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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Marc N Benhuri

- v -

Melvin Cooper

INDEX NO. 601838/03

MOTION DATE 4/19/06

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/18/07

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MARC N. BENHURI, MOISES KROITORO, and BERTHA EPSTEIN, individually and derivatively on behalf of FRONTLINE COMMUNICATIONS PERU S.A.C. and on behalf of ROYAL COMMUNICATIONS OF PANAMA, S.A. and NEGES CORPORATION,

Plaintiffs,

-against-

Index No.: 601838/03

MELVIN COOPER, DAVID BERSSON, VICTORIA HINES, FRONTLINE COMMUNICATIONS INTERNATIONAL, INC., FRONTLINE COMMUNICATIONS PERU S.A.C., ROYAL COMMUNICATIONS CORP. OF PANAMA, S.A., DC COMMUNICATIONS GROUP, LTD, and OMIX CORPORATION,

Defendants.

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RICHARD B. LOWE III, J.

This action involves the parties' efforts to establish and operate a Peruvian telecommunications company, derivative-plaintiff Frontline Communications Peru S.A.C (Frontline-Peru). As background, in the complaint, plaintiffs allege that defendants Bersson and Cooper are corporate fiduciaries of both defendant Frontline-Communications International, Inc. (Frontline-International), and Frontline-Peru. Frontline-Peru is a Peruvian corporation, the formation of which was contemplated in a May 28, 2002 letter, signed by defendant Cooper, as CEO of Frontline-International, and Benhuri (The Letter). According to the complaint, among other things, defendants breached an agreement, as expressed in The Letter, and usurped and diverted plaintiffs' telecommunications business opportunities and revenues.

Previously, on defendants' motion for summary judgment, the court dismissed the plaintiffs' breach of contract cause of action, which was based on The Letter. The court also determined that plaintiffs had raised an issue of fact, sufficient to defeat summary judgment, as to whether defendants had breached their fiduciary duties by usurping or diverting Frontline-Peru's telecommunications traffic business opportunity.[1]

After a three-day trial, the jury returned a verdict in favor of the individual plaintiffs in this action, Marc N. Benhuri, Moises Kroitoro and Bertha Epstein (Plaintiffs or the Individual Plaintiffs) for $750,000, finding that the Individual Plaintiffs had met their burden of establishing that defendants breached fiduciary duties owed to them. The jury did not find, however, that the Individual Plaintiffs had met their burden of establishing fraud or unjust enrichment.

In this motion, defendants Melvin Cooper, David Bersson and Frontline-International (together, Defendants) move, pursuant to CPLR 4404, for an order setting aside the verdict and: (1) directing that judgment be entered in their favor as a matter of law; or (2) ordering a new trial on the grounds that the verdict is against the weight of the evidence; or (3) ordering a new trial on the issue of damages, to prevent injustice, because the $750,000 jury award is excessive. Plaintiffs oppose Defendants' motion, and cross-move for an order entering judgment in favor of the Individual Plaintiffs, and against Defendants, jointly and severally, in the amount of $750,000, together with prejudgment interest, costs and disbursements.

In short, defendants argue, that the jury verdict, which they claim is inconsistent, and the evidence adduced at trial, demonstrate that they did not usurp a corporate opportunity that

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[1]Plaintiffs made similar allegations concerning derivative-plaintiff Royal Communications Corp. of Panama, S.A., which they alleged was formed in Panama for the purpose of "facilitating the operations and transfer of telecommunications revenues from Frontline-Peru to the individual parties in this action" (Complaint, ¶ 19).

belonged to Frontline-Peru. Defendants argue that the only consistent jury finding is that defendants breached the duty of loyalty, because they did not provide undivided loyalty to Frontline-Peru. Such a claim, Defendants contend, fails because defendants' divided loyalty was disclosed to, and accepted by, the minority shareholders of Frontline-Peru from the start of the parties' relationship.

Plaintiffs oppose defendants' motion and argue that they alleged, and the jury found, that Defendants violated their fiduciary duties to Plaintiffs by failing to share in the proceeds from telecommunications traffic into and out of Peru, after the formation of Frontline-Peru in June 2002 (Smith Aff., ¶¶ 2-3). Plaintiffs contend that such a duty was imposed on Defendants, as a matter of law, because of their status as majority shareholders and/or directors or officers of Frontline-Peru.

The following was adduced at trial. Benhuri testified that Cooper indicated to him that he would be interested in obtaining a license for telecommunications in Peru, and that after the license was obtained, Benhuri told Cooper of its existence, and the parties signed The Letter, which is Plaintiffs' Exhibit 1 (29-30).[2] The Letter, a one-page document dated May 28, 2002, is signed by Cooper, as C.E.O. of Frontline-International, and Benhuri. The Letter states that it is a memorandum of understanding that Frontline-International and Benhuri, or his assignee, "intend to form a new entity, ('Newco')" and provides that:

> "[n]either Frontline nor Benhuri intends the negotiations (including any oral or written promises made in connection therewith) to constitute a binding contract. Both parties reserve the right to be bound only by the signing of a written instrument, other than this letter, that shall serve as the final agreement between the parties."

[2]Numbers enclosed in parentheses refer to the pages of the trial transcript.

(Pl. Exh. 1).

