STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RICHARD ROCCHIO, RENEE M. TONUCCI, ROBIN MURDONO and RANDAL ROCCHIO, suing individually and derivatively on behalf of and in the right of Leas-Co Leasing, Inc.,

Plaintiffs,

MEMORANDUM DECISION

vs.

Index No. 8848/06
Cal. No. 08-817

LEAS-CO LEASING, INC., JOHN T. ROCCHIO and DUPLICATING CONSULTANTS, INC.,
Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **AMIGONE, SANCHEZ, MATTREY & MARSHALL, LLP**
Attorneys for Plaintiffs
Richard A. Clack, Esq., of counsel

LIPSITZ GREEN SCIME CAMBRIA LLP
Attorneys for Defendants Duplicating Consultants, Inc. and John T. Rocchio
Jeffrey F. Reina, Esq., of counsel
Joseph J. Manna, Esq., of counsel
Patrick J. Mackey, Esq., of counsel

CURRAN, J.

This matter came before the Court upon a motion for summary judgment by Defendants, John T. Rocchio and Duplicating Consultants, Inc. (Defendants), and upon two cross motions for partial summary judgment by Plaintiffs. Upon due consideration, the Court denies both cross motions in their entirety and grants Defendants' motion for summary

judgment in part:

(a) dismissing the 10th, 13th, and 14th causes of action; and (b)dismissing the 11th and 12th causes of action as to any interests of Plaintiffs solely as beneficiaries of "Totten" trusts established by John Rocchio. The motion is otherwise denied.

BACKGROUND

Plaintiffs are the children of Defendant John Rocchio.[1] John Rocchio formed Defendant, Duplicating Consultants, Inc. (Duplicating), in August 1974. Duplicating's business is selling and servicing copiers primarily for governmental and commercial entities. Duplicating's shares are owned entirely by John Rocchio (Rocchio Affid. ¶¶1,19, 20).

Defendant, Leas-Co Leasing, Inc. (Leas-Co), the company on behalf of which Plaintiffs sue derivatively and which Plaintiffs seek to dissolve in a related action, was formed by John Rocchio together with his late wife and Plaintiffs' mother Jeninne Rocchio, to serve as the leasing company for the copier contracts sold by Duplicating (Rocchio Aff. ¶ 3; Tonucci EBT at 60). Currently, John Rocchio owns fifty percent of the shares of Leas-Co, while Plaintiffs own the other fifty percent. Plaintiffs inherited the shares from their mother's estate albeit indirectly through John Rocchio's disclaimer which he characterizes as a gift (Richard Rocchio EBT at 196; *see* Tonucci EBT at 214-217; John Rocchio EBT at 421)

At all relevant times, John Rocchio served as the president and one of two

---

[1] Renee (nee Rocchio) Tonucci was born in 1972, and was 34 years of age in 2006, at the time of the filing of the complaint; Richard Rocchio was born in 1973, and was 33 years old in 2006; Robin (nee Rocchio) Murdono was born in 1976 and was 30 years old in 2006; and Randal Rocchio was born in 1983, and was 23 years old in 2006 (Richard Rocchio EBT at 12; Tonucci EBT at 12; Murdono EBT at 12; Randal Rocchio EBT at 10).

directors of Leas-Co (Rocchio Affid. ¶ 1). According to corporate documents, Richard Rocchio was substituted as a director of Leas-Co and of Duplicating after his mother died (John Rocchio Affid. Exhibits 3 & 4 [Dec. 31, 1994]). In July 2001, Renee Tonucci (Tonucci) was substituted for Richard as the sole other director of Duplicating, Richard having allegedly "resigned" (*id*. Exhibit 5). Richard Rocchio asserts that although he may be a director of Leas-Co on paper, he has had little to do with his father and nothing to do with Leas-Co since he and his father had a falling out in 1999, when he also quit his job as a salesman for Duplicating (Richard Rocchio Affid. ¶ 7).

Tonucci was named secretary and treasurer for Leas-Co and for Duplicating on December 31, 1994 (John Rocchio Affid., Exhibits 3 & 4). She was discharged from those positions for Duplicating in June 2006 (*id*. Exhibit 7 & 8).

All of the children were employed by Duplicating in the past: Richard Rocchio from 1996 through 1999; Tonucci from 1995 through 2005; Murdono from 1998 through 2004; and Randal Rocchio during college part time and for a few months in 2005.

The gravamen of the complaint is that John Rocchio has engaged in a scheme to purposefully make Leas-Co unprofitable and to dilute Plaintiffs' interest in Leas-Co by burdening the company with unnecessary "concocted" debt. Plaintiffs allege that John Rocchio has made all of the decisions for Leas-Co unilaterally and without Plaintiffs' input, involvement or knowledge, including all transactions between Leas-Co and his wholly-owned corporation, Duplicating (Murdono Affid. ¶¶5-7, 10, 13; Memo of Law at 5).

