officer of Group IX, Teeman would serve as the Executive Vice

President, Golomb would serve as Secretary, and Plaintiff would be Treasurer. (PX 1 ¶ 8(B).) Group IX did not appoint a board of directors and the parties did not receive salaries from Group IX. (Tr. 303:10-12.) Instead, the Shareholders' Agreement provided that Group IX would distribute net profits in excess of working capital requirements to the shareholders on a monthly basis. (PX 1 ¶ 9.)

The Shareholders' Agreement also provided Plaintiff with additional rights. Plaintiff was to receive financial statements from Group IX on a monthly basis. (PX 1 8(D).) In addition, the Shareholders' Agreement provided that if Group IX did not meet certain revenue targets, Plaintiff could terminate the Lease and recapture the Premises from Group IX. (PX 1 ¶ 8(c)(iii).)

3. *The TSI Contract*

Teeman formed TSI in January 1999 to provide switch partitioning services for customers. Teeman is the sole owner of TSI and receives a salary of $150,000 a year from TSI. (Tr. 166:3-168:22.) One of TSI's customers was non-party Global Rock Networks, which is wholly owned by Stu Sleppin. Global Rock Networks paid TSI more than $1,000,000 per year for its services. (Tr. 229:7-230:12.)

Prior to the formation of Group IX, Plaintiff was aware that Teeman owned TSI, which was located at the time at a colocation facility at 60 Hudson Street. (Tr. 30:23-31:5.) Plaintiff also knew that TSI was looking for a new location for its equipment and Plaintiff allowed Teeman to store some equipment at the Premises at the end of 1998.

(Tr. 30:12-32:12.) Thus, when the parties entered into the Group IX Shareholders' Agreement in October 2000, Plaintiff was aware of TSI's business and TSI was already located at the Premises. (Tr. 78:6-8.)

From Group IX's inception, the parties anticipated that Group IX would do business with other entities that were owned or controlled by its shareholders. All of Group IX's officers, including Plaintiff, agreed to bring TSI in as a customer. (Tr. 266:2-13 [Sleppin Testimony].) In fact, TSI was explicitly referenced in the Shareholders' Agreement as excluded from the calculation of the Company's gross revenue. (PX 1 ¶ 8(C)(iv).) This provision was included at Plaintiff's request to ensure that Group IX was a viable business and Defendants were not falsely inflating Group IX's revenues by doing business with their own companies. (Tr. 80:13-81:3.)

In November 2000, TSI entered into a contract with Group IX for its colocation services (the "TSI Contract"). The TSI Contract was negotiated on Group IX's behalf by Sleppin and Golomb and by Teeman on TSI's behalf. (Tr. 267:20-24.) Pursuant to the TSI Contract, TSI was to pay Group IX $500 per month for a rack, which included electricity. (PX 5 at GIX01462.) The TSI Contract did not require TSI to purchase any specific number of racks or mention a volume discount.

Sleppin testified that he set TSI's rates for rack space by visiting several competing facilities. (Tr. 268:16-20.) After his visit, Sleppin determined the monthly rate for a Tier 1 facility, which included a generator, was $700 per rack. (*Id.*) However,

Group IX did not have a generator and was not a Tier 1 facility, so the rate was reduced to $500 per month. (Tr. 268:21-23.)

The TSI Contract further provided TSI would pay $25 per T-1 cross-connect. (PX 5 at GIX01462.) A cross-connect is a physical cable that connects the switch to a telecom carrier hub. (Tr. 210:15-24.) A T-1 cross-connect has 24 lines and a DS-3 cross-connect is equivalent to 28 T-1 cross-connects. (Tr. 210:15-18; 212:14-17.) While the TSI Contract did not explicitly provide a price for DS-3 cross-connects, TSI paid $450 per DS-3 cross connect in September 2002, which was ultimately reduced to $375. (PX 17 at GIX 00969, 983.) Sleppin testified that he determined the price for a DS-3 cross-connect by visiting five or six competing facilities and determining that the going rate for a DS-3 cross-connect was between $200 and $500 per month. (Tr. 297:26-298:11.)

B. Facts Relevant to Plaintiff's Claims

Over the course of Group IX's nine years in operation, the business never generated net profits to distribute to shareholders. (Tr. 245:14-22.) In addition, from 2002 to 2005 Group IX's gross receipts declined from $670,721 to $324,645. (PX 11-14.) Plaintiff alleges the Individual Defendants used Group IX to benefit themselves by charging TSI a discounted rate, while Group IX suffered.

The main issue in this case is whether TSI received a "sweetheart deal" from Group IX. At trial, Plaintiff's expert, Chandler, proposed three methods of analysis to

show TSI was not charged a fair price for the services it received: (1) a comparison of TSI's rates to the rates other Group IX customers paid, (2) the market for colocation services in New York City, and (3) a cost analysis of Group IX's actual monthly costs.

