

PANTAZIS V. TSOURIDES

Superior Court of Massachusetts,
Worcester County.

Not Reported in N.E.2d, 2009 WL 2603147
Mass.Super.,2009.

July 08, 2009

Paul G. Pantazis

v.

Alice P. Tsourides et al., Trustees of the New Deal Realty Trust of Worcester.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

JAMES R. LEMIRE, Justice.

This is an action by Paul Pantazis (Paul) in which he claims that the defendants as trustees of the New Deal Realty Trust (“NDR Trust” or the “Trust”) breached certain duties to the Trust and to its beneficiaries. The plaintiff has brought three claims. Count One of his Amended Complaint demands an accounting of the disposition of the assets and income of the NDR Trust by defendant trustees Alice P. Tsourides (“Alice”) and John G. Pantazis (“John”) (collectively the “Trustees” or “Defendants”). Count Two is a claim for injunctive relief seeking to enjoin the Trustees from disposing of any further assets of NDR Trust. Count Three is a claim for breach of trust on the part of the Trustees alleging that the Trustees breached their fiduciary duties to the beneficiaries of NDR Trust.

Paul’s claims include that the defendant, Alice Tsourides (“Alice”), destroyed Trust records and used Trust assets to finance her family’s boat business. The defendant John Pantazis (“John”) is alleged to have used the Trust’s bank accounts for his own personal use. The plaintiff maintains that as a result of the defendants’ conduct, substantial funds are unaccounted for and substantial profits from Alice’s boat business are owed to the Trust.

This action was tried to the court, sitting without a jury, on January 9, 10, 11, 2007 and February 1, 2007. The parties each filed proposed findings of fact and rulings of law with the court on February 23, 2007. Arguments of counsel were heard on March 1, 2007, the court thereupon took the matter under advisement.

Now, upon consideration of such testimony of the witnesses as the court determines to be credible, the exhibits, and the written memoranda and arguments of counsel, the court makes the following findings of fact, rulings of law, and order for entry of judgment in this action.

FINDINGS OF FACT

Grigorios Pantazis (Grigorios) and Sofia Pantazis (Sofia) were married and lived at 104 Coolidge Road, Worcester, Massachusetts (104 Coolidge). They had five children, Paul, John, Charles, Katherine and Alice. On October 24, 1983 the family created a realty trust to protect the assets of Grigorios and Sofia following Grigorios’ diagnosis of dementia. The trust was named The New Deal Realty Trust and was funded with property transferred from Grigorios and Sofia. The five children

were equal beneficiaries. Alice and John were named as trustees with the duties of holding and managing the trust estate.

By February 27, 1984, Grigorios and Sofia had transferred the Pantazis family residence at 104 Coolidge Road to the Trust, as well as commercial property located at 666 Park Avenue and 668 Park Avenue, Worcester. The deeds transferring the parcels to the NDR Trust recite consideration, but the Trust, in fact, paid no consideration for these properties.^{1FN1} At the time the real estate was transferred into the Trust, all of this property was owned free and clear of any debt or encumbrances. In addition to the real estate, the NDR Trust also received an assignment of a note and mortgage that Grigorios and Sofia had received from Lawrence Fleming in exchange for property located at 18-20 Lakewood Street, Worcester, Massachusetts.

FN1. The Coolidge Road property was transferred to NDR Trust by a deed dated December 15, 1983 and showed consideration from the trust of \$80,000. 668 Park Avenue was transferred to NDR Trust by a deed dated November 30, 1983 and showed consideration from the trust of \$110,000. 666 Park Avenue was transferred to NDR Trust by a deed dated February 27, 1984 and showed nominal consideration from the trust.

Between its formation in 1983 and the beginning of 1990, the Trust's activity included buying, developing and selling real estate and renting commercial real estate to generate rental income. In some instances when property was sold, the NDR Trust took back a note and mortgage and, therefore received periodic payments of principal and interest which provided cash flow for the Trust. In other instances, it sold the property for full payment.

The first sale of real estate by the NDR Trust was the sale of 668 Park Avenue to P.F.T. Enterprises in December 1983 for \$110,000. The NDR Trust received \$5,000 in cash and received a note and mortgage in the amount of \$105,000. In 1984, the Trust purchased property for \$85,000 that it exchanged in a like kind exchange transaction for property located at 656 Park Avenue in Worcester. It divided that parcel into 656 Park Avenue and 660 Park Avenue. The NDR Trust engaged in construction on 656 Park Avenue and in 1985 sold it for \$175,000. It also conducted construction on 660 Park Avenue and, in 1988, sold that property to Steven Turo in exchange for \$30,000 cash and a note and mortgage in the amount of \$120,000. The NDR Trust continued to hold 666 Park Avenue until 1996 and received rental income from that property until that time.

Although the Trust did not include Grigorios or Sofia as beneficiaries, all family members intended the Trust assets to be for the benefit of Grigorios and Sofia during their lifetimes. It was understood by the children that after the deaths of Grigorios and Sofia the Trust would terminate and the Trust assets would be divided equally among the five children. In fact the Trust funds were used to provide for Grigorios and Sofia. In 1984, Grigorios moved into a nursing home where he remained until he died in 1992. The Trust paid for Grigorios' needs while he was at home, his nursing home costs, his health insurance and all other personal needs. Sofia remained in 104 Coolidge, a property owned by the Trust until she died in 1999. The Trust also paid for Sofia's needs including her health insurance, medication, personal needs and household expenses. John and Paul lived with Sofia at 104 Coolidge Road.^{FN2}

FN2. Paul separated from his wife in 1984 and moved in with his mother. Paul has resided continuously at 104 Coolidge Rd. since 1984. John too resided with his mother and brother since 1984 and remained there until Sophia's death in 1999.

In February 1990, the NDR Trust acquired property located at 1 Monticello Drive in Worcester, which was thereafter rented to John's girlfriend and his daughter.^{FN3} Although initially constructed as a single-family home, it was modified at some time to create a second dwelling unit. From 1990 until John began residing at Monticello Drive in 1999, all rent was paid to the Trust. All costs and expenses from 1990 to 1999 for this property were paid by the Trust. After Sofia's death in 1999, John moved to 1 Monticello Drive at which time John kept all rents and individually paid all expenses. John maintains that 1 Monticello was acquired in part with funds that he had placed in NDR Trust bank accounts. John had been unemployed since 1983 and had no source of income. He claimed that he had funds in securities accounts, but had no records of any such accounts. He also had no record indicating that he had ever placed money in NDR Trust accounts. John testified that he used

NDR Trust accounts to hide money from creditors. Under these circumstances I do not find it credible that John provided any funds to acquire 1 Monticello Drive and I find that it was acquired with NDR Trust funds.

FN3. John arranged for the construction of 1 Monticello and upon its completion it was transferred to the Trust by a deed dated February 2, 1990. The consideration listed for this property was \$115,000.

I find that at some point after the creation of the Trust, John began the practice of using the Trust account as his own and improperly paid personal expenses such as car payments from this account. Although John claims that he would put money into the Trust account to cover his personal expenses, he is unable to support these claims. I do not believe John and find that his claims that he placed personal funds in the Trust, before paying personal expenses such as car payments are not true and his use of Trust funds for personal use was improper and a breach of his fiduciary duties.

As of 1990, the NDR Trust owned 104 Coolidge, 1 Monticello and 666 Park Avenue, all in Worcester. It received rents from tenants occupying 1 Monticello and 666 Park Avenue. There were no encumbrances on any of these properties. The NDR Trust also continued to receive payments from PFT Enterprises, for the note and mortgage that the NDR Trust received in exchange for the sale of 668 Park Avenue.^{FN4}

FN4. The Trust assets that existed in 1990 are significant, in that, it was in this year that Alice began using Trust properties as collateral for her family's boat business.

The Trust records were kept by Alice from the commencement of the Trust. In 1995 she destroyed most of the NDR Trust records, keeping only a few checks that showed Paul receiving eight to nine thousand dollars from the Trust. At trial Alice claimed that she had disclosed her intention to dispose of the records to the other beneficiaries and obtained their consent to do so. Both Paul and Charles Pantazis (Charles)^{FN5} testified at trial that they knew nothing about Alice's plan to destroy the records of the Trust in 1995 and that they did not give their consent for her to do so. I do not credit Alice's testimony on this issue. The destruction of the records for the first twelve years of the Trust has prevented the plaintiff from receiving a full and accurate accounting of the NDR Trust accounts. I do find that a substantial amount of Trust money is missing. As I noted previously, John's practice of using Trust funds to pay for personal expenses explains some of the missing funds. However, Alice's destruction of the Trust records for the first twelve years of its existence makes it impossible to determine what happened to the funds that should still be in the Trust.

FN5. Charles Pantazis is a non-party beneficiary of the NDR Trust.

I find that NDR Trust assets were improperly used by Alice in order for her to build a boat business with her husband Paul.^{FN6} In 1986, Alice and Paul (the Tsourides), along with Fordyce Blake (Blake), formed Marine USA, Inc. (Marine USA) and, through that entity, acquired a boating business. Marine USA is in the business of the retail sale of boats, trailers and related accessories and equipment. Initially, the Tsourides owned 50% of Marine USA and the Blakes owned 50%. In 1989, Marine USA entered into an agreement to acquire additional assets from Robert Pawlowski. In 1989, Blake decided to withdraw from Marine USA and the Tsourides arranged to buy out his interest.

FN6. Trust assets were used by Marine and a realty trust created by Alice and her husband as collateral from 1990 through 1998.