Plaintiffs claim to have never received any shareholder distributions from Leas-Co (Memo of Law at 5-6), except for one year, 1999, when Richard Rocchio complained to his

father and demanded he be paid the amount shown on the Schedule K-1 issued to him by Leas-Co (Murdono Affid. ¶ 10). At that point, Murdono testified:

> my father said that he's going to raise the payroll and everything else, so this way Leas-Co doesn't show as [sic] a profit so he never has to pay Richard the K-1 earning again

(Murdono EBT at 211; see Randal Rocchio EBT at 131-132). Plaintiffs allege that their father carried out that threat by purposefully manipulating Leas-Co's books to ensure that it was not profitable, except for one year (2003) when he was being treated for cancer and "apparently could not fully implement his plan" (Murdono Affid. ¶ 10; Murdono EBT at 211-212, Tonucci EBT at 129-130). In that year, 2003, Plaintiffs received K-1s showing a profit without receiving any corresponding distributions from Leas-Co to pay the taxes (Murdono Affid. ¶ 10).

THE PLEADINGS

The original complaint was filed on May 19, 2006, and an amended verified complaint followed on November 30, 2006. After resolution of a motion to dismiss, Plaintiffs served a Second Amended Verified Complaint (SAVC), which consists of 17 causes of action, one of which was previously dismissed by the Court but reasserted when the SAVC was served (13th cause of action). (As to that cause of action, see infra at p. 21).

The first six causes of action are derivative and based upon alleged categories of transactions undertaken by John Rocchio and Duplicating which Plaintiffs claim have harmed Leas-Co. Those six derivative causes of action are:

(1st) breach of fiduciary duty by John Rocchio, by causing Leas-Co to engage in certain transactions in favor of Defendants and in conflict with Leas-Co's

interests;

(2nd) breach of Leas-Co's bylaws and of Business Corporation Law (BCL) §§ 713, 717 and 720 by John Rocchio;

(3rd) a declaration voiding transactions between Leas-Co and Defendants that constitute self-dealing and/or were unauthorized corporate actions under BCL § 713;

(4th) conversion of Leas-Co assets by Defendants;

(5th) unjust enrichment claims against both Defendants; and

(6th) unfair competition by Duplicating.

The seventh and eighth causes of action seek an accounting and indemnification by Leas-Co of Plaintiffs' attorneys fees and costs. Defendants did not move against the ninth cause of action.

The next eight causes of action are based upon Plaintiffs' individual rights:

(10th) against both Defendants for diversion of profits and dividends that should have been granted by the Leas-Co board to Plaintiffs;

(11th) against John Rocchio for breach of his fiduciary duty related to Plaintiffs' Uniform Gifts to Minors/Uniform Transfers to Minors Act (UGMA/UTMA) accounts;

(12th) against John Rocchio for conversion of assets in the UGMA/UTMA accounts;

(13th) against John Rocchio for breach of his fiduciary duty with respect to the testamentary trust in his late wife's will;

(14th) conversion of trust assets by John Rocchio;

(15th) individual unjust enrichment claims against both Defendants based upon missing funds from W2s, 1099s and diversion of dividends;

(16th) individual unjust enrichment claims against John Rocchio based upon the accounts; and

(17th) a constructive trust pertaining to the accounts.

Plaintiffs seek money damages, punitive damages, an accounting, and attorneys' fees and costs. In their answer, Defendants assert two counterclaims for indemnification and contribution, based upon alleged breaches of fiduciary duty by Richard Rocchio as a director of Leas-Co and Renee Tonucci as an officer. A dissolution action filed by Plaintiffs with regard to Leas-Co was stayed based upon John Rocchio's election to purchase Plaintiffs' shares pursuant to BCL § 1118.

STANDARDS ON A MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the moving party bears the initial burden of demonstrating prima facie its entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A defendant has the burden of affirmatively demonstrating the merits of its defense and does not meet its burden by merely noting gaps in the plaintiff's proof (*see Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]). Until the movant establishes its entitlement to judgment as matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*see Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]). The courts are required upon a defendant's motion for summary judgment to view the evidence in the light most favorable to the plaintiff (*see Evans v Mendola*, 32 AD3d 1231, 1233 [4th Dept 2006];

Esposito v Wright, 28 AD3d 1142, 1143 [4th Dept 2006]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*see Gern v Basta*, 26 AD3d 807, 808 [4th Dept], *lv denied* 6 NY3d 715 [2006]).

HEARSAY OBJECTIONS

In reply papers, Defendants object to the admissibility of some of the exhibits attached to the affidavits of Plaintiffs as unauthenticated hearsay, including portions of tax returns, bank statements, and copies of checks. Plaintiffs' counsel has attempted to explain their compliance with CPLR 3122-a (a) (Sanchez Reply Affid. ¶¶4-11; Clack Affid., sworn to Jan. 9, 2009 ¶¶5-7). While Defendants' objections are valid, as discussed below, the Court did not find need to rely upon the inadmissible evidence and the objections are therefore moot.

