

**Zelouf Intl. Corp. v Zelouf**

2015 NY Slip Op 32694(U)

May 14, 2015

Supreme Court, New York County

Docket Number: 653652/2013

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

Index Number : 653652/2013  
ZELOUF INTERNATIONAL  
vs.  
ZELOUF, NAHAL  
SEQUENCE NUMBER : 008  
OTHER RELIEFS

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/7/15  
MOTION SEQ. NO. \_\_\_\_\_

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

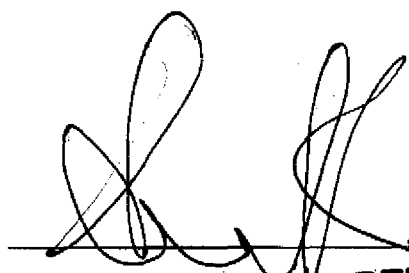
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 266-275  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 308-311  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM.  
DECISION AND ORDER.**

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

Dated: 5/4/15

  
\_\_\_\_\_  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SHIRLEY WERNER KORNREICH**  
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
ZELOUF INTERNATIONAL CORP.,

Index No.: 653652/2013

Petitioner,

**DECISION & ORDER**

-against-

NAHAL ZELOUF,

Respondent.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 008 and 009 are consolidated for disposition.

*I. Introduction*

Respondent, Nahal Zelouf (Nahal), moves to modify the report of JHO Ira Gammernan entered on March 23, 2015 (the Report) (Dkt. 278) and to confirm the modified report.<sup>1</sup> Seq. 008. Petitioner Zelouf International Corp., similarly, moves to modify and confirm the Report and further asks the court to set the rate of pre-judgment interest. Seq. 009.

In this valuation action, which encompasses a previously brought derivative action, the Report recommends the amounts that should be awarded to Nahal to cover the reasonable costs and fees paid to her law firms and experts. The court assumes familiarity with the extensive litigation between the parties. Familiarity with the court's orders dated October 6, 2014 (the Trial Decision) (Dkt. 165) and December 22, 2014 (the Reargument Decision) (Dkt. 201) also is presumed.

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<sup>1</sup> The parties appeared before JHO Gammernan on December 2, 2014, December 18, 2014, January 7, 2015, and January 12, 2015, and participated in a January 13, 2015 telephone conversation with JHO Gammernan. See Report at 2. Approximately two months after the conclusion of the hearing, the parties again appeared before JHO Gammernan on March 17, 2015, at which time he read his rulings into the record. The Report refers to the definitive version of his rulings, i.e., the so-ordered transcript of the March 17, 2015 record.

## II. *Relevant Procedural History*

The Trial Decision directed the parties to call the court within 10 days of the entry of the referee's report. *See* Trial Decision at 31. The court would then set a motion schedule, if necessary, to brief confirmation, modification or vacatur of the Report. The Trial Decision noted that "the parties will be instructed on the procedure for submitting proposed judgments in the decision on the Referee's report." *See id.* at 32. In the Reargument Decision, after the court vacated its damages calculation and expressly reserved determination of such amounts until after the attorneys' fee hearing, the court was unequivocally clear about what should and should not be addressed in the instant motion practice:

The parties' motion practice over the Referee's report shall include their position on the total calculation of damages and how much pre-judgment interest is equitable. **The briefing shall be limited to how much Nahal's total award should be and its breakdown, but may not serve as yet another round of reargument on the merits.**

*See* Reargument Decision at 4 (emphasis added).

Nahal's counsel violated these directives. Rather than arrange a call with the court to set a briefing schedule and discuss how proposed judgments should be submitted, Nahal moved by order to show cause to modify the Report on March 19, 2015, *four days before the Report was entered.*<sup>2</sup> Additionally, Nahal's counsel used the motion as yet another opportunity to reargue holdings in the Trial Decision, despite being explicitly ordered not to do so.<sup>3</sup>

Petitioner's counsel immediately brought these issues to the court's attention. After a telephone conference with the parties, the court issued an order, dated March 25, 2015 (Dkt.

