FILED, Clerk of the Appellate Division, February 01, 2023, **A-000385-22**, **AMENDED**

DIVYAJIT MEHTA and DGNS CORP., Plaintiffs/Respondents, vs. EMANUEL HEDVAT, FARIBA HEDVAT, CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, AMERICAN ANALYTICAL ASSOCIATION, INC., NJ CUBIC 29, LLC, 29 COTTAGE STREET, LLC, VIRTUAL INSTITUTE PERSONNEL, LLC, CHEMTECH GROUP LLC and EFJ REALTY LLC, Defendants/Appellants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET NO.:BER-C-135-20 SAT BELOW: HON. EDWARD A. JEREJIAN APPELLATE DIVISION DOCKET NO. A-000385-22

BRIEF OF DEFENDANT/APPELLANT, FARIBA HEDVAT

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PRELIMINARY STATEMENT

This appeal should be granted because the trial court made numerous material errors of law and rulings that were not supported by the evidential record, requiring the reversal of the final judgment (the "Judgment") entered against defendant, Fariba Hedvat ("Defendant"). In this case, plaintiffs alleged that the defendants fraudulently induced them to sell their respective ownership interests in Chemtech Consulting Group Inc. and Mountainside Realty LLC for approximately $6.3M, by fraudulently manipulating the companies' books and records, which, in turn, caused plaintiffs to sell their interests for a lower price than would have been warranted had the books and records been accurate. Notwithstanding the fact that the entire premise of plaintiffs' fanciful fraud claim collapsed like a house of cards and was dismissed, the court shockingly entered Judgment against the defendants on the remaining counts of plaintiffs' Amended Complaint (i.e. conversion, breach of contract etc.) As detailed herein, the court's Judgment was completely detached from the evidential record and based on clear and obvious misstatements and misapplications of law.

Defendant, the wife of co-defendant, Emanuel Hedvat, was not involved with the 2014 buyout transactions or the nine (9) transactions (the "Disputed Transactions") the court identified as the basis for the Judgment entered against her. Moreover, Defendant did not receive an unjust benefit from these

transactions, nor was she a party to the contracts the trial court found were breached. Against this backdrop, the Court should reverse the Judgment against Defendant for several reasons.

First, the court erred as a matter of law in denying Defendant's motion for summary judgment to dismiss the Amended Complaint against her. Indeed, the trial court provided no findings of fact or conclusions of law explaining what disputed facts the plaintiffs raised against Defendant (as opposed to her spouse) that required the court to deny summary judgment. Second, with respect to plaintiffs' conversion claims, the court erred as a matter of law at the summary judgment stage and at trial by failing to dismiss these claims for lack of derivative standing. Third, plaintiffs' failure to make a demand to return the "converted" funds was fatal to their conversion claims and the court's failure to recognize this requirement constitutes reversible error as a matter of law. Lastly, the court ignored material evidence that undermined plaintiffs' conversion claims and improperly shifted the burden of proof to Defendant to disprove the claims despite the plaintiffs' failure to establish a prima facie case against her, including the absence of any evidence that the Disputed Transactions were unauthorized or otherwise wrongful.

Similarly, there was no factual or legal basis for the court to hold Defendant liable for breach of contract, breach of the covenant of good faith and

fair dealing or unjust enrichment (Counts 7-8 and 11-13 of Amended Complaint). First, the court erred by holding Defendant liable for breaching contracts and the covenant of good faith and fair dealing for agreements that she was not a party to. Second, the evidential record did not support a finding that Defendant breached any contract or covenant thereunder. Third, plaintiffs' unjust enrichment claims were barred as a matter of law because there were no express contracts between Defendant and plaintiffs that were breached. Moreover, plaintiffs failed to prove that Defendant converted any money or that she received an unjust benefit belonging to plaintiffs.

For the reasons above, the court also erred by holding Defendant jointly and severally liable for the Judgment by finding her personally liable for purported actions committed by the defendant corporations. Further, the court erred by including transactions in the damage award that were barred by the statute of limitations, requiring, at a minimum, a substantial reduction in the damage award. Lastly, the court erred by granting plaintiffs' attorneys' fees and costs because there was no statute, court rule or contract entitling plaintiffs to such an award. For the foregoing reasons, and those set forth below, this Court should reverse the Judgment and dismiss the Amended Complaint in its entirety against Defendant.

PROCEDURAL HISTORY

On January 17, 2020, plaintiffs, Divyajit Mehta ("Mehta") and DGNS Corp. ("DGNS") (collectively, the "Plaintiffs") filed their original complaint against defendants, Emanuel Hedvat ("Hedvat"), Defendant, Chemtech Consulting Group Inc. ("Chemtech"), Mountainside Realty LLC ("MRL") and American Analytical Association, Inc. ("A3I"). Da07836 – Da07860. Defendants filed a motion to dismiss under R. 4:6-2(e), which resulted in Plaintiffs dismissing their complaint and filing a corrected pleading by consent on July 20, 2020. Da02524 – Da02529, Da02653.

On September 16, 2021, Plaintiffs filed an amended complaint ("Amended Complaint") naming NJ Cubic 29, LLC ("NJ Cubic"), 29 Cottage Street, LLC ("29 Cottage"), Virtual Institute Personnel, LLC ("VIP"), Chemtech Group LLC and EFJ Realty LLC ("EFJ") as additional defendants. Da00001. On September 23, 2021, defendants filed an answer and counterclaim as well as a third-party complaint by Chemtech, MRL and VIP against Arecon, Ltd. and Gayatri Mehta. Da00497.

Defendants filed motions (1) to bar or limit the testimony of plaintiffs' expert, Hemant Prajapati, and (2) for summary judgment on November 19, 2021. Da00683 – Da01573, Da01574 to Da02034. Following oral argument on

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December 20, 2021,[1] the trial court entered orders that (1) denied defendants' motion to limit the testimony of plaintiffs' expert and (2) granted in part and denied in part defendants' motion for summary judgment. 13T97-2, 100-21; Da02683 – Da02686. A non-jury trial was conducted over twenty-two (22) non-consecutive days, beginning on January 18, 2022 and ending on March 17, 2022. 14T to 35T. Defendants' motion for a directed verdict under R. 4:40-1 dismissing the Amended Complaint at the close of Plaintiffs' case was denied. 24T4-15 to 7-9. Plaintiffs' motion to dismiss Defendants' counterclaim and third-Party complaint was also denied. 35T52-21.

On June 30, 2022, the court rendered an oral decision and entered judgment against the defendants, jointly and severally, in the amount of $2,882,244.85 on Counts 5 and 6 (conversion), 7 and 8 (breach of contract), 11 (breach of covenant of good faith), and 12 and 13 (unjust enrichment) of the

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[1] The transcripts of the proceedings will be referred to as follows:

1T = 1/19/21
2T = 1/20/21
3T = 2/10/21
4T = 2/15/21
5T = 3/19/21
6T = 10/29/21
7T = 8/12/21
8T = 11/8/21
9T = 11/10/21
10T = 11/11/21
11T = 11/12/21
12T = 11/23/21
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25T = 2/22/22
26T = 2/23/22
27T = 2/24/22
28T = 3/1/22
29T = 3/2/22
30T = 3/3/22
31T = 3/8/22
32T = 3/9/22
33T = 3/10/22
34T = 3/16/22
35T = 3/17/22
36T = 6/30/22
37T = 9/9/22

Amended Complaint. 36T55-6 to 13; Da02688. The order also: (1) denied plaintiffs' request for punitive damages, (2) dismissed Counts 1-4 and 9-10 (fraud) of the Amended Complaint; and (3) dismissed defendants' counterclaim and third-party complaint. Da02688.

On September 14, 2022, the trial court entered judgment in the amount of $4,258,878.69 against all defendants. 37T93-14 to 23; Da02057 – Da02563, Da02690. On September 19, 2022, the trial court entered an order granting in part, and denying in part, defendants' motion for a stay of Judgment and reconsideration. 37T93-24 to 97-1; Da02035 – Da02056, Da02694 – Da02700.

Defendants, Hedvat, Chemtech, MRL, A3I, NJ Cubic, 29 Cottage, VIP, Chemtech Group LLC and EFJ filed a notice of appeal on October 4, 2022. Da02591 – Da02603. Defendant filed her notice of appeal on October 4, 2022. Da02564 – Da02590. The defendants subsequently filed separate amended notices of appeal on October 6, 2022. Da02604 – Da02635. Plaintiffs filed a respondent CIS and notice of cross-appeal on October 17, 2022. Da02636 – Da02643.

STATEMENT OF FACTS

A. Mehta and Hedvat's Business Partnership

This appeal arises from the Plaintiffs' 2014 sale of their respective interests in Chemtech and MRL to Hedvat and A3I for $6.3M. Mehta and Hedvat

were business partners for over 25 years in Chemtech, which is an environmental company. 18T42-9. Mehta, Hedvat and their spouses (through DGNS and A3I) also owned a 50/50 membership interest in MRL, which is a real estate holding company. 24T9-12 to 20-19. Despite accusing Hedvat of committing an elaborate multi-year $11M fraud, Mehta testified at trial that he had a great partnership with Hedvat and enjoyed working with him because their skill sets complimented each other. 16T88-1 to -17; 24T15-7 to -16. Indeed, he admitted during cross-examination that Hedvat was a good person and that he attributed his financial success to Hedvat, compliments that completely belied his characterization of Hedvat as a 'fraudster.' 14T112-12 to -19, 118-12 to -19; 16T90-2 to -17.

B. Chemtech's Operations

Mehta and Hedvat signed a stockholder agreement in 2007 (the "2007 Chemtech Stockholders Agreement") governing their rights as shareholders in Chemtech. Da02712. Despite his attempt at trial to minimize his role in managing Chemtech's finances and portray himself as simply the "technical person" working in the company's lab, the evidence overwhelmingly established that Mehta was intimately involved in managing Chemtech's finances and books and records and is a sophisticated businessperson. 16T92-10 to 99-9; 22T116-1 to -22, 154-5 to 155-13; 25T55-5 to 25; Da02761. In addition to being the 51%

majority owner of Chemtech, Mehta was the company's COO and had two votes to Hedvat's one vote as a director. 16T95-12 to 99-22; 24T49-4 to -17; Da02761 – Da02765. Hedvat, as President of Chemtech, reported to Mehta as COO. 16T94-19 to 99-9; 24T48-14 to -20; Da02761. Mehta was also Chairman of the Board of Directors. 16T96-25 to 98-2; Da02761.

Further, Mehta was directly involved in lease negotiations, lab purchases, signing corporate checks, ordering lab supplies, wiring funds overseas to Chemtech's India operation, reviewing invoices and purchase orders, and signing supplies and packing slips invoices. 16T102-18 to 119-11; 17T115-8 to -11; 24T17-22 to 36-24; 25T24-19 to -25; Da02897. Mehta also had administrative access to Chemtech's laboratory information management system called "e-CHEM" (which he developed) and servers, which stored Chemtech and MRL's financial information, including QuickBooks, financial statements, tax returns and customer information. 17T29-23 to 38-15; 24T51-21 to 66-4; 25T12-15 to 14-15, 41-3 to -11; Da02902.

Because of Mehta's 51% ownership of Chemtech, the company ultimately obtained certifications as a minority-owned entity ("MBE") and a disadvantaged business entity ("DBE"). 16T138-16 to 141-7; 25T33-20 to 35-5; Da03025 – Da03029. In connection with those certifications, Mehta submitted applications under oath to various reviewing agencies on annual basis, which included

personal financial statements and copies of Chemtech's financial records (i.e., corporate tax returns, balance sheets and profit and loss statements). Id.

C. MRL's Operations

After MRL was formed, DGNS and A3I executed an operating agreement (the "MRL Operating Agreement") drafted by MRL's attorney. 16T164-11 to 165-7; 25T47-8 to -22; Da02701. Mehta was materially involved in, and authorized, MRL's purchase, lease, financing and refinancing of its properties (the "MRL Properties.") 16T169-17 to 180-4; 24T19-8 to 24-5, 48-9 to -19; 25T45-22 to 48-19. Hedvat and Mehta regularly discussed the amount of income the MRL Properties were generating, corporate expenses, building repairs, and tenant issues. 25T10-24 to 11-21, 37-23 to 38-24. Further, Hedvat regularly provided Mehta rental rolls for the MRL Properties and he and Mehta split cash rents. 15T148-15 to 151-18; 25T52-25 to 55-4; Da03040.

D. Mehta's Material Involvement in Chemtech and MRL's Finances

1. Bookkeeping and Accounting

For the relevant period of 2008 through 2015, Mehta approved of Chemtech's expenses before its bookkeeper entered them in QuickBooks. 17T86-8 to 91-17; 24T58-8 to -20, 78-5 to 79-10; 25T7-16 to 19-3. Mehta had complete and unfettered access to Chemtech and MRL's financial records, had the username and passwords to make entries on those companies' QuickBooks,

and received copies of the companies' tax returns every year. 17T9-12 to 10-22, 97-12 to 101-15; 25T8-5 to 41-2; Da07299. Chemtech and MRL's QuickBooks were stored on Chemtech's server 141, which Mehta had administrative access to. 17T31-12 to 38-15; 24T51-21 to 52-2; 25T12-15 to 13-4, 41-3 to -11; Da03068. Mehta also worked from home using computers bought by Chemtech, which he used to remotely access Chemtech's servers and his desktop computer at Chemtech's office. 24T59-19 to 60-12; 25T15-6 to -15; Da03033 – Da03039, Da07364 – Da07386. Of note, Chemtech's IT manager Jacob Tsvic installed the QuickBooks and other software on Mehta's home computers and provided him a CD each time Chemtech upgraded its version of QuickBooks. 25T14-16 to 15-15.

Mehta and Hedvat regularly met with Chemtech and MRL's accountants, including the parties' longtime accountant, Sandy Myers ("Myers"), to discuss the companies' tax projections, financials and other accounting and business issues. 24T68-13 to 73-14; Da02734. In terms of tax preparation, during the period of 2009 to 2014, Myers met with Mehta and Hedvat at Chemtech's office several times a year to discuss their companies' finances and taxes. 17T93-10 to 101-5; 24T73-10 to 75-23. Mehta and Hedvat regularly discussed and reviewed Chemtech and MRL's finances and the transactions processed through the companies. 25T49-18 to 57-8; Da07299 – Da07305, Da07712 – Da07746.

2. Mehta Co-Managed Chemtech and MRL's Finances

Mehta participated in all material aspects of Chemtech and MRL's operations (including their affiliate entities) and approved of all significant transactions reflected on the company's accounting records, including the Disputed Transactions that are the subject of this appeal. 16T:136-21 to 137-3; 17T26-6 to 27-2, 55-14 to -21, 71-3 to 91-22; 24T46-7 to 48-20; 25T25-9 to -3; Da02994, Da02865 – Da 02878, Da02900 – Da02912, Da02994, Da02994 – Da02997, Da03021 – Da03023, Da03054 – Da03058, Da07299 – Da07305. Of note, Mehta regularly reviewed reports generated from Chemtech's QuickBooks, including balance sheets and profit and loss statements, which he retained for his personal records. 16T27-7 to 29-22; 17T39-11 to 51-18; Da02998 – Da03020, Da03025 to Da03029, Da03054 – Da03058. On behalf of Chemtech, Mehta and Hedvat jointly made financial decisions and effected financial transactions, which Mehta certified under penalty of perjury to in connection with Chemtech's MBE and DBE applications. 16T150-3 to 155-5; 17T38-24 to 55-13; 24T50-11 to 51-1; Da02865 – Da02896, Da03054 – Da03058, Da03060, Da 03061 – Da03062.

Mehta also had signatory authority on Chemtech and MRL's bank accounts, signed corporate checks and transferred funds between the companies, and paid corporate expenses. 16T183-2 to -10; 17T14-3 to -9; 25T38-25 to 39-

11; Da02900 – Da02997, Da03030 – Da03039. At various points from 2008 through 2015, Mehta and his wife Gayatri submitted certified personal financial statements to banks in which they represented what the value of their interests in Chemtech and MRL were worth. 16T167-6 to 169-16; 18T39-6 to 49-18; 6T49-22 to 52-19; 25T37-1 to -10; Da02858 – Da03081, Da03564 – Da03565, Da07388 – Da07389.

3. Mehta Stored Chemtech and MRL's Accounting Records On His Work Computer

The unrebutted testimony of defendants' computer forensics expert, Tino Kyprianou ("Kyprianou"), demonstrated that Mehta reviewed and had knowledge of Chemtech, MRL, DGNS and A3I's financial and accounting records stored on his Chemtech work computer, including QuickBooks files. 17T116-1 to 119-17, 131-20 to 135-10; 25T57-19 to 74-20; 31T44-19 to 99-1; Da03033 – Da03039, Da07364 – Da07386, Da07179 – Da07180, Da07387. Despite Mehta's testimony at trial that he did not review or access these records prior to this lawsuit, the metadata in the files found on Mehta's computer proved otherwise as the dates of the files ranged from 2007 to 2017. Id.

E. The 2014 and 2017 Chemtech and MRL Buyout Transactions

1. The Parties' Negotiations

From January 2014 through December 2014, Hedvat and Mehta negotiated the terms of a buyout of Mehta's interest in Chemtech and DGNS's

interest in MRL. 18T58-11 to 59-21; 25T75-4 to 112-23. Mehta was actively involved in the negotiations. 17T139-15 to -12. During this time, Mehta and Hedvat exchanged several negotiation sheets (each a "Negotiation Sheet" and collectively, the "Negotiation Sheets"), which contained the parties' proposed values of Chemtech and MRL's businesses and reflected payment terms. 17T139-15 to 147-20, 164-1 to -25; 25T80-20 to 83-1; Da02788 – Da02789, Da02790, Da02791, Da02794 – Da02799, Da02800, Da03059. Mehta admitted that he independently valued his collective interests in Chemtech and MRL at $6.2 Million, which was only $100,000 less than the $6.3 Million he ultimately received from these sales. 17T153-8 to 162-4; 25T83-11 to 84-12; Da02791, Da02800.

As part of their negotiations, Mehta and Hedvat jointly prepared excel schedules setting forth estimated values of Chemtech and MRL's assets and liabilities by utilizing data from Chemtech and MRL's QuickBooks and making adjustments to that data on the schedules. 17T7-14 to 10-12, 167-23 to -25; 18T 13-25 to 29-14; 25T84-13 to 110-4; 26T23-3 to -11; Da02792 – Da02797. These schedules, P-48 (Chemtech) and P-50 (MRL) in evidence, were referred to as "Exhibit S" during the trial and were the factual predicate for the Plaintiffs' claims against defendants. 25T84-13 to -20. At 6:57 p.m. on June 25, 2014, a few hours after the parties created P-50, Hedvat emailed Mehta appraisals for

several of MRL's properties. 18T27-14 to 38-21; 25T106-21 to 110-1; Da02794 – Da02797, Da03082 – Da03286. Notably, Mehta testified that he was not prevented from reviewing Chemtech or MRL's financial records to verify the information on P-48 and P-50. 17T166-18 to 167-2. Critically, Mehta admitted that Defendant did not make any representations to him about Exhibit S. 17T7-14 to 10-12, 167-23 to -25; 18T13-25 to 29-14; 25T86-20 to 110-4; 26T23-3 to -11.

Between June 27 and 30, 2014, Mehta exchanged emails (D-222 in evidence) with his friend, accountant and eventual expert, Hemant Prajapati ("Prajapati"), ***asking him for guidance on the buyout and Exhibit S (P-48 and P-50)***. 33T6-22 to 36-4; Da07776 – Da07786. As referenced in the email, Mehta also emailed Exhibit S to Prajapati's father Amarat for advice. Id. After this email exchange, Mehta called Prajapati and Prajapati advised Mehta on Exhibit S and the sale. Id. Mehta and Prajapati testified at their depositions and on direct examination in Plaintiffs' case that they did not review or discuss Exhibit S together in 2014 prior to the buyouts, which was false based on D-222. 17T7-14 to 10-12, 167-23 to -25; 18T13-25 to 29-14; 21T150-13 to 152-6; 22T105-1 to 135-22; 25T86-20 to 110-4; 26T23-3 to -11; 33T24-6 to 36-4; Da02792 – Da02797, Da07776 – Da7786.

2. The Sale Documents

On December 5, 2014, Hedvat and Mehta entered into a stock purchase agreement (the "2014 Chemtech SPA"), under which Hedvat purchased Mehta's 51% interest in Chemtech for $740,000. 25T121-1 to 123-7; 18T130-2 to 132-17; 25T126:4 to 133; Da02802 – Da02822, Da03458 – Da03462. On the same date, Mehta signed an employment agreement with Chemtech paying him $600,000 as an employee through 2017. Id. Further, on December 5, 2014, DGNS and A3I entered into a membership purchase agreement (the "2014 MRL Purchase Agreement"), under which A3I purchased DGNS's 50% interest in MRL for $4.96M. Id. Prior to the execution of the 2014 MRL Purchase Agreement, A3I gave DGNS a check for $1.36M (November 26, 2014) and another check for $1.28M (December 5, 2014) as a deposit towards the $4.96 Million contract price. 25T125-1 to 126-7; D03388. Mehta consented to Hedvat transferring funds from MRL's bank account to A3I's account for the deposit. Id.

Plaintiffs were represented by the law firm Archer & Greiner and by their financial advisor Prajapati in connection with the foregoing agreements, whereas Hedvat and A3I were unrepresented. 17T141-9 to -13; 18T62-17 to 95-7, 125-2 to 132-17; 25T115-16 to 117-7; 26T24-1 to -14; Da02798, Da02801, Da03287 – Da03289, Da03290 – Da03298, Da03299 - Da03324, Da03325 – Da03326, Da03327 – Da03455, Da03468 – Da03493, Da0394 – Da03498.

Defendant did not provide any documents to Plaintiffs or make any representations to them in connection with the 2014 Chemtech SPA or the 2014 MRL Purchase Agreement. 18T133-5 to 134-7; 25T133-3 to -10.

Prior to Mehta receiving the final $40,000 payment due under the 2014 Chemtech SPA, in or about June 2017, Mehta and Hedvat agreed that Mehta would transfer his shares in Chemtech to Hedvat's wife, Defendant, instead of to Hedvat, so that Chemtech could qualify as a WBE (Woman Owned Business). 25T140-16 to 142-3; Da04304. On or about December 15, 2017, Mehta and Defendant signed a Stock Purchase Agreement (the "2017 Chemtech SPA"), under which Defendant purchased Mehta's interest in Chemtech for $740,000. 25T142-6 to 145-24; Da02823, Da04575 – Da04602, Da07181 – Da07182. Mehta was paid in full under the 2017 Chemtech SPA and returned the payments he received from Hedvat under the 2014 Chemtech SPA. 25T141-13 to -18. The 2017 Chemtech SPA contains nearly identical terms to those in the 2014 Chemtech SPA. Id. Defendant did not make any representations to Mehta that he relied on before entering into the 2017 Chemtech SPA, nor did she provide him any records in connection with that agreement. 18T141-13 to -24; 25T140-16 to 150-2; Da07747 – Da7775.

F. The 2019 Tax Deficiency Notice and Lawsuit

In April 2019, Mehta and his wife Gayatri received a tax deficiency notice stating they owed New Jersey approximately $100,000 in additional taxes relating to DGNS's 2014 buyout from MRL. 25T147-11 to 150-15; Da02837. Myers provided a signed certification to New Jersey explaining an accounting mistake he made that gave rise to the tax deficiency notice. Da07183. Shortly thereafter, Prajapati exchanged emails with Mehta recommending that he proceed with a lawsuit against Hedvat and Myers. 22T124-12 to 126-16; Da06789.

G. Prajapati Failed To Establish Plaintiffs' Conversion Claims

Plaintiffs' accounting expert, Prajapati, provided Plaintiffs accounting and business advice prior to and following the 2014 transactions. 21T148-7 to 153-6; 22T104-23 to 110-12; Da02798 – Da02799, Da03287 – Da03289, Da03290 – Da03455, Da03458 – Da03462, Da03468 – Da03498, Da03501 – Da03563, Da03568 - Da04573. Interestingly, despite Mehta's testimony that he did not review Chemtech or MRL's QuickBooks prior to the 2014 sales, Prajapati could not say definitively whether or not he had discussions with Mehta about the QuickBooks. 22T117-23 to 118-8. Despite all of this, Prajapati authored an expert report for Mehta (at a discounted rate) criticizing the same transactions and events that he advised Mehta on 7 years earlier in 2014 and for several years thereafter. 18T150-3 to 173-21; 21T126-22 to 127-4, 148-15 to

152-6; 22T118-9 to 124-11; Da03500 – Da03567, Da03568 - Da04573. Prajapati failed to disclose the foregoing in his report and that he is currently Mehta and DGNS's accountant. 18T60-4 to 62-3. Moreover, Prajapati completely ignored the wrongful conduct of his own client, Mehta, who admitted during cross-examination that he paid for his home renovation project and personal airfare with MRL's funds. 17T16-17 to 25-2; Da02913 – Da02926. However, perhaps the most egregious thing that Prajapati did was his failure to disclose that ***he advised Mehta on Exhibit S in 2014, which he opined at trial was false and misleading!*** 21T128-1 to -19; 22T105-9 to 135:22; 30T93-12 to 94-11; 33T24-6 to 36-4; Da02798 – Da02799, Da7776 – Da7786.

Relying solely on Prajapati's deficient net opinion testimony, the court held that the defendants were jointly and severally liable for converting Plaintiffs' funds in connection with the following Disputed Transactions:

- $629,217.85 was transferred from Chemtech's customer Arbor Hills to A3I between 2013-2015 (36T34-20 to -35);

- $2,000,000 was transferred from MRL's Merrill Lynch checking account on December 6, 2008 to Hedvat's Capital One bank account (Id. at 35-8 to 36-10);

- $500,000 was transferred from MRL's BOA account on November 5, 2013 to Hedvat and Defendant's BOA account #0319 (Id. at 36-11 to -22);

- $50,000 was transferred from Chemtech's MR Line of Credit account on December 5, 2014 to A3I's bank account #8309 (Id. at 37-1 to -4);

- $50,000 was transferred from Chemtech's MR Line of Credit account on September 8, 2015 to Hedvat and Defendant's BOA account #0319 (Id. at 37-5 to -7);

- $90,000 was transferred from Chemtech's MR Line of Credit account on October 7, 2015 to Hedvat and Defendant's BOA account #0319 (Id. at 37-7 to -9);

- $50,000 was transferred from Chemtech's bank account on October 28, 2015 to A3I's bank account #8309 (Id. at 37-9 to -11);

- $75,500 was transferred from Chemtech's MR Line of Credit account on August 22, 2014 to A3I's bank account #8309 (Id. at 37-11 to -13); and

- $2,300,000 was transferred from MRL's bank account on November 26, 2014 to A3I's bank account #8309 (Id. at 37-17 to -23).

However, Prajapati's conclusion that the defendants converted these funds by fraudulently manipulating Chemtech and MRL's accounting records was pure speculation. 21T124-17 to 130-8; 22T24-13 to 28-11; 26T15-19 to 24-24; 29T32-14 to 36-6. Indeed, Prajapati admitted he did not conduct a proper forensic accounting investigation and that he ignored critical evidence against his clients. 21T124-3 to 139-24; 22T41-23 to 44-14; 29T34-4 to 37-9; Da02865, Da07299, Da07390 – Da07746. In particular, Prajapati ignored the sworn statements made by Myers in his affidavit, where he certified to, in part that: (1) Mehta approved of, and was involved in, all significant transactions reflected on Chemtech and MRL's financial records; and (2) there was nothing that happened

in Chemtech and MRL that Mehta was not aware of and/or did not participate in. Id.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ERRONEOUSLY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (13T64-6 to 97-9)

A. The Standard of Review

This appeal concerns mixed questions of fact and law. The Appellate Division reviews issues of law de novo and accords no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). For mixed questions of law and fact, the Appellate Division gives deference to "the supported factual findings of the trial court, but review[s] de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (citations omitted). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence

as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (citations omitted).

Any "error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." R. 2:10-2; see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 2:10-2 (2022). All error, including both plain error and harmful error, is tested by the standard set forth in R. 2:10-2, which is whether the error is "clearly capable of producing an unjust result." Id.

B. There Were No Material Facts In Dispute That Precluded The Entry Of Summary Judgment In Defendant's Favor

The standard of review regarding a trial court's decision on a motion for summary judgment is *de novo*. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The Appellate Division applies the same standard as the trial court, which is that summary judgment will be granted if there is no genuine issue of material fact and "the moving party is entitled to a judgment or order as a matter of law." Id. (quoting R. 4:46-2(c)).

Defendant moved for summary judgment to dismiss the Amended Complaint because Plaintiffs did not assert any viable causes of action against

her as a matter of law. 13T64-6 to 70-4. The court made several errors of law in denying Defendant's motion. First, the trial court provided no findings of fact or conclusions of law explaining what disputed facts the Plaintiffs raised to sustain their purported claims against Defendant. Id. at 92-8 to 97-9. The absence of disputed material facts in the motion record required the court to dismiss the Amended Complaint against Defendant as a matter of law.

Second, the court erred in failing to dismiss Plaintiffs' conversion claims for lack of derivative standing. The court denied summary judgment on this issue because it held Plaintiffs could establish that they suffered a special injury. Id. at 95-18 to 96-21. However, as discussed below, there were no factual disputes establishing that Plaintiffs suffered a special injury, which would permit Plaintiffs to pursue their conversion claims directly instead of derivatively on behalf of Chemtech and MRL. Id. at 91-3 to 96-21.

"Standing is a threshold requirement for justiciability." Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 421 (1991). "[S]tanding to assert the rights of third parties is appropriate if the litigant can show sufficient personal stake and adverseness so that the [c]ourt is not asked to render an advisory opinion." Estate of F.W. v. State of N.J., Div. of Youth and Family Servs., 398 N.J. Super. 344, 353 (App. Div. 2008). "Whether a party has standing to pursue a claim is a question of law subject to de novo review."

Cherokee LCP Land, LLC v. City of Linden Planning Bd., 234 N.J. 403, 414-15 (2018) (citations omitted).

It is a well-established rule that "a shareholder – even the sole shareholder – does not have standing to assert claims alleging wrongs to the corporation." Central Jersey Freightliner, Inc. v. Freightliner Corp., 987 F.Supp. 289, 301 (D.N.J. 1997) (quoting Jones v. Niagara Frontier Transportation Auth., 836 F.2d 731, 736 (2d Cir. 1987)); see also Cajoeco Llc v. Bensi Enters., 2021 N.J. Super. Unpub. LEXIS 1150, *19 (App. Div. June 17, 2021). Indeed, a litigant's mere status as a current or former shareholder does not confer them with direct ownership rights to corporate funds allegedly converted by a defendant. Id.; see also Cajoeco Llc, supra, 2021 N.J. Super. Unpub. LEXIS at *19 (individual shareholders may not recover for the injury to their investments alone); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970); Tully v. Mirz, 457 N.J. Super. 114, 123 (App. Div. 2018); and Strasenburgh v. Straubmuller, 146 N.J. 527, 549 (1996).

However, in some rare instances, a trial court may permit a shareholder (even in a closely held corporation) to directly pursue derivative claims if they demonstrate that they have suffered a "special injury." Tully, 457 N.J. Super. at 124-127; see also Brown v. Brown, 323 N.J. Super. 30, 36-38 (App. Div. 1999). "A special injury exists 'where there is a wrong suffered by [the] plaintiff that

was not suffered by all stockholders generally or where the wrong involves a contractual right of the stockholders, such as the right to vote.'" Tully, supra, 457 N.J. Super. at 124-127. See Pepe v. Gen. Motors Acceptance Corp., 254 N.J. Super. 662, 666 (App. Div.), *certif. denied*, 130 N.J. 11 (1992).