(A) All Derivative Claims: Groups of Challenged Transactions

Plaintiffs challenge the following types of transactions in their derivative claims against Defendants:

1. Service payments and Personal Loans to Leas-Co

Plaintiffs assert that Leas-Co has been improperly charged payments for "service copies" - - in other words Leas-Co has been billed by Duplicating for the numbers of copies lessees are permitted to make on their machines and any service charges. As stated by Robin Murdono:

> John Rocchio has grossly distorted the basic and standard transaction that repeatedly takes place between his wholly-owned company, Duplicating, and Leas-Co, in an attempt to justify the massive charges for "service copies". . . He admits that Duplicating (not Leas-Co) negotiates a copier lease with a potential customer, wherein the customer is charged for the

> machine it leases, as well as for the "copy kit" provided with the machine, together with whatever profit and interest he builds into the transaction (Rocchio Aff. ¶¶ 30-31). The copy kit provides the customer with free service and parts required for the machine during the duration of the copy kit and up to the number of copies included therein.

(Murdono Affid. ¶ 14). Thereafter, "Duplicating sells, and Leas-Co buys, both the copy machine and Duplicating's obligation to perform service under the copy kit" (Murdono Affid. ¶ 15; *cf*. John Rocchio EBT at 150-151). In the typical transaction, Leas-Co pays Duplicating in a lump sum for the copier and the service contract at a discount from the price charged to the customer (Murdono Affid. ¶ 15 & Exhibit D [copy of a typical lease]). Leas-Co then collects the lease payments from the customer (Murdono Affid. ¶ 15).

Defendants disagree with this characterization of the typical transaction between the two corporations. John Rocchio claims that Duplicating sells only the "paper" for the copiers to Leas-Co, at a discount from the retail price to the customer, but not including the cost of the "copy kit" (Rocchio Affid. ¶¶ 33, 37, 39-41;John Rocchio EBT at 149-150). According to John Rocchio's testimony, he decides how much to bill Leas-Co for the service copies and it is based on an average figure as to what service should be based on standards in the industry (John Rocchio EBT at 204; *cf*. Murdono Reply Affid. ¶ 9). Plaintiffs claim that this figure is entirely arbitrary.

Plaintiffs contend that between 2000 and 2005 John Rocchio has imposed a duplicate service copies charge upon Leas-Co for each machine it purchases from Duplicating and leases to customers, resulting in payments from Leas-Co to Duplicating of $1,128,326

(John Rocchio Affid. ¶ 59).[2]

Plaintiffs further allege that, "[w]hile he has systematically drained Leas-Co of any profits through these devices, John Rocchio has simultaneously made loans to Leas-Co to dilute the value of his children's interest in the company" (Memo of Law at 7). The amount owed by Leas-Co to John Rocchio prior to1999 was $267,196 (John Rocchio Affid. ¶ 109 & Exhibit 9). Leas-Co's tax returns from 2000 through 2006 show personal loans from John Rocchio that grew to a total of $2,216,011 in 2005 (John Rocchio Affid. ¶ 29 & Exhibits 10-15).[3]

John Rocchio has a security interest in all Leas-Co assets and, on May 5, 2006, he demanded immediate payment.

(2) Paychecks without funds; W2s; K-1s

According to Plaintiffs, since before their mother died, John Rocchio had Leas-Co issue paychecks to Plaintiffs, with correspondingW2s, without actually giving them the money (Tonucci EBT at 148-167). Plaintiffs would then have to report the "income" and pay taxes on it, although they received no actual funds from Leas-Co (*id*.). For example, Tonucci testified that as far back as the early 1990s, when her late mother was doing the payroll for Leas-Co, there were paychecks issued for Tonucci and her siblings. Tonucci testified that her

---

[2] It is these payments that are the subject of one of Plaintiffs' cross motions for summary judgment. See *infra*.

[3] John Rocchio testified that he had never been paid back any of his loans to Leas-Co (John Rocchio EBT at 128, 131 [taken on 1/30/2008]) but the 2006 tax return shows a drop in loans from shareholders of $234,846 (John Rocchio EBT Exhibit 16). In addition, Murdono alleges that John Rocchio paid himself back $425,000 of the loan amounts in 2006 (Murdono Affid. ¶ 45 & Exhibit F [copies of checks, "repayment of loan"]; Murdono Reply Affid. ¶ 10).

parents told her that those funds were put in accounts set aside for the children for college expenses (Tonucci EBT at 58-59). Tonucci had done no work for Leas-Co at that point. According to Plaintiffs, $150,000 from one such account was used by Tonucci to build a house (Tonucci EBT at 109-110), but the rest of the funds remained in John Rocchio's custody (John Rocchio's EBT at 316-319; 367-368; 398 et seq.). John Rocchio testified that he spent Plaintiffs' W2 money on their college education, their clothing and weddings, among other things (John Rocchio EBT at 318-319).