In 1990, the Tsourides decided to substantially expand the Marine USA business. They decided to acquire land and create a boat "superstore" with room to exhibit 25 boats. In connection with the expansion of Marine USA, the Tsourides created Aegean Realty Trust (Aegean) to take title to the property on which the new facility was to be constructed. The two of them were the trustees and beneficiaries of Aegean.

In connection with Marine USA's efforts to expand its business, Alice began to use NDR Trust assets to benefit Marine USA, in violation of her fiduciary duties to the Trust and the other beneficiaries. In March of 1990, Alice caused the NDR Trust to

grant a mortgage in the face amount of \$200,000 on its property located at 666 Park Avenue to secure a floor plan loan that Marine USA had obtained from GE Capital Corporation.^{FN7} In June of that same year, Alice caused the NDR Trust to borrow \$120,000 from Shawmut Worcester County Bank and secured the loan with a mortgage on the Trust's property located at 104 Coolidge Road. The funds were given to Marine USA to be used in connection with the acquisition of land on which to construct a new facility or to construct the facility. In connection with this loan, the Tsourides signed a trustee's certificate which, among other things, stated that the transaction had "the unanimous consent of the beneficiaries of the Trust." I find that that statement was false. Based on the testimony of the plaintiff and Charles, I find that the beneficiaries were not informed of, did not know of, nor did they consent to any use of NDR Trust assets for the benefit of Marine USA, Aegean or any other Tsourides affiliate.

FN7. A floor plan loan is a loan used to acquire inventory.

The defendants have argued that Sofia was informed about the use of NDR Trust assets to secure financing for the expansion of the Marine USA boating business and that her approval obviated the need for the consent of the other beneficiaries. This is wrong as a matter of law. In addition, Sofia Pantazis was born in Greece and came to the United States when she was twenty-three years old. Throughout her life, Greek remained her principal language and she never became fluent in English. Sofia was not a business woman and she never got involved in any family or household financial activities. It is unlikely that Sofia understood the real estate financing activity of the Trust and Marine USA, Inc. I find that Sofia's consent, if obtained, was not a knowing consent and, in any event, was insufficient to satisfy the obligation of the Trustees to fully inform the beneficiaries.

The Shawmut Worcester County Bank loan and mortgage were part of a larger financing arrangement by Marine USA and Aegean relating to acquiring land and constructing a new facility. The financing closed on June 19, 1990. As part of the financing, the Tsourides also placed a \$200,000 mortgage on their personal home, but as discussed below, in 1992, they substituted a mortgage on another NDR Trust property in order to have the \$200,000 mortgage removed from their property. As a result of the GE Capital Corporation loan and the Shawmut Worcester County Bank loan, by mid-June of 1990, Alice had caused NDR Trust property to be encumbered by mortgages totaling \$320,000.

In addition Alice also caused the Trust to guarantee obligations of Marine USA and Aegean which were not related to either the GE Capital Corporation loan or the Shawmut Worcester County Bank loan. One example of this occurred in 1990, when Alice replaced a Marine USA mortgage which had been given to Pawlowski in 1989 with a guarantee from NDR Trust in the amount of \$365,000. The other beneficiaries of the Trust did not consent to this guarantee nor were they informed of it. Moreover, in 1991, Pawlowski sued Marine USA, the NDR Trust and others, alleging that Marine USA had failed to pay amounts due to him and further alleging that the Marine USA and the NDR Trust had misled him with respect to the status of real estate held by the Trust. The beneficiaries were never informed that the Trust had been sued. The case was settled before any of them learned about it.

On November 16, 1990, Alice caused the NDR Trust to grant to Shawmut Worcester County Bank a guarantee for up to 15% of any indebtedness Aegean incurred with that bank. Shortly after that guarantee was given, Aegean, in December of 1990, incurred two separate indebtednesses with that bank, a loan in the amount of \$575,000 and a loan in the amount of \$460,000. Based on the November 1990 guarantee, the NDR Trust guaranteed \$155,250 of the amounts borrowed through those two loans. Therefore, by the end of 1990, Alice had imposed \$320,000 in mortgages on Trust property for the benefit of Marine USA and, in addition, had caused the Trust to guarantee \$520,250 in other indebtedness for the benefit of the Marine USA business.

At some time in late 1989 or early 1990, a 15% interest in Marine USA was conveyed to the NDR Trust. In 1990, a 15% interest in Aegean was conveyed to the NDR Trust.^{FN8} Because of the closeness in time between these transfers and the initial mortgages imposed on NDR Trust assets, I infer that the transfers were made in connection with those financing transactions. The NDR Trust tax returns reflect that the Trust received payments from Aegean as result of its interest in Aegean, but Aegean never made the payments to the Trust reflected on the tax returns. Similarly, the NDR Trust did not receive any distributions from Marine USA. In July 1999, Alice caused the Trust to transfer its interest in Marine USA and in Aegean to her hus-

band, Paul Tsourides. No compensation was paid to the Trust for the transfer to Paul.

FN8. The record does not indicate specifically when these transfers occurred.

On July 29, 1992, Alice caused the NDR Trust to grant a mortgage on 104 Coolidge Road and 666 Park Avenue to secure an indebtedness of Marine USA to the Blake family, totaling \$425,000. In connection with this transaction, John and Alice signed a trustees' certificate that represented that all of the beneficiaries had consented to the transaction. On September 23, 1992, Alice caused the NDR Trust to grant a mortgage on 1 Monticello to the Shawmut Bank in the amount of \$118,000 to secure a pre-existing loan from Shawmut to Aegean. The mortgage on 1 Monticello was substituted for the mortgage that had been placed on the Tsourides home in 1990. Thus, Alice placed a mortgage on a Trust asset to secure a loan to Aegean, so that the only mortgage that had been placed on Tsourides's property for the benefit of the Marine USA business could be released. In connection with this transaction, Alice also caused the NDR Trust to grant a guarantee and a collateral assignment of leases and rents to Shawmut. Alice and John signed a trustees' certificate that represented that all of the beneficiaries of the NDR Trust had consented to the transaction. I find that in both instances where Alice and John signed a trustees' certificate indicating that all beneficiaries consented, such representations were false. I find that the remaining beneficiaries were never notified of these transactions and as such never consented to them.

By the end of 1992, mortgages imposing a total of \$863,000 in encumbrances were in place on the Trust property securing debt of Marine USA and Aegean. In addition, NDR Trust guaranteed \$520,250 in additional Marine USA or Aegean indebtedness, bringing the total exposure to \$1,383,250. The same exposure continued into 1993.

The extent of exposure imposed on NDR Trust assets for the benefit of Marine USA varied over the next several years as encumbrances were added or removed. In 1993, the Pawlowski lawsuit had been resolved so the total exposure declined to \$1,018,250 and stayed at that level through 1994 and into 1995. In 1995, the indebtedness, created by the November 16, 1990 guarantee, was discharged, reducing the total exposure of the NDR Trust by \$155,250. In the beginning of 1996, the mortgage securing \$425,000 of indebtedness owed by Marine USA to the Blake family was discharged. However, in that year the NDR Trust sold 666 Park Avenue and took back a mortgage of \$168,000. Alice made a collateral assignment to the Blake family of that mortgage to provide continued security for Marine USA's \$425,000 loan. At the end of 1996, mortgages on Trust property totaled \$438,000. There was, in addition to that amount, the \$168,000 collateral assignment to the Blake family of the mortgage of 666 Park Ave. In 1997, Alice arranged for the Trust to give two guarantees to Safety Fund National Bank. One guaranteed an \$890,000 loan to Aegean and the other guaranteed a \$100,000 loan to Marine USA.^{FN9} The last mortgage on Trust property was discharged in 1998. The collateral assignment of mortgage given to the Blakes was reversed in July of 1999.

FN9. It is unclear from the record when the underlying indebtedness was discharged.

From the evidence presented at trial, it is clear to this court that Alice used the assets of the Trust to invest in the expansion of Marine USA to a boating "superstore," that the enlargement of the business was a direct result of the use of the assets of NDR Trust to collateralize these expansion efforts. Alice's use of NDR Trust assets to benefit Marine USA was a violation of her fiduciary duties to the Trust and the other beneficiaries. I find that the use of the NDR Trust assets to facilitate the financing of the expansion of Marine USA led to the company experiencing the profits it did from 1990 to the present and beyond.

During the summer of 1999, Paul suffered a heart attack. Shortly after he returned home from the hospital, his mother Sofia died. In July, the month of Sofia's death, Paul was rehospitalized for heart problems. Within a few days after Paul returned home from the second hospitalization, Alice had him served with a notice of eviction, evicting him from 104 Coolidge. Paul received an order from a court precluding his eviction pending the outcome of this case. Paul has continued to live in 104 Coolidge. John moved out of 104 Coolidge to 1 Monticello in 1999.

Beginning in approximately 1988, Paul began requesting information from the Trustees, concerning Trust activities. Alice and/or John would either ignore his queries or tell him that, if he did not mind his own business, they would cause him to be

evicted from 104 Coolidge Road, a Trust asset. In February of 1998, Paul hired an attorney who wrote to Alice as a Trustee inquiring about the status of the assets of the NDR Trust. In 1999, Paul began to personally conduct an investigation with respect to Trust assets and learned from records at the Worcester Registry of Deeds that Trust assets had been encumbered for the benefit of Marine USA. This action followed that investigation.

In the Verified Complaint in this case, there is a statement that Paul learned of a mortgage of 104 Coolidge Road by overhearing a conversation in 1992. Paul testified, however, that he believes that the stated year is incorrect, that the first mortgage he discovered was in 1999 and that the Complaint simply contains a typographical error. I find that, based on Paul's testimony which I regard as truthful and the contents of the 1998 letter from Paul's attorney to Alice, Paul did not know of the use of Trust assets to expand the business of Marine USA until his investigation in 1999.