The undisputed facts in the summary judgment motion record conclusively established that Plaintiffs' conversion claims were derivative claims because Plaintiffs did not have a direct ownership interest in the funds they claimed were misappropriated. See Strasenburgh, 146 N.J. at 551-52; Tully, 457 N.J. Super. at 126-27; Da00683 – Da0157. Like in Pepe, the alleged damages claimed by Plaintiffs (i.e. diminishment of the "net value" of Chemtech and MRL because of diversion of funds) were alleged injuries done to the companies and not specific to Plaintiffs. Da00001 – Da00043. As such, because Plaintiffs failed to comply with the derivative suit demand requirements for corporations and LLCs under N.J.S.A. 14A:3-6.3 and N.J.S.A. 42:2C-67, their conversion claims failed as a matter of law. Da00001 – Da00043.

The court's conclusory statement that "if the allegations were true, one could establish separate injury…I think that there is dispute of facts. I think the allegations in this case could establish such injury" was not supported by the motion record. 13T96-3 to -19. Indeed, the trial court failed to articulate what Plaintiffs' special injury was or where in the record there were disputed facts,

which if true, established that Plaintiffs had suffered a special injury. Id. at 95-18 to 96-21. This is because Plaintiffs' Amended Complaint plead no such facts, nor did the motion record establish that Plaintiffs suffered a "special injury" in connection with their conversion claims. See Kauffman, supra, 434 F.2d at 732; Da00001 – Da00043.

Based on the motion record, the trial court should have dismissed Plaintiffs' conversion claims for lack of standing. See Kauffman., supra, 434 F.2d at 732. Instead, the court misapplied the law on derivative standing and summary judgment by incorrectly holding that there were disputes of fact concerning Plaintiffs' alleged special injury, which was plainly wrong based on Plaintiffs' failure to establish direct damages. See Allstate New Jersey Ins. Co. v. Cherry Hill Pain & Rehab. Institute, 389 N.J. Super. 130, 136 (App. Div. 2006).

The court erred again at trial by holding that Plaintiffs had standing to assert their conversion claims because they established a "special injury." 36T21-1 to 22-25, 48-1 to 50-25. In so doing, the court failed to cite to any discernable facts or evidence in the record supporting its conclusory holding. Clearly, the trial court erred, as a matter of law, at the summary judgment stage and again at trial in failing to dismiss Plaintiffs' conversion claims for lack of standing and to dismiss the Amended Complaint against Defendant. Moreover,

the consequences of that error were significant, as the trial court's ultimate finding of liability on Plaintiffs' conversion counts (5 & 6) was the foundation for the assessment of damages on the other counts (7 & 8, 11-13) of the Amended Complaint. Because the gravity of this error of law clearly produced a manifestly unjust result, this Court should reverse the trial court's Judgment against Defendant as to Counts 5-8 and 11-13 of the Amended Complaint.

POINT II

THE TRIAL COURT'S HOLDING THAT DEFENDANT WAS LIABLE FOR CONVERSION WAS MANIFESTLY UNSUPPORTED BY THE EVIDENTIAL RECORD (13T51-21 to 56-22) (36T28-1 to 52-25)

A. Plaintiffs' Failure To Make A Demand For The Return Of The "Converted" Property Was Fatal To Their Claims And The Trial Court's Failure To Recognize This Requirement Constitutes Reversible Error As A Matter Of Law

The trial court held Defendant jointly and severally liable for conversion because it was "troubled with many of these transactions that just made no sense and the explanations made no sense," but failed to explain how Plaintiffs' established a prima facie case for conversion against her. 36T28-1 to -25, 47-1 to 48-25, 51-1 to 52-25. Indeed, there was no allegation or finding that any of the Disputed Transactions violated the law or that Plaintiffs made a demand for the return of the "converted" property as required in order to sustain their claim.

Under New Jersey law, conversion is defined as "'the exercise of any act of dominion in denial of another's title to . . . chattels, or inconsistent with such title.'" Marsellis-Warner Corp. v. Rabens, 51 F. Supp. 2d 508, 525 (D.N.J. 1999) (citation omitted). The elements of a conversion claim are: "(a) that the property and right to immediate possession thereof belong to the plaintiff; and (b) the wrongful act of interference with that right by the defendant." First National Bank v. North Jersey Trust Co., 18 N.J. Misc. 449 (N.J. 1940); Marsellis-Warner Corp., supra, 51 F. Supp. 2d at 525. However, in order for a plaintiff to prevail on a conversion claim, they must establish that they made a demand on the defendant to return the unlawfully acquired property prior to bringing suit. See Meisels v. Fox Rothschild LLP, 240 N.J. 286, 304-305 (2020). Further, the demand "must be made at a time and place and under such circumstances as defendant is able to comply with if he is so disposed, and the refusal must be wrongful. . . The burden of proof of a demand and a refusal rests on the plaintiff." Id. at 304.

Hedvat effectuated the Disputed Transactions in his capacity as a shareholder and/or officer of Chemtech and MRL, performing a role that Mehta agreed he had in the companies. 36T9-24 to 10-4. There was no allegation or finding that any transaction violated the law. It follows, therefore, that Hedvat's possession of some, if not all, of the disputed sums was "initially lawful."

Meisels, supra, 240 N.J. at 305. As a result, Plaintiffs' failure to make a demand for the return of the "converted" property prior to filing suit was fatal to their conversion claims. Id.

The trial court did not recognize the demand requirement in identifying the elements of conversion, which constitutes a fundamental error of law. 36T52-14 to -22. However, the trial court correctly observed that a conversion claim "doesn't require that defendants have an intent to harm the rightful owner of the money that belongs to another." Id. at 47-24 to 48-3. As a matter of public policy, the absence of any requirement of wrongful intent highlights the need for a demand before liability can be imposed. See e.g. Meisels, supra, 240 N.J. at 304-305. Accordingly, Plaintiffs' failure to demand the return of any property that was subject of their conversion claims requires the dismissal of those claims as a matter of law and a reversal of the Judgment against Defendant as to Counts 5 and 6 of the Amended Complaint.

B. The Trial Court's Judgment Against Defendant For Conversion Was Manifestly Unsupported by the Evidential Record And Based On Net Opinion Expert Testimony

1. The Trial Court Improperly Shifted The Burden Of Proof To Defendants On Plaintiffs' Conversion Claims And Failed To Consider Material Evidence Against Those Claims

The central premise underlying Plaintiffs' conversion claims was that the Disputed Transactions were unauthorized distributions to Hedvat. Da00001 –

Da00043. However, the trial court did not make factual findings regarding the elements of conversion that Plaintiffs purportedly established against Defendant and instead solely focused on the adequacy of the explanations provided by her husband regarding the Disputed Transactions. 36T28-17 to -20. By doing so, the Court improperly shifted the burden of proof on Plaintiffs' conversion claims to Defendant to disprove them rather than explaining how Plaintiffs established a prima facie case for conversion against Defendant. Id. at 28-1 to 52-25. The trial court's improper burden shifting constitutes reversible error requiring the dismissal of Plaintiffs' conversion claims as a matter of law. See Lembaga Enters., Inc. v. Cace Trucking & Warehouse, Inc., 320 N.J. Super. 501, 508 (App. Div. 1999).

The trial court also inexplicably ignored the following material evidence, which directly refuted Plaintiffs' conversion claims and established that Mehta had knowledge of, and authorized, the Disputed Transactions: (1) Myers' (the parties' accountant) affidavit and deposition testimony; and (2) Kyprianou's expert testimony establishing Mehta's possession and knowledge of Chemtech and MRL's accounting records (including QuickBooks files), which he stored on his Chemtech work computer. 25T60-24 to 74-20; 26T25-17 to 26-14; 36T13-19 to 14-3; 31T44-19 to 99-1; 36T13-19 to 21-23; Da07299, Da07364 – Da07386, Da07179 – Da07180, Da07712 – Da07746, Da07387. Had the trial

court properly evaluated and considered the foregoing evidence, it could **not** have found Defendant liable for conversion because transactions that Mehta knew about it and authorized cannot be simultaneously wrongful. As such, the trial court's failure to consider this crucial evidence produced a clearly unjust result, requiring the reversal of the Judgment against Defendant on Counts 5 and 6 of the Amended Complaint.

2. The Trial Court's Judgment Against Defendant For Conversion Was Manifestly Unsupported By The Evidential Record And Impermissible Net Opinion Testimony Of Prajapati

In addition to completely ignoring material evidence, the trial court's reasoning for holding Defendant liable for conversion was manifestly unsupported by the evidential record at trial. Namely, the trial court made no findings of fact that support its holding:

> I'm dealing with proofs that I have to consider and from the proofs that were presented, and I could only rule on what has been presented, I do believe that Mr. Mehta was shortchanged on certain monies . . . I think it's really the conversion claims here which are paramount, and I think the burden's been met. It's more likely than not that these funds were diverted and ultimately it lead to an unjust enrichment.

36T52-1 to -14. The court stated its conclusory holding without **any** direct testimony from Mehta explaining how and why the Disputed Transactions were wrongful or how exactly Defendant was involved. Instead, the court relied **exclusively** on Prajapati's net expert testimony in its decision that the Disputed

Transactions were unauthorized (which included improper assessments of defendants' motives regarding these Transactions), despite Prajapati's admitted lack of personal knowledge regarding the nature, character and purpose of the Transactions. 20T124-16 to 130-9; 21T25-11 to 28-12; 22T25-11 to 28-12, 50-21 to 52-2, 89-10 to -20; 23T11-5 to 28-18; 36T23-8 to 37-23. The court permitted Prajapati's net opinion testimony at trial over defendants' repeated objections. 20T69-24 to 25, 70-7 to -10, 71-9 to -12, 102-4 to -6, 119-25 to 120-5; 21T18-20 to 35-4. As a result, the trial court committed reversible error in (1) denying summary judgment, (2) permitting Prajapati to testify regarding his net opinions and (3) relying on Prajapati's net opinion testimony in reaching its conclusion that the Disputed Transactions were unauthorized. See Polzo v. Cnty of Essex, 196 N.J. 569, 582 (2008); Townsend v. Pierre, 221 N.J. 36, 53 (2015); N.J.R.E. 703.

Perhaps the most ridiculous opinion expressed by Prajapati was that A3I's withdrawal of $2.3M from MRL's bank account on November 26, 2014 to fund part of its buyout of DGNS's 50% membership interest in MRL constituted conversion. 20T124-16 to 125-14; 23T27-9 to 28-12. Based on Prajapati's testimony, the trial court summarily held that Defendant was jointly and severally liable for converting these funds despite there being no evidence in the record to this effect. 36T37-17 to -23.

What the evidence actually showed was that Mehta asked for two checks from A3I in November 2014 – one for $1.36M and the other for $1.28M – as a deposit towards the DGNS buyout so that he could use the money for an investment in India. 25T103-15 to 104-25, 123-9 to 135-3; Da02740, Da03362 – Da03388, Da03456 – Da03457. The evidence further confirmed that Mehta authorized Hedvat to transfer money from MRL to A3I in order to pay Mehta/DGNS the $2,640,000 deposit because A3I lacked funds to do so. Id. The terms of the 2014 MRL Purchase Agreement did not preclude A3I from using MRL's money to fund the buyout of DGNS because this was an equity sale with a contractually agreed upon purchase price – not an asset purchase involving a division of corporate cash. Id.

Rather than establishing that the Defendant wrongfully converted Plaintiffs' funds, the evidence at trial instead demonstrated that Mehta authorized the Disputed Transactions (which were reflected on Chemtech and MRL's accounting records), jointly made financial decisions with Hedvat on behalf of the companies, and continuously reviewed Chemtech and MRL's finances with Hedvat. 16T177-10 to 180-4; 20T124-16 to 130-9; 21T25-11 to 28-12; 22T43-16 to 52-2, 80-21 to 90-14; 23T11-5 to 28-12, 70-1 to 71-11, 97-16 to -24; 24T22-12 to 24-5, 50-11 to 51-1; 25T31-6 to 33-7, 56-3 to 57-8, 103-15 to 105-1, 125-1 to 126-4, 152-6 to 160-8; 26T6-1 to 24-24; 26T 32-14 to 34-

3, 58-22 to 62-16, 73-11 to 78-22, 104-4 to 106-23; 30T 89-17 to 98-5; Da02858 – Da03032, Da03054 – Da03068, Da03077, Da6612 – Da6788, Da07299 – Da07305, Da07364 – Da07386, Da07390 – Da07746. For example, the court concluded, without any explanation or citation to the record, that Hedvat made unauthorized withdrawals of capital from Chemtech and MRL via the Disputed Transactions. 36T28-1 to -25, 47-1 to 52-25. As such, the court held that these purported diversions precluded Plaintiffs from sharing in the profits of the companies, entitling them to half of the transferred funds. Id.

Mehta presented no evidence that he and Hedvat formally voted on any expenditure of funds or transaction made by Chemtech or MRL. This is because the evidence at trial firmly established that Mehta and Hedvat's custom and practice in running Chemtech and MRL did not involve voting on every transaction processed through the companies, but instead consisted of daily informal discussions. 17T93-1 to 101-15; 25T56-3 to 57-8. Indeed, the evidence showed that Mehta approved of all significant transactions involving Chemtech and MRL (including the Disputed Transactions) and was materially involved in all aspects of managing the companies' finances. 25T152-6 to 160-8; 26T6-1 to 24-25; 29T32-14 to 34-13, 104-4 to 106-23; 30T94-12 to 95-7; Da02858 – Da03032, Da03054 – Da03068, Da03077, Da06612 – Da06788, Da07299 – Da07305, Da07364 – Da07386, Da07390 – Da07746. This begs the question,

where was the testimony from Mehta that he did not authorize the Disputed Transactions? The simple answer is that Mehta did not provide any such testimony. 23T97-1 to 98-15. Mehta's unfounded accusation in the Amended Complaint that Hedvat took unauthorized distributions from Chemtech and MRL was akin to the pot calling the kettle black, considering that he paid for his home renovations with MRL's funds and processed numerous personal expenses through Chemtech and MRL without Hedvat's authorization. 17T16-17 to 25-2; 29T101-4 to -15; Da02913 – Da02926, Da07299 – Da07305. Therefore, based on Mehta's own conduct in running Chemtech and MRL, the court should have rejected Mehta's argument that the Disputed Transactions violated the 2007 Chemtech Stockholders Agreement and the MRL Operating Agreement because he purportedly did not authorize them. 23T114-12 to 115-11.

Lastly, Plaintiffs failed to present any evidence that Defendant had knowledge of, participated in, or benefitted from the Disputed Transactions. Due to the court's errors summarized above, including permitting Prajapati to present net opinion testimony at trial, the Judgment should be reversed against Defendant as to Counts 5 and 6 of the Amended Complaint in the interests of justice.

POINT III

THE TRIAL COURT'S HOLDING THAT DEFENDANT WAS LAIBLE FOR BREACH OF CONTRACT WAS MANIFESTLY UNSUPPORTED BY THE EVIDENTIAL RECORD (36T50-1 to 51-21)

A. The Trial Court Erred By Holding Defendant Liable For Breach Of Contract With Respect To Contracts That She Was Not A Party To

In order to prevail on a breach of contract action in New Jersey, the "law imposes on a plaintiff the burden to prove four (4) elements: first, that '[t]he parties entered into a contract containing certain terms'; second, that 'plaintiff[s] did what the contract required [them] to do'; third, that 'defendant[s] did not do what the contract required [them] to do[,]' defined as a 'breach of the contract'; and fourth, that 'defendant[s'] breach, or failure to do what the contract required, caused a loss to the plaintiff[s].'" Globe Motor Co. v. Igdalev, 225 N.J. 469, 483 (2016) (citations omitted). However, a nonparty to a contract cannot be liable for another's breach without privity of contract. FDIC Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 876 (3d Cir. 1994); Rieder Cmtys., Inc. v. Twp. of N. Brunswick, 227 N.J. Super. 214, 222 (App. Div.) (citations omitted), certif. denied, 113 N.J. 638 (1988).

Of the five contracts in dispute, the Court only held Defendant liable for breaching the MRL Operating Agreement and the 2007 Chemtech Stockholders Agreement because she "was legally part of it in this Court's mind." 36T50-10

to 51-21. However, Defendant was not a party to either of those contracts. Da02701, Da2712. Accordingly, the trial court clearly erred as a matter of law by holding Defendant personally liable for breaching contracts she was not a party to. Id.; see FDIC Deposit Ins. Corp., supra, 27 F.3d at 876 and Twp. of N. Brunswick, supra, 227 N.J. Super. at 222. Moreover, the court made no factual findings regarding the elements of breach of contract that Plaintiffs established against Defendant. Therefore, the Judgment against Defendant on Counts 7 and 8 of the Amended Complaint must be reversed as a matter of law.

B. The Record Evidence Did Not Establish That Defendant Breached Any Contract

The trial court's ruling that Defendant breached the MRL Operating Agreement the 2007 Chemtech Stockholders Agreement was manifestly unsupported by the evidential record and clearly produced an unjust result. 36T50-10 to 51-21. The alleged breaches under the MRL Operating Agreement and the 2007 Chemtech Stockholders Agreement, which were only generally recited in the Amended Complaint, relate to: (1) the expenditure of corporate funds upon majority vote; (2) the parties' fiduciary obligation to not commit acts that are detrimental to the companies; and (3) to properly enter business transactions in the companies' books. Da00001 – Da00043 at ¶¶ 113-114, 119-120. However, the evidence presented at trial established that Chemtech, Hedvat, MRL and A3I complied with all of their respective obligations under

the aforementioned agreements. 24T32-20 to -25, 38-20 to -24, 68-13 to 73-14; Da07299 – Da07305 at ¶¶ 6, 17-18.

In short, Plaintiffs did not sustain their breach of contract claims, nor did they establish a legal nexus between those contracts and Defendant, such that she could be held liable for purported breaches by the actual parties to those contracts. Moreover, the court did not find that Defendant breached the 2017 Chemtech SPA, the only contract she was actually a party to. 36T50-10 to 51-21. Accordingly, the Judgment should be reversed against Defendant as to Counts 7 and 8 of the Amended Complaint.

POINT IV

THE TRIAL COURT'S HOLDING THAT DEFENDANT WAS LAIBLE FOR BREACHING THE COVENANT OF GOOD FAITH AND FAIR DEALING WAS MANIFESTLY UNSUPPORTED BY THE EVIDENTIAL RECORD (36T50-1 to 51-21)

Under New Jersey law, a covenant of good faith and fair dealing (e.g., as alleged in in the Eleventh Count of the Amended Complaint) is implied in every contract." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) citing, Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). This means "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Sons of Thunder, supra, 148 N.J. at 420. The "breach of the implied covenant of good faith and

fair dealing does not create an independent cause of action when it is based on the same underlying conduct as the breach of contract claim." Hills v. Bank of Am., 2015 U.S. Dist. LEXIS 32502, *8 (D.N.J March 17, 2015) (citations omitted); Tredo v. Ocwen Loan Servicing, 2014 U.S. Dist. LEXIS 145731, *15 (D.N.J. Oct. 10, 2014). Rather, breach of the implied covenant of good faith and fair dealing may be an independent cause of action only under three limited circumstances:

> (1) to allow the inclusion of additional terms and conditions not expressly set forth in the contract, but consistent with the parties' contractual expectations; (2) to allow redress for a contracting party's bad-faith performance of an agreement, when it is a pretext for the exercise of a contractual right to terminate, even where the defendant has not breached any express term; and (3) to rectify a party's unfair exercise of discretion regarding its contract performance.

Id. at *8-9. Assuming Plaintiffs' claim was even cognizable under one of these three (3) limited circumstances, "a claim for breach of the duty of good faith and fair dealing requires a showing of 'bad motive or intention.'" Id. at *9, Wilson, supra, 168 N.J. at 246. Based on this principle, nonparties to contracts cannot be held responsible for a breach. FDIC Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 876 (3d Cir. 1994).

The only contract that Defendant was individually a party to was the 2017 Chemtech SPA, which the trial court did not find she breached. 36T50-1 to 51-21. The evidential record did not support a finding that Defendant did something

that adversely affected the Plaintiffs' rights under any of the contracts at issue in this case. Indeed, the only analysis that the trial court provided regarding this claim was in connection with the 2007 Chemtech Stockholders Agreement – to which Defendant was not a party – where the trial judge concluded, "And I think Count 11, those do violate the covenant of good faith and fair dealing, which I think are present here." 36T51-19 to -21. Plainly, Defendant cannot be liable for a breach of the covenant of good faith and fair dealing regarding a contract that she was not a party to. FDIC Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 876 (3d Cir. 1994).

Moreover, Plaintiffs' claim failed as a matter of law because: (1) it was based on the same underlying conduct as their breach of contract claims; (2) it did not fall within the limited circumstances warranting pursuit of such a claim; and (3) Plaintiffs did not meet their burden of proof of a bad motive or intent in establishing a breach of the implied covenant by Defendant. Tredo, supra, 2014 U.S. Dist. LEXIS at *8-9. Thus, the trial court erred as a matter of law by holding Defendant liable for breaching the covenant of good faith and fair dealing under the 2007 Chemtech Stockholders Agreement and MRL Operating Agreement, which produced an unjust result requiring the reversal of the Judgment against Defendant as to Count 11 of the Amended Complaint in the interests of justice.

POINT V

THE TRIAL COURT'S HOLDING THAT DEFENDANT WAS LAIBLE FOR UNJUST ENRICHMENT WAS MANIFESTLY UNSUPPORTED BY THE EVIDENTIAL RECORD (36T51-22 to 52-6)

In addition to misstating the legal standard for prevailing on a claim of unjust enrichment, the trial court also failed to provide an adequate statement of reasons for entering Judgment against Defendant on Plaintiffs' claims under Counts 12 and 13 of the Amended Complaint. 36T51-22 to 52-6. Recovery for unjust enrichment requires that a plaintiff "show both that defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Because unjust enrichment is an equitable remedy resorted to only when there was no express contract providing for remuneration, a plaintiff may recover on one or the other theory, but not both. Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3rd Cir.1982). Likewise, and finally, a claim for unjust enrichment cannot succeed where the allegations underlying the claim sound, as they do here, in tort. Pereira v. Azevado, 2013 U.S. Dist. LEXIS 54868, *13 (D.N.J. April 17, 2013) (citations omitted).

Against this backdrop, Plaintiffs' unjust enrichment claims were barred as a matter of law because there were express contracts between the parties. Van Orman, 680 F.2d at 311. Moreover, Plaintiffs' claims failed because the

allegations underlying the claims sounded in tort. Pereira, supra, 2013 U.S. Dist. LEXIS at *13. Lastly, Plaintiffs failed to prove that Defendant converted any money or that she received an unjust benefit belonging to them. See Points I-IV infra. Accordingly, the trial court's conclusion that Defendant was liable for unjust enrichment was manifestly unsupported by the evidential record and its errors of law produced an unjust result, warranting the reversal of the Judgment against Defendant on Counts 12 and 13 of the Amended Complaint in the interests of justice. 23T96-3 to 97-15.

POINT VI

THE TRIAL COURT'S RELIANCE UPON TRANSACTIONS THAT OCCURRED MORE THAN SIX YEARS BEFORE THE COMPLAINT WAS FILED CLEARLY PRODUCED AN UNJUST RESULT (13T58-7 to 100-23; 23T95-9 to 105-12; 36T52-7 to -24)

As Defendant has argued, the trial court's errors in this case warrant a reversal of the Judgment entered against her. However, even if the Judgment were to survive, the trial court's reliance upon transactions plainly outside the statute of limitations requires a substantial reduction of the Judgment in the interests of justice.

In her motion for summary judgment, Defendant argued that the court should dismiss Mehta's claim for unpaid compensation, in part, because this breach of contract claim was barred by the six-year statute of limitations.

N.J.S.A. 2A:14-1; 10T58-7 to 100-23. Defendant also raised the statute of limitations as an affirmative defense in her Answer and argued at trial that the "discovery rule" should apply to bar Plaintiffs' fraud and conversion claims on her motion to dismiss following the close of Plaintiffs' case. 23T95-9 to 105-12; Da00507 at ¶6. The record demonstrates that the trial court was aware of the statute of limitations applicable to Plaintiffs' conversion and breach of contract claims (36T52-7 to -10) in addition to the fact that a significant portion of Plaintiffs' claims relied upon transactions that occurred before the limitations period. 13T57-8 to -15.

The claims underlying the Judgment entered against Defendant (conversion, breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment) are all governed by a six-year statute of limitations. N.J.S.A. 2A:14-1; Save Camden Pub. Schs. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 487 (App. Div. 2018) (Determining whether a cause of action is barred by a statute of limitations is a question of law that this court reviews de novo). Because the initial complaint was filed on January 17, 2020, any claim sounding the foregoing causes of action that accrued before January 17, 2014 was barred under the statute of limitations. Notwithstanding the foregoing, the trial court relied exclusively upon the testimony and schedules prepared by Plaintiffs' expert in computing the Judgment amount, which

included transactions ranging from December 6, 2008 to November 7, 2013 (36T34-20 to 26-10) totaling $2,751,066.50. P-238 (schedule 15). Utilizing the same methodology as the trial court, half of the amounts of these time-barred transactions (approximately $1,375,533.25) were erroneously included in the $2,872,358.93 compensatory damage award. Thus, time-barred transactions represented nearly one-half of the award.

In its decision, the trial court acknowledged the application of a six-year statute of limitations but failed to apply the law correctly. That error is rooted in a misapplication of the discovery rule. The judge stated, "As far as any kind of statute of limitations claim, on the discovery rule, when you find something out, conversion has a six-year statute of limitation, as does the contract claim." 36T52-7 to -10. However, the discovery rule does not toll the statute of limitations until the date "when you find something out." Lopez v. Swyer, 62 N.J. 267, 274-75 (1973) (the discovery principle "modifies the conventional limitations rule only to the extent of postponing the . . . accrual of the cause of action" date until the plaintiff "discovers, or by an exercise of reasonable diligence and intelligence should have discovered[,] that he may have a basis for an actionable claim.) Because "legal certainty" is not required, a plaintiff does not need "to understand the legal significance of the facts" or "be informed by an attorney that a viable cause of action exists" before the claim will accrue.

Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (citing Lopez, 62 N.J. at 273-74). "Likewise, a plaintiff may not delay his filing until he obtains an expert to support his cause of action," Kendall, 209 N.J. at 193, which is what occurred here. see also DSK Enterprises, Inc. v. United Jersey Bank, 189 N.J. Super. 242, 251 (App. Div. 1983); Berman v. Gurwicz, 189 N.J. Super. 89, 102-103 (Ch. Div. 1981); Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56 (2000).

In this case, the Disputed Transactions were reflected in books and records that Mehta had access to and, as he repeatedly testified, was never prevented from reviewing. 17T166-18 to 167-2. Further, Myers, the parties' personal and corporate accountant, confirmed as such in his affidavit and further certified that Mehta was aware and approved of all significant transactions reflected on Chemtech and MRL's financial books and records. Da07299. Moreover, the evidence showed that Mehta had joint control, and participated in, the companies' finances and that he stored these records on his Chemtech work computer. 16T150-3 to 155-5; 17T38-24 to 55-13, 116-1 to 119-17, 131-20 to 135-10; 21T134-13 to 137-12; 16T57-19 to 74-20; 31T44-19 to 99-1; Da02865 – Da02896, Da02900 - Da03032, Da03033 – Da03039, Da03054 – Da03058, Da03060, Da03061 – Da03062, Da07364 – Da07386, Da07179 – Da07180, Da07387. As such, the evidence demonstrated that Mehta had the ability to conduct whatever due diligence he wanted regarding ***his*** companies and did in

fact review the QuickBooks at issue prior to selling his interests in Chemtech and MRL. Id.

Based on the foregoing, the trial court erred, as a matter of law, in awarding damages based on discrete transactions that occurred over six years before the complaint was filed, which accounted for nearly half of the compensatory damages awarded by the trial court. Because the magnitude of this error of law clearly produced an unjust result, this Court should reduce the damage award accordingly in the interests of justice and make corresponding reductions to the interest charged to Defendant as part of the final Judgment.

POINT VII

THE TRIAL COURT ERRED, AS A MATTER OF LAW BY HOLDING DEFENDANT JOINTLY AND SEVERALLY LIABLE FOR THE DAMAGES AWARDED IN THE JUDGMENT
(23T96-3 to 97-15; 36T49-11 to 51-21; 37T42-15 to 45-5)

Defendant argued at trial, and in her post-trial motion for reconsideration, that there was no legal basis to hold her jointly and severally liable for the entire Judgment. 23T96-3 to 97-15; 37T42-15 to 45-5. Nonetheless, the trial court, without explanation, held Defendant jointly and severally liable for converting funds with respect to transactions that she had no involvement in. 36T49-11 to 51-21. Bondi v. Citigroup, Inc. 423 N.J. Super. 377, 432 (App Div. 2011) (if a

party did not wrongfully convert money belonging to the plaintiff or did not receive converted funds, they cannot be liable for the tort of conversion).

Likewise, there was no evidence in the record, nor any factual findings made by the trial court, to support piercing A3I's corporate veil to hold Defendant personally liable for acts purportedly committed by A3I in connection with the Disputed Transactions. See Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006); N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 468, and 500 (1983). Further, the court did not engage in any analysis or make factual findings to impose personal liability on Defendant under the "tort participation theory," regarding monies purportedly converted by the corporate defendants. See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). Thus, as a matter of law, there was no basis for the court to hold Defendant personally liable for any purported acts committed by A3I in connection with the Disputed Transactions.

Furthermore, the court erred as a matter of law by holding Defendant personally liable for breaching contracts and the covenant of good faith and fair dealing under contracts that she was not a party to. 36T49-11 to 51-21; FDIC, supra, 27 F.3d at 876 (a nonparty to a contract cannot be liable for a breach of contract or breach of the covenant of good faith and fair dealing if they are not a party to the contract). The only contracts the court found were breached were

the MRL Operating Agreement and 2007 Chemtech Stockholders Agreement, neither of which Defendant was a party to. 36T50-10 to 51-21; Da02701, Da02712. Thus, as a matter of law, Defendant did not breach these agreements or any express or implied covenants contained therein. Likewise, the court erred in holding Defendant jointly and severally liable for unjust enrichment because she did not convert any funds from Plaintiffs or otherwise receive a financial benefit they were entitled to. See Caputo v. Nice-Pak Prods., Inc., 300 N.J. Super. 498, 507 (App. Div. 1997) (a party must receive an unjust benefit (contractual or otherwise) that they were not otherwise entitled to in order to be held liable for unjust enrichment). The court repeated all of the foregoing errors in denying Defendant's post-trial motion for reconsideration on these issues. 37T79-7 to 80-14; Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (the Appellate Division reviews a trial judge's decision on whether to grant or deny a motion for rehearing or reconsideration under R. 4:49-2 (motion to alter or amend a judgment order) for an abuse of discretion.)

For all the foregoing reasons, the trial judge clearly abused its discretion and made errors of law in holding Defendant jointly and severally liable under the Judgment and failing to reconsider its decision. The court's ruling produced an unjust result by holding Defendant 100% responsible for a damage award based on claims that Defendant could not be found liable for as a matter of law.

Therefore, at a minimum, the Court should apportion liability against Defendant only for the Disputed Transactions that were purportedly deposited into her and Hedvat's joint bank account. 36T36-11 to 37-9.

POINT VIII

THE TRIAL COURT ERRERED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING PLAINTIFFS COUNSEL FEES AND COSTS (36T26-10 to 32-10, 50-10 to 52-6; 37T88-13 to 92-18)

In connection with the Plaintiffs' post-trial motion for final judgment, the trial court awarded Plaintiffs $1,181,874.51 in attorneys' fees and litigation costs. However, there was no statute, court rule or contract that entitled Plaintiffs to such an award against Defendant. Accordingly, the court erred as a matter of law by granting Plaintiffs' fees and costs.