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<sup>2</sup> Though JHO Gammerman issued his recommendations on March 17, 2015, and the hearing transcripts were e-filed on March 19, 2015 (*see* Dkt. 247-251), JHO Gammerman did not so-order the Report or enter it on the docket until March 23, 2015.

<sup>3</sup> It should be noted that Nahal's counsel failed to submit a formal opening memo of law, opting instead to file an attorneys' affirmation lacking a table of contents and table of authorities.

279), directing petitioner to file its own motion regarding the Report on March 27, 2015, and setting a date for responsive papers and oral argument. *See* Dkt. 312 (5/1/15 Tr.). For the reasons that follow, the Report is confirmed. Additionally, at the end of this decision, the court issues the final judgment in this action, which, of course, must still be entered by the County Clerk. Finally, the court addresses other matters raised by Nahal's counsel at oral argument that were not raised at trial or in her briefs.

### *III. The Report*

Nahal argued to JHO Gammerman that she should be awarded \$7,423,642.56 – \$6,419,083 in attorneys' fees and \$1,000,559.56 in expenses. *See* Report at 2. Petitioner argued that the award should be limited to \$635,294 for the work performed by the fourth and final law firm that represented Nahal, Wolf Haldenstein Adler Freeman & Herz LLP (Wolf Haldenstein). *See id.* JHO Gammerman rejected both arguments. He rejected petitioner's position that Wolf Haldenstein's fees are not recoverable because Wolf Haldenstein was retained on a contingency basis. He also rejected the approximately \$7.4 million requested by Nahal as unreasonable in that it exceeded the amount of Nahal's actual recovery from petitioner. *See id.* at 3.

In explaining the basis for his recommendations, JHO Gammerman discussed the roles played by each of the four law firms that represented Nahal. Wilson Elser Moskowitz Edelman & Dicker LLP (Wilson Elser), the first firm which represented Nahal, represented her in her initial attempts to obtain financial disclosures from the company prior to the derivative action and in the investigation of her claims. *See id.* at 5. Contrary to petitioner's arguments, Wilson Elser's work was extremely valuable and was an essential predicate to the substantial recovery Nahal is being awarded in this appraisal proceeding.

Nahal then retained Morrison Cohen LLP (Morrison Cohen), which commenced the derivative action and represented Nahal up to the summary judgment stage. *See id.* The third attorney was Murray Honig, a solo practitioner (and Nahal's long-time personal attorney). *See id.* Honig successfully defeated the company's motion for summary judgment, which sought dismissal of Nahal's derivative claims.<sup>4</sup> Honig's successful briefing set the stage for the jury trial that was aborted in favor of the instant appraisal proceeding. After summary judgment, and to date, Nahal has been represented by Wolf Haldenstein. *See id.* at 5-6. Wilson Elser, Morrison Cohen, and Honig billed by the hour, and a portion of their bills have not been paid – a factor noted by JHO Gammerman and which played a part in his determination of the fees. Wolf Haldenstein has been working on a contingency basis.

JHO Gammerman first addressed Wolf Haldenstein's fees. Following the court's directives in the Trial Decision,<sup>5</sup> JHO Gammerman only considered the work performed by Wolf Haldenstein's lead trial counsel, Mark Rifkin, and two of his associates, Daniel Tepper and Lydia Reynolds. *See id.* at 6. These three attorneys recorded 2,969 hours of work in this action. *See id.* JHO Gammerman held, and the court agrees, that the entirety of this work should be recompensed. *See id.* Based on their reasonable average hourly rate of \$520 per hour, JHO Gammerman recommended that Wolf Haldenstein be paid \$1,543,880. *See id.* JHO Gammerman explained that this amount was reasonable since it roughly corresponds to the

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<sup>4</sup> Nahal's direct claims were dismissed.