Based on the credible evidence heard at trial I find that there are Trust funds that are missing and not accounted for. At trial certified public accountants were called by both sides and provided testimony on their analysis of the missing trust funds. Defendants' accountant Jon Fudeman (Fudeman) initially concluded that \$178,000 of Trust funds could not be accounted for, but that analysis contained \$205,000 in "double counts" and eliminating the double counts would have brought the missing funds in the first analysis to over \$380,000. Prior to trial, Mr. Fudeman prepared another analysis that removed the double count, but the new analysis made several additional last minute adjustments which brought him to a new missing amount of \$152,000.

The plaintiff called Jeffrey Folan (Folan), a certified public accountant, as an expert witness. Folan used records of real estate transactions engaged in by the Trust obtained from the Registry of Deeds to determine net revenues generated by purchases and sales. He used NDR Trust tax returns to identify net rental income and interest. This information was augmented by narrative information provided by his client and information derived from depositions of the defendants which identified other sources of funds and other expenses of the Trust. I find that Folan adopted a reasonable methodology and approach in light of Alice's destruction of Trust records and the need to reconstruct an account.

Fudeman's accounting did not consider information contained in the NDR Trust's tax returns because Fudeman found them suspect and unreliable, even though Alice signed these tax returns verifying their accuracy. Fudeman did rely on Alice's deposition testimony and on conversations he had with her. Fudeman did not explain the reasons he found Alice's conversations and testimony to be more truthful than her reports to the federal government. I find Fudeman's accounting to be based on conjecture and fallible memories and, therefore, less reliable.

Based on Folan's testimony, which I do find credible and reliable, I accept his determination that as of the end of 2005 the Trust should have had \$556,139 in cash.^{FN10} However, from that figure the trial record reflects that additional expenditures totalling \$23,620 should have been deducted.^{FN11} Further, testimony indicated that there was \$60,000 remaining in the Trust. Allowing for these deductions from Folan's figure I find that \$472,519 is missing from the NDR Trust and I find that the defendants are liable to the Trust for this amount.

FN10. This amount is derived from using the following figures: 1) The Trust generated \$72,075.00 of net revenue from rental activities; 2) The Trust generated \$575,957 in cash from real estate purchases and sales; 3) The Trust had (\$8,332) in miscellaneous cash expenses; and 4) The Trust had a net loss of (\$82,561) in revenues and expenses relating to Gregory and Sofia Pantazis.

FN11. The trail record reflects that \$11,700 was paid to Charles and that there were approximately \$11,920 in expenses for 104 Coolidge in 2006.

In addition to these amounts missing from Trust fund, the accounting proved that there are other amounts that should be paid to the Trust by the trustees including:

a. \$23,401 in income that the Trust should have received from Aegean, as reflect on NDR Trust tax returns. The evidence at

trial showed that Aegean never paid those amounts.

- b. \$58,501 in interest payments that the NDR Trust tax returns indicate the Trust paid with respect to loans for the benefit of Aegean.
- c. \$24,358 in attorneys fees and other expenses incurred by the defendants in defense of this case.

The Trustees are also liable for the above amounts totaling \$106,260.

The plaintiff presented evidence from Jerrold P. Katz (Katz) of J .P. Katz & Associates relating to the valuation and profitability of Marine USA. As I have already found above, the Tsourideses' use of the NDR Trust assets to facilitate the financing of the expansion of Marine USA led to the company experiencing the profits it did from 1990 to the present and beyond. Therefore, I have relied on the testimony of Katz in order to determine the Marine USA's profits to assist my assessment of damages against Alice.^{FN12}

FN12. Defendants offered no evidence to contradict Mr. Katz's conclusions. Moreover, the evidence of the lifestyle enjoyed by Alice was consistent with the level of profitability that Mr. Katz opined Marine USA enjoyed.

Based on Katz's testimony I find that in a closely held corporation, such as Marine USA, it is common for the owners/shareholders, in an attempt to minimize taxes and for other reasons, to shift profits from direct dividends to other perquisites such as leasing property from related parties, salaries for relatives in excess of their contributions to the business, expensive automobiles for family members, generous insurance plans, and excess travel expenses. Thus, in order to arrive at a true representation of profits or cash flow from such a business, a process of normalization must occur whereby the financial statements are revised in order to project a more accurate measure of profitability.

The Tsourides family enjoyed the profits of Marine USA in a variety of ways. They received income from Aegean Realty Trust which reflected rent from Marine USA which was above market rent. All four Tsourides family members, including the two children received salaries which constituted twenty to twenty-five percent of payroll. Alice and her husband, Paul, were provided with Mercedes-Benz automobiles which grew in value to \$80,000 to \$100,000. The Tsourides bought a house in Florida and recently purchased a new house in Worcester for three quarters of a million dollars. In all, they lived an elegant lifestyle as a result of using the Trust assets to finance their boat business at the expense of Alice's siblings.

The plaintiff's expert, Katz, testified that the determination of the profits of Marine USA could be based on its income or its cash flow. Based on Katz's testimony I find that the cash flow method is a more accurate representation of the profits by Marine USA and accordingly I will adopt this method in my calculations.^{FN13}

FN13. Katz testified that, in computing profit, you must determine whether to include non-cash items such as depreciation and amortization. Such items are not real cash expenses. That is the difference between income and cash flow. By adding back non-cash expenses to the income, you end up with cash flow. This represents the actual money that is available.

In considering an award of profits based on Marine USA's cash flow, the Court has to address three separate components:

1. the pre-complaint amount of cash flow generated by Marine USA (1990-1999);
2. the cash flow generated for each year after the filing of the complaint until the end of 2006; and
3. the value of the company at the end of 2006.

These components will be separately addressed because the law with respect to interest differs for each component.^{FN14} The total award, before adding statutory prejudgment interest, will be the sum of the three components, multiplied by the percentage of Marine USA's profits that the Court determines should be paid to the Trust.

FN14. For the period preceding the filing of the complaint, the Selected Percentage of the cumulative cash flow through 1999 with T Bill interest plus statutory interest from January 1, 2000 until the date of the entry of judgment, and for the period after the filing of the complaint through the end of 2006, the Selected Percentage of the annual cash flow for each year with statutory interest as follows:

On the 2000 amount, statutory interest from January 1, 2001 until the date of the entry of judgment.

On the 2001 amount, statutory interest from January 1, 2002 until the date of the entry of judgment.

On the 2002 amount, statutory interest from January 1, 2003 until the date of the entry of judgment.

On the 2003 amount, statutory interest from January 1, 2004 until the date of the entry of judgment.

On the 2004 amount, statutory interest from January 1, 2005 until the date of the entry of judgment.

On the 2005 amount, statutory interest from January 1, 2006 until the date of the entry of judgment.

On the 2006 amount, statutory interest from January 1, 2007 until the date of the entry of judgment; and

The Selected Percentage of the Value as of 2006 without statutory interest.

I find that for the years between 1990 and 2006 Marine USA experienced year by year cash flow^{FN15} as set forth below:

FN15. The year by year cash flows are derived from Exhibit 234 by subtracting from a given years' cumulative amount the cumulative amount for the prior year.

[Note: The following TABLE/FORM is too wide to be displayed on one screen. You must print it for a meaningful review of its contents. The table has been divided into multiple pieces with each piece containing information to help you assemble a printout of the table.]

 ***** This is piece: 1

| | | | | | | | | | | |
|---|----------|---------|---------|---------|---------|---------|---------|---------|------------|---------|
| 1 | | | | | | | | | | |
| 2 | 3 Months | | | | | | | | | |
| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 12/31/1997 | 1998 |
| 3 | 558,659 | 153,238 | 241,459 | 192,375 | 331,801 | 252,297 | 283,112 | 302,178 | 15,412 | 257,968 |

 ***** This is piece: 2

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| | | | | | | | | |
|---|---------|---------|---------|---------|---------|---------|---------|---------|
| 2 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
| 3 | 390,745 | 363,516 | 452,532 | 585,950 | 671,595 | 668,036 | 794,445 | 826,223 |

I find the total cumulative cash flow experienced by Marine USA between 1990 and 1999, the year in which the complaint was filed, including interest at U.S. Treasury Bill rates is \$3,830,714, and the value of Marine USA as of 2006 was \$4,684,226 based on cash flow.

Based on the evidence at trial, I find that 50% of Marine USA’s profits rightfully belong to the Trust. Alice’s use of the Trust assets to expand Marine USA was a major factor in the business’s profits. Moreover, when contrasted to the Tsourides’ use of their own real estate to secure financing for Marine USA and its affiliates, the Trust’s contributions, as expressed in face-amount of mortgages per year, tower over those of the Tsourides. The Trust not only provided mortgages representing substantially more in dollar amount than the Tsourides family did, but it also provided those mortgages for a greater number of months. I do credit the individual efforts made by Alice and her family to build Marine USA’s profits, including the hours of labor and the initial capital contributed by the Tsourides family. However, when a comparison is made which factors in both the face amount of the NDR Trust mortgages and the efforts of the Tsourides family I find that 50% of the profits from 1990 were generated by Alice’s use of the NDR Trust’s assets.

I find that Alice is to pay to the Trust 50% of \$3,830,714, the cumulative cash flow from 1990 through 1999 with Treasury Bill interest and 50% of the cash flow for 2000 through 2006 with statutory prejudgment interest.^{FN16} I find that the present value of the future cash flow is \$4,684,226. The involuntary investment that the Trust made in Marine USA entitles it to share in the future profits of Marine USA. Accordingly, it is entitled to 50% of the future cash flow amount as part of its judgment.

