

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

Fischer Brewing Co., Inc.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 97-678 B
)	Senior Judge Leonard Braman
The Estate of Howard Flax, et al.,)	
)	
Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause is before the court on appellate remand of post-judgment proceedings involving a writ of attachment served upon the debtor's employer, Montgomery Baker's Inc. ("MBI") in an effort to satisfy a judgment in favor of Paley, Rothman, Goldstein, Rosenberg & Cooper, Chartered ("Paley Rothman") against Benson Fischer ("Fischer") for bad faith litigation. The subject of the remand involves Paley Rothman's traverse of MBI's response to the attachment interrogatories and the hearings which ensued pursuant to D.C. Code § 16-553 (2001). Two nonjury traverse hearings were conducted by the late Judge Steffen Graae prior to the appeal, the first on July 18, 2002 and the second on October 22, 2003. I took evidence in a third traverse hearing on July 27, 2009.

Based upon the foregoing, together with further evidence to be noted and the entire record herein, the following Findings of Fact and Conclusions of Law are, this 5th day of January 2010, hereby published:*

*A table of contents will immediately follow the final page of these Findings and Conclusions.

Findings of Fact

*The Writ and Underlying Judgment*¹

1. On October 8, 2001, Paley Rothman, a judgment creditor, served a writ of attachment on MBI seeking to attach wages or other moneys owed by MBI to its president, Fischer, the judgment debtor of Paley Rothman. *Goldschmidt v. Paley, Rothman, Goldstein, Rosenberg & Cooper, Chartered*, 935 A.2d 362, 370 (D.C. 2007); (Jt .App. vol. 3 Pl. Ex. 1 at Bates 0666.)

2. Paley Rothman's judgment of January 5, 2001 for \$723,187, was based upon bad faith litigation instituted by Fischer in which he "orchestrated a continuing cover-up of his involvement in the preparation of letters fraudulently documenting" his bogus claim. *Fischer v. Estate of Flax*, 816 A.2d 1, 13 (D.C. 2003) (internal quotations omitted). Fischer was also found to have fabricated evidence in his subsequent bankruptcy proceeding. *Schlossberg v. Fischer (In re Fischer)*, 411 B.R. 247, 262-63 (Bankr. D. Md. 2009) ("*Schlossberg I*").

3. Paley Rothman challenged MBI's response to interrogatories accompanying the writ and requested a traverse hearing. *Goldschmidt*, 935 A.2d at 370.

MBI's Formation and It's Incorporating Debt

4. MBI was incorporated on June 22, 2001, five-and-a-half months after Paley Rothman's judgment. It is owned by Fischer and members of his immediate family, consisting of his wife Mona, and his parents, Sheldon and Ann Fischer. Benson Fischer and his wife own 50% of MBI as tenants by the entirety, and the parents own 25% each. The total capital investment was \$1,000, Fischer and his wife investing \$500 and his parents investing \$250 each. *Schlossberg I*, 411 B.R. at 254.

¹ Amongst other evidence admitted into evidence at the third traverse hearing of July 27, 2009 were four volumes of Joint Appendices. Evidence included in those volumes will be cited by Joint Appendix (Jt. App.), volume number, document identification and the Bates number as a page reference. *E.g.*, Jt. App. vol. 4 Pl. Ex. 78 at Bates 1195. Further, there were additional exhibits admitted into evidence at the third traverse hearing that were not submitted as a part of the Joint Appendices. These exhibits will simply be cited by Exhibit Number and page reference. *E.g.*, Def. Ex. 5 at 1.

5. “Because of the *de mimus* stockholder investment, the funds initially needed by MBI were provided from two loans. The first loan was from Sheldon and Ann Fischer in the amount of \$599,112 at an interest rate of ten percent (10%) per annum. The second loan . . . was from Fischer and his wife in the amount of \$310,000, also at an interest rate of ten percent (10%) per annum” and was “evidenced by a promissory note that was payable ‘to the order of Benson Fischer and Mona Fischer, as tenants by the entirety’” *Id.* MBI’s promissory note to Fischer and his wife was signed on behalf of MBI by Fischer. (Jt. App. vol. 4 Def. Ex. 3 at Bates 1206-07.) The note to the parents, also signed by Fischer for MBI, was not payable by the entireties. (Jt. App. vol. 4 Def. Ex. 4 at Bates 1208-09.)²

6. Fischer was a director of MBI along with his wife and parents. *Schlossberg I*, 411 B.R. at 255; (Jt. Proposed Stip. of Facts ¶¶ 66-69, *Schlossberg I* (“Jt. Stip.”).) From the inception of MBI through at least the start of 2007, Fischer was MBI’s President and Chief Executive Officer (“CEO”) (Joint. Stip. at ¶¶ 44, 50), and his father was Vice President and Treasurer (Jt. App. vol. 3 Pl. Ex. 2 at Bates 0671).

7. MBI was a start-up enterprise, *Goldschmidt*, 935 A.2d at 374. But it was formed for a particular purpose: “to acquire substantially all of the assets of Montgomery Doughnuts, Inc., a bankrupt bakery” that had been in business for 33 years. *Id.* at 370; (Estabrook Test. Traverse Hr’g Tr. 25:2–9, July 27, 2009.) Although MBI was a “new entity” it was . . . more of a change of ownership in a company that had been in existence for quite some time. (Estabrook Test. Traverse Hr’g Tr. 49:1-4, July 27, 2009); *see also Schlossberg I*, 411 B.R. at 256 (“MBI initially used the purchased assets to engage in a business similar to [Montgomery Doughnuts] former

² Of Fischers’ \$310,000 loan, \$60,000 came from his wife, Mona, and the remaining \$250,000 from a loan to the Fischers from Gary Posner, who was married to Mona’s sister. *Schlossberg v. Fischer (In re Fischer)*, No. 03-13704-NA, 2009 Bankr. LEXIS 3747, at *66-68 (Bankr. D. Md. Jan. 14, 2009) (“*Schlossberg II*”). At the second traverse hearing, Fischer testified the Posner loan was forgiven (Jt. App. vol. 1 B. Fischer Test. Traverse Hr’g Tr. 180:14-181:21 at Bates 0428-29, October 22, 2003), and the Posner note was not listed on Fischer’s bankruptcy petition. (Jt. App. vol. 2 J. Graae Memorandum Order, note 2, at Bates 0657.)

business.”) In sum, I find that MBI was a start-up company that acquired an established but bankrupt business for the purpose of turning it around.

8. The bakery plant was open from 7:30 a.m. until 10:00 p.m. seven days a week; the main retail store operated from 5:30 a.m. until 10:00 p.m. on weekdays, and until 9:00 p.m. on weekends. (Jt. App. vol. 1 B. Fischer Test. Traverse Hr'g Tr. 24:2–25:18 at Bates 0063-64, July 18, 2002.) The plant and retail store occupied 23,000 square feet. (*Id.* at 24:2-5, Bates 0064). MBI employed from 65 to 100 persons depending on the time of year, including two plant managers, two assistant managers, a driver-supervisor and driving staff. (*Id.* at 27:3–29:10, 30:15–17, Bates 0066-69.) MBI had 14 trucks for delivery of its products. (*Id.* at 51:22–52:6, Bates 0090-91.)

Fischer's Services for MBI without Compensation

9. As stated in *Goldschmidt*, 935 A.2d at 371, “There was no dispute that Fischer rendered services to MBI . . . he worked long and hard” He “regularly worked 10-12 hours per day, seven days a week.” (Joint. Stip. ¶ 51.)

10. “There also seems to be no dispute that he [Fischer] served without salary or compensation.” *Goldschmidt*, 935 A.2d at 371.

Repayments of Fischer's Loan

11. “From October 8, 2001, when the writ of attachment was served on MBI, thru August 21, 2003, Benson Fischer had drawn checks from MBI accounts totaling \$244,620. The money typically came in monthly payments of \$8,957.” *Goldschmidt*, 935 A.2d at 370; (Jt. App. vol. 4 Pl. Ex. 78 at Bates 1195.) The payments were repayments of the \$310,000 loan (Jt. App. vol. 4 Pl. Ex. 78 at Bates 1195), and were protected from Fischer's creditors, including Paley Rothman

because the loan was by the entireties.³ In 2008, Fischer deposed that “\$40,000 plus interest” was still due on the note. (B. Fischer Dep. 51:15–18, April 3, 2008.)

12. The Agreement Between Sheldon Fischer and Benson Fischer As To Ownership Of Montgomery Bakers, Inc. precluded loan repayments unless there was “net cash flow.” (Jt. App. vol. 4, Def. Ex. 2 at ¶ 2, Bates 1204.) *Goldschmidt*, 935 A.2d at 373. Accordingly, I find the foregoing loan repayments were made pursuant to the agreement and, hence, there was sufficient cash flow to support them.

13. The monthly payments were calibrated “to meet the living needs of his [Fischer’s] family.” (Jt. App. vol. 2 Memorandum Order of Judge Graae at 7, Bates 0660). The father testified, “I let him take all his money out of the capital account [of money loaned to fund MBI], it was because he was my son. I was worried about my grandchildren. I wanted them to have food on the table and I’d do what I had to do as a father.” (S. Fischer Test. *Montgomery Bakers Inc., v. Montgomery Distributors, Inc.*, (“*MBI v. MDI*”) Tr. 120:14–17, March 18, 2008.)⁴

14. While monthly repayments of principal and interest of Fischer’s loan usually were made by MBI in the amount of \$8,957, MBI generally repaid only monthly interest to the father in the amount of \$4,555, as is indicated in the MBI General Ledgers. (Jt. App. vol. 4 Pl. Ex. 53 at Bates 1094, Pl. Ex. 54 at Bates 1101, Pl. Ex. 55 at Bates 1107.) Thus, at least \$13,512 a month of “net cash flow” (as required by the shareholder agreement to repay loans) was available to pay a salary to Fischer instead of making loan repayments, had MBI chosen to do so. *Goldschmidt*, 935 A.2d at 373; (MBI’s Trial Br. 17.)

³ In the District of Columbia and Maryland, assets held by the entireties are immune from “creditors of one but not both of the tenants.” *Morrison v. Potter*, 764 A.2d 234, 237 (D.C. 2000).

⁴ The *MBI v. MDI* litigation arose after MBI ceased baking activities following a plant accident in 2003 when the principals agreed that Fischer would undertake the maintenance and/or restoration of the Starbucks account. MBI, through the father, sued Fischer and his new corporation, Montgomery Distributors, Inc. for unjust enrichment based upon the profitableness of the Starbucks account without an accounting to MBI. See Findings *infra*, at ¶¶ 33, 45(a). Testimony from that litigation was admitted here by agreement. (Traverse Hr’g Tr. 72:20-73:3, July 27, 2009).

The Bona Fides of Fischer Not Receiving Compensation

15. MBI's relies upon Bruce Pollekoff, a Certified Public Accountant ("CPA") who represented other Fischer companies but not MBI. (Jt. App. vol. 1 Pollekoff Test. Traverse Hr'g Tr. 141:13–25, 142:18–20 at Bates 0389-90, October 22, 2003.) He testified that owners of small companies generally invest “as much [money in their company] as a loan [and] as little [in] paid in capital. Because they want it back.” (*Id.* at 147:10–148:2, Bates 0395-96.) He “advise[s] the client to . . . [repay] the loan first if there was not the money to be able to pay a salary.” (*Id.* at 148:20–149:6, 149:16–150:3, Bates 0396-98.)⁵ As Mr. Pollekoff correctly states, “there’s a difference between cash flow and net income. A corporation can generate cash flow but not net income.” (*Id.* at 148:17–20, Bates 00396.)