(3) Excessive Lease Payments to John Rocchio Personally & Clerical charges to Leas-Co from Duplicating

Plaintiffs claim that John Rocchio has caused Leas-Co to pay excessive amounts to him for use of limited space in the offices and warehouse at 315 Creekside, owned by John Rocchio personally (e.g. Tonucci EBT at 115-117). In addition, Plaintiffs claim that from 2001 through 2005, arbitrary sums have been charged to Leas-Co by Duplicating for "clerical" work, which sums have increased 100% between 1999 and 2005 (Murdono Affid. ¶ 42; John Rocchio Affid. ¶ 98; John Rocchio EBT at 260). Defendants have allegedly produced no contemporaneous records showing that any accounting methodology was used to determine these charges against Leas-Co (Murdono Affid. ¶ 42). Defendants submit affidavits of four employees concerning the work they do for Leas-Co (John Rocchio Affid., Exhibits 39-42).

(4) Insider Compensation

Plaintiffs claim that insider compensation was paid to John Rocchio and his wife Carol Rocchio in the form of bonuses from Leas-Co; that Leas-Co has paid for thousands of dollars in gifts to Duplicating employees, and that John and Carol Rocchio have taken lavish trips and charged them to Leas-Co (SAVC ¶ 45-46; Tonucci EBT at 195-197).

(5) Treatment of Off-lease Copiers

Plaintiffs allege that their forensic accountants (whose report is not in the record) informed them that, when customers give back copiers they leased, the copiers are transferred from Leas-Co to Duplicating without any consideration; they are refurbished and released or sold back to Leas-Co (Murdono Affid. ¶ 38; Tonucci EBT at 70-71; Richard Rocchio EBT at 70-74). John Rocchio disputed this (John Rocchio Affid. ¶¶82-96).

(6) Leas-Co's Vehicles

According to Plaintiffs, John Rocchio caused Leas-Co to purchase between 20 and 26 vehicles for use by him, his wife, and Duplicating salespeople and technicians (including the Plaintiffs) during the period between 2000 and 2006 (John Rocchio Affid. Exhibit 14 [2004 tax return for Leas-Co listing 17 cars valued at $377,855]). Plaintiffs contend that no payments are made to Leas-Co for this service (Murdono Affid. ¶ 29; *cf.* John Rocchio EBT at 142 [Lease-Co has a "lease portfolio" of vehicles]). Defendants submit only a list of vehicles and alleged dates when they were "paid off", i.e. when Duplicating or others had paid Leas-Co for the use of the vehicles, along with invoices generated after the filing of the instant complaint (John Rocchio Affid., Exhibits 24-25).

(7) Sharp Account

According to Plaintiffs, John Rocchio invented a fictitious school district so as to order equipment at a non-profit rate from the Sharp Company through a salesman who later came to work for Duplicating, (Tonucci EBT at 98-99; Napolitano Affid.).

(B) Defendants' Motion Defense # 1: Acquiescence, Ratification or Estoppel

Defendants argue that the derivative claims which seek relief concerning all

seven of the challenged transactions should be dismissed because Plaintiffs ratified or acquiesced to the transactions at issue and/or should be estopped from challenging their validity. Defendants argue that Plaintiffs have testified to their active knowledge of and/or participation in five of the different transactions at issue, including the issuance of W2s and K-1s, gifts and trips paid for by Leas-Co, the Sharp copier transaction, the handling of off-lease equipment, and the leasing of vehicles. They rely on several cases which provide that "[a] shareholder is estopped to challenge a corporate policy which he or she affirmatively approved, or of which the shareholder had knowledge but to which no objection was interposed" (*Winter v Bernstein*, 149 Misc2d 1017, 1020 [Sup Ct NY County 1991], *mod'd on other grounds* 177 AD2d 452 [1st Dept 1991]; *see Blake v Blake*, 225 AD2d 337 [1st Dept 1996]).

The cases relied on by Defendants are factually distinguishable. In *Winter*, plaintiffs suing derivatively held only life interests in their shares, while the remainderpersons were grandchildren of the controlling shareholder defendant. One of the plaintiffs had approved the salary and dividend policies while on the board of directors for eight years, and the other plaintiff shareholder had received copies of minutes of the meetings at which the salaries he was now objecting to had been approved. The court did not apply estoppel to the years after the plaintiff was removed from the board of directors (*Winter*, 149 Misc2d at 1020-1021). Leas-Co, on the other hand, held no annual meetings, board of directors meetings or shareholder meetings, and Plaintiffs never attended any formal corporate meetings (John Rocchio EBT at 65-66).

In another case cited by Defendants, where the plaintiff son knew his mother was selling the disputed property at a certain price and advised her to do as she liked with it

(*Blake*, 225 AD2d at 337), the court estopped the plaintiff from later complaining about the transaction, in light of his knowledge of and acquiescence to the sale (*id.*). Another cited case holds that a shareholder may be estopped from derivatively challenging corporate expenditures "if she participated in, and benefitted from them" (*Steinberg v Steinberg*, 106 Misc2d 720, 722-723 [Sup Ct NY County 1980] [divorcing wife brought derivative action challenging Defendant husband's use of corporate funds for lavish lifestyle she participated in]; *see Diamond v Diamond*, 307 NY 263 [1954]).