The Letter further provides that the following terms reflected Benhuri and Frontline-International's "mutual understanding of the proposed terms and conditions of the aforementioned final agreement": (1) that Frontline-International was to own 2/3 of the new company; (2) that Benhuri, or his assignee, was to own 1/3 of the new company; (3) that profits, losses and expenditures "shall be in direct proportion to ownership"; (4) that Frontline-International "shall be responsible for the establishment and implementation of telecommunications networks between the United States and Peru"; (5) that Frontline-International "shall conduct all business related to Peru through Newco"; (6) that Benhuri "shall be responsible for obtaining all licenses pertaining to and necessary for the operation of 'Newco' in Peru"; and (7) that Benhuri was to "arrange meetings between Newco and telecommunications companies doing business in Peru . . . " and assist Newco in all other matters that arose in Peru in connections with its operation there (Pl. Exh. 1).

Shortly after signing the letter, Benhuri called Solomon Epstein,[3] in Peru, who arranged for meetings with seven telecommunications carriers located in Peru (30). Thereafter, Benhuri, Solomon Epstein and Moises Kroitoro (The Benhuri Group), and Bersson, Cooper and Hines (The Cooper Group) traveled together to Peru (30). According to Benhuri, the Cooper Group and the Benhuri Group formed Frontline-Peru in Peru, and distributed the company's shares, with the agreement that the Cooper Group would own 70%, and the Benhuri Group 30% (31). Because of their expertise in the telecommunications business, Benhuri stated that the defendants were to be in charge of Frontline-Peru's operations (31).

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[3]According to the complaint, Solomon Epstein is deceased, and plaintiff Bertha Epstein was his wife.

Through an attorney hired in Peru, the parties amended the corporate documents to "indicate all the stipulation [*sic*] for the corporation and opened a bank account for the corporation," into which Frontline-International deposited $7,000, and The Benhuri Group, $3,000 (34). Benhuri and Bersson had signing authority for the bank account (35), and the money deposited therein was used to pay some office expenses, the attorney and notary, and the consultant who was hired to take the parties to meet with different telecommunication carriers. It is undisputed that the parties opened an office together in Lima, and Benhuri testified that a telecommunications license was obtained (35-36).

According to Benhuri, the telecommunications licensing process in Peru is such that, after issuing the license, "they would make it public knowledge in the newspaper, that they said such and such a license has been issued, which—that happened in July" (35-36). Regarding the operational set up of Frontline-Peru, Benhuri stated:

> "we were supposed to set up all the equipment and everything else that was part of Frontline Telecommunication and they said: For [the] time being, while we are setting it up and setting up the office, we are going to use another company's line; you know, MegaCom, and they had a meeting with [MegaCom] over there, and then we set up the equipment in order to do the national and international telephone and whatever else we can do, and that's what was supposed to be done"

(36).

Benhuri testified that Cooper told him that he could expect two to three hundred thousand dollars per month for the Benhuri Group, through plaintiff Neges Corporation (37), and that when he returned to New York Cooper told him that "the traffic is very good." Benhuri further testified:

> "if I'm not mistaken, [Cooper] said that its somewhere around a couple of hundred thousand [telecommunications minutes], meaning per day . . . and I believe the fees

> was . . . anywhere between . . . 20 to 35 cents per minute to–in and out of Peru. And the numbers have never changed. He always said that that's what our group is going to get . . . "

(40).

Benhuri stated that determining the revenue of the business entailed multiplying the number of minutes per day, by the cents per minute, which would yield the total revenue for that day (41). Concerning the business' costs, Benhuri stated that Cooper told him that because "we have . . . our own lines and the hub" the costs were not more than 20 percent, which was for the lines, the office overhead and what "they pay to the other carrier to take their call," thus generating gross profits of 80% (41-42).

Benhuri testified that he asked Cooper for his group's share of the revenues many times. When questioned as to when he first asked Cooper about revenues, Benhuri's response was that in September 2002, upon asking Cooper when the Benhuri Group was going to receive its portion of the profit, Cooper said that it would be just a few weeks (42). Benhuri stated that he again inquired from Cooper as to the profits a couple of weeks thereafter, at which point Cooper stated "[n]ext week. I promise you" (42). According to Benhuri, when he went back a week later, Cooper stated that he wanted to "do it but David, my partner David Bersson, he doesn't want to do it, so we are not going to give you anything" (43).

When asked whether Cooper ever sent any documents reflecting the monies that Benhuri could expect to receive from the business, Benhuri responded that Plaintiffs were not given any documents, although they asked for them constantly, until October, at which point Cooper gave him Plaintiffs' Exhibit 13. Plaintiffs' Exhibit 13 are three invoices from "MegaCom Corp." (MegaCom) addressed to Frontline-International (the MegaCom Invoice) (45, 174). Benhuri

testified that MegaCom had the "line" that "Frontline Communication" was using in order to send traffic in and out of Peru (45), and that the MegaCom Invoice reflected the telecommunications minutes that were going through MegaCom.

Regarding discussions with Cooper concerning MegaCom, Benhuri stated that:

> "when we were in Peru and they said that we're going to meet with them. And according to [The Letter] that we had, it said, no matter what business they did before or they do after, it goes to the Frontline Peru"

(46). When asked whether he ever received assurances from Cooper about revenues generated through MegaCom, Benhuri testified:

> "Absolutely. I mean, even – I mean, on [The Letter] that we signed, it – it – one of the line indicated, from the time that we sign the contract no matter what business they had previously or in the future done, going to come to the new company, which became Frontline Communication of Peru"

(47).