FN16. Prejudgment interest at the rate of 12% per annum is to be added to the sum of \$1,915,357 from December 31, 1999. Interest at the rate of 12% per annum is to be added to each annual cash flow amount from the end of the year when that amount would have been received until the date of the judgment. (See footnote # 14 above.)

Therefore, I find that the Trust should be awarded \$1,915,357 as pre-complaint profits; \$2,181,148.50 as 2000 through 2006 profits; and \$2,342,113 as future profits together with statutory interest as previously discussed.

RULINGS OF LAW

The plaintiff’s claims against both defendants are as follows: Count One of his Amended Complaint demands an accounting of the disposition of the assets and income of the NDR Trust by defendant trustees Alice and John (collectively the Trustees). Count Two is a claim for injunctive relief seeking to enjoin the Trustees from disposing of any further assets of NDR Trust. Count Three is a claim for breach of trust on the part of the Trustees alleging that the Trustees breached their fiduciary duties to the beneficiaries of NDR Trust. The principal relief the plaintiff seeks is an award of damages for (i) missing NDR Trust funds that cannot be accounted for by the Trustees and (ii) the profits earned by Marine USA, Inc. and its affiliates for the Trustees’ breach of their fiduciary duties.

It is well understood that “[a]n agent or fiduciary is under a duty to keep and render accounts and, when called upon for an accounting, has the burden of proving that he properly disposed of funds which he is shown to have received for his principal or trust. See Restatement 2d: Agency, §§ 382, 399, comment e; see also Restatement: Trusts, §§ 172, 244-45; Scott, Trusts (2d ed.) §§ 172, 244-45.2.” *Samia v. Central Oil Co.*, 339 Mass. 101, 123 (1959). An accounting is a judicial proceeding in equity in which the court adjudicates the amount of funds that ought to be in the possession of the trust and a determination of any amounts for which the trustees are liable to the trust or its beneficiaries. “The judgment in an action for an accounting should adjudicate the account and show the balance due from one party to the other.” 31 Massachusetts Practice & Procedure, *Equitable Remedies* § 303, p. 457-58 (1993 ed.) (citing *Milbank v. J.C. Littlefield, Inc.*, 310 Mass. 55, 61 (1941). “In such an action the judgment should state the account and provide for the payment of the balance due from one party to the other.” *Id.*

The judicial proceeding is distinct from a written “account” rendered by a trustee. See *Quinton v. Gavin*, 2001 WL 1194151 *26 (Mass.Super.2001) (Doerfer, J.), *affirmed* 64 Mass.App.Ct. 792, *further review denied* 445 Mass. 1107 (2005) (citing *Brown v. Howe*, 9 Gray 84, 85 (1857)); see also *Chopelas v. Choplas*, 303 Mass. 33, 34 (“The court below had jurisdiction in equity to compel the accounting and to examine the entire account of the management of the trust”) (citing authority). The Court is the arbiter of the amount for which the trustee is personally liable to the trust estate based on the evidence presented at trial. See *Markus v. Markus*, 331 Mass. 394, 399 (1954).

The plaintiff bears the burden of proving that a trust existed. See, e.g., *Akin v. Warner*, 318 Mass. 669, 675 (1945) (citations omitted). There is no dispute in this case that the NDR Trust existed and that the defendants are the trustees. The defendants bear the burden of proof of accounting for all property of NDR Trust and demonstrating they did not misappropriate or fail to preserve the assets of the trust. See *Akin*, 318 Mass. 669, 675 (1945); *Knowlton v. Fourth-Atlantic Nat. Bank*, 271 Mass. 343, 350-51 (1930) (“The plaintiff had the burden of proving that a trust relationship ... existed between [the beneficiary] and the defendant, but that being established, the defendant had the burden of proving that it had discharged its duties as trustee with reasonable skill, prudence and judgment, including the duty to account to the beneficiary at reasonable times and to exercise a proper supervision over the activities of its agent or agents ...”). “An agent or fiduciary is under a duty to keep and render accounts and, when called upon for an accounting, has the burden of proving that he properly disposed of funds which he is shown to have received for his principal or trust.” *Samia*, 339 Mass. 101, 126 (1959) (citing Restatement (second) of Agency, §§ 382, 399, comment e; Restatement of Trusts, §§ 172, 244-45; *Scott on Trusts* (2d ed.) §§ 172, 244-45.2). See also *Briggs v. Crowley*, 352 Mass. 194, 199 (1967) (it is well settled that trustee has duty to account for trust property); *Rugo v. Rugo*, 325 Mass. 612, 617 (1950) (trustee has duty to keep clear and accurate records); *Campbell v. Cook*, 193 Mass. 251, 256 (1906) (trustee has duty to render accounts as to all details of his management); Restatement (Second) of Trusts § 172 (1959).

“The burden of proof is on the trustee to account for money or property held by him in trust.” *Akin*, 318 Mass. at 674 (citations omitted); *Markus*, 331 Mass. at 399 (where trust is established the trustee bears burden “to account for all the trust property that came into his possession”). It was also the duty of the defendants to maintain clear records of their disposition of trust assets. E.g. *Akin*, 318 Mass. at 674 (citing *Campbell*, 193 Mass. at 256); *Samia*, 339 Mass. at 126; *Rugo*, 325 Mass. at 617). Alice Tsourides destroyed most of the pre-1995 financial and other records of the NDR Trust that would have illuminated how the Trustees disposed of the trust assets. The plaintiff’s accounting expert made a substantial showing that a total of that \$472,519 in cash is missing from NDR Trust which should have been in the Trust’s possession as of the end of 2006.

The defendants bear the burden of proving that the transactions resulting in encumbrances being placed on NDR Trust property and in the transfer of trust property were advantageous to the beneficiaries and were made in good faith. “When a transaction engaged in by a trustee is challenged as constituting self-dealing ‘[t]he burden of showing good faith and fairness is on the trustee, as is the burden to show that any questioned transaction was advantageous to the beneficiaries.’” *Quinton*, 2001 WL 1194151 at *22 (quoting *Johnson v. Witkowski*, 30 Mass.App.Ct. 697, 706, *rev. denied*, 411 Mass. 1104 (1991)).

Alice’s destruction of virtually all NDR Trust records prior to 1995—all except a handful of checks made out to the Plaintiff which she deliberately preserved—constitutes a violation of her fiduciary duty to preserve and maintain clear records of her activities as trustee. See *Akin*, 318 Mass. at 674 (citing *Campbell*, 193 Mass. at 256); *Samia*, 339 Mass. at 126. She was under an affirmative duty to maintain the records she destroyed. See *Akin*, 318 Mass. at 674 (it is the “duty of ... [a] trustee to keep clear and accurate accounts with respect to the administration of the trust”) (citations omitted).

Alice’s destruction of NDR Trust records constitutes spoliation of evidence and warrants the sanction of an adverse inference. “The destruction of relevant evidence ... has a pernicious effect on the truth-finding function of our courts.” *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 553 (2002). “The doctrine of spoliation allows a court to impose sanctions and remedies for the destruction of evidence in civil litigation, ‘based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results.’” “ *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698, 705 (2005) (quoting *Keene v. Brigham & Women’s Hosp., Inc.*, 439 Mass. 223, 234 (2003) (*default* appropriate against hospital that lost records critical to plaintiff’s case); citing *Kippenhan v. Chaulk Serv’s., Inc.*, 428 Mass. 124, 127 (1998) (spoliation sanction appropriate where reasonable person would realize that evidence *might be relevant to possible action*)).

The Court has broad discretion in determining the appropriate sanction for spoliation, ranging from outright default or dismissal of a claim, to excluding evidence, to permitting the trier of fact to draw an adverse inference against the spoliating party. See *Keene*, 439 Mass. at 235; *Wiedmann*, 444 Mass. at 705-06; *Westover v. Leiserv, Inc.*, 64 Mass.App.Ct. 109, 113 (2005) (citing *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 488 (2003)); *Capitol Bank & Trust Co. v. Richman*, 19 Mass.App.Ct. 515, 522 n. 7 (1985) (“there is a presumption that the proponent would not have destroyed the document unless matter unfavorable to him”).

“In the case of business torts, an element of uncertainty in the assessment of damages is not a bar to their recovery.” *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 430 (1976); accord *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760 (1986). An “award of damages can stand on less than substantial evidence particularly [in] the case of business torts, where the critical focus is on the wrongfulness of the defendant’s conduct.” *Zimmerman v. Bogoff*, 402 Mass. 650, 661-62 (1988); *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass.App.Ct. 396, 426 (1982).

The plaintiff’s accountant expert, Mr. Folan, presented substantial evidence as to the amount of money that ought to be in the possession of NDR Trust as of 2005, but was hindered to the extent that bank records and relevant trust documents were destroyed by Alice, who was under an affirmative duty to maintain these documents. Mr. Folan concluded that \$556,139 was missing from NDR Trust. Taking into account other trial testimony that \$60,000 remains in the trust and approximately \$11,700 was paid to Charles Pantazis, and that the 104 Coolidge expenses for 2006 were \$11,920, Mr. Folan’s adjusted analysis is that \$472,519 is missing. The plaintiff also established that an additional \$106,260 should be paid to the Trust by the Trustees.^{FN17}

FN17. This figure is derived as follows: \$23,401 in income that the Trust should have received from Aegean, as reflected in NDR Trust tax returns. The evidence at trial showed that Aegean never paid those amounts. \$58,501 in interest payments that the NDR Trust tax returns indicate the Trust paid with respect to loans for the benefit of Aegean. \$24,358 in attorneys fees and other expenses incurred by the defendants in defense of this case.

