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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5924-09T1

HEDI MIZRACK a/k/a HEDI LEISTNER, GILBERT LEISTNER and NICHOLAS J. DELZOTTI, Chapter 7 Trustee,

Plaintiffs-Respondents/
Cross-Appellants,

v.

FAIRMOUNT CHEMICAL CO., INC., DAMOTA FAMILY PARTNERSHIP, CREDITRADE, INC. and AMPEZO BROTHERS, L.P., a Virginia Partnership or Trust,

Defendants,

and

JERREL BRANSON, individually and as parent and legal guardian of A. BRANSON, B. BRANSON, C. BRANSON and D. BRANSON, REIDAR T. HALLE and GLEN A. DAMOTA,

Defendants/Cross-
Respondents,

and

WILLIAM C. KALTNECKER,

Defendant-Appellant/
Cross-Respondent.

Argued January 9, 2013 - Decided January 25, 2013

Before Judges Axelrad, Sapp-Peterson and Haas.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-337-03.

James A. Scarpone argued the cause for appellant/cross-respondent (Scarpone & Vargo, L.L.C., attorneys; Mr. Scarpone, of counsel and on the brief; Meghan O. Murray, on the brief).

David H. Pikus argued the cause for respondents/cross-appellants (Bressler, Amery & Ross, attorneys; Mr. Pikus, on the brief).

Arthur P. Zucker argued the cause for cross-respondent Reidar T. Halle (Ferro Labella & Zucker, L.L.C., attorneys; Mr. Zucker, of counsel and on the brief; Russell T. Brown, on the brief).

PER CURIAM

This appeal arises from a derivative action by two shareholders against the officers and directors of Fairmount Chemical Co. (Fairmount), and related entities. The shareholders, plaintiffs Hedi[1] and Gilbert Leistner, initially sued Fairmount and one of its officers, defendant William Kaltnecker, for damages and an order directing them to comply

[1] Hedi Leistner was known as "Hedi Mizrack" when the complaint was filed.

with document requests. Plaintiffs later amended their complaint to add other defendants and to allege additional counts such as breach of fiduciary duty and misappropriation of corporate opportunities. Fairmount's Chapter 7 bankruptcy trustee subsequently joined plaintiffs in the action.

Following a fourteen-day bench trial, Judge John C. Kennedy found that defendants Jerrel Branson and Reidar Halle had breached their fiduciary duties, and awarded damages. The judge dismissed the allegations against defendants Kaltnecker, Glen A. DaMota, and the DaMota Family Partnership (DFP). The judge denied counsel fees to all parties except for an award of $100,000 in favor of Kaltnecker against Fairmount only.

Kaltnecker appeals from the court's decision to limit his fee award. Plaintiffs cross-appeal, arguing the judge erred by failing to find Kaltnecker and DaMota liable; awarding Halle a setoff for damages and failing to find him also liable for additional sales of Fairmount's products; limiting damages against Branson; and dismissing their expert's opinion on valuation. After reviewing the record in light of the contentions advanced on appeal, we affirm, substantially for the reasons set forth in the oral opinions of Judge Kennedy.

I.

A.

Fairmount, a New Jersey corporation established in 1938, engaged in the manufacture and sale of specialty and fine organic chemicals. Its offices and plant facilities were located in Newark. Fairmount's major products and their markets included imaging and photographic chemicals used in the manufacture of photographic film, television picture tubes, and medical imaging products; hydrazine-based products used for corrosion control in commercial boilers and power generating systems; plastic additives used in products made from various plastic resins and polymers; and specialty chemicals used in the pharmaceutical and agricultural industries.

Plaintiffs Hedi and Gilbert Leistner are the children of William Leistner, a chemist and entrepreneur. Together with his partner, Olga Knoepke, William decided to purchase Fairmount in 1982. William asked his other son, Howard, to evaluate Fairmount. Howard, who was a chemical engineer, concluded the investment was a "terrible" idea because Fairmount's product line lacked innovation, its manufacturing processes were old-fashioned, it failed to adapt to new technologies, and its agricultural and photographic products served dying markets. Howard also found that the physical facilities were extremely

rudimentary, the instrumentation was nonexistent, and the quality of the personnel was poor.

Nevertheless, William and Knoepke went ahead with the purchase. In their first year, the company lost $1,736,300. It continued to have financial problems in the years that followed. Each year, William and Knoepke lent money to Fairmount to make its books look better. By the early 1990s, however, Fairmount's stock was valued at only five or six cents a share.

William died in 1993. By that date, he had advanced Fairmount over $15 million. His common stock was valued at about $230,000 and his preferred stock at about $180,000.

On May 31, 1994, Fairmount filed a restated certificate of incorporation which, among other things, included an indemnification provision for its directors and officers, limiting their personal liability to the "fullest extent permitted by corporation law." At this time, the company was being directed by individuals who had worked with William in the past. Hedi's former husband, Richard Mizrack, served on the board and as the company's general counsel during this period. He described Fairmount as "a very sick company," which had been kept on "life support" by the loans provided to it by William and Knoepke.

In 1997, William's estate was settled and control of Fairmount passed to plaintiffs and Howard.[2] Plaintiffs each owned approximately 19.3 percent of Fairmount's common stock and one-third of the preferred shares. They held these shares for investment purposes, and were not materially involved in the company's operation or management. Plaintiffs were also the recipients of two promissory notes valued at $216,000 and $163,866.67, which were initially issued to a trust and later made payable to them.

By this time, Knoepke had also passed away, and her interest was inherited by her nephew, defendant Glen DaMota. DaMota owned approximately twenty-four percent of Fairmount's stock, and was the beneficiary of a promissory note valued at $142,600. DaMota, his father, his brother, and his sister formed DFP to hold their Fairmount shares and notes.