According to Benhuri, Cooper explained to him that the MegaCom Invoice, "is the bill that MegaCom sent to [Frontline-International] showing "how many minutes they used during a certain period of time" (50). When asked what the MegaCom Invoice meant to him when Cooper showed it to him Benhuri responded:

> "I am not a telecom expert. You know, I did the thing, and he said this was the certain – I mean the number of the minute that they sent through MegaCom, and I take him at his word. You asking me a question which I have no knowledge of"

(51). Benhuri testified that the three-page MegaCom Invoice showed approximately 300,000 minutes of telecommunications traffic for the one week period ending October 6, 2002, that he did not know if there were more documents, other than the MegaCom Invoice, and did not recall if Cooper gave him additional documents (50-52).

Benhuri also testified that although he attended the meetings with carriers in Peru, during the parties' trip there, he was never given follow-up information concerning those carriers, and did not know if any agreements were made with them, or whether telecommunications traffic was sent by any of them through Frontline-International or Frontline-Peru (53-55). Benhuri stated that he thought a partnership existed, and answered "no" when asked if he ever tried to verify whether any telecommunications traffic was sent through any of the carriers with which the parties met in Peru, either through Frontline-International or Frontline-Peru (55).

Benhuri further testified that during the trip to Peru, Cooper and Bersson met with representatives of MegaCom (46, 55). Regarding that meeting, Benhuri stated that Cooper and Bersson told him that they were going to talk to MegaCom in the lobby of the hotel where the Benhuri Group and the Cooper Group were staying, and that it was not necessary for Benhuri to be there because it was just technical work (55). Benhuri testified that he did not know if Frontline-Peru or Frontline-International ever signed a contract with MegaCom (56), and that he was aware that Frontline was doing business with MegaCom before the Peru trip, but had not been told anything else about MegaCom (56-57).

According to Benhuri, Defendants told him, sometime after The Letter was signed, "that for the time being, rather for us right now to send all the equipment there, we can start our business with the new–I mean corporation that we formed–by using their facility, which is like renting their facility" (58). When asked whether Defendants told him that they were going to continue to use MegaCom through Florida, Benhuri responded "[t]hey said that if it's more–what do you call it?–is bringing more money to the corporation, you know, they try to go to the cheapest route as possible" (58).

Benhuri did not know if Frontline-International was going to use MegaCom from or through Florida, or Peru, responding that it as a technical question (58-59). When asked if he knew if Frontline-International or Frontline-Peru ever set up operations out of Peru with any company Benhuri had mentioned at any time, Benhuri responded that the corporation and bank account were set up, but that the rest of the work was technical (59). Benhuri also stated that he did not get any information or know if they did business with those carriers that the Benhuri Group introduced to the Cooper Group in Peru (59).

Benhuri testified that he believed that the defendants would have needed to send a switching system from the United States to send and receive traffic from Peru, and that Defendants were supposed to bring the switching system, but apparently did not "due to the fact that MegaCom–they talked to them and for time being, they're going to use their switching system" in Peru and Florida (60). Benhuri did not know if "Frontline" ever actually used a switching system from MegaCom in Peru (60).

Benhuri stated that at the time he signed The Letter, Plaintiffs already had the Peruvian telecommunications license (61), and that this was the reason the parties had signed The Letter, and were setting up the agenda and traveling to Peru to meet with the carriers (60). According to Benhuri, the license was issued to one of Mr. Epstein's employees and assigned to Frontline-Peru, a fact that Benhuri states Cooper knew before the parties left for Peru (60-61).

Benhuri testified that Defendants' Exhibit A was an agenda (the Agenda) prepared by Mr. Epstein's office in advance of the parties' trip to Peru, and that he attended meetings with the seven telecommunications companies listed on the Agenda, but did not attend the MegaCom meeting. It was Benhuri's belief that Cooper's office scheduled the MegaCom meeting, and he

stated that Cooper told him both that the meeting was with MegaCom, and that "we set it up here and you guys don't have to attend; we going to go alone"(66). When asked if he knew that Frontline-International was doing business with MegaCom prior to that time, Benhuri responded that he did not (66).

Benhuri testified that the day of the MegaCom meeting in Peru, "[Bersson and Cooper] said that they are going to use their switch, for the time being, till they send down their own switches, according to our contract" (66), and that he was not aware of whether Frontline-International had been sending traffic to Peru before that meeting (67). Benhuri's deposition testimony from approximately a year earlier, read at trial, revealed that Benhuri had previously testified that Cooper told him that MegaCom was doing some business with Frontline-International at the time Frontline-Peru was formed (69). Benhuri testified that he did not recall whether he was aware of Frontline's dealings with MegaCom before he entered into the transaction, or went to the meetings in Peru (69).

Benhuri stated that he did not know if Frontline-International or Frontline-Peru ever sent any traffic using the telecommunications license that was secured in Peru (70). When asked if a formal agreement was ever signed between the Benhuri Group and Frontline-International or Cooper, Benhuri responded affirmatively, stating that the parties formed Frontline-Peru and had a shareholder agreement "and everything is stipulated in that. And we opened a bank account, as a partner, and we had the signatory" (73).

