

**Shyer v Zyloware Corp.**

2023 NY Slip Op 32502(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 651109/2018

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART 03M

Justice

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CATHERINE SHYER,
as preliminary executrix of the estate of ROBERT SHYER

INDEX NO. 651109/2018

Plaintiff,

- v -

ZYLOWARE CORPORATION,

Defendant.

-----X

DECISION AFTER TRIAL ON EQUITABLE DEFENSES AND COUNTERCLAIMS

In this action, Plaintiff Catherine Shyer ("Plaintiff"), as executrix of the estate of Robert Shyer ("Robert"), alleges that Defendant Zyloware Corporation ("Zyloware") committed a number of breaches of contract in connection with the repurchase of Robert's Zyloware shares over a period of years, and after his death.

Most of Plaintiff's claims (and Zyloware's associated defenses) were resolved by a jury after a trial held from October 3, 2022 to October 17, 2022. The jury determined that Zyloware did not breach its obligations under the Zyloware Shareholders Agreement with respect to its purchase of a series of successive annual options from 2014-2017 (the "Option Shares") by applying a 35% discount to the Option Shares but did breach its obligations under that agreement in applying a 35% discount to the purchase price of Robert's remaining shares upon his passing (the "Estate Shares") (NYSCEF 1100). The jury found Zyloware liable to Plaintiff for damages with respect to the Estate Shares in the amount of \$2,939,029.00 (NYSCEF 1110 at 9).

This post-trial decision addresses a claim (and, in particular, Zyloware's related equitable defenses and counterclaims) that was not decided by the jury. Specifically, it concerns Plaintiff's

claim that Zyloware improperly withheld Robert's base salary and insurance bonuses, in breach of his Employment Agreement, when it purchased Robert's Option Shares in 2014, 2015, 2016, and 2017 (the "Salary Claim"). As discussed below, on summary judgment the Court determined that Zyloware breached the Employment Agreement by deducting more of Robert's salary than was permissible under the agreement to pay for the Option Shares. The Court rejected Zyloware's estoppel defense, but found that its waiver defense presented disputed issues of fact for trial (*see* NYSCEF 450 at 16-17).

At trial, Zyloware sought to establish that Plaintiff waived the Salary Claim by accepting the benefits of the option payments without promptly notifying Zyloware of any objection to its method of deducting salary to pay for the shares (NYSCEF 1077 at 2), and also argued (again) that principles of equitable estoppel should bar Plaintiff from recovering under the Salary Claim (*id.*). Zyloware also seeks a decree of specific performance enforcing Plaintiff's Share delivery obligations (*id.* at 20). The Court now resolves Zyloware's equitable defenses and counterclaims based on the evidence introduced at trial. The Court also addresses in this decision certain ancillary issues raised in the Parties' post-trial papers and Plaintiff's Motion to Fix the Date From Which Interest is Computed (Motion Sequence 026).

For following reasons set forth below, the Court finds that Plaintiff (individually and/or standing in Robert's shoes for purposes of this claim) did not waive her rights with respect to the Salary Claim. Nor does estoppel bar her claim. She is entitled to damages and prejudgment interest as described herein. The Court also finds that Zyloware's counterclaim for declaratory judgment and specific performance is rendered moot in light of Plaintiff's willingness to deliver the Share Certificates. The Court further finds that Plaintiff is entitled to the amount of \$216,672 representing the undisputed remaining balance owed for the 2017 Option Shares.

Finally, with respect to the Estate Share Claim decided by the jury, the Court finds that Plaintiff is entitled to prejudgment interest only with respect to the remaining principal due under the Promissory Note (the “Note”) as accelerated by Zyloware’s breach of contract, and not as to amounts tendered by Zyloware but rejected by Plaintiff.

**FINDINGS OF FACT REGARDING ZYLOWARE’S EQUITABLE DEFENSES AND COUNTERCLAIMS**

The Court makes the following findings of fact relevant to the Salary Claim (and associated counterclaims and defenses) based on its review of the evidence submitted at trial (October 3-17, 2022), including its evaluation of the credibility of the witnesses who testified during the proceedings, post-trial briefs submitted by counsel on November 23, 2022 and December 22, 2022, and oral argument on April 11, 2023 (NYSCEF 1152).

As noted above, both Plaintiff and Zyloware sought summary judgment on Plaintiff’s Salary Claim (*see* NYSCEF 450). Both motions were denied based upon the Court’s finding that while Zyloware breached the “unambiguous text of the Succession Agreements plainly prohibit[ing] Zyloware from drawing a salary credit for quarters during which the company did not exercise an option,” “Zyloware’s defense of waiver raise[d] material questions of fact as to whether Robert relinquished his right to have his salary withheld” in accordance with the Succession Agreements (*id.* at 15-16). As a result, the waiver issue was reserved for trial.