Defendants have marshaled the evidence they particularly rely upon in their appendix, including portions of the depositions of all of the Plaintiffs and of Plaintiffs' forensic accountant. In reviewing that evidence, the Court determines that Defendants have failed to meet their burden of establishing their entitlement to judgment as a matter of law on the defenses of ratification, acquiescence, or estoppel. The evidence in Defendants' papers raises questions of fact whether Plaintiffs had any knowledge of the challenged transactions or any intent to acquiesce to them. For example, Plaintiffs testify that they had no knowledge that Duplicating was taking off-lease copiers from Leas-Co for no consideration (Randal EBT at 78; Murdono Affid. ¶¶24-25, 38; Tonucci EBT at 70; Richard EBT at 71-72); that Duplicating was charging Leas-Co for service to customers separately from the sale of the leases (Murdono Affid.¶ 7); that John Rocchio had transferred UGMA/UTMA money to himself or loaned it to Leas-Co (Murdono Affid. ¶ 48-62; Tonucci EBT at 60, 164); or that allegedly excessive lease and employee costs were being charged to Leas-Co (Murdono Affid. ¶¶39-42; Tonucci EBT at 115-116).

Defendants assert that family-owned corporations tend to be run more

informally, and the fact that there were no shareholder or directors meetings should not stand as an impediment to summary judgment. For example, the trial court in the *Winter* case quoted from *Kranich v Bach*, 209 AD 52 [1st Dept 1924], which stated:

> it is to be noted that this is a family corporation, and it is a fair inference that the members knew each other intimately and presumably had a more intimate knowledge of the corporation and its affairs than would be the case in a large corporation where the stockholders are widely scattered and know nothing of what is transpiring

(*Kranich v Bach*, 209 AD 52, 54 [1st Dept 1924]). Unlike in *Winter*, however, although Richard Rocchio was a director of Leas-Co, he denies having had any significant contact with his father, or anything to do with the company since 1999 (Richard Rocchio Affid. ¶ 7). In addition, the lack of formal meetings, notices and minutes is significant where the dissenting shareholders claim that the controlling shareholder was secretive and autocratic. Plaintiffs contend that no one could tell John Rocchio what to do, unless he decided he wanted to hear it. For example, Rene Tonucci testified that:

> A few times I would ask my dad to explain Leas-Co and what our capacities were and he just – you know, he runs it and that was it. He wasn't willing to teach us about the business. He wanted to be in charge of it and didn't want to have to explain it to anybody else what he was doing with it

(Tonucci EBT at 91). John Rocchio confirmed that he is the person who has run both companies day in and day out and has made all of the decisions (John Rocchio EBT at 59).

Waiver is the intentional relinquishment of a known right (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 403, *rearg. denied* 3 NY2d 941 [1957]). Claims of ratification are premised on the intent of the alleged ratifier (*Sovereign Metal Corp. v Ciraco*, 210 AD2d 75 [1st Dept 1994]). "The act of ratification . . .must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly

established and may not be inferred from doubtful or equivocal acts or language" (*Holm v C.M.P. Sheet Metal, Inc.*, 39 AD2d 229, 233 [4th Dept 1982]). Defendants' papers fail to establish that Plaintiffs had any intent to waive their objections or ratify the challenged transactions. Moreover, questions of intent like this typically are for the finders of fact and should not be resolved on motion (*Robbins v Tucker Anthony Inc.,* 233 AD2d 854, 855 [4th Dept 1996]). To the extent Defendants argue estoppel, they have failed to establish any reliance by Defendants on Plaintiffs' inaction or silence. Rather, Defendants' papers raise questions of fact as to what Plaintiffs knew, when they knew it, and whether any action they took short of a lawsuit would have changed Defendants' behavior. Therefore, Defendants' motion is denied insofar as it relies upon those defenses.

(C) Defendants' Motion; Defenses # 2 & 3: Laches and Unclean Hands

Defendants also assert that the defense of laches is a basis to dismiss all of the derivative claims. "Neglect to assert a right for an unreasonable and unexplained length of time, accompanied by other circumstances causing prejudice to an adverse party, operates as a basis for the doctrine of laches" (*Matter of Taylor v Vassar College*, 138 AD2d 70, 73 [3rd Dept1988]). However, mere delay without actual prejudice is insufficient, and Defendants' papers do not establish any prejudice due to delay by Plaintiffs in bringing an action (*Matter of Ricciardi v Johnstown Leather*, 1 AD3d 661, 663 [1st Dept 2003]; 75A NY Jur2d, Limitations and Laches § 369). Further, laches is inherently a fact-specific defense (*Taylor*, 138 AD2d at 73).