Fairmount continued to lose money. In 1997, Halle was hired by Richard as a consultant. He concluded the business was in terrible condition with an inefficient facility. In 1998, Halle became Fairmount's president and chief executive officer (CEO). In July 1998, Fairmount hired Kaltnecker as its controller.

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[2] Howard was not a party to this litigation.

The company continued to decline. In 1998, the cost of hydrazine raw material increased by twenty percent and the company lost forty percent of its European sales. It was not able to meet new product specifications set by one of its largest customers, Bayer Germany. New standards for hydrazine storage caused Fairmount to pay more to transport and store it. In 1999, a fire destroyed equipment and part of the roof of a production building. In 2001, the company lost over $4 million. Another large customer, Polaroid, filed for bankruptcy.

In June 2001, Kaltnecker was elected Fairmount's treasurer. In August 2001, the company stopped sending note holders interest checks on their promissory notes. It laid off fifty percent of its remaining production staff and terminated two management employees.

In September or October 2001, Richard asked Branson to review Fairmount's operations and cash status. Richard knew Branson because they were partners in a bio fuel business called Hudson Bio Systems, L.L.C. (Hudson). Branson believed Fairmount had serious financial problems, but that it might be able to avoid bankruptcy if it could market its technologies and real property.

On January 12, 2002, Fairmount hired Branson to produce a more in-depth analysis. He was paid $3,000 per week. Ten days

later, the board passed a resolution naming Branson as Fairmount's director. In March 2002, Branson became the CEO. From that point forward, Branson, rather than Kaltnecker, made all the decisions about what bills to pay. Halle continued as the company's president.

Branson developed a business plan and operating perspective. He and DaMota negotiated with Fleet Bank to retain Fairmount's credit line, worked with trade creditors to pay off debt, reduced staff, investigated less expensive manufacturing locations and alternative supplies of raw materials, and explored tolling and licensing agreements with other companies to make and market Fairmount's products. Halle continued at the company and worked unsuccessfully with several companies to develop new products for Fairmount. At Branson's suggestion, Halle also conducted research into the use of bio diesel as fuel to improve Fairmount's product additives. Although this research was not fruitful, it allowed the company to claim a $400,000 State tax break.

Between December 31, 2001 and March 31, 2002, the New Jersey Department of Environmental Protection (DEP) began investigating whether Fairmount had caused or contributed to contamination detected at a Newark landfill and whether it had violated the Air Pollution Control Act, N.J.S.A. 26:2C-1 to

-25.2 (APCA). Halle retained an environmental attorney and an environmental consultant to assist in responding to DEP's concerns. On September 20, 2001, DEP fined Fairmount $30,080 for installing and modifying equipment without the required air quality permits and for failing to maintain required records. DEP also ordered Fairmount to obtain the required permits.

By June 2002, due to resignations and the completion of the terms of other board members, Branson, Halle and DaMota were the only remaining Fairmount board members. Fairmount filed a form 10-Q statement with the Securities and Exchange Commission stating the company was losing money and could not "predict its short-term future prospects." The company also reported that it was possible it would need to declare bankruptcy, particularly if its promissory note holders demanded payment. Fairmount also reported that DEP was investigating the plant and had already imposed monetary penalties.

On August 26, 2002, DEP filed a complaint and order to show cause alleging Fairmount had failed to comply with its September 2001 order to obtain permits. On that same date, the trial judge temporarily restrained Fairmount from operating equipment that emitted hydrazine. Fairmount subsequently reduced its operations to just three product lines and, on September 3, 2002, it entered into a consent order to remove the hydrazine

from the Newark facility. By December 2002, Fairmount was in substantial compliance with the APCA and had closed its facility in Newark and surrendered all its air permits.[3]

In August 2002, Fairmount laid off additional employees. It was unable to retain an independent accountant to assist it in preparing its form 10-Q at the end of September 2002.

During the spring and summer of 2002, Fairmount attempted to negotiate a sale of its real property to two separate companies. Under Fairmount's proposal, plaintiffs and Howard would convey their shares and promissory notes in return for $297,486. However, neither deal materialized.

Branson continued to devote time to Hudson. In partnership with Smithfield Foods in Virginia, he also created a new bio fuel company called Best Bio Fuels, L.L.C. On behalf of Smithfield Foods, Branson also worked in Utah and Texas on other projects. In February 2003, Branson accepted a full-time position as president of Best Bio Fuels, with an annual salary of $100,000. From that point forward, the time he spent on Smithfield Foods' business increased.

In April 2003, Branson advised plaintiffs, Howard and DaMota that Fairmount had become a "'virtual' manufacturing

[3] In an April 15, 2004 consent order, Fairmount agreed to pay a penalty of $227,500 to resolve its litigation with DEP.

company" due to DEP's actions. He believed the company's best strategy was to sell Fairmount's property, facility, and equipment and enter into tolling agreements with other companies to manufacture Fairmount's products. Branson negotiated a mortgage on the property and used the proceeds to pay property taxes, fund the company's pension obligations, pay some creditors and pay environmental legal and consultant bills.

On May 29, 2003, Morris Realty Associates (Morris Realty) agreed to buy Fairmount's site for $3.5 million. Fairmount, however, would be responsible to perform environmental remediation and demolition of any buildings required for the cleanup. Morris Realty also agreed to loan $1.6 million to Fairmount. The company's shareholders, including plaintiffs, approved the sale. Fairmount used the loan to pay money owed to Fleet Bank and trade creditors. Branson also instructed Kaltnecker to use some of the funds to pay interest to the note holders. DaMota received approximately $24,000 in full payment of his interest. Plaintiffs, however, only received partial payments.