"In the field of civil litigation, New Jersey courts historically follow the 'American Rule,' which provides that litigants must bear the cost of their own attorneys' fees." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). "However, 'a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001)). "[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc.,

200 N.J. 372, 386 (2009) (quoting Packard Bamberger & Co., supra, 167 N.J. at 444).

Without belaboring the point, the **only** contracts that the Court found Defendant breached were the Chemtech Stockholders Agreement and the MRL Operating Agreement, which do not contain fee shifting provisions. 36T50-10 to 52-6; Da02701, Da02712. Notwithstanding the foregoing, the trial court incorrectly accepted Plaintiffs' argument that they were entitled to recover fees and costs under the 2014 and 2017 Chemtech SPAs and the 2014 MRL Purchase Agreement, despite never finding that Defendant breached these agreements in its June 30, 2022 decision. 36T26-10 to 32-10, 50-10 to 52-6; 37T88-13 to 92-18; Da02740, Da02816 – Da02836. Moreover, the court's puzzling conclusion that the Chemtech SPAs, 2014 MRL Purchase Agreement, 2007 Chemtech Stockholders Agreement and MRL Operating Agreement "all play off of each other" is not a legal basis to award counsel fees. 37T88-1 to 89-20. Therefore, as a matter of law, Defendant was not required to indemnify Plaintiffs for damages under agreements she did not breach and which the court **did not find** she breached. Based on the foregoing, the trial court's award of counsel fees and costs to Plaintiffs constituted a clear abuse of discretion and error of law. Therefore, this Court should reverse the award of fees and costs against Defendant under the Judgment.

CONCLUSION

For the foregoing reasons, the chancery court's Judgment should be reversed against Defendant as to Counts 5-8 and 11-13 under the Amended Complaint and the award of attorneys' fees, costs and pre-trial interest should be vacated.

Respectfully Submitted,

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DIVYAJIT MEHTA and DGNS CORP., Plaintiffs-Respondents / Cross-Appellants, v. EMANUEL HEDVAT, FARIBA HEDVAT, CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, AMERICAN ANALYTICAL ASSOCIATION, INC., NJ CUBIC 29, LLC, 29 COTTAGE STREET, LLC, VIRTUAL INSTITUTE PERSONNEL, LLC, CHEMTECH GROUP LLC and EFJ REALTY LLC, Defendants-Appellants / Cross-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000385-22T1 Civil Action ON APPEAL FROM: Superior Court Of New Jersey Bergen County: Chancery Division Docket No. BER-C-135-20 Sat Below: Hon. Edward A. Jerejian, P.J.Ch.
CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, and VIRTUAL INSTITUTE PERSONNEL, LLC, Third-Party Plaintiffs-Appellants, v. ARECON LTD., GAYATRI MEHTA, JOHN DOES 1-10 and ABC CORPS. 1-10, Third-Party Defendants-Respondents.	

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENTS AND CROSS-APPELLANTS DIVYAJIT MEHTA AND DGNS CORP.

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PRELIMINARY STATEMENT

In this business divorce and misappropriation action, the lower court determined after 22 days of trial that defendants Emanuel and Fariba Hedvat – directly and through business entities that they own and/or control – diverted $2,872,358.93 that rightfully belonged to their former business partners (and Respondents here), Divyajit Mehta and DGNS Corp. After weighing volumes of documentary evidence and weeks of witness and expert testimony, the trial court found the defendants liable, jointly and severally, for breach of contract, conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing.

The trial court's determination as to Appellant Fariba Hedvat's liability is fully justified. Fariba is and always has been the 100% shareholder in defendant American Analytical Association, Inc. ("A3I"). A3I, from inception, was Plaintiff DGNS Corp.'s sole co-member in defendant Mountainside Realty, LLC ("MRL"). Fariba signed the MRL operating agreement on behalf of A3I, and signed all of A3I's tax returns. Additionally, Fariba, Mehta, and Chemtech Consulting Group, Inc. ("Chemtech") entered into the Chemtech Stock Purchase Agreement from which, together with the MRL-related claims, the entire subject matter of this action arises. All of the sums as to which the trial court held the defendants liable for conversion were deposited either into A3I's account or Fariba's joint account with her husband. To assert, as Fariba does, that she was not involved in the conversion transaction is

simply false. Fariba, no less than her husband, received and benefited from the converted sums. She presented no separate defense at trial. Fariba's liability for conversion and contract-related claims are inseparable from the liability of her husband and their related business entities.

The trial court carefully weighed virtually all of the evidence that either side sought to present. In its two post-trial oral decisions, the lower court made clear findings that Plaintiff Divyajit Mehta and his accounting expert, Hemant Prajapati, were both credible. The trial court mentioned as much at least three times. The court below went so far as to explain that while the defendants attempted to characterize Mehta as delusional for having the temerity to file this lawsuit, "I didn't find that he was delusional. I found him credible. I found Mr. Prajapati credible. I found transactions which were diversions or misappropriations." The trial court made no similar credibility findings about the defendants or their experts. In fact, the trial court rejected the defendants' explanations for their conduct, concluding: "there's nothing there. You know there was really no meat to most of the explanations."

In this Court, Fariba raises several arguments, none of which has merit. Some – like the statute of limitations and the failure to satisfy a pre-suit demand for conversion – were never raised below. Most of the other issues she raises inappropriately ask this Court to recast itself as a finder of fact, quibbling with weight of the evidence. Over and over, appellant argues that the trial court erred

because the proofs at trial failed to establish a right to relief. What she continually ignores, however, is that the trial court had a full opportunity to weigh the evidence offered by all parties. It judged the demeanor of the witnesses who testified to determine their credibility. In fact, appellant says nothing at all about the trial court's finding that the Plaintiffs' principal witnesses were credible, or its finding that there was "no meat" to the defense's explanations.

Ultimately, the trial court weighed the evidence and correctly decided virtually all of the issues before it, save one: pre-judgment interest. The trial court identified nine discrete instances when defendant, Emanuel Hedvat, in concert with Fariba and the other defendant entities, misappropriated funds from two defendant companies in which the Plaintiffs had an interest: Chemtech and MRL. Each misappropriation for which the trial court awarded damages to Plaintiffs was tied to a specific date and transaction for which Plaintiffs showed that money flowed from Chemtech or MRL to the Hedvats' own personal bank accounts or other accounts for entities they owned or controlled. Based on these findings, the trial court should have assessed $838,810.40 in pre-judgment interest based on the defendants' use and enjoyment of these funds. Instead, the trial court only awarded $190,480.68 in interest, calculated from the commencement of suit. In doing so, the lower court abused its discretion. That discrete portion of the judgment should therefore be reversed.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This is a lawsuit between two former business partners, one of whom misappropriated millions of dollars from their joint enterprises. Those misappropriations deprived the Plaintiffs, Divyajit Mehta and DGNS Corp., of nearly $3 million when their interests were acquired by the defendants.

A. The Personal and Business Relationship Between Mehta and Hedvat

The key players are Mehta and his former business partner, Emanuel Hedvat ("Hedvat"). Mehta is a chemical engineer with a degree from India. In 1984, he began to work for defendant Chemtech Consulting Group, Inc. ("Chemtech"), an environmental testing company, eventually becoming the lab manager. (14T 39:3-18; 14T 45:12-17).[2] Hedvat immigrated to the U.S. from Iran, studied chemistry, and began working for Chemtech around the same time as Mehta. Hedvat eventually became Chemtech's sales and marketing manager. (24T 13:1-16; 14T 45:12-14).

Over time, Mehta and Hedvat became good friends. Hedvat hired Mehta's wife as a chemist, the Mehtas attended Hedvat's wedding, and Hedvat gave the Mehtas some money to purchase their first home. (14T 45:7-16). Together, they built Chemtech into a multi-million-dollar enterprise.

In 1990, Mehta and Hedvat acquired ownership interests in Chemtech, and in

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[1] Because the facts and procedural history are inextricably intertwined, they are presented in a single narrative for clarity.

[2] Respondents adopt the same transcript references as appellant.

2007 became the sole shareholders in the company. (14T 47:18-24). In the interim, the company grew and became successful. Chemtech acquired and operated labs in Englewood, Edison, Forked River, and eventually Mountainside. (14T 52:10-12).

During this period the division of labor between Mehta and Hedvat also crystallized. Mehta managed lab operations and travelled between locations to oversee the technical aspects of Chemtech's operations. Hedvat was in charge of sales, marketing, books and records, and Chemtech's finances. (Da2775). He maintained the Chemtech company check book and had primary access to it. In nearly thirty years of working together, the company issued tens of thousands of checks and wires. Mehta signed a few dozen, usually with Hedvat's approval; Hedvat signed the rest. (19T 39:8 to 41:23; 17T 92:10-20). The trial court found: "there's no doubt in [my] mind that Mr. Mehta was a scientist. He was a chemist. He wasn't a bookkeeper. He wasn't an accountant. He wasn't running the company. That was more of Mr. Hedvat's role with other professionals." (36T 9:23 to 10:1).

B. The Formation of Mountainside Realty and its Holdings

Because of its multiple locations, Chemtech's operation was spread thin. Hedvat convinced Mehta to join him in acquiring a permanent headquarters for the company. As there were other partners in Chemtech at the time, the two men formed Mountainside Realty, LLC ("MRL") to serve as a holding company for the property where Chemtech would be headquartered. They further decided to establish 50/50

membership in MRL via two other entities, American Analytical Association, LLC ("A3I") and DGNS, which were, at the time, owned by their wives, Fariba Hedvat and Gayatri Mehta, respectively. (14T 60:13 to 61:10; Da2701-11).

Eventually, Hedvat and Mehta found 284 Sheffield Street in Mountainside. That space was sufficient to house and eventually consolidate Chemtech's other lab operations, and could accommodate potential expansion. (14T 61:18-23). Mehta's role in acquiring the building (via MRL) was limited to visiting the site and confirming that it was sufficient to accommodate Chemtech's needs. However, he was not directly involved in negotiations relating to the property, its financing, or the closing, each of which Hedvat handled. (14T 62:6 to 63:12). Chemtech leased the space from MRL for $40,000.00 per month. Hedvat set the lease terms. (14T 63:23 to 64:3).

MRL acquired additional real estate holdings after the Mountainside location. Notwithstanding that Mehta and Hedvat both had equal interests (through their wives' entities) in MRL, Hedvat generally handled the business and management aspects of the various MRL holdings. (28T 125:1-15; Da2775). In fact, Hedvat was a real estate agent and personally handled MRL's acquisitions. (14T 69:9-13). Eventually MRL's portfolio grew to include residential properties in Edgewater and Fort Lee, three buildings in Maywood and Leonia (the "EFJ Properties"), and a commercial building in Jersey City ("29 Cottage Street"). Mehta contributed capital

to fund most of these purchases, while Hedvat generally assumed responsibility for things like maintenance, rent collection, taxes, and other business aspects of the operation.

Although Hedvat purported to create an operating agreement for MRL that was made effective as of May 2000, the document was not actually signed until 2005 when a lender requested it in connection with the acquisition of another property that MRL came to own in Fort Lee. Fariba executed the document for A3I. Mehta had no role in drafting the operating agreement. (Da2701-11; 14T 64:16 to 66:4).

While Mehta remained focused on running the Chemtech labs, Hedvat continued his work on the marketing, sales, and accounting side of both MRL and Chemtech. Both companies kept accounting and business records via QuickBooks, which Hedvat oversaw. In fact, until the immediate run-up to this lawsuit in 2020, Mehta did not know how QuickBooks operated, had no training with the software, and never made accounting entries via the software. (14T 95:25 to 96:23; 19T 111:19 to 113:12). The "Admin" username for QuickBooks registered via Intuit to Chemtech, MRL, and other affiliated companies was Hedvat's. (21T 87:7-20). Hedvat also controlled the administrative password for QuickBooks. (22T 35:10-19). While some financial/accounting records were ultimately found on Mehta's Chemtech computer, Hedvat's digital forensic expert confirmed that QuickBooks software was not even installed on the machine and Mehta confirmed it was not

installed on his home computer. (17T 106:8-10; 32T 140:8-11).[3]

C. Hedvat Hires an Accountant for the Companies

During the Cottage Street, Jersey City transaction for MRL, Hedvat met the seller's accountant, Sandy Myers, with whom he developed a relationship. At Hedvat's urging, Myers became Chemtech's and MRL's accountant. Based on that relationship, Myers also became the accountant for Mehta and his family, and for DGNS. (14T 126:15 to 128:2). Although Mehta knew that Myers became the accountant for Chemtech and MRL, Myers mainly liaised with Hedvat, not Mehta. (15T 12:24 to 15:8; 16:11 to 18:3; 18:6-17; 21:24 to 22:18; 23T 83:9 to 91:5). According to engagement letters, Myers would review accounting and general ledger activity, advise on adjusting or correcting journal entries, year-end closing of books, and provide tax services, but he would not "audit or verify the data submitted." (Da2734-38). When Myers would come to the office, Hedvat took the meeting; Mehta joined later for lunch. (Da7392; 3T 109:18 to 110:24).

D. Business Operations from 2007-2014

The period between about 2005 and 2007 was the height of Mehta's business and personal relationship with Hedvat – what Mehta called a "golden time." (14T

[3] The trial court rejected the defendants' theory (Db12) that Mehta had knowledge of company finances based on information found on his computer. (36T 9:23 to 10:1). Indeed, to the extent the defendants rely on the testimony of their computer expert, Mr. Kyprianou, to establish this, the trial court concluded that his work was "cursory and not necessarily . . . dispositive of anything." (36T 41:1-3).

112:5-22). Business was booming and both men were well-compensated for their efforts. (14T 109:21 to 110:6; 15T 32:9 to 33:2). During a birthday party that Mehta threw for Hedvat, Mehta expressed in a speech his gratitude for Hedvat's friendship, how much he trusted and relied on Hedvat, and called Hedvat as his "partner" and his "guru." (14T 118:1-15).

In July 2007, the last of Mehta and Hedvat's partners sold his interest in Chemtech, leaving the two as the company's sole shareholders. (14T 120:11-18). They executed a revised Chemtech shareholder agreement made effective as of July 26, 2007 (Da2712). Each also executed an employment agreement with the company. (Da970; 976). At that time, Mehta acquired a 51% interest in the company and Hedvat acquired a 49% interest. (Da2732). Though they treated each other as equals (a fact memorialized in paragraph 31 of the 2007 stockholders agreement), this slightly greater ownership percentage for Mehta helped the company maintain Minority Business Enterprise ("MBE") and Disadvantaged Business Enterprise ("DBE") status, which was critical to help the company procure government contracts. (14T 120:19 to 121:3). Although Mehta was the "face" of the company for the purpose of preserving its MBE/DBE status, Hedvat knowingly participated in and enjoyed the benefits of that status. In fact, Hedvat supplied Mehta with the financial information necessary to complete the company's MBE/DBE applications and even completed some of the applications in his own handwriting. Mehta relied

on Hedvat to provide financial information that was accurate. (3T:113:2 to 114:7; 14T 125:24 to 126:14; 19T 9:21 to 11:9; 14:17 to 15:4; 15:23 to 16:4; 17:14-17; 17:18 to 18:21; 19:22 to 20:24; 22:4-13; 24:18 to 25:16; 25T 34:19 to 36:5; Da2865; 2879; 2998; 3054).

E. Negotiations Pertaining to the Acquisition of Plaintiffs' Interests

By 2013, Hedvat was managing MRL's real estate portfolio together with Chemtech's business affairs, and Mehta was working with both the Chemtech lab and the India office. Both men were busy. At about that time, Hedvat suggested that one of them buy the other out. Mehta wasn't interested at the time, but in about early 2014, Hedvat broached the topic once more, and Mehta asked him to send a proposal. (15T 40:22 to 41:23).

Hedvat put forth a series of proposals beginning in March 2014. (Da2788-89). Mehta was skeptical of the initial proposal from Hedvat because he did not believe it accurately reflected his investment and interest in certain properties. (15T 46:16 to 47:11). Between about March and April 2014, Mehta requested some additional information about the properties, but was still skeptical about splitting them at that time. Specifically, Mehta was concerned that he lacked sufficient knowledge in real estate. Mehta proposed tabling the idea of dividing up the MRL properties and Chemtech for five or six years. Hedvat responded that he wanted to do it at that time, and not wait. (15T 49:21 to 51:9).

Hedvat continued to put forth proposals for consideration in the following months. (Da2790; 2791). In analyzing these proposals, Mehta relied on the financial information and property valuations that Hedvat provided and did not perform any independent investigation. Mehta only later came to learn that many of Hedvat's figures were incorrect. For example, Mehta only learned during this lawsuit that the $2.4 million in Chemtech cash-on-hand that Hedvat represented in one proposal was closer to $3.4 million. (15T 66:12 to 67:2).[4]

On about June 25, 2014, Hedvat provided to Mehta two documents, in evidence at trial as P-48 and P-50.[5] (Da2792-97; 15T 67:15-22). Hedvat had called Mehta into his office that evening and the two continued to discuss splitting the properties. Hedvat mocked Mehta during that conversation about not being "good at business" because he could not collect money – a criticism that Mehta acknowledged. At various points during the chat, Hedvat became dismissive and told Mehta that Mehta would not get anything from Hedvat as part of a deal. (15T 71:16 to 72:24).

Hedvat described P-48 and P-50 to Mehta as balance sheets for Chemtech, MRL, and another entity, Cubic (which held the Cottage Street property in Jersey City). Mehta had not previously seen these documents and did not participate in

[4] Hedvat testified at deposition that he could not recall whether he ever lied to Mehta about the business of Chemtech and MRL. (23T 78:6-21).
[5] P-48 and P-50 together are colloquially known in this litigation as "Exhibit S."

preparing them. (15T 72:25 to 73:11; 73:25 to 74:6). In fact, Hedvat testified that Mehta was not even supposed to have seen these documents. (23T 69:2 to 70:25). This marked the first time that Hedvat had shown Mehta balance sheets for MRL and Cubic. (15T 73:25 to 74:6; 92:21-25).

P-48 and P-50 purported to be balance sheets for Chemtech, MRL, and Cubic, each of which identified in the left column an account for the company, an account value to the right of that, and, where applicable, an adjustment to value in the next column. (Da2792-97; 15T 74:7-16; 76:3-17). The left and center columns in P-48 and P-50 were extracts from the companies' QuickBooks, but some of the data in the left and center columns was removed, modified, or altered. The data in the left and center columns was extracted from the company records and served as a starting point for Mehta and Hedvat's discussion, and the right-most column for each company contained additional modifications made by Hedvat. (19T 91:16 to 92:20; 93:4 to 95:19; 30T 85:1-21).

Hedvat and Mehta reviewed P-48 and P-50. In their review, Hedvat purported to explain each line item and his various adjustments, where applicable. As to Chemtech, Hedvat subtracted liabilities from assets and arrived at a value of about $1,192,363.52. (Da2792-93). A similar discussion ensued about P-50, including for each of the cash and liability accounts and fixed assets for MRL and Cubic. (15T 82:12 to 90:11). Hedvat then took the net asset figures that he calculated for MRL

and Cubic and added them to reach $8,467,115.57. (Da2797). He then deducted out several supposedly forthcoming expenses, and third-party sale commission to arrive at a value for MRL and Cubic of $7,570,115.57. (Da2797). Hedvat told Mehta that he would add that third party sale commission back since they were not selling to a third party to arrive at a value for MRL and Cubic of $8.3 million. (15T 90:13-23).

For MRL and Cubic, DGNS' share of that $8.3 million figure would have been 50%, or $4.15 million. (15T 96:13 to 97:1). For Chemtech, after calculating net equity at just shy of $1.2 million, Hedvat applied a multiplier of 3 to arrive at a $3.6 million company valuation. Mehta's 51% interest in Chemtech yields a value attributable to him of $1.8 million. (15T 97:2-21). Thus, using these figures, Mehta's total interest in MRL, Cubic, and Chemtech would have been about $5.9 million. (15T 97:2 to 98:1).

Discussions continued into the summer and Hedvat presented a few additional proposals. (Da2798-2800). One such document purported to solicit Mehta to sell his interest in the real estate holdings for $4.1 million and his interest in Chemtech for $1.5 million for a total of $5.6 million. (Da2800). In a subsequent proposal, Hedvat increased the Chemtech value from $3 million to $3.2 million, which resulted in a corresponding change in the purchase price from $5.6 million to $5.7 million. This offer also modified the payout from a $1.6 million note to $1.7 million payable in $100,000 monthly installments. (Da2800 vs. Da2798). Hedvat also explained that

he needed Mehta to stay with Chemtech for an additional 3 years so that Chemtech could continue to hold its MBE status because it had ongoing government work. (15T 106:22 to 107:7). Hedvat had been offering to pay Mehta $120,000 per year, but Mehta demanded $200,000 per year for a total of $600,000. With this additional $600,000 added to the previously discussed $5.7 million for Mehta's interest in Chemtech, MRL and Cubic, Mehta's total payout would be $6.3 million. (Da2800; 15T 107:8 to 108:8).

Based on Hedvat's representations as to the finances, Mehta insisted upon receipt of $6.3 million. He and Hedvat shook hands and agreed that they had a deal on that number. (15T 109:17-23). Between the parties' original negotiations and exchange of spreadsheets in March 2014 and their handshake agreement in July of that year, Mehta never reviewed company financial records, and Hedvat never provided support for the balance sheets, P-48 and P-50. (15T 109:24 to 110:10). The reason that Mehta did not request any of this information from Hedvat was because after decades of friendship and partnership in business, Mehta trusted Hedvat implicitly and relied on him for all finance-related matters in their shared business endeavors. In their years working together, Mehta had never known Hedvat to have deceived him. (15T 110:11-14; 110:24 to 111:3).

After Mehta and Hedvat reached their handshake deal, Hedvat told Mehta that he didn't need a lawyer and that he (Hedvat) would draft up an agreement for them

and their wives to sign. Initially, Mehta agreed, but once he started receiving communications from Hedvat about memorializing the deal, Mehta noticed that they had been drafted by an attorney that Hedvat engaged (Mehta learned that Hedvat subsequently terminated his lawyer's services). Mehta then reached out to an accountant acquaintance, Hemant Prajapati, who referred him to an attorney. (15T 111:23 to 113:11). Mehta provided the attorney's name to Hedvat so that counsel could assist in the contract drafting. (Da2801). However, Mehta's attorney played no role in negotiating the purchase price for the deal. (15T 113:18-22).

To memorialize their agreement, Mehta, Hedvat, and their wives executed two documents. The first was a Stock Purchase Agreement ("SPA") made on December 5, 2014 by which Mehta sold his Chemtech interest to Hedvat. (Da2802). The second was a Membership Interest Purchase Agreement ("MIPA") made on the same date, and by which DGNS sold its interest in MRL to A3I. (Da2740).

The purchase price reflected in the SPA for Mehta's interest in Chemtech is not the $1.6 million previously discussed and agreed upon, but, rather, $740,000. (15T 115:18-21). This modification did not reduce the $6.3 million in total consideration for the entire transaction, but merely reallocated $860,000 of the Chemtech purchase price to the MRL acquisition based on the information set forth in P-48 and P-50 that formed the basis for the parties' deal. (15T 116:6 to 118:1; Da2802; 2816; 2740). Hedvat insisted on this reallocation to ensure Chemtech could

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maintain its MBE/DBE status. (15T 116:14-18).

According to the SPA, the closing to the transaction was delayed until December 31, 2017. (Da2803). Mehta was to receive from Hedvat $400,000 upon execution of the SPA, an additional $300,000 on July 1, 2017, and a final $40,000 payment at the December 31, 2017 closing. (Da2802-03).

Mehta did not, however, receive the final $40,000 payment as anticipated by the original SPA. (15T 120:11-15). Instead, at Hedvat's urging, and not long before he and Mehta were scheduled to close the original SPA transaction, the two men unwound the deal and re-executed a modified SPA with the same terms, except that appellant Fariba Hedvat, not Emanuel, would serve as purchaser of Mehta's interest. (Da2823). With Fariba purchasing Mehta's 51% interest in Chemtech, the company could continue as a DBE and Woman-Owned Business Enterprise ("WBE"). (15T 121:21 to 122:11). Mehta agreed to pay back the $700,000 portion of the SPA purchase price that he had been paid to date, and received in return new checks for that same amount issued by Fariba Hedvat. (15T 122:12-23; Da2836).

Despite having executed the MIPA and SPA, the parties' relationship vis-à-vis Chemtech did not change. They continued as partners with Mehta continuing to run the lab, and Hedvat continuing to run the business. (16T 38:2-6; 57:24 to 59:19). Mehta completed his additional three-year stint with Chemtech as the SPA contemplated as of December 31, 2017. (Da2816).

F. Mehta Discovers Hedvat's Accounting Antics

In April 2019, Mehta received a tax notice from the New Jersey Department of the Treasury. An audit of his 2015 tax return revealed that he owed an additional $98,038 to the State. (Da2837-38). Mehta then reached out to Sandy Myers (who at the time was still his personal accountant) and Hedvat to discuss the situation. Mehta also engaged CPA Hemant Prajapati to assist. To avoid further penalties, Mehta made a payment in about July 2019. (16T 69:4 to 70:18; 72:7-15).

Although Prajapati had known Mehta for about 20 years, Prajapati did not begin providing accounting services for him or for DGNS until sometime in 2019. (19T 79:7 to 80:1). Prajapati had no role in negotiating the purchase price for Mehta's interest in Chemtech or for DGNS's interest in MRL, nor was Prajapati paid in connection with discussions relating to the sale of those interests. (19T 80:23 to 81:25).

Mehta engaged Prajapati in about the summer of 2019 to review certain MRL business records that Mehta had received in response to inquiries prompted by the tax deficiency notice from the State. (19T 82:17-24). However, the records that Hedvat provided were insufficient, and Prajapati asked Mehta to request a complete set of the books of account for MRL. (19T 83:12 to 84:20). Mehta attempted to coordinate discussions with Myers, Hedvat, and Prajapati to figure out what happened and why he owed the money. Myers and Hedvat suggested a "quick fix"

to correct what they described as an error on the 2015 tax return. They proposed an amended return to address the issue, but Mehta was not convinced that would resolve the matter, and Prajapati requested to review the backup documentation to support the return. (16T 71:13 to 72:10; Da54-64).

Prajapati was concerned because the "quick fix" scheme concocted by Myers and Hedvat was to recharacterize the MRL transactions from membership interest sales to asset sales, which, in Prajapati's view, was inappropriate and could constitute tax fraud. (19T 84:21 to 85:24). Compounding matters, despite requests, Hedvat refused to turn over the full set of backup documentation that Mehta had been seeking. However, after several demands, Hedvat did turn over to Mehta certain limited QuickBooks files for MRL, Cubic, and another entity called VIP. Upon reviewing them, Mehta and Prajapati found about $2.1 million in accounting issues. Prajapati prepared a schedule based on the limited information provided containing entries that he and Mehta could not reconcile. When confronted, Hedvat responded that he had incorrectly entered certain information and that Myers would correct it. In addition, the parties discussed Hedvat providing an affidavit as to the errors and that Myers would file an amended tax return. Myers also said that he would speak with Prajapati about the situation. (16T 72:11 to 73:21; 19T 84:21 to 85:5).

One significant issue was that Hedvat declined to turn over to Mehta and

Prajapati full MRL backup data and supporting documents. By letter dated September 6, 2019, Mehta admonished Hedvat that he and Prajapati still had not received the full set of backup documentation that they had been requesting to support the MRL tax returns. At the end of the letter, Mehta advised Hedvat that if Hedvat was not willing to provide the information that Prajapati was requesting, Mehta would have no choice but to pursue legal action. (Da2842-44). Neither Hedvat nor the defendants ever turned over the full set of much sought-after backup documentation prior to Mehta commencing suit. (16T 74:24 to 75:7).

About two weeks later, on September 19, 2019, Myers issued a letter to the New Jersey Division of Taxation advising that a nearly $2 million distribution charged to DGNS and A3I equally should have been charged solely to A3I, as DGNS did not actually receive any funds, and that this change would negate any tax due from Mehta in the State's tax deficiency notice. (Da2845). Still, neither Mehta nor Prajapati received any underlying documentation to explain this supposed error. (16T 76:21 to 77:2). On October 1, 2019, Mehta requested from Hedvat Chemtech QuickBooks files up to January 2018. (Da2857). Hedvat refused to turn those over. Instead, he provided a few additional Chemtech tax returns, but those tax returns raised more questions, because the 2017 return showed significant unexplained retained earnings on which Mehta paid taxes but which Hedvat had refused to distribute. (16T 77:22 to 78:5; 78:6 to 79:6).

On October 29, 2019, Myers executed an affidavit purporting to memorialize the circumstances of the tax filing that erroneously allocated that nearly $2 million distribution to DGNS and A3I, instead of just to A3I. (Da2848). Initially, Myers prepared the affidavit for Hedvat's signature, but Hedvat refused to sign. In fact, by this time, Hedvat was so overtly hostile toward Mehta that when Myers asked him to sign the affidavit, Hedvat responded in a series of text messages: "NO fucking way . . . No fucking way I sign anything for anyone . . . File a fucking suit . . . Never ever mention [Mehta's] fucking name to me again . . . If you want to stay my CPA." (27T 14:11-22; Da7309). Myers ultimately prepared and signed the requested affidavit himself. Although Myers prepared and signed the affidavit, the State still refused to refund any of the amounts Mehta paid pursuant to the tax deficiency notice. (16T 80:7-20).

G. Procedural History Through the Time of Trial

As a result of their intransigence and refusal to produce the requested records, on January 17, 2020, Mehta and DGNS filed a Complaint against the Hedvats, Chemtech, MRL, and A3I. (Da7836). The defendants moved to dismiss. The trial court granted that motion in part, allowed the Plaintiffs leave to replead, and entered a consent order, dated May 22, 2020, tolling the statute of limitations and allowing Plaintiffs to file a new complaint within 60 days. (Da2653-54). On July 20, 2022

Mehta and DGNS filed a new Complaint. (Da2533).[6] The defendants filed an answer with a counterclaim and third party complaint. (Da497).[7]

Several discovery disputes ensued involving the production of financial records of the named defendant companies and other related entities also controlled by the Hedvats. The defendants fought "tooth and nail" to limit the scope of what records Plaintiffs were able to access. (36T 15:23 to 17:6). Ultimately, the trial court recognized this reticence to produce financial information for what it was—an effort to conceal from Plaintiffs what the defendants had done:

> I found transactions were diversions or misappropriations. So to say that the plaintiffs caused delay, it was like pulling teeth to get these QuickBooks. And then [the defendants] want to limit the scope when the defendant[s] knew that there were transactions after the fact. So that is why he wanted to limit it, because you knew that. Well, the plaintiffs didn't know that, the Court didn't know that.

(37T 75:7-21). As the trial court made clear, the defendants were not opening their books and saying to the Plaintiffs and the Court "we have nothing to hide." (37T 75:22 to 76:3).

Ultimately, the defendants produced some records that Plaintiffs sought, and the review of these materials led Plaintiffs (with permission) to file an Amended

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[6] The original matter filed in January 2020 proceeded under BER-C-13-20. The new matter filed in July 2020 proceeded under BER-C-135-20.

[7] The defendants also filed third party claims against accountant Sandy Myers and his firm, but voluntarily dismissed them after Myers provided what Hedvat believed was an affidavit favorable to his claims against the Plaintiffs. (Da497; 27T 25:3-6).

Complaint on September 16, 2021. The Amended Complaint not only asserted claims against the Hedvats, Chemtech, MRL, and A3I, but also against a series of other entities owned or controlled by the Hedvats: NJ Cubic 29, LLC; 29 Cottage Street, LLC; Virtual Institute Personnel, LLC; Chemtech Group, LLC; and EFJ Realty, LLC. The Amended Complaint asserted claims for an accounting, constructive trust, conversion, breach of contract, fraud, breach of the covenant of good faith and fair dealing, and unjust enrichment. (Da1). The defendants again filed an answer with counterclaims and a third-party complaint.[8] (Da497).

After additional fact and expert discovery relating to the matters in the Amended Complaint, the defendants moved to bar or limit the testimony of Plaintiffs' accounting expert, Hemant Prajapati, and for summary judgment. On December 20, 2021, after extensive argument, the trial court denied the motion to bar or limit Prajapati's testimony, and denied the summary judgment motion, except as to one discrete issue about whether Mehta was entitled to allegedly unpaid compensation, which the trial court dismissed. (Da2683-86).