This court draws an adverse inference from Alice’s destruction of the trust records, specifically that the information contained therein would have reflected substantial diversion of funds by the Trustees. This court infers from Alice’s conduct that plaintiff’s conclusion that \$578,779 was missing from NDR Trust as of 2006 is accurate.

The Trustees are jointly and severally liable for amounts for which they fail to account and for any misappropriation of trust assets. *Rutanen v. Ballard*, 424 Mass. 723, 731 (1997) (liability among trustees is joint and several where one breaches his fiduciary duty and the other joins, consents, aids, or makes possible the breach of the other trustee by his own neglect) (citing *Ashley v. Winkley*, 209 Mass. 509, 528 (1911); Restatement (Second) of Trusts § 184 (1959)).

As I ruled above, “[i]t [is] the duty of [the defendants] as trustee[s] to keep clear and accurate accounts with respect to the administration of the trust.” *Akin*, 318 Mass. at 674 (citing *Campbell*, 193 Mass. at 256); *Samia*, 339 Mass. at 126. If the trustee is unable to render a proper account due to his failure to comply with this duty, the trustee is liable for the missing assets. *Akin*, 318 Mass. at 674 (citations omitted); *Markus*, 331 Mass. at 399 (“If [a trustee is] unable to account he must stand the loss”) (citing *Little v. Phipps*, 208 Mass. 331 (1911); *Knowlton v. Fourth-Atlantic National Bank*, 271 Mass. 343, 350-51 (1930); *Rugo*, 325 Mass. at 617; see also *Quinton*, 2001 WL 1194151 *26 (“A failure to comply with the duty to account falls upon the trustee who is liable for any loss or expenses arising from this failure”) (citing *Bogle v. Bogle*, 85 Mass. 158, 3 Allen 158, 161 (1861)). Misappropriation of trust assets constitutes a breach of the trustees’ duty to account. E.g. *Quinton*, 2001 WL 1194151 *26 (citing *Briggs*, 352 Mass. at 200). “A trustee cannot be relieved of this duty to account by the term of a trust instrument.” *Id.* Liability to the Trustee is personal, and includes the principal amount of the unaccounted for funds plus the legal rate of interest. See Scott, the Administration of Trusts, §§ 170.17, 207; *Markus*, 331 Mass. at 399 (“If [a trustee is] unable to account he must stand the loss”) (citing *Little*, 208 Mass. 331; *Knowlton*, 271 Mass. at 350-51; *Rugo*, 325 Mass. at 617; see also *Quinton*, 2001 WL 1194151 at *26.

Based on my factual findings and rulings of law I find that Alice Tsourides is jointly and severally liable for John Pantazis' co-mingling of trust assets, as she was aware of this conduct and took no steps to prevent him from breaching his fiduciary duty. *See Rutanen*, 424 Mass. at 731.

Massachusetts law defines a trust as “a fiduciary relationship with respect to property [which] subject[s] the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.” *Markham v. Fay*, 74 F.3d 1347, 1360 (1st Cir.1995) (quoting *Russell v. Russell*, 18 Mass.App.Ct. 901, 959 (1984)); Restatement (Second) of Trust § 2 (1959). “The general principles governing the conduct of a fiduciary in dealing with trust property have been frequently declared by this court.” *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 140 (1944).

A trustee must exercise good faith and act solely in the interests of the beneficiaries in administering the trust. He must lay aside self interest when it becomes adverse to the rights of the cestui que trust, for the office of trustee cannot be subverted to fostering the personal advantage or individual gain of the incumbent. There can be no divided loyalty. This principle has always been rigorously enforced. *Id.*

As trustees of the NDR Trust, it is clear that the defendants owe the plaintiff and the other beneficiaries a duty of good faith and loyalty, *Rutanen*, 424 Mass. at 731, a duty not to engage in self-dealing conduct, *Johnson*, 30 Mass.App.Ct. at 706, a duty of full disclosure, *Akins*, 318 Mass. at 675, and a duty to segregate trust property from their own property, *Markus*, 331 Mass. at 400.

“A trustee must exercise good faith and act solely in the interests of the beneficiaries in administering the trust. [She] must lay aside self interest ... for the office of trustee cannot be subverted to fostering the personal advantage or individual gain of the incumbent. There can be no divided loyalty.” *Rutanen*, 424 Mass. at 731; see also *Boston Safe Deposit*, 317 Mass. at 140 (trustee must lay aside self-interest when it becomes adverse to the rights of the beneficiaries); *Ball v. Hopkins*, 268 Mass. 260, 266 (1929) (trustee cannot derive personal advantage at the expense of the trust or put himself in a position antagonistic to those of the beneficiaries); *Johnson*, 30 Mass.App.Ct. at 706 (“The rule that a fiduciary may not derive personal advantage at the expense of the trust, nor put himself in a position antagonistic to the beneficiaries of the trust will be strictly enforced”). A trustee must fully disclose to the beneficiaries all of the material facts surrounding a self-interested transaction. See *Akins*, 318 Mass. at 675; see also *Demoulas*, 424 Mass. at 519.

The Trustees are under a “duty to segregate trust property from [their] own [personal] property. ‘Trust funds should not be mingled with the personal funds of the trustee.’” *Quinton*, 2001 WL 1194151 *27 (quoting *Markus*, 331 Mass. at 400; citing Restatement (Second) of Trusts § 179). A trustee who intermingles personal property with trust property, and who cannot account for which funds belong to the trust and which belong to the trustee, is liable to the trust for the entire amount of the intermingled fund. *International Trust Co. v. Boardman*, 149 Mass. 158, 163 (1889) (“The duty rested upon [the trustee] to keep that fund for which he was accountable separate from that for which he was not accountable, and if, by reason of his failing to do so, he was unable to show how much of the proceeds of the sale he was entitled to keep, he must account for the whole”) (citations omitted); see also *Quinton*, 2001 WL 1194151 *27.

A trustee is personally liable for any unauthorized conveyance of trust property made to a non-beneficiary. Restatement of Trusts, § 226. “A trustee must compensate the trust for any loss in value of trust property as a result of the breach.” See *Boston Safe Deposit and Trust Co. v. Seifert* (“*Seifert*”), 6 Mass. L. Rprt. 410, 1997 WL 64043 *5 (Mass.Super. Jan. 29, 1997) (citing Restatement (Second) of Trusts § 205, comment c).

A personal guarantee is considered property. *In re Kovacs*, 42 B.R. 1, 3 (Bkrcty.D.Mass.1982) (a debtor who receives a loan or a guarantee of an obligation from another, has received property within the meaning of the Bankruptcy Code). Likewise, a mortgage conveys a property interest. See *Pineo v. White*, 320 Mass. 487, 489 (1946) (“A mortgage of real estate is, as between the parties, a conveyance in fee, defeasible upon the performance of the conditions therein stated”).

“The rule is general and fundamental, that no person holding trust funds can be allowed to derive any personal gain or advan-

tage, either *directly* or *indirectly* from the use thereof, but he must manage them with a single eye to the advantage of the trust estate[.] ... *Whatever form the transaction may assume*, the salutary rule must be enforced which forbids them from reaping a personal profit from the method which they adopt of investing or managing the trust estate.” *Bowen v. Richardson*, 133 Mass. 293, 296 (1882) (emphasis added).

A trustee is liable for any loss suffered by the trust resulting from his or her breach of trust, and the trustee will not be permitted to retain any personal gain from such breach. E.g. *Akins*, 318 Mass. at 675. “When a trustee commits a breach of trust, he is ‘accountable for any profit accruing to the trust though the breach of trust; or chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.’ “ *Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *3 quoting Restatement (Third) of Trusts § 205 (1992). Where “the breach of trust causes a loss ... the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach.” *Id.*

A “trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust[.]” including “any profit which would have accrued to the trust estate if there had been no breach of [the] duty” of loyalty. *Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *3 (quoting Restatement (Third) of Trusts § 205; citing Restatement (Second) of Trusts § 206, comment a).

Alice’s and John’s misappropriation of NDR Trust property, as well as their intermingling of personal and trust property, were obvious breaches of their fiduciary duties as trustees. John admitted in his testimony before the Court that he deliberately intermingled his personal property with NDR Trust property and maintained no record whatsoever of his activities. He admitted to making free use of the funds in the NDR Trust checking accounts for his personal benefit. He admitted to using at least some trust assets to construct a home at 1 Monticello Drive, though there is no written record supporting his contention that some of the funds used to construct the home were his own. He then allowed his girlfriend and their child to move into without paying rent, other than to pay the minimum amount sufficient to maintain the expenses. To the extent they paid any rent, he collected it and did not distribute it to the NDR Trust. Eventually he moved into the property himself and he pays no rent.

I have determined that Alice used the equity of NDR Trust assets to fund the operation and expansion of Marine USA, a business that she owned along with members of her family. Alice’s misuse of NDR Trust was a plain and fundamental breach of her duties as trustee. The remedy for Alice’s diversion of trust assets to her company is to award to the NDR Trust an appropriate portion of the profits generated by Marine USA, with interest. It is well settled that where a trustee diverts trust assets to her own business, no matter what particular form the misappropriation takes, the beneficiaries are entitled to recover from the trustee all of the profits earned by the business. While the portion of the trust’s interest in the profits of the recipient-business may properly be reduced to reflect legitimate sources of capital that may have contributed to the business capacity to generate profits, the burden is on the trustee to prove the extent to which the business was funded by non-trust assets.