With respect to the defense of unclean hands, "where . . . a party 'has engaged in inequitable or unconscionable conduct connected with the matter in litigation,' it is not entitled

to equitable relief" (*Coty v Steigerwald*, 262 AD2d 946, 947 [4th Dept1999], quoting *Cohn & Berk v Rothman-Goodman Mgt. Corp.*, 125 AD2d 435, 436 [2d Dept 1986]). Defendants contend that Plaintiffs admit to participating in and/or benefitting from transactions involving Leas-Co's expenditures for leased vehicles, gifts, trips, and purchases. However, Defendants have failed to submit evidence of "inequitable or unconscionable conduct" on the part of the Plaintiffs sufficient to warrant dismissal of Plaintiffs' derivative claims.

Therefore, Defendants' motion, insofar as it relies upon the defenses of laches and unclean hands, is denied.

(D) Defendants' Motion: Defense # 4: Statute of Limitations

Defendants assert that the derivative claims are barred by the statute of limitations. CPLR 213(7) provides a six-year statute of limitations for an action "by or on behalf of a corporation against a present or former director, officer or shareholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith" (*see Spitzer v Schussel*, 7 Misc3d 171, 174 [Sup Ct New York County 2005]; *see also Loengard v Santa Fe Indus.*, 70 NY2d 262, 266 [1987]).

Generally, breach of fiduciary duty and unjust enrichment claims accrue upon breach, rather than upon discovery (*Pollack v Warner Bros Pictures*, 266 AD 118 [1st Dept 1943]; *see General Stencils v Chiappa*, 18 NY2d 125 [1966] [discussing application of equitable estoppel where Defendants' affirmative wrongdoing induced Plaintiff to refrain from filing a timely action]). However, breach of fiduciary duty claims may be tolled due to certain behaviors by the fiduciary. "A defendant may be estopped from pleading the Statute of

Limitations where a plaintiff was induced by fraud, misrepresentation, or deception to refrain from timely commencing an action. . . .Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship ... which gave the defendant an obligation to inform him or her of facts underlying the claim" (*Gleason v Spota*, 194 AD2d 764, 765 [2d Dept 1993]; *see also Niagara Mohawk Power Corp. v Freed*, 265 AD2d 928, 940 [4th Dept 1999]). Because Defendants' papers do not resolve the questions of fact about what Plaintiffs knew about the challenged transactions and when they knew it, the motion insofar as it seeks dismissal of any claims based upon the statute of limitations in relation to breach of fiduciary duty is denied.

(E) Defendants' Motion: Defense # 5: Business Judgment Rule

Defendants raise the business judgment rule as a basis upon which to dismiss Plaintiffs' contentions concerning the challenged transactions. Defendants argue that, to the extent the transactions involved self-dealing, they are still protected by the business judgment rule because the transactions were fair, reasonable and in the best interest of Leas-Co.

Plaintiffs are correct in stating that the business judgment rule, on its own, does not protect the challenged transactions. "That doctrine prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979] [internal citation omitted]; *see Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-38 [1990]). As John Rocchio admits, he made virtually all decisions with respect to both companies, including in connection with the transactions between the two companies or between Leas-Co and himself. It is his "good faith" and "honest judgment" that Plaintiffs

contest. Because Defendants have not established that decisions were made by a disinterested board and were made in good faith following full disclosure (BCL § 713), there remain questions of fact with regard to the propriety of the challenged transactions engaged in by Defendants. Therefore, the business judgment rule does not entitle Defendants to summary judgment.

(F) Defendants' Motion: Defense # 6: Failure to State a Cause of action (Unfair Competition)

Defendants contend that the sixth cause of action for unfair competition must be dismissed for failure to state a cause of action. "A cause of action based on unfair competition may be predicated . . . 'upon the alleged bad faith misappropriation of a commercial advantage belonging to another 'by exploitation of proprietary information or trade secrets'" (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008], quoting *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.,* 20 AD3d 439, 440 [2d Dept 2005] [internal citation omitted]). With respect to this cause of action, Plaintiffs allege that John Rocchio and Duplicating conspired to exploit Leas-Co's proprietary information to enrich themselves at Leas-Co's expense. Plaintiff has therefore properly stated a cause of action for unfair competition under New York law.

(G) Personal Causes of Action, # 10: Diversion of Profits and Dividends

In the 10th cause of action against John Rocchio and Duplicating, Plaintiffs assert that as shareholders they are entitled to distributions of profits and dividends from Leas-Co as "fairly and reasonably determined by the board of directors", but that Defendants have diverted all such profits and dividends to themselves or their designees (SAVC §¶119-122). In their opposition to the motion for summary judgment, Plaintiffs fail to cite any case law

controverting Defendants' contention that Plaintiffs lack standing to bring this cause of action individually, as it is solely a derivative cause of action under New York law, and encompassed within other causes of action asserted by Plaintiffs. "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]; *Elenson v Wax*, 215 AD2d 429 [2d Dept 1995]).

Specifically, a cause of action asserting that the managing directors and chief executive officers of a corporation have failed to pay dividends and received excessive salaries, "involving as they do matters of business judgment . .. are . . .insufficient to make out an individual cause of action, but rather to make out a claim of a derivative nature which belongs to the corporation" (*Bender v Ferro*, 86 AD2d 12, 13 [1st Dept 1982]; *see also Gordon v Ellman*, 306 NY 456, 459 [1954] [until dividend is declared, shareholder has no right of action to be paid any part of the corporation's funds]). Thus, Defendants' motion is granted insofar as it seeks the dismissal of the 10th cause of action.