On the motion to bar Prajapati's testimony, the trial court explained that such a determination would be "premature" and that any issues concerning expert

[8] The lower court dismissed the counterclaims and third-party complaint with prejudice after trial. (Da2692). They are not the subject of the present appeals. The trial court concluded that the counterclaims were "just brought basically in retaliation" (36T 38:23 to 39:2), and that they were, in essence, "noise" around the issue of whether Mehta received his fair share. (36T 53:10-13).

qualifications or scope of testimony could be addressed via voir dire and objections at trial. (13T 51:23 to 52:9; 56:8-22). There were far too many material questions of fact, the trial court said, to rule dispositively before hearing testimony:

> I want to hear it firsthand as to who did what, how this came about, what was relied on . . . I don't know what anybody is going to say, honestly. I am sure you will be quick to point out any inconsistencies. But I think we need to get to the bottom line, and I am certainly not going to preclude [Plaintiffs'] expert before the trial starts.

(13T 54:25 to 55:11).

As to summary judgment, the trial court denied relief for various reasons, but most notably because "it has been alleged that there were material misrepresentations that were relied on" and "I think based on what has been alleged, and looking at it most favorably [to the non-moving party], there are certainly material disputes of fact as to that." (13T 90:2-12). Further, "on the fraud claims, I think the expert report alleges facts that are more than sufficient. And again, the burden is on the moving party. So I don't think they've showed the absence of such." (13T 90:16-20).

The defendants also asked the trial court to dismiss Plaintiffs' conversion claim because they sued directly, rather than derivatively. The trial court rejected that argument, relying principally on *Brown Roofing* and related decisions, finding that "the so-called derivative claim rule . . . often is not practical in two-person entities or very small closely held companies especially where fraud is alleged."

(13T 95:18-23). Moreover, the trial court concluded that if the allegations were true, Plaintiffs could establish the "separate injury" required by our case law. (13T 95:24 to 96:5).

Judge Jerejian conducted a 22-day bench trial from mid-January to mid-March 2022. In addition to testimony from other fact and expert witnesses, the trial court entertained about six days of testimony from Mehta; four days of testimony from Plaintiffs' accounting expert, Prajapati; and about five days of testimony from Hedvat. (See 14T–29T; 33T). The defendants moved orally at the close of Plaintiffs' case for a directed verdict; the Plaintiffs moved to dismiss the counterclaims and third-party complaint at the close of the evidence. The trial court denied both motions without prejudice. (24T 6:11 to 7:6; 35T 52:17 to 53:23).

H. Prajapati's Reviews the Records and Uncovers Diversions of Funds

Through discovery, the Plaintiffs were finally able to obtain many of the financial records that they had been requesting prior to commencing litigation. Plaintiffs' expert, Prajapati, was the only accounting expert in this lawsuit who actually reviewed the books and records for Chemtech, MRL, and the defendant companies. (19T 100:20 to 106:8; 113:13-23; 36T 33:3-13).

At a tree-tops level, Prajapati concluded, based upon his in-depth review of company books and records and other materials, that the values in P-48 and P-50 were false and misleading. (Da2792-97; 19T 114:11 to 115:17; 21T 120:7-21).

Prajapati also concluded that Mehta and DGNS suffered millions of dollars in damages based on funds that the Hedvats improperly diverted from the defendant entity accounts. (Da6732-33).

Notwithstanding Prajapati's extensive review of the books and records, there were many transactions involving funds that he believed were diverted, but the ultimate destination for which he was not able to trace. This was due to information that the defendants did not produce in discovery and that Plaintiffs were unable to obtain via subpoenas served upon financial institutions. (21T 118:12 to 119:25). The difficulty that Prajapati encountered was compounded by the fact that the defendants insisted that Plaintiffs could only review financial records for the period from 2008 to 2015. (23T 36:17 to 37:19).

Despite the defendants' obstruction, Prajapati was still able to reach the conclusions about which he testified to a reasonable degree of professional certainty, including that the defendants diverted millions of dollars in company funds for their own benefit and to the Plaintiffs' detriment, and that harm was both definite and quantifiable. (Da6731-32; 19T 107:24 to 108:4).

Prajapati testified about inconsistencies he found in the defendants' QuickBooks records, and why what he observed in the books of accounts was suspicious. Most notably, Prajapati testified that he repeatedly encountered abnormal account structures, conduit accounts, co-mingling of funds, step

transactions, fake accounts, and duplicate expenses. (36T 15:10-22). Conduit accounts, Prajapati explained, are generally transitory accounts that accumulate certain activities or funds, which are then disbursed out of the account elsewhere. (20T 74:23 to 75:19). He identified several such accounts in his report and examinations. (*E.g.*, 20T 69:15 to 73:3; 20T 109:25 to 113:22; 114:20-24; 116:4 to 117:14; 21T 76:17 to 83:2).

Prajapati also noted abnormal structuring and transaction history in company accounts. He concluded that Hedvat and the defendant entities employed a series of "step transactions" or structured transactions to avoid detection. "Step transactions" are multi-step transactions to achieve a single objective. Prajapati observed an elaborate series of step transactions that facilitated the diversion of millions of dollars from the Chemtech, MRL, and other defendant-entity accounts via a series of transactional steps in multiple accounts and multiple companies across multiple years. The objective of structuring these transactions in this way was to avoid detection. (23T 28:13 to 29:8). Some parts of these structured transactions occurred prior to the presentation of P-48 and P-50 and/or the closing, with additional money moved afterward. These transactions, in particular, were relevant to Prajapati's conclusion that the defendants were diverting funds to mislead the Plaintiffs as to the values on P-48 and P-50. (Da2792-97; 23T 31:6 to 33:3).

As to whether these and other abnormalities were merely innocent accounting

errors, Prajapati explained that multiple entries in multiple company books over multiple years were inconsistent in ways that suggested that these issues were not just innocent errors. Moreover, rectification of an error would usually occur with an opposing transaction for the same dollar amount. Prajapati did not observe that in the books and records. (20T 72:4-8; 73:4 to 74:2).

Over several days, Prajapati testified about dozens of transactions that represented diversions of funds from Chemtech and MRL. In some cases, he was unable to trace the funds to a particular destination. In other cases, Prajapati was able to identify specific funds diverted on specific dates and the precise destination of those funds. In total, Prajapati identified about $10 million that he believed was diverted from Chemtech and MRL into accounts controlled by the Hedvats. (Da6612-6788).

The trial court afforded the defendants a full opportunity to respond to Prajapati's analysis. They cross-examined him over two days. (21T-22T). Hedvat also responded to Prajapati's analysis, and the defendants presented their own accounting expert, Henry Fuentes. Unlike Prajapati, however, Fuentes did not review financial records from the defendant entities to determine whether the balance sheets provided to Mehta for negotiation were manipulated by hiding and disguising transactions. Nor did Fuentes review the QuickBooks files for the business entities in the case or confer with his expert report co-author, Charles Lota

(who did not testify), the accountant who maintains the entity-defendant books and records, about their contents. (30T 27:21-23; 30:10-13). Fuentes admitted on cross-examination that he refused to review records necessary to validate or debunk Prajapati's conclusions. (30T 39:20 to 40:12; 46:14 to 47:3; 73:19-22; 43:3-13; 45:5-8; 78:16-21; 47:24 to 48:3; 50:24-51:3; 53:1-13; 54:6-19).

I. The Trial Court Finds that the Defendants Misappropriated Funds

After 22 trial days, the lower court characterized this matter as "probably the most complicated case involving numbers" it had seen in 17 years on the bench. (36T 55:14-20). In reaching a decision, Judge Jerejian explained that he reviewed the record in painstaking detail: the transcripts, the exhibits including emails, balance sheets, spreadsheets, and the 44 schedules from Prajapati's reports. Judge Jerejian also considered the demeanor of the witnesses to judge their credibility. (36T 6:8-20). In the end, the trial court rejected almost wholesale the defendants' theory of the case:

> You know, the whole tenor of this from day one, and I remember it clearly, was that this is somehow a completely frivolous action, it is [seller's] remorse. It was just Mr. Mehta waking up one day years later deciding that he just wants more. *And I reject that completely.* I know it started with certain accounting irregularities, and then this tax notice. And maybe if [Hedvat] would have paid, . . . at that point [Mehta] might have been satisfied. But that is just another indication that [the defendants] are going to fight . . . tooth and nail, like somehow the plaintiff is delusional. *Well, I didn't find that he was delusional. I found him credible. I found Mr. Prajapati credible. I found transactions which were diversions or misappropriations.*

(37T 74:21 to 75:13, emphasis added). This is consistent with the court's findings (repeated several times) that the defendant companies were "set up in a maze of accounts" and that "there was a maze and webs created." (36T 22:21-25; 53:9-10; 37T 73:3-13; 79:7 to 80:13; 86:16-20).

The trial court also explained why it credited the Plaintiffs' theory over the defense. Defense expert Henry Fuentes, the lower court explained, "never really analyzed . . . some of these monies that ended up in accounts that were controlled by defendants." And, while the defense offered some testimony responding to the misappropriation of funds issue, the Court found that, "there's nothing there. You know, there was really no meat to most of the explanations." (36T 33:6-13). Moreover, the Court identified conduit accounts, co-mingling, and step transactions in the entity-defendant financial records. (36T 33:14-16).

Based on these and other findings, the trial court found that the defendants converted funds that rightfully belonged to the Plaintiffs. (36T 47:18 to 48:4; 50:6-9). The trial court also found that the defendants breached their obligations under the MRL Operating Agreement and Chemtech Stockholders Agreement, the MIPA and the SPAs. (36T 50:18-25; 51:10-19; 37T 87:20 to 88:4; 89:5-11). Moreover, the trial court found that the defendants breached the covenant of good faith and fair dealing, which included claims under the MRL Operating Agreement, the Chemtech Stockholders Agreement, the MIPA, and the SPAs. (36T 51:19-21; 37T 95:24 to

96:8). In particular, the Court found that the defendants withdrew capital from the companies "without approval and authorization from . . . the other shareholder," that the Plaintiffs "didn't get to share in all the profits" of the Companies, and that the defendants received "more than their share of the profits." The lower court found that these diversions of funds were "detrimental to the interest" of the Plaintiffs and that the defendants were unjustly enriched as a result. (36T 51:1 to 52:23). Also, the trial court adopted the Plaintiffs' theory as to the division of labor between Mehta and Hedvat, concluding: "[Mehta] was the scientist. There is no doubt in my mind he was out of this [financial] loop." (37T 86:16-17).

The trial court also explained that Prajapati's analysis "had to be done to trace the monies going all over the place and not into Mr. Mehta's pocket." (37T 86:13-15). In the end, the trial court identified 9 diversion transactions for which the Plaintiffs satisfied their burden of proof:[9]

- Misappropriation #1: $500,000 transferred from MRL's Bank of America account November 5, 2013 to the Hedvats' Bank of American account #0319. (36T 36:11-22).

- Misappropriation #2: On various dates from 2013-2015, Hedvat paid himself $629,217.85 from Chemtech customer, Arbor Hills, to A3I's bank account. (36T 34:20 to 35:7).[10]

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[9] Although Prajapati identified about $10 million in diverted (or suspected diverted) funds, the trial court performed an exacting analysis of the evidence and determined that the proofs as to some of those diversions were insufficient to warrant relief.

[10] The discrete dates for the various transfers comprising this amount were set out in Prajapati's report at Da6687.

- Misappropriation #3: $2,000,000 transfer from MRL's Merrill Lynch checking account on December 26, 2008 to the Hedvats' Bank of America account. (36T 35:8 to 36:10).[11]

- Misappropriation #4: $50,000 transferred from Chemtech's MR line of credit account on December 5, 2014 to A3I's bank account #8309. (36T 36:23 to 37:4).

- Misappropriation #5: $50,000 transferred from Chemtech's MR line of credit account on September 8, 2015 to the Hedvats' bank account #0319. (36T 37:5-7).

- Misappropriation #6: $90,000 transferred from Chemtech's MR line of credit account on October 7, 2015 to the Hedvats' bank account #0319. (36T 37:7-9).

- Misappropriation #7: $50,000 transferred from Chemtech's bank account on October 28, 2015 to A3I's bank account ending in #8309. (36T 37:9-11).

- Misappropriation #8: $75,500 transferred from Chemtech's MR line of credit account on August 22, 2014 to A3I's bank account ending in #8309. (36T 37:11-16).

- Misappropriation #9: $2,300,000 transferred from MRL's bank account on November 26, 2014 to A3I's bank account ending in #8309. (36T 37:17-23).

The foregoing confirms the diverted funds were moved into accounts that Emanuel and Fariba Hedvat jointly controlled, like the personal account ending in 0319, or into an A3I bank account, like that ending in 8309, a company in which

[11] Appellant incorrectly identifies the date of this transaction as December 6, 2008 and the destination as Hedvat's Capital One account. Contrary to the appellant's brief, this transfer was made to a Bank of America account, not a Capital One account. (Db18; 28T 114:15 to 115:6).

Fariba Hedvat was purportedly the sole member. (23T 9:23 to 29:9; 24T 20:16-24).[12]

On June 30, 2022, based on its findings, the trial court entered judgment for the Plaintiffs' on counts 5 and 6 (conversion), 7 and 8 (breach of contract), 11 (breach of the covenant of good faith and fair dealing), and 12 and 13 (unjust enrichment) of the Amended Complaint in the total amount of $2,882,244.85, jointly and severally against each of the defendants—an amount equal to half of the misappropriated funds. (Da2689).

The trial court dismissed Plaintiffs' remaining causes of action, including the fraud counts, explaining that just because the Plaintiffs did not meet their elevated burden of proof for fraud does not mean that they did not meet their preponderance burden for the remaining causes of action:

> The numbers were wrong. It was bogus. And, yeah, I stopped short of the standard for fraud, which is clear and convincing because a lot of this, again, was created by one person. And then, you know, to argue that, well, you can show it by clear and convincing or you can't, you know, prov[e][13] it at all, I think is somewhat disingenuous.

(37T 88:1-8).

J. <u>Post-Trial Motions</u>

Following the trial court's June 30, 2022 decision and order, the Plaintiffs' moved for the entry of final judgment (including pre- and post-judgment interest),

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[12] Although Fariba was the sole member of A3I, Emanuel was purportedly the President of the company. (Da2748).

[13] The transcript should read "prove" and not "provide" here.

and for attorneys' fees and costs of suit, and taxed costs. (Da2057). The trial court awarded $1,181,874.51 in legal fees and costs to the Plaintiffs based on the terms of the Chemtech Stockholders Agreement, the MRL Operating Agreement, the MIPA, and the SPAs. (37T 88:9-24). Plaintiffs also requested $838,810.40 in pre-judgment interest, calculated at court interest rates for each transaction where the trial court determined the defendants had misappropriated funds. (Da2073-76). The trial court rejected that approach and instead awarded $190,480.68 in pre-judgment interest, the amount calculated on the principal judgment dating back to July 20, 2020, when Plaintiffs' filed suit. (37T 77:7 to 78:23).

The defendants separately moved for a stay pending appeal, and for partial reconsideration. As to reconsideration, the defendants argued: (a) the trial court miscalculated the judgment amount by $9,885.92; and (b) the trial court should amend the judgment to apportion liability severally, but not jointly. (Da2035). The trial court granted reconsideration solely as to the miscalculation issue and modified the principal amount of the judgment to $2,872,358.93. (Da2695). It denied reconsideration on the joint and several liability issue, concluding that the facts and equities supported that result:

> These are these webs and these mazes and conduit accounts and these co-mingled accounts, were in the control of Mr. Hedvat. I know his wife had 51 percent in one of the entities, and these monies are being moved around. Monies maybe are still being moved around. That is not before the Court, I have no idea. But to say that when the music stops playing, well, this one and that one didn't have any – bottom line, is,

> there are all woven out of the same cloth and they are all controlled by the same person. . . . So now I am going to, at this point in reconsideration, I am going to apportion percentages to people and then lo and behold when the music stops playing, the money won't be there, it will be somewhere else. So I reject that. It has to be joint and several. And the way this was set up is the classic case that would warrant that. And to apportion it the way it is being suggested [by the defendants], just cannot be done. . . . There is no other way to parse this without it becoming inequitable to the plaintiff. So I am not going to reconsider that . . . I don't think . . . the facts of this case would warrant such conclusions. So I will deny that.

(37T 79:7 to 80:14; Da2691-97). The trial court agreed to stay the judgment pending appeal, conditioned on the posting of a bond. (Da2695-99).

On September 14, 2022, the trial Court entered final judgment totaling $4,258,878.69, comprised of the principal award, attorneys' fees, taxed costs, and pre-judgment interest. (Da2690-93). The defendants timely filed separate appeals: one by Fariba Hedvat (A-385-22), and one by Emanuel Hedvat and the entity defendants (A-386-22). Plaintiffs' filed a cross-appeal limited to the issue of whether the trial court properly calculated pre-judgment interest. (Da2564; 2591; 2636).

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED SUMMARY JUDGMENT TO FARIBA. (13T 87:24 to 101:11).

Though it reviews a trial court's summary judgment decision *de novo*, this Court must still "accept as true" the non-moving party's version of the facts, giving it "the benefit of all inferences favorable to its claim. *R.* 4:46-2; *Bernard v. IMI Systems, Inc.*, 131 N.J. 91, 93 (1993). All inferences of doubt are in favor of the non-

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movant. *See Brill vs. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1985). A court should deny summary judgment when determinations of material disputed facts depend primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion. *Parks v. Rogers*, 176 N.J. 491, 502 (2003); *Davin, L.L.C. v. Daham*, 329 N.J. Super. 54, 71 (App. Div. 2000) (summary judgment should have been denied when there were conflicting certifications of experts). Summary judgment must also be denied when a claim requires determination of a state of mind or intent, like claims of waiver, bad faith, fraud, or duress. *See, Auto Lenders v. Gentilini Ford*, 181 N.J. 245, 271-272 (2004).

A. The Claims Against Fariba Were Rife With Disputed Fact Issues

Fariba argues that the trial court should have dismissed the case against her on summary judgment because the Amended Complaint "failed to assert any viable causes of action against her as a matter of law." (Db21-22). This position cannot be squared with the motion record.

In denying summary judgment, the trial court explained that the allegations and evidence were sufficient to keep Fariba in the case. Two particular issues of fact were discussed in detail: whether funds were diverted to accounts that Fariba owned and/or controlled, and the last-minute decision to swap in Fariba as the purchaser of Mehta's Chemtech shares via the 2017 SPA. (13T 65:9-25; 68:19 to 70:4).

First, there was an issue of fact about whether Chemtech and/or MRL funds were improperly transferred to Fariba, either individually, jointly with Emanuel, or to entities that she controlled. The lower court ultimately resolved this fact question at trial in the Plaintiffs' favor (36T 50:18-25; 37T 79:7-12), but even on summary judgment, the record evidence from Prajapati's report and other financial records that he reviewed indicated that Fariba shared control over the funds that Emanuel wrongfully diverted from Chemtech and MRL. (Da764-896). Even if Emanuel was the owner on paper of certain defendant entities, the proceeds from them flowed to both he and Fariba. She and her husband had beneficial ownership in the same entities. (11T 292:15 to 293:8; 13T 67:21 to 69:24). Also, diverted funds were moved into accounts that Emanuel and Fariba jointly owned. (Da4602; Da764-896). Funds were also diverted to A3I, an entity that Fariba purportedly controlled. (Da1584; 1590; 1673). Questions about intent and state of mind were pervasive in the motion record. (13T 54:19 to 55:11; 92:17-23). These issues were more than sufficient for the Plaintiffs to demonstrate disputed issues of material fact, and for the trial court to deny summary judgment. (13T 90:2-20).

Second, prior to finalizing his obligations under the 2014 Chemtech SPA, Emanuel decided at the last minute to substitute Fariba as the purchaser of Mehta's Chemtech stock to enable Chemtech to qualify as a woman-owned business (WBE). Emanuel accomplished this by requesting that Mehta enter into the 2017 Chemtech

SPA, which had the effect of rescinding the 2014 Chemtech SPA, Mehta refunding the $700,000 he had to that point received from Emanuel for his Chemtech shares, and Fariba paying $740,000 back to Mehta. (Da4602). Because Fariba signed the 2017 SPA, paid the consideration for Mehta's Chemtech shares, and accepted of Mehta's shares, she assumed liability under the SPA. (Da4589-4602). The trial court correctly concluded that keeping Fariba in the lawsuit was crucial to the Plaintiffs obtaining complete relief after trial. In a case where Plaintiffs alleged fraud, misappropriation, and diversion of funds, these fact issues were more than sufficient to defeat summary judgment.

B. Plaintiffs Were Not Required to Proceed Derivatively Against the Defendants.

Appellant also argues that the trial court should have dismissed the conversion claims for want of derivative standing, either on summary judgment or at trial. (Db22-26). However, she misconstrues the governing legal principles, which the trial court correctly articulated and applied. Accordingly, this Court should affirm the denial of summary judgment and the judgment for conversion after trial.

Appellant argues that the Plaintiffs lack standing because they did not bring their claims derivatively on behalf of Chemtech and MRL. However, Plaintiffs had the right to bring their conversion claims directly because they suffered a special injury. And, even if this Court believes that the Plaintiffs did not suffer a special injury, the trial court properly exercised its equitable discretion to waive the

requirement that these claims be pursued derivatively because Mehta, Hedvat, and their wives – directly or via other party-entities to this case – are the only shareholders or members in Chemtech and MRL. As our case law makes clear, the possible prejudice to the entities in such cases is minimal, and treating this case as a direct action still permitted the trial court to afford complete relief.

1. Plaintiffs Established Standing Via the "Special Injury" Exception.

Our courts take a generous view of standing. *In re State Contract A71188*, 422 N.J. Super. 275, 289 (App. Div. 2011). To establish standing, a plaintiff must present a "sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden County*, 170 N.J. 439, 449 (2002).

Generally, a corporation is regarded as separate from its shareholders, and "suits to redress corporate injuries that only secondarily harm all shareholders alike are brought only by the corporation." *Strasenburgh v. Straubmuller,* 146 N.J. 527, 549 (1996). Derivative actions are important to "maintaining the investment resources of the corporation, avoiding a multiplicity of suits, providing equal benefit for all shareholders and avoiding partial dividends or partial liquidation." *Id.* at 549-50. Thus, when injury to corporate stock falls equally upon all shareholders, an individual stockholder generally cannot recover for the injury to his stock alone, but must sue derivatively on behalf of the entity. *Id.* at 550.

However, New Jersey recognizes an exception to the derivative suit rule. An individual stockholder can assert a direct claim against another shareholder when the plaintiff suffers a "special injury." *Tully v. Mirz*, 457 N.J. Super. 114, 124 (App. Div. 2018). "A special injury exists where there is a wrong suffered by the plaintiff that was not suffered by all stockholders generally or where the wrong involves a contractual right of the stockholders such as the right to vote." *Id.*

This difficult and fact sensitive inquiry in the context of larger entities is far simpler in the case of closely held companies like Chemtech and MRL because shareholders or members owe fiduciary duties not just to the entity but also their fellow shareholders or members. *See N.J.S.A.* 42:2C-11(g); *Muellenberg v. Bikon Corp.*, 143 N.J. 168, 181 (1996). Thus, it is far easier for members in closely held entities to establish a special injury than in much larger entities.

In *Small v. Goldman*, 637 F. Supp. 1030, 1033 (D.N.J. 1986), Judge Ackerman, applying state law, held that a plaintiff had an individual cause of action (rather than just a derivative claim) arising out of a conspiracy by directors to compel the sale of the plaintiff's shares below value – a situation very similar to that alleged by the Plaintiffs here. The court in *Small* explained that a shareholder may sue for the harm inflicted upon the corporation where there exists "a special relationship between the suing shareholder and the defendant, creating a duty, contractual or otherwise, other than that owed to the corporation." This is because "[t]he directors

and officers of a corporation owe a fiduciary duty to not use their positions for their own personal advantage, or for the advantage of others, to the detriment of the interest of the stockholders of the corporation." *Id.* In reaching his conclusion, Judge Ackerman also relied on a Seventh Circuit decision, *Borak v. J.I. Case. Co.,* 317 F.2d 838, 842 (7th Cir.1963), which held that "A director of a corporation acts as a fiduciary not only to the corporation but also to the stockholders, and the essence of a cause of action by a stockholder, based upon allegations of fraudulent acts by a director, is not the fraud against the corporation, but the fraud of the director as it affects the stockholders." *See also Joseph Oat Holdings, Inc. v. RCM Digesters, Inc.*, 2009 WL 900758 (D.N.J. Mar. 31, 2009).

The Plaintiffs' claims for conversion, breach of fiduciary duty, breach of contract, unjust enrichment, and breach of the covenant of good faith are similar to those in *Small* and *Joseph Oat Holdings*, and the trial court rightly concluded that the holdings in those decisions permitting individual claims to proceed due to the existence of a special injury should apply with equal force here. The motion record is replete with evidence, which, when viewed in the light most favorable to the Plaintiffs, establishes that Emanuel, in concert with the other defendants (including Fariba), misappropriated funds, manipulated financial records, provided Plaintiffs with false and misleading balance sheets that reflected values for the company books of accounts that were far less than they should have been, overreported liabilities,

and diverted money from Chemtech and MRL into other entities that they controlled. Because the nature of Emanuel's and Fariba's conduct (in concert with the other defendants) raised questions of fact, including issues relating to intent and credibility, the trial court was absolutely correct to deny summary judgment and allow Plaintiffs' claims to proceed to trial. (13T 90:21 to 97:4). These facts were also borne out at trial and are more than sufficient to sustain the trial court's judgment. (36T 48:5 to 50:9; 37T 87:20 to 88:8).

2. ***Alternatively, the Trial Court Was Well Within Its Discretion to Treat Plaintiffs' Claims As Direct Rather Than Derivative.***

Unlike some other states, New Jersey adopts a flexible approach in determining whether to couch an action as direct or derivative in the context of closely held entities. *Am. List Couns., Inc. v. Andrew Ostroy & Belardi-Ostroy, Ltd.*, 2013 WL 12201498, at *7 (D.N.J. July 31, 2013). This is because the difficulties that arise when trying to apply corporate norms to closely held entities "has led to the development of substantial authority permitting departure from these norms and recognition instead of the real relationships of the principals." *68th St. Apts., Inc. v. Lauricella*, 142 N.J. Super. 546, 558 (Law Div. 1976). For decades, our courts have molded a body of law holding that:

> the conception of a legal entity distinct from the persons composing the corporation is to be disregarded, in equity, in cases not within the reason and policy of this legal fiction, *e.g.*, to adjust equities among members of the corporation internally where the rights of the public or third persons are in no wise involved.

Id. The trial court rightly exercised its equitable powers in adopting this approach.

This Court's decision in *Brown v. Brown*, 323 N.J. Super. 30 (App. Div. 1999), is instructive. Eleanor Brown was a former 50% shareholder in a closely held company called Brown Roofing. She transferred her shares to her ex-husband as part of a divorce settlement. While the divorce was pending, she filed a third-party complaint against her adult daughter, Terri, alleging that Terri had diverted corporate opportunities and customers from Brown Roofing to Terri's new company, Brown and Guarino, depriving Brown Roofing of assets and profits. The trial court dismissed the third-party action, holding that Eleanor's claims were derivative and could not be brought via a direct claim against Terri, and because Eleanor could not bring a derivative action since she had already transferred her shares in Brown Roofing. *Id.* at 33-34.

On appeal, Eleanor argued that the derivative standing rules applicable to public entities should not apply because Brown Roofing was closely held, that Brown Roofing should be deemed a partnership for purposes of this issue to avoid the consequence of the share transfer, and that equity demanded that she be allowed to pursue her claims against Terri and Brown and Guarino. *Id.* at 35. This Court largely agreed, and in doing so, adopted § 7.01(d) of The American Law Institute's Principals of Corporate Governance: Analysis and Recommendations (1992), which explained:

> *In the case of a closely held corporation … the court in its discretion may treat an action raising derivative claims as a direct action*, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of the creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons. (Emphasis added.)

In the case of closely held entities, "the normal policy reasons for requiring a plaintiff to employ the form of the derivative action may not be present or will be less weighty, even though the action alleges in substance a corporate injury." *Id.* at 37. This is because "the concept of a corporate injury that is distinct from any injury to the shareholders approaches the fictional in the case of a firm with only a handful of shareholders. *Id.*; *Tully*, 457 N.J. Super. at 125-26.[14]

Section 7.01(d) does not go so far as to convert all intracompany disputes that would normally be derivative actions into direct actions when closely held entities are involved, but it gives trial courts wide discretion to treat the action as direct if the policy considerations enumerated above are satisfied. When a direct action is brought on behalf of the entire class of injured shareholders and the company's solvency is not in question, there is less reason to insist that the action be brought

[14] *Tully* further explained that the pre-suit demand requirement is almost always futile in the context of closely held entities. Also, *Tully* explained that the general rule is to prohibit counterclaims in derivative actions. Here, the defendants asserted counterclaims, which undermines their argument that Plaintiffs should have brought this suit derivatively. *Tully*, 457 N.J. Super. at 125-26.

derivatively. *Brown*, 323 N.J. Super. at 37. Indeed, one of the main reasons to abandon the distinction between a direct and derivative action in a context like this – a closely held entity with few shareholders – is that even if a minority owner overcomes the procedural hurdles to bring a derivative suit, "any recovery accrues to the corporation and hence remains under the control of the very parties who may have been defendants in the litigation." *Id.* at 38, citing *Richards v. Bryan*, 879 P.2d 638, 647 (Kan. 1994).

Here, there was good reason to permit the Plaintiffs' direct suit to proceed. First, the lawsuit will not unfairly expose the defendants to a "multiplicity of actions." Chemtech and MRL were already defendants, as were the entities to which Hedvat improperly transferred funds. Second, this suit does not materially prejudice Chemtech and MRL creditors. The Amended Complaint alleges (and Prajapati's reports show) that Hedvat underreported assets, overreported liabilities, and diverted millions from Chemtech and MRL to the Plaintiffs' detriment several years ago with minimal impact on the financial wellbeing of the companies. The defendants did not identify any third-party creditor claims as a defense to the claims here. Third, there is no reason to believe that this lawsuit will interfere with distribution of the recovery among interested persons. The only interested persons here are Emanuel and Fariba Hedvat, and Divyajit and Gayatri Mehta, all of whom are already parties. And, one of the main reasons that Plaintiffs amended their complaint to name additional

defendant companies was so that Plaintiffs could obtain complete relief from the entities that the Hedvats control if Plaintiffs prevailed at trial. Accordingly, even if the Court declines to find that Plaintiffs suffered a special injury, the trial court was still correct to exercise its equitable discretion to allow this suit to proceed.

Finally, Fariba argues that the trial court compounded its error by finding special injury at trial. (Db25-26). However, the trial court clearly explained — relying on the logic of *Brown* — why Plaintiffs could proceed directly, instead of derivatively. (36T 47:18 to 50:9). *Brown* also confirms that allowing Plaintiffs to proceed directly was a matter of discretion for the trial court, both on summary judgment and at trial. Thus, this Court should only reverse that holding if it concludes that the trial court abused its discretion, which, as set out above, it plainly did not. *See Brown*, 323 N.J. Super. at 39.

II. AFTER 22 DAYS OF TRIAL, THIS COURT MUST DEFER TO JUDGE JEREJIAN'S WEIGHING OF THE EVIDENCE AND CREDIBILITY DETERMINATIONS. (36T 4:1 to 56:13; 37T 71:25 to 97:1).

The bulk of the appellant's arguments for reversal center on the manner in which Judge Jerejian weighed the evidence at trial and a mistaken belief that the evidence was insufficient to support liability. (Db Points II-VI). However, these arguments fly in the face of the appropriate standard of review. Appellate courts should defer to the trial court's factual findings and legal conclusions, especially in non-jury trials, so long those facts are supported by adequate competent evidence in

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the record. The appellate court should not disturb those findings and conclusions unless it concludes that "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974). This standard applies no matter the type of evidence presented, whether live, recorded, or written evidence. *State v. McNeil-Thomas*, 238 N.J. 256, 271 (2019).

