To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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STEVEN VAN FLEET,

Plaintiff,

DECISION AND ORDER
INDEX NO. 2018-53252

-against-

MICROMEM TECHNOLOGIES, INC. and MICROMEM APPLIED SENSORS TECHNOLOGIES, INC.,

Defendant(s).

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ACKER, J.

On April 29, 2021, this Court issued an order striking the pleadings of Plaintiff-Counterclaim Defendant Steven Van Fleet ("Van Fleet") and setting the matter for an inquest as to damages on the counterclaim of Defendants-Counterclaimants Micromem Technologies, Inc. ("Micromem") and Micromem Applied Sensor Technologies, Inc. ("MAST"). The counterclaim alleges breach of fiduciary duty, breach of contract (money damages, injunctive relief, faithless employee), fraudulent inducement and conversion and seeks money damages, specific performance and an accounting.

The inquest proceeded on June 3, 2021 and June 7, 2021. The Court heard testimony from three witnesses for Micromem and Van Fleet. The Micromem witnesses were Dan Amadori, the Chief Financial Officer for Micromem, Diana Fuda, accounts payable/receivable and Martha McGroaty, office manager.

MAST is a wholly owned subsidiary of Micromem and was formed in 2008. Van Fleet became the President of MAST in 2008.[1] He was also a board member of Micromem. Van Fleet's

[1] Van Fleet's complaint states he became president in 2005.

employment contract was admitted into evidence. The term of the contract was from June 1, 2008 until May 31, 2011. Mr. Amadori testified that the agreement was renewed on a month to month basis until Van Fleet's resignation on August 17, 2018. The contract contained a compensation package for Van Fleet. It is not contested that, during the relevant time period, Van Fleet was to be paid $15.000 a month plus $3,598 a month for health insurance and a monthly automobile allowance in the amount of $719.35. In addition, Micromem agreed to pay to Van Fleet, on a quarterly basis, a sum representing his income taxes.

Mr. Amadori testified about Van Fleet's responsibilities and obligations to Micromem as president of MAST. After Van Fleet's resignation, Micromem discovered an email to a third party which indicates Van Fleet was holding himself out as president and chief operating officer of another company during his tenure with Micromem. In the email, Van Fleet referred to Micromem's "abysmal" financial condition. Mr. Amadori also testified that some of Van Fleet's progress reports to Micromem did not accurately relate what occurred at certain business opportunity meetings.

Ms. Fuda performs duties related to accounts receivable and payable for Micromen. She provided information to the Court as to how invoices were processed by Micromem. Ms. Fuda testified about payments made to Van Fleet for his salary and other benefits. She also testified about expense reimbursements made to Van Fleet for supplies and legal services. Commencing in October of 2015 and continuing until May, 2017, Van Fleet submitted certain invoices to Ms. Fuda claiming that he paid these expenses. He did not. For example, an inventory search revealed that Micromem only received four Cascodium ARC-2 pulse generators while Van Fleet submitted invoices seeking reimbursement for the purchase of 17 generators. The vendor confirmed that only four were purchased. In addition, Micromem received bills from law firms for outstanding charges which Van Fleet claimed to have paid.

Ms. McGroaty gave similar testimony. The invoices created by Van Fleet and other documentary support for the witnesses' claims were admitted into evidence. Spread sheets created by Ms. Fuda and Ms. McGroaty were also admitted into evidence. One spreadsheet totals the salary and benefits paid to Van Fleet for the relevant time period while the others total the payments made to Van Fleet for invoices he submitted for items for which he did not pay.

Pursuant to the "Faithless Servant" Doctrine, Counterclaimants seek $591,818.29, representing salary and benefits paid to Van Fleet from the period of October 2015 to August 17, 2018. They also seek $163,600 for invoices paid to Van Fleet for the generators he never purchased and $10,161.06 for legal expenses he claimed to have paid, but did not.