**Summary findings:**

1. Zyloware deducted the Option Share purchase price from the sum of Robert’s base salary and insurance bonus and paid out the difference as salary (PX 31; PX 183).
2. Accounting for the deduction of the Option Share purchase price, each year, Robert was contractually entitled to receive \$351,900, comprised of three quarters of his \$350,000.00 base salary (i.e., \$262,500.00) plus \$89,400.00 in insurance bonus.

3. Instead, Robert received \$279,083.00 in base salary and insurance bonus in 2014 (PX 30; PX 31); \$97,449.00 in base salary and insurance bonus in 2015 (PX 31); and \$66,211.00 in base salary and insurance bonus in 2016 (*id.*).
4. In 2017, Robert was entitled to receive \$338,438.00 in base salary and bonus through the date of his death, but only received \$62,921.00 in base salary and insurance bonus (*see* PX 183).
5. By the day of Robert's death, Zyloware had paid \$139,930.37 of the purchase price of the 2017 Option Shares, \$64,134.75 of which was paid late during the fourth quarter of 2017 (PX 183). On March 16, 2018, Zyloware tendered payment in the amount of \$216,672.00 reflecting the remaining balance of the 2017 Option Shares (PX 163).

Detailed Findings:

6. In July 2014, Robert began receiving two weekly bank deposits from Zyloware as opposed to the usual one. The second payment was for the Option Shares (241:16-242:7). Plaintiff inquired of Zyloware CFO Benitha Mintz in February 2015 as to the reason. Ms. Mintz told Plaintiff, for the first time, that it was due to Zyloware starting the "share buyback." (Tr. 241:18-242:12; 643:8-18).
7. Plaintiff was then directed to speak with Zyloware's accountant, Stephen Wagner, for further information. Mr. Wagner confirmed that the change was due to the share buyback (Tr. 242:22-243:6; JX11). Also, around this time, Ronald Weiner (Plaintiff and Robert's personal advisor) sent Plaintiff excerpts of the Shareholders Agreement advising her "I suspect a letter from counsel may be needed" (JX11).
8. Plaintiff then asked Robert "if he knew anything about [the buyback] and he said no" (Tr. 243:6). Robert asked Plaintiff to follow up with Mr. Weiner, but Mr. Weiner was also

unaware of the share buyback and suggested Plaintiff ask Zyloware for documentation (Tr. 242:17-243:6; 243:10-18).

9. Importantly, at this time Robert's mental condition – which was the subject of substantial expert and percipient witness testimony at trial – was materially worse following his return from a trip to Africa in July 2014 than it had been prior to the trip (Tr. 1371:16-1372:7; 1395:18-1396:20; PX143; *see also* Tr. 1400:6-1401:3; Tr. 1436:14-1437:8). Robert's condition did not significantly improve thereafter (*see* Tr. 961:9-15; 963:23-25; 989:3-7). The Court finds, based on the evidence admitted at trial, that Robert's ability to meaningfully understand the nuances of the contractual provisions relating to the Salary Claim at issue here was substantially impaired during the period relevant to the purported waiver of his contractual rights with respect to that claim.
10. While Plaintiff was concerned that raising the issue with Zyloware might cause the company to not respond to her requests for continued assistance with expenses related to Robert's medical care, which took "priority," Plaintiff never made or expressed "an affirmative decision at that time not to assert rights" relating to the share buyback (Tr. 653:3-654:7).
11. Plaintiff contacted Zyloware by the end of April 2015 and received a copy of the 2014 Option Notice from Ms. Mintz (PX8; JX13).
12. Plaintiff showed the 2014 Option Notice to Robert, who said that he did not recognize it (which the Court accepts solely for the fact that it was said, not for the truth of the matter asserted) and asked Plaintiff to have Mr. Weiner "fix it." Plaintiff and Robert subsequently met with Mr. Weiner to discuss the 2014 Option Notice (Tr. 258:5-12; 248:10-249:4).