Furthermore, when witness credibility is an important factor – as it was here – "the trial court's conclusions must be given great weight and must be accepted by the appellate court unless clearly lacking in reasonable support." *N.J. Div. of Youth & Family Servs. v. F.M.*, 375 N.J. Super. 235, 259 (App. Div. 2005). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility" because an appellate court's review cannot replace "the trial court's opportunity to hear and see the witnesses who testified on the stand." *Balducci v. Cige*, 240 N.J. 574, 594-95 (2020). This deferential standard holds even if the trial judge's reasons for the credibility determination are not articulated in detail. *State v. Locurto*, 157 N.J. 463, 470 (1999).

In this 22-day bench trial, Judge Jerejian watched and listened to the witnesses and reviewed the documentary evidence. As discussed below, the evidence supports the trial court's factual findings and legal conclusions. Deference by this Court is warranted, and the judgment must be affirmed.

III. THE TRIAL COURT FOUND PRAJAPATI CREDIBLE, WEIGHED THE OPINIONS HE PRESENTED, AND REACHED PROPER CONCLUSIONS BASED ON THE EVIDENCE AT TRIAL. (36T 4:1 to 56:13; 37T 71:25 to 97:1).

Because the Defendants offered no expert who reviewed the defendants' financial records, they are left to attack the only witness who did, Plaintiffs' accountant, Hemant Prajapati. The trial court found Prajapati credible, even when it didn't always completely agree with his conclusions. (36T 23:8-11; 55:21-25; 37T 75:10-13). At bottom, the attacks on Prajapati all fail because they do little more than dispute the way the trial court weighed the evidence. Because the evidence that Prajapati and the Plaintiffs offered was more than sufficient to support the judgment below, this Court must affirm.

A. The Trial Court Properly Allowed Prajapati's Testimony at Trial.

Initially, the Defendants contend that the lower court erred by denying their motion to bar or limit Prajapati's testimony before commencing this bench trial, and in allowing Prajapati's characterization of certain transactions at trial. They believe the experienced trial judge sitting in the Chancery Division unable to separate the wheat from the chaff in the presentation of the evidence. If anything, the trial court's decision confirms that it paid close attention to the parties' presentations, and rejected a significant component of Prajapati's theory. (36T 23:8 to 28:5).

The admission of expert testimony is committed to the trial court's discretion,

and a trial court's determination on a motion to strike expert testimony is entitled to deference on appeal. Such a decision is reviewed for abuse of discretion. *Townsend v. Pierre*, 221 N.J. 36, 52-53 (2015). When confronted with an evidence determination precedent to a ruling on summary judgment – as occurred here with defendants' pre-trial motion to bar Prajapati – the trial court must address the evidence decision first, and that decision is subject to review for abuse of discretion. *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 385 (2010).

Here, the trial court acted well within its discretion in denying the motion to bar or limit Prajapati's testimony before trial and allowing his testimony at trial. This was a complex business divorce in which Plaintiffs' alleged fraud, diversions, and misappropriations of company funds. Before trial, the lower court was presented with defense arguments about the extent to which Prajapati could testify on issues of intent. Plaintiffs' response to those concerns was that it was appropriate for Prajapati, based on his years of experience, to provide opinion testimony as to intent based on patterns of conduct and manipulations of data suggestive of intentionality that he was able to distill from his review of the financial records, and the defendants were free to cross examine Prajapati as to those opinions. (13T 42:2 to 44:1).

Contrary to appellant's arguments now, the trial court was sensitive to those concerns. Though it deferred those issues for trial, the trial court explained at the motion hearing: "Ultimately it is up to the Court whether [the defendants' conduct]

was done intentionally or it is a fraud or whatever, but those are objections that come up when certain questions are asked." (13T 35:9-12). Furthermore, the trial court made clear that Prajapati's testimony on the subject of intent could not just be based in conjecture and speculation; it must be tied to some other evidence supportive of that opinion. (13T 56:8-25). *See Borough of Saddle River v. 66 E. Allendale, LLC,* 216 N.J. 115, 144, (2013) (expert must "give the why and wherefore that supports the opinion, rather than a mere conclusion."); *Johnson v. Salem Corp.*, 97 N.J. 78 (1984) (weight of expert opinion can rise no higher than the strength of the facts and reasoning supporting it).

Likewise, the trial court was well within its discretion to allow Prajapati's trial testimony. Despite repeated objections, the trial court correctly permitted testimony from Prajapati as to whether the transactions he described could "potentially have been the product of fraudulent activity." (20T 69:20 to 71:17; 21T 35:2-24). Prajapati testified that he had experience in examining books and records for fraud, and he testified about certain factors that might be indicative of fraudulent conduct that he observed in the Chemtech and MRL financial books and records. (20T 120:19 to 121:24). The trial court explained that the issue of intent was ultimately one for the court to decide based on a weighing of the evidence, but that Prajapati could provide expert testimony – based on his experience and the data presented to him – why the defendants' conduct warranted scrutiny. (20T 70:22 to 71:8; 21T 18:20 to

19:22). In fact, the trial court sustained the defendants' objections when Prajapati's testimony went too far afield. (21T 21:15 to 22:5).

The appellant mistakes the net opinion rule for a "standard of perfection." An expert need not "organize or support an opinion in a particular manner that opposing counsel deems preferable." *Townsend*, 221 N.J. at 54-55. Nor may a court exclude an expert's testimony as net opinion "merely because it fails to account for some particular condition or fact which the adversary considers relevant." *Id., citing State v. Freeman,* 223 N.J. Super. 92, 116 (App. Div. 1988). Disagreements of the sort appellant advances here (Db31-34) are the subject of cross examination or impeachment, not exclusion. *See Rosenberg v. Tavorath,* 352 N.J. Super. 385, 402 (App. Div. 2002).

What makes the appellant's arguments particularly strange, though, is that on the issue of intent, they prevailed. The trial court did not enter a judgment for fraud because it did not find that the Plaintiffs' met their clear and convincing burden. However, the Court did find that the Plaintiffs established some (though not all) of the alleged misappropriations by a preponderance of the evidence sufficient to establish liability for conversion, breach of contract, unjust enrichment, and breach of the covenant of good faith. As the trial court noted, conversion, in particular, does not require a showing of intent. (36T 47:18 to 48:3; 48:20 to 50:9).

In the end, none of this constitutes reversable error. The defense objections to

Prajapati's testimony went to weight, not admissibility, and the trial court, in view of all of the evidence presented accepted Plaintiffs' theories of diversion and misappropriation of funds. The trial court's judgment must, therefore, be affirmed.

B. The Trial Court Relied on Far More Than Just Prajapati's Testimony In Reaching Its Decision.

Appellant attacks the trial court for "[r]elying solely on Prajapati's deficient net opinion testimony," and "rel[ying] **exclusively** on Prajapati's net expert testimony that Disputed Transactions were unauthorized." (Db18; 30-31, emphasis in original). Those statements are neither accurate nor properly framed: in crediting Prajapati's testimony about certain transactions, the trial court weighed the evidence, including the accounting records that buttressed Prajapati's assertions, and the defense's response, which the trial court did not find credible. (36T 33:6-13).

First, in addition to Prajapati's testimony, the trial court also had before it Prajapati's 44 schedules analyzing the financial records for Chemtech, MRL, and the other defendant entities. (Da6612-6788). He was the only witness to perform that analysis. Prajapati also testified that he conferred with Mehta to ascertain whether he authorized many of the transactions in question. (34T 75:15-23).

Second, for each of the defendants' misappropriations, the trial court reviewed the underlying records, including bank statements, checks, and other materials to support Prajapati's opinion that the defendants misappropriated funds from the Chemtech and MRL accounts to accounts they controlled. (23T 9:23 to 29:9).

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Third, Prajapati's analysis withstood the defense's extensive cross examination. Over two days, the defendants challenged Prajapati's methodology, his analysis, and argued forcefully that Prajapati was biased. (*E.g.,* 22T 122:16 to 124:11). Cross examination focused heavily on issues of intent and whether Prajapati knew if certain transactions where authorized. (22T 26:12 to 28:11; 78:21-24; 80:19-21; 80:13-16). The trial court credited Prajapati and rejected the defense position.

Fourth, the trial court weighed Prajapati's testimony against the perfunctory denials offered by Hedvat. On direct examination, Hedvat was repeatedly asked point-blank whether he engaged in the various misappropriations alleged by Plaintiffs. Each time, Hedvat testified "no" or "never" or words to similar effect without any significant additional context or explanation. (25T 152:4-11; 152:23 to 153:3; 154:25 to 155:5; 26T 6:10 to 7:8; 15:19 to 16:2; 16:19-21; 17:9-11; 22:13-21; 24:15-24). The trial court did not find these perfunctory denials credible, stating, "there's nothing there. You know, there was really no meat to most of the explanations." (36T 33:6-13).

Also, the few times when Hedvat tried to explain his misappropriations, the explanations made no sense. For instance, as to the $500,000 the diversion in 2013, Hedvat claimed that he had "borrowed" money from MRL and that he was repaying Mehta that money as part of the $1.36 million promissory note to acquire DGNS' interest in the company. However, Hedvat twice admitted on cross examination that

he could not offer a single document supportive of the claim that he "borrowed" the money, or that a portion of the $1.36 million represented a partial repayment to Mehta of the $500,000 that Hedvat "borrowed" in 2013. (28T 74:15 to 76:14; 94:16 to 96:15). Naturally, the trial court did not find Hedvat's testimony credible. Crediting that testimony would have meant that a sizable chunk of the money that Plaintiffs were to receive was not actually for their interest in the companies, but, rather, to repay Mehta *his own funds* for the money that Hedvat stole. (28T 94:3-20).

Fifth, the trial court weighed Prajapati's analysis against the testimony offered by the defense's accounting expert, Fuentes. *In re Guardianship of D.M.H.*, 161 N.J. 365, 382 (1999) (reviewing courts defer to trial court determinations as to expert witness credibility). As discussed, Prajapati was the only expert in the case to review the financial records; Fuentes did not. (30T 27:21-23). Fuentes offered no explanation with respect to some of largest transfers of Chemtech and MRL funds from those entities' accounts into accounts owned or controlled by Hedvat. For instance, Fuentes testified that he was unaware of the $2 million that Hedvat deposited into his personal bank account. (30T 50:24-51:3). Nor could Fuentes explain the $500,000 that Hedvat took. (30T 54:6-19).

Despite all of this, the trial court did accept some of Fuentes' analysis and concluded that it would have been improper to adopt some of Prajapati's opinions about taking certain funds and adding them to the value of the company to establish

a damage figure. That was part of why the trial court did not award Plaintiffs the full quantum of damages they originally sought. (36T 23:8 to 28:5). But what the trial court did find, based on Prajapati's analysis, other testimony, and documentary evidence, was that there were specific instances when Hedvat and the other defendants diverted funds from the Chemtech and MRL accounts to their own accounts that were beyond the Plaintiffs' control. The trial court made clear that it was "troubled with many of these transactions that just made no sense and the explanations made no sense. And [for] some of them, there was no explanation." (36T 28:13-20). Ultimately, the appellant is dissatisfied with the way the trial court resolved a battle of the experts between Prajapati and Fuentes, but that is not a basis to reverse the trial court's judgment.

C. Sufficient Credible Evidence Supported Each of the Misappropriations and/or Diversions Found by the Trial Court.

The appellant spills a great deal of ink arguing that the trial court lacked sufficient evidence to find misappropriated and/or diverted funds, and that it ignored certain material evidence in reaching its conclusions. In doing so, she disregards the applicable standard, which requires only that the trial court's findings be consistent with the "competent, relevant, and reasonable credible evidence." *Rova Farms*, 65 N.J. at 484. Given these arguments, it is important to highlight some of the evidence that the trial court considered to support its findings for each misappropriation.

***Misappropriation #1:* $500,000 transferred from MRL's Bank of America account**

November 5, 2013 to Bank of American account #0319 belonging to the Hedvats. (36T 36:11-22).

- This transaction was not recorded in the company's QuickBooks until the following year, November 2014, pursuant to an entry of correction made in March 2021 – after the Complaint was filed in this lawsuit. (Da6723; 21T 26:7 to 28:12; 23T 10:24 to 20:8).

- Hedvat testified – completely incredibly – that he took the $500,000 pursuant to an agreement with Mehta, but presented no documentary evidence of any agreement, and admitted that none exists. (28T 74:15 to 76:14).

- Hedvat testified that he allowed Mehta to take the same amount. (28T 92:18 to 93:4). However, Hedvat presented no documentary evidence of any such agreement. When asked about this on cross examination, Hedvat's accounting expert, Fuentes, testified that his client had no good explanation for what happened. (30T 54:15 to 55:2).

- Hedvat took the money in 2013, when Chemtech was having cash flow problems, and was unable to pay either he or Mehta their full salaries. Meanwhile, unbeknownst to Mehta, Hedvat was taking the balance of his salary from a different entity, Arbor Hills. (28T 107:22 to 108:17).

<u>Misappropriation #2:</u> Hedvat paid himself $629,217.85 from Chemtech customer, Arbor Hills. (36T 34:20 to 35:7).

- Between 2013 and 2015 Hedvat paid $629,217.85 from Chemtech customer 432 Owners, LLC (also called Arbor Hills) to his wife's separate company, A3I. Until discovery in this lawsuit, Plaintiffs had no access to the A3I financial records. Hedvat is listed as the contact for Arbor Hills in Chemtech's records. (Da6687; 20T 96:21 to 99:14).

- While Hedvat represented to Mehta that when Chemtech encountered cash flow problems (which happened all the time – 25T 20:5-8), and could not pay Mehta his full salary, Hedvat was paying himself his Chemtech salary from Arbor Hills without making similar payments to Mehta. (25T 31:13 to 32:23; 28T 109:14-17).

- Hedvat claimed that he paid himself through Arbor Hills to protect

Chemtech's DBE certification, which he said prevented him from being paid a greater salary than Mehta. However, Hedvat offered no support for that proposition, and even if such support existed, Hedvat presented no proof of an agreement between himself and Mehta to permit payment through Arbor Hills. (28T 108:7 to 109:13).

<u>Misappropriation #3:</u> $2,000,000 transfer from MRL's Merrill Lynch checking account on December 26, 2008 to Hedvat's Bank of America account. (28T 114:18 to 115:6; 36T 35:8 to 36:10).[15]

- MRL purchased the Cottage Street property in Jersey City with effect from January 1, 2009. On December 26, 2008, Hedvat transferred $2 million out of MRL's Merrill Lynch checking account to his own personal account, and debited the MRL stockholder's loan account by that amount, purportedly to cover this acquisition. (26T 8:6 to 9:8; 28T 114:18 to 115:6; 115:12-22; 34T 76:8 to 77:7). This diversion of funds resulted in a negative balance in the stockholder's loan account. On December 31, 2008, to rectify this issue, Hedvat recorded a journal entry to show that the Cottage Street property was acquired in December 2008, rather than in January 2009. These dates are inconsistent with the actual transaction documents, and there is no documentation tracing these funds as actually being used to purchase the Jersey City property. (Da6702; 20T 128:25 to 130:9).

- Defendants argued at trial that part of that $2 million was used to purchase the Jersey City property, and that the funds were also repaid to MRL via a series of four $500,000 deposits in May 2009 by way of capital contributions. (34T 73:8 to 74:25; *and see* Da6714).

- MRL's financial records don't show any connection between the $2 million withdrawn in December 2008 and the subsequent $2 million coming back into the company via capital contributions in May 2009. Hedvat admitted that the four $500,000 capital contributions were new funds, not repayment of capital. (26T 10:15-20).

- The defense theory would mean Hedvat took $2 million from MRL, and then, rather than repaying that full amount himself, he facilitated repayment by putting in $1 million of his own money and $1 million from Mehta. In other

[15] Appellant incorrectly identifies the date of this transaction as December 6, 2008 and the destination as Hedvat's Capital One account.

words, Hedvat would still owe the company $1 million from what he took. (34T 67:15 to 70:3). Fuentes did not even know that Hedvat wrote that $2 million check to his own *personal* account. (30T 49:5-7).

- The explanation about using the $2 million to acquire the Jersey City property doesn't make sense because the Jersey City property was acquired via the Bank of America line of credit and an assumption of an existing mortgage, which resulted in a net payment by MRL of far less than $2 million. Hedvat then used a series of corrective journal entries to cover his taking of the $2 million for which no supporting documentation is provided. (34T 70:4 to 72:21; 76:8 to 77:7; 77:21 to 78:2).

<u>Misappropriation #4:</u> $50,000 transferred from Chemtech's MR line of credit account on December 5, 2014 to A3I's bank account #8309. (36T 36:23 to 37:4).

- Prajapati was shown extracts of the Chemtech MR line of credit account from the company's QuickBooks software and was able to tie the transfer of $50,000 from that account to a bank statement for the company for December 2014, which showed the funds were transferred to an account ending in 8309, which Plaintiffs established belonged to A3I. (23T 15:21 to 22:15; Da6665).

- Hedvat conceded that Mehta didn't receive an equal $50,000 distribution on that date. (28T 110:16 to 111:6).

<u>Misappropriation #5:</u> $50,000 transferred from Chemtech's MR line of credit account on September 8, 2015 to the Hedvats' bank account #0319. (36T 37:5-7).

- Prajapati was shown extracts of the Chemtech MR line of credit account from the company's QuickBooks software and was able to tie the transfer of $50,000 from that account to a September 2015 bank statement for the company, which showed the funds were transferred to an account ending in 0319, which Plaintiffs established belonged to the Hedvats. (23T 15:21 to 22:15; Da2836).

<u>Misappropriation #6:</u> $90,000 transferred from Chemtech's MR line of credit account on October 7, 2015 to the Hedvats' bank account #0319. (36T 37:7-9).

- Prajapati was shown extracts of the Chemtech MR line of credit account from the company's QuickBooks software and was able to tie the transfer of

$90,000 from that account to an October 2015 bank statement, which showed the funds were transferred to an account ending in 0319, which Plaintiffs established belonged to the Hedvats. (23T 24:14-21).

***Misappropriation #7:* $50,000 transferred from Chemtech's bank account on October 28, 2015 to A3I's bank account ending in #8309. (36T 37:9-11).**

- Prajapati was shown extracts of the Chemtech bank account from the company's QuickBooks software and was able to tie the transfer of $50,000 from that account to an October 2015 bank statement for the company, which showed the funds were transferred to an account ending in 8309, which Plaintiffs established belonged to A3I. (23T 24:22 to 25:13).

***Misappropriation #8:* $75,500 transferred from Chemtech's MR line of credit account on August 22, 2014 to A3I's bank account ending in #8309. (36T 11-16).**

- Prajapati was shown extracts of the Chemtech bank account from the company's QuickBooks software and was able to tie the transfer of $75,500 from that account to a bank statement for the company for August 2014, which showed the funds were transferred to an account ending in 8309, which Plaintiffs established belonged to A3I. (23T 25:18 to 26:19).

- When cross-examined, Hedvat could not identify a similar $75,500 distribution paid to Mehta. (28T 111:24 to 113:4).

***Misappropriation #9:* $2,300,000 transferred from MRL's bank account on November 26, 2014 to A3I's bank account ending in #8309. (36T 37:17-23).**

- Schedule 21 to Prajapati's expert report identified a transfer of $2,300,000 from MRL's bank account to A3I's account ending in 8309, which was corroborated via the MRL November 2014 bank statement showing a transfer to the A3I account. (Da6701; 23T 26:21 to 28:18).

- This transaction was significant because it meant that A3I did not use its own capital (or capital infused by the Hedvats) to acquire DGNS's interest in MRL. Rather, A3I used MRL funds to purchase DGNS's interest in MRL. (20T 124:16 to 126:20).

- Though there were competing explanations offered for this transfer, the trial

> court resolved the factual dispute in Plaintiffs' favor and rejected the defendants' alternative explanation. (See Db31-32). The trial court held that the defense theory, that Mehta asked for these funds as a deposit toward the DGNS buyout so that he could use the money for an investment in India, did not hold up to scrutiny.

Two final arguments relating to Prajapati's testimony warrant responses. First, appellant attacks the trial court's findings on the ground that Mehta did not specifically testify as to his damage claim. (Db30-31). Not so. Mehta provided deposition testimony, which was part of the parties' designations at trial concerning his claimed damages. (Da7390; 4T 325:1 to 328:8; 360:25 to 364:10; 365:7-16; 509:17 to 510:8; 512:5 to 513:10). Mehta also testified at trial that he adopted Prajapati's damage calculation in his report. (16T 80:21 to 81:20; 83:15 to 84:2). In addition, Prajapati testified that he consulted with Mehta concerning damages. (34T 75:15-23). Despite the insinuation that this was improper, it was appropriate for Mehta—a scientist and not an accountant—to rely on his forensic accounting expert in this misappropriation case to establish the basis for his damages.

Second, appellant argues that the trial court's inclusion of certain transactions was improper because they occurred after Hedvat provided P-48 and P-50 to Mehta, the balance sheets for the companies that ultimately formed the basis for Hedvat's buyout offer. (Da2792-97). As Prajapati explained, many of these transactions were part of a broader series of step transactions that Hedvat used to move money from Chemtech and MRL into various conduit accounts, and then (sometimes after P-48

and P-50 were exchanged) into accounts that he, his wife, and the other defendants controlled. (23T 30:15 to 34:7; Da6701).

In the end, the trial court had before it not just Prajapati's testimony, but also his considered analysis of the businesses' financial records (the only accounting expert to do so). His analysis was corroborated in each instance by bank statements showing misappropriations to accounts the Hedvats owned and/or controlled. The lower court also evaluated the testimony of Prajapati and Mehta against that of Hedvat and Fuentes and found the Plaintiffs' to be credible. By corollary, the trial court concluded that Hedvat was not credible, as confirmed by its statement that Hedvat's explanations for the diversions that Plaintiffs identified were lacking. (36T 33:6-13). The trial court's decision must, therefore, be affirmed.

IV. THE DEFENDANTS WAIVED ANY STATUTE OF LIMITATIONS ARGUMENT BY FAILING TO RAISE IT BELOW. (NOT RAISED BELOW).

The appellant's statute of limitations argument must be rejected because the issue was never properly raised below. (Db41). Since the defendants never pressed their statute of limitations argument on summary judgment or at trial, this Court may only reverse on the issue if it finds that the trial court committed plain error. *Johnson v. Benjamin Moore & Co.*, 347 N.J. Super. 71, 97 (App. Div. 2002).[16] It did not.

[16] Fariba contends that this Court reviews *de novo* whether an action is barred by the statute of limitations. But that rule applies only when a party raises the issue below.

Pleading a statute of limitations defense in an answer is not sufficient to preserve the matter for appeal if a party does not actually litigate the issue. The statute of limitations is an affirmative defense that defendants have an obligation to both raise and establish by a preponderance of the evidence. *Fees v. Trow*, 105 N.J. 330, 335 (1987); *Williams v. Bell Tel. Labs. Inc.*, 132 N.J. 109, 118-120 (1993) (defendant waived the statute of limitations defense by failing to assert it at any stage of the proceedings after pleading it in its answer). Though pled in their answer, the defendants did not raise the issue with respect to *any* of the claims that proceeded to trial—not on summary judgment, not in their *Rule* 4:40-1 motion at the close of Plaintiffs' case, and not in their post-trial proposed findings or post-trial motions. In fact, the defendants surgically raised the issue in one and only one context: in support of their summary judgment motion as to the *specific and limited* issue of Mehta's claim for unpaid compensation—on which they prevailed. (13T 57:2-13; 59:17 to 60:18; 79:4-18). They did not raise it on summary judgment or at trial as to any of the other claims in this lawsuit. The appellant does not identify any section of any transcript where she affirmatively raised this issue in any other context.[17]

Even if the Court does not reject appellant's newly raised statute of limitations issue outright, the Court must still affirm based on the discovery rule. The discovery

[17] The sole reference to the statute of limitations in any context at or after trial was the trial court's one-line off-the-cuff mention of it (and the discovery rule) in its decision. (36T 52:7-10).

rule is an equitable principle that modifies the statute of limitations only until the date when the plaintiff discovers or by an exercise of reasonable diligence should have discovered that he may have an actionable claim. *Catena v. Raytheon Co.*, 447 N.J. Super. 43, 52 (App. Div. 2016). The date of discovery determination is "highly fact-sensitive, and will vary from case to case, and . . . from type of case to type of case." *Id.* at 54.

In this case, the trial court made specific findings not only that Mehta did not know what Hedvat and the defendants had done until Prajapati forensically analyzed the books and records, but that the defendants took deliberate steps conceal their conduct so that Mehta could not have discovered it in timely fashion. These findings warrant application of the discovery rule, and are entitled to deference on appeal.[18]

First, despite Mehta's ownership interest in Chemtech and MRL, the trial court very clearly found that he was a scientist: "He wasn't a bookkeeper. He wasn't

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[18] While the discovery rule generally does not apply to breach of contract claims (as opposed to torts like conversion), the Supreme Court has recognized its application in limited contexts, generally in cases of misrepresentation, as here, where the trial court finds that the Plaintiffs did not know and had no reason to know of the basis for a claim. *See, e.g., Gibbins v. Kosuga*, 121 N.J. Super. 252 (Law Div. 1972); *Pruco Life Ins. Co. v. Koslowsky*, 2015 U.S. Dist. LEXIS 100515, at *12 (D.N.J. July 31, 2015). Relatedly, the statute of limitations may be equitably tolled when the defendant, "through either intentional or unintentional fraud or concealment . . . causes the plaintiff to relax his vigilance or deviate from his duty of inquiry into the facts." *Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159, 168 (App. Div. 2007). As discussed, the trial court certainly found facts supportive of the defendants taking steps to conceal their conduct from the Plaintiffs. In any event, the issue is moot because the defendants waived the issue by failing to timely raise it at trial.

an accountant. He wasn't running the company. That was more of Mr. Hedvat's role." (36T 9:23 to 10:4). As the trial court later explained: Mr. Mehta "was the scientist. There is no doubt in my mind that he was out [the financial] loop." (37T 86:16-17).

Second, the trial court found that: "what really led to all of this, was in April of 2019, Mr. Mehta received a tax notice from the New Jersey Department of the Treasury indicating an audit of his 2015 tax return and that there was tax owed of $98,038." (36T 13:14-18). After months of trying to obtain financial records from Hedvat, Mehta filed suit less than a year later.

Third, the trial court repeatedly explained that Hedvat had created a series of "webs" and "mazes" of accounts with the company finances, including conduit accounts, co-mingled funds, and step transactions. These "mazes" and "webs" inhibited Mehta from discovering the defendants' conduct sooner and allowed Hedvat and the defendants to conceal their conduct. (36T 22:21 to 23:7; 33:14-16; 53:9-10; 37T 72:13-15; 73:3-13; 75:14-21; 79:7-16; 86:18-20; 89:5-11). *See Motamed v. Chubb Corp.*, 2016 U.S. Dist. LEXIS 33301, at *8 (D.N.J. Mar. 11, 2016) ("While Ayco argues that the discovery rule should not apply to Fay's breach of contract claim, the Court finds that the rule is applicable here because Ayco's alleged actions are 'by their nature . . . self-concealing or undiscoverable.'").

Fourth, and in light of these findings, the trial court concluded that "there was

no way" for Mehta to know in 2014 that the $6.3 million figure provided by Hedvat was inaccurate. Prajapati's forensic analysis was critical. As the trial court explained: "[i]t took a million dollars and two years to figure it out." (37T 89:12-17). Whether Plaintiffs knew or should have known that the defendants were misappropriating funds is a pure fact question that the trial court resolved in the Plaintiffs' favor. The appellant may disagree with the trial court's findings after weighing all of the evidence, but those findings are entitled to deference on appeal.

In sum, the failure to affirmatively raise the statute of limitations argument below is fatal to the appellant's claim. But even if it weren't, the trial court rightly concluded that the Plaintiffs could not, by reasonable diligence, have discovered the defendants' misappropriations sooner because of the ways the defendants concealed their conduct. The trial court's judgment must, therefore, be affirmed.

V. THE TRIAL COURT PROPERLY FOUND THE DEFENDANTS LIABLE FOR CONVERSION. (36T 4:1 to 56:13; 37T 71:25 to 97:1).

A. Appellant Waived Her Pre-Suit Demand Argument (Not raised below).

As a threshold matter, the appellant's argument that Plaintiffs failed to make a pre-suit demand to establish their conversion claim fails on its face because the appellant never raised the issue below. (Db26-27). *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 465 (App. Div. 2001) (an argument that one party failed to prove an element of a cause of action cannot be raised for the first time on appeal).

The appellant has not identified any part of any transcript where the specific issue of a demand for return of the converted property was actually raised before, during, or after the trial, and the segments identified in her point heading make no reference to the issue of a demand whatsoever. Appellant therefore waived this argument.

But even were the Court to consider the substance of the argument, Plaintiffs did attempt to make a pre-suit demand, but were stymied in their efforts by the defendants' obfuscation. Once Plaintiffs recognized an issue based on the New Jersey tax notice, Prajapati (at Plaintiffs' instruction) made a series of written demands of Hedvat in August 2019 to produce accurate financial data for the defendant entities to establish how much money Plaintiffs were owed. (Da49-61). Mehta made a similar demand in early September 2019. (Da2842-44). Defendants' accountant, Sandy Myers, conceded in response that Mehta's capital account should have increased by $972,140 because a distribution attributed to both he and Hedvat should solely have been attributed to Hedvat. (Da58). Put somewhat less generously: Hedvat and the defendants stole money.

The defendants refused to provide complete information. In fact, when Myers attempted in late summer 2019 to coordinate with Hedvat on this, Hedvat responded: "please never mention [Mehta's] fucking name to me. I see him in court if he wants to. He is DEAD to me." (Da7307). When Myers asked Hedvat to sign an affidavit to resolve the tax issue in October 2019, Hedvat responded: "NO fucking way. No

fucking way I sign anything for anyone. File a fucking suit. Never ever mention [Mehta's] fucking name to me again if [you] want to stay my CPA." (Da7309). A few months later, Hedvat demanded to know if Myers gave Mehta the Chemtech QuickBooks files. When Myers said that he didn't, Hedvat responded that Mehta was now suing him for "7.5 million dollars." (Da7306). If that weren't repudiation enough, the defendants took the position throughout this entire lawsuit that Plaintiffs' claims were frivolous. (37T 74:21 to 75:13; Da2548).

But even if Plaintiffs' demands were not sufficient, any demand requirement should be excused here as futile. *See Johnson v. Glassman*, 401 N.J. Super. 222, 229 (App. Div. 2008) (addressing pre-suit demand issue in the derivative suit context). The trial court found that the defendants were not opening their books and saying to the Plaintiffs and the Court "we have nothing to hide;" rather, they fought "tooth and nail" against Plaintiffs' efforts obtain their books and records. (36T 15:23 to 17:6; 37T 75:22 to 76:3). As a result of the defendants' intransigence, the Plaintiffs were prevented from determining with particularity before the lawsuit the precise amount owed to them. It would be inequitable for the defendants to defeat a conversion claim by refusing to turn over the information Plaintiffs needed to ascertain the precise amount of their demand.