If a trustee “assumes to use [trust assets] *in any manner* for his own benefit or *in his own business*, he must account for *all* profits arising from such use [.]” *Bowen*, 133 Mass. at 296 (emphasis added); see also *O’Brien v. Dwight*, 363 Mass. 256, 283 (1973). The SJC explained this longstanding rule of law in *O’Brien, supra*, stating that:

[t]he general principles governing the conduct of fiduciaries dealing with trust property ... are clear. In *Bowen v. Richardson*, 133 Mass. 293, 296, we said: “The rule is general and fundamental, that no person holding trust funds can be allowed to derive any personal gain or advantage, either directly or indirectly, from the use (or sale) thereof ... (that) he must account for all the profits arising from such use, if profits are made, ... (and that t)his rule is applicable to every kind of fiduciary relation: to executors, administrators, trustees, guardians, directors of corporations, and all persons who hold funds in trust for others. It is also applicable to every mode in which such trustees may either directly or indirectly seek to derive a personal gain or advantage from the use of trust funds, whether by using the same in their personal business, or by treating the same as a loan to one or more or all of themselves ... or to a firm of which they are members, or otherwise. *Whatever form the transaction may assume*, the salutary rule must be enforced which forbids them from reaping a personal profit from the method which they adopt of investing or managing the trust estate.”

O'Brien, 363 Mass. at 283. “The principles quoted above have been reaffirmed or restated and applied in many of our decisions too numerous to cite.” *O'Brien*, 363 Mass. at 283 (citing *Bowen*, 133 Mass. at 296). *Accord Demoulas*, 424 Mass. at 556 (where a trustee “obtains a gain or advantage through a violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny any profit to the wrongdoer and prevent his unjust enrichment”); *Production Mach. Co. v. Howe*, 327 Mass. 372, 378 (1951) (director who diverts corporate opportunity away from company to which he owes fiduciary duty to a third-party business that he owns is liable for the profits acquired by the third-party business); *Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *4.

“Where a trustee uses trust funds in his own business, the beneficiaries have the option of ... holding him accountable for a share of the profits of the business.” Scott, *The Administration of Trusts*, § 207, § 170.17. “Where the trustee by the wrongful disposition of trust property acquires other property which is or becomes more valuable than the trust property used in acquiring it, the beneficiary is entitled to reach the property so acquired, and thus to secure the profit which arises from the transaction.” Restatement of Trusts, § 202, comment a; *accord Akins*, 318 Mass. at 675.

[This rule] is applicable where the trustee by the wrongful disposition of trust property acquires other property, even though the transaction is an aleatory transaction, that is one involving a large element of risk of loss and possibility of profit. In such a case if there is a profit realized, the beneficiary is entitled to reach it; and if there is a loss he can hold the trustee personally liable and can enforce an equitable lien upon the product, if any, of the trust property.

Illustrations:

6. A is trustee for B of \$1,000. He wagers the \$1,000 on a horse race and wins \$10,000. B can enforce a constructive trust of the \$10,000.

Restatement of Trusts, § 202 (comment c).

Thus disgorgement of profits, and not merely restoration of the misappropriated principal, is the appropriate remedy where a trustee misappropriates trust assets to her own benefit by diverting trust assets to a business that she owns. See Restatement of Trusts, § 205(b) (“If the trustee commits a breach of trust, he is chargeable with ... any profit made by him through the breach of trust”). As the SJC explained in *Bowen, supra*, where the fiduciary purchased real estate with the misappropriated funds:

By using the funds in their hands for the purchase of real estate, the executors became responsible in their fiduciary or official capacity for all the profits which might arise from such purchase ... [I]t is the duty of both the [fiduciary] to give to the estate which furnished the purchase money the benefit of the purchase. The beneficiaries in that estate have the option to take the profits, or to take interest on the money.

Bowen, 133 Mass. at 297.

The fact that Alice earned the profits indirectly, i.e., through her ownership of Marine USA and its affiliates, is immaterial. “As was said in *Durfee v. Durfee & Canning, Inc., supra*, ‘a director, who fraudulently or in violation of his fiduciary relationship diverts profits from the corporation, is personally liable though the profits are acquired by an agency controlled by the director or a third party.’ “ *Production Mach. Co.*, 327 Mass. at 378 (quoting *Durfee*, 323 Mass. 187, 196, (1948); citing *Lazenby v. Henderson*, 241 Mass. 177, 181 (1922); *Beaudette v. Graham*, 267 Mass. 7, 12-13 (1929); *American Agricultural Chem. Co. of Mass. v. Robertson*, 273 Mass. 66, 83-88 (1930). A fiduciary that diverts property with which she is charged to an entity she controls “is responsible for the profits of his wholly owned corporation resulting therefrom.” *Production Mach. Co.*, 327 Mass. at 378.

Where a trustee or other fiduciary “obtains a gain or advantage through a violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny any profit to the wrongdoer and prevent his unjust enrichment.” *Demoulas*,

424 Mass. at 556 (emphasis added) (citing *Broomfield v. Kosow*, 349 Mass. 749, 758 (1965); *Production Mach. Co.*, 327 Mass. at 377-78; *Durfee*, 323 Mass. at 198). “The burden of proof is on the defendants to show how much of any entity’s assets are not the direct or indirect result of the violations of fiduciary duty.” See *Demoulas*, 424 Mass. at 557-58 (citing *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 174 n. 14 (1979) (burden is on defendants to show portion of profits not attributable to misappropriated trade secrets); further citing Restatement (Second) of Trusts, *supra* at § 291(3) (transferee who is required to repay value of property received in breach of trust, is entitled to credit for amount he paid for property)).

When a defendant-trustee uses trust assets in a profit generating activity, the starting presumption is that *all* profits generated by this activity are owed to the trust. If the trustee maintains that all such profits should not be paid to the trust he or she bears the burden of showing that some portion of the profits should not be paid to the trust and bears the burden of establishing what portion of the profits should not be apportioned to the trust. Where a trustee or other fiduciary “obtains a gain or advantage through a violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny *any* profit to the wrongdoer and prevent his unjust enrichment.” *Demoulas*, 424 Mass. at 556 (citing *Broomfield*, 349 Mass. at 758; *Production Mach. Co.*, 327 Mass. at 377-78; *Durfee*, 323 Mass. at 198).

The defendants bear the burden of proof on this issue—they must show what portion of the profits earned by Marine USA and its affiliates are attributable to a source other than the misappropriated assets of the New Deal Realty Trust. See *Demoulas*, 424 Mass. at 557-58 (“The burden of proof is on the defendants to show how much of any entity’s assets are not the direct or indirect result of the violations of fiduciary duty”) (citing *Jet Spray Cooler, Inc.*, 377 Mass. at 174 n. 14 (burden is on defendants to show portion of profits not attributable to misappropriated trade secrets); further citing Restatement (Second) of Trusts, *supra* at § 291(3) (transferee who is required to repay value of property received in breach of trust, is entitled to credit for amount he paid for property)).

The plaintiff is entitled to pre-complaint interest on the profits earned by Marine USA, Inc. and its affiliates that are owed to NDR Trust as an element of Plaintiff’s damages. See *Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *3, 5 (awarding pre-complaint interest from the date from which the trust was wrongfully deprived of use of its assets, as a component of damages, in *addition to* statutory prejudgment interest) (citing *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 227 (1954) (where funds were misappropriated by trustee, “[t]he judge correctly found that the trustee owes to the fund the amount of the withdrawals with interest ... [t]he 4% rate of interest was apparently fixed by the judge as being the rate of return which would have been received on the investment of the principal which had been withdrawn”); *Bowen*, 133 Mass. at 296 (in case of loss, trustee must account for the principal *and interest*)).

“Interest is compensation fixed by law for the use of money or, alternatively, as damages for its detention.” *Id.* (quoting *Boston Children’s Heart Foundation, Inc. v. Nadal-Ginard*, 73 F.3d 429, 442 (1st Cir.1996) (fiduciary of non-profit corporation was held liable for interest corporation would have earned on funds he misappropriated) (internal quotation omitted).

The appropriate interest rate, to be applied for the time period during which NDR Trust was deprived of the use of its assets through the December 3, 1999, the date the Complaint was filed, is the “reasonably prudent investor rate,” i.e. the rate a reasonably prudent investor would expect to earn during the time frame in question. *Id.*, *6 (citing *Bowen*, 133 Mass. at 296; *Trustees of Dartmouth College*, 321 Mass. at 227 (citing Restatement (Third) of Trusts § 227)). “If the breach of trust consists in an improper sale of trust property or an improper purchase of property for the trust, the trustee is chargeable with interest at the current rate of return on trust investments ...” Restatement (Third) of Trusts § 227, comment c. “Return rates are determined by application of the ‘prudent investor rule’ requiring the exercise of care, skill and caution ‘with a view both to safety of the capital and to securing a reasonable return.’” “*Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *6 (citing Restatement (Third) of Trusts § 227, comment e).

The Court has wide discretion in setting this rate. In the present case Plaintiff’s expert witness on the profits earned by Marine USA, Inc. and its affiliates during the relevant time frame was Jerrold Katz. In determining the profits earned each year from 1990 through 1999 (through the date this lawsuit was commenced), Mr. Katz applied an interest rate at a rate equal to the going-rate for One-Year U.S. Treasury Bill, a highly conservative interest rate.

The Court adopts the U.S. Treasury Bill rate of interest as the reasonably prudent investor rate and applies this rate of interest to the profits earned by Marine USA and its affiliates for each year from 1990 through December 3, 1999, the date on which this action was commenced.