Although Benhuri believed that there was another document signed by someone from Frontline-International, he stated that he did not have the document (75). When asked if there was ever a written instrument other than The Letter, that was signed by both parties, Benhuri

pointed to The Letter and responded that "[i]t's the document, the corporation that we formed" (73). Benhuri stated that he believed that the forming of the corporation, the shareholders' agreement, the division of shares, and the inclusion of Bersson as another signatory on Frontline-Peru's bank account constituted exactly what had been agreed to by the parties (74).

When asked if there was any written document, other than The Letter, that was executed with Frontline-International, Benhuri responded that there was an amendment, that he believed was signed by Frontline-International, but that he did not have the document with him, and could not remember if anyone had signed it (74). Benhuri later stated that Plaintiffs' Exhibit 5, which is unsigned, was the amendment of which he had earlier spoken (112-113; Smith Aff., Exh. 3), and that he thought that the officers and directors of Frontline-Peru were Cooper, Bersson, Kroitoro and Solomon Epstein (80).

Benhuri testified that Cooper told him that "we are sending between two to three hundred thousand minutes a day," and that there were a lot of other companies that were sending traffic, but he did not know the names of the companies, because the defendants would not give him the information (76-77). Benhuri also stated that Cooper had told him that Plaintiffs' expected income for the joint-venture company would be between two to three hundred thousand dollars a month (76-78).

Benhuri testified that MegaCom had a switching system in Miami and Peru, and when asked about Megacom's role as related to Frontline-Peru Benhuri stated that:

> "we generated traffic through that–either from [the] Miami switchboard or the Peru. I believe the traffic from Peru came to the Miami switchboard, then from there it was distributed to the rest of the world, or the traffic from everywhere went to Miami, then to the Peruvian switchboard"

(80-81). In answer to the question "[a]nd you mentioned that there was an arrangement about renting MegaCom's switch[, w]hat did you mean by that?" Benhuri replied "t[h]ey paid for usage of their switching system till we bring our own equipment and set up the equipment" (81).

Benhuri testified that, in addition to requiring a business address and a bank account, the Peruvian telecommunications license was issued with a condition that the licensee had to bring the equipment. After a license is issued, Benhuri stated, the Peruvian government makes an announcement in the national newspaper concerning the grant (81). Benhuri testified that such an announcement is made about a month and a half after a license is issued, and that he believed that the announcement for Frontline-Peru, stating that a telecommunications license for 20 years was issued, came out in July (82).

Plaintiff Benhuri's son, Michael Benhuri, testified that he worked at the office of Frontline-International, monitoring telecommunications traffic on the company's computers, for two months during the summer of 2002. He further testified that a Frontline-International employee and salesperson told him that a trunk, which is a collection of T1 lines that move data from one place to another, lead to his father's business in Peru (95-97). Michael Benhuri also stated that he recalled that, one time, he saw approximately 1,000 minutes traveling through the MegaCom trunk, and reported this to his father, who had inquired about it, and that the trunk had traffic during the hundreds of times he checked it, but he did not quantify the amount (97-98, 100).

Plaintiffs offered the testimony of a translator, Rafael Rodriguez, who stated that Plaintiffs' Exhibit 8, an article or notice from a newspaper in Peru announcing that a telecommunications license was issued to a Mr. Merino, was a true and accurate translation of

the article (109). Benhuri stated that Mr. Merino, who worked for Mr. Epstein, obtained the license in his name (111). Benhuri believed that there was a written agreement between Frontline-Peru and Merino concerning Merino's securing of the license on behalf of the company (111-112), but that he did not have a copy of the agreement, which is in Spanish (112-113). Benhuri described Plaintiffs' Exhibit 5 as a copy of the amendment to the corporate documents, of which he had previously spoken, and stated that the name of Gustavo appeared on that exhibit, because Gustavo paid the checks from the local bank to pay Frontline-Peru's rent and other expenses from a second bank account to which money was transferred (114).[4]

Plaintiffs offered the testimony of Ken Saperstein on the profits, expenses, costs, finances and financing of telecommunications businesses (119). Saperstein testified that his background was not in the carrier-to-carrier telecommunications business (132), but discussed the manner in which profits could be derived from the cost and sales price of telecommunications minutes, profit margins in the industry, and overhead expenses.

Cooper, the only witness on behalf of Defendants, testified that he was then, and for the preceding eight years had been, the CEO of Frontline-International. According to Cooper, Frontline-International is a carrier's carrier that sells only to other carriers, and earns profits by selling telecommunications minutes to those carriers at above cost (140-141). Cooper testified that at the beginning of their relationship, Benhuri told him that he had a license in Peru for telecommunications business (142). Cooper stated that obtaining a license in Peru would aid Frontline-International because it would be able to send traffic to Peru and enter into contracts

[4]Rodriguez testified that Plaintiffs' Exhibit 5, included his written certification that the translation of that document was true and accurate (107).

with various carriers in Peru, thereby enabling it to run traffic through those carriers to different countries—to which the Peruvian carriers had access—in South or Central America, and to Peru (142-143). The Peruvian carriers would, in turn, also be able to run traffic to many of Frontline-International's routes (143).