13. Then, in May 2015, Plaintiff spoke with James Shyer who informed Plaintiff that Robert was “continuing to receive the same salary and that [Zyloware was] acting in accordance with the Shareholder Agreement” (DX DB).
14. There is no evidence that either Robert or Plaintiff were aware at that point that Zyloware was deducting excess amounts from Robert’s salary to pay for the Option Shares (Tr. 644:22-645:1; 678:5-10).
15. In January 2016 Plaintiff informed Mr. Weiner she “needed more information” to “understand the figures” regarding the payments from Zyloware. (Tr. 671:3-672:12).
16. Plaintiff and Robert then went to Zyloware’s offices to request information and were told to have Mr. Weiner follow up with Mr. Wagner (DX DD; Tr. 261:6-15; 262:3-13).
17. After receiving a response from Mr. Wagner stating he had “no authority to provide [Mr. Weiner] with copies of corporate documents directly” in a February 26, 2016 email (PX134), Mr. Weiner followed up on March 23, 2016, by letter stating that he had questions regarding the buyback (*id.*). However, Christopher Shyer directed Mr. Wagner to only instruct “[Weiner] any requests from the company must come from Bob, directed to the company” (*id.*).
18. Then, in June 2016, Plaintiff emailed James Shyer a list of questions relating to the buyback, including: “Is it correct to offset Robert Shyer’s salary by offsetting the purchase price?” (PX117; Tr. 270:23-271:10). Two and a half months later, in September 2016, James responded (incorrectly, though likely not intentionally so) stating “we are following the terms of the agreement” (PX 106).
19. Robert’s counsel then sent a letter to James and Christopher Shyer on November 29, 2016, stating he had been retained because “efforts to discuss this matter have been made in the

past and no helpful information has been provided” and that Robert was “owed substantial amounts” and “has not been paid all the amounts due to him pursuant to the Master Executive Employment Agreement” (PX40). The letter reserved all of Robert’s rights and remedies (*id.*).

20. On January 27, 2017, Robert’s attorney sent a subsequent letter again questioning whether “the amount being paid to Robert comports with the terms of” the Employment Agreement and asked for a “written explanation for the calculation of the amounts being paid to Robert Shyer pursuant to the Master Executive Employment Agreement” (PX 42; Tr. 786:16-24).
21. Zyloware then responded on March 6, 2017, providing the written explanation of the salary calculation and showing that Robert’s entire base salary and insurance bonus was reduced by the amount of the purchase price of the Option Shares of the stock price each year for the seven shares purchased (PX 43).
22. Plaintiff commenced this action on March 8, 2018.

#### Facts Relating To the Estate Shares

23. In anticipation of the scheduled closing on the purchase of the Estate Shares on March 16, 2018, Zyloware tendered to Plaintiff payment of the “Calculated Price” of the Estate Shares as contemplated in the Note without prejudice to any claims, setoffs, or defenses the Parties may have (*see* DX BN). However, Plaintiff declined to participate in the closing based, in part, on her objection to the application of a 35% discount to the purchase price reflected in the Note (DX CD).
24. Despite the failed closing and this pending action, Zyloware continued to tender to Plaintiff the Installment Payments due pursuant to the Note in May 2019, 2020, and 2021 on a “without prejudice” basis (*see* DX CQ).

25. Counsel for Plaintiff rejected the tendered Note on the grounds that the principal amount was too low (DX BV; DX BS). By May 2019, Plaintiff's Second Amended Complaint likewise alleged the Note was deficient (NYSCEF 126 ¶¶41-44) and Plaintiff's counsel rejected the tendered payments as deficient (*see e.g.*, NYSCEF 1098).

## CONCLUSIONS OF LAW

### A. WAIVER AND ESTOPPEL

The Court determined on summary judgment that “Zyloware’s separate defense of equitable estoppel... fails as a matter of law” (NYSCEF 450 at 17 n.3). The Court found that “Zyloware point[ed] to no evidence suggesting that it “ha[d] been misled by Robert, or that Robert concealed information regarding the buyback program from Zyloware” (*id.*). Therefore, the Court does not find the need to re-address the arguments raised in the Parties’ post-trial papers regarding the estoppel defense. In any event, the Court finds that no evidence adduced at trial would change its view. Zyloware made its share purchase decisions on its own, not in reliance on anything that Robert did or said. The decisions to exercise the share options once per year (rather than dividing the purchases by quarter), despite the clear language of the agreement permitting only a quarterly credit against salary, were Zyloware’s alone.

With respect to Zyloware’s waiver defense, under New York law “[c]ontractual rights may be waived if they are knowingly, voluntarily, and intentionally abandoned” (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., LP*, 7 NY3d 96, 104 [2006] [internal citation omitted]). “However, waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection” (*id.* [internal quotations omitted]). “Such intention must be unmistakably manifested, and is not to be inferred from a doubtful or

equivocal act” (*Echostar Satellite LLC v ESPN Inc.*, 79 AD3d 614, 617 [1<sup>st</sup> Dept 2010] [internal quotation omitted]).