B. The Defendants Are Liable for Conversion

The trial court correctly found that the defendants, acting in concert, converted

monies that rightfully belonged to the Plaintiffs. Conversion is premised on the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *LaPlace v. Briere*, 404 N.J. Super. 585, 595 (App. Div.), *certif. den.*, 199 N.J. 133 (2009). It does not require that defendants have an intent to harm the rightful owner or know that the money belongs to another. *Id.*

As articulated in Points I and III, *supra*, Plaintiffs presented sufficient evidence for the trial court to conclude that the defendants exercised unauthorized control and ownership over identifiable funds that rightfully belonged to Mehta and DGNS by manipulating the books and records to take distributions without making equal payments to the Plaintiffs. (*See* III.C, *supra*). The Hedvats engaged in the aforesaid conduct without authorization from Chemtech, MRL, or the Plaintiffs, all to the detriment of the defendant companies from which they stole, and from Mehta and DGNS, as anticipated beneficiaries of their equitable share of those funds. *See Brown*, 323 N.J. Super. at 37. Compounding matters, they deposited the funds into their joint account or the A3I account, outside of the Plaintiffs' knowledge and control. (23T 9:23 to 29:9). Appellant's dispute as to the trial court's factual findings and weighing of the evidence (Db29-30) is not a sufficient reason to reverse the trial court's well-founded conclusions. *Rova Farms*, 65 N.J. at 484.

FILED, Clerk of the Appellate Division, May 24, 2023, **A-000385-22**, **AMENDED**

VI. THE TRIAL COURT PROPERLY FOUND THE DEFENDANTS LIABLE FOR BREACH OF CONTRACT, BREACH OF THE COVENANT OF GOOD FAITH, AND UNJUST ENRICHMENT. (36T 4:1 to 56:13; 37T 71:25 to 97:1).

A. The Backdrop and Legal Standards

This was a complex case with a lot of moving parts. Yet, the appellant urges this Court to evaluate the conduct of each of the individual parties, each cause of action, and each bit of evidence and testimony in isolation. Doing so would disserve the trial court's prerogative to find facts and develop conclusions based on the totality of circumstances developed over 22 days of trial. As the trial court explained, "you have to step back and look at the big picture here," and "[y]ou can't take any part of this case and put blinders on and say, well, this entity we can't say did this, or this one did, because they are all being moved and controlled by Mr. Hedvat." (37T 79:4-6; 88:21-24).

Based on a wholesale weighing of the evidence, the trial court found that the defendants, in concert, moved money without the Plaintiffs' knowledge via conduit accounts, accrual accounts, step transactions, and other means, all of which created what the trial court called "mazes" and "webs" of accounts that made the funds extraordinarily difficult to trace. Money was "being moved [by the defendants] all over the place" and "we don't even know where it is now." (37T 72:13-15; 73:3-18). The trial court found that this was all being done without the Plaintiffs' knowledge. (37T 75:7-21). In view of these facts, trial court made clear that it had the power to

adopt remedies flexible to the circumstances of every case and the complex relations of all the parties. (36T 6:21 to 7:5). *Matejek v. Watson*, 449 N.J. Super. 179, 183 (App. Div. 2017). Against this backdrop the evidence was more than sufficient to establish that the defendants were liable for breach of contract, breach of the covenant of good faith, and unjust enrichment.

B. <u>The Defendants Are Liable for Breach of Contract.</u>

In Counts 7 and 8 of the Amended Complaint, the Plaintiffs asserted breach of contract claims against MRL, A3I, Chemtech, and the Hedvats relating to the MRL Operating Agreement and the Chemtech Stockholder's Agreement. To establish a breach of contract claim, a plaintiff must show that the parties entered into a valid contract, the defendant failed to perform his obligations under the contract, and the plaintiff sustained damages as a result. *Coyle v. Englander's*, 199 N.J. Super. 212, 223 (App. Div. 1985). Damages are intended to compensate the injured party for losses due to the breach and to put that party in as good a position as if performance had been rendered as promised. *Totaro, Duffy, Cannova & Co., L.L.C. v. Lane, Middleton & Co., L.L.C.*, 191 N.J. 1, 12-13 (2007).

Fariba's argument on appeal is that the trial court erred by holding her liable for breaching contracts to which she was not a party. (Db35). The problem, however, is that she definitely was a party to contracts that the trial court concluded had been breached, and the Plaintiffs showed that money flowed into accounts that she

controlled as a result of those breaches. (23T 9:23 to 29:9; 37T:87:20 to 88:4). To the extent Fariba claims that the trial court's conclusions are contrary to the evidential record, that argument falls flat because the evidence was sufficient to establish her liability when the trial court considered the documents, testimony, and credibility of the witnesses. There is no basis for this Court to reverse the lower court's well-founded conclusions after thoroughly weighing of the evidence presented during an extensive 22-day trial.

The MRL Operating Agreement is a contract between A3I and DGNS and is enforceable against any member who violates its terms. (Da2701). Fariba is the "paper" owner and sole member of A3I. (Da2711). The MRL Operating Agreement contains certain covenants, including that "All profits of the Company enterprise shall be shared by each of said members according to the percentage of interest each member owns. . . . No member shall make any withdrawals from capital without prior approval of the Company." (Da2703). The agreement further provides that MRL is to be member managed with decisions and actions decided by a "majority in the interest of its members," with a majority defined as 51% or more. (Da2704). The agreement prohibits members from taking actions "detrimental to the best interests of the Company or which would make it impossible to carry on the ordinary purpose of the Company." (Da2705). With respect to MRL's books, the agreement provides that "Each of the parties to this agreement hereby covenants and agrees to

cause all known business transactions pertaining to the purpose of the Company, to be entered properly and completely into said book." (Da2706).

The evidence at trial established, and the trial court found, that A3I, as a member in MRL, and Fariba Hedvat and Emanuel Hedvat, who controlled A3I and MRL, breached their obligations to DGNS under the MRL Operating Agreement by: (a) making withdrawals of capital from the company without prior approval and authorization of a majority of the members; (b) not sharing company profits in a manner consistent with and in proportion to their 50% membership interest in the company; (c) distributing, receiving and/or causing to be distributed and/or received by MRL and A3I more than their share of profits and surplus of MRL; (d) engaging in critical company decision making involving company finances (including removing significant capital from the company) without seeking or obtaining DGNS' authorization; (e) taking actions detrimental to the interests of the company and DGNS by diverting funds from the company in a manner detrimental to the interests of the company; and (f) failing to enter transactions pertaining to the company accurately in the company's financial books and records. (36T 35:16 to 37:23; 50:10 to 51:21).

The 2007 Chemtech Stockholders Agreement between Mehta and Hedvat provides that all decisions regarding operation of the business of the corporation and the expenditure of funds "shall be made by majority vote of the Stockholders."

(Da2714). It further provides that the company shall always maintain sufficient cash to cover six months of projected operating expenses, and that the company shall only distribute profits which are "in excess of that amount." (Da2727).

The evidence established, and the trial court found, that Hedvat breached the Chemtech Stockholders Agreement by: (a) expending company funds without Mehta's authorization; and (b) distributing profits inequitably and inconsistently with his interest in the company, to the detriment of the company and Mehta. (36T 35:16 to 37:23; 50:10 to 51:21). In the case of both MRL and Chemtech, the Hedvats, acting in concert, moved millions of dollars into accounts that they controlled, to the detriment of the Plaintiffs. (23T 9:23 to 29:9).

The trial court correctly went further on reconsideration. In both the SPAs and the MIPA, the defendants represented that they would indemnify the Plaintiffs for any "material inaccuracy . . . contained in this Agreement." (Da2806-07; 2744-45; 2827-28). In the SPAs, *both* of the Hedvats and Chemtech also warranted that consummation of the purchase transaction would not result in a breach of any other agreement, contract, or arrangement to which either Hedvat or Chemtech were bound. (Da2804-05; 2825-26). This necessarily included the Chemtech Stockholder Agreement. The defendants argued below that the trial court did not *explicitly* state that they breached the MIPA and SPAs in its earlier opinion, so the lower court clarified the issue on reconsideration, based on the foregoing language, that the

defendants' conduct also breached the MIPA and SPAs, stating:

> [T]here is an argument . . . that the court didn't make findings under the SPA or MIPA . . . and that there is no breach of those agreements. I don't accept that argument because how do you have a sale that is shortchanging somebody based on [] what occurred historically? The numbers were wrong. It was bogus."

(37T 87:20 to 88:1). DGNS and A3I were parties to the MIPA; Mehta and Emanuel were parties to the 2014 SPA; and Mehta and Fariba were parties to the 2017 SPA. (Da2740; 2802; 2823).

Thus, the trial court found that the defendants *also* breached the two SPAs and the MIPA *because* they breached the Chemtech Stockholder Agreement and MRL Operating Agreement. This necessarily includes the 2017 SPA *to which Fariba was a party*. On appeal, Fariba largely ignores this critical finding by the trial court. As the trial court explained, both Fariba and Emanuel breached their obligations under the MIPA and the SPAs by presenting balance sheets and financial information to Mehta that were "inaccurate" because they had diverted funds from the companies into accounts that they controlled (principally, the A3I account and the Hedvats' joint account), and compounded the issue when Hedvat used that inaccurate information to induce Plaintiffs' to sell their interests for $6.3 million when the defendants knew "the numbers were wrong" and "bogus." (37T 87:23 to 88:18). As the trial court explained: the Chemtech Stockholders Agreement, the MRL Operating Agreement, the SPA and the MIPA "all feed off of each other," "there are

a lot of moving parts" and "they all play off of each other." (37T 88:19-20; 89:1-4).

C. The Defendants Breached the Covenant of Good Faith

The trial court correctly found that the defendants breached the covenant of good faith and fair dealing. The covenant, inherent in every contract, requires that neither party do anything that would have the effect of destroying or injuring the right of another party to receive the fruits of the contract. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. at 420-21; *Seidenberg v. Summit Bank*, 348 N.J. Super. 243, 259 (App. Div. 2002) (one party to a contract may not unreasonably frustrate the other's purpose). One party to a contract may not use the powers bestowed on them to unilaterally destroy the other's expectations without legitimate purpose. Such risks are beyond the expectations of the parties at the formation. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001). Bad faith is to be found in the "eye of the trier of fact" and can be discerned from the proofs regarding the defendants' state of mind and the context from which the claim arose. *Seidenberg*, 348 N.J. Super. at 262-63.

Here, the trial court found that the financial records that Hedvat produced for Chemtech and MRL (on behalf of himself, A3I, and the other defendants), and that formed the basis for the purchase prices in the MIPA and the SPAs were "bogus." (37T 87:20 to 88:1). Hedvat accomplished this by creating what the trial court repeatedly called "webs" and mazes" of accounts to divert funds from the companies to himself, his wife, and entities they controlled. (37T 79:7-12). The defendants used

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accounting tricks to conceal this conduct from the Plaintiffs' view. (37T 89:12-17). The trial court found that even if all of the aforesaid conduct did not violate the express terms of the subject contracts, it breached the implied covenant of good faith since it had the effect of destroying the Plaintiffs' reasonable expectations. (36T 51:19-21). As the trial court later explained: the counts for which defendants were found liable were all "interrelated, including the covenant of good faith and fair dealing which I think deals with all of this." (37T 95:24 to 96:5).

D. <u>The Defendants Were Unjustly Enriched.</u>

In Counts 12 and 13 of the Amended Complaint, the Plaintiffs asserted unjust enrichment claims against all defendants. Unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. A plaintiff must show proof that the defendant received a benefit and retention of that benefit without payment would be unjust. *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 110 (2007). Unjust enrichment may arise "outside the usual quasi-contractual setting." *Goldsmith v. Camden Cty. Surrogate's Office*, 408 N.J. Super. 376, 382 (App. Div. 2009). A court need not find a contract between plaintiff and defendant to conclude that a party was unjustly enriched. *See, Insulation Contractor & Supply v. Kravco, Inc.*, 209 N.J. Super. 367, 376 (App. Div. 1986).

As the Supreme Court has explained in the context of an unjust enrichment claim: "equities arise and stem from facts which call for relief from the strict legal

effects of given situations." *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 288 (2016). This is why "cases must ultimately be decided on facts" and "rules of law are not applied in the abstract but must be considered in light of the facts in individual cases." *Hanover Ins. Co. v. Franke*, 75 N.J. Super. 68, 74 (App. Div. 1962); *A.W. v. T.D.*, 433 N.J. Super. 365, 370 (Ch. Div. 2013). That is what the trial court did here. The defendants acted inequitably for the reasons already set out above, including that they took funds from the companies without paying out an equal amount to the Plaintiffs. (36T 51:22 to 52:23). The Hedvats controlled the defendant entities and moved money among them as instrumentalities of their broader scheme. (37T 79:7-12). It would have been inequitable to force the Plaintiffs to chase those funds from defendant to defendant and account to account to be made whole. (37T 79:7 to 80:8).

Given the "full picture" and the circumstances here, the trial court was well within its power to hold each defendant liable, jointly and severally, for breach of contract and breach of the covenant of good faith. But even if the Court were to disagree, that error would be harmless, because the trial court had the equitable power to extend liability to all defendants under an unjust enrichment theory based on the movement of money between and among Emanuel and Fariba Hedvat and the defendant entities. Thus, the judgment of the trial court as to the breach of contract, covenant of good faith, and unjust enrichment claims must be affirmed.

VII. THE TRIAL COURT CORRECTLY FOUND THE DEFENDANTS JOINTLY AND SEVERALLY LIABLE. (37T 79:7 to 80:14).

To protect the Plaintiffs, the trial court correctly entered judgment jointly and severally. Hedvat exerted control over all of the entity defendants and monies were transferred from Chemtech and MRL into joint accounts that he and Fariba controlled. Despite this, the defendants below advocated for a convoluted set of allocations: 60% to Emanuel; 11% to Fariba; 16% to Chemtech; 84% to MRL; and 98% for A3I; and nothing to the rest of the defendants. (37T 44:6-13). They now press that argument on appeal. (Db45).

In New Jersey, "liability is presumed to be joint and several" except when a reasonable basis exists to determine the contribution of each cause of a single harm. *Bendar v. Rosen*, 247 N.J. Super. 219, 232 (App. Div. 1991). This presumption exists so that the innocent plaintiff need not establish what portion of the eventual damages are attributable to each act by the defendants. *Id.* Joint and several liability exists to provide an injured party with full recovery. *Kustka v. Batz*, 236 N.J. Super. 495, 499, (App. Div. 1989). "It provides the injured party with complete financial exoneration when some, but not all, of the tortfeasors are able to respond to the judgment." *Id.*

The trial court, looking at the full picture, rather than each party and claim in a vacuum, concluded that the defendants' allocation was unworkable. The percentages don't even add up to 100%. In view of Hedvat's conduct, his control over the entities, the "webs" and "mazes" of accounts he created, and the way

Plaintiffs' showed that he moved money around, the trial court found that was the "classic case that would warrant" joint and several liability. (37T 79:7 to 80:14).

Though the defendants urge this Court to focus on individual transactions to apportion liability severally, several factors support joint and several liability here. *First,* the defendants acted in concert. The trial court focused throughout both of its opinions on the conduct of all of the defendants acting together, not just some of them as to particular transactions. This is consistent with the trial court's findings of conduit accounts, step transactions, and co-mingling of funds, that the defendant companies were "set up in a maze of accounts," and that "there was a maze and webs created." (36T 22:21-25; 33:14-16; 53:9-10). Relatedly, Prajapati (who the Court found to be credible) provided uncontroverted testimony that certain of the defendant entities were merged into A3I after the closing of the sale transaction for the Plaintiffs' interests. (23T 33:24 to 34:3). It is neither fair nor equitable to place the burden on the Plaintiffs, as the innocent parties here, to untangle or deconstruct the complex accounting web that the defendants created.

Second, the trial court found that Hedvat controlled the defendants' finances. (36T 30:15-19; 33:6-9; 37:1-3; 37T 79:7-16; 88:21-25). He moved funds where and when he wanted (including to his and Fariba's joint personal account), to the Plaintiffs' detriment. A result that apportions liability severally would penalize the Plaintiffs, who have already suffered as a result of the defendants' bad faith conduct,

by requiring them to chase different groups of defendants for different "pots of money"–an illogical outcome given the trial court's findings as to the defendants' conduct and the maze of accounts that the defendants established.

Third, the defendants did not seek an allocation of liability amongst themselves at trial, or assert crossclaims for contribution or indemnification. Nor did they advocate for several liability in the event the lower court declined to dismiss the Plaintiffs' claims. Even still, the defendants are free to pursue contribution claims if, upon collection by the Plaintiffs, some of them believe they paid more than their fair share of the judgment.

Fourth, the Court should reject any invitation to diminish the Hedvats' liability for the conduct in question. At a minimum, each is individually liable for the *entire* compensatory award based on their conversion of the funds because:

> A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character, but a director or officer who commits the tort or who directs the tortious act to be done, or participates or cooperates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for tort.

McGlynn v. Schultz, 95 N.J. Super. 412, 416 (App. Div. 1967); *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J. Super. 372, 381 (App. Div. 1995) ("Any corporate officer, or director who participates by aid, instigation, or assistance in a conversion, is liable."). This is true even when the conversion was for the benefit of the corporation and directors did not receive the misappropriated funds. *See id.*

The trial court found that the Hedvats received misappropriated monies, either directly or through the other defendant entities. Under *McGlynn*, there is little question that both Hedvats must be liable for the entire judgment amount. Emanuel controls the defendant entities. He was the "man behind the curtain" pulling the strings, moving the money, and facilitating the transactions. Fariba shared a joint bank account with her husband into which a significant portion of the misappropriated funds flowed. She acquired Mehta's Chemtech shares via the 2017 SPA and is the sole principal in A3I (which held a 50% interest in MRL). There is no logical reason to diminish the Hedvats' liability by apportioning damages to them severally, rather than jointly and severally.

Finally, the Court must reject the defendants' attempts to exculpate NJ Cubic 29, Cottage Street LLC, VIP, Chemtech Group LLC, and EFJ. Appellant argues that the Court should not appropriation joint and several liability to these entities because they were not direct parties to the transactions in which the defendants misappropriated funds. However, this is not a case in which multiple unconnected defendant parties are separately liable for harm to the Plaintiffs. Here, Hedvat (in concert with Fariba) controls the entities. He freely moved money among them. Establishing a complex regime of several liability would allow Hedvat and the other defendants to move money, file for bankruptcy, or make mischief in ways detrimental to the Plaintiffs' interests as judgment creditors. Put simply, the

defendants advocate for a several liability regime that would allow them to engage in the same bad faith conduct the lower court found they engaged in to begin with. The trial court's judgment should therefore be affirmed.

VIII. THE AWARD OF LEGAL FEES AND COSTS WAS PROPER. (37T 79:4 to 93:23).

The trial court correctly awarded Plaintiffs their attorneys' fees, expert fees, and costs of suit totaling $1,181,874.51. Fee-shifting is allowed if expressly provided for by statute, court rule, or contract. *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 440 (2001). Fee determinations by trial courts "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995). This is because the trial court is best positioned "to weigh the equities and arguments of the parties." *Packard-Bamberger*, 167 N.J. at 447. An appellate court should only reverse a trial court's fee determination if it was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *C.E. v. Elizabeth Pub. Sch. Dist.*, 472 N.J. Super. 253, 262 (App. Div. 2022). Here, the trial court correctly concluded that the contracts that the defendants breached authorized an award of legal fees and costs to the Plaintiffs, and the trial court's fee award was reasonable.

A. The Defendants Violated Agreements That Provide For Counsel Fee Awards.

To start, the trial court found that the defendants breached the MRL Operating Agreement. Section XX of that document, entitled "Violation of this Agreement," provides for a broad indemnity to the Plaintiffs:

> Any member who shall violate any of the terms, conditions, and provisions of this Agreement shall keep and save harmless the Company property and shall also indemnify the other members from any and all claims, demands, and action of every kind and nature whatsoever that may arise out of or by reason of such violation of any terms and conditions of this Agreement.

(Da2710). This broad language is not limited to third party claims, or by the nature or scope of the violation. *See Boyle v. Huff*, 2023 N.J. Super. Unpub. LEXIS 85, at *17 (App. Div. Jan. 20, 2023). It requires members to indemnify other members "from any and all claims . . . of every kind and nature whatsoever" arising from a violation. The Plaintiffs prevailed on their MRL breach of contract claim. (36T 50:10 to 51:21). Full indemnity is the contractually prescribed remedy when one member violates "any term[] and condition[]" of the agreement. Section XX entitles Plaintiffs to indemnification from defendants for violating their rights, including attorneys' fees, expenses, and costs of suit. *See, e.g., Metex Mfg. Corp. v. Manson*, 2008 U.S. Dist. LEXIS 25107, at *30 (D.N.J. Mar. 28, 2008) (broad indemnity as to "any liability" arising from "any" claim, including claims by other members, sufficient to warrant award of counsel fees).

The SPAs contain fee shifts too. Section 6.3 of the 2014 and 2017 SPAs, which the trial court found the defendants violated, contain the following language:

> **Indemnification for Seller's Benefit.** Buyer agrees to indemnify and hold harmless Seller from and against any and all Losses incurred by Seller after the date of this Agreement and arising out of, resulting from, or relating to (i) any material inaccuracy or breach of any representation or warranty of Buyer contained in this Agreement, (ii) any material breach or violation of the covenants or agreements of Buyer contained in this Agreement and (iii) any material inaccuracy in any certificate, instrument or other document delivered by Buyer as required by this Agreement.

Section 6.2 of the SPAs defines "Losses" as: "any and all obligations . . . claims, actions, injuries, demands, suits, judgments, proceedings, investigations, arbitrations and reasonable expenses, including reasonable accountant's and reasonable attorney's fees and expenses." (Da2806; 2827). *See Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 385 (2009) (explicit reference to attorney's fees as part of the definition of "Losses" sufficient for award). Again, nothing in this broad provision limits the indemnity to third party claims. *See Boyle, supra*, at *17; *Cem Bus. Sols., Inc. v. BHI Energy*, 2022 U.S. Dist. LEXIS 62724, at *6 (D.N.J. Apr. 4, 2022), citing *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 255 (3d Cir. 2010) ("[W]e cannot hold that first-party indemnification claims . . . are categorically barred as a matter of law in New Jersey absent direct authority to that effect.").

As part of his assurances, representations, and warranties in Section 3.2(b) of the 2014 SPA, Hedvat attested that consummation of the purchase would not "result in a breach of . . . any agreement, contract . . . or other arrangement to which Buyer [Hedvat] is a party or by which he is bound." (Da2804). Similarly, on behalf of

Chemtech, Hedvat represented that consummation of the purchase would not "result in a breach of . . . any agreement, contract . . . or other arrangement to which the Company is a party or by which it is bound," or "violate any provision of the charter or bylaws of the Company." (Da2805). Fariba made similar representations in the 2017 SPA. (Da2825-26). These representations (and those on behalf of Chemtech) survived closing. (Da2806; 2827). The trial court found breaches of the Chemtech Stockholders Agreement and the SPAs, which triggered these indemnity provisions and the requirement that, at the very least, Emanuel and Fariba (as parties to the SPAs) pay Plaintiffs' attorneys fees, expenses, investigation costs, and other costs of suit. (36T 50:10 to 51:21; 37T 87:20 to 88:1).[19]

Finally, Section 6.3 of the 2014 MIPA contains the following language:

> **6.3 Indemnification for Seller's Benefit.** Buyer agrees to indemnify and hold harmless Seller, and will pay to Seller the amount of any Damages, arising out of, resulting from, or relating to:
>
> any material inaccuracy or breach of any representation or warranty of Buyer contained in this Agreement or in any other document delivered by Buyer as required by this Agreement;
>
> any material breach or violation of the covenants or agreements of Buyer contained in this Agreement or in any other document delivered

[19] Fariba's argument (Db49) that the trial court did not find that she breached the SPA is simply wrong. The trial court expressly found that the defendants breached the SPAs, saying "The numbers were wrong. It was bogus." (37T 87:20 to 88:1). As Emanuel did in the 2014 SPA, Fariba represented in the 2017 SPA that consummating the purchase would not result in the breach of any agreement to which either she or Chemtech were bound – including the Chemtech Stockholder Agreement, which the trial court found had been breached. (36T 50:10 to 51:21).

by Buyer as required by this Agreement.

(Da2744). "Damages" is defined in Section 6.2 of the MIPA as:

> the amount of any actual loss, liability, claim, damage (excluding incidental and consequential damages) and expense (including costs of investigation and defense and reasonable attorney's fees and costs of suit), whether or not involving a third-party claim."[20] (Da2744).

The same principles articulated above apply to the MIPA indemnity provision. And, as was true with the SPAs, the trial court found that Hedvat knew the numbers he used to establish the sale price for MRL "were wrong" and "bogus." (37T 87:23 to 88:18). The trial court correctly held that this qualified as a "material inaccuracy" that triggered Section 6.3's indemnification provision.[21]

The trial court also correctly awarded expert fees and other costs. The indemnity language in the MIPA and SPAs is broad, and includes not just an attorney fee shift, but also "expenses," which includes "costs of investigation and defense," and "costs of suit" and "reasonable accountant's . . . fees and expenses." (Da2744; 2827). This language covers all of the expert and other litigation expenses that the

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[20] This is not merely an indemnity for third party claims. A3I separately agreed to indemnify DNGS from and against certain third-party claims by Company lenders with respect to personal guaranties. (Da2743).

[21] Fariba complains that she was ordered to pay fees for contracts that the trial court did not find that she breached. (Db49). Not so. Fariba executed the 2017 SPA and acquired Mehta's interest in Chemtech. (Da2823). The trial court found the 2017 SPA breached because the buyer's representations were "materially inaccurate" under Section 6.3, and because Hedvat breached the Chemtech Stockholders Agreement which he represented he had not done under Sections 3.2 and 4.2.

trial court awarded. Prajapati is an accountant, so his fees are covered by the plain definition of "Losses" in Section 6.2 of the SPA. "Costs of investigation and defense" from Section 6.2 of the MIPA, and "investigations" and "expenses" from Section 6.2 of the SPAs encompass the expert investigation necessary to respond to the counterclaims and third-party claims that the trial court ultimately dismissed. The term "reasonable expenses" and "costs of suit" from those same sections serve as catchalls for anything not expressly covered elsewhere within the definitions of "Damages" and "Losses" in the documents.

B. The Trial Court's Fee Award Was Reasonable.

The trial court's fee award reasonable in light of the facts and equities in the case. In determining reasonableness, the threshold issue is whether the party seeking the fee prevailed in the litigation. The lawsuit must be causally related to securing the relief obtained and the prevailing party's efforts must be a necessary and important factor in obtaining the relief. *Litton Indus.*, 200 N.J. at 386.

Here, the trial court conducted an extensive analysis of the R.P.C. 1.5 factors including the time and labor required to prepare for this 22 day trial, the complexity of the case, the amount involved and results obtained, and the experience and reputation of counsel, and concluded that Plaintiffs' fees were appropriate and reasonable. (37T 80:15 to 93:13). The trial court expressed its belief that there was not really another way for Plaintiffs to obtain relief without expert accounting

services and the extensive legal work provided by counsel. (37T 89:12-17; 91:10-18; 92:16 to 93:13).[22]

In addition to the R.P.C. 1.5 factors, the trial court also considered several factors about the defendants' conduct in determining the fee award. For example, the trial court considered the immense hurdles that the Plaintiffs had to surmount just to obtain the defendants' financial books and records, which the defendants fought "tooth and nail" to avoid disclosing in full. (37T 75:7 to 76:8). Plaintiffs and their expert also expended significant time and effort to unravel what the trial court called "webs" and "mazes" of accounts that the defendants' created to conceal their misappropriations. (37T 79:7-9; 86:18-20). Appellant also forgets that not only did Plaintiffs prevail on their own claims, but they also soundly defeated the fusillade of counterclaims and third party claims for which the defendants sought $3.2 million, punitive damages, attorneys fees, costs of suit, and various forms of injunctive relief, all of which the trial court found were "just basically brought in retaliation," and some of which the trial court did not "even want to dignify." (36T 11:23 to 12:15; 38:18 to 39:20).

[22] Though counsel did not handle this case on a contingency, the total legal fees for Plaintiffs' counsel at Winne Banta and Lazarus & Lazarus (exclusive of expert fees and other expenses) were roughly one-third of the trial court's compensatory award. (Da2083-2472). While not dispositive, that degree of proportionality imbues the Plaintiffs' fee application with an imprimatur of reasonableness. *Litton Indus.*, 200 N.J. at 389.

The trial court's analysis of Plaintiffs' fee application was thorough. Because it did not abuse its discretion, the award of legal fees and expenses must be affirmed.

IX. THE TRIAL COURT ERRED BY DECLINING TO AWARD PREJUDGMENT INTEREST ATTRIBUTABLE TO EACH INDIVIDUAL MISAPPROPRIATION. (37T 77:7 TO 78:23)

Though the trial court's judgment is almost entirely correct, the court below erred in one key respect: it denied Plaintiffs the full quantum of pre-judgment interest to which they were entitled. Plaintiffs sought $838,810.40 in pre-judgment interest, calculated at prevailing court rates for each transaction where the trial court determined the defendants had misappropriated funds. (Da2073-2076). The trial court rejected that approach and instead awarded $190,480.68 in pre-judgment interest, only dating back to July 20, 2020, when Plaintiffs' filed their complaint. (37T 77:7 to 78:23).

Generally, matters of pre-judgment interest are subject to the trial court's discretion. *Lautek Corp. v. Image Bus. Sys. Corp.*, 276 N.J. Super. 531, 551 (App. Div. 1994). Here, the trial court limited Plaintiffs' pre-judgment interest demand based on *R.* 4:42-11(b), as it found liability based on the tort theory of conversion in addition to the contract-based claims. (37T 77:9 to 78:23). The Rule's limitation makes sense in the context of unliquidated damage claims in tort actions. A defendant hauled into court by an injured plaintiff has no idea what his exposure might be until the jury renders a verdict, so the limitation furthers an important

fairness interest for defendants in that respect.

However, this is not a case in which Plaintiffs asserted an unliquidated damage claim. The trial court tied the losses that Plaintiffs suffered here to specific dates when the defendants diverted specific amounts from Chemtech and MRL. Moreover, the trial court found that the defendants' misappropriated these funds without the Plaintiffs' knowledge. In similar circumstances, "where the claims are for a liquidated sum, prejudgment interest is regarded as compensatory." *Lautek*, 276 N.J. Super. at 551. The purpose of interest in such a case is to "cover the value of the sum awarded for the prejudgment period during which the defendant had the benefit of the monies to which the plaintiff is found to have been earlier entitled." *Rova Farms Resort, Inc. v. Inv'rs Ins. Co.*, 65 N.J. 474, 506 (1974). This principle holds even when defendants in good faith contest the validity of claims because they are able to use and enjoy the funds, earning "interest, dividends, and other benefits . . . whereas the plaintiff was deprived of any such enjoyment." *Id.*

In this case, the trial court denied Plaintiffs' the full amount of prejudgment interest for each of the defendants' misappropriations because it believed that would be "piling on." (37T 78:6-8). This was error. In the context of a liquidated or readily ascertainable sum, the award of prejudgment interest is compensatory and denying such relief when the defendants enjoyed the funds for an extended period of time is an abuse of discretion. *See, Klein v. Cty. of Hudson*, 187 N.J. Super. 603 (Law Div.

1980). This is because a plaintiff is denied the use of his money from the moment the funds in issue are taken. *Rova Farms*, 65 N.J. at 506. This is consistent with Plaintiffs' proposed $838,810.40 calculation. The alternative approach advocated by the defendants below and adopted by the trial court rewards the defendants for their nefarious conduct. Therefore, the trial court's judgment as to this sole issue should be reversed.

CONCLUSION

The judgment of the trial court should be affirmed, except as to the award of pre-judgment interest. That portion of the judgment should be reversed with a direction to enter an award of pre-judgment interest totaling $838,810.40.

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DIVYAJIT MEHTA and DGNS CORP., Plaintiffs-Respondents/Cross-Appellants, v. EMANUEL HEDVAT, FARIBA HEDVAT, CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, AMERICAN ANALYTICAL ASSOCIATION, INC., NJ CUBIC 29, LLC, 29 COTTAGE STREET, LLC, VIRTUAL INSTITUTE PERSONNEL, LLC, CHEMTECH GROUP LLC and EFJ REALTY LLC, Defendants-Appellants/Cross-Respondents.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET NO: BER-C-135-20 SAT BELOW: HON. EDWARD A. JEREJIAN APPELLATE DIVISION DOCKET NO. A-000385-22
CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, and VIRTUAL INSTITUTE PERSONNEL, LLC, Third-Party Plaintiffs-Appellants, v. ARECON LTD., GAYATRI MEHTA, JOHN DOES 1-10 and ABC CORPS. 1-10, Third-Party Defendants-Respondents.	