The plaintiff is entitled to prejudgment interest on all of his damages at the legal rate of 12% from the date of the filing of the Complaint, December 3, 1999, through the entry of judgment. *See Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *9 (awarding 12% prejudgment interest on total damages awarded, including profits disgorged from defendant trustee and award of interest thereon at the reasonably prudent investor rate, through the date of judgment). A violation of a fiduciary duty or a breach of trust “is viewed as a tort for the purpose of determining prejudgment interest, and G.L.c. 231, § 6B, applies.” *Lat-tuca v. Robsham*, 59 Mass.App.Ct. 1105, 2003 WL 22244355 *4 (2003) (Table) (citing *Sugarman v. Sugarman*, 797 F.2d 3, 14 (1st Cir.1986)). A twelve percent (12%) interest rate per annum is prescribed by G.L.c. 231, § 6B.

With respect to damages for the profits earned by Marine USA and its affiliates, prejudgment interest should be applied to all amounts owed to NDR Trust, including the award of interest at the reasonably prudent investor rate, at 12% per annum for the length of time between the filing of the Complaint through the entry of judgment. This aspect of the prejudgment interest calculation is complicated somewhat by the fact that Marine USA and its affiliates continued to generate profits beyond the date of the filing of the Complaint, through judgment. While prejudgment interest is typically applied “ministerially” to the period of time between commencement of suit and entry of judgment, *see Mendoza v. Union Street Bus Co., Inc.*, 876 F.Supp. 8, 12 (D.Mass.1995) (applying Massachusetts law), prejudgment interest on profits earned by Marine USA should not be applied until the profits had actually been generated. This issue was addressed in *O’Malley v. O’Malley*, 419 Mass. 377, 381 (1995), where the plaintiff was owed a percentage of the profits earned by a restaurant for a period of years which included years after the filing of the complaint. The SJC held that the plaintiff was “entitled to an award of prejudgment interest calculated from the end of each year (1987, 1988, 1989) in which the judge determined [he] was entitled to 20% of the restaurant’s profits, based on the amounts determined by the judge for each year.” *Id.* (applying prejudgment interest statute for claims arising in contract).

Thus, for the period following the filing of the Complaint through the entry of judgment, prejudgment interest should be applied as follows to the award of damages for Marine USA’s profits:

1. On the 2000 amount, 12% per annum from January 1, 2001 through the entry of judgment.
2. On the 2001 amount, 12% per annum from January 1, 2002 until the date of the entry of judgment.
3. On the 2002 amount, 12% per annum from January 1, 2003 until the date of the entry of judgment.
4. On the 2003 amount, 12% per annum from January 1, 2004 until the date of the entry of judgment.
5. On the 2004 amount, 12% per annum from January 1, 2005 until the date of the entry of judgment.
6. On the 2005 amount, 12% per annum from January 1, 2006 until the date of the entry of judgment.
7. On the 2006 amount, 12% per annum from January 1, 2007 until the date of the entry of judgment.

This “stepped” application of the prejudgment interest rate to the disgorged profits award avoids the inequity of charging Alice with interest on the profits of Marine USA for years in which those profits had not yet been generated. Interest should be charged only after the profits have been made.

Generally, however, “the plaintiff is entitled to prejudgment interest on his compensatory damages from the commencement

of the action.” *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 327 (1993) (citing *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 716 (1990); *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp.*, 25 Mass.App.Ct. 302, 320 (1988)). “Prejudgment interest on compensatory damages is designed to make a plaintiff whole for the loss of money during the time it was owed but not paid.” *Id.* (citing *Conway v. Electro Switch Corp.*, 402 Mass. 385, 390 (1988)). “A litigant is entitled to pre-judgment interest as a matter of law. It is not a matter of discretion under M.G.L.A. c. 231, § 6B.” Flanagan, *Massachusetts Practice*, vol. 43, Trial Practice, § 18.13 p. 535 (2005) (citing *Moose v. Massachusetts Institute of Tech.*, 43 Mass.App.Ct. 420 (1997)).

The plaintiff is entitled to be reimbursed from the assets of the NDR Trust for his attorneys fees incurred in his successful prosecution of his claims against the Trustees, as his effort benefited the NDR Trust estate generally and the non-party beneficiaries in equal part to himself. “[W]hen many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefit of his efforts.” *Davis v. Bay State League*, 158 Mass. 434, 434-35 (1893) (citing *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Railroad Co. v. Pettus*, 113 U.S. 116, 5 Sup.Ct.Rep. 387 (1885)) (internal quotation omitted). “This court has acted on this rule, not only in cases of express trusts under wills or other written instruments, but in a proceeding for the common benefit of many persons interested in the preservation of property.” *Davis*, 158 Mass. at 435 (citing *Kinmonth v. Brigham*, 5 Allen 270, 87 Mass. 270 (1862); *Amory v. Lowell*, 1 Allen 508, 83 Mass. 504 (1861)). “A court of equity will, as a general rule, in its discretion, order an allowance of counsel fees ... to a complainant, or directly to his attorney, who at his own expense has maintained a successful suit for the preservation, protection or increase of a common fund or of common property or who has created at his own expense or brought into court, a fund in which others may share with him.” *Allowance of Attorneys Fees In, Or Other Costs Of, Litigation By Beneficiary Respecting Trust*, 9 A.L.R.2d 1132, § 5, pp. 54 (1950, supp.2007) (citing *Trustees*, 105 U.S. 527; *Davis*, 158 Mass. at 435) (further citations omitted). “There are, then, numerous cases involving litigation by a trust beneficiary to enforce the liability of the trustee for maladministration or breach of trust in which the propriety of an allowance to a beneficiary of the trust for attorneys fees was upheld.” *Id.*, § 18, pp. 111 (citing *Amory*, 1 Allen 508, 83 Mass. 504) (further citations omitted).

The attorneys fees of the plaintiff-beneficiary should be paid from the trust estate and should be the first funds distributed from the NDR Trust prior to a distribution of the trust assets to the beneficiaries.

Whether an allowance for costs or attorneys fees in litigation respecting an express trust brought by a beneficiary thereof, once made, is to be charged against the general trust estate depends upon a number of considerations. Perhaps the most important of these is whether the litigation was for the benefit of the estate as a whole and not for the benefit of the trustee individually or of one or more, but less than all, of the beneficiaries ... Another important factor, in connection with the allowance of costs or fees in favor of a trustee in litigation seeking to enforce his liability for a breach of trust, is the outcome of the litigation ... Thus, the doctrine that one who has created or preserved a common fund is entitled to an allowance of his attorneys fees, which is discussed *supra*, § 5, embraces, as an integral part thereof, the further proposition that the allowance is to be out of the fund or property created or preserved.

**21Id.*, § 35, pp. 169.

In *Amory*, 1 Allen 508, 83 Mass. 504, a will directed the executors to sell certain real estate for the payment of debts and left the residue of the estate to trustees, to pay the income to plaintiffs, the testator’s children, for life. The plaintiffs sued to compel the trustee to release to them certain funds of the trust corpus, and the SJC held that plaintiffs were entitled to the relief sought. *See id.* at 508. The SJC ordered that “the costs of this suit and fees of counsel as between solicitor and client on both sides, are a charge upon the proceeds of sales [of portions of the trust real property] now in the hands of the defendant, or hereafter to be received, and be paid from out thereof.” *Id.*

In the related context of a closely held corporation, in *Guay v. Holland System Hull Co.*, 244 Mass. 240, 247 (1923), the allowance of counsel fees out of funds recovered in minority shareholder derivative suit for corporation to compel repayment to it of moneys diverted by majority stockholders to another corporation controlled by them was affirmed by the SJC on the

basis of the principles announced in *Davis*, 158 Mass. 434. *Accord Shaw v. Harding*, 306 Mass. 441, 450 (1940) (citing same).

It is also well settled that where a breach of fiduciary duty on the part of the trustee is established, the trustee is not entitled to reimbursement for attorneys fees from the trust assets. E.g. *National Academy of Sciences v. Cambridge Trust Co.*, 370 Mass. 303, 312 (1976) (“trustee is not entitled to indemnity if the incurring of the expense became necessary because of his own fault”); *accord Lattuca v. Robsham*, 442 Mass. 205, 210-11 (2004) (Superior Court was within its discretion to deny request for indemnification of attorneys fees for trustee who was “at fault for the litigation expenses that were subsequently incurred”).

The plaintiff is entitled to an equitable lien on the beneficial interest of both defendant-Trustees, Alice and John, in the NDR Trust. This equitable lien shall secure any damages award in favor of the plaintiff or the other injured beneficiaries of NDR Trust. In essence, this means that any assets belonging to the NDR Trust, whether currently in its possession or collected pursuant to a judgment entered by this Court, shall be applied to the beneficial interests of the plaintiff and the other two injured beneficiaries (Katherine Poly and Charles Pantazis) *before* any NDR Trust assets are distributed to the defendants, until such time as the judgment of this Court is fully satisfied.

“A breaching fiduciary forfeits his share of trust property unless and until he makes good on the loss he caused the beneficiaries.” *Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *8 (Mass.Super. Jan. 29, 1997) (citing Restatement (Second) of Trusts, § 257). “If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust, unless the settlor manifested a different intention.” Restatement (Second) of Trusts, § 257. *Accord Belknap v. Belknap*, 5 Allen 468, 87 Mass. 468, 471 (1862) (estate in the hands of the trustee should be used to discharge the legacies of other beneficiaries before the disloyal trustee “can claim any part of it, if the estate has been diminished by a violation of his duties as trustee”); *Loring v. Baker*, 329 Mass. 63, 66 (1952) (rightful owner of misappropriated property entitled to “an equitable lien ... against property acquired in exchange for property wrongfully disposed of by the conscious wrongdoer”); *see also Seifert*, 6 Mass. L. Rptr. 410, 1997 WL 64043 *8 (citing same, awarding equitable lien to plaintiff-beneficiary on beneficial interest of disloyal trustee-beneficiary, to secure damages awarded to plaintiff).