Further, “a contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement.” (*Madison Ave. Leasehold LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 5 [1<sup>st</sup> Dept 2006] [internal quotation omitted]). Such waiver “may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage” (*Fundamental*, 7 NY3d at 104). A party’s prolonged “failure to assert [a] right” can, in certain circumstances, “evince[] a knowing intent not to claim such right” (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 408 [1<sup>st</sup> Dept 2007]).

However, “mere silence or oversight does not constitute clear manifestation of an intent to relinquish a known right” and neither does “mistake, negligence, or thoughtlessness” (*Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 601 [1<sup>st</sup> Dept 2015]). Ultimately, the doctrine is “designed to prevent the waiving party from lulling the other party into a belief that strict compliance with a contractual duty will not be required then... suing for noncompliance” (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 281 [2d Dept 2017] [internal quotation omitted]).

As discussed in this Court’s Decision and Order on the Motion for Partial Summary Judgment, Plaintiff’s Salary Claim arises from Zyloware’s issuance of annual, rather than quarterly, option notices and “[t]he unambiguous text of the Succession Agreements plainly prohibit[ing] Zyloware from drawing a salary credit for quarters during which the company did not exercise an option” (NYSCEF 450 at 16). It is undisputed that Zyloware nonetheless drew a salary credit over the course of the full year in the years in which the company exercised the Option Notices. The evidence adduced at trial, however, reveals that neither Plaintiff nor Robert

“knowingly, voluntarily, and intentionally abandoned” (*Fundamental*, 7 NY3d at 104) her or his rights under the Succession Agreements to limit the salary offset.

The evidence showed that Plaintiff became aware that Robert began receiving two weekly payments without receiving additional money in February 2015 and that she requested information as early as the spring of 2015 (Tr. 241:16-243:18; 243:12-18; 246:08-14; 443:12-23; 803:14-23; 805:10-23). Over the course of the next two years, Plaintiff attempted to get information concerning the Option Shares payments from Zyloware. Plaintiff received incorrect information from James Shyer in May 2015 (*see* DX DB). Plaintiff also notified her advisor, Mr. Weiner, in January 2016 that she needed more information, who then requested information from Mr. Wagner on multiple occasions, including in March 2016 (*see* Tr. 644:22-645:1; 261:6-15; 262:3-13; DX DD; PX134).

Plaintiff likewise emailed James a list of questions relating to the buyback on June 21, 2016 because she did not have sufficient information to understand the payments herself (PX117; Tr. 270:23-271:10; 785:12-786:12; 803:24-804:7). Then, after receiving a response to that email two and a half months later in September 2016 (PX106), Robert’s attorney sent a letter to James and Christopher on November 29, 2016 indicating he had been retained because “efforts to discuss this matter have been made in the past and no helpful information has been provided” (PX 40). The letter also stated Robert was “owed substantial amounts” and reserved all his rights and remedies (*id.*). Robert’s counsel followed up in January 2017, again, inquiring “how the amount being paid to Robert Shyer comports with the terms of” the Employment Agreement and asked for a written explanation while again reserving all rights and remedies (PX 42; Tr. 786:16-24). Nonetheless, Zyloware did not provide a “written explanation of the salary calculation of Mr. Shyer’s salary pursuant to the Master Executive Employment Agreement”

until March 6, 2017 (PX 43). This demonstrated desire to seek more information regarding the buyback undermines Zyloware's contention that Plaintiff waived Robert's rights as attorney-in-fact (*see Richard A. Hutchens CC, LLC v State of New York*, 59 AD3d 766, 770-71 [3d Dept 2009] [rejecting waiver claim where party made "repeated requests for further information" which "convey[ed] concern rather than consent"]).

Similarly, Plaintiff's alleged rejection of Zyloware's advice to retain counsel and prioritization of seeking financial aid to assist in Robert's medical costs, do not "evince[] a knowing intent not to claim" Robert's rights under the Succession Agreements (*Jumax*, 46 AD3d at 408). In fact, the email Zyloware points to for the contention that Plaintiff rejected Mr. Weiner's advice that "a letter from counsel may be needed" (JX 11) also states Plaintiff "will take the next step on the buy back in April" (*id.*). Additionally, Plaintiff's concerns regarding financial assistance in covering Robert's medical costs did not amount to a knowing and voluntary waiver as Plaintiff believed Zyloware would not be responsive to the requests if she questioned the buyback (*see Gallegos v Top RX, Inc.*, 2008 WL 4279526, at \*14 [WDNY Sept. 15, 2008] [applying New York law, finding the plaintiff's fear of "rocking the boat" supported reasonable inference that her delay in discussing legal action "was not voluntary... thus negating any asserted waiver of" her breach of contract claim]).