<sup>5</sup> The court does not believe that the time spent by the many other lawyers who appeared in court and did nothing should be reimbursed. Moreover, if these other lawyers were there due to their legal acumen, the court notes that Wolf Haldenstein's briefs often lacked citation to supporting legal authority [*see* Trial Decision at 18 n.13 (noting that Wolf Haldenstein failed to cite the applicable legal standard for corporate waste, a claim that formed the basis for a substantial portion of Nahal's award)], and, as set forth below, Wolf Haldenstein advanced critical arguments on the record that it failed to advance at trial and in its briefs.

contingency amount Wolf Haldenstein would be entitled to under its retainer agreement (20% of any recovery up to \$3 million, 25% of any recovery between \$3 million and \$5 million, and one-third of any recovery in excess of \$5 million). *See id.* at 7. JHO Gammerman held, and the court agrees, that this amount is appropriate in light of the results achieved and the risks undertaken.

*See id.*

Next, JHO Gammerman recommended, and the court agrees, that Nahal recover all of the fees she paid to Wilson Elser, which totaled \$91,296.35. *See id.* at 8. However, JHO Gammerman recommended, and the court agrees, that Wilson Elser should not be permitted to recover an additional \$32,000 that was billed but not paid. *See id.* Unpaid legal bills, in the court's experience, are often the subject of negotiations, particularly where the services were rendered nearly 6 years ago and approximately three-quarters of that bill has been paid. It would be speculative to award the remaining amount of the bill without any certainty that the amount awarded would be paid.

In regard to Morrison Cohen, the second law firm, JHO Gammerman noted that it was paid \$537,324.62 by Nahal. *See id.* at 8. JHO Gammerman, following the court's directives, determined that the reasonable amount for Morrison Cohen's services is \$400,000. This court defers to JHO Gammerman's reasonableness assessment, as he was in the best position to make that determination in light of his thorough review of the billing records and his observations of the witnesses who testified. *See Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 (1st Dept 2010) (where there is "ample evidence supporting the reasonableness of the fees charged", "a court will not disturb the findings of a special referee where those findings are supported by the record"); *see also Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705

(1st Dept 1985) (“New York courts will look with favor upon a Referee’s report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented”), quoting *Holy Spirit Assn. v Tax Comm’n of the City of New York*, 81 AD2d 64, 70-71 (1st Dept 1981). The court also rejects petitioner’s argument that Morrison Cohen’s award should be further reduced based on dicta from the Trial Decision. The court finds the \$400,000 amount recommended to be reasonable.

Finally, Honig supposedly performed \$256,000 worth of legal work for Nahal. *See* Report at 9. However, after reviewing Honig’s work, JHO Gammerman determined that Honig was only paid \$55,315 for work attributable to the derivative claims, as opposed to other work unrelated to the derivative litigation (again, Honig was Nahal’s personal attorney).<sup>6</sup> *See id.* at 9-11. The court agrees that Nahal should be paid \$55,315 for Honig’s work, which included determinative work on the summary judgment motion.

In sum, JHO Gammerman awarded Nahal, exclusive of expenses, \$2,090,491.35 in legal fees, with \$1,543,880 attributable to Wolf Haldenstein, \$91,296.35 attributable to Wilson Elser, \$400,000 attributable to Morrison Cohen, and \$55,315 to Honig. *See id.* at 11.

Next, pursuant to the Trial Decision, JHO Gammerman awarded Nahal the full amount she paid to Elliot Lesser: \$577,680.40. *See id.* The court agrees with this determination. Nahal’s derivative award would not have been possible without his work. Nahal also is entitled to the \$82,934.40 JHO Gammerman found that she paid to another of her experts, James Ashe. *See id.* at 12. Ashe’s work and testimony were relied on by the court, though Ashe himself was not mentioned in the Trial Decision.

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<sup>6</sup> JHO Gammerman further rightly noted that Honig failed to distinguish between work done as Nahal’s personal counsel and work done on the derivative claims and that his billing included “substantial block billing.”