1. *Rates for Group IX's Other Customers*

On Group IX's website, the advertised rate for rack space was $950. Sleppin testified that all of Group IX's rates were negotiable and customers actively negotiated for less expensive rates. (Tr. 278:13-20; 279:7-18.) None of Group IX's customers paid the advertised rack rate of $950.

a. *Group IX Customers with Higher Rates than TSI's Rate*

From 2000 to 2002, there were a number of customers who paid more than the $500 per rack TSI paid to Group IX. Plaintiff's expert, Scott C. Chandler, analyzed the rates that ten other Group IX customers paid for rack space from 2000 to 2002.[6] Chandler concluded that the average Group IX customer paid between $700 and $800 for a rack. (Tr. 433:23-435:8.) For instance, Novolink Communications paid Group IX $850 per rack. (DX M at SG000376.) Horizon Phonecard Inc. paid $750 per rack. (PX 7 at GIX01474.) Equant paid $700 per rack. (DX M at SG000373.) Finally, three

[6] Chandler was only provided the contracts and leases for five customers. For the remaining five customers Chandler relied upon the sales journal.

companies, Global Gateway Inc., Voxsant Inc., and Millennium Global Telecom each paid $650 per month. (DX M SG000373, 377 & 403.)[7]

In addition, several unaffiliated customers paid more for T-1 and DS-3 cross-connects than the $25 TSI paid for a T-1 or $450 TSI paid for a DS-3 cross-connect from 2001 to 2003. Horizon Phone Card paid $50 per T-1 and $1,000 per DS-3 cross-connect. (PX 7 at GIX01474.). Equant and Voxsant each paid $100 per T-1 cross-connect. (DX M at SG000373.)

b. *Group IX Customers with Lower Rates than TSI's Rate*

Defendants produced evidence that there were customers that paid lower rates than TSI paid. For instance, RTS Plus paid $150 for a full rack. (Tr. 292:2-3; DX JJ.) Four companies, Net Web Group, IT Globe, Sliced Bread and Quick Dial, had rack rates of $225 for a half rack and $450 for a full rack. (Tr. 271:6-272:14, DX Y; Tr. 273:19-274:25, DX AA; Tr. 290:2-17, DX CC; Tr. 291:2-8, DX EE.) Taiwan.com paid $400 per rack and $25 per T-1 cross-connect. (DX D.) Finally, Next Encounter, a company owned by Plaintiff, had a rack rate of $400 per rack and $400 per DS-3 cross-connect. (Tr. 277:3-278:12; DX LL.) Sleppin testified that the average rate over 20 customers in

[7] The Court notes that Plaintiff proffered documents showing that two potential Group IX customers, Telemark Ltd. and IBE Pro, agreed to pay Group IX more than $500 per month for a rack. However, these two companies never moved into the Premises, became Group IX customers, or paid for its services. Accordingly, the Court will not consider the prices those companies would have paid Group IX.

Group IX, excluding TSI, was $490 per rack. (Tr. 280:3-7.) Accordingly, the record is clear that while there were some customers that paid higher rates than TSI paid, there were also customers that paid less than TSI paid.

c. *TSI Was Group IX's Largest Customer*

Defendants argue that while there were some customers whose rates were higher than TSI's rates, those customers never used as many racks or cross-connects as TSI used. Defendants argue TSI received discounts on its services because it was Group IX's "anchor tenant."

An anchor tenant is a customer that is critical to the business, and without which the datacenter would not be able to operate. (Tr. 630:24-631:10.) The TSI Contract did not require TSI to purchase a specific number of racks or mention a volume discount of any kind. (PX 5.) Nevertheless, Defendants' expert, Erik Levitt, testified that an "anchor tenant" was a concept used in the colocation business that would not necessarily be defined in a customer's contract. (Tr. 631:3-5.) A customer may be designated an anchor tenant based on the customer's volume of business transacted with the datacenter or based on the customer's ability to attract additional customers to the datacenter. (Tr. 631:5-10.)

Defendants argue that the TSI Contract was a crucial element in starting Group IX. Prior to Group IX, there was no infrastructure to bring the necessary telecommunications to the building. (Tr. 177:21-25.) Teeman testified that the telecommunications

companies, such as MFS/MCI and Verizon, only agreed to run the fiber optics to the Premises if Group IX committed to locate the facility there and TSI committed to placing its racks there. (Tr. 179:13-24.) Second, with TSI's commitment, Group IX was able to commence business immediately after it installed the fiber optics, air-conditioning, and other necessities. (Tr. 179: 6-12.) Finally, TSI attracted customers to Group IX with its mere presence at the Premises. Teeman testified that TSI helped for "visualization" because TSI's presence notified potential customers that Group IX was in business. (Tr. 180:8-15; Tr. 266:25-267:10 (Sleppin Testimony).)

Furthermore, TSI was Group IX's highest volume customer. In 2000, TSI rented three racks from Group IX. (PX 17 at GIX01061.) Over three years, TSI increased its number of racks to 10 racks. (PX 17 at GIX00977.) Then in August 2006, TSI increased its number of racks to 23, where it remained until 2009, when Group IX vacated the Premises. (PX 17 at GIX01018.) In comparison, the average Group IX customer had 1.1 racks. (Tr. 280:9-11.) The next largest customer was Global Gateway, which had three racks. (Tr. 269:14-19.) Similarly, no other Group IX customer used as many DS-3 cross-connects as TSI used. (Tr. 297:11-15.) For instance, Voxsant paid $100 per T-1 cross-connect (DX M), yet it only had two T-1s, while TSI had 560 T-1s. (Tr. 297:11-15.) Based on the evidence provided, the Court finds TSI was Group IX's anchor tenant.

Defendants' expert, Levitt, testified that in the colocation business, an anchor tenant would customarily receive a discount of 20% to 40%. (Tr. 630:17-631:10.) Plaintiff's expert, Chandler, recognized that an anchor tenant may receive a discount for

colocation services. (Tr. 468:21-26.) However, Chandler did not factor in TSI's status as an anchor tenant in his analysis. Accordingly, the Court concludes that the rate TSI paid was fair because TSI was Group IX's anchor tenant and, as such, received a discount.