Van Fleet does not dispute much of the testimony of the Micromem witnesses. His testimony largely detailed his efforts to help Micromem, a startup company, succeed. He stated that his role was tactical and "to do things." He was the only person pursuing business on behalf of MAST and he kept the President and Board of Micromem apprised of his various projects. The company was floundering financially and the lack of funding resulted in the loss of several large business opportunities. Van Fleet charged expenses on his credit card to pay for necessary items and loaned Micromem his life insurance money.[2] He testified that he was a loyal employee and he acted to help the company.

Liability has been determined against Van Fleet. Thus, he cannot dispute the Counterclaimants' assertions that he, *inter alia*, submitted false invoices, breached his employment contract and was a "faithless servant." At an inquest to determine damages, Van Fleet could only "cross-examine witnesses, give testimony, and offer proof in mitigation of damages." *Dejesus v. H.E. Broadway, Inc.*, 175 AD3d 1485 (2d Dept. 2019) (*citations omitted*).

The Micromem witnesses were competent, credible and knowledgeable. Their testimony as to the calculation of damages was clear and concise. While Van Fleet testified in a credible manner as to his sometimes tireless efforts on behalf of Micromem and MAST, his testimony as to the fraudulent invoices was less so. He claims to have "episodically" ordered generators, with the consent of Micromem's president, as the company could not afford to order ten at a time as required by the vendor. He would invoice the generators to build a "war chest" as the company could not be counted on to accumulate the necessary funds. To the extent that this can be considered an explanation for the feigned purchase of the generators, it does not make sense. These purchases took place over the course of two years. What company president would agree to such a scheme when the testimony by all was that he ultimately made all the financial decisions? Why give up control of more than $150,000 in funds during a financially difficult time? And, if Van

[2] Van Fleet did not provide documentary support for these expenditures nor did he specify any amount owed to him during his testimony.

Fleet's actions were well intentioned, why wait until now to offer this explanation? The Court notes he offered no such explanation for the legal invoices.

Van Fleet commenced this lawsuit seeking compensation for unpaid earnings. While he now acknowledges that he should have just "written them a check" for the "war chest" at his resignation, he did not do so because Micromem owed him money. His complaint is silent as to any set-offs for the war chest. There was no documentary proof submitted that the funds were deposited in an account and not depleted during the relevant period. Instead, it appears to the Court that Van Fleet's last few years at Micromem were extraordinarily stressful, both professionally and financially. Van Fleet was not being regularly paid and he felt he was entitled to compensation so he paid himself.

Under the "faithless servant doctrine,"

> One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary (Restatement, Agency 2d, s 469). Nor does it make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent (see *Wechsler v. Bowman*, 285 N.Y. 284, 291-292, 34 N.E.2d 322, 325-326, remittitur and 286 N.Y. 582, 35 N.E.2d 930; *Lamdin v. Broadway Surface Adv. Corp.*, 272 N.Y. 133, 138-139, 5 N.E.2d 66, 67).
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> *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928-29 (1977).

"This is because the function of [a breach of fiduciary duty] action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but...to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." *Diamond v. Oreamuno*, 24 NY2d 494, 498 [1969].

Here, the evidence established that Van Fleet first submitted a fraudulent invoice to his employer on October 24, 2015 and he was reimbursed on November 9, 2015. Thus, pursuant to the faithless servant doctrine, Counterclaimants are to recover all compensation paid to Van Fleet from November 1, 2015 until his resignation in August 2018, a total of $591,818.29. They are

also awarded the sum of $163,600.00 for the generator invoices and $10,161.06 for the legal expense invoices. In the Court's discretion, interest pursuant to CPLR 5001(a) shall begin to accrue as of May 9, 2017. *See Siegel, NY Practice, §411, at pg. 795 (6th ed.).*

Counterclaimants shall submit a judgment on notice to Plaintiff-Counterclaim Defendant.

Dated: June 16, 2021
Poughkeepsie, New York

CHRISTI J. ACKER
Justice of the Supreme Court

To: Michael A. Freeman
Greenberg Freeman LLP
Via NYSCEF

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