(H) Personal Causes of Action #11, #12 and #17

Defendants contend that Plaintiffs' claims with respect to the Uniform Gift to Minors Act or Uniform Transfer to Minors Act (UGMA/UTMA) accounts that were established for them by their father and/or mother should be dismissed as untimely (11th cause of action for breach of fiduciary duty [accounts] and 12th cause of action for conversion [accounts]). Initially, gifts made under UGMA and UTMA are "irrevocable and convey[] to the minor an indefeasibly vested legal title" (*Matter of Ajamian*, 270 AD2d 724, 727 [3d Dept],

appeal dismissed 95 NY2d 931 [2000] [citing EPTL former§ 7-4.3]; *see* EPTL § 7-6.11 [b]). However, New York courts have held that the accrual date for causes of action seeking funds held in such accounts must be measured from the date the minor becomes eligible to receive the funds , either at 18 or 21 (depending upon the manner in which the account is set up) *(Lupo v Republic National Bank of New York*, 215 AD2d 452, 453 [2d Dept 1995] [action commenced more than six years after plaintiff's 18th birthday to recover funds from UGMA account time-barred under CPLR 213 (1)]; *Paprin v Silberstein*, 3/11/2004 NYLJ 18, col. 1; EPTL former § 7-4.4[d] [upon minor's 18th birthday, custodian "shall deliver or pay"over assets to minor]; EPTL § 7-6.20 [custodian must pay over property to minor at 18 or 21, depending upon manner in which property was transferred; EPTL § 7-6.22 [effect of repeal of UGMA on existing accounts]).

Richard Rocchio and his two sisters were all at least 30 years old in 2006, when the complaint was filed, and therefore it was filed more than six years after either their 18th or 21st birthdays, whichever applied (Richard Rocchio EBT at 12; Tonucci EBT at 12; Murdono EBT at 15).[4] Therefore, with respect to the UGMA/UTMA accounts, John Rocchio has established his entitlement to summary judgment as a matter of law concerning any claims to the amount of money in the UGMA/UTMA accounts more than six years prior to the filing of the complaint in this action, but Plaintiffs have raised issues of fact concerning whether John Rocchio should be equitably estopped from asserting the statute of limitations as a defense (*see Lupo v Republic Nat'l Bank*, Slip Op, submitted by Plaintiffs, at 3 [Sup Ct Suffolk County

[4] Defendants have not moved to dismiss the cause of action with respect to Randall Rocchio's UGMA/UTMA account.

1992], *aff'd* 215 AD2d 452, 453 [2d Dept 1995]).

As to any moneys deposited in those accounts thereafter which may have been transferred to a Totten trust or personal account of John Rocchio's, there are issues of fact concerning whether Plaintiffs have a claim to those amounts on a breach of contract or breach of fiduciary duty theory. In addition, Plaintiffs have demonstrated that John Rocchio may have converted K-1 earnings belonging to Plaintiffs. Therefore, to the extent that the 11th and 12th causes of action assert claims to moneys belonging to Plaintiffs but deposited by John Rocchio into an account over which he had sole dominion and control, the motion for summary judgment as to those causes of action is denied. Further, Defendants' motion to dismiss with respect to the 17th cause of action for a constructive trust with regard to the accounts is denied as premature.

To the extent that Plaintiffs seek relief concerning their interests as beneficiaries to a "Totten" trust "(*see Matter of Totten*, 179 NY 112, 125-126 [1904]), the 11th and 12th causes of action are dismissed. A Totten trust vests no interest in the beneficiary until the death of the trustee (*NK v MK*, 17 Misc3d 1123 (A), *44-45 [Sup Ct Kings County 2007]). Plaintiffs retain their claims to money they assert was due and owing to them (personal claims) or to the corporation (derivative claims) (if any) insofar as it was deposited by John Rocchio into those "In trust for" accounts.

(I) Personal Causes of Action #13 & #14: Statute of Limitations Concerning Testamentary Trust

Defendants previously moved to dismiss the 13th cause of action in the amended verified complaint that alleged breach of fiduciary duty by John Rocchio as trustee of a testamentary trust set up by the will of his late wife, of which Plaintiffs were the beneficiaries.

In January of 1995 the three older children, who were legal adults at the time, executed a Statement of Distribution, which their father (executor and trustee) had them sign (John Rocchio Affid. ¶¶129-133 & Exhibit 31). The trust held assets including cash and shares in Leas-Co (*id*. Exhibit 32). Defendants allege that the cash was distributed to the Plaintiffs, who executed releases in 1996 and 2001 (Randal only) acknowledging that John Rocchio and the other trustees had accounted to them satisfactorily (*id*. Exhibits 34-36, 38). By order granted April 16, 2007, the Court dismissed the 13th cause of action pursuant to CPLR 3211 (a) (1), based upon the releases. The cause of action was then repleaded verbatim in the SAVC. Because the Court's prior order of April 16, 2007 is law of the case as to this cause of action, the Court dismisses the 13th cause of action in the SAVC.