DEFENDANT-APPELLANT, FARIBA HEDVAT'S REPLY BRIEF AND OPPOSITION BRIEF TO PLAINTIFFS-RESPONDENTS' CROSS-APPEAL

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FILED, Clerk of the Appellate Division, June 22, 2023, **A-000385-22**

PRELIMINARY STATEMENT

Plaintiffs refuse to address Defendant, Fariba Hedvat's ("Defendant") appeal arguments on the merits in the misplaced hope that this Court will flinch in the face of the "volumes of documentary evidence and weeks of witness and expert testimony" and engage in only a token appellate review. Plaintiffs effectively argue that this Court should ignore the litany of legal errors made by the trial court solely because it found plaintiff, Divyajit Mehta ("Mehta") and his accounting expert credible. While a trial court's credibility findings are entitled to deference, they cannot be relied on in the absence of evidence in the record supporting the court's legal conclusions as is the case here.

Plaintiffs leave Defendant's appeal arguments materially unopposed by failing to highlight the record evidence which established the required elements of any prima facie cause of action against Defendant. Plaintiffs' position that the trial court correctly held Defendant jointly and severally liable under the Judgment by virtue of her being married to defendant, Emanuel Hedvat ("Hedvat") and because of his purported wrongful conduct is legally untenable and not supported by any credible evidence or case law.

Plaintiffs' remaining arguments also lack merit. Defendant did not waive her pre-suit demand and statute of limitation arguments with respect to Plaintiffs' conversion claims. Plaintiffs fail to cite any evidence in the record

demonstrating that Defendant intentionally relinquished or abandoned a known right. The trial court's failure to recognize the pre-suit demand requirement in identifying the required elements of conversion in its decision, and its inclusion of transactions in the damage award that were barred by the applicable statute of limitations, constitute plain error that fundamentally prejudiced Defendant. The trial court's clear errors in this regard merit vacating the Judgment against Defendant.

Plaintiffs' arguments concerning their breach of contract, breach of covenant of good faith and unjust enrichment claims equally miss the mark. Without citing any supporting case law, Plaintiffs urge this Court to overlook the trial court's plain error in holding Defendant liable for breaching contracts (and implied covenants therein) that she was not a party to and holding her personally liable for A3I's purported acts in the face of no credible evidence justifying piercing the entity's corporate veil. Equally confounding was the trial court's decision to hold Defendant liable for unjust enrichment, which belied its finding that Defendant was liable for damages for breaching express contracts with Plaintiffs. Plaintiffs did not even bother to address these arguments in their brief. Again, the court's errors of law demand reversal of the Judgment.

Lastly, there was no legal justification for the trial judge to award Plaintiffs their attorneys' fees and costs. The record evidence did not support

the finding that Defendant breached a contract containing a fee shifting provision. The 2017 Chemtech SPA, which is the only contract that Defendant was party to that arguably contained such a provision, required Defendant to indemnify Mehta for losses only if she breached her covenants under the contract or if she delivered Mehta a materially inaccurate document required by the contract. There was no rational or credible evidence in the record to support a finding that Defendant did either of these things. Thus, the trial court erred by entering a fee award against Defendant under the applicable contracts.

Although the trial court's Judgment against Defendant was unjustified, the court did not err in its ruling on Plaintiffs' pre-judgment interest claim. The trial court correctly applied R. 4:42-11(b) to award Plaintiffs pre-judgment interest dating back to July 20, 2020, when Plaintiffs filed their complaint. Plaintiffs' argument that they were entitled to pre-judgment interest from the date of the alleged misappropriation of funds because their claim was for "liquidated damages" lacks merit, and in any event, was waived since Plaintiffs never raised the issue below. The trial court correctly exercised its equitable discretion in rejecting Plaintiffs' punitive method of calculating pre-judgment interest based on an "equitable contractual ground" because it violated the purpose of R. 4:42-11(b). Therefore, Plaintiffs' cross-appeal should be denied.

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant relies on the Procedural History and Statement of Facts set forth in her moving brief.[1]

REPLY LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING DEFENDANT LIABLE FOR CONVERSION (13T51-21 to 56-22, 64-9 to 66-8; 23T96-3 to 99:1; 36T28-1 to 52-25)

A. Defendant Did Not Waive Her Pre-Suit Demand Argument

Plaintiffs concede in their brief that they were required to establish that they made a pre-suit demand on Defendant to return the purported misappropriated funds to sustain their conversion claim (Pb64-65). See Mueller v. Tech. Devices Corp., 8 N.J. 201, 207-08 (1951) ("It is well settled that where possession of chattels is lawfully acquired, a demand therefor and refusal to deliver is generally necessary before an action in trover and conversion will accrue. . .The demand, however, must be made at a time and place and under such circumstances as defendant is able to comply with if he is so disposed, and the refusal must be wrongful . . .The burden of proof of a demand and refusal rests upon the plaintiff."); Meisels v. Fox Rothschild LLP, 240 N.J. 286, 304

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1 All capitalized terms that are not otherwise defined herein shall have the same meaning ascribed to them in Defendant's moving brief. Defendant also adopts the same transcript references set forth in her moving brief.

(2020). Rather than 'face the music,' Plaintiffs have resorted to misrepresenting the record by claiming that Defendant waived her pre-suit demand argument by not raising the issue below (Pb64). Further, Plaintiffs assert that even if Defendant did not waive this issue, Plaintiffs attempted to make a pre-suit demand and that the demand requirement should nonetheless be excused here as futile (Pb65). These arguments fail for several reasons.

First, Defendant raised the pre-suit demand issue below. In her Amended Answer to Plaintiffs' Amended Complaint, Defendant asserted several affirmative defenses to Plaintiffs' conversion claim regarding their inability to make a prima facie case against Defendant (Da506-16 at Aff. Def. #'s 1, 24, 25 and 44.) Further, on her summary judgment motion and her R. 4:40-1 dismissal application made at trial, Defendant argued that Plaintiffs failed to establish a prima facie case for conversion against **her**, which indubitably included the pre-suit demand element of the cause of action (13T51-21 to 56-22, 64-9 to 66-8; 23T96-3 to 99-1). Moreover, Defendant cited the Mueller case in her post-trial brief, in which our Supreme Court unequivocally held that to sustain a conversion claim, a plaintiff must establish (1) that he made a pre-suit demand on the defendant to return property and (2) that the defendant's refusal to return the property was wrongful. Mueller, supra, 8 N.J. at 207-08. Accordingly, the trial court and Plaintiffs were on notice of Defendant's argument regarding the

Plaintiffs' failure to establish the prima facie elements of their conversion claim, which included the pre-suit demand requirement. A.D.M. v. A.M., 2018 N.J. Super. Unpub. LEXIS 2780, at *5-6 (App. Div. Dec. 19, 2018) (citing Mueller, supra, 8 N.J. at 207) (To sustain a conversion claim as a matter of law, a plaintiff must demand the return of the property and establish the refusal to return the property was wrongful.)

Second, even if this Court were to conclude that Defendant did not explicitly argue this issue below, which it should not for the reasons discussed above, Defendant cannot be deemed to have waived the issue as a matter of law (Pb64). The Appellate Division does not review waived arguments but assesses forfeited ones for plain error. United States v. Brito, 979 F.3d 185, 189 (3d Cir. 2020) (citing United States v. Olano, 507 U.S. 725, 733-34 (1993)). In Olano, the Supreme Court explained the distinction between forfeiture and waiver: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" Olano, supra, 507 U.S. at 733 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). "To be a waiver, the failure to assert a right must be intentional, and the right relinquished must be known. Anything less is mere forfeiture." Brito, supra, 979 F.3d at 189. "The only way to assess a waiver is to review the whole record."

Id. at 190 (citing Gov't of the Virgin Islands v. Rosa, 399 F.3d 283, 291 (3d Cir. 2005)).

The record below firmly establishes that Defendant neither intentionally relinquished nor abandoned a known right. Accordingly, at most, it could be argued that Defendant did not expressly argue or timely present her pre-suit demand argument. That is a forfeiture, not a waiver. See Olano, 507 U.S. at 733. As forfeited arguments are reviewed under the plain error standard, Defendant must prove that there was an error; that the error was plain; that it prejudiced her substantial rights; and that not correcting the error would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Id. at 733-37. Defendant has satisfied this burden.

The true facts are undisputed. Plaintiffs did not make pre-suit demand on Defendant to return any money, nor did they cite to where in the record such a demand was made (Pb64-67). Plaintiffs' argument that Defendant stymied their ability to discover the purported conversion of funds does not withstand critical examination (Pb65). First, Plaintiffs put forth zero evidence at trial that Defendant refused to provide them financial information from MRL or Chemtech at any point in time, that she provided them inaccurate information, or that she effectuated any financial transactions from the subject companies. Furthermore, as set forth in her moving brief, the "discovery rule" (which the

trial court incorrectly applied) does not excuse Plaintiffs' failure to make a pre-suit demand on Defendant because the underlying record established that the Plaintiffs had access to all the relevant financial information they would have needed to make a pre-suit demand (Db43-45). See Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (a plaintiff may not delay his filing until he obtains an expert to support his cause of action); See Lopez v. Swyer, 62 N.J. 267, 274-75 (1973) (the discovery rule does not postpone the accrual of a cause of action if a party by an exercise of reasonable diligence and intelligence should have discovered the basis for an actionable claim.)

The trial court failed to explain in its decision or on Defendant's reconsideration motion how Plaintiffs established the prima facie elements for conversion against Defendant (36T28-1 to -25, 47-1 to 48-25, 51-1 to 52-25). Further, the trial judge did not recognize the pre-suit demand requirement in identifying the elements of conversion in his trial decision (36T52-14 to -22). Absent establishing that they made a pre-suit demand on Defendant, Plaintiffs could not, as a matter of law, sustain a prima facie claim for conversion against Defendant. See Meisels, supra, 240 N.J. at 305-306 ("The demand is the linchpin that transforms an initial lawful possession into a setting of tortious conduct. Accordingly, in such circumstances, a demand is essential . . . there are circumstances, to be sure, where demand may be futile, but that is and must be

viewed as an exception). As such, the trial court's error was plain and fundamentally prejudiced Defendant because it resulted in the entry of an unjust Judgment against her. The trial court's Judgment, therefore, must be vacated in its entirety against Defendant.

B. Plaintiffs Failed To Establish That Defendant Converted Funds From Plaintiffs

Despite Plaintiffs' assertion to the contrary, the trial court incorrectly found that Defendant converted funds from the Plaintiffs (Pb66). As argued in her moving brief, the trial court's conclusion that Defendant misappropriated funds was manifestly unsupported by adequate, substantial, or credible evidence in the record (Db26-34). Plaintiffs' opposition brief was their opportunity to show that the trial court's factual findings were supported with credible evidence. However, glaringly absent from Plaintiffs' 31-page Counterstatement of Facts is any citation to evidence (credible or otherwise) in the record establishing that Defendant engaged in wrongful conduct (Pb4-34). As such, this Court should not defer to the trial judge's findings on which the Judgment was purportedly based. See Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 483-84 (1974).

For example, Plaintiffs do not cite any evidence in the record establishing that Defendant wrongfully diverted money from either Chemtech or MRL (22T10-22 to 22-20). Incredibly, Mehta gave no direct testimony on any of the

Disputed Transactions, including whether they were authorized or not. And how could Mehta credibly say that the Disputed Transactions were unauthorized when he testified that he always agreed with Hedvat and the parties discussed business transactions daily (17T163-13 to -24; 18T65-8 to -23, 178-1 to -3; Da07299).

There is equally no evidence that the $640,000 that Hedvat deposited into his and Defendant's joint bank account between November 2013 and October 2015 was wrongfully obtained, that Defendant was even aware that the funds entered the account, or that she dispersed and used these funds for her own purposes (36T36-11 to -22, 37-5 to -9); see Westhoff v. Kerr S.S. Co., 219 N.J. Super. 316, 323 (App. Div. 1987). As such, the trial court erred by finding that Defendant converted these funds solely because they were deposited into her and her husband's joint account without evidence that the transfers were unauthorized and that Defendant had knowledge of them (Da00506-00512, Aff. Def. #s 1, 24-25, 44). See Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 461(App. Div. 2009) ("Despite exercise of dominion or control over money belonging to another, one who innocently received the money in exchange for something of equivalent or comparable value, without participation in or knowledge of the fraud, has a greater right to keep the money than the victim of the fraud has to its return from that person.")

In response to these arguments, Plaintiffs contend that they proved that the Disputed Transactions were unauthorized because Mehta testified that he adopted his expert's damage analysis (Pb59). Plaintiffs further argue that because the trial court found Prajapati and Mehta credible, the court's conclusion that Defendant wrongfully converted funds from Plaintiffs is legally sound (Pb60). Not so.

A trial court's legal conclusions, as here, require evidential support. Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (citations omitted). Mehta's testimony that he agreed with his expert's damage analysis is not synonymous with direct evidence that the Disputed Transactions were improper, unauthorized or that Defendant engaged in wrongful conduct. Likewise, the court's finding that Mehta and Prajapati were credible witnesses is irrelevant when there is no testimony from Mehta that the Disputed Transactions were unauthorized or wrongful to begin with. Plaintiffs cannot rely on the trial court's credibility findings in the absence of evidence in the record supporting the court's legal conclusions. Indeed, this is not a "he hit me" or "he didn't hit" me situation where witness credibility would be paramount, because there is no evidence of anyone being "hit" to begin with. In other words, Plaintiffs still had to prove their conversion claims against Defendant even if the trial court did not find that there was "meat" to her husband's explanations regarding the nature

and purpose behind the Disputed Transactions (36T33-13). Martinez v. Swomiak, 2018 N.J. Super. Unpub. LEXIS 2142, at *5 (App. Div. Sep. 27, 2018) (citing LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div. 2009) (to prevail on a claim for conversion, a plaintiff must prove "the wrongful exercise of dominion and control over property owned by another inconsistent with the owners' rights."); accord with Guerriero v. U-Drive-It Co., 22 N.J. Super. 588, 592 (Cnty. Ct. 1952) (In order for a defendant to implead another as a third-party defendant upon a theory of contribution in a tort case, the other party must be legally liable to the injured person); D. Wolff & Co. v. Lozier, 68 N.J.L. 103, 107 (1902) (A husband was not liable for his wife's default under a contract of lease because he did not purchase the articles and was not a party to any contract for the breach of which a trover action would lie against him); and DuBois, Sheehan, Hamilton & DuBois v. DeLarm, 243 N.J. Super. 175, 183 (App. Div. 1990) (In the absence of an agreement, the income and property of one spouse should not be exposed to satisfy a debt incurred by the other spouse).

In the absence of any credible evidence from Mehta in support of his conversion claims, the Court improperly relied on Prajapati's net expert testimony in finding that the Disputed Transactions were unauthorized distributions from Chemtech and MRL, and thus, wrongful. Specifically, the trial court, over Defendant's repeated objections, permitted Prajapati to testify

about his improper assessments of the Disputed Transactions and Hedvat's motives regarding them, despite Prajapati's admitted lack of personal knowledge regarding the nature, character and purpose of the Transactions (19T78-2 to 79-3, 89-10 to 91-11, 115-6 to 116-9; 20T69-20 to 71-21; 21T21-2 to -24, 34-5 to 35-24; 22T78-21 to 80-22; 36T19-10 to 29-15, 24-24 to 38-17, 51-1 to -9, 55-21 to -25; Db28-31.)

Under N.J.R.E. 702, an expert witness must have sufficient expertise to offer the intended testimony. See State v. Jenewicz, 193 N.J. 440, 454 (2008). "The mere self-proclaimed nomenclature designating a witness as an expert does not make all proffered testimony admissible." North Jersey Media Group, Inc. v. IC Sys. Solutions, 2015 N.J. Super. Unpub. LEXIS 327, *60-64 (Law Div. February 18, 2015), aff'd in part, rev'd in part, and remanded, 2017 N.J. Super. Unpubl. LEXIS 2176 (App. Div. August 30, 2017). "[A]n expert's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere 'net opinion.'" State v. Townsend, 186 N.J. 473, 494-95 (2006). In this regard, an expert witness may not opine on a defendant's state of mind or whether a defendant's conduct was wrongful as these are ultimate issues of fact reserved for the trier of fact, which in this case was the trial court. See State v. Cain, 224 N.J. 410, 427 (2016); see also Estate of Cohen v. Booth Computers, 421 N.J. Super. 134, 149 (App. Div. 2011). Further, experts may not opine on

the credibility of a party because "credibility is an issue which is peculiarly within the jury's ken with respect to which ordinarily jurors require no expert assistance." State v. Jamerson, 153 N.J. 318, 341 (1998) (quoting State v. J.Q., 252 N.J. Super. 11, 39 (1991), aff'd, 130 N.J. 554 (1993); see also State v. Henderson, 208 N.J. 208, 297 (2011).

Similarly, expert witnesses cannot opine that a party committed a fraudulent or wrongful act without providing a recognized standard for making such a conclusion or without establishing that their expertise qualifies them to render such an opinion. See e.g. Polzo v. County of Essex, 209 N.J. 51, 35 (2012). For example, in Polzo, the Supreme Court affirmed a trial court's grant of summary judgment where the Court found that Plaintiff's expert did not set forth any recognized standard for determining when a roadway defect presents a dangerous condition. Id.

As Defendant argued repeatedly below, there is no conceivable way that Prajapati, or any other expert for that matter, could possibly determine what Hedvat's state of mind was or that the Disputed Transactions were unauthorized or wrongful (13T28-11 to 30-25, 34-4 to 37-9, 51-21 to 56-25; 22T24-6 to 28-11). These ultimate issues of fact were for the trial court to decide – not Plaintiffs' accounting expert. See Hassan v. Williams, 467 N.J. Super. 190 (App. Div. 2021) (court may bar ultimate issue opinions, among other reasons, if they

are unhelpful, unreliable, and unduly prejudicial). Prajapati, as an accountant, was not qualified to express bare conclusory opinions that the Disputed Transactions were unauthorized or wrongful or that the documents he examined in connection with his report were false or misleading because those words implied wrongful intent and went to the ultimate issues in the case (13T28-11 to 30-25, 34-4 to 37-9, 51-21 to 56-25; 22T24-6 to 28-11). See Cain, supra, 224 N.J. at 427. In sum, Prajapati's opinions about fraudulent documents and the purported wrongful nature and character of the Disputed Transactions was mere conjecture and should not have been admitted into evidence. See Polzo, supra, 209 N.J. at 35 (affirming a trial court's granting of summary judgment after disqualifying an expert whose testimony constituted a net opinion, insofar as it did not set forth a recognized or established standard for determining the ultimate issue). See also Occulto v. Adamar of N.J., Inc., 125 F.R.D. 611, 616 (D.N.J. 1989) ("Experts participate in a case because ultimately, the trier of fact will be assisted by their opinions. . . . They do not participate as the alter-ego of the attorney who will be trying the case.")

Thus, the trial court committed reversable error by permitting Prajapati to testify that Hedvat's alleged acts were unauthorized, wrongful, fraudulent, and part of a "planned commingling of funds to facilitate diversion." See e.g., Biro v. Prudential Ins. Co. of America, 110 N.J. Super. 391 (App. Div. 1970), rev'd,

57 N.J. 204 (1970) (Court reversed appellate ruling that allowed a medical examiner to opine, as part of a defense to an action upon a life insurance policy, that the deceased had committed suicide. The Court adopted the appellate dissenting opinion that the admission of such a conclusion would confound and distort the delicate balance, which is the fact-finding process, and that a jury would be perfectly competent to draw its own conclusion about whether the death was a suicide.) Similarly, the trial court here compounded its error by exclusively relying on Prajapati's net expert testimony and damage schedules in finding Defendant liable for conversion when there was simply no evidence that Defendant "exercised unauthorized control and ownership over identifiable funds that rightfully belonged to Plaintiffs by manipulating the books and records to take distributions without making equal payments to Plaintiffs" (Pb67; 36T23-8 to 37-23). See Polzo v. Cnty of Essex, 196 N.J. 569, 582 (2008); Townsend v. Pierre, 221 N.J. 36, 53 (2015); N.J.R.E. 703. Based on the foregoing, the Judgment must be vacated in its entirety against Defendant.

II. THE TRIAL COURT ERRED BY FINDING DEFENDANT LIABLE FOR BREACH OF CONTRACT, BREACH OF COVENANT OF GOOD FAITH, AND UNJUST ENRICHMENT (36T50-1 to 52-6)

A. Defendant Cannot Be Liable For Breaching Contracts That She Was Not A Party To

The trial court's conclusion that Defendant breached contracts that she was not a party to was imbued with legal error. In their brief, Plaintiffs implore this Court to restrain itself from evaluating the purported evidence of Defendant's conduct that underpinned the trial court's ruling because "[d]oing so would disserve the trial court's prerogative to find facts and develop conclusions based on the totality of circumstances developed over 22 days of trial" (Pb68). The trial court's "prerogative" was to find facts and make conclusions of law based on credible evidence in the record -- not to hold Defendant liable for acts she did not commit because "she was legally part of it in this Court's mind," which is not a recognized legal standard (36T50-18 to -25). As such, the trial court's Judgment must be reversed against Defendant as to Plaintiffs' breach of contract claims.

Plaintiffs contend that the record evidence established that Defendant, in concert with her co-defendants, moved money from Chemtech and MRL without the Plaintiffs' knowledge or consent via conduit accounts, accrual accounts, step transactions, and other means, all of which created "mazes" and "webs" of

accounts that made the funds difficult to trace (Pb68). This is simply false. There was no evidence introduced at trial demonstrating that Defendant engaged in any such conduct, nor do Plaintiffs cite to a single instance in the record where such evidence was presented.

Further, Plaintiffs wrongly assert that the evidential record supported the trial court's conclusion that Defendant breached the MRL Operating Agreement and the 2007 Chemtech Stockholder Agreement. As argued in Defendant's moving brief, the trial court's holding that Defendant was liable for breaching these contracts because she "was legally part of it in this Court's mind" was legally and factually deficient (36T50-10 to 51-21). It is undisputed that Defendant was not a party to either of these contracts. Thus, as a non-party, Defendant could not have breached these agreements as a matter of law. D.R. Horton Inc. - N.J. v. Dynastar Dev., 2005 N.J. Super. Unpub. LEXIS 842, *45 (Superior Court of New Jersey, Law Div., Mercer County, August 10, 2005) ("It should be a non-controversial principle that nonparties to contracts cannot be held responsible for a breach.") (citing FDIC Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 876 (3d Cir. 1994) (stating that under New Jersey law, non-parties to a contract cannot be held liable for a breach of a contractual duty)).

Realizing that they have no credible response to this argument, Plaintiffs pivot to arguing that the court nonetheless found that Defendant breached the

2014 and 2017 Chemtech SPAs and the 2014 MRL Purchase Agreement. This argument also falls flat. First, Defendant cannot, as a matter of law, be held liable for breaching either the 2014 Chemtech SPA or the 2014 MRL Purchase Agreement because she was not a party to those contracts. FDIC, supra, 27 F.3d at 876. Second, Plaintiffs concede that the 2017 Chemtech SPA had the "effect of rescinding the 2014 Chemtech SPA" (Pb36-37). By their own admission, the 2014 Chemtech SPA had no legal effect and certainly was not binding on Defendant. Moreover, the trial court neither made findings nor conducted any legal analysis that would justify piercing A3I's corporate veil to hold Defendant personally liable for the company's purported wrongful acts in connection with the contracts that A3I was a party to (Db46; Da00507, Aff. Defense #5).

Additionally, Plaintiffs did not refute that the trial court failed to make specific findings in its decision that Defendant breached the 2014 and 2017 Chemtech SPAs and the 2014 MRL Purchase Agreement (Db36-37). The trial court's unformed attempt to cure this defect on Defendant's reconsideration motion only compounded the court's initial error of law and did not identify the record evidence that the court relied on in finding that Defendant breached these contracts (37T87-20 to 88-1). Plaintiffs, unsurprisingly, ignore the fact that Mehta admitted on cross-examination that: (1) he did not review Exhibit S with Defendant; (2) Defendant did not make any representations to Mehta about

Exhibit S; (3) Defendant did not provide Mehta any records in connection with either 2014 MRL Purchase Agreement or the 2014 and 2017 Chemtech SPAs; and (4) Defendant made no representations to Mehta in connection with either the 2014 MRL Purchase Agreement, the 2014 Chemtech SPA, or the 2017 Chemtech SPA (18T14-17 to 15-7, 27-16 to 28-4, 133-5 to 134-10, 141-25 to 142-3).

The trial court's comments on Defendant's reconsideration motion that "I don't accept that argument because how do you have a sale that is shortchanging somebody based on [] what occurred historically? The numbers were wrong. It was bogus," and that the subject contracts "all feed off each other," are mere conclusions without the required factual findings from the record evidence that are necessary in order to hold Defendant liable for breaching the 2017 Chemtech SPA, which is the only contract that she was a party to (36T50-10 to 51-21; 37T87-20 to 89-4). In short, there was no evidence that Defendant engaged in the unauthorized expenditure of funds from Chemtech or MRL, that she committed acts that were detrimental to the companies, that she failed to properly enter business transactions in the companies' books or manipulated financial records, or that she breached any representation or warranty in the 2017 Chemtech SPA (Db35-36). As such, the absence of any credible evidence that

Defendant breached any of the contracts at issue mandates that the Judgment be vacated against her.

B. The Trial Court Improperly Held Defendant Liable For Breaching The Covenant Of Good Faith

Plaintiffs contend that the trial court correctly found that Defendant breached the implied covenant of good faith in the subject contracts because they established that her conduct had the effect of destroying the Plaintiffs' reasonable expectations under the contracts (Pb74). This argument is flawed for several reasons.

First, Plaintiffs failed to introduce any evidence at trial demonstrating that Defendant engaged in wrongful conduct with respect to these contracts. Tellingly, Plaintiffs do not cite any evidence in the record supporting their contention or where in the trial court's decision the court referenced such evidence. As noted in Defendant's moving brief, the only analysis the trial court offered regarding this claim concerned the 2007 Chemtech Stockholders Agreement (which Defendant was not a party to) where the trial court concluded, without any evidentiary support, "And I think Count 11, those do violate the covenant of good faith and fair dealing, which I think are present here" (Db30; 36T51-19 to -21). Absent credible evidence that Defendant engaged in conduct that had the effect of destroying or injuring the Plaintiffs' rights to receive the fruits of the subject contracts, the trial court could not, as a matter of law, find

that Defendant breached the covenant of good faith. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). Because there was no evidence that Defendant committed any such acts, the trial court erred by finding that Defendant breached the covenant of good faith.

Second, Plaintiffs fail to cite any cases where a defendant was found liable for breaching the covenant of good faith under a contract that the defendant was not a party to. FDIC, 27 F.3d at 876; see also Wade v. Kessler Inst., 343 N.J. Super. 338, 346-52 (App. Div. 2001) (to prove a claim for breach of the implied covenant of good faith, a plaintiff must prove a contract existed between the parties and the defendant acted with bad faith and deprived the plaintiff of rights or benefits under the contract). Likewise, Plaintiffs failed to even address how their good faith claim could survive as an independent cause of action when it was based on the same underlying conduct as their breach of contract claims and there was no evidence that Defendant had a "bad motive or intention." See Hills v. Bank of Am., 2015 U.S. Dist. LEXIS 32502, *8 (D.N.J March 17, 2015) (citation omitted); Tredo v. Ocwen Loan Servicing, 2014 U.S. Dist. LEXIS 145731, *15 (D.N.J. Oct. 10, 2014) (explaining the limited circumstances under which a claim for breach of the covenant of good faith may be an independent cause of action). What the evidence did establish is that Mehta received every

dollar of the $740,000 share price he bargained for under the 2017 Chemtech SPA (18T52-9 to -25, 141-16 to 145-24).

In sum, the trial court erred by sustaining Plaintiffs' covenant of good faith claim because: (1) Defendant could not breach the covenant in contracts that she was not a party to; (2) the claim was based on the same underlying conduct as their breach of contract claims, and thus, could not be asserted as independent cause of action; and (3) Plaintiffs did not meet their burden of proof of a bad motive or intent in establishing a breach of the implied covenant by Defendant. Tredo, supra, 2014 U.S. Dist. LEXIS at *8-9.

C. The Trial Court Erred By Finding Defendant Liable For Unjust Enrichment When There Was An Express Contract Providing For Renumeration

Plaintiffs' position that Defendant was unjustly enriched contradicts their argument that the trial court correctly ruled that Defendant breached the subject contracts and was liable for damages caused by her breach (Pb75-76). In making this argument, Plaintiffs completely ignore well settled case law that unjust enrichment is a remedy that is only available when there was no express contract providing for remuneration. See Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3rd Cir.1982). As there were express contracts between the parties that the trial court granted Plaintiffs relief under, Plaintiffs' unjust enrichment claims against Defendant were defective as matter of law because they were based on

the same underlying conduct. Id. Put differently, if the trial court correctly ruled that Defendant breached contracts like Plaintiffs argue, then she could not be found liable for unjust enrichment based on the same underlying conduct as a matter of law. Van Orman, supra, 680 F.2d at 311. The trial court missed this legal distinction by incorrectly holding Defendant liable for both breach of contract and unjust enrichment (36T51-22 to 52-6).

In their opposition brief, Plaintiffs also failed to address the well settled legal principle that a claim for unjust enrichment cannot succeed where the allegations underlying the claim sound, as they do here, in tort. Pereira v. Azevado, 2013 U.S. Dist. LEXIS 54868, *13 (D.N.J. April 17, 2013) (citations omitted). Accordingly, because the factual and evidentiary foundation for Plaintiffs' conversion claims was the same for their unjust enrichment claims, the trial court erred by holding Defendant liable for both conversion and unjust enrichment. Pereira, supra, 2013 U.S. Dist. at *13. Based on the foregoing, the trial court's Judgment must be vacated against Defendant on Plaintiffs' unjust enrichment claims.

III. DEFENDANT DID NOT WAIVE HER STATUTE OF LIMITATIONS ARGUMENT (10T58-7 to 100-23; 13T57-8 to -15; 23T95-9 to 105-12; 36T52-7 to -10)

Plaintiffs argue that Defendant waived her statute of limitations defense by failing to affirmatively raise it at trial (Db60). This is simply untrue. The

record reflects that Defendant raised this argument at various stages of this litigation. For example, Defendant asserted that Plaintiffs' claims were barred by applicable statute of limitations as an affirmative defense in their Answer to Plaintiffs' Amended Complaint (Da00507 at ¶6.) Moreover, Defendant raised this defense in connection with her Summary Judgment Motion (10T58-7 to 100-23.) Further, Plaintiffs' expert was extensively cross-examined on his improper inclusion of transactions that fell outside the applicable statute of limitation periods in his damage calculation (22T19-7 to -21, 22-21 to 24-5, 74-8 to 75-8, 89-10 to 91-19). Additionally, Defendant argued at trial that the "discovery rule" should apply to bar Plaintiffs' claims on her motion to dismiss following the close of Plaintiffs' case (23T95-9 to 105-12). Indeed, even the trial court acknowledged Defendant's statute of limitations argument in its trial decision when it misapplied the "discovery rule" and found, albeit incorrectly, that the statute of limitations did not bar Plaintiffs' claims (13T57-8 to -15; 36T52-7 to -10). Based on the foregoing, Defendant did not waive her statute of limitations argument.

Even if Defendant did not expressly raise this argument at trial, at most, it could be argued that she forfeited the argument, which is reviewed under the plain error standard. See Olano, 507 U.S. at 733. Clearly, the trial court's awarding of damages against Defendant based on discrete transactions that

occurred over six years before the complaint was filed, which accounted for nearly half of the compensatory damages awarded by the trial court, constitutes plain error (Db42-43; 36T34-20 to 36-10; Da06612 (Schedule 15)); see Brito, supra, 979 F.3d at 189. Because this error of law produced a manifestly unjust result, this Court should, at a minimum, reduce the damage award entered against Defendant accordingly and make corresponding reductions to the interest charged to Defendant as part of the Judgment.