2. *Fair Market Rates for Colocation Services in New York*

In 2003, the Uptime Institute established a framework to classify colocation facilities that ranges from Tier I to Tier IV. (Tr. 621:13-622:4.) Levitt testified as to the following capabilities of each of the classifications:

> A tier I facility at a minimum has a backup generator and environmental capabilities superior to, say, an average office space. A tier II facility would have additional redundancies beyond that. . . . A tier III facility begins to introduce what's considered concurrently maintainable facilities, which simply put means that we can take a piece of equipment offline and it will have no impact whatsoever on the computers and telecommunications equipment that's stored within. A tier IV facility, again, goes beyond that. And it includes certain environmental restrictions.

(Tr. 621:16-622:4.) Levitt visited Group IX's facilities in early 2002. (Tr. 620:12-18.) He testified that Group IX was not even a Tier I facility, because it did not have a back-up generator. (Tr. 623:10-14.)

The tier of the facility is one of the most significant elements in pricing, such that the price a Tier I facility can command would be substantially less than a Tier II facility or above. (Tr. 622:9-25.) Levitt testified that there could be a 10% to 20% change in pricing as you moved up or down the tier scale. In addition, there could be a 20% to 40%

decrease in value from a Tier II facility to a nontiered facility, like Group IX. (Tr. 624:6-12.)

Scott C. Chandler, Plaintiff's expert, based his analysis on the market for colocation services in New York and concluded the fair market value for Group IX's services was $750 per rack and $750 per DS-3 cross-connect. (Tr. 429:14-430:3; 432:20-433:20.) However, upon cross-examination, it became clear that while Chandler was familiar with the Uptime Institute classification system, he did not know and did not attempt to find out Group IX's tier ranking. (Tr. 457:26-458:10.) Chandler also testified that the quality of the services a colocation facility could provide was one element on the prices that facility could charge. (Tr. 458:19-24.) Yet, Chandler was not aware of whether Group IX had a back-up generator at the Premises. (Tr.456:18-23.) Thus, the Court does not give credence to Chandlers' conclusions regarding the fair market rates for comparable colocation services in New York.

Erik Levitt, Defendants' expert, also testified regarding the market for colocation services from 2000-2009 in New York, which was based on his own personal experience as a data center manager in New York and his visit to the Premises in 2002. Levitt concluded that the fair market price for services provided by a non-tiered colocation facility between 2000 through 2009 was $500 per month for rack space and anywhere on a sliding scale from $350 per month for the DS-3 cross-connects from 2001 to 2002, down to as little as $175 per month by 2009. (Tr. 630:3-11.)

a. *Rates for Colocation at the Premises After Group IX*

Group IX vacated the Premises in July 2009. After Group IX vacated the Premises, Plaintiff improved the space by adding a back-up generator, additional air conditioning and a fiber optic "backbone" cable and associated panels. (Tr. 506:14-507:2.) Subsequently, Atlantic Metro Communications II, Inc. ("Atlantic Metro") moved into the Premises and became the new tenant.

When Defendants' counsel asked Plaintiff whether Atlantic Metro was operating a colocation facility from the Premises, Plaintiff responded that Atlantic Metro was "manage hosting." (Tr. 512:17-513:5.) However, Chandler, the consultant who prepared the business model for Data Center NYC, testified that Atlantic Metro offered colocation services, along with other services. (Tr. 468:15-20 (Chandler Testimony).) Furthermore, Atlantic Metro was charging its customers for the same services that Group IX had provided, *i.e.* rack space, power, and cross-connects. (504:7-506:13; 509:13-515:22 (Moyal Testimony).)

In 2010, Plaintiff hired Chandler and his firm to develop a business plan for Data Center NYC at the Premises. (Tr. 459:17-461:24; DX X.) Data Center NYC was a proposed business between Atlantic Metro and Plaintiff. Plaintiff testified that Data Center NYC remained a proposed business and was never formalized as a legal entity. (Tr. 516:9-12.) The business plan provided that Atlantic Metro was going to be a strategic partner and an anchor tenant for Data Center NYC. (Tr. 467:15-468:6; DX X at 713.) Pursuant to the business plan, a "flat rate anchor tenant" would be charged $500

per month for a rack and $125 for a DS-3 cross-connect. (DX X at SG000715-16; Tr. 472:11-16, 480:23-481:4.)

On December 13, 2011, Data Center NYC and Atlantic Metro entered into a Rate Agreement with Mutual Release. (DX ZZ.) Atlantic Metro set the rates contained in the Rate Agreement and Plaintiff agreed to those rates on behalf of Data Center NYC. (Tr. 506:5-13.) Pursuant to the Rate Agreement, Atlantic Metro would pay $500 per rack. (DX ZZ ¶ 2.)

Therefore, based on the facts presented, the Court makes the following conclusions: (1) there were substantial improvements to the Premises after Group IX vacated, (2) the subsequent tenant ran a colocation facility out of the improved Premises, (3) the proposed business plan for the Premises provided the new tenant would be an anchor tenant and provided it with a discounted rate, (4) the new tenant was charged the same rate for rack space as Group IX.

Accordingly, the events that occurred after Group IX vacated the Premises support Levitt's conclusion and undermines Chandler's conclusion regarding the fair price of Group IX's services based on the prices that could have been charged at the Premises and the market for colocation services in New York.