According to Cooper, at the time he met Benhuri, MegaCom had a license in Peru to terminate the calls and Frontline-International was already sending traffic to Peru through MegaCom and other companies (143). Cooper stated that Frontline-International had a contract with MegaCom, while MegaCom had a contract with the carriers in Peru, and that it was MegaCom's license that was used in such transactions (143). Cooper further stated that to make a deal in Peru, with a Peruvian carrier, Frontline-International would need its own license (143-144).

Cooper testified that he signed The Letter, and that his understanding with Benhuri concerning The Letter was that if everything was complied with and he had the proper licenses, they would enter into a formal agreement with a 2/3-1/3 split, with Frontline owning 2/3 and Benhuri's company owning 1/3, and with profits divided in the same proportions (146-149). Cooper further testified that his understanding was that the formal agreement terms would include that Frontline would be responsible for implementing the telecommunication networks, and Benhuri would be responsible for obtaining all licenses pertaining to, and necessary for, the operation of the new company in Peru (148).

Cooper testified that he and Bersson went to Peru with Benhuri, and met with a number of Benhuri's associates in Peru, as well as carriers (144). Although he testified that he could not remember when the parties went to Peru and met with the Peruvian carriers, he stated that it was

before July 2002 (178), and that Frontline-Peru was the company referred to as "Newco" in The Letter (156). Cooper stated that, while the parties were in Peru, Benhuri never indicated that he had the license, but only that he was working on it, and that its acquisition would, by Peruvian law, require investing half a million dollars worth of assets in Frontline-Peru, which Cooper had not previously been told would be required (149-150, 168). Cooper stated that Frontline-Peru had no assets, and that he learned that a license was secured after this lawsuit was started, when he saw it in a motion, but never saw it prior to that time (149, 168).

According to Cooper, the Megacom Invoice is an invoice from MegaCom to Frontline-International for Peruvian traffic, and Frontline-International's bookeeper received such invoices from MegaCom on a regular basis (174). Cooper testified that the MegaCom Invoice appears to reflect a few hundred thousand minutes of telecommunications traffic for the week ending on the invoice's date, October 7, 2002 (153, 174).

Cooper stated that Benhuri asked him for a copy of the MegaCom Invoice, because he wanted to see how many minutes Frontline-International was doing through MegaCom (153). Cooper also stated that he had discussions with Benhuri, sometime after the MegaCom Invoice was printed, in which he stated that the number of minutes Frontline-International was buying through MegaCom was a few hundred thousand a week, but that he never told Benhuri that he could share in the profits of MegaCom (152, 168-169).

Cooper did not deny that he had engaged in discussions with Benhuri as to the amount of profits that could, potentially, be generated from Frontline-Peru, and did not recall if he gave Benhuri any specific figure as to the profit that he expected the Peruvian venture would produce, other than that the profits would be substantial (151, 159). Plaintiffs' counsel asked Cooper if he

recalled his deposition testimony in which Cooper stated that the volume Frontline did with MegaCom was perhaps a couple of hundred thousand minutes a day (171). Cooper responded that that number was speculation (172-173).

Cooper stated that Frontline-International was conducting MegaCom traffic in November 2002, but that he did not know if it was conducting traffic with MegaCom in June, July and August of 2002 (170), that he could not testify as to the rate of traffic being done in October, and that although he had received invoices from MegaCom on a regular period, he could not testify as to the period of time that telecommunications traffic was run (175). According to Cooper, the reason Defendants were able to produce only one invoice for MegaCom during discovery was that they were unable to find other invoices in storage (177-178).

Cooper testified that neither he nor any principal or affiliate of Frontline-International ever signed a formal agreement with Benhuri, his associates, or plaintiffs (158). He further testified that Frontline-International neither signed any kind of a contract, nor did business with the carriers to which Benhuri introduced the parties in Peru, and that no one in Frontline-International's office was working with any of the Peruvian carriers (155, 157, 188).

Cooper stated that Frontline-International invested about $10,000 in the Frontline-Peru venture and when asked for the purpose of that "investment," he responded that "[w]e secured an office in Peru and opened a bank account and paid for the airfares and hotels" (155-156). Cooper also testified that "we" retained an attorney in Peru and that a corporation was formed (156). According to Cooper, the opening of the office and bank account, occurred prior to the meetings with the carriers (166), but he did not know when the corporation was formed (167).

Cooper stated that Benhuri asked him for money, and stated that he was entitled to

"anything that we [Frontline-International] do in Peru," to which Cooper responded that Benhuri would be entitled to money from Peru if he obtained the license (159). Cooper also stated that after learning, while in Peru, that Benhuri did not have a license, he had no further discussions with carriers, and his interest in the venture ceased (166). According to Cooper, the understanding with Benhuri was that once there was a license in place and contracts were signed with carriers, the formal agreement would go into effect, but that that did not happen (188).

Cooper testified that Bersson sent a network plan which contains the statement "traffic originated in Peru by AT&T, transported by MegaCom and terminated by Frontline" with a facsimile dateline of August 2002 (180). Cooper stated that the diagram represented "what could happen" (180). Cooper could not explain why he gave invoices to Benhuri in October 2002 reflecting MegaCom telecommunications traffic, Bersson sent network plans to Kroitoro in August 2002, and defendants participated in opening a bank account and forming a corporation, if he was no longer interested in doing business with Plaintiffs in Peru after meeting with the Peruvian telecommunications carriers (181).