Plaintiffs' 14th cause of action is barred by the statute of limitations. In that cause of action Plaintiffs allege that, after they signed the releases, John Rocchio had them sign checks representing their shares of the cash in the testamentary trust, and then converted those monies by depositing them into UGMA/UTMA accounts which were never turned over to them. Based upon any view of the applicable statute of limitations, these claims are barred as to all of the children except Randal.

(J) Remaining Personal Causes of Action ##15-16

Plaintiffs' 15th cause of action for unjust enrichment alleges that at various times, Plaintiffs received W2s or 1099s from Leas-Co but did not receive the attendant funds, which they claim were diverted to Defendants. The 16th cause of action asserts a claim that Defendants have been unjustly enriched by using funds deposited in the Accounts that belonged rightfully to Plaintiffs. The motion for summary judgment as to these causes of

action is without merit, and is denied.

(K) Cross Motion by Plaintiffs regarding certain Key Bank Accounts

Renee Tonucci asserts that she had a joint bank account with John Rocchio at Key Bank. Tonucci alleges that the account was closed by John Rocchio on January 9, 2006, without her authorization or consent, and at that time the balance was $14,794.42. She had paid taxes on the interest on that account (Tonucci Affid., sworn to on Oct. 31, 2008, Exhibits A-C). Tonucci seeks half of the balance at that time, plus interest. Robin Murdono and Richard Rocchio make similar claims about joint accounts in their names and their father's name.

Plaintiffs rely upon Banking Law § 675 (b), which provides that the making of a deposit in a joint account is prima facie evidence in any action to which the bank is a party, of the intention of both depositors to create a joint tenancy; the burden of proof in rebuttal is on the party challenging the title of the survivor (Banking Law 675 [b]; *see also id*. (b) (2) [subsection does not alter common law]). "[A] joint account creates a rebuttable presumption that a joint tenancy exists as to funds deposited therein, . . .the burden of proof in refuting the presumption created by prima facie evidence of a joint account is on the party who challenges the existence of the joint tenancy, [and] with respect to the funds held in the joint account each joint tenant has the right to a moiety or less for his or her own use, and . . . where a joint tenant draws an amount in excess of his or her moiety there exists an absolute right in the other tenant, during the lifetime of both, to recover such excess" (*Warren v Warren*, 95 AD2d 807 [2d Dept1983]). The fact that one of the joint owners has exclusive possession of the passbook, makes all deposits and is the sole source of the funds, does not by itself rebut the presumption (*In re*

Ricci, 18 AD3d 663, 664 [2d Dept 2005]).

Defendants allege that the complaint contains no allegations concerning the Key Bank Accounts at issue, and therefore no relief can be awarded with respect to them. The Court agrees. Paragraph 124 of the SAVC alleges upon information and belief that John Rocchio established and "maintained several bank or brokerage accounts (collectively, "Accounts") on behalf of each of the Plaintiffs". In paragraph 125, the term "Accounts" is defined to include UGMA and UTMA accounts and Totten Trusts. These allegations are incorporated in the 12th cause of action seeking damages for conversion from the Accounts (SAVC ¶¶ 141, 142). However, paragraph 126 seems to limit the accounts at issue to those defined in paragraph 125, because it states that no one has an enforceable claim to any of the assets in the Accounts except Plaintiffs – and that would not apply to a joint account (*see also* SAVC ¶¶126, 175, 184).

In any event, John Rocchio has raised an issue of fact for trial, whether the accounts were opened only for his convenience, to save money for his children and to leave them the money upon his death (John Rocchio Reply Affidavit ¶¶33-36; *see Matter of Reardon*, 52 Misc2d 371, 374 [Surrogate's Court Bronx 1966], *decree aff'd* 29 AD2d 630 [1st Dept 1967], *order affd* 22 NY2d 928 [1968]; *Moyer v Briggs*, 47 AD2d 64, 66-67 [1st Dept 1975]). Therefore, Plaintiffs' cross motion seeking partial summary judgment on the joint bank accounts is denied.

(L) Plaintiffs' Cross Motion on Service Copies

Plaintiffs also move for partial summary judgment with respect to the service copies transactions. This cross-motion consists of one paragraph in their memo of law which cites no

case law. That motion is denied, due to the existence of issues of material fact for trial.

Therefore, the Court denies both cross motions in their entirety and grants Defendants' motion for summary judgment in part: (a) dismissing the 10th, 13th and 14th causes of action; and (b) dismissing the 11th and 12th causes of action as to any interests of Plaintiffs solely as beneficiaries of "Totten" trusts established by John Rocchio. The motion is otherwise denied.

Settle order.

DATED: June 30, 2009

_____

HON. JOHN M. CURRAN, J.S.C.