3. *Cost Analysis*

Plaintiff argues that the prices TSI paid Group IX did not cover Group IX's cost of providing services. A colocation facility's major costs are rent, power, and connectivity (ping, power and pipe[8]). (Tr. 599:18-604:3.) Levitt testified that these three costs constitute 70-90% of the colocation facility's total costs. (Tr. 648:24-649:4.) In addition to the major costs, Group IX also had minor costs for transportation, bandwidth, advertising, bad debts, depreciation, subscriptions, freight insurance, accounting fees, license fees, maintenance, repairs, parts, and wages. (Tr. 599:18-604:3.)

Chandler analyzed Group IX's tax documents, invoices, and general ledger to determine the Company's rent, power, and internet costs on a per rack basis from 2002-2009. (Tr. 430:17-23.) This analysis did not take into account Group IX's minor costs. (Tr. 442:16-22.) Chandler calculated the per rack cost by calculating Group IX's total monthly costs and dividing it by 50 racks.

a. *The Assumptions Used in Chandler's Cost Analysis*

Defendants argue Chandler's cost analysis should be disregarded because it contains several flaws and is based on incorrect data. Specifically, Defendants raise two

[8] "Ping" refers to the space where the physical equipment is located and the primary cost component of "ping" is real estate, *i.e.* rent for the premises. The term "ping" is used because you are able to "ping" the device at that location. (Tr. 438:19-439:3.) "Pipe" refers to the circuits and internet bandwidth that are connected to the equipment. (Tr. 441:4-9.)

issues regarding the total number of racks and the total rent costs Chandler used in his analysis.

i. *The Number of Racks Used to Determine Per Rack Costs*

Chandler's analysis was based on the assumption that that there were 50 racks located at the Premises. Defendants argue Chandler's analysis is flawed because the Premises was capable of housing 120 racks. Levitt testified that based on his knowledge of industry standard, there were 3,600 square feet of available space for equipment, that could hold 120 racks. (Tr. 636:24-637:11; 652:17-20.) While the Court accepts that the additional racks could have been added to the space, Plaintiff testified that at a maximum 54 racks were located at the Premises. (Tr. 63:6-12.) This is consistent with Levitt's testimony, who testified that he believed that the maximum number of racks Group IX built out in the space was 43. (Tr. 656:8-10.) Defendants fail to proffer any reason or explanation why the cost analysis should be based on the total number of potential racks instead of the number of actual racks. Thus, Defendants' argument is unavailing and the Court accepts Chandler's assumption of 50 racks.

ii. Monthly Rent Costs

Chandler used $20,000 as the monthly rent costs. It is undisputed that Group IX's rent in 2000 was approximately $10,000 and only increased to $20,000 after 2002. (Tr. 545:23-25.) Accordingly, Chandler's analysis is restricted to the period after 2002.

The Court recognizes that the parties dispute the nature of the additional $10,000 monthly payments to Plaintiff. Regardless, the additional $10,000 per month was a fixed cost that Group IX was required to pay. For the sake of Chandler's cost analysis alone, the Court will accept the monthly $10,000 payment as an additional rent cost.

b. *Group IX's Actual Per Rack Costs*

Based on 50 racks, Chandler concluded that Group IX's rent costs were $800 per rack (Tr. 439:8-13; 442:7-13; 63:6-12); power costs were $650 per rack (Tr. 440:10-18); and connectivity costs were $500 per rack. (Tr. 442:24-443:6.) Chandler concluded that, in total, TSI would have to pay $2,000 per rack in order for Group IX to break even. (Tr. 442:7-13.)

On cross-examination, Defendants' expert, Levitt, testified that assuming there were 50 racks, Group IX's costs per rack were $480 for rent (Tr. 659:2-6), $262.62 for electricity (Tr.664:4-12), and $600 for internet (Tr. 665:16-26). Thus, Levitt admitted on cross-examination that based on Plaintiff's analysis, Group IX's monthly costs per rack were over $1,300. (Tr. 666:9-10.) Thus, at a price of $500 per rack, TSI would not cover Group IX's monthly per rack costs for providing services.

Defendants argue Plaintiff's counsel incorrectly calculated the cost for internet because he included the Worldcom hub transport charges in the base rack rent. Defendants argue Worldcom's hub transport fees were not fixed monthly costs. (Defs.' Br. at 15.) However, Defendants failed to establish this fact on re-direct at trial. In fact,

it was Defendants' expert, Levitt, who concluded that the connectivity cost on a per month basis based on 40 racks was $600. (Tr. 665:16-26). Accordingly, the Court cannot determine Levitt incorrectly calculated Group IX's monthly internet costs.

c. *Monthly Revenue Received from TSI*

Chandler failed to provide an analysis or summary of the monthly revenues Group IX received from TSI. Instead, Chandler testified solely as to his conclusion that, based on his cost analysis, Group IX could never have covered all of its costs based on a monthly charge of $500 per rack. In his post-trial brief, Plaintiff argues in aggregate, TSI consistently paid below $1,200 per rack. (*See, e.g.*, PX 17 at GIX01061 (11/1/01 Invoice).)

Upon further review of the record, the Court notes that in some months, TSI's per rack revenue did exceed $2,000 per rack. For instance, in June and July 2001, TSI had five racks and per rack revenue of $2,660. (PX 17 at GIX000954.) It wasn't until Group IX increased to nine racks and switched from T-1 cross-connects to DS-3 cross connects in September 2002, that TSI's per rack revenue dropped to $1,570. (*Id.* at GIX00969.) The Court notes TSI's per rack revenue in September 2002 still exceeded $1,300, which was Levitt's calculation for Group IX's break-even point using Chandler's cost method. When TSI increased its number of racks again to twenty-three in October 2006, its per rack revenue dropped below both Chandler and Levitt's calculation of per rack costs. (*Id.* GIX01018.)