16. While the Bankruptcy court in *Schlossberg I* credited the father’s bona fides for his not taking compensation, “Benson’s motivation was another matter.”:

In the months immediately preceding the incorporation of MBI, Benson had been the subject of intensive creditor actions by Paley Rothman, which had served writs of garnishment on numerous banks in Montgomery County seeking to garnish bank accounts and on four companies with which Fischer had been associated seeking to garnish any wages. Fischer was being advised by at least two bankruptcy and creditors’ rights lawyers. They reinforced his understanding that the MBI stock, as well as any other assets he acquired, should be held as tenants by the entirety. Fischer knew full well that assets he owned individually were subject to attachment, but assets he owned as tenants by the entirety with Mona were not

Fischer knew that his salary would be subject to garnishment. He knew that not taking a salary would enhance the value of his equity interest in MBI, owned by the entirety with Mona. Indeed, Fischer admits that his expected “remuneration” for his services was the anticipated increase in the value of MBI stock. Thus Fischer’s motivation for not taking a salary from MBI was that he was able to convert what would have been salary (and therefore subject to garnishment) into increased equity in MBI (which was held by the entirety and therefore not subject to claims of Fischer’s individual creditors). *The Court finds that Fischer did not take any salary from MBI in bad faith and, further, did so*

⁵ Joseph Estabrook, Paley Rothman’s expert on the reasonable value of Fischer’s services to MBI, took general issue with Pollekoff on the appropriateness of these practices in the case of a Subchapter S corporation. (Estabrook Test. Traverse Hr'g Tr. 49:9-51:9, July 27, 2009.) That matter is of no importance in this case, however.

with the actual intent to hinder and delay the collection efforts of Paley Rothman

Schlossberg I, 411 B.R. at 255–56 (footnotes omitted) (emphasis added).

17. That motivation is underscored by Fischer’s letter of May 15, 2001 to Paley Rothman’s attorney, Frank Mastro, in which he flaunted:

Dear Frankie:

I have reviewed the interrogatories that were served on Bruce Pollekoff and Stanley Goldschmidt [Fischer’s attorney]. I can only assume that you intend to serve me as well. It is absolutely astounding that you have spent nearly \$20,000 in filing fees *alone* in order to find out what you already know. You can’t get a penny from me! I recognize it is upsetting to you and your associates that you will never be able to satisfy judgments due to the “tenants by the entirety” status of my holdings.

(Pl.’s Br. Regarding Entitlement to Prejudg. Interest Ex. 4, March 12, 2009) (emphasis in original). Notably, this letter preceded the formation of MBI by a month.

18. Fischer’s fixation with “tenancy by the entirety” to frustrate creditors found its way into MBI’s structure. When Fischer’s father was asked why MBI “was structured tenants by the entireties for Mona and Benny, but individual ownership for the stock for you and Ann,” Sheldon Fischer replied: “My son formed it as tenants in the entireties as a protective thing because of his lawsuits and his judgments. And anything that was in his name and his wife’s name couldn’t be touched by the people that were chasing him.” (S. Fischer Test. *MBI v. MDI* Trial Tr. 66:5-14, March 18, 2008.) His son told him this. (*Id.* at 66:16-20.)

The Nature of Services Rendered by Fischer for MBI Prior to the Roof Collapse⁶

19. The *Goldschmidt* Court, adopting Judge Graae’s description of Fischer’s responsibilities, stated Fischer, “assum[ed] primary responsibility for marketing promotion, product development, franchising equipment, contracting with vendors, and overseeing the legal

⁶ The remand instructions, as will presently be explained, potentially open up the issue of the reasonable value of Fischer’s services for MBI from October 8, 2001 (the date the writ was served) to October 31, 2003, the end date stipulated by the parties. (Pretrial Order July 16, 2009 at ¶ (5).)

affairs of the company.” *Goldschmidt*, 935 A.2d at 370 (internal quotations omitted).

Schlossberg I observed:

From its fledging days, Fischer played the central role in establishing MBI as a successful company. He actively managed most aspects of the business affairs (other than the financial affairs), including marketing, manufacturing, sales and the day-to-day operations of the company. The parties entered into a stipulation listing the many extensive activities in which Fischer was engaged on behalf of MBI. He sometimes worked seven days a week for MBI without receiving any compensation.

Schlossberg I, 411 B.R. at 255.

20. According to the Joint Proposed Stipulated Facts filed in and adverted to in the bankruptcy case, Fischer, on behalf of MBI, “attended and participated in the bankruptcy court hearing at which MBI purchased the assets of Montgomery Doughnuts, Inc.” (Joint Stip. at ¶ 12); was “involved in all negotiations [relating to] the acquisition” of that company’s assets (*Id.* at ¶ 13); promoted MBI’s business in an interview with the Washington Post (*Id.* at ¶ 14); redesigned MBI’s donut box (*Id.* at ¶ 15); purchased new delivery trucks (*Id.* at ¶ 16); had the new trucks painted to match the colors and redesign of the donut boxes (*Id.* at ¶ 17); obtained Kosher certification to increase sales and broaden the customer base (*Id.* at ¶ 18); expanded the company’s product line to include bagels, danish, croissants and cookies (*Id.* at ¶ 19); negotiated a trash service agreement (*Id.* at ¶ 20); executed a lease agreement (*Id.* at ¶ 21); planned the staffing, marketing, advertising, promoting and product development (*Id.* at ¶ 22); reviewed financial statements, daily production and sales reports (*Id.* at ¶ 23); placed an online classified ad for a plant manager (*Id.* at ¶ 24); upgraded equipment by purchasing a water chiller and a food wrapper (*Id.* at ¶ 25); and was a promoter and incorporator of MBI as well as MBI’s President and CEO during all relevant times. (*Id.* at ¶¶ 44, 45, 50, 51.)

21. Apart from Fischer’s services as recited in the Joint Stipulation, he was also responsible in January, 2003 for acquiring the Starbucks account for cafes in Maryland, Virginia

and the District of Columbia. (S. Fischer Test. *MBI v. MDI* Trial Tr. 74:16-23, 76:5-8, March 18, 2008; Jt. App. vol. 4 Pl. Ex. 58 at Bates 1135, 1136-1137, Pl. Ex. 59 at Bates 1138.) (After the bakery's roof collapsed on February 17, 2003 and caused the cessation of MBI business, Fischer's development of the Starbucks account resurrected MBI's business. Findings, *infra*, at ¶ 45(a).)

22. MBI's retail locations in Silver Spring and Gaithersberg, Md. were sold and licensing agreements were negotiated whereby the purchasers-licensees were allowed to operate the stores independently under the name of "Montgomery Doughnuts" in exchange for purchasing all of their bakery products from MBI. (Jt. App. vol. 1 B. Fischer Test. Traverse Hr'g Tr. 34:9-35:4, 38:9-40:5 at Bates 0073-74, 0077-78, July 18, 2002; Jt. App. vol. 3 Pl. Ex. 27 at Bates 0932-40.) This was part of a plan to "streamline their operations in changing the business from [a] retail business to a wholesale business, and the fact they were opening up new markets on the wholesale side." (Estabrook Test. Traverse Hr'g. Tr. 25:14-17, July 27, 2009.)

23. In anticipation of the need for a larger manufacturing space, Fischer in December 2002 initiated extensive negotiations with Safeway, Inc. (an MBI customer) involving (a) the purchase of Safeway's bread plant in Prince George's County, Md. and (b) a supply contract in which MBI would provide Safeway with MBI baked goods for all of its stores in the Washington-Baltimore market. (B. Fischer Dep. Ex. 5 *Montgomery Bakers, Inc. v. England Family, LLC* ("*MBI v. England*") 232:7-233:6, 237:18-238:3, 545:9-547:8; Jt. App. vol. 4 Pl. Ex. 40 at Bates 0987-88.)⁷

⁷ Fischer's deposition was taken in the case of *MBI v. England Family*, No. 268863-V in the Circuit Court of Maryland for Montgomery County. MBI claimed that its lessor, England Family, LLC, had provided it with a defective roof which collapsed under the weight of a snowfall.

24. Fischer concurrently entered into negotiations with state and local authorities to fund the Safeway project with an industrial revenue bond offering. (B. Fischer Dep. Ex. 5 *MBI v. England* 233:7-234:12.)

25. Fischer hired and consulted with two attorneys in connection with the Safeway transaction. (*Id.* at 253:17-255:17.) He also hired a consultant who did a couple of layouts showing the manner in which MBI's equipment would fit into the Safeway space. (*Id.* at 238:4-239:17; 240:6-12; B. Fischer Test. Traverse Hr'g Tr. 186:8-12, July 27, 2009.)

26. Fischer's father "concentrated [on] the financial end" of the business. "I sat on top of the money." (S. Fischer Test. *MBI v. MDI* Trial Tr. 69:20-25, March 18, 2008.) The father also was involved in the factory (*Id.* at 69:17-19) and supervised the retail stores. (*Id.* at 70:1-4.) But "Benny was more into production than I was . . . [t]he hours we worked were very extensive." (*Id.*)

MBI's Economic Condition before the Roof Collapse

27. "At the time MBI purchased MDI's [Montgomery Doughnuts, Inc.] assets and began operations, the business was losing approximately \$50,000 per month." *Schlossberg I*, 411 B.R. at 256. By September 7, 2001, MBI had sufficient net cash flow for Fischer to receive his first monthly loan repayment. (Jt. App. vol. 3 Pl. Ex. 25 at Bates 0888.) By December 31, 2001, after a little more than five months of operation, a business that was losing \$50,000 a month had only lost \$129,000 notwithstanding the economic downturn following the September 11, 2001 terrorist attacks. (Jt. App. vol. 3 Pl. Ex. 19 at Bates 0770.) In 2002, MBI's loss for the *full* year of operation was only \$130,776, a 78% decrease in 17 months of its predecessor's annual losses. (Jt. App. vol. 4 Pl. Ex. 49 at Bates 1045.)

28. Behind these end numbers are the following facts:

(a) MBI earned \$1.8 million in gross revenue in the final six months of 2001 (Jt. App. vol. 4 Pl. Ex. 50 at Bates 1070), and \$3.1 in 2002. (Jt. App. vol. 4 Pl. Ex. 51 at Bates 1079). During the first seven weeks of 2003 (before the roof collapse), MBI earned \$435,000 in gross revenue. (Jt. App. vol. 4 Pl. Ex. 52 at Bates 1088.)

(b) Retail sales accounted for less than 26% of MBI's gross revenue in 2001 (Jt. App. vol. 4 Pl. Ex. 50 at Bates 1070) and for less than 20% in 2002. (Jt. App. vol. 4 Pl. Ex. 51 at Bates 1079.) Retail sales for 2003 were projected by MBI to be less than 8% of monthly revenue. (Jt. App. vol. 4 Pl. Ex. 48 at Bates 1042.)

(c) Wholesale accounts, amounting to more than 1,000 at the outset of 2003 included, in addition to Safeway and Starbucks, the U.S. Senate and House of Representatives, the Executive Office, the FBI, CIA, Eurest and other government buildings, Ottenberg's Bakery as well as churches, caterers, hotels, car dealerships, and prisons. (B. Fischer Dep. 24:2-8; B. Fischer Dep. Ex. 5 *MBI v. England* 354:18-355:21; S. Fischer Test. *MBI v. MDI* Trial Tr. 72:8-18, March 18, 2008; Jt. App. vol. 4 Pl. Ex. 46 at Bates 1037; Pl. Ex. 48 at Bates 1042.) MBI's federal income tax identified its business activity as "wholesale sales." (Jt. App. vol. 3 Pl. Ex. 19 at Bates 0770-71; Jt. App. vol. 4 Pl. Ex. 49 at Bates 1044-45.)

(d) With Starbucks and other new accounts on board for 2003, the prognosis for 2003 suggested that it would be the turnaround year.⁸ Although the roof collapse would shortly bring business to a halt, the insurance company, pursuant to an umpire's award, paid \$663,554 for the year's business interruption (or loss of profits), thereby confirming that 2003 would have

⁸ Sheldon Fischer confirmed this belief when he testified at the second traverse hearing on October 22, 2003 that repayment of the loans was less important to him than to his son, "[a]lthough our agreement stipulated that I could get first money out when the company turned around, *which we were about to do.*" (Jt. App. vol. 1 S. Fischer Test. Traverse Hr'g Tr. 159:10-20 at Bates 0407, October 22, 2003.) (emphasis added).

been a profitable year for MBI. (S. Fischer Test. *MBI v. MDI Trial Tr.* 7:3–7, March 19, 2008; B. Fischer Dep. 52:18–53:2; 61:12–62:12, April 3, 2009.)