Moreover, Zyloware fails to identify any evidence that Robert himself knowingly, voluntarily, and intentionally abandoned his contractual rights. First, Robert informed Plaintiff that he did not recognize the 2014 Option Notice and instructed Plaintiff to "send this to [Mr. Weiner] and get him to fix it" (Tr. 248:5-13; 644:22-645:5). Second, Robert's substantially diminished cognitive capacity by mid-2014 undermines any suggestion that Robert waive his contractual rights knowingly, voluntarily, and intentionally (*see* Tr. 644:22-645:1; 678:5-10; *see*

*also Fundamental*, 7 NY3d at 104). Zyloware’s own witnesses testified to Robert’s diminished capacity following his return from a trip to Africa in late 2014 and into 2015 (*see* Tr. 961:915; 963:23-25; 1371:16-1372:7; 1395:18-1396:20; 1436:14:1437:8). Third, the tax returns prepared by Mr. Wagner, and filed by Plaintiff and Robert do not establish a knowing, voluntary, and intentional waiver as Plaintiff testified as to both her and Robert’s lack of understanding of the tax returns (Tr. 673:24-674:5).

Finally, Zyloware’s reliance on *Jumax Assocs. v 350 Cabrini Owners Corp.*, 46 AD3d 407 [1<sup>st</sup> Dept 2007] is unavailing. In *Jumax*, the First Department found waiver where the plaintiff’s representatives on a board of directors of a residential cooperative “never asserted the roof rights reserved for it” despite having “the offering plan and its amendments... always in plaintiff’s possession and thus readily available for plaintiff’s consultation and review” (*id.* at 408). The court in *Jumax* relied on the fact that plaintiff’s representative “had read the entire offering plan” and held the fact that “one of plaintiff’s partners could not recall, and another partner was unaware, that plaintiff had retained the roof rights” did not dissuade the court’s finding of waiver (*id.* at 408-09).

By contrast, neither Plaintiff nor Robert were personally involved in the decision to withhold Robert’s annual base salary and bonus (*see e.g.*, PX182). Plaintiff also promptly began requesting information about the Option Share payments after becoming aware of them, putting Zyloware on notice (PX8; PX117). Zyloware’s responses to Plaintiff’s requests were unclear in certain instances, frustrating her efforts (DX DB; DX DD). Moreover, Robert’s counsel expressly reserved all rights and remedies approximately one and a half years after Plaintiff first requested information about the Option Shares. Even assuming knowledge of Robert’s rights could be imputed on Plaintiff under *Jumax*, this conduct refutes any finding of a “clear

manifestation of intent to relinquish a contractual protection” (*Fundamental*, 97 NY3d at 104).

As a result, Zyloware has failed to establish the defense of waiver.

Plaintiff is entitled to judgment on the Salary Claim in the amount of \$888,474.00, representing the sum total of 75% of Robert’s unpaid salary and insurance bonus for the years 2014, 2015, 2016, and 2017, with statutory prejudgment interest on \$72,817.00 of that amount from October 14, 2014 for the 2014 underpayment; \$254,451.00 of that amount from June 30, 2015 for the 2015 underpayment; \$285,689.00 of that amount from June 30, 2016 for the 2016 underpayment; and on \$275,517.00 of that amount from June 30, 2017 for the 2017 underpayment (*see* CPLR 5004; CPLR 5001 (a); CPLR 5001(b) [where damages “were incurred at various times,” interest may be computed upon “all of the damages from a single reasonable intermediate date”]).<sup>1</sup>

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<sup>1</sup> The Court rejects Zyloware’s argument that applying the statutory interest rate is inappropriate (NYSCEF 1128 at 20-21). Section 8 of the Employment Agreement’s reference to the “Wall Street Journal’s prime rate” is in connection to salary withheld in the event an executive is terminated for cause and successfully challenges the termination in arbitration (JX § 8). It does not contemplate the interest rate to be applied in event of a breach of that agreement (*id.*; *see also Brady v. Zambrana*, 221 AD2d 171, 172 [1<sup>st</sup> Dept 1995]; Part C *supra*).