Cooper testified that a contract existed between Frontline-International and MegaCom, signed by his son David Cooper on behalf of Frontline-International (184), which concerned services, and specifically telecommunications minutes, provided to Frontline-International (184). Defendants' Exhibit B, a redacted copy of the Frontline-International agreement with MegaCom, was admitted into evidence without objection (184-185). Cooper further testified that the document was redacted because of a confidentiality agreement with the vendor, which was attached to the document (185). Cooper stated that the date of the agreement was February 12, 2002, which was when he, or presumably Frontline-International, started to do business with

MegaCom (185). Cooper stated that he was no longer doing business with MegaCom, and stopped doing business with MegaCom six months before the action was commenced (190-191). The parties stipulated, on the record, that the lawsuit was commenced on June 11, 2003 (190).

Cooper testified that Frontline-International has bilateral agreements with carriers (193), and is not doing business in Peru now, but merely runs traffic to and from Peru with a United States carrier that has a license and terminates the calls (193). He further testified that MegaCom is a domestic carrier that has termination agreements in Peru, while Frontline-International has termination agreements in other countries. Cooper also stated that Frontline-International was not doing business with any of the seven carriers with which the parties met, while in Peru (191-194). According to Cooper, when he testified that Frontline-International was not doing business in Peru, he meant that Frontline-International's agreements were with domestic carriers that have termination in different countries.

Plaintiffs read into evidence Bersson's deposition testimony that he sent a diagram or network plan to Kroitoro, on August 21, 2002, on which was written "'Traffic originated in Peru by AT&T, transported by MegaCom and terminated by Frontline'" (202). During his deposition, Bersson stated that the document was the plan for how Frontline-International would have conducted telecommunications traffic into and out of Peru, had the joint venture gone forward (202). Defendants read into evidence Bersson's deposition testimony in which Bersson stated: "one thing I know is that Frontline-International has never done business with anyone in Peru. We have done business with carriers in the United States" (204).

Discussion

Defendants seek to set aside the verdict both, as a matter of law, and as against the weight

of the evidence pursuant to CPLR 4404. To set aside a verdict and for judgment as a matter of law, the trial court must conclude that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict'" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the non-movant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, New York Practice § 406, at 656 [3d ed.]).

Defendants argue that the verdict should be set aside because the only alleged business opportunities they could have taken were: (1) the opportunity presented by The Letter's term to transfer Frontline-International's business to Frontline-Peru (Pl. Exh. 1), or (2) the contacts or

providers that were introduced to the defendants and Frontline-Peru by Plaintiffs in 2002 in Peru (Goldman Aff., ¶ 14). Defendants contend that the verdict supports this argument as the findings of no fraud or unjust enrichment demonstrate that Frontline-Peru's contacts, and the connection it was to establish using those contacts, were never used by any of the defendants. They further argue that the verdict should be set aside because it is inconsistent, and pursuant to New York Business Corporation Law [BCL] § 713, because Defendants divided loyalty was disclosed to plaintiffs from the start.

Under New York law, proof of breach of fiduciary duty requires proof of a fiduciary relationship between parties which has been breached. An officer or director of a corporation stands in a fiduciary relationship to it, and must discharge his duties diligently and in good faith (BCL § 717). Good faith includes loyalty to the corporation (*Foley v D'Agostino*, 21 AD2d 60, 66-67 [1st Dept 1964]). Thus, a corporation's officer or director is not permitted to derive a personal profit at the expense of the corporation (*see Bertoni v Catucci*, 117 AD2d 892 [3d Dept 1986]), unfairly compete with it or, without consent, divert and exploit for their own benefit any opportunity that is an asset or opportunity of the corporation (*see Alexander and Alexander of New York v Fritzen*, 147 AD2d 241 [1st Dept 1989]). In addition, while "[a]n officer, acting in good faith, is not precluded from participating in a business similar to that of his corporation . . . he must not act so as to cripple or injure the corporation" (*Bertoni v Catucci*, 117 AD2d at 895).

Controlling majority shareholders are in a fiduciary duty with respect to the minority shareholders (*see Barbour v Knecht*, 296 AD2d 218, 227 [1st Dept 2002]), and may not usurp an opportunity that belongs to the corporation (4A Haig, Commercial Litigation in New York State Courts § 80:5 [West's N.Y. Prac. Series 2d ed.]). In addition, such shareholders may not use

their control of the corporation to benefit themselves, to the detriment of the minority shareholders (1 Knepper & Bailey, Liability of Corporate Officers and Directors § 4.22).

A corporate opportunity has been defined as property, information, or prospective business dealings in which the corporation has an interest or tangible expectancy, or which is essential to its existence or logically and naturally adaptable to the corporation's business (*Alexander & Alexander of New York, Inc.*, 147 AD2d at 247-248). A "tangible expectancy" has been defined as "something much less tenable than ownership, but, on the other hand, more certain than a 'desire' or a 'hope'" (*Alexander & Alexander of New York, Inc.*, 147 AD2d at 247-248).