29. Within a month and a half into the new year, on February 17, 2003, a severe snow brought down the roof of the bakery plant and offices, and business ceased. *Goldschmidt*, 935 A.2d at 370. Business was never to resume as it was before.

Services Rendered by Fischer after the Roof Collapse

30. MBI concedes that Fischer rendered full and regular services for MDI through April, 2003. For the balance of the period, May through October, 2003, MBI's expert stated his services were so limited as to merit only 10% of reasonable value. (Friedman Test. Traverse Hr'g Tr. 114:25–115:10, July 27, 2009.)

31. Fischer's post-roof-collapse activities for MBI until early May, 2003 were described by the bankruptcy court:

The collapse of the roof led to a period of intense and almost overwhelming activity for Fischer (dealing with helping the company's 100 employees find new employment, dealing with unemployment claims, removing food product, dealing with insurance adjusters, and with the county's fire and building departments, and so forth). This occupied a great deal of Fischer's attention

Schlossberg II, 2009 Bankr. LEXIS 3747 at *15.

32. Fischer persisted in the Safeway negotiations which had the potential of a \$10,000,000 deal. (B. Fischer Dep. Ex. 5 *MBI v. England* 545:9–546:9.) He and his father flew to Pleasanton, California, Safeway's headquarters, in March or April to continue discussions. (*Id.* at 234:2–3; B. Fischer Test. Traverse Hr'g Tr. 185:18–186:7, July 27, 2009.) Parallel dealings continued with state and county on funding by a revenue bond offering. (B. Fischer Dep. Ex. 5 *MBI v. England* 234:4–12.) Talks continued until Safeway decided not to go forward in the summer of 2003. (*Id.* at 253:11–13.) The primary cause of MBI's difficulties was that its customer base vanished when it was unable to manufacture product. (B. Fischer Test. Traverse

Hr'g Tr. 185:3-9, July 27, 2009; B. Fischer Dep. *MBI v. England* 234:13-17, 520:6-9, 523:4-19.)

33. Starbucks was a different story. With the agreement of his father, Fischer attempted to pursue the bagel, fritter and donut business with Starbucks. (S. Fischer Test. *MBI v. MDI* Trial Tr. 118:5-119:5, March 18, 2008; Judge's Oral Decision *MBI v. MDI* Trial Tr. 161:24-162:14, March 20, 2008.) Since MBI could produce no product for Starbucks, the Fischers resourcefully shifted their focus to the bakery-brokerage business whereby, on the basis of a hoped-for supply contract with Starbucks, MBI would subcontract with independent bakers to produce donuts, bagel and fritters according to MBI's recipes. (B. Fischer Dep. Ex. 10 at 2; S. Fischer Test. *MBI v. MDI* Trial Tr. 91:13-20, 103:22-24, March 18, 2008; Judge's Oral Decision *MBI v. MDI* Trial Tr. 163:7-17, March 20, 2008.)

34. A series of e-mails tell a story of Fischer's Starbucks activities which, to succeed, required that he unseat the incumbent supplier who had taken MBI's place when it could no longer manufacture. (Jt. App. vol. 4 Pl. Exs. 61-66 at Bates 1140-45.) Exhibit 65 dated June 11, 2003 refers to the subcontractor "baker who is going to do the fritters" and remarks, "It took some training, but the[y] have it down." This is suggestive of substantial services by Fischer involving substantial time. The e-mail goes on, "I worked with the Bagel baker last week," again indicating substantial services and time. But the services were incomplete because Fischer "had to wait for my ingredients to come in order that the product will be up to our standards." The plain implication is that more services were necessary to produce an acceptable product.⁹

35. And Judge Dugan, in the course of delivering his opinion in *MBI v. MDI*, read from a Fischer writing to his father referring to the length of time it took to locate a satisfactory contract baker: "[It] took me months to find someone to handle the project. You even stated to me you

⁹ From MBI, Fischer transitioned to identifying his products with Montgomery Distributors, Inc., his separately formed company which did not involve his parents. This led to the litigation initiated by the father and MBI.

have given up long ago as the process was dragging on I was able to find Brad, which was nothing but daily aggravation, and then I started selling product to Starbucks in November, which provided a net profit of 8500 per month.” (Judge's Oral Decision *MBI v. MDI* Trial Tr. 167:7–14, March 20, 2008.) Donuts came on line as a regularly supplied product in January, 2004, yielding an additional profit of \$20,000 per month, which would later increase. (*Id.* at 167:20-23, 173:2-7.) Clearly, the time spent by Fischer on donut production prior to the end period, October 31, 2003, must have been considerable.

36. To the services recited above there must necessarily be added the time for negotiating the agreements with Starbucks and the baker subcontractors.

37. Fischer also negotiated and executed an agreement with Young Adjustment Company, authorizing it to act on behalf of MBI with respect to its insurance claim with Erie Insurance Exchange following the roof collapse. (Jt. App. vol. 4 Pl. Ex. 30 at Bates 0964.) MBI's insurance claim was negotiated by Fischer with a total recovery of about \$2.2 million. (S. Fischer Test. *MBI v. MDI* Trial Tr. 6:24–7:12, March 19, 2008.)

38. He negotiated a contract in May, 2009 for dismantling MBI's conveyor belt system, which was damaged by the roof collapse, and worked on the design of a new system. (B. Fischer Dep. Ex. 6 *Erie Ins. Exch. v. H.T. Harrison & Sons, Inc.* ("*Erie v. Harrison*") 152:16–154:10, January 25, 2006; Jt. App. vol. 4 Pl. Ex. 36 at Bates 0975, Pl. Ex. 38 at Bates 0980-81.)¹⁰

39. In April and May, 2003 Fischer was involved with the landlord on various problems incident to the roof. (Jt. App. vol. 4 Pl. Ex. 33 at Bates 0971, Pl. Ex. 35 at Bates 0974, Pl. Ex. 36 at Bates 0975.)

¹⁰ The testimony is from Fischer's deposition in *Erie Insurance Exchange v. H.T. Harrison & Sons, Inc.*, No. 259863-V in the Circuit Court for Montgomery County. This litigation arose out of the MBI warehouse roof collapse. Erie Insurance was subrogated to MBI's claims seeking damages from Harrison, manufacturer of the roof.

40. He arranged for and supervised the removal of debris from the factory incident to the collapse. (Judge's Oral Decision *MBI v. MDI* Trial Tr. 166:12–14, March 20, 2008.)

41. Convinced that his present landlord was “playing a game,” Fischer began searching from the summer until October, 2003 for alternative factory and business locations in Maryland and in Washington, D.C. and negotiated on lease terms. (B. Fischer Dep. Ex. 5 *MBI v. England* 555:18–556:1, 559:6–8, 520:15–21, 525:1–10, 541:8–545:8, 558:9–559:5.)

42. Other potential business opportunities Fischer pursued in vain included private labeling of bagels for ConAgra under their business name of Hebrew National and a deal with Krispy Kreme. (*Id.* at 524:6–525:14.)

43. From September, 2003 through January, 2004, Fischer advertised and sold MBI’s damaged equipment including ovens, fryers, trucks, etc. (*Id.* at 559:9–560:5, 513:11–515:7, 517:3–518:11; S. Fischer Test. *MBI v. MDI* Trial Tr. 228:16–17, March 18, 2008.)

44(a) On October 22, 2003, the day he testified at the second traverse hearing and when he had no reason to diminish his son’s labors, Sheldon Fischer sought to dispel any notion that he or his son were idle: “We have an office that we rent. We go into that office everyday. We’re negotiating with the insurance company. We’re trying to line up what we’re going to do for the future. So when I say I’m unemployed [as he did on direct examination], it was really a joke.” (Jt. App. vol. 1, S. Fischer Test. Traverse Hr’g Tr. 163:11–19 at Bates 0411, October 22, 2003.)

(b) The self-interested and, therefore, self-effacing testimony of Fischer, as corroborated by the father in his own interests, rendered *after* the *Goldschmidt* opinion are not persuasive. I find that Fischer rendered full-time services for MBI after the roof collapse as well as before.

Results of Fischer’s Post-Roof-Collapse Services

45(a) The value of Fischer’s post-roof-collapse services are apparent. By November 2003, he was “selling product to Starbucks” and making a “net profit of about 8500 per month.”

(Judge's Oral Decision *MBI v. MDI* Trial Tr. 167:11–14, March 20, 2008.)¹¹ By the first five months of 2004, Fischer's new company, MDI, using MBI's goodwill involving donuts and other baked products (including its recipes), had turned a net profit of \$197,143, or \$39,428 per month. (*Id.* at 173:2–7.) The court allowed Fischer to keep 2004 profits for equitable reasons. (*Id.* at 174:7–20.) Net profits for the following years were as follows: For 2005, \$263,904 in net profits plus an add-back of \$104,985 for attorney's fees Fischer charged to MDI, but which were considered by the court attributable to his personal matters, making for a total of \$368,889 in net profits. (*Id.* at 174:21–175:16); For 2006, \$250,471 in net profits plus \$209,597 in added-back, personal attorney fees, for a total of \$460,068 (*Id.* at 175:16–21); Profits for 2007 were determined to be \$414,478 by averaging 2005 and 2006 figures (*Id.* at 175:22–25); and for the two months of 2008 preceding the decision, net profits of \$65,079 were determined. (*Id.* at 175:25–176:3.) Thus for the 3 years (2005, 2006, 2007) and 2 months (of 2008), the court found total net profits of \$1,308,514 and awarded \$654,257 (1/2 of the total) to MBI on the theory of unjust enrichment. (*Id.* at 176:3–20.)¹²

(b) While these profits were earned after the end date of October 31, 2003, they began to flow soon thereafter and, being the product of Fischer's efforts prior to the end date, they necessarily cast evidentiary light on the value of those services, services which turned around in one-and-a half years a company that had lost \$50,000 a month.

(c) The value of these services of Fischer was recognized by Estabrook who, when asked of profitability and executive salaries, responded, "I think you have to look at it as equivalent to

¹¹ The Court of Special Appeals of Maryland, in reviewing Judge Dugan's decision in *MBI v. MDI*, observed on the basis of the evidence that Fischer "began" to supply "bagels and donuts" on "October 19, 2003," before the end date for recognizing services to be evaluated for imputed compensation in our case. *Fischer v. Montgomery Bakers, Inc.*, Appeal No. 380, Sept. Term 2008, slip op. at 63–64 (Md. Ct. Spec. App. December 2, 2009) (*aff'g* on liability and *remanding* on damages) ("*Fischer v. MDI*").

¹² The court also ordered MBI into dissolution. (Judge's Oral Decision *MBI v. MDI* Trial Tr. 176:21–177:13, March 20, 2008.) The damage award was reversed on appeal as unduly favoring Fischer and his wife. *Fischer v. MDI*, slip op. 92-94.

like a turnaround -- turnaround situation where, you know, someone is brought in to turn around the company, so even though they had experienced some losses, they were in a growth mode, and to do that job someone would get paid this amount of money.” (Estabrook Test. Traverse Hr'g Tr. 47:8–16, July 27, 2009.)

(d) So clear was 2003 seen as a year of turn around that MBI’s insurance carrier paid MBI \$663,554 for loss of profits for the year commencing February 17, 2003, when the roof collapsed. Findings, *supra*, at ¶ 28(d).

Reasonable Value of Fischer’s Services

Lianne Friedman

46. Ms. Friedman, MBI’s expert, is a vocational rehabilitation counselor employed by Rehabilitation Experts of Maryland. (Friedman Test. Traverse Hr'g Tr. 79:9–21, July 27, 2009.)¹³ She researches the labor market to determine the qualifications for various occupations in the District of Columbia metropolitan and Maryland job markets. (*Id.* at 81:13–16, 82:4–7.) She determines a person’s reasonable salary by ascertaining the person’s “job title . . . the day-to-day tasks . . . of that job, the education that’s required for [the job] . . . and access[ing] department of labor numbers through the bureau of labor statistics . . .” (*Id.* at 82:8–25.)