On the other hand, the Court also rejects Plaintiff’s claim for prejudgment interest on 75% of each year’s Option Share purchase price based on Zyloware’s “delayed” payments for the Option Shares over the course of an entire year, rather than in full during the third quarter of each year the company exercised the option (*see* NYSCEF 1102 at 15-16). The Court’s ruling on summary judgment dealt with Zyloware’s use of Robert’s salary to offset the Option Shares purchase price (NYSCEF 450). It did not address the question of whether Zyloware also breached the Succession Agreements based on alleged delayed payments. Nor did Plaintiff present evidence at trial establishing her right to this interest. The Court is also concerned that adding prejudgment interest on the “delayed” purchase price payment on top of prejudgment interest under the Salary Claim would provide an inappropriate windfall. The Court is mindful of the fact that the agreement gave Zyloware the ability to exercise the options on a quarterly basis so as to claim a complete (or near complete) credit by deducting four quarters of Robert’s salary to pay for the Option Shares. Because Zyloware did not take advantage of that opportunity, Plaintiff will now be receiving 75% of his annual salary (plus prejudgment interest on that amount) *and* retain the full purchase price of the options she received at the time. Adding intra-year prejudgment interest to the latter amount seems to the Court inappropriately punitive and inequitable.

## B. DECLARATORY JUDGMENT AND SPECIFIC PERFORMANCE

Zyloware's counterclaims for a declaratory judgment and/or "a decree of specific performance enforcing [P]laintiff's Share delivery obligations" are denied (NYSCEF 1077 at 20). Plaintiff does not dispute that Zyloware is entitled to the Estate Shares and Option Shares certificates that it has purchased, or seeks to purchase, and has expressed a willingness to execute the appropriate documentation relinquishing any rights to the shares in the event the certificates are unable to be located (NYSCEF 1130 at 9). Thus, there is no actual controversy regarding the share certificates that would warrant granting a declaratory judgment. (*Touro Coll v Novus Univ. Corp.*, 146 AD3d 679, 680 [1<sup>st</sup> Dept 2017] [holding a declaratory judgment requires a "justiciable controversy...in which not only does the plaintiff have an interest sufficient to constitute standing to maintain the action but also that the controversy involves present, rather than hypothetical, contingent, remote, prejudice to plaintiffs"] [internal quotation omitted]). Additionally, Plaintiff's willingness to agree on an alternative mechanism to satisfy the share delivery requirement obviates the need for a specific performance judgment.

## C. PREJUDGMENT INTEREST ON THE ESTATE SHARES CLAIM

CPLR 5001(b) states that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed." However, "[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 reasonable intermediate date" (*id.*). Plaintiff seeks prejudgment interest on the jury award with respect to Plaintiff's Estate Share claim to be computed from March 16, 2018, (*i.e.*, the date of the scheduled closing) with respect to the life insurance proceeds component of the Estate Shares purchase price, and from May 15, 2019, with respect to the portion of the purchase price subject to the Note (NYSCEF 1102 ¶¶ 71-72). As set forth below,

however, the Court finds that Plaintiff's entitlement to prejudgment interest is limited to the remaining principal, not previously tendered by Zyloware, as accelerated by Section 6.4 of the Shareholders' Agreement (JX 3 § 6.4).

Under New York law, "one of the principal purposes of allowing prejudgment interest is to compensate the plaintiff for its inability to use the money" (*Koch v Greenberg*, 14 F Supp3d 247, 285 [SDNY 2012] [applying New York law]). It follows then, that where "plaintiffs receive, but refuse, a tender offer of the money at issue in the eventual suit, courts have recognized that defendants should not be penalized for [such a plaintiff's] refusal of the tender" (*id.* [internal quotation omitted]). However, to stop the accrual of interest, a tender of payment must be "for the full amount due plus interest" and "be unconditional" (*Cardella v Giancola*, 297 Ad2d 618, 619 [2d Dept 2022]).

Zyloware's tender of \$1,428,563.48 in collected life insurance proceeds together with the Note in the "amount of the greater difference between (a) the Calculated Purchase Price...and the Adjudicated Purchase Price," in anticipation of the March 16, 2018 closing date (DX CQ), and all subsequent tenders of the installment payments due under the Note each May from 2019-2021 constitute unconditional tenders sufficient to stop the running of interest. Although Zyloware's tender of the installment payments due under the Note were based on the Calculated Price and not the Adjudicated Price (*id.*), in each instance, the tender was made "without prejudice to any claims (including counterclaims), setoffs, or defenses [Plaintiff] has or may have arising from or relating to the Shareholders Agreement, including, without limitation, [Plaintiff's] right to establish the Adjudicated Purchase Price" (DX BN; DX CQ).