However, in accordance with the court's direction, JHO Gammerman did not award Nahal the amount she paid to Professor Anthony Saunders. The irrelevance of Professor Saunders' testimony is explained in the Trial Decision. To the extent Nahal is rearguing that determination (which, again, she should not be doing on this motion), the court adheres to its original decision. Petitioner's counsel's cross examination of Professor Saunders was proficient<sup>7</sup> and demonstrated why he should not have been retained as an expert in this case.

Next, JHO Gammerman recommended, and the court agrees, that Nahal should be reimbursed the \$119,502.49 of her reasonable costs and disbursements. That amount, plus the expert's and attorneys' fees, comes to a total of \$2,870,608.64.

It should be noted that JHO Gammerman did not award Nahal additional attorneys' fees for the time Wolf Haldenstein spent litigating the derivative action, nor did JHO Gammerman award all of the fees and costs Wolf Haldenstein incurred in the appraisal action. Moreover, as the parties explained at oral argument, JHO Gammerman made minor computational errors.

That being said, in deciding this motion, the court has reviewed the entirety of the record submitted before JHO Gammerman and the e-filing dockets for both the derivative and appraisal actions. After extensive contemplation of the history of this litigation and the efforts expended by Wolf Haldenstein, the court does not believe that Wolf Haldenstein deserves a greater fee than the amount awarded to it by JHO Gammerman. Wolf Haldenstein was retained on a contingency basis. Though the court is cognizant of the difficulty of this litigation, at the end of the day, the court finds \$1,543,880 to be a fair award that is commensurate with the amount of Nahal's recovery, the breakdown of which set forth below, and the intent and expectations of the

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<sup>7</sup> While petitioner, and, in turn, Danny and Rony, are the losers in this action, they should not blame their attorneys at Cooley LLP, whose representation was extraordinary. The performance at trial by petitioner's lead counsel, Jason Koral, was exceptional.

parties to the retainer. For all of the above stated reasons, the court accepts the recommendations of JHO Gammerman.

#### *IV. The Judgment*

The first component of the judgment is the unpaid amount of Nahal's fair value award – that is, the fair value of her shares minus the amount previously tendered. The parties agree the unpaid fair value amount is \$705,005.

Next is the value of Nahal's derivative claims. The parties agree that the Trial Decision held that the amount misappropriated from Old ZIC was \$14 million. Nahal's share, 25% of that amount, is \$3.5 million. The parties further agree that \$401,000 was spent on the luxury automobiles. 25% of that amount is \$100,250. The parties agreed in a stipulation dated April 7, 2014 (Dkt. 127) that Katherin was paid a total of \$598,400 between 2006 and 2010. 25% of that amount is \$149,600.

The remaining amounts are more contentious. First, Nahal argues that the court suggested in the Trial Decision that it agreed with all three of Lesser's main findings: (1) that Danny stole \$14 million of the company's gross profits; (2) that the company understated its inventory by \$4.9 million; and (3) that the company's reported cost of goods sold (COGS) was overstated by \$717,000. Nahal avers that all three amounts should be part of the derivative award.

The Trial Decision only analyzed the \$14 million amount. It did not award the COGS amount because doing so would be duplicative. COGS is a balance sheet input that impacts profit. Once total understated profit is computed, separately adding an amount for overstated COGS would be redundant. The \$14 million missing profit amount was derived based on "the

profit a typical firm in the industry would have earned had that firm sold the **quantity** of inventory sold by Old ZIC between 2004 and 2010.” *See* Trial Decision at 26 (emphasis added). In other words, the \$14 million was not premised on the inventory’s cost. Rather, it was based on volume. Indeed, the court did not give weight to the additional amounts allegedly stolen based on cost data because, as the court noted, the MOD2 cost data prior to 2011 was unreliable. *See id.* at 25 n.22. Further, while the court found Lesser’s profit analysis to be persuasive, much of his inventory cost analysis was not. For this reason, the court did not find that the value of the company was really \$4.9 million higher due to inventory that really existed but was unaccounted for in the company’s financials.