47. In addition to familiarizing herself with the record (*Id.* at 85:15–25), she interviewed both Fischer and his father twice to determine what Fischer did. (*Id.* at 86:2–5, 87:24–88:7.)

48. In determining reasonable value, she also employed America’s Career InfoNet Career One Stop, a salary and occupational profile database of Bureau of Labor statistics and data from the State Maryland, which is customarily used by experts in the vocational counseling field. (*Id.* at 86:6–87:4, 103:16–21.)

¹³ A vocational rehabilitation counselor, she explained, primarily works with disabled persons, “in helping them obtain suitable and gainful employment, taking into consideration whatever limitations they may have.” (*Id.* at 80:23–81:4.) About half of her work involves persons without handicap. (*Id.* at 89:9–12.) Ninety-eight percent of her work involves litigation. (*Id.* at 84:5–10.)

49. She described the tasks Fischer performed on a day-to-day basis, as recounted by him, as “mostly . . . directing operations and productions,” “supervis[ing] a couple of sales people,” a trucking supervisor, two plant managers and, as needed, he delivered cakes, unloaded trucks, mopped floors and baked donuts — not the “sort of hands-on work typical of that performed by an CEO or president” (*Id.* at 93:12–94:10.)

50. Ms. Friedman’s opinions on the reasonable value of Fischer’s services for MBI are primarily predicated upon a comparison of his day-to-day activities with the “Occupation Specific Tasks” in the America’s Career InfoNet Occupation Profile for “First-Line Supervisors/Managers of *Retail Sales Workers: Maryland.*” (Def. Ex. 5, Sub Ex. 2 at 3–4.) (emphasis added) Based upon that comparison, she concluded that Fischer’s “job role” conforms most closely to that of a “first line supervisor/manager of retail sales workers.” (Friedman Test. Traverse Hr’g Tr. 95:20–96:10, July 27, 2009.) A detailed comparison followed. (*Id.* at 97:4–100:4.)

51. Friedman likewise negated Fischer’s fit with the Career InfoNet Occupation Profile of “Chief Executives: Maryland.” (*Id.* at 100:5–105:2; Def. Ex. 5, Sub Ex. 4.)¹⁴

52. On the reasonable value of Fischer’s services to MBI for the period in question, she concluded:

(a) Based on the “actual value to MBI” standard as applied to a first-line supervisor/manager of retail sales workers, the reasonable value of Fischer’s services amounted

¹⁴ O*Net, a Bureau of Labor publication, in an issue entitled “Top Executive,” recites:

The nature of the responsibilities of other high-level executives depends on the size of the organization. In small organizations, such as independent small retail stores or small manufacturers, a partner or general manager often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties.

(Def. Ex. 5, Sub Ex. 5 at 1.)

to between \$37,000 and \$50,000 per year according to Bureau of Labor Statistics. (Friedman Test. Traverse Hr'g Tr. 105:3–17, July 27, 2009; Def. Ex. 5 at 1.)

(b) On the “fair market” standard, Fischer’s services were worth between approximately \$61,000 and \$64,000 per year. (Friedman Test. Traverse Hr'g Tr. 106:24–107:8, July 27, 2009.) That range was based on (1) the 90th percentile average salary for a Maryland, first-line supervisor/manager of retail sales workers, which is \$64,700 a year (Def. Ex. 5, Sub Ex. 2 at 2), and (2) the 10th percentile average salary for a Maryland CEO, which is \$61,300. (Def. Ex. 5, Sub Ex. 4 at 2; Friedman Test. Traverse Hr'g Tr. 107:9–108:8, July 27, 2009.)

Evaluation of Friedman’s Testimony

53. Friedman’s testimony – her first in testifying to an individual’s value to a particular company as opposed to the market in general (Friedman Test. Traverse Hr'g Tr. 122:20–23, July 27, 2009) – relied significantly on her double interviews with each of the Fischers, both of whom had strong economic reason to downplay Fischer’s importance to MBI, which they did.¹⁵ But the facts of Fischer’s accomplishments were unimpeachable. Friedman’s source for her testimony of Fischer mopping floors and delivering cakes, etc. was stated to be Fischer “when interviewing him.” (*Id.* at 93:20–94:7.) So menial were these and other Fischer tasks that, when asked about whether the father’s activities included “tasks normally associated with that of a chief executive officer?”, she replied, “Yes, more so than Benson Fischer.” (*Id.* at 104:23–105:2.) But Friedman’s testimony was impeached by the father himself in *MBI v. MDI* who, in describing the business relationship between father and son stated, “I just let him run the show at

¹⁵ Since both Fischers testified in the last traverse hearing of July 27, 2009, I also have the benefit of witnessing their testimony in assessing their credibility. Fischer, already tainted by his prior fraud upon the Court, further impaired his credibility by his flippant demeanor which contradicted his efforts at self-effacement. The father, recently stung by his son’s judgment against him for \$1,374,486.85, stolidly, but with noticeable difficulty, followed the company line. The judgment against the father involved an entirely different enterprise than that involved here: Benson and Mona Fischer brought various claims against Sheldon and Ann Fischer related to an enterprise owned and operated by the parties known as “Coin X Change.” *Fischer v. Fischer*, Case No. 276599V (Cir. Ct. Mont. County, Md. May 22, 2009).

the time. He was the president. He took care of whatever he wanted to do, *and I just was his assistant.*” (S. Fischer Test. *MBI v. MDI* Trial Tr. 67:22–25, March 18, 2008) (emphasis added).

54. Friedman’s focus in opining on reasonable value was MBI’s retail operation. She was either unaware that the wholesale operation (which dwarfed the retail business) was Fischer’s domain (Findings, *supra*, at ¶¶ 28(a)–(c)), or she had an *a priori* reason for linking Fischer with the retail operation. The *only* articulated connection Friedman made between Fischer and retail sales was that “he supervised a couple of sales people” (Friedman Test. Traverse Hr’g Tr. 93:20–21, July 27, 2009), a thin reed on which to hang an “Occupational Profile” while she affirmed at the same time that Fischer was engaged “*mostly* [in] . . . directing operations and productions.” *Id.* at 93:16–17 (emphasis added). But again, Sheldon Fischer rejects Friedman’s premise by his testimony in *MBI v. MDI*: “And I was into the stores. I supervised the stores and whatever.” (S. Fischer Test. *MBI v. MDI* Trial Tr. 70:2–3, March 18, 2008.)

55. Friedman had two ways to go under America’s Career InfoNet after she settled on treating Fischer as a supervisor/manager rather than a CEO or president, either supervisor/manager of *retail* workers or supervisor/manager of *nonretail* workers. If Fischer was treated as a retail sales supervisor, his InfoNet salary in Maryland would be between approximately \$37,000 and \$50,000. (Def. Ex. 5, Sub Ex. 2 at 2) (median and 75th percentile). But if Friedman had opted for supervisor/manager of nonretail workers (which, as between retail and nonretail, Fischer manifestly supervised), the compensation would have been significantly higher according to O*Net’s publication entitled “Sales Worker Supervisors,” which MBI offered in evidence. (Def. Ex. 5, Sub Ex. 3 at 3.) It is there stated, “Salaried supervisors of *nonretail* workers had median annual earnings of \$65,510, including commissions, in May, 2006. The middle 50 percent averaged between \$48,900 and \$94,670 a year. The lowest 10%

earned less than \$34,800, and the highest 10 percent earned more than \$135,270.” (*Id.*) (emphasis added) The inference is that Friedman eschewed nonretail workers for the lower wages.

56. One of the reasons she placed Fischer in the lowest 10 percent of CEOs was that MBI was not profitable. (Friedman Test. Traverse Hr’g Tr. 120:20–23, July 27, 2009.) I am not able to credit this testimony for the reasons stated by Paley Rothman (Pl.’s Memo. in Supp. of Prop. Finds. and Concls. at 15): (a) Friedman was unaware of the profitability of the other businesses in the 10th percentile; (b) she also was unaware of any studies or surveys tying executive compensation to profitability; and (3) she had no empirical basis for putting Fischer’s compensation in the lowest percentile based on MBI’s profitability. (Friedman Test. Traverse Hr’g Tr. 121:7–123:11, July 27, 2009.)¹⁶ I would add that, notwithstanding MBI’s inability to earn a profit at year’s end during the referable period, it was able to afford \$13,512 each month in loan repayments. Findings, *supra*, at ¶ 14.

57. Ms. Friedman was selective in her use of Bureau of Labor literature. She looked at the Labor Bureau’s Salary.com as a salary check but consulted it for bakery manager and operation manager, not for CEO. (Friedman Test. Traverse Hr’g Tr. 148:4–11, July 27, 2009.) Salary.com lists the 10th percentile, base pay for a CEO in Rockville, Maryland at \$376,127, considerably more than Paley Rothman’s expert opined. (*Id.* at 146:25–147:8; Pl. Ex. 105 at 2.); Findings, *infra*, at ¶ 64.

¹⁶ MBI’s doing business only in Montgomery County was cited by Friedman as another reason for placing Fischer in the lowest rung of chief executives, again showing her unawareness of MBI’s operations in that it had substantial wholesale operations in the District and Virginia. (Friedman Test. Traverse Hr’g Tr. 120:20–121:6, July 27, 2009.) Fischer’s lack of a college degree was also a factor. *Id.* at 120:12–16. (He finished “a couple of” years. (Friedman Test. Traverse Hr’g Tr. 92:19, July 27, 2009.)) But Friedman did not know whether any of the others in that percentile were degreeless, and she acknowledged there were others without degrees in the higher percentiles. (*Id.* at 123:12–127:12.)

58. In expounding on her giving consideration to “what MBI could afford to pay,” Friedman noted, “They were putting so much money back into trying to improve the equipment, and the plant, and that they really didn’t have at that time - - no one was getting a salary.” (Friedman Test. Traverse Hr’g Tr. 106:1–10, July 27, 2009.) Objection was taken on the ground that the testimony exceeded the witness’s expertise in vocational rehabilitation. (*Id.* at 106:13–17, 165:20–25.) Although I will permit the testimony to stand, I will accord it nominal weight because it is minimally credentialed.

Joseph Estabrook

59. Paley Rothman called Estabrook as its expert on reasonable value based on fair-market value.¹⁷ He is a CPA, who specializes in business valuation and compensation. He has published and lectured on business evaluation, which incidentally includes valuation of executive compensation. (Estabrook Test. Traverse Hr’g Tr. 8:20–9:19, 11:21–18:6, July 27, 2009.)¹⁸

60. His opinions took into consideration four factors: (1) The size and complexity of MBI’s business; (2) Fischer’s qualifications as president; (3) The nature, scope and extent of Fischer’s services for MBI; and (4) the prevailing compensation for comparable positions at similar companies. (*Id.* at 21:17–22:4.)

61. In setting forth his general views of factor one (See Findings, *supra*, at ¶¶ 7, 8), he mentioned that the Fischers basically were “turning around a company and making it grow” and that they sought to change the business from a retail business to a wholesale business” (*Id.*

¹⁷ Estabrook testified in the second traverse hearing (Jt. App. vol. 1 Estabrook Test. Traverse Hr’g Tr. 25:22-90:10 at 0273-0338, October 22, 2003) and in *Schlossberg I*. His *curriculum vitae* is Pl. Ex. 101.

¹⁸ Estabrook’s 26(b) statement, admitted into evidence as Pl. Ex. 102, consists of two parts (which are best understood by the statement’s Table of Contents). The first part of the statement, consisting of the sections I and II, the Schedules and Appendix A, were prepared for this proceeding. Appendix B was Estabrook’s report of April 28, 2006, prepared for the Fischer bankruptcy proceeding in *Schlossberg I*. The documents considered by Estabrook in forming his opinions are set forth in Appendix B at 4-5 and Schedule A at 4. (Estabrook Test. Traverse Hr’g Tr. 23:3–24:21, July 27, 2009.)

at 25:11–17.) In describing his views on factor two (Fischer’s qualifications), he noted that Fischer’s website included his experience with prior turnarounds. (*Id.* at 25:18–26:11.) On Fischer’s services for MBI (factor three), Estabrook mentioned, *inter alia*, that he “orchestrated” the asset purchases of the bankrupt Montgomery Doughnuts, unprofitable retail stores were either sold or attempted to be franchised and he expanded the wholesale business with new accounts, like Starbucks. (*Id.* at 26:12–27:18.) For the fourth factor (ascertaining the prevailing compensation for comparable positions in similar companies), he turned to the Economic Research Institution (ERI) and its database, the Economic Compensation Assessor. (*Id.* at 27:22–28:3.)