The fact that the Note was for an amount later deemed to be deficient, or that the tendered payments were conditioned on Plaintiff's delivery of the Estate Share certificates and the

executed Note, does not entitle Plaintiff to the prejudgment interest on the amounts tendered and refused. In essence, Zyloware attempted to limit the scope of the Parties' dispute to the difference between the Calculated Price and the Adjudicated Price contemplated in the Note. In those circumstances, granting prejudgment interest on the amounts unconditionally tendered by Zyloware would essentially reward Plaintiff for strategically rejecting a proposal to narrow the scope of the dispute in hopes of recovering on a more substantial judgment. Moreover, "an acceptance of these [tenders] would neither have explicitly, nor implicitly, barred [Plaintiff's] ability to bring the claims central to this lawsuit; and as such, the [] offers cannot reasonably be construed as conditional" (*Koch*, 14 F Supp3d at 286; *see also San-Dar Assoc. v Toro*, 213 AD2d 233, 234-35 [1<sup>st</sup> Dept 1995] ["defendant's tender of payment of rent and landlord's rejection of tender and failure to move the court to accept such payments without prejudice, warranted denial of an award of interest"]; *see also Knab Bros. v Town of Lewiston*, 58 AD2d 1016, 1017 [4<sup>th</sup> Dept 1977] [noting "the right to interest may be lost on equitable principles of estoppel, such as a refusal by a creditor to accept a tender"] [citing *Feldman v Brodsky*, 12 AD2d 347, 350-51 [1<sup>st</sup> Dept 1961]).

Plaintiff is, however, entitled to prejudgment interest on \$1,050,236.82 of the jury award, representing the remaining principal under the Note that has not yet been tendered by Zyloware, as accelerated by Section 6.4 of the Shareholders Agreement. The jury verdict found Zyloware in "breach [of] the Shareholders Agreement by applying a 35% discount" to the purchase price of the Estate Shares as applied to Zyloware's tender of the proceeds due under the Note (NYSCEF 1110 at 5; *see also* NYSCEF 1152 49:14-18).<sup>2</sup>

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<sup>2</sup> The Court notes the arguments made in the Parties' post-trial briefs regarding a breach based on the allegation that Zyloware "used an incorrect interest rate of 2.2%, and did not include all

In the event of a breach, Section 6.4 of the Shareholders Agreement states the Note “shall accelerate as to all unpaid principal and interest if at any time [Zyloware] shall fail to pay any portion of the principal amount thereof or interest thereon within 10 days after written notice that the payment is past due” (JX 3, § 6.4). Plaintiff’s counsel rejected the tendered Note at the time it was offered on the grounds that the principal amount was too low (DX BV; DX BS). Additionally, by that time, Plaintiff instituted this action and filed an initial complaint, and Second Amended Complaint, which both included the allegation that Zyloware improperly calculated the “Enterprise Fair Market Value [of the Estate Shares by including a] “35% discount that was not contemplated in the Shareholders Agreement” (NYSCEF 2 ¶ 70; *see also* NYSCEF 126 ¶¶ 41-44). Accordingly, the written notice requirement of Section 6.4 was satisfied.

Further, under New York law, absent a provision setting forth the applicable interest rate in the event of a default, the statutory rate applies (*see Brady v. Zambrana*, 221 AD2d 171, 172 [1<sup>st</sup> Dept 1995] [finding that for the post-breach period, “since no provision was made for a default interest rate, the statutory 9% is appropriate”]; *Chipetine v McEvoy*, 238 AD2d 536, 537 [2d Dept 1997] [same]; *Levy, King & White Adv. v Gallery of Homes*, 177 AD2d 967, 968 [4<sup>th</sup> Dept 1991] [same]). In the absence of any such provision here, Plaintiff is entitled to prejudgment interest on the amount accelerated under Section 6.4 based on Zyloware’s failure to tender principal plus interest based on the Adjudicated Price of the Estate Shares at the statutory rate of 9%.

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interest from March 16, 2018” (NYSCEF 1102 at 18) and declines to consider them. First, the issue was not presented to the jury (*see* NYSCEF 1110; *see also* NYSCEF 1152 at 51:6-12)). Second, the breach found by the jury, i.e., the tender applying the 35% discount, and any potential breach based on the interest rate applied to Zyloware’s tender of the installment payment would result in an accrual of prejudgment interest computed from the same date, May 15, 2019.

Finally, CPLR 5001(c) provides that if a jury verdict does not specify the date from which prejudgment interest shall be computed, “the court upon motion shall fix the date.” In accordance with the Court’s findings stated above, Plaintiff’s post-trial motion to fix the date from which interest is to be computed (*see* NYSCEF 1102 ¶¶ 70-72) is granted to the extent Plaintiff seeks to set May 15, 2019 as the date from which prejudgment interest shall be computed with respect to accelerated principal due under the Note.