Moreover, the amounts computed by Lesser were simply *estimates* based on various methodologies. In evaluating whether the value of the company should be deemed higher than appraised, the court considered the soundness of the methodology and checked that methodology’s conclusions by evaluating such conclusions within the broader context of the overall valuation. Viewing the totality of the circumstances, the court finds that adding more than \$14 million (exclusive of the luxury cars and Katherin’s salary) to the valuation based on inaccurate financials would overstate the value of the company.

Nor will the court award Nahal more based on Zelouf West profits supposedly not accounted for by Vannucci. The court explained in the Trial Decision why no further adjustment based on Zelouf West profits is warranted. The arguments Nahal proffers on this motion are unpersuasive.

Finally, the court will not increase Nahal’s award based on the amount of Danny’s and Rony’s legal fees that were paid by the company in the derivative action. Normally, based on

the findings of their malfeasance in the Trial Decision, such disgorgement would be required. Nahal would, therefore, get 25% percent of that amount.<sup>8</sup> However, Nahal failed to raise this issue during trial. Indeed, while Nahal preserved a number of derivative claims to be tried in the appraisal proceeding, the only two she proved at trial were the luxury cars and Katherin's salary. Nahal waived her remaining derivative claims, such as the tuition claim discussed in the summary judgment decision.

Likewise, at the May 1 oral argument, Nahal's counsel addressed numerous issues that were not raised in her briefs. That is, in part, why the court did not rule on the instant motions from the bench. Thus far, the court has been quite generous in allowing Nahal's counsel to make up for important briefing omissions, such as the statute of limitations and corporate waste issues. However, at this stage of the proceedings, it is far too late to seek a greater recovery based on matters that should have been raised at trial or more robustly in the briefs.

In total, exclusive of interest, Nahal shall recover: (1) \$705,005, the unpaid fair value amount of her shares; (2) \$3,749,850, her 25% share of the derivative damages; and (3) \$2,870,608.64 in costs and legal expenses.

#### *V. Interest*

The court will not compute the amount of pre-judgment interest. That is, as always, a task for the County Clerk. *See* CPLR 5001(c). However, the following are the interest rates applicable to the fair value award and the derivative award.

The parties stipulated that the mandatory statutory rate of 9% applies to the derivative award and that the reasonable intermediate date from which interest should run is July 1, 2007. *See Cortes v 3A N. Park Ave Rest Corp.*, 46 Misc3d 670, 697 (Sup Ct, Kings County 2014)

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<sup>8</sup> \$145,500, 25% of the \$582,000 of legal fees incurred by Danny and Rony.

(Demarest, J.), citing *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 (1st Dept 2007). The parties dispute the proper interest rate that should apply to the fair value award. Nahal argues the rate should be 9%. Petitioner contends the rate should be 4%.

CPLR 5004 provides that the pre-judgment interest rate is 9% “except where otherwise provided by statute.” BCL § 623(h)(6) provides that in an appraisal proceeding:

The final order shall include an allowance for interest **at such rate as the court finds to be equitable**, from the date the corporate action was consummated to the date of payment. In determining the rate of interest, the court shall consider all relevant factors, **including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding**. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

(emphasis added); see *Carolina Gardens, Inc. v Menowitz*, 238 AD2d 189, 190 (1st Dept 1997); see also *Jamaica Acquisition, Inc. v Shea*, 25 Misc3d 1212(A), at \*27 (Sup Ct, Nassau County 2009).

As a threshold issue, the court does not find Nahal’s refusal to accept the company’s tender offer to be “arbitrary, vexatious or otherwise not in good faith.” The company’s offer was clearly below her shares’ fair value and did not account for the value of the derivative claims or the misappropriation found in the Trial Decision. Nonetheless, petitioner has the better of the argument with respect to the proper rate of interest. The court takes judicial notice that current interest rates are far less than 9%. Petitioner avers that the rate applied should be 4%, the rate at which it would pay to borrow money. The court agrees. This metric is set forth in § 623(h)(6). In the current interest rate environment, 4% is fair.