Plaintiffs argue that the evidence at trial established the following: (1) that the parties signed a letter of intent providing for the 1/3-2/3 split of profits from a business that later became known as Frontline-Peru; (2) that Frontline-Peru was formed on June 4, 2002; (3) that Benhuri, Kroitoro and Epstein owned 30% of Frontline-Peru, while Cooper and Bersson, the principals of Frontline-International, owned 67% of Frontline-Peru, and Victoria Hines 3%; (4) that the Peruvian government issued a license to Frontline-Peru to conduct a telecommunications business in July 2002; and (5) that Frontline-International conducted substantial telecommunications traffic into and out of Peru during at least the six-month period from June 2002 through the end of December 2002.

According to Plaintiffs, although The Letter loosely contemplated a joint venture agreement between the parties with a 1/3-2/3 split of profits, instead of entering into a joint venture agreement, "the parties formed a corporation, and modified the intended split so that [the Individual Plaintiffs] obtained a 30% interest (not one-third interest), Cooper and Bersson

obtained a 67% interest, and Victoria Hines . . . obtained a 3% interest" (Smith Aff., ¶ 14). Plaintiffs further argue that the fact that the parties did not execute a final joint venture agreement, but instead formed a corporation, is consistent with the finding that no joint venture contract existed, but that a fiduciary duty based upon the formation of the corporation existed.

Plaintiffs point out that it is undisputed that the parties formed a corporation, Frontline-Peru, and that Cooper and Bersson became its officers, directors, and majority shareholders (Smith Aff., ¶ 13). Thus, Plaintiffs argue that a duty of loyalty and care is imposed upon the defendants, by operation of law, and notwithstanding whether a contractual duty was or was not created through The Letter, Defendants are not released from the fiduciary obligations imposed upon them by virtue of their status as corporate fiduciaries of Frontline-Peru.

Defendants counter that Frontline-International's existing Peruvian business, and the profits derived therefrom, were not a business opportunity that belonged to Frontline-Peru. They further contend that Frontline-International's continued use of its previously contracted carrier, MegaCom, as opposed to switching to a new provider or creating its own direct line, demonstrates that Frontline-International did not use the new contacts made by the parties in Peru, and thus did not usurp that opportunity.

Defendants contend that the verdict is inconsistent. They argue that the jury's findings on the unjust enrichment cause of action demonstrates it did not find that the MegaCom business belonged to Frontline-Peru, or that Frontline-International's choice not to transfer its Peruvian operations to Frontline-Peru was the usurpation of Frontline-Peru's business opportunity. Defendants further contend that the jury verdict concerning the unjust enrichment theory demonstrates that the jury determined that it was not unjust, under the circumstances, for

Defendants to retain all of the proceeds from the Peruvian operations conducted after June 4, 2002. Defendants also argue that the verdict demonstrates that the jury did not find fraud.

Defendants thus conclude that the basis for the jury's findings on the fiduciary duty theory may have been its confusion over the charge, as the jurors were not asked if the defendants were liable to Plaintiffs for misappropriating funds and corporate opportunities that belonged to Frontline-Peru, therefore breaching a fiduciary duty, but instead were asked "Did the Defendant's [*sic*] breach a fiduciary duty?" (Goldman Aff., ¶ 26). The latter question, Defendants argue, together with the jury instruction given, may have lead the jury to find that Cooper and Bersson did not, as directors for two corporations doing the same business, give Frontline-Peru its undivided and unqualified loyalty, instead of determining whether a corporate opportunity was usurped. Citing to BCL § 713 for support, Defendants also maintain that because their divided loyalty was disclosed to Plaintiffs from the start, there was no conflict.[5]

Regarding the jury charge, Plaintiffs argue that as Defendants raised no objection to it, they should not be heard to complain about the jury's rejection of one theory and acceptance of another. Where a party fails to preserve its objection to a jury charge, the law stated therein becomes the law applicable to rights of parties in the litigation, and the trial court is not entitled to set a verdict aside based on legal principles which it later decides should have been included in its charge (*Kroupova v Hill*, 242 AD2d 218 [1st Dept 1997]; CPLR 4110-b; 8 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 4017.06; 4017.09; 4110-b.03). Thus, the jury's determination must be examined in light of the charge it was given (*see Passantino v Consolidated Edison Co. of N.Y.*,

[5]Although Defendants cite to BCL § 713 to support their claim, that statute concerns conflict of interest transactions, which is not the type of injury involved here, as there was no evidence at trial of a direct or indirect contract between Cooper or Bersson and Frontline-Peru.

54 NY2d 840 [1981]).

While defendants submitted a request concerning the charge, they did not object to the charge given by the court, despite having been afforded the opportunity to do so, and defense counsel agreed to Plaintiffs' application to change the charge and verdict sheet to present to the jury a method of calculating direct damages to the Individual Plaintiffs (223, 225).[6] The charge presented three discrete legal theories for consideration and included plaintiffs' contention that Cooper, Bersson and Frontline Communications were liable to them for misappropriating corporate opportunities that belonged to Frontline Peru. That the jury found liability based upon one theory, but not another, does not render the verdict inconsistent. Moreover, as previously discussed, Defendants having failed to earlier voice such an objection, may not now offer belated conjecture about confusion concerning the charge (CPLR 4410-b; 4017; *CBB Entertainment v Korn*, 240 AD2d 184, 185 [1st Dept 1997]; *Carrasquillo v American Type Founders Co., Inc.*, 183 AD2d 410 [1st Dept 1992]).