As a condition of closing, Fairmount agreed to remove equipment and dispose of chemicals on its site. Branson estimated it would cost hundreds of thousands of dollars to remove the hazardous chemicals. On June 20, 2003, in an effort

to reduce inventory, Branson granted Halle the non-exclusive right to produce products using Fairmount's various technologies and to sell chemicals in the company's catalogue[4] directly to end-users. Halle would be permitted to keep ninety percent of any profit from these sales, with Fairmount receiving ten percent.

In August 2003, Halle shipped nineteen pallets of Fairmount's chemicals to an outside company for storage. Between January 2004 and January 2006, Halle sold almost all of these chemicals. Halle made these sales through a separate company he had created called Norse Associates, Inc. (Norse). Halle received $147,044.95 from these sales, and claimed he received a profit of $105,414.85. The judge subsequently "rounded" this figure to $105,414.

In September 2003, Fairmount stopped paying salaries to its officers. Kaltnecker left the company in November 2003. Halle stopped working on April 1, 2004. He claimed Fairmount owed him "about $69,993.24 or something" in salary at that point, plus approximately $72,000 in expenses.

In October 2003, plaintiffs filed a complaint against Fairmount and Kaltnecker alleging breach of contract and failure

[4] The only chemical Halle was not permitted to sell was "Mixxim BB100."

to produce corporate documents to them. On May 19, 2004, plaintiffs filed an amended complaint adding Branson, Halle, DaMota and DFP as defendants. This ten-count complaint alleged breach of contract, corporate misconduct by officers and directors, misappropriation of corporate opportunity, unjust enrichment, and spoliation of documents.

With regard to discovery, plaintiffs went to Fairmount's offices on October 30, 2003 to inspect documents. Kaltnecker attempted to retrieve all the documents they sought, but he was unable to do so. Over the next month, Kaltnecker, Halle and Branson located more documents, including tax returns. All of the documents were placed in an empty office. In November 2003, representatives of the New Jersey State Auditors went to Fairmount to review certain documents and, in December 2003 or January 2004, representatives of its pension board removed personnel files. These files were never returned. Kaltnecker went back to Fairmount several times after that to look for more documents to respond to plaintiffs' requests.

On June 2, 2004, the Fairmount board passed a resolution allowing Halle to sell Fairmount's products and retain seventy percent of the profits. Halle denied ever seeing this resolution or agreeing to its terms. The next day, he and

Branson signed an agreement that authorized Halle to sell the products and retain one hundred percent of the profit.

On August 26, 2004, the trial court appointed William Wallach as a special fiscal agent to preserve Fairmount's assets and to monitor and approve its expenses and operations. Plaintiffs and Wallach went to the Fairmount offices and found papers "all over the place," along with evidence of a break-in. Some file cabinet drawers were open and others were empty.

The real estate closing with Morris Realty did not go well. Fairmount failed to submit an acceptable remediation plan to DEP, defaulted on its mortgage and failed to pay real estate taxes after July 2003. Morris Realty eventually took title to the property through a foreclosure action. Morris Realty assumed responsibility for the site cleanup and demolition work and spent approximately $5.5 million on cleanup expenses, water and sewer charges, and taxes.

On January 10, 2007, Halle, Branson, DaMota and others signed an involuntary petition in bankruptcy against Fairmount. On September 26, 2007, plaintiffs and the interim bankruptcy trustee executed a case funding and management agreement which permitted the State court action to continue during the pendency of the bankruptcy action. The trustee testified that Fairmount received $200,000 from the sale of its real estate in December

2007 and $2,000 from the sale of hydrazine "totes," which had been used to transport its products to customers. The company had no other assets or income stream.

Plaintiffs' expert, James Lofredo, opined that Fairmount was worth $6 million as of December 31, 2001. In rendering this opinion, Lofredo reviewed annual financial statements and auditor's opinions filed with the SEC on form 10-K, and quarterly statements filed on form 10-Q. He also reviewed internal documents, including the company's April 2002 draft business plan, its federal income tax return as of December 30, 2000, and an outside assessment on the value of the company's property, plant, and equipment.

Lofredo discussed his methodology and findings regarding the fair market value of Fairmount and its worth on a liquidation basis. He used traditional methodologies to value the business, explaining:

> I looked at transactions that had actually taken place in the marketplace around that time in the chemical industry, as well as what other publicly-traded chemical companies were trading at at that time. That was a market-based approach.
>
> I — I also looked at the company using a[n] income methodology; whereby, I . . . looked at the company's historical performance and then what the company was projecting in the way of — of its future performance and derived a value . . . in — using that data as well.

. . . .

> The final — the final methodology that I used was looking at the — what the company might be worth using an asset-basis approach. And, under that approach, it was looking at the assets of the company, what they were — what they were worth on a net-tangible book-value basis, and then what they might be worth on a replacement-value basis, as if someone wanted to enter this business, what they would have to invest if they were going to go out and buy all the plant equipment.

Lofredo recognized, however, that a commodity chemical business like Fairmount went through "peaks and valleys," and that at the time of his valuation it was in a downturn. Nonetheless, he believed Fairmount had a viable business plan and competent managers who identified a course of action to address the company's shortcomings. Lofredo said that he followed "common practice" in preparing his report, but acknowledged that he did not utilize any published standard.

By contrast, Frank Beck, Halle's expert on business valuations, testified that there were published standards for business appraisers to follow when conducting evaluations. He referred to Revenue Ruling 5960 as the "bible of business evaluation," and also mentioned the Uniform Standards of Professional Appraisal Procedures (USPAP) and the American Institute of Certified Public Accountants (AICPA) Standards for

Business Appraisals. He described all three standards as similar, and stated that, in his opinion, an evaluator could not reach a conclusion without following one of them. Beck, who reviewed Lofredo's report, believed Lofredo did not follow the AICPA guidelines in principle.