62. The Assessor’s database, which Estabrook has used for ten years, contains “salary surveys, of publicly available information on salaries, including Government information on salaries[.] [I]t’s a very large database that they’ve had since 1987 that was originally formed at the request of [the] internal revenue service.” (*Id.* at 28:3–9.) It can be customized to reflect factors that impact executive compensation such as geographic area, industry, job position, organizational financial size and date; it is “standard in the industry.” (*Id.* at 28:19–29:10.)¹⁹

63. In customizing the Assessor to companies with a revenue size comparable to MBI’s, Estabrook proffered a menu of hypotheses to the fact finder: (1) For 2002, he used \$3.1 million as a comparable revenue size since it was MBI’s historical performance for the year; (2) For 2001, he used both \$3.1 and \$3.6 million as separate, comparable revenue sizes, the former being MBI’s performance for 2002 and the latter being the annualized revenue for the last six months of 2001 when MBI began its operations; (3) 2003 was problematic since the plant ceased to function with the roof’s collapse on February 17, 2003. Estabrook’s solution was to use

¹⁹ Friedman acknowledged that vocational rehabilitation counselors also use ERI. (Friedman Test. Traverse Hr’g Tr. 161:24–162:5, July 27, 2009.)

separately three hypotheses for 2003, the \$3.1 million actual revenue for the prior year, the annualized revenue of \$3.6 for 2001 and \$7.8 million in projected sales that MBI submitted to its insurance company on its claim for business interruption. (*Id.* at 35:1–23.)²⁰

64. The Assessor expresses itself in terms of “base” and “total” compensation. The difference between the two is that total compensation includes bonuses, while base is pure salary. (*Id.* at 34:15–19.) Estabrook’s “Mean Survey” annual compensations for a president of a company in the “bread, cake and related products” business in the Washington, D.C. metropolitan area are as follows:

(a) As of December 31, 2001,

(1) for a company with \$3.1 million in annual revenue, \$175,047 in base salary and \$201,112 in total compensation. (Pl. Ex. 102, App. A at 6-7, Schs. F, E; Estabrook Test. Traverse Hr'g Tr. 29:11–41:24, July 27, 2009.)

(2) for a company with \$3.6 million in annual revenue, \$181,989 in base salary and \$209,701 in total compensation. (*Id.*)

(b) As of December 31, 2002,

(1) for a company with \$3.1 million in annual revenue, \$180,121 in base salary and \$206,910 in total compensation. (Pl. Ex. 102, App. A at 4–5, Schs. F, E; Estabrook Test. Traverse Hr'g Tr. 29:11–42:5, July 27, 2009.)

(c) As of October 31, 2003,

²⁰ Estabrook’s opinions on compensation (as derived from the ERI Assessor) are set forth in Plaintiff’s Exhibit 102 (Estabrook’s 26(b) statement) at Schedules F and E, which are based on Appendix A. Estabrook’s explanations of his methodology, Appendix A and the Schedules are set forth at 29:11–46:25 of his testimony at the last traverse hearing on July 27, 2009. A more concise and lucid description is contained in Paley Rothman’s Memorandum of its Proposed Findings of Fact and Conclusions of Law at 12–14.

(1) for a company with \$3.1 million in annual revenue, \$184,047 in base salary and \$211,731 in total compensation. (Pl. Ex. 102, App. A at 2–3, Schs. F, E; Estabrook Test. Traverse Hr'g Tr. 29:11–43:7, July 27, 2009.)

(2) for a company with \$3.6 million in annual revenue, \$190,819 in base salary and \$220,691 in total compensation. (*Id.*)

(3) for a company with \$7.8 million in annual revenue, \$227,706 in base salary and \$272,290 in total compensation. (*Id.*)

Evaluation of Estabrook's Testimony

65. Estabrook is a well-credentialed and credible CPA with substantial business experience. He specializes in the subject matter of our concern.

66. Nevertheless, I am not persuaded by his including \$7.8 million as one of the revenue options for 2003. Although I believe (as did the insurance company) that 2003 would have been a successful year, MBI's projection for insurance purposes was exuberant.

67. \$3.6 million, the extrapolated revenue option for 2001, should also be disregarded as unreliable, but not for the reasons cited by MBI. Since MBI was formed in June, 2001, its operations consisted only of the last six months of the year. To reach a year's gross revenue of \$3.6 million, Estabrook "annualized" the revenue for the last six months (\$1,845,347) by doubling it. MBI objects to the use of \$3.6 million on the grounds that the procedure of annualization is "unreliable," and "it ignores the fact that MBI's best business and highest revenues were in the cold months such as January and February." (MBI's Post-Tr. Br. at 10.) But annualization is a commonly accepted practice when the base (here ½ a year) is sufficient. And the fact that the actual revenues constituting the base do *not* include January and February only makes the annualization more compelling, not less. However, the flaw in the annualization is that the gross revenues for 2001 include an undetermined amount of collected accounts

receivable among the approximately \$500,000 of receivables MBI had just purchased. (Jt. App. vol. 1 S. Fischer Test. Traverse Hr'g Tr. 169:22–23 at Bates 0417, October 22, 2003.) Since the \$3.6 million figure includes the nonrecurrent, purchased receivables, I cannot accept it as a true measure of normal operations. Accordingly, the remaining, historical yardstick for determining the size of companies comparable in revenue to MBI is \$3.1 million, the only year (2002) of full operations for MBI. Estabrook's work up covers this contingency. Conclusions, *infra*, at ¶ 28.

68. MBI takes exception to Estabrook giving any consideration to Fischer's attempt to "turn[] around a company and mak[e] it grow" (Estabrook Test. Traverse Hr'g Tr. 25:11–13, July 27, 2009) and to Fischer's holding himself out as a turnaround specialist (*Id.* at 26:5–11) on the ground that Estabrook "failed to articulate whether 'turnaround specialist' is a recognized occupational profile" on ERI's Assessor.²¹ (MBI's Post-Tr. Br. at 9.) But MBI made no such objection at the hearing. The point, moreover, confuses a niche skill with an occupation. Also, an expert such as Estabrook would give consideration in the case of a troubled company to whether a president has the talent to turn around the bankrupt company. (Estabrook Test. Traverse Hr'g Tr. 48:12–18, July 27, 2009.) Moreover, ERI's Assessor varies compensation in terms of whether the individual is placed in the "25th Percentile," the "Survey Mean" or the "75th Percentile", thus allowing for flexibility in determining compensation. (*See* Pl. Ex. 102, App. A at 2–7.) MBI's other objections on "turnaround" are subject to the same responses.

69. Estabrook did testify (contrary to MBI's assertions) that "[Fischer] did [perform] all the functions of the president" (Estabrook Test. Traverse Hr'g Tr. 61:23–25, July 27, 2009), which he (Estabrook) had described earlier in his testimony. (*Id.* at 25:18–27:18.) Further, no objection on the ground now asserted was advanced at the hearing. I find that Fischer functioned

²¹ The Bureau of Labor's America's Career InfoNet, which was the basis of MBI's expert's testimony, is like ERI's Assessor in this respect. (*See* Def. Ex. 5, Sub Ex. 4 at 2.)

as a president but, like other presidents of small corporations, did other tasks as well. *See* note 14, *supra*, at 18.

70. MBI also complains that ERI's Assessor does not account for the profitability, expenses or debt of a subject company; but neither does InfoNet, used by MBI's expert.²² And since Estabrook's opinions on the reasonable value of Fischer's services are geared to fair-market value of a *position*, factors such as a company's profitability, expenses and debt are not significant. *See*, *Conclusions, infra*, at ¶ 21. Contrariwise, Friedman's testimony, which addressed reasonable value in terms of actual value to MBI, was obliged to consider MBI's profitability, expenses and debt.²³

71. Finally, MBI faults Estabrook for not personally interviewing the Fischers. Estabrook agreed this would be customary "unless you have the opportunity to go and listen to their testimony at trial or read depositions at which they have testified. That is completely acceptable to do versus an interview." (Estabrook Test. Traverse Hr'g Tr. 63:3–11, July 27, 2009.) Estabrook attended the first traverse hearing on July 18, 2002 at which Fischer testified (*Id.* at 27:19–21) and read his various deposition transcripts. (*Id.* at 24:16–21.)

Sequestered Insurance Proceeds

72. The Circuit Court for Montgomery County, Maryland has sequestered \$723,187 of insurance proceeds payable to MBI, which amount has been placed in an interest bearing account. (Traverse Hr'g Tr. 230:6–231:4, July 28, 2009.)

Conclusions Of Law

Application of §16-579

1. The dispositive statute, D.C. Code §16-579 (2001), provides in pertinent part:

²² Estabrook did, however, personally consider profitability, expenses and debt. (Estabrook Test. Traverse Hr'g Tr. 47:1–16, 54:7–14, 57:15–59:6, 63:15–64:8, 66:20–25, 68:6–69:10, July 27, 2009.)

²³ As previously stated, Friedman's qualifications in business operations were lacking.

Where the judgment debtor claims or is proved to be rendering services to or employed by . . . a corporation owned or controlled by a relative or other person, without salary or compensation, . . . the court may direct the employer-garnishee to make payments on account of the judgment, in installments, based upon a reasonable value of the services rendered by the judgment debtor under his employment or upon the debtor's then earning ability.

There is no dispute that the four preconditions to the statute's invocation are present here:

(1) Paley Rothman served a writ of attachment upon MBI on October 8, 2001 (Findings, *supra*, at ¶ 1); (2) Fischer was employed by and rendered services to MBI during all relevant times (*Id.* at ¶¶ 6, 9); (3) He received no salary or compensation for his services (*Id.* at ¶ 10); and (4) MBI is a corporation owned and controlled by Fischer, his wife and parents. *Id.* at ¶ 4. Indeed, each of these prerequisites were virtually present in *Goldschmidt*.²⁴

2. The *Goldschmidt* Court quoted approvingly from *In re Schneiderman*, 251 B.R. 757, 766 (Bankr. D.D.C. 2000) as to the legal consequences of free services rendered by a judgment debtor: “[O]nce a writ is served and the judgment-debtor then renders her services for free, the judgment-creditor is necessarily being impeded and defrauded.” *Goldschmidt*, 935 A.2d at 373. Notwithstanding this sweeping, condemnatory language, *Goldschmidt* noted that section 16–579 “does repose discretion in the trial court when it provides that ‘the court *may* direct the employer-garnishee to make payments’” *Id.* at 374 (emphasis in original). Whether or not the statute's duality can be analytically rationalized as distinguishing between the wrong (*i.e.*, a garnished employer who accepts the gratuitously rendered services of an employee, judgment debtor) and the statutory remedy conferred (*i.e.*, imputed compensation in the garnishment proceeding), the overriding fact is that the statutory remedy is permissive.

²⁴ The Court observed: “On October 8, 2001, Paley Rothman served a writ of attachment . . . [upon] MBI [T]he [trial] court found that MBI ‘is owned by Benson Fischer, his wife Mona Fischer . . . and his parents Sheldon and Ann Fischer’” *Goldschmidt*, 935 A.2d at 370. “There was no dispute that Fischer rendered services to MBI There also seems to be no dispute that he served without salary or compensation.” *Id.* at 371.

3. This apparent asymmetry may be functionally resolved by the “presumption” treatment accorded the statute in *IBF Corp. v. Alpern*, 487 A.2d 593 (D.C. 1985):

The statute [§16-579] is designed to permit a levy against the corporate fisc when a debtor who renders services to the corporation takes inadequate, if any compensation -- and thus *presumably* leaves his or her money in the corporation - - in order to defraud or otherwise impede personal creditors.