Therefore, the Court concludes that the amount Group IX received from TSI after October 2006 failed to cover Group IX's operating costs on a per rack basis.

C. Facts Relevant to Defendants' Counterclaim

Pursuant to the Shareholders' Agreement, Plaintiff was entitled to receive monthly financial statements from Group IX. (PX 1 ¶ 8(D)(1)).) Plaintiff testified that he requested the financial statements and Defendants failed to produce any documents (Tr. 47:3-15.) On June 28, 2002, Plaintiff's accountants sent a letter to Group IX requesting documents to perform an audit. (PX 3; Tr. 48:14-49:17.) On July 2, 2008, Defendants' counsel responded to the document request, stating that no further documents would be produced. (PX 4; Tr. 49:18-50:12.) The parties dispute whether an audit was ever conducted. Nevertheless, the record is clear that Plaintiff retained accountants, those accountants requested documents from Group IX, and Group IX provided some, but not all, of the documents requested from the period July 1, 2001 to June 28, 2002. (Tr. 310:8-312:7 (Sleppin Testimony).)

In the summer of 2002, Plaintiff was concerned that Group IX was paying below market rent and the business had not made any distributions to the shareholders. (Tr. 49:18-50:12.) Subsequently, the parties reached an agreement relating to Plaintiff's request for an audit and monthly financial statements. In exchange for Plaintiff's promise to drop the audit and accept quarterly financial statements rather than monthly reports, the Individual Defendants agreed to pay Plaintiff an additional $10,000 per month. The

monthly payments commenced on August 2002 and continued for approximately five years, until February 2007. The parties dispute the nature of the $10,000 monthly payment.

1. *Additional Rent*

Plaintiff argues the additional $10,000 monthly payment was "additional rent." Each of the checks Plaintiff received from Group IX were marked with the notation "Additional Rent." (PX 33.) In addition, Group IX deducted the $10,000 per month as a rent expense from Group IX's tax returns. (Tr. 380:25-381:3; PX 11-14.)

Peter Golomb testified in January 2007, he noticed that Group IX did not have enough cash on the books and there were a number of unpaid invoices for electricity used by Plaintiff's company, Next Printing & Design, Inc. (Tr. 573:14-574:10.) In February 2007, Group IX stopped the additional $10,000 monthly payments. Subsequently, Plaintiff sent a notice of default under the Lease. In turn, Group IX commenced an action captioned *Group IX, Inc. v. One Two One on Varick, LLC*, Index No. 103122/2007 (Stallman, J.) (the "Rent Action") to preserve the lease. (DX R.)

In a Decision and Order, dated May 5, 2009, Justice Stallman granted Group IX's motion for summary judgment against One Two One Varick, holding that the $10,000 monthly payment was not "additional rent." (DX R at 1.) Justice Stallman found that the parties did not execute a written modification to the Lease and the Lease contained a no oral modification clause. Furthermore, when analyzing whether there was an exception

to the statute of frauds for partial performance, Justice Stallman concluded that David Moyal's conduct indicated that the monthly payments were a modification of the Shareholders' Agreement rather than the Lease. (*Id.* at 2.) Justice Stallman reached this conclusion based on the fact that the payments were made to Moyal personally, the funds were deposited in his personal bank account, and the proceeds were not shared with Moyal's business partner in One Two One Varick. (*Id.*) Therefore, Justice Stallman held that Defendants were not obligated to continue paying the $10,000 payment under the Lease.

Here, Plaintiff attempts to raise the identical issue that was raised and finally determined in the Rent Action. The doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). Accordingly, the monthly payment was not additional rent.

2. *Settlement of Plaintiff's Claims*

Defendants argue the $10,000 monthly payments were a settlement of any claims Plaintiff had against Defendants, including the claims raised in this lawsuit. As an initial matter, there was never any settlement agreement that was memorialized in writing. Plaintiff testified that prior to August 2002, he was deciding whether to "proceed with a lawsuit" but then the parties reached a "temporary solution" and he decided not to sue. (Tr. 101:1-102:4.) In his August 4, 2009 deposition, Plaintiff testified that he accepted

the $10,000 as a settlement and agreed not to sue. However, at the time, Plaintiff's concerns were the below-market rent Group IX was paying and Group IX's failure to make distributions to its shareholders. (Tr. 49:18-50:12.)

Plaintiff was not an attorney and did not understand the additional monthly payment to be a settlement or release of all claims he might have against Defendants. (Tr. 109:16-22.) Nor is there any evidence that the Individual Defendants intended to bring about that result. Therefore, the additional $10,000 monthly payment was not a settlement of the instant claims.

V. CONCLUSIONS OF LAW

Plaintiff asserts two derivative causes of action against Defendants for (1) breach of fiduciary duty against Defendants Teeman and Sleppin arising from Group IX's relationship with TSI and (2) unjust enrichment against TSI. Defendants assert a counterclaim against Plaintiff for unjust enrichment arising from the $10,000 monthly payments Plaintiff received from Group IX between August 2002 and February 2007.

A. Statute of Limitations

Defendants argue both of Plaintiff's derivative claims are barred by the statute of limitations. The statute of limitations on derivative claims for breach of fiduciary duty and unjust enrichment is six years. *See Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 651-52 (1st Dep't 2012) (six-year statute of limitation for

derivative claim for breach of fiduciary duty seeking money damages); *Kaufman v. Cohen*, 307 A.D.2d 113, 127 (1st Dep't 2003) (unjust enrichment claim must be brought within six years of the allegedly wrongful act giving rise to restitution).