In Beck's opinion, Lofredo's report did not accurately reflect Fairmount's value. Beck explained that Lofredo ignored the fact that shares of Fairmount were being traded "over-the-counter;" he did not include a discount for marketability; and he valued the assets without considering liabilities. Moreover, whereas the general rule was not to consider events beyond the valuation date, Beck noted that AICPA guidelines called for disclosure of subsequent significant events in a separate section of the report to keep users informed and make the valuation meaningful. Lofredo, however, did not take into account the fact that Fairmount ceased operations in 2002. Beck also noted that Lofredo relied on Fairmount's draft business plan without considering its past earnings.

Using Fairmount's annual reports and tax returns, Beck calculated its operating earnings and losses between 1979 and 2001. He determined that Fairmount suffered losses every year except 1979, 1994, 1995, and 1998, and that its overall operating loss was $25,277,093. On cross-examination, Beck

acknowledged that he did not consider depreciation in his calculations, that he was unfamiliar with the chemical industry, and that he primarily valued companies in connection with tax returns.

Raymond Dalmaso, Senior Vice President of Operations at Industrial Appraisal Company, testified on behalf of plaintiffs about his company's original appraisal of Fairmount in 1995, and a re-valuation summary dated September 1, 2000. The appraisal was undertaken for insurance purposes, not market valuation. The total insurable value was $14,832,870, including $4,468,914 for the buildings and $10,363,956 for the equipment. This value represented the costs of replacement, less observed depreciation. The appraisal did not consider whether the company was profitable, whether there were outstanding liens on the property, or whether the company was facing a costly environmental cleanup.

B.

Over the course of the fourteen-day trial, Judge Kennedy heard testimony from twelve witnesses, considered hundreds of documents, and thousands of additional pages of deposition testimony. On October 9, 2009, he rendered a lengthy oral opinion setting forth his findings of fact and conclusions of law.

Judge Kennedy found that Fairmount was insolvent and nonviable since at least December 31, 2001 and probably for many years before that. He further found that none of the individual defendants had caused or hastened the company's demise, although Branson and Halle did not meet all of their obligations to the company.

The judge did not find any evidence of misconduct by either Kaltnecker or DaMota. Although Kaltnecker served as controller, the judge found that, after January 2002, Branson determined what bills should be paid. Kaltnecker did not disclose the DEP administrative order in company audits prior to June 2002, but the judge found his failure to do so did not constitute misconduct or proximately cause any damage to plaintiffs. The judge also found that while DaMota merely had the misfortune of being "the board chair at the time the music finally stopped[,]" DaMota "went above and beyond the duty that would be required by a board member by assisting Mr. Branson in negotiating the forbearance, negotiating with Fairmount, [and] helping in the sale of the net operating losses" for a tax benefit.

The judge found plaintiffs had failed to demonstrate that Halle's actions were a proximate cause of DEP's decision to shut down the plant. Halle had retained counsel and an expert to respond to DEP's charges.

However, the judge found that Halle should not have sold Fairmount's products for his own profit while he was still the president of the company. The judge rejected Halle's argument that he was "helping" Fairmount by disposing of the hazardous substances. Halle received net profits of $105,414 from these sales, which the judge found occurred "at a time when Fairmount needed the undivided loyalty of its employees to marshal its assets during its liquidation process." The judge also rejected the argument that Branson had suggested and approved the arrangement, explaining that Halle had an independent obligation as an officer and member of the board to observe all requirements of loyalty and fair dealing.

At the same time, however, the judge noted that Halle dedicated many months of uncompensated service to Fairmount. The judge also found that Halle sold chemicals that had already been produced by Fairmount at a time when the company was insolvent. If the chemicals had not been sold, the company would not have received anything for these materials. Thus, the judge concluded that Halle did not usurp any corporate opportunity that Fairmount was otherwise capable of exercising.

Accordingly, the judge exercised his equitable power to apply the $105,414 Halle had received from the chemical sales as an offset to the $101,992.24 in unpaid salary and expenses still

owed to Halle. Thus, the judge entered judgment against Halle and in favor of plaintiffs for $3,421.11.[5]

The judge found that Branson had discharged his obligation of advising the board and plaintiffs about Fairmount's status and that he tried to do what was possible to address the company's rapidly failing status. As with Halle, the judge concluded that the business judgment rule precluded Branson from being held liable for the decisions he made while he was CEO.

However, the judge found that Branson violated his duty of loyalty when he accepted full-time employment with Smithfield Foods in March 2003 after he had already assumed the full-time position of CEO at Fairmount. While the evidence showed that the Fairmount board knew Branson was employed by Smithfield Foods, the judge concluded that Branson could not work both jobs on a full-time basis.

The judge determined that the only fair measure of damages for Branson's divided loyalties as of March 2003 was the disgorgement of any fees he received from that date through September 2003, when Fairmount stopped paying salaries. Because Branson received $3,000 per week for each of these twenty-eight

[5] This amount was incorrect and the correct amount due plaintiffs should have been $3,421.76. However, no party has raised this de minimus mathematical error as an issue and we therefore decline to modify the judgment.

weeks, the judge entered judgment against Branson for $84,000. The judge also held that Branson was not entitled to a setoff credit because his work at Smithfield Foods provided no benefit to Fairmount. Finally, the judge found no evidence that defendants "hid, destroyed or failed to produce any documents otherwise in their control and in existence." The judge's rulings were memorialized in an order filed on October 22, 2009.

In a May 28, 2010 order, the judge denied plaintiffs' motion for reconsideration, and plaintiffs', Halle's and DaMota's motion for counsel fees. After reviewing the attorney bills submitted by Kaltnecker, the judge granted him $100,000 in counsel fees against Fairmount only. On July 16, 2010, the judge denied Kaltnecker's motion for reconsideration. This appeal and cross-appeal followed.