Id. at 597 (emphasis added). Thus, proof that a judgment debtor has worked for free after his employer is garnished will, as stated in *Goldschmidt*, be treated as *prima facie* evidence that the “impede[d] and defraud[ed]” judgment creditor is entitled to the statutory remedy.

4. *Goldschmidt* points to some of the discretionary considerations:

In determining *whether* and *how* to exercise that discretion, the court may consider the reasons why no compensation is being paid. Similarly, there may be many factors that help the court determine the “*reasonable value* of the services rendered” D.C. Code § 16-579. One such factor might be that the arrangement was in place, as the trial court noted, “during the start-up period of a new business.”

Goldschmidt, 935 A.2d at 374 (emphasis added). Obviously, consideration of “why” Fischer did not take compensation opens the issue of his motivation, whether to beat creditors or for legitimate, business reasons. I will consider the case for each motivation.

The Case for Bad Faith

5. Fischer’s own hand informs us (a month before MBI was formed) of his purpose in foregoing compensation for his services. In response to Paley Rothman’s persistent attachments of other Fischer companies, Fischer mocked their attorney by letter declaring, “You can’t get a penny from me!” This is so, he says, “due to the ‘tenants by the entirety’ status of my holdings.” Findings, *supra*, at ¶ 17. But Fischer was well-informed and experienced in the law of creditor rights, as the court found in his own bankruptcy case. Findings, *supra*, at ¶ 16. While aware that loan repayments could be protected by clothing the loan in tenancy-by-the-entirety status, “Fischer [also] knew that his salary would be subject to garnishment.” *Id.* Being the product of

his own labor, his wages could not be insulated by the spousal tenancy. Thus, with his assets duly protected by that tenancy, Fischer could confidently assert that Paley Rothman would “not get a penny” only so long as Fischer took no compensation for his services.

6. We have it from the father that, while he and his wife each took their stock individually, his son and wife took theirs by the entireties “as a protective thing because of his lawsuits and his judgments.” Findings, *supra*, at ¶ 18.

7. Paragraph 2 of the Agreement Between Sheldon Fischer and Benson Fischer As To Ownership of Montgomery Bakers, Inc. provided, “To the extent that the Corporation has net cash flow, *the same shall be distributed* to the shareholders, first to repay interest (pro rata in accordance with the shareholder loans) and any remaining net cash flow shall be paid to the shareholders to repay principal (pro rata in accordance with the outstanding principal balance of the loans).” (Jt. App. vol. 4, Def. Ex. 2 at ¶ 2, Bates 1204.) (emphasis added). Fischer was still owed \$40,000 on his loan when his deposition was taken on April 3, 2008. (B. Fischer Dep. 51:15–18.) Thus, compensation for services rendered was foreclosed as a matter of *contract* during all relevant times in this case.

8. The Bankruptcy Court in *Schlossberg I* found that “Fischer did not take any salary from MBI in bad faith and, further, did so with the actual intent to hinder and delay the collection efforts of Paley Rothman” *Schlossberg I*, 411 B.R. at 256 (quoted in Findings, *supra*, at ¶ 16). MBI correctly points out that, as respects the *Schlossberg* trustee’s claim of fraudulent conveyance (Count VIII), the bad-faith finding is dictum since the court’s ultimate holding was that, under Maryland common law, personal services cannot be deemed “property” to which

creditors can have a claim under any theory of conveyance. Hence, there was no “conveyance.” *Id.* at 265–66.²⁵

(a) But the bad-faith finding *was* essential to the determination of Count I, which was predicated upon the trustee’s subrogation to Fischer’s alleged claims against MBI for “unpaid wages” and “unjust enrichment.” As to unpaid compensation, the court held that there was no agreement to pay wages later. “Fischer simply did not take any salary during that period in anticipation of realizing an increase in the value of [his] stock.” *Id.* at 257. The purpose to forgo compensation for enhancement of equity, to which Fischer admitted in *Schlossberg I*, was a debtor’s badge of bad faith as found by the court. *Id.* at 256 (quoted in Findings, *supra*, at ¶ 16). Hence, Fischer’s bad faith in intending to work for free was not dictum.

(b) Resolution of the unjust enrichment claim also brings *Schlossberg I* into focus. The claim of unjust enrichment was rejected on the ground that MBI was not *unjustly* enriched by not compensating Fischer for his services. This was so because “Benson Fischer realized a substantial benefit from his [free] work for MBI” by the “additional equity appreciation of the MBI stock.” *Id.* at 258. Thus, the condemned intent to work for free for the purpose of enhancing stock was a square holding in *Schlossberg I*.

(c) However, even if *Schlossberg I*’s findings on bad faith are deemed dicta, *consideration* of those findings here would not be foreclosed. Collateral estoppel, when applicable, is an absolute bar to the relitigation of an issue by a party who has already failed to persuade on that issue. *Modiri*, 904 A.2d at 394. But the fact that preclusion is inapt because a proposition is dictum does not mean that a court, relitigating an issue that a party has lost before, cannot consider as *evidence* the previous findings and their underlying bases, especially when the issue was hard fought. *Ko v. Eljer Indus., Inc.*, 678 N.E.2d 641, 646 (Ill. App. Ct. 1997) (federal

²⁵ *Modiri v. 1342 Restaurant Group, Inc.*, 904 A.2d 391, 394 (D.C. 2006) (collateral estoppel requires, *inter alia*, that “the determination [be] essential to the judgment, and not merely dictum.”)

court's comment on accrual of cause of action in state claim not collateral estoppel but nevertheless "highly persuasive"). The once defeated party may submit, as MBI has here, whatever relevant evidence it has, including that previously offered. Nevertheless, the relitigating court may consider the prior findings for what they are worth. *Schlossberg I's* findings on the issue of bad faith in working for free are persuasive and nuanced. For example, the court, while condemning Fischer's purposes in forgoing compensation for his services, found his father's purposes both credible and reasonable.²⁶ I accept the findings and underpinnings in *Schlossberg I*.

9. The Court of Special Appeals of Maryland in *Fischer v. MBI* (note 11, *supra*, at 16), as an alternate ground for holding Fischer and his wife personally liable, found that "Mona and Benson [Fischer] created MDI, with Mona as the sole shareholder to protect MDI from Benson's creditors." *Fischer v. MBI*, slip op. at 81. The purpose of the anti-creditor tactic condemned in that case was to divert Starbucks' payments from MBI, where Fischer *was* a shareholder, to MDI where he was *not* a shareholder. "[B]oth [Fischer and his father] did what they could to make certain that the creditors didn't find out about any goings on by which they might try and get some money from Benny," said the appellate court, quoting the lower court. *Id.* at 47. Thus, MDI was created on October 30, 2003 (*Id.* at 64) for the purpose of assuming MBI's account with Starbucks, thereby enabling MDI to deal directly with and service Starbucks, who in turn would remit monthly payments directly to MDI, whose sole shareholder was Fischer's wife. *Id.* at 61–62, 64.²⁷

²⁶ The father structured many businesses with shareholder loans and gave them full priority of payment over any salaries without there being an indication to avoid creditors, as by using and abusing spousal immunity. *Schlossberg I*, 411 B.R. at 255.

²⁷ The internecine differences between the Fischers developed and/or intensified when the father learned that, unbeknownst to him, his daughter-in-law owned all of the MDI stock, thus denying the parents any ownership and shutting them out of the Starbucks' payments. *Id.* at 7.

10. Special interrogatories were propounded to MBI in aid of Paley Rothman's writ of attachment. Interrogatory 9, asked, "Identify . . . all monies paid by you to, or received by you from Benson J. Fischer (whether individually or in conjunction with another person or entity) from January 1, 1998 to the present." On October 12, 2001, MBI, through Fischer, answered that he and his wife, "Mona B. Fischer, as tenants by the entirety, loaned the sum of . . . \$310,000 to [MBI] on or about June 20, 2001." (Jt. App. vol. 3 Pl. Ex. 2 at Bates 0675.) The answer failed to disclose loan repayments made to Fischer and his wife. I find the omission was deliberate. On July 17, 2002 nine months after the original answers and the day before the first traverse hearing, MBI (again through Fischer) amended its answers by disclosing that loan repayments had been made prior to the original answers of October 12, 2001, on September 7, 2001 in the amount of \$8,957.22 and on July 1 in the amount of \$2,885.84. (Jt .App. vol. 3 Pl. Ex. 25 at Bates 0887-0888.) Had the amended answers supplemented the original answers, they would have disclosed that ten monthly repayments had been made since the original answers, each in the amount of \$8,957, for a total of \$89,570. (Jt .App. vol. 4 Pl. Ex. 78 at Bates 1195.)

The Case for Legitimate Business Reasons

11. MBI concedes as it must, "It is inarguable that because MBI had the funds to repay Benson Fischer's loan, it could have chosen, instead, to pay him a salary." (MBI's Tr. Brief 17.) It's purported justification for its choice is the testimony of Bruce Pollekoff, the CPA for many of the Fischer companies, who testified that he advises owners of small companies (1) to maximize funding by loans rather than invested capital and (2) to repay the "loan first if there was not the money to pay the salary." Findings, *supra*, at ¶ 15.

12. Whatever the merits of funding by loan, it does not conflict with the policy underlying section 16-579. Pollekoff's advice to prefer payment of debt over salary when funds are insufficient to pay both is based upon two reasons: (1) start-up companies "want to try to

make their balance sheet and their P and L statement look as healthy as possible;” and (2) with payment of salary, “you pay the payroll taxes.” (Jt. App. vol. 1 Pollekoff Test. Traverse Hr’g Tr. 148:20–149:6 at Bates 0396-97, October 22, 2003.) MBI implicitly contends that the Pollekoff advice trumps section 16-579.

13. Again, Pollekoff’s advice does not implicate the statutory policy unless the insider-lender is also a judgment debtor, as was Fischer. Of course, Pollekoff did not and could not speak to the statute’s consequences. But dealing with the reasons he gave for his advice as it applies to the case of an insider-lender who is also a judgment debtor, a “healthy” financial statement cannot prevail in legal triage over an announced public policy in favor of the judgment creditor (especially when an undercapitalized company can hardly be called “healthy.”) Nor is there any public interest in tax avoidance that can outrank the interest in satisfaction of a legal judgment. Plainly, the statute trumps Pollekoff.

14. But our situation is *a fortiori*, for here Fischer contrived to frustrate Paley Rothman by using tenancy-by-the-entirety protection for the loan. And Fischer went further, for his contract with his father foreclosed his receiving any wages through October 31, 2003, the end period in this case. Conclusions, *supra*, at ¶ 7. Fischer was, in substance, agreeing to work for free while loans were unpaid. But “Fischer may [not] thwart his judgment creditors’ use of § 16-579 simply by *agreeing* that he will work for free.” *Goldschmidt*, 935 A.2d at 374 (emphasis in original).²⁸

²⁸ *Goldschmidt’s* caveat, noted but not decided – that MBI might have to “make payments on the judgment before it repays [Fischer’s loan,]” 935 A.2d at 373 – was pursued after remand. (See Pretrial Order July 16, 2009 at ¶ (6)) (requiring briefing on the issue of priority between the Paley Rothman judgment and the Fischer loan). Of particular concern was the application of D.C. Code § 28-3105 (2001) dealing with fraudulent preferences to insiders. But the briefing went off mostly on mootness and, since the other issues were clearly resolvable and self-sufficient, I decided to let the priority issue await another day.

The Exercise of Discretion

15. Considering the evidence of both parties, Paley Rothman's proof reinforces the presumption that Fischer's working for free did in fact hinder and defraud creditors. Fischer's avoidance of compensation was directed explicitly against Paley Rothman, whom he had admonished would never "get a penny from me." Section 16-579 was squarely aimed at this case and, hence, my discretion will be exercised accordingly.