IV. THE TRIAL COURT INCORRECTLY DENIED DEFENDANT'S SUMMARY JUDGMENT MOTION (13T64-6 to 97-9)

Plaintiffs argue that the trial court correctly denied Defendant's Summary Judgment Motion because the claims against her were "rife with disputed fact issues" (Pb35). This is simply wrong. First, Plaintiffs fail to cite to any evidence in the Summary Judgment record that gave rise to a disputed fact regarding whether Defendant misappropriated funds from Chemtech and/or MRL (Pb35). The schedules to Prajapati's report that Plaintiffs cite (Da764-896) in their brief certainly did not show that funds were improperly transferred to Defendant (Pb36). Likewise, the trial court failed to cite any such evidence in its decision (13T65-9 to 66-21).

Second, there was no issue of fact with respect to Defendant's purported liability under the 2017 Chemtech SPA as Plaintiffs contend (Pb37). Again,

Plaintiffs fail to cite to any evidence in the Summary Judgment record that gave rise to a dispute of fact regarding Defendant's alleged breach of the 2017 Chemtech SPA. Plaintiffs' argument that the trial court correctly kept Defendant in the lawsuit so that Plaintiffs could obtain complete relief after trial is complete nonsense (Pb37; 13T65-9 to 25). Plaintiffs failed to introduce any evidence on the Summary Judgment Motion that gave rise to a disputed fact regarding the viability of their claims against Defendant arising under the 2017 Chemtech SPA (13T65-14 to 67-12, 92-17 to 23). Likewise, the trial court failed to cite any such evidence in its decision on the Motion (Id.)

Based on the foregoing, the trial court should have dismissed this case against Defendant on summary judgment because the Amended Complaint failed to assert any viable causes of action against her as a matter of law. As a result of the trial court's error, the unjust Judgment entered against Defendant must be vacated in its entirety.

V. THE TRIAL COURT IMPROPERLY FOUND DEFENDANT JOINTLY AND SEVERALLY LIABLE (23T96-3 to 97-15; 36T49-11 to 51-21; 37T42-15 to 45-5)

As an initial matter, the evidence at trial overwhelmingly established that Defendant was not liable for any of Plaintiffs' claims (Db45-48). However, to the extent that this Court disagrees, the trial court nonetheless erred when it held

Defendant jointly and severally liable for the entire damage award under the Judgment (Id.)

Plaintiffs argue that the trial court correctly held Defendant jointly and severally liable because doing so protected them as judgment creditors (Pb77-81). It was not the trial court's job to assist Plaintiffs with judgment collection, nor is that a recognized legal standard under which a court may impose joint and several liability on a defendant. "Liability is presumed to be joint and several unless there are either distinct harms or a reasonable basis upon which to determine the contribution of each cause of a single harm." Bendar v. Rosen, 247 N.J. Super. 219, 232 (App. Div. 1991) (citation omitted). Based on the evidence introduced at trial, there were distinct harms that the court could have attributed to specific defendants and there was a reasonable basis upon which the trial court could have determined the contribution of each cause of those single harms.

A. The Evidence Did Not Support Piercing A3I's Corporate Veil

Plaintiffs initially argue that the trial court correctly held Defendant jointly and severally liable for A3I's purported wrongful acts because is a principal of the company (Pb79-80). This argument is flawed for several reasons. First, Plaintiffs' Amended Complaint did not plead a cause of action for piercing the corporate veil, nor was there any evidence presented at trial to

that effect (Da00001; Da00507, Aff. Def. #5); See Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006) (discussing prima facie elements a plaintiff must establish to pierce the corporate veil); Boyd v. Renal Ctr. of Passaic, 2020 N.J. Super. Unpub. LEXIS 1581, at *6 (App. Div. Aug. 11, 2020) (for a principal of a company to be held personally liable for the company's tort or breach of contract, a plaintiff must establish the requisite elements to pierce the company's corporate veil). Second, despite Plaintiffs' bald assertion to the contrary, the record evidence did not establish that Defendant aided, instigated, or assisted in a conversion. See Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 381 (App. Div. 1995) (discussing prima facie elements a plaintiff must demonstrate to prevail on tort participation theory). In this regard, Plaintiffs failed to cite evidence from trial where these elements were demonstrated (Pb79-80). Therefore, as a matter of law, there was no legal or factual basis for the trial court to hold Defendant personally liable for any purported acts committed by A3I.

B. Defendant Cannot Be Jointly And Severally Liable For Conversion Or Unjust Enrichment Relating To Funds That She Neither Diverted Nor Received

Plaintiffs wrongly assert that one party's purported wrongful conduct (i.e. Hedvat) automatically renders co-defendants liable for that same act (Pb77-78). Put differently, a party cannot be liable to an injured party if they did not commit

a wrongful act against the injured party. Bendar, supra, 247 N.J. Super. at 232. For example, to prevail on a conversion claim, a plaintiff must prove: (1) that the money converted by a tortfeasor belonged to the plaintiff; (2) that the tortfeasor exercised dominion over its money and repudiated the superior rights of the owner; and (3) the repudiation must be manifested in the injured party's demand for the funds and the tortfeasor's refusal to return the monies sought. Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 432 (App. Div. 2011). Conversely, if a party did not wrongfully convert money belonging to the plaintiff or did not knowingly receive misappropriated funds, they cannot be liable for the tort of conversion. Id.; see Ellis, supra, 409 N.J. Super. at 461.

In its decision, the trial court did not cite any evidence establishing that Defendant either used funds from, participated in, aided, or effectuated any of the Disputed Transactions (36T28-21 to 39-20, 47-4 to 51-25, 52-7 to 54-10). In fact, of the nine (9) Disputed Transactions at issue (which were all effectuated by Hedvat), only three (3) were shown to result in funds being transferred to a joint account Defendant had with her husband:

- $500,000 transferred from MRL's BOA Account on November 5, 2013 to Hedvat and Defendant's BOA Account #0319 (36T36-11 to -22);

- $50,000 transferred from Chemtech's MR Line of Credit Account on September 8, 2015 to Hedvat and Defendant's BOA Account #0319 (Id. at 37-5 to -7); and

- $90,000 transferred from Chemtech's MR Line of Credit Account on October 7, 2015 to Hedvat and Defendant's BOA Account #0319 (Id. at 37-7 to -9).

Therefore, at most, Defendant could only be liable for conversion in connection with the above three (3) Disputed Transactions. Thus, to the extent the conversion and unjust enrichment Judgment survives this appeal, the amount of compensatory damages awarded against Defendant must be reduced to $320,000.00 (($500,000 + $50,000 + $90,000) / 2 = $320,000) in accordance with the trial court's damage formula (36T54-1 to -10; 37T42-15 to 46-17, 71-1 to -24, 79-1 to 80-14; Da02043-02049).

C. Defendant Cannot Be Jointly And Severally Liable For Breach Of Contract Or Breach Of The Covenant Of Good Faith For Agreements She Was Not A Party To

There was no rational factual or legal basis for the trial court to impose personal liability on Defendant for breaching contracts that she was never a party to. In context of contractual liability, the "liability of two or more persons, which is joint and not several, can arise only out of a joint contract." Fid. Union Tr. Co. v. Union Cemetery Ass'n, 138 N.J. Eq. 50, 52 (1946). Based on this principle, nonparties to contracts cannot be held liable for a breach of the contract or any implied covenant therein. See FDIC, supra, 27 F.3d at 876 (stating that under New Jersey law, non-parties to a contract cannot be held liable for a breach of a contractual duty).

It is undisputed that the only contract that Defendant was a party to was the 2017 Chemtech SPA (Da02823). There was no credible evidence at trial supporting the trial court's conclusion that Defendant breached this agreement, nor do Plaintiffs cite to any in their brief. Further, Plaintiffs failed to cite to any cases where a non-party was held liable for breaching a contract they never entered into based on the conduct of a party to the actual contract. Therefore, the trial court erred by holding Defendant jointly and severally liable for breaching contracts she was never a party to.

Based on the foregoing, the trial court erred by holding Defendant jointly and severally liable for the entire damage award in the Judgment. Accordingly, if the Judgment survives this appeal, the Court should, at a minimum, reduce the compensatory damage award entered against Defendant to $320,000.00 and adjust the pre-judgment interest and attorneys' fees award against her accordingly.

VI. THE TRIAL COURT IMPROPERLY AWARDED LEGALS FEES AND COSTS AGAINST DEFENDNAT (36T26-10 to 32-10, 50-10 to 52-6; 37T88-13 to 92-18)

Plaintiffs' argument that the trial court correctly awarded Plaintiffs their attorneys' fees, expert fees, and costs under the MRL Operating Agreement, 2014 MRL Purchase Agreement, and the 2014 and 2017 Chemtech SPAs does not withstand scrutiny.

New Jersey has a strong policy disfavoring shifting of attorneys' fees. See N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569-70 (1999). Such a policy has been grounded in the notion "that sound judicial administration is best advanced if litigants bear their own counsel fees." Department of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 504 (1983). However, if a contract contains a clearly stated attorneys' fee provision, then a New Jersey court can order the payment of fees at the end of litigation. See Satellite Gateway Communications, Inc. v. Musi Dining Car Co., 110 N.J. 280, 286 (1988). Importantly, when such a contractual fee-shifting provision exists, however, the court must strictly construe the provision considering the general policy disfavoring the award of attorneys' fees. McGuire v. City of Jersey City, 125 N.J. 310, 327 (1991). Therefore, while such "fee-shifting" provisions can be enforceable, they must be carefully worded, and will be the subject of court scrutiny. Id.

At the outset, the evidence at trial did not establish that Defendant breached any contracts at issue. As discussed above, Defendant, as a matter of law, could not have breached the Chemtech Stockholders Agreement, MRL Operating Agreement, the 2014 Chemtech SPA or the MRL Purchase Agreement since she was not a party to those contracts. Even if Defendant could be held liable under those contracts as a non-party, the indemnification clauses

in those agreements do not provide for the payment of attorneys' fees and costs (Da02701, 02712, 02740, and 02802).

Plaintiffs argue that trial court correctly awarded them fees and costs under Section XX of the MRL Operating Agreement because the indemnification provision states that a member who violates the agreement shall indemnify the other members from "any and all claims, demands, and action of every kind and nature whatsoever." Further, they contend that the language of the provision is clear and unambiguous (Pb81-83). However, under scrutiny, it is evident that this clause is inapplicable to first-party claims, such as the claims asserted by Plaintiffs against Defendant, and was intended to apply only to potential third-party claims (Da02712).

Generally, "an indemnification agreement must be based upon 'the indemnitee's claim to obtain recovery from the indemnitor for liability incurred to a third party.'" Invs. Sav. Bank v. Waldo Jersey City, LLC, 418 N.J. Super. 149, 159 (App. Div. 2011) (quoting Travelers Indem. Co. v. Dammann & Co., 592 F. Supp. 2d 752, 766-67 (D.N.J. 2008), aff'd, 594 F.3d 238 (3d Cir. 2010)). "An intention to indemnify against [a] certain loss or liability must be expressed in such clear and unequivocal terms that no other meaning can be ascribed to the language." McCann v. Whitehall Manor Condo. Ass'n, 2021 N.J. Super. Unpub. LEXIS 2891, at *11-13 (App. Div. Nov. 24, 2021) (citation omitted).

Courts in other jurisdictions "have generally declined to infer indemnification obligations arising from an indemnitee/indemnitor suit if the contractual language does not expressly refer to or explicitly contemplate such circumstances and the context does not suggest that the contracting parties were specifically concerned with prospective litigation between themselves." Id. (citing Luna v. Am. Airlines, 769 F. Supp. 2d 231, 244 (S.D.N.Y. 2011)).

Here, the trial judge never addressed whether the indemnification provision in the MRL Operating Agreement covered the Plaintiffs' first-party breach of contract claims against Defendant (37T79-4 to 93-23). The trial court found the indemnification provision enforceable against Defendant even though she was not a party to the agreement and without addressing the applicable case law. Feigenbaum v. Guaracini, 402 N.J. Super. 7, 18 (App. Div. 2008). Even in cases where a party may be entitled to indemnification, fees incurred in enforcing an indemnification contract may not be recoverable absent express language allowing such fees. See Simko v. C & C Marine Maint. Co., 594 F.2d 960, 969 (3d Cir. 1979) (remanding for the court to consider separately fees incurred in defense of an action and fees incurred in enforcing the right to indemnification).

The indemnification provision in the MRL Operating Agreement did not contemplate recovery of attorneys' fees in first-party claims between Plaintiffs

and Defendant, nor does it expressly provide for payment of attorneys' fees. Moreover, Plaintiffs did not introduce any evidence at trial regarding the interpretation of this provision. Therefore, the trial judge incorrectly awarded Plaintiffs' attorneys' fees and costs against Defendant under the MRL Operating Agreement.

Plaintiffs' arguments regarding 2014 MRL Purchase Agreement and the 2014 and 2017 Chemtech SPAs also fail. First, Plaintiffs admitted in their brief that the 2014 Chemtech SPA was voided and replaced by the 2017 Chemtech SPA (Pb36-37). A void contract is a contract of no legal effect, and thus, cannot be breached. See D'Agostino v. Maldonado, 216 N.J. 168, 194, fn.4 (2013). As such, the trial court erred by finding that Defendant breached the voided 2014 Chemtech SPA (which she was not a party to) and awarding Plaintiffs' attorneys' fees and costs under the agreement.

Second, even if the 2014 MRL Purchase Agreement and 2017 Chemtech SPA could be construed as containing express provisions for the payment of attorneys' fees for first-party claims, the trial judge's conclusion that Plaintiffs were entitled to their fees under these agreements because Defendant breached these contracts was not supported by credible evidence in the record. The indemnification provisions in these contracts could only be trigged if Plaintiffs established: (i) there was a material inaccuracy or breach of any representation

or warranty of Defendant contained in the agreements; (ii) Defendant materially breached or violated her covenants or agreements contained in the contracts; or (iii) there was a material inaccuracy in any certificate, instrument or other document delivered by Defendant as required by the contracts (Da2744, 2806, 2827). The record demonstrates that the trial judge made no specific findings as to any of the foregoing elements. As such, the court's conclusion that Defendant breached the 2014 MRL Purchase Agreement (which Defendant was not a party to) and the 2017 Chemtech SPA, and its decision to award Plaintiffs' fees and costs under those agreements, were not supported by rational or credible evidence in the record. Therefore, this Court should reverse the award of fees and costs against Defendant under the Judgment.

VII. THE TRIAL COURT CORRECTLY LIMITED PLAINTIFFS' PRE- JUDGMENT INTEREST CLAIM BASED ON R. 4:42-11(b) (Not Raised Below; 37T8-1 to -12, 26-13 to 29-11, 52-9 to 53-4, 77-7 to 78-23)

A. Plaintiffs Waived Their Liquidated Damages Argument

The Court should reject Plaintiffs' argument that they were entitled to pre-judgment interest from the date of the alleged misappropriation of their funds because their claim was for "liquidated damages" since they never raised the issue below (37T8-1 to -12); Johnson v. Benjamin Moore & Co., 347 N.J. Super. 71, 97 (App Div. 2002). Plaintiffs have not identified where in the record below they raised this argument. During oral argument on their post-judgment motion,

Plaintiffs did not argue that the pre-judgment interest calculation guidelines mandated under R. 4:42-11(b) should be ignored because they presented a liquidated damages claim, rather they argued that the Court should grant pre-judgment interest from the date the alleged misappropriation occurred (i.e. 2008) on an "equitable contractual ground." (37T53-14 to 54-8). Therefore, Plaintiffs waived this argument.

B. The Trial Court Correctly Applied R. 4:42-11(b) To Calculate Pre-Judgment Interest

Even if the Court were to consider the merits of this argument, the trial court correctly applied R. 4:42-11(b) to award Plaintiffs' pre-judgment interest dating back to July 20, 2020, when Plaintiffs filed their complaint (37T77-7 to 78-23).

The decision to award pre-judgment interest rests within the sound discretion of the trial court. See e.g., Rendine v. Pantzer, 141 N.J. 292 (1995). Thus, the trial court's decision on this issue must be reviewed under the abuse of discretion standard. See Musto v. Vidas, 333 N.J. Super. 52 (App.Div.2000) (award of prejudgment interest is subject to trial judge's broad discretion). Rule 4:42-11(b) mandates awards of pre-judgment interest, except as otherwise provided by law, only in tort actions. Meshinsky v. Nichols Yacht Sales, 110 N.J. 464, 478 (1988). In contrast, pre-judgment interest on contractual claims is not mandated, but a court has the discretion to award it in accordance

with equitable principles. Id. at 478. Equitable discretion is "broad," and merits appellate deference "unless it represents a manifest denial of justice." Musto v. Vidas, 333 N.J. Super. 52, 74, (App. Div. 2000).

Under R. 4:42-11(b), pre-judgment interest is calculated from the later of the date of the institution of the action or six (6) months after the date the cause of action arises. R. 4:42-11(b). However, the purpose of the rule is not to penalize the judgment debtor, but rather, to remedy the inequity arising from the fact that until judgment is entered and paid, the judgment debtor has enjoyed full use of money rightfully belonging to the judgment creditor. Sylvia B. Pressler, Current N.J. Court Rules, R. 4:42-11 cmt. 8 (2006); see also N. Bergen Rex Transp., Inc., supra, 158 N.J. at 574-75 (noting the "equitable purpose of prejudgment interest").

In construing a court rule, like the trial court did here with R. 4:42-11(b), our courts apply well-understood principles of statutory construction:

> When interpreting court rules, we ordinarily apply canons of statutory construction. Accordingly, as with a statute, the analysis must begin with the plain language of the rule. The Court must "ascribe to the [words of the rule] their ordinary meaning and significance . . . and read them in context with related provisions so as to give sense to the [court rules] as a whole . . . ." If the language of the rule is ambiguous such that it leads to more than one plausible interpretation, the Court may turn to extrinsic evidence.

State v. Robinson, 448 N.J. Super. 501, 516 (App. Div. 2017) (quoting Wiese v. Dedhia, 188 N.J. 587, 592 (2006) (citations omitted) (alterations in original)).

The trial court correctly applied the plain language of R. 4:42-11(b) in calculating pre-judgment interest from July 20, 2022, which is the date Plaintiffs refiled their case (37T52-9 to 53-4; Da02533). At oral argument, Plaintiffs conceded that this is what the plain language of R. 4:42-11(b) requires (37T53-6 to 54-8). Furthermore, the trial judge correctly rejected Plaintiffs' "equitable contractual" argument and applied the plain and unambiguous language of R. 4:42-11(b) in calculating pre-judgment interest:

> THE COURT: -- the stay, and then of course you could reply to whatever Mr. Reiser argued then I will give Mr. Reiser the last word, Under 4:42-11(b), the statute is consistent with Mr. Reiser's argument on the tort claim that it is the latter of the dates, including the cause -- not the cause of action, but the filing. I know you cited the comment, I think it is 2.3 to it which seems to be inconsistent. So how do you respond to the statutory language which I am sure you are familiar with? You could read it into the record. It is -- just so it is clear -- give me one moment. The prejudgment interest was calculated from the later of the date of the institution of the action or six months after the date the cause of action arises. That is 4:42-11(b). That is with the torts as opposed to contractually. And the Court has discretion on equitable grounds.

(37T52-9 to 53-4).

Further, the trial court correctly exercised its equitable discretion in rejecting Plaintiffs' punitive method of calculating pre-judgment interest because it violated the spirit of R. 4:42-11(b), which is not to penalize the judgment debtor:

> First, in addressing this prejudgment interest. First, under 4:42-11(b), I mean it is -- there has to be exceptions and -- for tort actions and, again, this delay, lack of the settlement and so forth, I don't find. So it falls within

> that. I think the statute speaks for itself. I agree with the defendant that it should be from the date of the filing. I know there is an argument on equitable principles. We should go back to 2008. I am just not satisfied to do that. You know, first of all, I know this was -- and I said it at the outset in my opinion, I went back and read it, and this is an unfortunate circumstance for everybody involved here. I said at the time of my decision, you know, you have to scratch your head. This was the marriage made in heaven. This is a company people would envy to have. It was growing, it was making money. And all of a sudden, I want to buy you out. Well, maybe we found out the reasons why, but that is what it is. And, you know, to go back to 2008 I don't think would be equitable. And I think to a certain degree it would be piling on. So I am -- I don't think that that would be properly in the Court's discretion. I mean, I have in the past, you know, when there has been a consent order, adopted the first date as opposed to the second date but, again, in this case, I think that the amount of the award and now we are going to get into the attorney's fees, I am satisfied with the defendants' argument that if we -- if we have the prejudgment interest calculated, and there should be some prejudgment interest, I don't have a problem with using July 20th of '20 to June 30th of '22 which, with the reduced amount given the mathematical error, would be 190,480.68. So I accept the defendants' argument as to that.

(37T77-7 to 78-23); Sylvia B. Pressler, Current N.J. Court Rules, R. 4:42-11 cmt. 8 (2006).

Undeniably, it would be manifestly unjust for the trial court to award Plaintiffs' prejudgment interest on the remainder of their contractual and equitable claims because those claims derived from the same set of facts and circumstances underlying Plaintiffs' tort claims (37T26-13 to 29-11). Moreover, Plaintiffs fail to cite any case law supporting the award of prejudgment interest on contractual and equitable claims when the damages arising from those claims are identical to damages awarded under tort claims. Lastly, Plaintiffs fail to cite

any case law where a court calculated prejudgment interest under R. 4:42-11(b) from the date of the misappropriation of funds in the context of a liquidated damages claim. Therefore, to the extent the Court upholds the trial court's Judgment, the Court should not reverse the trial judge on this issue.

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's moving brief, the Court should vacate the trial court's Judgment against Defendant in its entirety and deny Plaintiffs' cross-appeal.

Respectfully Submitted,

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DIVYAJIT MEHTA and DGNS CORP., Plaintiffs-Respondents / Cross-Appellants, v. EMANUEL HEDVAT, FARIBA HEDVAT, CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, AMERICAN ANALYTICAL ASSOCIATION, INC., NJ CUBIC 29, LLC, 29 COTTAGE STREET, LLC, VIRTUAL INSTITUTE PERSONNEL, LLC, CHEMTECH GROUP LLC and EFJ REALTY LLC, Defendants-Appellants / Cross-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000385-22T1 Civil Action ON APPEAL FROM: Superior Court Of New Jersey Bergen County: Chancery Division Docket No. BER-C-135-20 Sat Below: Hon. Edward A. Jerejian, P.J.Ch.
CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, and VIRTUAL INSTITUTE PERSONNEL, LLC, Third-Party Plaintiffs-Appellants, v. ARECON LTD., GAYATRI MEHTA, JOHN DOES 1-10 and ABC CORPS. 1-10, Third-Party Defendants-Respondents.	

REPLY BRIEF ON BEHALF OF PLAINTIFF-RESPONDENTS AND CROSS-APPELLANTS DIVYAJIT MEHTA AND DGNS CORP.

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ARGUMENT ON REPLY

THE TRIAL COURT SHOULD HAVE ENTERED A PREJUDGMENT INTEREST AWARD OF $838,810.40 BASED ON THE DATES OF EACH SPECIFIC MISAPPROPRIATION FOUND BY THE TRIAL COURT.

The trial court abused its discretion when it awarded $190,480.68 in prejudgment interest, rather than $838,810.40 to which the Plaintiffs were entitled. The decision below on this issue was based on an erroneous interpretation of *R.* 4:42-11, which resulted in the trial court cutting off Plaintiffs' prejudgment interest claim based on when they commenced suit, rather than allowing prejudgment interest to run from the dates when the trial court found that the defendants misappropriated funds. (Pb30-31). Accordingly, the trial court's judgment on that sole issue should be reversed.

As an initial matter, Fariba's assertion that Plaintiffs "waived their liquidated damages argument" is flat wrong. (Fariba Reply Br. 37-38). Plaintiffs very specifically asked the trial court to award pre-judgment interest based on its determinations that the defendants misappropriated specific sums of money on specific dates, and that they deprived the Plaintiffs of the use and enjoyment of those funds from each of those dates onward. (37T:53:19 to 54:8). Plaintiffs established the amount of their request in their certification in support of the entry of final judgment, and their accompanying interest calculation chart, which set out the precise amount of interest due from each individual misappropriation at applicable

Court interest rates. Indeed, the left-most column of the chart setting forth Plaintiffs' interest calculation is called "Date of diversion." (Da2061; 2073-2076). The notion that Plaintiffs somehow waived this claim by not raising it below is simply incorrect.

Fariba also engages in a bit of rhetorical slight-of-hand by relying on the phrase "liquidated damages" in her brief when the case law actually refers to "liquidated sums." (Fariba Reply Br. 41-42). *See Rova Farms Resort, Inc. v. Inv'rs Ins. Co.*, 65 N.J. 474, 506 (1974); *Lautek Corp. v. Image Bus. Sys. Corp.*, 276 N.J. Super. 531, 551 (App. Div. 1994). This distinction matters. Liquidated damages, Fariba and the defendants correctly explain, are a specific amount of money that a party to a contract agrees to pay if he or she breaks some promise. They are the product of a negotiated good faith estimate in advance of the actual damages that will likely ensue from the breach. *E.g., Green v. Morgan Props.*, 215 N.J. 431, 453-54 (2013).

A liquidated sum, by contrast, is a broader phrase referring to specific amounts found to be due and owing pursuant to a contract. The liquidated sum need not be the product of a specific contractual liquidated damages provision, as is evident from the decisions in both *Rova Farms* and *Lautek*. In both of those cases, the courts concluded that interest was due because the claims were for liquidated sums that were readily calculable or ascertainable, not because the subject contracts contained liquidated damages provisions. *Rova Farms*, 65 N.J. at 506; *Lautek*, 276 N.J. Super.

at 551-52.

Rova Farms is also helpful to explain why both Fariba's and the trial court's reliance on *R.* 4:42-11(b) is misplaced in the context of this action. Fariba argued both here and below (and the trial court incorrectly held) that because conversion is a tort cause of action, Plaintiffs' right to pre-judgment interest was limited by rule to the later of six months after the cause of action arose or the date the action was instituted. *R.* 4:42-11(b). However, the *Rova Farms* Court explained that rigid application of that Rule created a problem about determining the trigger date for the interest calculation in the context of the excess liability suit at issue in that case. Critically, the Court explained, "it is unnecessary to resolve the issue since *we do not think that compensation should be dependent on what label we place upon an action, but rather on the nature of the injury inflicted upon the plaintiff and the remedies requested by him*." *Rova Farms*, 65 N.J. at 504 (emphasis added).

When the claims in a lawsuit sound in both tort and contract, the trial court has additional flexibility, and equity dictates that the aggrieved party should be entitled to interest from the date he was deprived of the funds in question. *Id.* at 506-07. Indeed, the trial judge's refusal in *Rova Farms* to impose prejudgment interest because he agreed with the respondent's view that the action before him "sounded merely in tort" was a critical ground for reversal. The Court explained that "While an equity court has discretion in awarding interest, a proper exercise of that

discretion requires that the judge be aware of the alternatives open to him for consideration." *Id.* at 512. A view that the trial court lacks the power to impose pre-judgment interest in the absence of absolute proof as to a loss of use of the subject funds, the Court held, is "a mistaken one." *Id.* at 505.

Thus, the Court held, "At least in the case of a liquidated sum, prejudgment interest has been regarded by our courts as compensatory – to indemnify the plaintiff for the loss of what the moneys due him would *presumably* have earned if payment had not been refused." *Id.* at 506 (emphasis in original). That loss need not be proved; it is "assumed." *Id.* This is because the defendants use and presumptive earning of interest on the subject funds creates the loss, while "the plaintiff was deprived of such enjoyment." *Id.*; *Lautek*, 276 N.J. Super. at 551 ("The interest awarded does nothing more than cover the value of the sum awarded for the prejudgment period during which the defendant had the benefit of the monies to which the plaintiff is found to have been earlier entitled.").

The reasoning in *Rova Farms* almost perfectly describes the trial court's error here. To be sure, the rule in contract cases addressing less certain and more difficult-to-predict questions like consequential damages or lost profits, where damages are not a liquidated sum or readily ascertainable, may well be different. But the Supreme Court has repeatedly reaffirmed that where damages are "capable of ascertainment" on a breach of contract claim, prejudgment interest should be awarded. *E.g.,*

Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 471, 478 (1988). The Court even acknowledged a loosening of the rigidity that existed prior to cases like *Rova Farms* in favor a more equitable approach that accounts for the plaintiffs' loss of use and enjoyment of the funds. *Id*. at 478 (acknowledging that the earlier stricter standards for awarding interest had been "significantly eroded").

Finally, Fariba chastises the Plaintiffs for failing to cite to case law where a court calculated prejudgment interest under *R.* 4:42-11 from the date of the defendants' misappropriation of funds. (Fariba Reply 41-42). There is no question that recent decisions have adopted this more equitable approach. *In re Estate of Lash*, 169 N.J. 20 (2001), is one such example. There, the Supreme Court upheld the award of prejudgment interest "from the date each improper use of funds was made by the administrator." *Id.* at 25. The Supreme Court agreed with the Appellate Division's conclusion that "the date of defalcation should serve as the commencement date from which interest should be assessed," quoting directly from this Court's opinion in the matter:

> [W]e conclude simple interest should be calculated from the date the improper use of the funds was made. Under these circumstances, we view lost interest as an element of the estate's damages claim. . . . We are persuaded this approach is more equitable in that lost interest is an integral part of the estate's damage claim as a result of the defalcation. . . .

Id. at 35.

In re Estate of Sogliuzzo, 2015 N.J. Super Unpub. LEXIS 2921 (App. Div.

Dec. 17, 2015), is yet another more recent example. There, this Court squarely addressed the question of "whether prejudgment interest should run from the date of the complaint or when monies were wrongfully taken." *Id.* at *1. This is, of course, the *precise* issue presented in the instant matter. The Court in *Sogliuzzo* explained that while *R.* 4:42-11 addresses post judgment interest in tort actions and generally provides for simple interest calculated from the date of the institution of action, "under some circumstances, interest may be assessed form the date of the actual defalcations." *Id.* at *6.

In adopting the latter approach, this Court relied on *Lesh's* conclusion that "calculating interest form the date of the wrongdoing is more equitable in that lost interest is an integral part of the [plaintiff's] damage claim as a result of the defalcation." *Id.* This Court also recognized that *Lesh* "made no distinction between tort and contract damages and nothing in [Lesh] limits the doctrine to contract cases only." *Id*. at *7. Thus, this Court concluded: "The dates of misappropriation mark the point at which [the defendant] benefitted from his wrongdoing as well as the point at which [the plaintiff] was injured. Equity compels calculating prejudgment interest from the date of defalcation. . . ." *Id.*

The facts here call for a similar approach. After 22 days of trial and an extensive weighing of the evidence and witness credibility, the trial court unequivocally found that the defendants (including Fariba) misappropriated funds.

(37T 75:7-21). It also found that the defendants took steps to conceal these misappropriations from the Plaintiffs via "webs" and "mazes" of accounts and a series of accounting gimmicks like conduit accounts, comingling, and step transactions. (36T 22:21 to 23:7; 33:14-16; 53:9-10; 37T 72:13-15; 73:3-13; 75:14-21; 79:7-16; 86:18-20; 89:5-11). In light of the foregoing, the trial court abused its discretion by denying Plaintiffs prejudgment interest from the date of each of the defendants' misappropriations. Therefore, this Court should reverse the trial court's judgment on that sole issue and direct the entry of an award of prejudgment interest in the amount of $838,810.40.

CONCLUSION

The judgment of the trial court should be affirmed, except as to the award of pre-judgment interest. That portion of the judgment should be reversed with a direction to enter an award of pre-judgment interest totaling $838,810.40.

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