"A tort claim accrues as soon as 'the claim becomes enforceable, i.e. when all elements of the tort can be truthfully alleged in a complaint." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 (2009). Defendants argue Plaintiff's claims accrued on November 1, 2000, the date Group IX and TSI entered into the TSI Contract. Plaintiff commenced this action in June 2007. Thus, Defendants argue Plaintiff's claims are time barred.

Plaintiff argues that the statute of limitations was tolled. First, Plaintiff argues the "open repudiation" doctrine tolled the statute of limitations. The open repudiation doctrine tolls the statute of limitations where there is an ongoing fiduciary relationship between the parties. However, the doctrine does not apply here because Plaintiff seeks money damages. *See In re Clark*, 146 A.D.3d 495, 496-97 (1st Dep't 2017), *lv. denied*, 29 N.Y.3d 907 (2017); *Cusimano v. Schnurr*, 137 A.D.3d 527, 530 (1st Dep't 2016). Plaintiff also argues the statute of limitations was tolled by the continuing wrong doctrine.

1. *The Continuing Wrong Doctrine*

"Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act." *Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564, 568 (1st Dep't 2017). Defendants argue the continuous wrong doctrine does not apply because the doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." *Henry v. Bank of Am.*, 147 A.D.3d 599, 601 (1st Dep't 2017).

In *Henry*, plaintiff commenced a suit against defendant Bank of America for allegedly enrolling him in two accounts without his consent. The First Department held that the action was barred by the statute of limitations because the causes of action accrued when plaintiff was enrolled in the programs, which occurred more than six years before the commencement of the action. *Henry*, 147 A.D.3d at 600. While plaintiff continued to receive Bank of America's account charges within the statute of limitations, the First Department held that these charges "represented the consequences of those wrongful acts in the form of continuing damages, not the wrongs themselves." *Id.* at 602. Thus, the First Department held the continuing wrong doctrine did not apply. Defendants argue this case is analogous to *Henry*, because the breach of fiduciary duty occurred when the TSI Contract was executed, and any subsequent transactions would add to Plaintiff's damages, but were not separate breaches.

The Court disagrees and finds this case more analogous to *Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564 (1st Dep't 2017). In *Palmeri*, plaintiff was a former employee of Ramius Securities LLC who retained defendant Willkie Farr in early 2009 to represent him in a FINRA investigation for transactions that occurred during his employment at Ramius. Willkie Farr was subsequently retained by Ramius in connection with the same FINRA investigation. Several months after Willkie Farr represented plaintiff at his investigative examination before FINRA, the law firm terminated its relationship with plaintiff, informing him that there was a conflict of interest with its representation of Ramius. Then, in 2010, FINRA commenced a disciplinary proceeding against plaintiff, alleging that plaintiff had made false and misleading statements to Ramius's compliance officer during the FINRA investigation. Defendant represented Ramius during the disciplinary proceeding.

Plaintiff commenced an action in 2013 against defendant alleging, *inter alia*, claims for legal malpractice and breach of fiduciary duty. The trial court dismissed the action, holding plaintiff's claims were time barred because plaintiff failed to commence the action within three years of defendant's termination of its representation. On appeal, the First Department held that the breach of fiduciary duty was improperly dismissed based on the continuing wrong doctrine. *Palmeri*, 156 A.D.3d at 567. The First Department held there was an issue of fact as to whether defendant breached its fiduciary duties to plaintiff during its ongoing representation of Ramius during the disciplinary proceeding. *Id.* at 568.

Here, Plaintiff alleges the Individual Defendants owed fiduciary duties to Group IX. Furthermore, Group IX entered into a conflicted transaction with TSI in 2000 and TSI continued to increase its business with Group IX until 2009. Due to the Individual Defendants fiduciary duties to Group IX, each transaction between Group IX and TSI that added additional services and benefitted TSI was a continuing wrong. This is especially true, in light of Plaintiff's argument that the per rack revenue received from TSI failed to cover Group IX's operating costs per rack. Accordingly, the alleged breaches are more than mere "charges" as in *Henry* and more analogous to *Palmeri*. Therefore, Plaintiff's claims are not time barred by the statute of limitations.

B. Plaintiff's Claim for Breach of Fiduciary Duty

Plaintiff alleges Defendants Teeman and Sleppin breached their fiduciary duty to Group IX by selling its services to TSI at a reduced price for their own individual benefit. To prevail on a claim for breach of fiduciary duty, Plaintiff must prove (1) the existence of a fiduciary duty between the parties, (2) breach of that duty, and (3) damages suffered as a result of the breach." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014).

1. *Teeman and Sleppin Owed Fiduciary Duties to Group IX*

Officers and directors owe a duty of loyalty to the corporation. They "should never be permitted to profit personally at the expense of the corporation. Nor must they allow their private interests to conflict with the corporate interests." *Foley v. D'Agostino*,

21 A.D.2d 60, 66-67 (1st Dep't 1964). "This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (internal quotation marks omitted). As executives and managing shareholders of Group IX, Defendants Teeman and Sleppin owed a duty of loyalty to the Company.

2. *The TSI Contract Was a Self-Interested Transaction*

Corporate fiduciaries become "self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Marx v. Akers*, 88 N.Y.2d 189, 202 (1996). Here, Group IX's contract with TSI was a self-interested transaction because Teeman was the sole owner of TSI. Teeman stood to benefit from the reduced prices TSI received from Group IX. Similarly, Sleppin would have benefitted from the TSI Contract because his wholly owned company, Global Rock Network, was TSI's largest customer. Any savings obtained from Group IX could be passed along to Global Rock Network and Sleppin. Therefore, Plaintiff established that Teeman and Sleppin entered into a self-interested transaction with Group IX.