II.

In their cross-appeal, plaintiffs raise the following points for our consideration:

> I.
> KALTNECKER SHOULD BE LIABLE FOR FALSE FINANCIAL FILINGS AND STATEMENTS AND OTHER FAILURES.
>
> II.
> HALLE SHOULD NOT HAVE RECEIVED A SETOFF.
>
> III.
> THE COURT ALSO FAILED TO ADDRESS ADDITIONAL SALES MADE ILLEGALLY BY HALLE.

IV.
DaMOTA IS LIABLE AS A DIRECTOR.

V.
THE COURT'S FINDING ON DAMAGES IS MANIFESTLY UNSUPPORTED AND INADEQUATE.

In his appeal, Kaltnecker has raised the following contentions:

I.
THE TRIAL COURT MISAPPLIED THE "REASONABLE CAUSE" STANDARD UNDER [N.J.S.A. 14A:3-6].

a. The trial court interpreted the phrase "brought without reasonable cause" too narrowly.

b. The Policies behind [N.J.S.A. 14A:3-6].

c. The Lawsuit Against Kaltnecker Was Brought and Maintained Without Reasonable Cause.

II.
THE TRIAL COURT IMPROPERLY REDUCED KALTNECKER'S FEE AWARD.

a. The trial court did not properly consider the factors set forth in R.P.C. 1.5(a) in determining Kaltnecker's indemnification award.

(i) The trial court's determination of the reasonable number of hours was flawed.

(ii) The trial court's determination of a reasonable hourly rate was flawed.

(iii) The trial court did not consider any of the factors for enhancement of the lodestar fee.

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review[.]" Seidman v. Clifton Sav. Bank, 205 N.J. 150, 169 (2011). "'[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" In re Trust Created by Agreement Dated December 20, 1961, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). The court's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

To the extent that Judge Kennedy's rulings in this case implicate equitable principles, we also bear in mind that appellate courts are generally reluctant to interfere with the exercise of judgment by a court of equity. We accord considerable deference to the discretion of the judges who make such equitable rulings. Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354 (1993). "[A] judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of

fairness, justice and the law." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

By comparison, we review the trial court's determinations on legal issues de novo. A trial judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to an special deference." Manalapan Realty v. Twp. Comm., 140 N.J. 366, 378 (1995).

Applying these well-established standards of review here, we discern no basis to set aside the trial judge's final judgment.

A.

Plaintiffs argue the judge erred by failing to find Kaltnecker liable for filing false financial statements and to assess damages against him for discovery violations. We disagree.

There was ample evidence in the record to support the judge's finding that Kaltnecker was blameless for Fairmount's demise and how it wound up its affairs. Kaltnecker was the company's treasurer. After January 2002, however, Branson was responsible for determining what bills to pay. Therefore, the judge was unable to find that Kaltnecker's actions contributed to Fairmount's deterioration. There was simply nothing in the

record to suggest that Kaltnecker neglected or failed to perform his assigned duties.

While Kaltnecker did not specifically mention the DEP administrative order in the SEC filings prior to March 31, 2002, these documents did disclose that DEP was investigating whether any of Fairmount's materials had caused or contributed to contamination at a Newark landfill. In addition, the June 30, 2002 and September 30, 2002 SEC filings specifically addressed the environmental investigation, the administrative order, the consent order Fairmount had entered with DEP and the possibility the company would be fined. The judge found no evidence in the record to support a finding that Kaltnecker filed these reports in bad faith or for personal advantage. In addition, there was no evidence that Kaltnecker's failure to report the DEP action earlier caused any damage to Fairmount or plaintiffs. See Seidman, supra, 205 N.J. at 176 (in a damage action, a person challenging the conduct of a director or officer must prove that there was a breach of the duty of care, and that the breach was the legal cause of the damage suffered by the corporation).

Kaltnecker continued to work for Fairmount without compensation from September to November 2003. He later returned to complete certain projects and attempt to retrieve documents for plaintiffs. With regard to discovery, there is ample

evidence in the record to support the judge's finding that Kaltnecker had not "deliberately obstructed discovery" as plaintiffs alleged. Plaintiffs presented nothing to indicate that Kaltnecker hid, destroyed, or failed to produce any documents and the judge properly described plaintiffs' claims to the contrary as "vague and rife with conclusion rather than fact."

The judge found that, when plaintiffs filed their complaint in 2003, Kaltnecker "did what he could to marshal documents," and that "much else had been taken by others, including the pension board and the New Jersey State auditors and were never returned." The judge explained:

> Also it has to be remembered that when this lawsuit was commenced essentially most of the administrative personnel and sales personnel at Fairmount had been discharged or left the corporation. In essence what was left was Mr. Branson, Mr. Halle, and Mr. Kaltnecker. The corporation was in a state of disaster. It ha[d] been shut down by the DEP. It was no longer manufacturing. It had some tolling arrangements but no satisfactory evidence had been produced that that tolling arrangement produced any profits.
>
> The records of the corporation had been gone through by a number of people. There had been a break-in of the corporation and there's no showing that records were actively destroyed or hidden by any of the defendants in this case.

We discern no basis for disturbing these well-supported findings.

B.

The judge found that Kaltnecker was entitled to counsel fees against Fairmount pursuant to N.J.S.A. 14A:3-5(2)(a), which grants corporations the "power to indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such a corporate agent" if the "agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." Acting pursuant to this provision, Fairmount's restated certificate of incorporation stated:

> Fairmount shall to the fullest extent permitted by N.J.S.A. 14A:3-5 of the corporation law indemnify any and all persons who[m] it shall have the power to indemnify against all expenses, liabilities, or other matters. And the indemnification provided shall not be deemed exclusive of any other rights which a person may be entitled to by virtue of any bylaw agreement or vote.