Reasonable Value

The Measure of Reasonable Value

16. Because the record in *Goldschmidt* did not "show the current state of [MBI's] affairs" and did not indicate "if MBI had reopened[,] the remand called for "further proceedings, including a determination of the reasonable value of the services rendered from October 8, 2001 to the present." *Goldschmidt*, 935 A.2d at 370, 374. Because Fischer's services on behalf of MBI had apparently concluded because of the termination of MBI's wholesale and retail business, the parties stipulated that the end date "for the purposes of determining 'reasonable value'" shall be October 31, 2003. (Pretrial Order July 16, 2009 at ¶ (5).)

17. The opinion in the *IBF* case instructs on three different yardsticks for measuring the reasonable value of service rendered: (1) "market value," (2) "actual value of the services to the employer," and (3) "amount actually received by the employee." *IBF*, 487 A.2d at 597-98. Of these, the "most favored, is market value. 'The service itself is the commodity to be valued [The employer] has received service that he requested for which the plaintiff could have obtained a price on the market.'" (quoting 5 A. CORBIN, CORBIN ON CONTRACTS § 1112 (1964).) *Id.* at 597-98. Paley Rothman espouses the market-value yardstick, while MBI urges actual-value-of-the-services-to-the-employer.

18. MBI errs in concluding that *IBF*, having sanctioned as the measure of reasonable value the judgment debtor's "gross annual receipts from the architectural business" (*Id.* at 598),

necessarily departed from the market-value standard which it professed to be appropriate on the facts of the case. (Def.'s Prop. Finds. and Concls. at Concls. ¶ 17.) On the contrary, what the judgment debtor, a practicing architect, was actually able to earn in the open market classically amounts to evidence of market value. Market value is especially appropriate in our case because it frees us from the distortions that inevitably arise in a family business. I will use market value as the measure of reasonable value.

Profitability and Reasonable Value

19. To depress a reasonable value award, MBI contends (*passim*) that it was financially unsuccessful. But this overlooks that, at the start of 2003, MBI was on the brink of what would have been a successful year but for its plant's destruction, as its insurance carrier ultimately conceded. Findings, *supra*, ¶¶ 27, 28(d). Even then, by dint of Fischer's efforts in 2003 after MBI's wholesale and retail business collapsed, MBI was converted to a successful outsourcer with substantial profits. *Id.* at ¶ 45(a).

20. Moreover, when garnished MBI was confronted with the option of paying Paley Rothman monthly no more than 25% of a reasonable salary for Fischer or making its usual monthly repayment to Fischer of \$8,957 on his unsecured loan, which was junior to Paley Rothman's judgment. MBI, at the instance no doubt of Fischer, preferred payment of his loan.²⁹ By August 31, 2003, MBI had paid out \$244,620 to Fischer (and still owed \$104,004). (Jt. App. vol. 4 Pl. Ex. 78 at Bates 1195.) In addition, MBI paid the father \$4,555 monthly on account of interest only (and still owed the full principal of \$599,112). Findings, *supra*, at ¶¶ 14, 5. Thus, by August 31, 2003, the father had received \$104,765. Since the agreement between the Fischers permitted loan repayments only from "net cash flow," there must have been a monthly

²⁹ MBI's promissory note to Fischer and his wife was signed by Fischer. Findings, *supra*, at ¶ 5.

cash flow of at least \$13,513 to pay principal and interest on Fischer's note and interest on the Father's note. Findings, *supra*, at ¶¶ 12, 14.

21. Those sums having been self-indulgently drained from MBI's fisc, it is estopped from claiming that any equal or lesser amount of imputed compensation would be improper on the grounds of lack of profitability. *Cf. IBF*, 487 A.2d at 598 (amount actually received by employee may be measure of reasonable value "since the employer at least would be estopped from asserting that the services were worth less.")

22. But even if we assume, *arguendo*, MBI's profitability was negative, *IBF* teaches that under the circumstances of this case, reasonable value of Fischer's services may nevertheless be pitched on gross receipts (*i.e.*, market value) rather than a negative net income or loss. In *IBF*, the judgment debtor (Frishman), president of IBF (a family corporation) had suffered "net business losses" in his architectural practice. *Id.* at 598. Frishman received no dollar compensation from IBF for his services. "Thus [the *IBF* Court was] confront[ed] squarely [with] the question whether, when there is great disparity between gross and net income (loss), the gross receipts can be said to reflect the 'reasonable value' of services within the meaning of § 16-579." *Id.* The lower court's use of market value was affirmed for two reasons:

First, the statute refers to the "reasonable value of the services rendered by the judgment debtor," not merely the reasonable value to the employer; the statute itself does not command use of a "net" rather than a "gross" value. Second, Alpern's judgment against Frishman substantially predated any architectural expenses that would offset current IBF/Frishman income; thus, it is equitable to deem IBF accountable to Alpern off the top, rather than to subordinate that debt to the claim of more recent suppliers.

Id.

23. Our case is more persuasive for the application of market value than was *IBF*, and I will apply it.

Reasonable Value – Expert Lianne Friedman

24. I do not credit Friedman’s testimony. She was so far indoctrinated by the self-serving interviews with the Fischers that she believed the father functioned more like the CEO than the son did, notwithstanding the father’s testimony (which she had purportedly read) that he “just was his [son’s] assistant.” Findings, *supra*, at ¶ 53. Although the father testified that “I supervised the stores,” she pigeonholed the son into the occupational category of “supervisor/manager of retail workers” on the slim grounds that “he supervised a couple of sales people.”

25. Further, I find that Friedman’s classification of Fischer in the retail subclass was contrived. Even if we were to assume that Friedman correctly rated him a supervisor/manager (contrary to my Findings ¶ 69, *supra*), to further type him, as did Friedman, a supervisor/manager of retail rather than nonretail workers is absurd. *Goldschmidt*, 935 A.2d at 370 (he had “primary responsibility for marketing, promotion, product development, franchising, purchasing equipment, contracting with vendors, and overseeing the legal affairs of the company.”) *See also* Findings, *supra*, at ¶¶ 19, 20. By attaching the sublabel of “retail” to Fischer, Friedman was able to value Fischer’s *top* vocational worth as \$50,000 per year according to Bureau of Labor statistics (Findings, *supra*, at ¶ 52(a)), less than 50% of Fischer’s “monthly [loan] draw [of \$8,957] to meet the living needs of his family.” *Goldschmidt*, 935 A.2d at 371 (quoting Judge Graae’s finding). If, on the other hand, Friedman had placed Fischer in the “nonretail” subclass, where he obviously belonged if the “supervisor/manager” title is indulged, the top salary would be \$135,270 per year according to the Bureau. Findings, *supra*, at ¶ 55. Friedman’s conclusion-driven opinions are not acceptable.

Reasonable Value – Joseph Estabrook

26. Estabrook is both qualified and credible notwithstanding MBI's efforts to impeach him. Findings, *supra*, at ¶¶ 65, 68–71.

27. His presentation was more customized to MBI than Friedman's. Whereas Friedman used Bureau of Labor statistics that did not discriminate between revenue size, Estabrook's use of the ERI Assessor did take this factor into consideration. Estabrook was, therefore, required to input data involving the type and size of the company's revenue. Estabrook's concern was a company that sold its own manufactured product but did so for only about 20 months stretching over one full calendar year and portions of two others. His comprehensive presentation provided alternative proffers of annual compensation based upon three revenue options predicated upon historical performance (2002), extrapolation (2001) and/or estimate (2003).

The Court's Determination of Reasonable Value

28. I have determined to proceed only upon Estabrook's opinions based upon the year of historical performance, 2002. Findings, *supra*, at ¶¶ 66, 67. Gross earnings were \$3.1 million for 2002. Findings, *supra*, at ¶ 63.

(a) For 2001, Paley Rothman is entitled to imputed wages for the period October 8, 2001 (the day of service of the garnishment) to the end of the year, or 84 days. The reasonable value of Fischer's services is \$40,368, being base salary. (Pl. Ex. 102, App. A, Schs. F and E.)

(b) For the entire year of 2002, the reasonable value of Fischer's services is \$180,121, again based on base salary. (*Id.*)

(c) For 2003 through October 31, 2003, the reasonable value of Fischer's services is \$176,443. (*Id.*) This amount is "total compensation," which includes a bonus for his successful efforts in 2003, after the roof collapse, in transforming MBI from a manufacture/seller

to a broker/outsourcer (Findings, *supra*, at ¶¶ 34–35) and laying the groundwork, prior to the end period, for MBI’s turnaround at the close of 2003 and the beginning of 2004. *Id.* at ¶ 45(a).

(d) Accordingly, the reasonable value of Fischer’s services for the period October 8, 2001 through October 31, 2001 amounts to \$396,932, which sum represents what he would likely have earned working for another company (not family owned) of similar size in the region.³⁰

29. I have considered that there was moderation in the monthly amount of Fischer’s draw on his loan “during the start-up period of a new business.” *Goldschmidt* indicated this was relevant to “reasonable value.” *Id.* at 374. I have decided not to give this factor any weight. First, as a newly formed corporation, MBI was in fact starting up. But it was not starting afresh. It was, as Estabrook said, stepping into the shoes of a 33-year-old bankrupt business having bought its assets, including its receivables, with the aim of making it a profitable business again. (Estabrook Test. Traverse Hr’g Tr. 25:2–17, 47:11–16, 48:20–25, July 27, 2009.) Second, the facts clearly demonstrate that Fischer’s intent in forgoing compensation was to defraud creditors, not to assist a newly born business. Findings, *supra*, at ¶¶ 16-18. Third, moderation in the amount of a draw on a loan held under spousal immunity should not be equated with the forgoing of “salary or compensation” which is the concern of section 16-579.

30. Finally, MBI contends that for the period May through October 31, 2003, (the end period), Fischer’s services were so scant as to warrant only ten percent of reasonable value. Heavy reliance is placed upon Friedman. (Def.’s Prop. Finds. and Concls. at Finds. ¶¶ 61–64, Concls. at ¶¶ 33(b), 39(b).) But her testimony was based upon the self-serving words of Fischer and his father: “[F]rom May to October, he [Fischer] said he spent maybe five hours a week if

³⁰ MBI’s “net cash flow” for this period was at least \$376,411 in the light of (1) the combined monthly loan repayments to both Fischers in the amount of \$349,348 for the period October, 2001 through August, 2003 and (2) an additional \$27,026 on account of presumed, monthly repayments for September and October, 2003, each in the amount of \$13,513. Conclusions, *supra*, at ¶ 20, Findings, *supra*, at ¶ 11.

that much in Montgomery Bakers, Inc. And Mr. Sheldon Fischer confirms that.” (Friedman Test. Traverse Hr'g Tr. 113:11–14, July 27, 2009.) I am satisfied that Fischer’s work on behalf of MBI from May through the end period was fulltime in order, *inter alia*, to transform MBI to its new business as a broker-outsourcer. Findings, *supra*, at ¶¶ 33–35.

Entitlement to Prejudgment Interest

31. At common law a garnished employer that employs a debtor who works for free is able to escape garnishment since the law does not view the free services as a fraudulent transfer. *Schlossberg I*, 411 B.R. at 264-66; *In re Schneiderman*, 251 B.R. at 761; Conclusions, *supra*, at ¶ 8. Section 16-579 changed the law of the District of Columbia, at least as to garnishments. It imposed a new obligation upon a garnished employer of a judgment debtor who works for free, especially in the family corporation situation. If the garnished employer persists in not paying the debtor-employee for services rendered, the statute authorizes the imposition upon the employer of an obligation to pay a reasonable compensation as determined by judicial decree. *Goldschmidt*, 935 at 372; *IBF*, 487 A.2d at 597.

32. This obligation is owed not to the debtor-employee who, presumably, is hindering or defrauding his creditor by not taking an attachable salary. Instead, the statutory obligation is in the nature of a debt owed to the creditor by the employer-garnishee who, by persisting in not paying wages, is forced to pay constructive wages which are attachable.