#### **D. OUTSTANDING BALANCE ON 2017 OPTION SHARES**

Plaintiff is likewise entitled to Zyloware’s tender of \$216,672.00 for the purchase of the balance of the 2017 Option Shares. In her Fourth Amended Complaint, Plaintiff sought recovery of this remaining balance “for the 2017 Option Shares that Zyloware stated it would pay but had not paid at the time of [Robert’s] death” (NYSCEF 901 ¶ 56). In its Answer with Counterclaims, Zyloware acknowledges that “Zyloware had modified the purchase price for Option Shares Nos. 1-21, and owed Bob about \$216,000 toward the modified purchase price of Option Shares Nos. 22-28 [i.e., the 2017 Option Shares]” (NYSCEF 844 ¶ 20).

“Facts admitted in a party’s pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made” (*GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549, 551 [2d Dept 2014]; *see also Kismo Apartments LLC v Gandhi*, 24 NY3d 403, 412 [2014] [holding “statements in the corporations’ pleadings that they owed [] the settlement money constitute formal judicial admissions” and “are conclusive upon the party making [them] [because] the corporations did not seek from the court to be relieved of the consequence of these admissions”]).

Given this admission, there was no fact issue to submit to the jury regarding this outstanding balance. The jury was asked to decide only whether Zyloware breached its

obligations under the Shareholders Agreement by applying the 35% discount to the Option Shares purchase price (NYSCEF 1110 at 3). The jury's verdict that Zyloware did not breach the Shareholders Agreement by applying the 35% discount to the Option Shares does not absolve Zyloware of its obligation to pay the full *discounted* price for the 2017 Option Shares. In fact, Zyloware's defense was predicated on the fact that the amounts tendered and paid reflected the Shareholders Agreement's purchase prices. Further, Plaintiff's willingness to relinquish her rights in the share certificates removes any potential bar to the receipt of these funds arising out of the certificate delivery requirements (*see Part B, supra*). However, Plaintiff is not entitled to prejudgment interest on the balance owed for the 2017 Option Shares as Zyloware likewise tendered the amount on March 16, 2018 (*see Part C, supra; see also DX BN; PX163; DX CD*).

Accordingly, Plaintiff is entitled to judgment for the balance owed for the 2017 Option Shares as calculated by Zyloware in the amount of \$216,672.00.

#### E. COSTS

Finally, Plaintiff is not entitled to costs as the prevailing party under CPLR 8101, which states "the party in whose favor a judgment is entered is entitled to costs in the action... unless the court determines that to so allow costs would not be equitable under all of the circumstances." Although Plaintiff prevailed on the Estate Shares claim over Zyloware, Zyloware was successful in a number of defenses, including on the breach of contract claim concerning the Option Shares. Thus, the Court does not find an award of costs to be appropriate in these circumstances. (*see Raab v Dumblewski*, 226 AD2d 1021 [3d Dept 1996] [holding trial court's denial of costs was not an abuse of discretion where "each party prevailed on significant issues"]).

CONCLUSION

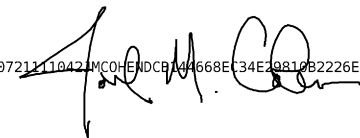
Accordingly, it is:

ORDERED and ADJUDGED Plaintiff Catherine Shyer, as preliminary executrix of the estate of Robert Shyer, is entitled to relief against Defendant Zyloware Corporation on the Salary Claim in the amount of \$888,474.00, with prejudgment interest at the statutory rate on (i) \$72,817.00 from October 14, 2014; (ii) \$254,451.00 from June 30, 2015; (iii) \$285,689.00 from June 30, 2016; and (iv) \$275,517.00 from June 30, 2017 in accordance with the decision above to be calculated by the Clerk; it is further

ORDERED and AJUDGED that, in accordance with the jury verdict, Plaintiff is entitled to relief against Defendant on her cause of action for breach of the Shareholders Agreement with respect to the purchase of the Estate Shares in the amount of \$2,939,029.00, with prejudgment interest on \$1,050,236.82 of that amount at the statutory rate from May 15, 2019, to be calculated by the Clerk; it is further

ORDERED and ADJUDGED that Plaintiff is entitled to relief against Zyloware in the amount of \$216,672.00 representing the remaining balance owed for the 2017 Option Shares, without prejudgment interest; and it is further

ORDERED that the Clerk enter judgment accordingly, without costs, upon submission by Plaintiff of a proposed judgment in proper form.

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JOEL M. COHEN, JSC

DATE: 7/21/2023

Check One:  Case Disposed

Non-Final Disposition

Check if Appropriate:  Other (Specify \_\_\_\_\_ )