## VI. Conclusion

There is no need for the parties to submit further proposed judgments. The judgment set forth below is derived from the parties' proposed judgments submitted on this motion (*see* Dkt. 286) (redline) and includes the amounts discussed in this decision. This decision should be submitted to the County Clerk to compute interest and the total judgment amount. **Once** signed by the County Clerk, this document shall be entered as the final judgment in **this action**. The court, moreover, will not stay execution of the judgment. BCL § 623(h)(8) mandates satisfaction within 60 days of the entry of judgment although the statute does not prohibit Nahal from availing herself of Article 52 beforehand. Accordingly, it is

ORDERED that the parties' motions are decided in accordance with this decision, and the Clerk is directed to enter the following judgment:

### **JUDGMENT**

The parties appeared throughout this matter by their respective attorneys. Zelouf International Corporation (Petitioner), filed its Petition on October 22, 2013 (Dkt. 1), asking the Court to fix the fair value of Nahal Zelouf's (Respondent) 25% interest in Zelouf International Corp., a New York corporation formed in 1984 (Old ZIC), at \$1,556,250. Respondent served her Answer and Counterclaims (Dkt. 9) on November 8, 2013, seeking a judgment, *inter alia*: (a) denying the Petition; (b) fixing the fair value of her 25% interest in Old ZIC, including the value of the shareholder derivative claims asserted in the action styled *Zelouf v Zelouf*, Index No. 603746/2009 (Sup Ct, NY County) (the Derivative Action), at \$11,053,497.06; (c) awarding attorneys' fees and expenses incurred in the Derivative Action, and (d) awarding attorneys' fees and expenses incurred in this appraisal proceeding. The parties were heard over eleven days

between March 17, 2014 and July 10, 2014, at which time the parties presented their proofs. The Court issued an order dated October 6, 2014 (the Trial Decision) (Dkt. 165), awarding damages to Respondent and referring the calculation of Respondent's reasonable costs and attorneys' fees to a special referee to hear and report. The parties each moved to reargue the Trial Decision (the Reargument Motions). The Reargument Motions were decided in an order dated December 22, 2014 (Dkt. 201).

Judicial Hearing Officer Ira Gammerman (JHO Gammerman) held a hearing over five days between December 2, 2014 and January 13, 2015. JHO Gammerman, on March 17, 2015, recommended that Respondent be awarded attorneys' fees and expenses in the amount of \$2,870,608.64. JHO Gammerman entered his recommendation on March 23, 2015 (Dkt. 278) (the Report). Having reviewed the record, the transcripts of the hearing before JHO Gammerman and the Report, the Report is confirmed in its entirety for the reasons set forth above. Accordingly, it is hereby:

ADJUDGED, that this judgment shall be docketed as a money judgment and that Respondent Nahal Zelouf, residing at 555 East Shore Road, Great Neck, New York 11024, shall recover from Petitioner Zelouf International Corp., 225 West 37th Street, New York, New York 11018:

(a) the sum of \$705,005.00, as the unpaid fair value of Respondent's 25% interest in Old ZIC, plus interest on this amount at the rate of 4% per annum from October 22, 2013 until the date of entry of the judgment, as calculated by the Clerk, amounting to the sum of \_\_\_\_\_; plus


(b) the sum of \$3,749,850.00, as Respondent's share of the quasi-derivative claims, plus pre-judgment interest at the rate of 9% per annum from July 1, 2007 until the date of entry of the judgment, as calculated by the Clerk, amounting to the sum of \_\_\_\_\_; plus

(c) the sum of \$2,870,608.64 in attorneys' fees and expenses; plus

(d) costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, amounting to the sum of \_\_\_\_\_;

these sums collectively amounting in all to a total judgment of \_\_\_\_\_, and that Respondent shall have execution thereon.

Dated: May 14, 2015

ENTER:   
\_\_\_\_\_  
J.S.C.  
**SHIRLEY WERNER KORNREICH**  
J.S.C