Where there is self-dealing, defendants are not entitled to the protections of the business judgment rule. *See Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 559 (1984). Moreover, a corporate fiduciary in a self-interested transaction bears the burden of

proving by a preponderance of evidence that the transaction was fair and reasonable. *Schachter v. Kulik*, 96 A.D.2d 1038, 1039 (2d Dep't 1983). Therefore, Teeman and Sleppin bear the burden of proving the "entire fairness" of TSI's transactions with Group IX. *See Alpert*, 63 N.Y.2d at 570.

3. *Breach of the Duty of Loyalty*

The concept of fairness as it relates to a breach of fiduciary duty has two principal components: (1) the fiduciary must have followed a "course of fair dealing" in entering into the transaction and (2) the transaction must have been for a fair price. *See Alpert,* 63 N.Y.2d at 569-70 (analyzing breach of fiduciary duty in corporate merger).

As an initial matter, the fact that Group IX entered into a contract with TSI is not in itself a breach of fiduciary duty. Business Corporation Law § 713 provides a transaction between a corporation and another entity in which that corporation's director is a director or has a substantial financial interest is not void or voidable, for this reason alone, if (1) the material facts of the conflict are disclosed in good faith or known to the shareholders entitled to vote thereon, and (2) such transaction is approved by the shareholders. *See* N.Y. Bus. Corp. Law § 713(a)(2).

The record shows that Plaintiff was aware that TSI was Teeman's company and agreed to allow TSI to move into the Premises before Group IX was even formed. (Tr. 30:12-32:12; 78:6-8.) Moreover, all of Group IX's officers, including Plaintiff, agreed to make TSI one of Group IX's customers. (*See* Tr. 266:2-13.) The Shareholders'

Agreement expressly identified TSI and anticipated the TSI Contract. (PX 1 ¶8(C)(iv).) Therefore, Plaintiff was aware of the conflict and approved the transaction with TSI.

a. *Fair Price*

In determining whether there was a fair price, the Court need not determine the precise "fair price" that TSI would have received through an arm's length transaction. *See Alpert*, 63 N.Y.2d at 571 (discussing entire fairness of merger transaction and determination of fair price). Nevertheless, the Court will look at the factors surrounding the transaction to determine whether Group IX received a fair price. The Court will address the evidence relating to the rates Group IX's other customers paid for services, the market value for colocation services in New York City at the time, and Chandler's cost analysis.

i. *Rates for Group IX's Other Customers*

The first method of analysis focused on the prices other Group IX customers paid. Fair market value is defined as the price a willing buyer would pay a willing seller in an arm's length transaction. *See Matter of Gordon v. Town of Esopus*, 15 N.Y.3d 84, 91 (2010) (analyzing fair market value of property in relation to RPTL 480-a). Plaintiff argues the Court should only look at the highest prices Group IX was able to receive for its services. The Court rejects this argument, as the prices that were lower than the TSI Contract prices were negotiated and set through arm's length transactions.

The evidence provided proves that the $500 per rack TSI paid was a fair price compared to Group IX's other customers. As noted above, while there were some customers that paid more than TSI paid for rack space and DS-3s, there were also customers that paid less than TSI paid. (*See* Section II.B.1, *supra.*) In addition, Chandler failed to take TSI's status as an anchor tenant into account. Customarily, an anchor tenant would receive a 20% to 40% discount from the rates an ordinary customer would pay. (Tr. 630:17-631:10.) Accordingly, it would be fair for TSI to receive a discount for Group IX's services. Therefore, the price TSI paid for Group IX's services was fair in comparison to other Group IX customers.

ii. *Market for Colocation Services in New York City*

The second method focused on the prices other customers paid for colocation services in New York. Levitt testified that the tier ranking of a colocation facility greatly affects the prices that colocation facility can charge for its services. Group IX was a non-tiered facility and therefore could not charge the same prices as a tiered facility. Thus, based on Levitt's review of the Premises and his personal experience with colocation facilities in New York, Levitt concluded that the fair market price for colocation services for a non-tiered colocation facility between 2000 to 2009 was $500 per rack and between $350 and $175 for a DS-3 cross-connect. Levitt's conclusion was further supported by evidence that the Premises were upgraded after Group IX vacated and the new colocation facility that moved in was to be charged the same rates for rack space.

Chandler failed to consider Group IX's tier ranking when arriving at his final conclusion. Chandler also failed to provide any foundation for his conclusion, other than personal experience. An expert's ultimate conclusions must not be speculative or conclusory. *See Romano v. Stanley*, 90 N.Y.2d 444, 451 (1997) (disregarding expert testimony on defendant's appearance on the night of accident because such conclusion could not be inferred from the expert's affidavit). Therefore, the Court disregarded Chandler's opinion and accepted Levitt's opinion regarding the fair market value of rack space and DS-3s in New York City during the relevant period.

Accordingly, Defendants established the price TSI paid for Group IX's services was fair compared to the prices other non-tiered facilities were charging in New York City.

iii. *Failure to Cover Costs*

The third method was based on Group IX's cost structure. Based on this analysis, Chandler determined Group IX's monthly costs per rack and concluded that the gross revenue Group IX received from TSI was not sufficient to cover the per rack costs of the services provided. Plaintiff utilizes Chandler's cost analysis in two ways. First, Plaintiff uses the cost analysis to demonstrate that TSI did not pay a fair price for Group IX's services. In essence, this is a breach of loyalty argument and will be addressed below. Second, Plaintiff uses Chandler's conclusions to argue that the Individual Defendants breached their duty of care. This argument will be addressed in the following section.