The judge found that Kaltnecker was a "corporate agent" covered by the statute and was entitled to indemnification for the cost of his defense to the claims asserted against him. The judge further found that, pursuant to the case funding

management agreement entered in the bankruptcy court, Fairmount, rather than plaintiffs, was responsible for this obligation.

Kaltnecker sought $341,319.35 in fees, representing 1,348 hours of work on his behalf. The judge examined all of the billing records and, in a comprehensive analysis placed on the record on May 27, July 16 and September 9, 2010, he reduced the hours to 500 hours and the fees to $100,000. The judge explained:

> And that sum of money is derived . . . by looking at the bills for services rendered on [Kaltnecker's] behalf in the amount of 1,348 hours[,] reducing that figure to 500 hours and reimbursing a blended rate for Ms. Murray and Mr. Scarpone [Kaltnecker's attorneys] at $200 per hour, which the court finds is extremely modest for this type of arrangement.

Specifically, the judge considered the factors set forth in RPC 1.5(a) and determined that a number of hours should be eliminated from the bill because they (1) occurred prior to November 8, 2008, the date the judge denied Kaltnecker's motion for summary judgment; (2) were duplicative to some degree; or (3) were capable of being done in a more expeditious manner. The $200 per hour rate was a "blended" rate based upon the time spent by a partner, an associate and a paralegal on the file.

In the bankruptcy action, Kaltnecker negotiated a settlement with the trustee under which he would be paid $30,000

rather than the $100,000 Fairmount owed him under Judge Kennedy's decision. By accepting these funds, plaintiffs argue that Kaltnecker waived his right to pursue any further recovery against the corporation. We disagree.

On October 5, 2010, a notice of settlement was filed in the bankruptcy court announcing the settlement. The notice advised any creditor or other party in interest to file a written objection to the settlement. There is nothing in the record to indicate plaintiffs ever filed such an objection.

In addition, the notice specifically stated that, in agreeing to the settlement, "Kaltnecker is in no way waiving any claims he may be asserting against [Hedi Leistner] and Gilbert Leistner." Thus, by its express terms, the settlement did not preclude Kaltnecker from pursuing his request in this appeal for additional fees. "A party may accept the sum to which he is in any event entitled and still pursue a request for a determination on appeal which would increase that sum." Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604, 609 (App. Div. 1987) (rejecting contention "that defendants, having executed upon and obtained satisfaction of the judgment . . . [were] estopped from pursing [an] appeal" for additional attorneys' fees), certif. denied, 109 N.J. 484 (1987). Therefore, we reject plaintiffs' contention that Kaltnecker's

settlement with the bankruptcy trustee precluded his appeal for additional counsel fees.

In his appeal, Kaltnecker asserts the judge erred by limiting his counsel fee award. This argument lacks merit.

A court may award fees in all cases where they are permitted by statute. R. 4:42-9(a)(8). We will disturb the trial judge's award of fees only "'on the rarest of occasions, and then only because of a clear abuse of discretion.'" Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)(quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

Kaltnecker first argues the judge erred in reducing the number of hours his attorneys expended on the case after November 8, 2008. He claims his counsel had already eliminated 93.6 hours spent by an associate to avoid duplication and the judge eliminated these hours a second time when he determined to allow 500 hours. However, Kaltnecker did not submit any documentation to support this claim and the record on appeal does not contain a copy of his attorneys' certification of counsel fees to verify it. Judge Kennedy went over the bills virtually line-by-line on September 9, 2010 and there is nothing in the transcript to indicate he double-counted any eliminated hours.

Kaltnecker next argues the judge failed to consider certain factors outlined in RPC 1.5(a), including the degree of success obtained and the skill required to litigate the matter. However, while the judge did primarily focus on the time and labor required to perform certain tasks, he gave specific reasons for each and every reduction in hours he made. See Rendine, supra, 141 N.J. at 335 ("[h]ours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary"). The judge made his findings after reviewing all of the bills for services submitted by Kaltnecker's attorneys. See Aquino v. State Farm Ins. Co., 349 N.J. Super. 402, 417 (App. Div. 2002) (noting that a court should carefully review affidavits of services to determine whether the time asserted for particular services is reasonable). We discern no abuse of discretion with respect to the judge's determination of the hours reasonably expended on Kaltnecker's behalf.

We also do not believe the judge abused his discretion in determining that a blended rate of $200 per hour was appropriate. The judge assessed the skill and experience of the attorneys and staff assigned to this case and was satisfied, as are we, that the hourly rate was fair, realistic, and accurate. Rendine, supra, 141 N.J. at 337.

Kaltnecker argues the judge should have ordered a fee enhancement, using the lodestar analysis in Rendine. That analysis, however, is employed only when there is a statutory fee-shifting provision. Walker v. Giuffre, 209 N.J. 124, 129-30 (2012). N.J.S.A. 14A:3-5 is not a fee-shifting statute and was not intended to be an attorneys' fee statute. Cohen v. Southbridge Park, Inc., 369 N.J. Super. 156, 174 (App. Div. 2004). Rather, it is intended "to provide indemnification to protect persons who exercise binding managerial authority and discretion on behalf of a corporation in matters involving third parties." Ibid. Thus, the Rendine doctrine permitting trial courts to enhance counsel fees in fee-shifting cases does not apply here.

Finally on the topic of counsel fees, Kaltnecker contends the judge erred by finding he was not entitled to counsel fees under N.J.S.A. 14A:3-6(2). That statute provides that, if the trial court finds "that the action was brought without reasonable cause," it "may require the plaintiff or plaintiffs to pay to the parties named as defendants the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action." Relying upon this provision, Kaltnecker argues the judge should have ordered that plaintiffs,

rather than Fairmount, bear responsibility for the payment of his counsel fees. We disagree.