At the conclusion of an accounting proceeding, the Court is empowered to terminate the trust and distribute the assets. “If one party holds property upon a trust for the benefit of both parties and both parties are entitled to a termination of the trust the judgment should, where necessary, provide for the liquidation of the trust res and its distribution.” 31 Mass. Practice, § 303, p. 457-58 (citing *Dimanno v. Dimanno*, 332 Mass. 709, 712 (1955); *Manganaro v. DeSanctis*, 351 Mass. 107, 112 (1966)).

The plaintiff’s claim for breach of trust against the defendants was timely filed because it was filed within months of the plaintiff’s “actual knowledge” that the defendants breached their fiduciary duties as trustees, *see Demoulas*, 424 Mass. at 518, and, therefore, well within the three-year statute of limitation for breach of fiduciary duty. G.L.c. 260, § 2A; *Jane Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 247 (2006). A cause of action for fiduciary breach does not accrue until those to whom the duty is owed have *actual knowledge* of the specific breach of fiduciary duties by the trustees. *See id.*

“Actual knowledge” is a subjective standard. *See Harbor Schools, Inc.*, 446 Mass. at 247. “Only when the beneficiary’s harm at the fiduciary’s hands has ‘come home’ to the beneficiary ... does the limitations clock begin to run.” *Id.* at 255. Moreover, it is specific knowledge that it is the fiduciary’s conduct that has caused the harm that must exist for the claim to accrue. “For the tort of fiduciary breach, we toll the statute of limitations until a plaintiff has ‘actual knowledge’ that she has been injured by the fiduciary’s conduct.” *Id.* at 254.

“Constructive knowledge is insufficient.” *Lattuca*, 442 Mass. at 213. “What a beneficiary ‘could have’ discovered by investigation is irrelevant to the analysis; *actual* knowledge is essential and constructive knowledge is insufficient.” *March v. March*, 62 Mass.App.Ct. 1109 at *2 (2004) (emphasis in original) (citing *Lattuca*, 442 Mass. at 213).

Here, the plaintiff did not obtain actual knowledge that the defendants had violated their fiduciary duties as trustees by misusing trust assets until, at the earliest, August of 1999, mere months before the filing of the complaint in December 1999. In February 1998, when the plaintiff's counsel wrote to the defendants inquiring about the status of the NDR Trust assets, he lacked actual knowledge of the defendants' misdeeds, as is evidenced by the fact that his letter makes no mention of it. Rather, the February 1998 letter states that the plaintiff "has been unable to obtain information about the assets and investments of the trust since it was established in 1983. Although Mr. Pantazis has continually requested this information from the trustees he has only been informed that the trust's initial assets have been depleted. Request is hereby made for a detailed accounting of the assets, expenses, and investments of New Deal Realty Trust since 1983." This letter is consistent with the allegations of the complaint, which alleges that "[f]rom 1983 until late last month, however, the Trustees provided Paul Pantazis with no information about these transactions." To the extent the defendants base their contention that Paul had actual knowledge of their fiduciary breaches in the early 1990s upon the allegations of the complaint, their argument fails because the complaint reveals no such actual knowledge on his part. The fact that Paul "overheard that 104 Coolidge had been mortgaged" in 1992 does not amount to knowledge of a fiduciary breach. As the remaining allegations of the complaint make clear, Paul repeatedly demanded detailed information concerning NDR Trust from the Trustees, and the Trustees refused to accommodate his request. On or about August 16, 1999, three days following a second letter from the plaintiff's counsel to counsel for the Trustees demanding an accounting of the activities of NDR Trust, the defendants responded by serving eviction papers on Plaintiff.

At various points during the trial, the defendants alleged that they obtained the consent of their mother, Sophia Pantazis, to engage in the self-dealing transactions herein at issue, prior to doing so. Sophia Pantazis was a co-settlor of NDR Trust but has never been a Trustee nor a beneficiary of the trust. The declaration of trust does not indicate that either settlor retained any authority whatsoever over the disposition of the assets of the NDR Trust. Rather, the declaration of trust is clear that the defendants are the sole trustees for NDR Trust, and further that the Trustees have "full power, authority, and discretion" over the disposition of the assets of NDR Trust, subject of course to their duties as fiduciaries to act in the interest of the beneficiaries.

Parol evidence as to the intent of the settlor to retain control over the trust property is inadmissible to the extent it contradicts the express terms of a written declaration of trust. See *Mickelson v. Barnet*, 15 Mass.App.Ct. 918 (1983) (rescript). In *Mickelson*, settlors of a trust offered evidence that their intentions as to how the trust property should be disposed was contrary to the provisions of the declaration of trust. See *id.* The Court refused to consider the parol evidence of the settlors' intent, stating: "Even if we were to consider the stipulation as to the parties' intent, but see Restatement (Second) of Trusts §§ 38(2) and 164, Comment (e) (1959), such evidence cannot negate the explicit language of paragraphs 1 and 5 [of the declaration of trust] without putting an 'impossible strain on the words used.'" See *id.* (quoting *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 851 (1973)).

"If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust *is not inadmissible because of the Statute of Frauds, the parol evidence rule, or some other rule of law.*" Restatement (Second) of Trusts § 164, comment (e) (emphasis added).

"If the owner of property transfers it inter vivos to another person by a written instrument in which it is declared that the transferee is to hold the property upon a particular trust, *extrinsic evidence*, in the absence of fraud, duress, mistake or other ground for reformation or rescission, *is not admissible to show that he was intended to hold the property upon a different trust or to take it beneficially.*" Restatement (Second) of Trusts § 38(2) (emphasis added). While the settlor could have retained some element of control over the disposition of the trust assets, *see generally* Restatement (Second) of Trusts § 37 (comment a), any evidence that the settlors so intended is contrary to the express terms of the declaration of trust and is thus barred. See *Mickelson*, 15 Mass.App.Ct. 918; Restatement (Second) of Trusts §§ 38(2) and 164, Comment (e). The fact that the Trustees' mother, as co-settlor, consented to the Trustees' self-dealing use of the trust assets and funds, is immaterial because the declaration of trust is clear that the Trustees shall be exclusively responsible for managing the trust property for the benefit of the beneficiaries; there is no provision under which the trustees may act solely in their own interest in the event they obtain the consent of the settlors.

ORDER

Judgment to enter for the plaintiff as follows:

(1) The defendants have failed to account for \$578,779 of funds that should be in the possession of New Deal Realty Trust (the "Trust"). The defendants Alice Tsourides and John Pantazis are jointly and severally liable for this amount and are Ordered to pay this amount to the Trust.

(2) The defendants are enjoined from taking any action as Trustees of the New Deal Realty Trust that would impair the judgment or impair or reduce the value of the New Deal Realty Property.

(3) Alice Tsourides is liable to the Trust for the Trust's share of the profits earned by Marine USA, Inc. and its affiliate entities ("Marine USA"). The Trust is entitled to 50% of the profits generated by Marine USA between 1990 through the entry of judgment.

(4) Alice Tsourides is liable to the Trust for the Trust's 50% interest in the profits generated by Marine USA, as follows:

(a) For the period between 1990 and 1999, \$1,915,357 which equals 50% of \$3,830,714 (total cumulative cash flow between 1990 and 1999 with interest at T-Bill rates).

(b) For 2000, \$181,758 which equals 50% of the year 2000 cash flow.

(c) For 2001, \$226,266 which equals 50% of the year 2001 cash flow.

(d) For 2002, \$292,975 which equals 50% of the year 2002 cash flow.

(e) For 2003, \$335,797.50 which equals 50% of the year 2003 cash flow.

(f) For 2004, \$334,018 which equals 50% of the year 2004 cash flow.

(g) For 2005, \$397,222.50 which equals 50% of the year 2005 cash flow.

(h) For 2006, \$413,111.50 which equals 50% of the year 2006 cash flow.

(i) For the period after 2006, \$2,342,113, which equals 50% of \$4,684,226, the value as of 2006.

(5) Prejudgment interest shall run at the statutory rate of twelve percent (12%) per annum on all damages awarded hereunder.

(6) The plaintiff and the other non-trustee beneficiaries of the Trust, Charles Pantazis and Katherine Poly, have an equitable lien on the respective beneficial interests of Alice Tsourides and John Pantazis in the Trust, until this Judgment has been satisfied.

(7) The Trust shall be dissolved and the assets of the Trust liquidated and distributed in equal share (20% each) to the five beneficiaries in accordance with the provisions of the Declaration of Trust, Exhibit 1 at trial. Further proceedings shall be held with respect to the liquidation of the Trust assets. Alice Tsourides and John Pantazis shall only receive a distribution from the Trust after they have satisfied the equitable lien described above in paragraph 6.

(8) The plaintiff is awarded his reasonable attorneys fees and costs incurred in maintaining this action. A hearing shall be held to determine the amount of plaintiff's attorneys fees and costs. Plaintiff's attorneys fees and costs shall be paid from the Trust funds, shall be the first monies distributed from the Trust, and shall be distributed prior to division of the Trust proceeds among the beneficiaries.

Mass.Super.,2009.

Pantazis v. Tsourides

Not Reported in N.E.2d, 2009 WL 2603147 (Mass.Super.)