Plaintiff argues Chandler's cost analysis shows that the TSI Contract price was unfair. By calculating the fixed costs of rent, power, and connectivity, and comparing it to the gross revenue Group IX received from TSI per rack, Plaintiff attempts to show that TSI should have paid more for rack space and cross-connects. Yet, the fact that TSI failed to meet Group IX's per rack costs for services cannot be used as evidence that the TSI Contract was unfair. As Levitt testified, cost analyses are typically performed to test the viability of a business and are not conducted for each customer to set pricing. (Tr. 629:11-630:2.)

Even if the Court were to consider the cost analysis as an indication of fair price, Mr. Chandler's analysis does not prove that the TSI Contract price was unfair. As noted above, there were other customers that paid less than TSI for Group IX's services and those customers would also fail to cover their fixed per rack costs. Therefore, Chandler's conclusion regarding Group IX's costs cannot be used to establish a fair price for Group IX's services.

For the foregoing reasons, the Court finds that the Individual Defendants did not breach their fiduciary duty of loyalty by entering into the TSI Contract and continuing Group IX's relationship with TSI.

4. *Breach of the Duty of Care*

Plaintiff alleges the Individual Defendants breached their fiduciary duty of care by permitting TSI to purchase Group IX's services at prices insufficient to cover Group IX's actual operating costs. Pursuant to New York Business Corporations Law § 715(h), "[a]n officer shall perform his duties as an officer in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." N.Y. Bus. Corp. Law § 715. The fiduciary duty of due care obligates fiduciaries to act in an informed and "reasonably diligent" basis in "considering material information." *Higgins v. N.Y. Stock Exch., Inc.*, 10 Misc. 3d 257, 283 (Sup. Ct. N.Y. Cnty. Sept. 2, 2005).

Neither Teeman nor Sleppin performed any cost analysis to ensure that TSI's rates would be sufficient to cover Group IX's costs to provide those services. (Tr. 233:11-26; 352:15-353:17.) Sleppin also testified that he could not bring in a customer unless it made money for the Company. (Tr. 280:22-282:7.) However, there was no evidence that Group IX failed to cover its operating costs in 2000, when the parties entered into the TSI Contract. Chandler's cost analysis was limited to 2002-2009. (*see* Section II.B.3.a.ii, *supra*.) Furthermore, as Levitt testified, a business cannot be expected to cover all of its costs immediately after opening. (Tr. 638:11-19.) Accordingly, any alleged breach of the duty of care would have occurred after 2002, when Group IX incurred an additional $10,000 in monthly costs as a result of the payments to Plaintiff.

Here, Plaintiff fails to prove that the Individual Defendants breached their duty of care by allowing the revenues from TSI to fall below Group IX's operating costs. Plaintiff fails to establish that the Individual Defendants acted unreasonably by failing to raise TSI's rates, or any other customers' rates, when Group IX's costs increased. Therefore, Plaintiff fails to establish the Individual Defendants breached their duty of care.

C. Plaintiff's Claim for Unjust Enrichment

Plaintiff alleges Defendants were unjustly enriched by the reduced rates Group IX offered to TSI. To prevail on his unjust enrichment claim, Plaintiff must show that (1) Defendants were enriched, (2) at his expense, and (3) that it is against equity and good conscience to permit Defendants to retain what is sought to be recovered. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). In light of the Court's conclusion that the TSI Contract price was a fair price, Plaintiff fails to establish that Defendants were unjustly enriched.

D. Defendants' Counterclaim for Unjust Enrichment

Defendants allege Plaintiff would be unjustly enriched if he is permitted to retain the $10,000 monthly payments the Individual Defendants paid to him from August 2002 to February 2007. Defendants fail to proffer any evidence that the parties agreed that the

monthly payments would be treated as advances on profit, or that Plaintiff would be obligated to return the money if Group IX failed to generate a profit.

Even if the Court found that the $10,000 monthly payments were advances on profits, Defendants cannot allege that it is against equity and good conscience to permit Plaintiff to retain the payments. It is undisputed that Group IX never made any distributions of profits to the shareholders. It is further undisputed that prior to 2002, Group IX paid Plaintiff below-market rent during its occupancy of the Premises. In fact, the additional $10,000 payment brought the rent price closer to market value. Furthermore, as noted above, the Court found that the $10,000 monthly payments were not a settlement of Plaintiff's claims against Defendants. Therefore, the Court concludes Defendants fail to establish it would be inequitable to permit Plaintiff to retain the $550,000.

VI. HOLDING

Accordingly, after due deliberation and careful consideration, it is hereby

HELD Defendants Stu Sleppin, Bob Teeman, and Telecom Switching, Inc.'s motion *in limine* is denied; and it is further

HELD that Plaintiff David Moyal's motion *in limine* is granted in part and otherwise denied; and it is further

HELD Plaintiff's cause of action for breach of fiduciary duty is denied; and it is further

HELD Plaintiff's cause of action for unjust enrichment is denied; and it is further

HELD Defendants' counterclaim for unjust enrichment is denied.

This constitutes the Decision and Order of the Court. Counsel for Plaintiff is directed to enter this Decision and to thereafter, within three days, serve Defendants a copy with notice of entry.

Dated: New York, New York

December 18, 2018

ENTER:

Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN
J.S.C.