At trial, the jury could have credited Benhuri's testimony that Defendants were in charge of Frontline-Peru's operations. The jury also could have credited Benhuri's testimony concerning his conversations with Cooper in which Benhuri testified that Cooper told him that the parties would use Frontline-International's switch, on behalf of Frontline-Peru, to transmit telecommunications traffic. The jury may also have credited Benhuri's testimony that, after the

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[6]The verdict sheet was changed to substitute the words "the plaintiffs Benhuri, Kroitoro and Epstein" for "the plaintiffs." Plaintiffs' counsel stated that he was making the request because he was concerned that if the jury found for Plaintiffs it would not be clear whether or not the damages were those of the Individual Plaintiffs or Frontline-Peru. The difference, Plaintiff's counsel maintained, was that in the event that the jury found for Frontline-Peru, the proceeds would have to be "split 30/70" to reflect the respective ownership interests of the parties (222-224). While diversion of a corporate opportunity gives rise to a derivative action (*Abrams v Donati*, 66 NY2d 951 [1985]; *Glenn v Hoteltron Systems, Inc.*, 74 NY2d 386, 393 [1989]), as the parties agreed to this change, they have charted their own course which became the law of the case .

parties return from Peru, Cooper repeatedly stated to him that the Benhuri Group could soon expect to receive its portion of the profits from the venture, that the Peruvian telecommunications traffic was good, and that it was reflected in the MegaCom Invoice. From this evidence, the jury could have inferred that, employing the telecommunications infrastructure of Frontline-International, Defendants diverted telecommunications business that belonged to Frontline-Peru to themselves, thus injuring the fledgling corporation and its shareholders.[7]

Defendants argue that "PJI 2:2276" provides for recovery of a sum that will justly and fairly compensate Plaintiffs for all losses sustained[8] and that the "only monetary evidence presented was of money invested in the amount of $3,000 by Plaintiffs and $7,000 by Defendants" (Goldman Aff., ¶ 33). Defendants further argue that the jury's award is excessive because the jury's finding on the unjust enrichment and fraud claims demonstrates that Defendants' division of loyalty caused no damages to Frontline-Peru. "The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct" (*105 East Second Street Associates v Bobrow*, 175 AD2d 746, 746 [1st Dept 1991]; *E.W. Bruno Company v Friedberg*, 21 AD2d 336 [1st Dept 1964]; *see Diamond v Oreamuno*, 24 NY2d 494 [1969]).[9]

Plaintiffs damages are not based on the loss of their investment or start-up costs, but on the loss of a percentage of profits of the business diverted from Frontline-Peru. At his

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[7]*See* note 6, *supra*.

[8]It appears that Defendants may be referring to PJI 2: 227 which concerns general damages in negligence actions. Damages for breach of fiduciary duty are discussed in PJI 3:59.

[9]The jury instructions stated that "if you find that Cooper or Bersson breached a fiduciary duty and that breach was a substantial factor in causing plaintiffs to sustain damages, you will award plaintiffs such an amount as you find to be the actual damages sustained for their lost profits or loss of business" (276).

examination-before-trial, Cooper testified that the volume of Megacom business was several hundred thousand minutes a day. The jury was free to discredit Cooper's trial testimony that his prior statement was speculation. In addition, the jury was free to credit Benhuri's testimony, at trial, that Cooper told him that the traffic was a couple of hundred thousand minutes per day, the sales price for the minutes was in the range of 20 to 35 cents each, and overhead costs were not more than 20%. The jury may have also have relied on the MegaCom Invoice to determine the approximate cost per minute.

Plaintiffs move for an order directing entry of judgment with prejudgment interest running from October 1, 2002. The CPLR provides that prejudgment interest "shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with . . . possession or enjoyment of [ ] property. . . ." (CPLR § 5001 [a]). Causes of action such as breach of fiduciary duty qualify for the recovery of prejudgment interest under this section (*see Gibbs v Breed, Abbott & Morgan*, 181 Misc 2d 346, 354 [Sup Ct 1999] *reversed on other grounds* 279 AD2d 887 [1st Dept 2001]; *Howard v Carr*, 222 AD2d 843, 849 [3d Dept 1995]). Prejudgment interest shall run "from the earliest ascertainable date the cause of action existed" and "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single intermediate date" (CPLR § 5001[b]).

Accordingly, it is

ORDERED that the motion of defendants Frontline Communications International, Inc., Melvin Cooper and David Bersson to set aside the verdict as a matter of law and as against the weight of the evidence is denied; and it is further

ORDERED that the cross motion of the plaintiffs for an order entering judgment in favor of the plaintiffs Marc N. Benhuri, Moises Kroitoro and Bertha Epstein, and against defendants Melvin Cooper, David Bersson and Frontline Communications International, Inc., jointly and severally, in the amount of $750,000, together with interest prejudgment as of October 1, 2002, until the date of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs Marc N. Benhuri, Moises Kroitoro, and Bertha Epstein and against defendants Melvin Cooper, David Bersson, Frontline Communications International, Inc., jointly and severally, in the amount of $750,000 together with interest as prayed for allowable by law at the rate of 9% per annum from the date of October 1, 2002, until the date of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: April 18, 2007

Enter:

HON. RICHARD B. LOWE, III
J.S.C.