33. The predicament of the employer is well-explained in *Schneiderman*:

Prior to knowledge of any judgment, the employer may have gratefully accepted the free services for years without any warning that § 16–579 might be brought to bear. The writ of attachment alerts the employer that continued acceptance of services for free may not actually be free. The employer is now well aware that its arrangement with the debtor will frustrate the creditor’s collection efforts by depriving it of attachment payments that would be owed were the debtor receiving fair compensation. *In that circumstance, the employer can be viewed as proceeding with the arrangement at its own risk that a statute may make it liable for imputed compensation.*

In re Schneiderman, 251 B.R. at 767 (emphasis added).

34. Having elected not to pay Fischer a salary when it was garnished, MBI is subjected to the terms of section 16-579, which at least presumptively constitutes MBI a debtor of Paley Rothman, as in the case of an ordinary employer-garnishee who becomes indebted to its employee's creditor under D.C. Code § 16-575 (2001) for failure to pay properly garnished wages to the creditor.³¹

35. Our Court of Appeals explained that a statutory debt may yield interest as does an ordinary debt:

A statutory obligation may bear interest even though the statute makes no provision therefor. *United States v. United Drill & Tool Corp.*, 87 U.S. App. D.C. 236, 237, 183 F.2d 998, 999 (1950). If the obligation is in the nature of a debt, it is deemed interest-bearing, because the statutory purpose was to create a debtor-creditor relationship, and in equity, interest is allowed as a means of compensating a creditor for the loss of use of his money. *Id.*³²

Riggs National Bank v. District of Columbia, 581 A.2d 1229, 1253 (D.C. 1990) (allowance of prejudgment interest under Unclaimed Property Act permitted although statute makes no provision therefor, where bank's failure to turn over escheated assets as mandated by statute rendered it the government's debtor); *see also Federal Marketing Co. v. Virginia Impression Products Co., Inc.*, 823 A.2d 513, 532 (D.C. 2003).

36. Where a debtor fails to pay what is owed, the creditor is only partly compensated by an award of the amount owed. Prejudgment interest must be allowed to make up for the loss of use of the money from the time payment was due to the time of the award. Were it otherwise, the delinquent party is able "to take advantage of his own wrong and become the richer for it."

³¹ *IBF*, 487 A.2d at 597, expresses the statutory debt in term of "a levy against the corporate fisc" *Schneiderman*, 251 B.R. at 767, states that the "statute may make [the employer] liable for imputed fair compensation."

³² *United States v. United Drill & Tool Corp.* was decided by our Circuit Court of Appeals (opinion by Judge Prettyman) before the Court Reform Act of February 1, 1971 and, therefore, is binding law in this jurisdiction. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Federal Marketing, 823 A.2d at 532 (prejudgment interest allowed where contemnor violates consent decree) (citing *Riggs*, 581 A.2d at 1253).

37. Our case dramatically illustrates the vice in withholding prejudgment interest under these circumstances. Fischer, the debtor, was a co-owner of MBI with his father. Both of these principals were aware of Paley Rothman's vigilance as a judgment creditor and took steps to structure MBI so as to hinder and defraud Paley Rothman and the other creditors. In the face of the garnishment's lien (D.C. Code § 572 (2001)), MBI breached section 16-579 each month by preferential transfers to its unsecured insiders, Fischer and his wife. The loan repayments aggregated almost a quarter of a million dollars, none of which Paley Rothman was able to reach because of the asserted tenants-by-the-entirety immunity. Findings, *supra*, at ¶ 11; Conclusions, *supra*, at ¶ 20. MBI and its principals have had the use of the money owed to Paley Rothman for eight years.

38. I do not rest my decision on either of the stand-alone statutes authorizing prejudgment interest under limited circumstances. D.C. Code §§ 16-108 & 16-109 (2001). Instead, section 16-579 is my source of authority as interpreted by the case law of this jurisdiction.

39. MBI's counter arguments are not persuasive.

(a) Even if the debt imposed by section 16-579 is, *arguendo*, assumed unliquidated, as MBI contends (Def.'s Prop. Finds. and Concls. at Concl. ¶ 96), "whether the amount of the debt is readily ascertainable is a less important consideration than whether 'the plaintiff has been deprived of the use of the money withheld and should be compensated for the loss.'" *Federal Marketing*, 823 A.2d at 531 (citing *District of Columbia v. Pierce Assoc., Inc.*, 537 A.2d 306, 311 (D.C. 1987)).

(b) Nevertheless, MBI argues, there is no evidence it acted in bad faith. (Def.'s Prop. Finds. and Concls. at Concls. ¶¶ 97(b), 103.) MBI conveniently overlooks Fischer's conduct and seeks refuge in the father's conduct. We may concede the father's impeccable conduct prior to MBI, but his own testimony shows that in the case of MBI, he acceded to his son's determination to escape creditors. He testified that his son "formed" MBI with tenancy-by-the-entirety protection "as a protective thing because of lawsuits and his judgments. And anything that was in his name and his wife's name couldn't be touched by the people that were chasing him." Findings, *supra*, at ¶ 18. Moreover, the father was a signatory to the MBI agreement with his son which, by mandating that all "net cash flow" be used to pay off the shareholders, effectively prevented the payment of any salaries during the time here in question. Conclusions, *supra*, at ¶ 7. With Fischer's loan repayments protected by spousal immunity and salaries precluded by contract, there was nothing for creditors to attach. Thus, the father's conduct was not without fault, *albeit* his transgressions were those of a caring parent. Fischer's transgressions, however, were egregious. Like all other corporations, MBI was a purely legal entity. It was also an insider corporation controlled by two principals. It is idle to consider what one of the principals did in directing MBI's course without considering the conduct of the other.

(c) MBI seeks to avoid prejudgment interest because of the risk of a double recovery of interest since postjudgment interest is also accruing on the underlying judgment against Fischer. No supporting authority is cited. But as Paley Rothman replies, "anything collected as a result of this proceeding, regardless of whether it is principal, interest or both will be applied to the balance owed by Fischer under Paley Rothman's judgment." (Pl.'s Resp. to

Def.'s Prop. Finds. and Concls. ¶18.)³³ The same “risk” is, of course, present where joint and several judgments are obtained against joint tortfeasors. Only one satisfaction is allowed.

40. Determination of when prejudgment interest should commence to run is uncertain here since MBI paid Fischer no wages.³⁴ We must decide upon a date when MBI, having been garnished on October 8, 2001, should have paid Fischer had it chosen to do so in the circumstances described in *Schneiderman*. See Conclusions, *supra*, at ¶ 33. The dates of loan repayments show no consistency. (Jt. App. vol. 4 Pl. Ex. 78 at Bates 1195.) Under the circumstances, I will order prejudgment interest to commence from November 8, 2001, one month after service of the writ.

On Paley Rothman’s Recovery Under Section 16–579 Being Limited to 25% of Imputed Compensation³⁵

41. It is important to note the limited scope of MBI’s argument on the 25% cap mentioned in the writ served on MBI. (Def.’s Prop. Finds. and Concls. at Concls. ¶¶ 108–117.) It does not argue, as it once did, that such a cap applies as a matter of law to section 16–579 recoveries of imputed compensation. Instead, it contends that Paley Rothman (who is not alleged to have known that Fischer was working without pay) is stuck with the 25% limitation since it chose to use a “fill-in-the blank writ of attachment form provided by the District of Columbia judiciary” which limits the recovery to “25% of defendant’s disposable wages for each

³³ Super Ct. Civ. R. 69-II(b) requires the judgment creditor to give the clerk written notice of all payments on the judgment.

³⁴ D.C. Code § 16-573(a) (2001) would apply in the routine case by making payment to the garnishor due “within 15 days after the close of the last pay period of the judgment debtor for any pay period ending in any calendar month”

³⁵ Since MBI has been ordered into dissolution (*supra*, note 12 at 16), and \$723,187 of MBI’s insurance pay off has been sequestered at Paley Rothman’s instance by the Circuit Court of Montgomery County Maryland (Findings, *supra*, at ¶ 72), it is difficult to see what MBI’s argument practically accomplishes, for it has no affect upon the *amount* of Paley Rothman’s judgment.

workweek or other pay period.” (Jt. App. vol. 3, Pl. Ex. 1 at Bates 0666.) The word “estoppel” is never used.

42. The writ served upon MBI, clearly indicated that the 25% cap was dependent upon there being “disposable wages.”³⁶ As MBI well knew, Fischer had no wages, and hence MBI had no justification for reliance upon a 25% cap on a section 16-579 recovery. MBI had no course except to respond that Fischer was working for free.

43. Nor can MBI point to any prejudicial shift in its position that was induced by the writ Paley Rothman served upon it. *Goldberg v. Old Republic Surety Co.*, 727 A.2d 858, 862 (D.C. 1999).

44. MBI relies upon *Landhal, Brown & Weed, Assocs., Inc. v. Houston*, 404 A.2d 934 (D.C. 1979), its sole authority for the “proposition that it is the garnishor’s responsibility to inform the employer-garnishee of the extent of its *potential* liability.” (Def.’s Prop. Finds. & Concls. at Concls. ¶ 115) (emphasis added). *Landhal* had nothing to do with “potential liability.” Instead, it faulted the garnishor for not giving a mandated notice to the garnishee of the allocations of principal and interest *after* each monthly payment, as specified and required by *Super. Ct. Civ. R. 69-II(c)*. The liability for interest on a judgment is neither potential nor contingent, but fixed and certain. Liability under section 16-579, however, is wholly contingent upon the infrequent circumstance of an employee who works for free for the garnished employer,

³⁶ The writ served upon MBI commanded the employer-garnishee:

“to withhold from the disposable wages (*See* Instructions 1–2) of the defendant [Fischer] for any workweek on other pay period **THE LESSOR OF:**

- (1) 25% of defendant’s disposable wages for each workweek or other pay period; **OR**
- (2) [inapplicable since it would have resulted in a greater sum than the 25% formula and is not relied upon by MBI]

“Wages” is defined in Instruction 1 (referenced above) on page 2 as “mean[ing] compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise”; and “disposable wages” is defined as “earnings . . . remaining after the deduction . . . of any amounts required by law to be withheld.”

a circumstance about which the garnishor may be wholly ignorant. MBI cannot shift the burden of knowing and advising of 16-579 when there is no statute or rule so requiring.

45. Were MBI confused by the official-form writ, inquiry would have revealed that section 16-579 is not affected by the 25% cap. The statute (Conclusions, *infra*, at ¶ 46) and case law (Conclusions, *infra*, at ¶¶ 47–48) would have proved this.

46. The statute provides, “the court may direct the employer-garnishee to make payments *on account of the judgment*, in installments, based upon a reasonable value” (emphasis added) The legislative directive is that “payments” be made “on account of the judgment,” a plain reference to the “account” of the judgment creditor, not the “account” of the debtor and certainly not for the benefit of the employer-garnishee.

47. The case law at the time of the writ’s service upon MBI was to the same effect. In *IBF*, decided in 1985, the Court affirmed a section 16-579 “levy of \$1,500 per month against *IBF* until Alpern’s judgment against Frishman is satisfied.” *IBF*, 487 A.2d at 599. The monthly payment was reached by averaging Frishman’s gross earnings for 2 years and dividing by 12. *Id.* at 597. No adjustment for 25% or for any other reason was made.

48. Finally, *Schneiderman*, decided in 2000, explicitly rejected a 25% cap on the authority of *Kokoszka v. Belford*, which involved a similar federal cap. *Schneiderman*, 251 B.R. at 762. The Supreme Court held the statutory cap limited to “garnishment . . . on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis.” *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974). *Schneiderman* then concluded, “Under the rationale of *Kokoszka*, a recovery under § 16-579 “is not subject to the statutory caps [sic] because the recovery is not periodic payment of compensation.” *Schneiderman*, 251 B.R. at 762.

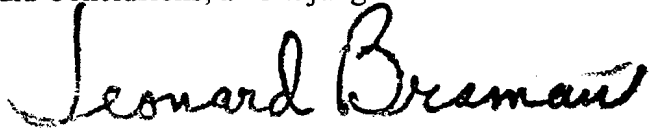
Provision For Judgment

On the basis of the foregoing Findings and Conclusions, a final judgment will be entered

on this date.

1/5/2010

Date



SENIOR JUDGE LEONARD BRAMAN

(Signed in Chambers)

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