Here, the judge found plaintiffs had "reasonable cause" to bring the action. The judge explained the case involved "a complicated set of facts requiring a thicket of findings by a trier of facts." While "having god's knowledge of the facts, it should have been apparent to those who brought the case that the case against [Kaltnecker] was the thinnest of thin reeds[,]" the judge could not find that plaintiffs proceeded in bad faith or in an unreasonable fashion. The judge concluded "it would have been difficult to have seen this before the trial because of the complexity of the proofs and the expansiveness of the proofs."

This was a complex case that took fourteen days to try and several months thereafter to brief and resolve. Under those circumstances, the judge found that plaintiffs could not have known their claims against Kaltnecker would ultimately be denied when they instituted this action. We defer to the judge's findings on this issue because they are based both upon the record and his "feel of the case." Rova Farms, supra.

Kaltnecker's alternate argument, that N.J.S.A. 14A:3-6(2) should be read to impose an obligation upon plaintiffs to continually assess their position and to decline "to maintain" any action once it is clear it is no longer "reasonable" to do

so, lacks merit. The plain language of the statute requires only that a plaintiff's action be "reasonable" at the time it is filed. We are bound by the words of the statute. O'Connell v. State, 171 N.J. 484, 488 (2002)(holding "[a] court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language"). Moreover, the judge specifically found that the outcome of the case against Kaltnecker did not become clear until after the trial. Thus, there was no basis for the judge to conclude that plaintiffs unreasonably "maintained" their action against Kaltnecker. We therefore reject Kaltnecker's contention on this point.[6]

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[6] Kaltnecker did not file the trial transcripts in support of his appeal and, on February 1, 2011, we granted plaintiffs' motion to dismiss Kaltnecker's appeal. Plaintiffs thereafter submitted the transcripts in connection with their cross-appeal. Kaltnecker then filed a motion to reinstate his appeal. We granted this motion on April 27, 2011 and noted that "[i]n the event that [Kaltnecker] prevails on appeal, the merits panel shall have the right to direct him to reimburse plaintiffs for transcript costs." In light of our resolution of the appeal and cross-appeal, we now order Kaltnecker to reimburse plaintiffs for fifty percent of the transcript costs. See Pressler & Verniero, Current N.J. Court Rules, comment 4 on Rule 2:5-3(d)(2013)(stating that this Rule "generally provides for payment for transcripts by all appellants").

C.

Plaintiffs next contend the judge erred by granting Halle a setoff for unpaid wages and unreimbursed wages. This decision, however, was firmly grounded in the record.

The judge found that Halle violated his duty of loyalty to Fairmount by selling its products during the liquidation process and attempting to retain the net profits. Although this arrangement had been approved by Branson, the judge determined that Halle was not permitted, as "a current or former officer and director of an ailing corporation to appropriate to himself such assets even if in some sense there was some benefit to the corporation in clearing the site of chemicals." The judge found that Halle had received net profits of $105,414 from these sales.

Nevertheless, the judge exercised his equitable power to apply a setoff to this figure. The judge explained:

> [A setoff is reasonable] because the Court is convinced that Halle dedicated many months of uncompensated service to Fairmount after the corporation could no longer pay him and such service was instrumental in some degree in enabling Fairmount to marshal enough funds to pay most of its creditors and other financial obligations.

Because Fairmount owed Halle $69,992.24 in salary and $32,000 in unreimbursed expenses, the judge ruled that the total amount due Halle, $101,992.24, should be subtracted from the $105,414 in

net profits Halle had received from the sale of the chemicals. The judge therefore entered judgment against Halle in plaintiffs' favor for $3,421.11.

We decline to second-guess the judge's disposition of this issue. A setoff involves "an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff's claim is based." Beneficial Fin. Co. of Atl. City v. Swaggerty, 86 N.J. 602, 609 (1981). A "setoff may be awarded for any amount to which the defendant is entitled." Ibid. Here, the judge fully explained the reasons underlying his decision to grant Halle the setoff. Although Halle should not have sold the chemicals, he was nevertheless entitled to his earned salary and unpaid expenses. Therefore, we perceive no error in the judge exercising his equitable powers to adjust the amount plaintiffs were due.

Plaintiffs also argue the judge erred by failing to find that Halle had improperly sold almost $1 million of Fairmount products, rather than the $147,044.95 in gross sales he testified about at trial. As the judge found, however, the record does not support plaintiffs' claim. The invoices supplied by Halle, upon which plaintiffs rely, were not clear as to what products were actually sold and when these sales occurred. Therefore, the judge found that plaintiffs failed to

prove that these alleged additional sales involved Fairmount products, that the products were sold to Fairmount customers, or that the sales usurped any corporate opportunity that Fairmount was capable of exercising. This finding is amply supported by the record and there is no reason to disturb it. Rova Farms, supra.

D.

Plaintiffs contend the judge erred by failing to find that DaMota[7] violated his duty as a director to detect and prevent illegal conduct. Again, we disagree.

All directors have a duty to manage the business and affairs of the corporation and to take reasonable means to prevent illegal conduct by co-directors. Francis v. United Jersey Bank, 87 N.J. 15, 34 (1981). Directors also have a continuing obligation to keep informed about the corporation's activities. Id. at 31. Thus, "[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look." Id. at 21.

Here, however, the record supports the judge's findings that DaMota admirably performed his duties as Fairmount's

[7] DaMota did not file a timely answering brief and, on October 27, 2011, we ordered that no brief on his behalf would be accepted for filing.

director. DaMota attended board meetings. He and Branson negotiated the forbearance of the Fleet Bank line of credit, dealt with trade creditors, and sold some of Fairmount's net operating losses so it could receive a tax benefit. He was actively involved in the negotiations with Morris Realty for the sale of Fairmount's property.

There is simply nothing in the record to suggest that DaMota was negligent in failing to prevent Fairmount's demise or that he did anything improper. As the judge noted in his findings, the situation involving DaMota was best summed up by Judge Learned Hand's comments in Barnes v. Andrews, 298 F. 614, 616-17 (S.D.N.Y. 1924):

> [W]hen a business fails from general mismanagement, business incapacity, or bad judgment, how is it possible to say that a single director could have made the company successful, or how much in dollars he could have saved? Before this cause can go to a master, the plaintiff must show that, had [the defendant] done his full duty, he could have made the company prosper, or at least could have broken its fall. He must show what sum he could have saved the company.

Because plaintiffs failed to meet this burden, we reject their contentions on this point.

E.

Finally, plaintiffs contend the judge erred by rejecting Lofredo's expert testimony on valuation and by limiting damages

to Branson's[8] infidelity to the corporation when he assumed full-time employment with Smithfield Foods and to Halle's sales of Fairmount's chemicals. However, the judge did not abuse his discretion in making these rulings.

As to Lofredo's testimony, "the trial court is better positioned to evaluate the [expert] witness' credibility, qualifications, and the weight to be accorded [his or her] testimony." In re Guardianship of DMH, 161 N.J. 365, 382 (1999). We therefore accord great deference to a trial judge's findings regarding the credibility and reliability of an expert witness, unless they are clearly erroneous or show an abuse of discretion. Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 368 (1999).

Lofredo testified Fairmount was worth $6 million at the end of 2001. The judge, however, rejected Lofredo's opinion and he explained his reasons in detail. Overall, he found that Lofredo made assumptions that were not based in reality and that he ignored obvious facts that undercut his opinion. The judge explained that Lofredo disregarded Fairmount's staggering debt and the fact that it was not meeting its yearly sales

[8] Branson did not file a timely answering brief and, on October 27, 2011, we ordered that no brief on his behalf would be accepted for filing. On December 23, 2011, we denied his motion to vacate this suppression order.

projections. Lofredo never visited the facility, never interviewed anyone connected with Fairmount, and he had no idea what amount of money the corporation would have to raise to rehabilitate its plants or develop new products.

Lofredo prepared his reports using "common practice," not published standards. He was unaware of the millions of dollars William and Knoepke put into the company in the past in an attempt to make it appear to be viable. Lofredo also failed to consider Fairmount's past earnings or the fact that it ceased operations in 2002. Thus, there is sufficient credible evidence in the record to support the judge's conclusion that Lofredo's expert testimony and opinions were unpersuasive.

Plaintiffs also argue the judge erred by limiting Branson's disgorgement to the period after he began working for Smithfield Foods. However, the record fully supports the judge's decision.

The record reflects that the Fairmount board was well aware that Branson had outside interests during his entire time at Fairmount. However, once Branson accepted full-time employment with the Smithfield bio fuel project, the judge found that he was no longer entitled to his Fairmount salary. The judge explained his decision as follows:

> Look at the facts. Fairmount was seeking a buyer for its physical site and all the production had stopped. The company was plagued by debts, it[s] property was

> contaminated, it had a catalog of worn and aged equipment it needed to dispose of and the . . . site still had on it chemicals and inventory that needed to be prudently dealt with. His staff consisted of two people.
>
> On the Smithfield side[,] Branson was charged with developing a new product and a new market for the so-called bio-fuel business. This was a new and as yet untested enterprise requiring imagination, effort and the marshalling of a team capable of fulfilling the mandate of a new business.
>
> So the Court concludes that . . . Branson's service of two masters as of March 2003 ended up serving neither, or at least not serving Fairmount.

The judge concluded that the only fair measure of damages for Branson's divided loyalties was the disgorgement of the fees he received from March 2003, when he began his full-time employment with Smithfield, and September 2003, when Fairmount stopped paying salaries to any of its employees. The judge recognized that this method of determining damages was imprecise. However, our courts have recognized that "'[d]amages need not be proved with precision where that is impractical or impossible.'" Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007)(quoting Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003)). Here, there is sufficient credible evidence in the record to support the judge's finding of damages with respect to Branson, together with a reasonable basis for the amount.

Plaintiffs also argue that Halle should have been held responsible for DEP's action in shutting down Fairmount's production. However, we believe the judge correctly rejected this argument.

Officers and directors of a corporation are immune from liability when their business judgments are made in good faith based on reasonable business knowledge. Seidman, supra, 205 N.J. at 175. If the business judgment rule applies, ratified corporate actions or stockholder-approved actions are presumed correct. Id. at 177. "[T]hat presumption may be rebutted only if the challenged corporate actions are so far from the norm of responsible corporate behavior as to be unconscionable or constitute a fraud, impermissible self-dealing or corporate waste." Ibid. Thus, under this rule, "bad judgment, without bad faith, does not ordinarily make officers individually liable." Maul v. Kirkman, 270 N.J. Super. 596, 614 (App. Div. 1994).

Here, there is nothing in the record to support plaintiffs' claim that Halle, or for that matter Kaltnecker or Branson, were responsible for Fairmount's environmental violations. As the judge noted, Fairmount had been manufacturing and using hazardous chemicals at the Newark site since before World War II. Under those circumstances, it was inevitable that

environmental deficiencies would be found. Contrary to plaintiffs' contention, Halle did not ignore DEP. Rather, in response to the agency's actions, Fairmount agreed to limit its emission of air pollutants and obtain DEP approval before continuing production. It ultimately had to cease operations because it lacked the funding necessary to continue, not because of any "unconscionable" conduct on the part of Halle.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION