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-000386-22
CHEMTECH CONSULTING GROUP INC. and MOUNTAINSIDE REALTY LLC, Third Party Plaintiffs, vs. PHARMACHEM LABORATORIES, INC., ARECON LTD., GAYATRI MEHTA, SANFORD MYERS CPA LLC, SANFORD MYERS, JOHN DOES 1-10 and ABC CORPS. 1-10 Third Party Defendants.	

BRIEF OF DEFENDANTS/APPELLANTS, EMANUEL 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

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PRELIMINARY STATEMENT

Before the trial even began, the trial court correctly observed, "This case is about the buyout." Plaintiffs' primary objective was to prove they were fraudulently induced to accept an artificially depressed price for the sale of their business interests, seeking nearly $10 million in damages.

The two principal parties here are plaintiff Divyajit Mehta and defendant Emanuel Hedvat. In 2014, after decades of a successful business relationship, they divided their properties, with defendants paying $6.3 million for plaintiffs' interests. Plaintiffs received every dime of the purchase price.

But after Mehta received a tax deficiency notice in 2019, he retained an accountant friend, Hemant Prajapati, to rake through business records reaching back as far as 2008. Without a business evaluation, Prajapati formed an opinion that the businesses' net values had been artificially depressed by various transactions. Without investigating the underlying facts, he assumed there was a nefarious motive for the transactions. Upon this shoddy basis, Prajapati opined that the amount of each transaction he questioned had a dollar-for-dollar negative impact on the net value of each company and contended plaintiffs suffered a loss approaching $10 million.

At the close of the case, the trial court correctly rejected this theory and the fraudulent inducement claims it was intended to support.

The complaint also alleged conversion and contract-related claims. No fact witness testified that any transaction was made without Mehta's authorization and Prajapati cited no factual support for his threshold premise that the subject transactions were "unauthorized." He was, however, permitted to give net opinion testimony that the court relied upon extensively, if not exclusively, in finding defendants liable on counts alleging conversion, breach of contract, breach of the covenant of good faith and fair dealing and unjust enrichment. The error of allowing this testimony was thus exacerbated by the court's extensive reliance upon it.

The trial court entered judgment in the amount of $4,258,878.69 against all defendants, without regard to whether a defendant was personally liable or even named in the charging count. Of that amount, $1,375,533.25 is based on transactions that are time-barred. The judgment also includes an award of $1,181,874.51 in attorney fees and litigation expenses that were not authorized by any contract.

Further, judgment on the conversion claims must be reversed because plaintiffs failed to show the money allegedly converted was an "identifiable sum" that "belonged" to them and failed to prove the essential elements of demand and repudiation. The court's findings on the contract-related claims were insufficient as a matter of law and inextricably dependent upon Prajapati's net opinion testimony.

The failures of proof, reliance upon impermissible net opinion testimony and legal errors require a reversal of the judgment against defendants in its entirety.

JUDGMENTS AND ORDERS APPEALED FROM

PROCEDURAL HISTORY

On January 17, 2020, plaintiffs Divyajit Mehta and DGNS Corp. filed a complaint against Emanuel Hedvat, Fariba Hedvat, Chemtech Consulting Group, Inc. (Chemtech) Mountainside Realty, LLC (MRL) and American Analytical Association, Inc. ("American Analytical" or "A3I"). Da1-7. On May 22, 2020, a consent order was entered, dismissing the complaint and granting plaintiffs "leave to re-file a Complaint no later than 60 days from the date of this Order (the Re-filing date)" and tolling the statutes of limitations through the Re-filing date. Da9-10.

On September 16, 2021, plaintiffs filed an amended complaint against the original defendants and added the following defendants, 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"). Da12-54. On September 23, 2021, defendants filed an answer and counterclaim as well as a third-party complaint by Chemtech, MRL and VIP against third-party defendants, Arecon, Ltd. and Gayatri Mehta. Da12. Plaintiffs filed an answer to the counterclaim and third-party complaint on October 20, 2020. Da694-714.

Defendants filed motions (1) to bar or limit the testimony of plaintiffs' expert, Hemant Prajapati, and (2) for summary judgment on November 19, 2021.

Following oral argument on 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. Da716-17.

A non-jury trial was conducted over twenty-two non-consecutive days, beginning on January 18, 2022 and ending on March 17, 2022. Defendants' motion for a directed verdict under R. 4:40-1, dismissing the amended complaint, was denied. 12T4:15. Plaintiffs' motion to dismiss defendants' counterclaim and third-party complaint was also denied. 23T52:1.

On June 30, 2022, the court entered judgment, Da719-20, and rendered an oral decision, dismissing Counts 1-4 and 9-10 (fraud) of the amended complaint and denying plaintiffs' request for punitive damages. 24T31:10,19, 22-23, 24T54:11-13. The court awarded plaintiffs compensatory damages of $2,882,244.85 on Counts 5 and 6 (conversion), 7 and 8 (breach of contract), 11

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

1T = 12/20/21	10T = 2/15/22	19T = 3/08/22
2T = 1/18/22	11T = 2/16/22	20T = 3/09/22
3T = 1/20/22	12T = 2/17/22	21T = 3/10/22
4T = 1/25/22	13T = 2/22/22	22T = 3/16/22
5T = 1/26/22	14T = 2/23/22	23T = 3/17/22
6T = 1/27/22	15T = 2/24/22	24T = 6/30/22
7T = 2/08/22	16T = 3/01/22	25T = 9/09/22
8T = 2/09/22	17T = 3/02/22	
9T = 2/10/22	18T = 3/3/22	

(breach of covenant of good faith), and 12 and 13 (unjust enrichment) of the amended complaint. 24T54:3-10. The court also dismissed defendants' counterclaim and third-party complaint. 24T55:10-11.

The court identified the following transactions as the basis for the judgment:

- Transfer of $629,217.85 from Chemtech's customer Arbor Hills to A3I between 2013-2015 (24T34:20-35)

- Transfer of $2,000,000 from MRL's Merrill Lynch checking account to Emanuel Hedvat's Capital One bank account on December 6, 2008 (24T35:8-36:10)

- Transfer of $500,000 from MRL's Bank of America account to Emanuel and Fariba Hedvat's account on November 5, 2013 (24T36:11-22)

- Transfer of $50,000 from Chemtech's MR Line of Credit account to A3I's bank account on December 5, 2014 (24T37:1-4)

- Transfer of $50,000 from Chemtech's MR Line of Credit account to Emanuel and Fariba Hedvat's account on September 8, 2015 (24T37:5-7)

- Transfer of $90,000 from Chemtech's MR Line of Credit account to Emanuel and Fariba Hedvat's account on October 7, 2015 (24Tat 37:7-9)

- Transfer of $50,000 from Chemtech's bank account to A3I's bank account on October 28, 2015 (24T37:9-11)

- Transfer of $75,500 from Chemtech's MR Line of Credit account to A3I's bank account on August 22, 2014 (24T37:11-13)

- Transfer of $2,300,000 from MRL's bank account to A3I's account on November 26, 2014 (24T37:17-23)

The court also dismissed defendants' counterclaim and third-party complaint. 24T55:6-11.

On September 14, 2022, the trial court entered judgment in the amount of $4,258,878.69 against all defendants. Da722-25.

Defendants Emanuel Hedvat, Chemtech, MRL, A3I, NJ Cubic, 29 Cottage, VIP, Chemtech Group LLC and EFJ filed an amended notice of appeal on October 6, 2022. Da 727-37. Defendant Fariba Hedvat filed a notice of appeal on October 6, 2022. Da738-59. Plaintiffs filed a notice of cross-appeal on October 17, 2002. Da760-775.

STATEMENT OF FACTS

The relationship between plaintiff Divyajit Mehta and defendant Emanuel Hedvat dates back to 1984. Mehta, a chemical engineer, had recently arrived in the United States from India. His difficulties with the language posed a major obstacle in his efforts to secure a job better than the $4 an hour job he held. 2T41:21-42:2. After sending out 200 resumes with no responses, Mehta received a job offer from Hedvat, the laboratory manager at defendant Chemtech Consulting Group, Inc. (Chemtech), an environmental testing laboratory. He hired Mehta to work as a chemist for $6 per hour. 2T42:1-20. In describing the success that followed, Mehta said, "I am so grateful to Emanuel that he gave me a 6 dollar job, and in 2006 and 2007 I am make $300,000 a year. My success is because of him." 2T112:14-17.

In 1998, Mehta was promoted to lab manager and Hedvat became the sales and marketing manager. 2T45:12-14. Their relationship extended beyond the workplace. As Mehta noted, Hedvat loaned him $12,000 to help him buy his first house. 2T15-17

In 1990, when the owner decided to sell Chemtech, 2T45:18, Mehta, Hedvat and a group of other investors purchased the company. 2T47:4-17. After the others sold their interests, Mehta and Hedvat became the two remaining stockholders in 2007. 2T23-48:3. They executed a Stockholders

Agreement (P-8) Da1505-1526 as well as employment agreements for each of them.

The Chemtech Stockholder Agreement included customary formalities regarding the operation of the business. For example, the Agreement required an annual election of the officers of the corporation, established a procedure for voting by the directors and dictated that "[a]ll decisions regarding the operation of the business of the Corporation and the expenditure of the funds thereof shall be made by majority vote of the Stockholders." Da1507. In practice, Mehta and Hedvat ran Chemtech and MRL in a much more informal way.

Chemtech did not have regular Board of Directors meetings. 3T7:6-8. Mehta and Hedvat simply agreed that Mehta would become Chief Operating Officer and handle the lab, "in charge of all the instruments, all the certifications, all the audits, all the chemists." 2T50:4-9. Hedvat would take care of sales, marketing, books and records. 2T48:25-49:2.

Mehta did not cede all financial responsibilities to Hedvat. For example, Mehta had check-signing authority, 2T59:4-6, and approved Chemtech's expenses before the bookkeeper entered them in QuickBooks. 5T148:15-22-151:18; 13T52:25-55:4.

Mehta also had a singularly important role in qualifying Chemtech as a minority business enterprise (MBE) and a disadvantaged business enterprise

(DBE). To secure this status, which gave the company an advantage in obtaining certain public contracts, Mehta acquired a 51% interest and Hedvat received a 49% interest in the company. 2T120:19-121:3. To maintain that status, Mehta had to regularly submit financial documents and certifications subject to civil and criminal penalties regarding Chemtech's finances and his own net worth. 4T138:16-144:17.

Mehta described the hands-on way in which the two partners worked together to decide on the acquisition of a lab in Forked River. "[M]e and Emanuel visited that lab and Emanuel had looked at all the books and records and I looked at all the laboratory part of the business . . . I interview chemist and the field person, and Emanuel was talking to the owner of the lab. And this is the process we went through in 1995 to acquire [the] lab." 2T13-22.

In addition to handling the "day-to-day operation of the Forked River lab," Mehta was responsible for ensuring the lab was in compliance with regulations. He was "in charge of making sure the lab have a certification required by the State, lab passed the audit, make sure all the training done properly." 2T53:23-54:3. Hedvat handled the business part of the lab. 2T54:6.

They also had labs in Edison and Englewood, employing a combined number of 90 employees. 2T56:1-21. Mehta's responsibilities included "solving various technical issues, solving client technical issues; . . . dealing with the

State agencies for making sure the certifications and licenses are there, working with the State agency in terms of auditing, . . . making sure everything is in compliance." 2T56:23-57:7. Mehta described this compliance responsibility as "very demanding in terms of technical" because penalties were imposed for non-compliance. 2T58:5-12. Hedvat handled the business end, day-to-day banking, making sure all the vendors were paid. 2T58:23-25.

To further their plan to purchase a building for Chemtech's operations, 2T60:8-23, the two partners formed a real estate company, defendant Mountainside Realty, LLC (MRL). An operating agreement (MRL Operating Agreement) was executed, granting 50/50 ownership in MRL to companies owned by their wives, plaintiff DGNS, Inc. (DGNS), owned by Gayatri Mehta, and defendant American Analytical, Inc., (A3I), owned by Fariba Hedvat. 2T61:5-10; (P-2) Da935-46.

Mehta and Hedvat visited 284 Sheffield Street, Mountainside with a real estate agent and determined the building could accommodate both the Edison and Englewood operations and had room for expansion. They agreed to buy the building through MRL and rent it to Chemtech. 2T61:18-62:2.

Their decision to acquire a lab in Maryland was reached in similar fashion. They both drove to Maryland, where Mehta spoke to all the chemists and Hedvat spoke to the owners of the lab and the building. They agreed to acquire the

assets of the lab and lease the building under a different corporate name, Chemtech, LLC. 3T33:3-34:4.

As in the selection of lab sites, each of the partners was free to make suggestions regarding business opportunities and engaged in making decisions. By way of example, in 2013, Mehta suggested that they open a new company in India that would provide services for a customer in the United States. Hedvat agreed and they formed a new company for that purpose, defendant Virtual Institute Personnel, LLC, (VIP) a virtual employment agency that was owned by DGNS and A3I, but no longer exists. 3T36:14-37:10; 15T37:2-3.[2]

Although neither Mehta nor Hedvat were "owners," they operated MRL and made the relevant financial decisions. As was the case with Chemtech, they each had signing authority for company checks and Mehta personally signed corporate checks, transferred funds between the companies and paid corporate expenses. 4T183:2-10; 5T14:3-9; 13T38:25-39:11.

Sanford Myers, a certified public accountant, provided accounting services to Chemtech, MRL, their subsidiaries and related entities,[3] as well as to

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[2] The remaining defendants added in the amended complaint are: 29 Cottage Street, LLC ("29 Cottage"), a real estate holding company that owns property at that address in Jersey City; NJ Cubic 29, LLC ("NJ Cubic"), a holding company formed when MRL acquired the Cottage Street property; and EFJ Realty LLC ("EFJ"), a holding company for certain real estate interests.2T40:5-8; 12T22:4-11, 23:17-23, 24:6-25:24.

[3] Mr. Myers was deposed but died prior to the trial. His affidavit, D-155, was admitted into evidence. 14T25:2-14

A3I and DGNS from about 2009.(D-155) Da994. As Mehta acknowledged, 2T66:5-67:3,[4] Myers met with him and Hedvat every tax season "to review [the businesses'] financial books and records, including the general ledgers and QuickBooks files." Ibid., Da995. Mehta and Hedvat "reviewed and approved Chemtech and MRL's financial records, including bank statements and general ledgers and at times requested . . . adjustments to the ledgers." The two "also reviewed and approved Chemtech and MRL's tax returns before they were filed each year." Ibid.

Myers described the involvement of the two partners in Chemtech and MRL:

> Divyajit and Emanuel were aware and approved of all significant financial transactions that are reflected on Chemtech and MRL's financial books and records each year, including intercompany transfers and loans, shareholder/member loans and expenses processed and reimbursed. Additionally, it is my understanding that Divyajit had access to and did look at Chemtech and MRL's QuickBooks files because he was in charge of managing IT for both companies. There was really nothing that happened in these companies that Divyajit and Emanuel were not aware of and/or did not participate in as they were both involved in Chemtech and MRL.
>
> [Ibid.]

[4] Despite this acknowledgment, Mehta also denied meeting with Myers regarding professional services he provided to Chemtech and MRL. 3T12:20-13:24.

Hedvat had no involvement with DGNS, which was owned by Mehta's wife, Gayatri Mehta. Mehta alone exercised control over DGNS's finances and approved its tax returns. As Myers explained, "Although DGNS was owned by Divyajit's wife Gayatri, to my knowledge, Divyajit controlled and operated the company and was responsible for all financial decisions since he communicated with me about DGNS's tax returns and approved them before they were signed by his wife and filed." Da995-96.

Mehta's status as IT (Information Technology) manager for both companies was not merely an honorific title. In addition to routinely solving technical issues for the companies and clients, as well as technical questions from their India facility,[5] 3T34:15-17, Mehta participated in writing the technical proposal for a customized laboratory information management system (LIMS) that was marketed to a customer, Pharmachem. 3T37:23-39:24.

In 2014, Mehta and Hedvat decided to divide their business interests. Their negotiations were conducted in the same informal, personal manner as they had conducted their businesses for over two decades. Rather than retain a professional to appraise each business interest and assign a fair market value,

[5] Chemtech expanded its operations to India in 2005 so it could have a 24-hour operation, forming Chem-e-tech in 2005 and E-Chem in 2011. Both companies are now owned by Mehta. 4T113:18-115:5.

the two men sat down over a period of months, exchanging their own estimates and proposals.

The first of their exchanges was an email from Hedvat to Mehta in March 2014. 3T42:2-43:9 (P-37) Da077-78. Mehta reviewed the 2 page document and discussed certain omissions with Hedvat, who agreed to adjust the schedule to reflect Mehta's investment in the India property. 3T43:17-45:1, 46:18-47:6. Mehta asked for additional information, which Hedvat agreed to provide. 3T50:5-14. In April 2014, Mehta received P-41 (Da979) from Hedvat, which he reviewed and made his own entries on. 3T52:2-53:8. Hedvat then suggested that since their properties in India and Fort Lee were of equal value, Mehta could take the India property, Hedvat could take the Fort Lee property and they would remove those properties from the list of properties to be split. Mehta agreed and they went out to lunch. 3T53:20-54:11.

In May 2014, Mehta received P-43 (Da980) from Hedvat. He reviewed the document, made entries of his own and discussed further the division of a multi-family residential building and commercial properties. Hedvat advised he would work further on a value for Chemtech. 3T58:3, 59:3-6, 59:15. 60:3-13, 62:5-9. Mehta reviewed the values of the properties and devised two options for their division in which Mehta and Hedvat would each receive $6.2 million. 3T63:1-64:4. Their discussions continued, "almost every day." 3T68:15-24.

Mehta received P-48 and P-50 (referred to jointly as Schedule S) (Da.981-82, Da1539) from Hedvat in June 2014. They met in Hedvat's office and went over the documents "line by line." 3T71:20-75:5. When they finished, Mehta took the documents and told Hedvat he would think it over and get back to him. 3T99:20-24.

In late June 2014, Mehta reached out to Hemant Prajapati, an accountant he had known for twenty-five years, sending him copies of P-48 and P-50, and asking him for his "guidance going forward." (D-222) Da776-904; 9T28:20-22; 21T25:11-14, 27:13-18.

On July 2, 2014, Mehta received P-51 (Da983); he understood that to be an offer of $5.6 million, which he rejected. 3T99:5-7, 100:3-19, 103:3- 14.

Later in July, Hedvat sent Mehta an updated offer of $5.7 million. (P-52) Da985, 3T104:2-9, 105:1-3, 20-24, 106:9-10. Mehta countered with a demand of $6.3 million. 3T108:4-8 They negotiated how much compensation Mehta would receive for continuing to work for Chemtech for three years. 3T109:12-16. Mehta described how the negotiations ended:

> Then Emanuel told me, Divya, if I give you $6.3 million, do we have a deal? I told him yes, we have a deal.
>
> He got up for his chair, shook my hand, and said, Divya, we have a deal.
>
> So this is how we finalized this document and finalized the deal.

[3T109:17-23]

The deal that was struck was documented in the following agreements:

1. A stock purchase agreement in which Hedvat purchased Mehta's interest in Chemtech for $740,000 (2014 Chemtech SPA) (P-80). Da906-934

2. Employment agreement between Chemtech and Mehta (P-81) Da969-975

3. A membership purchase agreement in which A3I purchased DGNS's interest in MRL for $4.96 million. (2014 MRL MIPA) (P-82) Da946-775

The 2014 Chemtech SPA called for a series of payments totaling $740,000. Da906-907 Before the last payment was made, Mehta and Hedvat agreed to substitute Hedvat's wife, Fariba Hedvat, for Hedvat as the purchaser so that Chemtech could qualify as a WBE (Woman Owned Business). 13T140:16-142:3; (D-137) Da987. The ensuing 2017 Chemtech SPA mirrored the terms of the 2014 Chemtech SPA, naming Fariba Hedvat as the purchaser. Mehta returned the payments he had received from Hedvat under the 2014 Chemtech SPA and was paid in full under the 2017 Chemtech SPA. 13T140:21-141:18.

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. 2/22/22 Tr. at 147:11 to 150:15. Myers provided a signed certification to the taxing authority explaining an

accounting mistake he made that gave rise to the tax deficiency notice, (D-150) Da989.

But Mehta was not satisfied. He asked Prajapati to review business records for Chemtech Consulting Group, Inc. and Mountainside Realty, LLC. 7T82:17-83:11. In October 2019, Prajapati sent an email to Mehta, recommending that Myers should be added to the lawsuit. 2/15/22 Tr. 124:12 to 126:16; D-151. The initial complaint in this matter was filed on January 17, 2020.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INCLUDING TRANSACTIONS IN THE JUDGMENT THAT OCCURRED MORE THAN SIX YEARS BEFORE THE COMPLAINT WAS FILED. (24T52:7-10)

As defendants' brief illustrates, the errors in this case warrant a reversal of the entire judgment entered against them. However, under any circumstances, the trial court's reliance upon transactions that occurred clearly outside the statute of limitations requires a substantial reduction of any judgment.

The record reflects that the court was aware of the statute of limitations applicable to plaintiffs' conversion and breach of contract claims (24T52:7-10) as well as the fact that some of plaintiffs' claims rested upon transactions that occurred before the limitations period. For example, during oral argument, the court stated:

> I know it is argued now somehow under the breach of contract theory or that we should go back to the 2007 as opposed to just the '14 agreement. But at a minimum we should look from '14 on because it is within the statute of limitations. I know it is raised as a standing issue with the conversion claims and so forth.
>
> [1T57:8-15]

The trial court cited transactions totaling $5,744,717.85 that plaintiff's expert contended were improper and awarded plaintiffs compensatory damages for one-half that amount, based upon the premise that one-half of those amounts should have

been distributed to Mehta. However, nearly half of that $5.7 million number is based on transactions that occurred more than six years before the initial complaint was filed in this action. Indeed, the court included a transaction for $2 million, which occurred in 2008, nearly twelve years before the complaint was filed.

The judgment was entered on counts alleging conversion (Counts 5, 6), breach of contract (Counts 7, 8), breach of covenant of good faith and fair dealing (Count 11), and unjust enrichment (Counts 12, 13). These claims are all governed by a six-year statute of limitations. N.J.S.A. 2A:14-1; Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 286-87 (App. Div. 2005) (applying a six-year statute of limitations to claims of conversion and breach of fiduciary duty); Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 373-74 (App. Div. 1997) (N.J.S.A. 2A:14-1's six-year limitations period applicable to quasi-contract claims, including unjust enrichment).

Because the initial complaint was filed on January 17, 2020, any claim sounding in those causes of action that accrued before January 17, 2014 was time-barred. Yet, relying exclusively upon the testimony and schedules prepared by plaintiffs' expert, the court included $2,751,066.50 in transactions that occurred from 2008 to November 2013 in computing the judgment:

12/6/2008 Transfer from Mountainside Realty's Merrill Lynch checking Account to Emanuel Hedvat's Capital One account for $2,000,000 (24T35:8 to 36:10)

11/5/2013	Transfer from Mountainside Realty's Bank of America account to Emanuel and Fariba Hedvat's Bank of America account for $ 500,000 (24T36:11-22)	
2013	"Arbor Hills" transactions cited by Prajapati, (24T34:20-35:3) which included the following invoices for site investigation services six years or more before the complaint was filed:	
5/13/2013	Invoice # 2013041	$ 10,000.00
7/5/2013	Invoice # 201300601	104,687.00
7/18/2013	Invoice # 201300601[6]	104,687.00
11/7/2013	Invoice # 20131001	31,692.50

Employing the same methodology as the trial court, it follows that one-half of the amounts of these time-barred transactions, or $1,375,533.25, was erroneously included in the compensatory damages award of $2,872,358.93. Thus, time-barred transactions represent almost one-half of the compensatory damages awarded.

Determining whether a cause of action is barred by a statute of limitations is a question of law that this court reviews de novo. Save Camden Pub. Schs. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 487 (App. Div. 2018); Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div. 2016).

In this case, the trial court acknowledged the application of a six-year statute of limitations but failed to apply the law correctly. The judge stated, "As far as any kind of statute of limitations claim, on the discovery rule, when you find something

[6] While this list might appear to double-count Invoice # 201300601, the transactions are presented as set forth on Schedule 15 of Prajapati's report (P-238) Da866-67 and adopted by the court. 24T34:20-35:3.

out, conversion has a six-year statute of limitation, as does the contract claim." 24T52:7-10. (Emphasis added).

The discovery rule does not, however, toll the statute of limitations until the date "when you find something out."

The discovery rule is an equitable principle, which "balances the need to protect injured persons unaware that they have a cause of action against the injustice of compelling a defendant to defend against a stale claim." Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (citing Lopez v. Swyer, 62 N.J. 267, 273-74 (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.'" Catena, 447 N.J. Super. at 52 (citing Lopez, 62 N.J. at 274-75); see also, Burd v. New Jersey Tel. Co., 76 N.J. 284, 291-92 (1978).

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); Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56, (2000); Burd, 76 N.J. at 291; Lopez, 62 N.J. at 273-74. "The proofs need not evoke a finding that plaintiff knew for a

certainty that the factual basis was present. It is enough that plaintiff had or should have discovered that he 'may have' a basis for the claim." Lapka, 162 N.J. at 556 (quoting Burd, 76 N.J. at 293). See also, Savage v. Old Bridge-Sayreville Med. Group, 134 N.J. 241, 248 (1993).

Here, all the transactions identified by Prajapati that formed the basis for the court's decision were reflected in the books and records that Mehta had access to and, as he acknowledged, was never prevented from reviewing. See, e.g., 5T14:3-6, 94:16-19, 104:10-105:1, 162:23-163:4, 166:18-167:2; Affidavit of Sanford Myers, (D-155, ¶¶ 5, 6) Da995. Indeed, to maintain Chemtech's status as an MBE and DBE, Mehta regularly submitted financial documents and certifications regarding Chemtech's finances and his own net worth that were subject to civil and criminal penalties. 4T138:16-144:17; 150:3 to 155:5; 5T 38:24-55:13. 12T 50:11-51:1. If there were any validity to the claims asserted now, Mehta clearly had the opportunity, if not the duty, to discover any irregularities in the financial records on a timely basis.

Clearly, 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. Moreover, the consequence of that error was far from trifling. Therefore, any judgment that might survive this appeal should be reduced accordingly with

corresponding reductions to the interest charged to defendants as part of the final judgment entered on September 14, 2022.

POINT II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND LITIGATION EXPENSES. (25T80:15-89:4; 89:23-93:13)

The trial court awarded plaintiffs $1,181,874.51 in attorney fees, expert fees and other expenses incurred in the normal course of preparing a case for litigation. The threshold issue in any fee-shifting request is to determine if there is "express authorization" for such an award in a statute, court rule or – as claimed here – a contract between the parties. That threshold was not met here.

None of the contracts relied upon mention an award of attorneys fees based on the breaches alleged here, let alone additional litigation expenses.

Consequently, plaintiffs failed to prove the requisite authorization for a departure from the American Rule. Because the trial court's decision was not "supported by adequate, substantial, credible evidence" and was based on legal error, the award should be reversed.

A. The Award of Attorney Fees Was Not Authorized By Any Contract Between The Parties.

Consistent with its "stalwart commitment" to the American Rule, In re Niles Trust, 176 N.J. 282, 293-94 (2003), our Supreme Court recognizes "sound judicial administration is best advanced if litigants bear their own counsel fees." Satellite Gateway Communications, Inc. v. Musi Dining Car Co., 110 N.J. 280 (1988) (quoting State, Dept. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 504 (1983)).

Three principles are served by the American Rule: "(1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016) (quoting In re Niles Trust, 176 N.J. at 294).

Therefore, "legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract." Ventron, 94 N.J. at 504 (emphasis added); Cohen v. Fair Lawn Dairies, Inc., 86 N.J. Super. 206 (App. Div.), aff'd, 44 N.J. 450 (1965). See also, Innes, 224 N.J. at 592; Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 404 (2009)); N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999); Brunt v. Bd. of Trustees, Police & Firemen's Ret. Sys., 455 N.J. Super. 357, 363 (App. Div. 2018). "[E]ven where expressly provided, 'the narrowness of [the exceptions] . . . has always [been] rigorously enforced, lest they grow to consume the general rule itself.'" First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 425-26 (App. Div. 2007) (quoting Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979)).

The award of $886,223.06 in attorneys' fees here contravened one of the essential principles served by the American Rule -- it amounted to a massive penalty to defendants "for exercising their right to litigate [this] dispute," a penalty they should not bear simply because they lost.

Plaintiffs contended and the trial court found that the award of fees was authorized by contract between the parties.[7] 25T13:3-5. Because contractual provisions that shift liability for attorneys' fees are in derogation of the common law, our courts "strictly construe" such provisions. Litton, 200 N.J. at 385; N. Bergen Rex Transp., 158 N.J. at 570; McGuire v. Jersey City, 125 N.J. 310, 326-27 (1991). In Green v. Morgan Properties, 215 N.J. 431, 455 (2013), the Court emphasized, "[W]e have made plain that . . . contractual fee-shifting provisions are strictly construed."

Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434 (1990) presents an example of the level of scrutiny required in reviewing purported statutory authorization. The matter, alleging gender discrimination, was brought before the Commissioner of Education. Id. at 436. If a similar claim had been brought in court under the Law Against Discrimination, N.J.S.A. 10:5-27.1 permitted the recovery of attorney fees to a successful plaintiff. Although the Commissioner of Education had "sweeping authority for enforcing equal protection in the administration of the public education law," the Court noted, "[t]his statutory authority . . . has not been construed or exercised to include the power to award counsel fees." Balsley, 117 N.J. at 442. In short, the Court held, "the absence of express statutory authority is

[7] Plaintiffs also argued that a fee award was permitted under the New Jersey Trade Secrets Act. 25T18:7-23. This argument was rejected by the trial court. 25T89:23-90:15

fatal to the claim for counsel fees." Ibid. (Emphasis added). See also, Perez, 391 N.J. Super. at 428 ("vague reference in N.J.S.A. 12A:4-207(c) to 'expenses' was an insufficient basis to conclude that the statute expressly authorized an award of attorney's fees contrary to the general rule").

The same careful scrutiny was required in reviewing contractual provisions here. For example, in Cmty. Realty Mgmt. v. Harris, 155 N.J. 212, 234 (1998), the Court observed the lease "must expressly permit a landlord to recover reasonable attorneys' fees and damages in a summary dispossess proceeding before a landlord/tenant court may consider those expenses as additional rent." Such express authorization existed where "the plain language in the Agreement provides that attorneys' fees and costs are included in the definition of 'losses.'" Litton, 200 N.J. at 385-86.

Further, the fact a contract may permit fee-shifting for a specific breach does not mean that any breach of the contract will provide a basis for an award of fees. A contractual provision that permits fees for an identified purpose cannot be broadened to encompass fees for purposes not specified in the contract. In McGuire, the subject lease provision permitted "fees only for legal services related to reletting, such as the recovery of possession of the premises or the drawing up of a new lease to replace that of the breaching tenant." 125 N.J. at 326-27. The Court reasoned that because the landlord's sale of the properties constituted a mitigation, "the lease's provision

concerning attorneys' fees would entitle him to recover fees for legal services related to the sale, [but could not be] applied to support an award of attorneys' fees in an action for damages for breach [because] there is no equivalent provision in the lease to allow attorneys' fees in an action . . . to recover damages for breach." 125 N.J. at 326-27.

And, when the contract identifies the party who may receive a fee award, the fee-shifting provision may not be used to award fees to someone else. See, e.g., Satellite Gateway Communications, 110 N.J. at 285-88 (holding that a lease provision granting counsel fees to the landlord if the tenant defaulted did not permit a fee award to an assignee of the original tenant).

As these representative cases show, important questions in assessing the applicability of a fee-shifting provision include: (1) what is the conduct that triggers the fee-shifting provision; (2) how does the fee-shifting provision define the scope of the fees that may be awarded; (3) who is required to pay the counsel fee award; and (4) who is entitled to receive a counsel fee award.

Moreover, when the claim for attorney's fees rests upon a contractual provision, rather than an award of counsel fees under R. 4:42-9, it constitutes "an element of damages, which ordinarily must be proved "in the same manner as . . . any other item of damages." Jennings v. Cutler, 288 N.J. Super. 553, 567 (App. Div. 1996) (quoting Cohen, 86 N.J. Super. at 216). See also Green, 215 N.J. at 455

("[W]e have made plain that the party seeking to be awarded attorneys' fees ordinarily bears the burden of proving that they are reasonable"); see also, Jugan v. Friedman, 275 N.J. Super. 556, 574 (App. Div.), certif. denied, 138 N.J. 271 (1994). Therefore, plaintiffs were required to prove that a contractual provision expressly authorized the award of fees and expenses and that the $1,181,874.51 awarded here was reasonable.

The trial court had the concomitant obligation to strictly construe the contractual provisions relied upon to determine whether they constituted an "express authorization" for an award of fees. On appeal, however, the "[i]nterpretation and construction of a contract is a matter of law for the court subject to de novo review," Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998), and the trial court's interpretation is "not entitled to any special deference." Hayes v. Delamotte, 201 N.J. 373, 386-87 (2018) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)); Kaur v. Assured Lending Corp., 405 N.J. Super. 468 (App. Div. 2009).

Plaintiffs relied upon the following contracts in claiming an award of counsel fees and litigation expenses was authorized:

(1) the Stock Purchase Agreement (SPA), dated December 5, 2014, in which Mehta sold his share in Chemtech Consulting Group, Inc. to Emanuel Hedvat, with a closing date of December 31, 2017. (P-80). Da906-934

(2) the Stock Purchase Agreement (SPA), dated December 5, 2014, in which Mehta sold his share in Chemtech Consulting Group, Inc. to Fariba Hedvat, with a closing date of December 31, 2017. (P-103) Da1527-1541

(3) Membership Interest Purchase Agreement (MIPA), dated December 5, 2014, for the sale of Mountainside Realty, LLC by DGNS, Corp., Inc. to American Analytical Association, Inc. (P-82) Da948-967

(4) MRL Operating Agreement, dated May 2000, between DGNS and American Analytical Association (P-2) Da935-947[8]

The trial court's decision did not include an explicit finding that the MIPA was breached. As to the other agreements, the court did not identify any particular breach that supported the award of fees. The thrust of the trial court's findings was that there were certain transactions, "whether you call it a diversion or misappropriation, or just sloppy bookkeeping," (24T33:11-5), during the years 2013 through 2015, that improperly favored Hedvat to Mehta's detriment:

> [Counts] 7 and 8 are breach of contract, and I think there was a breach. . . . And we're talking about the MRL Operating Agreement and then also the Chemtech Stockholders Agreement.
>
> With regard to the Operating Agreement, Mr. Hedvat, A3I, Fariba, breached their obligations. . . .
>
> So withdrawals were made of capital from the company without approval and authorization from, in this

[8] Plaintiffs added the MRL Operating Agreement as an additional document that purportedly authorized the award of fees in their reply brief. Defendants objected to the assertion of a new argument in a reply brief, which improperly deprived them an opportunity to present written opposition. 9/9/2022T36:16-37:2. See, Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper, and we generally will not consider such an issue."). Nonetheless, the trial court proceeded to reference this agreement in its decision. 24T50:10-51:19.

> case, the other shareholder, Mr. [Mehta]. He didn't get to share in all the profits and he didn't get the distributing and receiving and/or causing to be distributed or received by MRL and A3I more than their share of the profits. And these are decisions that should have been made together. And these diverting of the funds were detrimental to the interest.
>
> And similarly, with the same applying to the Chemtech Stockholders Agreement, that the 2007 agreement indicates that expenditure of funds should be a vote of the stockholders. So expending company funds without authorization; failing to maintain sufficient cash to cover expenses, which I don't think is really applicable; distributing profits inequitably, you know, which does.
>
> [24T50:10-51:19]

When the issue of counsel fees was addressed during the post-trial motion hearing, the trial court's analysis of the contractual provisions relied upon consisted of the following:

> 6.3 of the 2014 and '17 SPA has – certainly has an indemnification provision. . . . [A]gain, 6.3 of the 2014 which is indemnification for the seller's benefit, any material inaccuracy or breach, any representation – it was inaccurate.
>
> And all these agreements – and there are a lot of moving parts. They all play off of each other.
>
> You 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.
>
> So I think [plaintiffs' counsel's] argument is correct with regard to that, that the Chemtech stockholders agreement, the MRL operating agreement, and the stock purchase agreement and the MIPA agreement all feed off of each other.

> Again the court identified conduit accounts and co-mingling and step transactions, and books and records which were manipulated and these were breaches of obligations under the MRL operating agreement and the Chemtech stockholders agreement which then leads to these arguments which is the subject of this litigation.
>
> [25T88:13-89:11]

Rather than examine and "strictly construe" the specific language of the indemnification clauses, the court inferred that they applied because it had concluded that defendants Emanuel Hedvat, A3I and Fariba Hedvat "breached their obligations" under the MRL Operating Agreement and the Chemtech SPA. A review of the contracts relied upon, however, reveals that they do not contain any "express authorization" for the award of fees and, further, the limitations of the indemnification language in each of them bars an award of fees based upon the proofs and arguments presented at trial.

1. Chemtech Consulting Group, Inc. Stock Purchase Agreements (SPAs).

The trial court adopted plaintiffs' contention that the "Indemnification for Seller's Benefit" clause in the SPAs provided the requisite authorization for the award of fees.

Paragraph 6.3 states:

> 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.
>
> [(P-80), (P-103), Da925-926, Da1532-33 (emphasis added.)]

This provision clearly does not provide the "express authorization" required to abandon the American Rule. The words "attorneys fees" do not appear anywhere in this clause and "Losses" are not defined to include counsel fees. Moreover, the indemnification is limited to "Losses incurred by Seller after the date of this Agreement," plainly revealing that the parties' agreement did not intend to include indemnification for alleged losses that preceded the agreement.

The "material breaches" that trigger the indemnification clause are also limited to the SPA itself. The loss must be caused by a material breach of a representation, warranty covenant or agreement of the Buyer "contained in this Agreement," or a material inaccuracy in a "document delivered by Buyer as required by this Agreement." (P-80), (P-103) Da925-926, Da1532-1533. Therefore, it clearly would not apply to the wholly separate transactions that are the basis of the judgment.

Moreover, Paragraph 6.3 is included in Article VI, which sets forth the remedies for breaches of the representations and warranties contained in Sections

3.2, 3.2 and 4.1 through 4.3 of the agreement. Therefore, it explicitly relates to breaches of the Buyer's Representations and Warranties set forth in Paragraph 3.2 (Da923, Da1530) and the documents the Buyer was required to deliver at closing identified in Paragraph 5.2. (Da925, Da1532). No evidence was presented or cited by the trial court that there was a material breach or inaccuracy relating to the representations and warranties referenced in Article VI or any document the Buyer was required to deliver at closing.

A comparison of the language of Section 6.3 with other clauses in the contract provides further evidence that the parties did not agree that attorney fees should be awarded under Section 6.3 because Section 8.3 clearly does provide for the recovery of attorney fees.

Section 8.3 addresses Buyer's obligations to "cause all creditors to release Seller . . . from any and all personal guaranties." (Da914, Da1536) P-80 at 9. It was agreed that, until such release was secured, the Company and Buyer were obliged to indemnify Seller from all losses. Unlike the language of Section 6.3, "losses" is defined here to include "court costs, reasonable attorney's fees, interest expenses and amounts paid in compromise or settlement." Ibid. This is the "express authorization" required to depart from the American Rule. It is an ineluctable conclusion that the inclusion of this language in Section 8.3 demonstrates that the parties could have used similar language in Section 6.3 if that was their intent. Their

failure to do so thwarts any attempt to interpret Section 6.3 as "express authorization" for the award of counsel fees here.

Finally, the Chemtech SPAs cannot provide any authorization for a counsel fee award because each of them contains the following integration clause:

> 7.1 Entire Agreement. This Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes any prior understandings, agreements, or representations by or among the parties, written or oral, to the extent they relate in any way to the subject matter hereof. The Recitals and the Exhibits and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.
>
> [Da911, Da1533] P-80, p. 6; P-103, p. 6 (emphasis added).]

As a result, the 2014 SPA and the 2017 SPA each exclude consideration of representations made before its execution. In Moynihan v. Lynch, 250 N.J. 60 (2022), the Supreme Court made clear that such an integration clause extinguishes claims based upon prior agreements. In reviewing the effect of a single line in a palimony agreement, the Court stated:

> [T]he last line of the written palimony agreement . . . provides: "This agreement finalizes all obligations of Mr. Lynch to Ms. Moynihan." That last line suggests that, if there were any previous agreements, they were subsumed into the final written agreement.
> [Id. at 91.]

The parties' intention in Paragraph 7.1 is not merely a line that "suggests" finality; the paragraph plainly states that the agreement "supersedes any prior understandings, agreements, or representations" by the parties. As a result, any alleged misrepresentation or breach that occurred before December 4, 2017 is unavailable as a basis for requiring indemnification.[9]

2. MIPA Membership Interest Purchase Agreement (MIPA)

The parties to this agreement for the sale of Mountainside Realty, LLC are two corporations: DGNS ("Seller"), and A3I ("Buyer"). Paragraph 6.3 of Article VI sets forth the scope of the Buyer's obligation to indemnify the Seller:

> Indemnification for Seller's Benefit. Buyer agrees to indemnify and hold harmless Seller and will pay to Seller the amount of any Damages,[10] arising out of, resulting from or relating to:
>
> > (a) 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;
> > (b) Any material breach or violation of the covenants or agreements of Buyer contained in this Agreement or in any other document delivered by Buyer as required by this Agreement; . . . .
>
> [(P-82) Da952-53. (emphasis added).]

---

[9] Similarly, although the integration clauses were not specifically raised as grounds for dismissal of the Counts related to Chemtech in the trial court, the plain language of the integration clauses bars any cause of action based upon representations made prior to the Stock Purchase Agreements, i.e., Counts 6, 8, 11 (as to Chemtech) and 12.

[10] Paragraph 6.2 defines "Damages" as "any actual loss, liability, claim, damage (excluding incidental and consequential damages) and expense (including costs of investigation and defense and reasonable attorneys' fees and costs of suit)."

Once again, the language relied upon does not mention "attorneys' fees" and limits the indemnification provided to conduct required by the Agreement.

The Buyer's Representations and Warranties contained in the MIPA are set forth in Paragraph 3.2 (P-82 at 3). The documents A3I was required to deliver at closing are identified in Paragraph 4.2. (P-82 at 4). Plaintiffs did not claim that any representation, warranty, covenant or agreement in "this Agreement" was breached. Plaintiffs also did not identify any "additional agreements, instruments, certificates [or] other documents that DGNS requested A3I to deliver at the closing, let alone any material breach of such a document. Similarly, the trial court did not identify any breach relevant to the indemnification provision. (See 24T11:4-8).

To the extent the court relied upon this contract to enter a judgment that included an award of fees against all defendants, this was legal error.

3. MRL Operating Agreement

A3I and DGNS were the parties to the MRL Operating Agreement, dated May 2000. The pertinent sections of this contract state:

> This Operating Agreement is a contract between its parties and is enforceable by the Company against any member who violates its terms. All members, past, present and future must sign this Operating Agreement as a condition of membership.
>
> . . .
>
> XX Violation of This Agreement

> 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 actions of every kind and nature whatsoever which may arise out of or by reason of such violation of any terms and conditions of this Agreement.
>
> [Emphasis added.]

This paragraph constitutes the third strike against the award of counsel fees because it, too, fails to even mention attorneys' fees, let alone provide express authorization for an award of counsel fees and litigation expenses.

Plaintiffs contended this contract justified the award of fees because the trial court found that this contract had been breached. 25T14:6-12. Clearly, the award of fees is not justified merely by the occurrence of a breach.

B. The Court Erred In Awarding Expert Fees And Other Litigation Expenses.

In addition to attorneys' fees of $886,223.06, plaintiffs sought and were awarded $296,651.45 for the following:

- Expert fee for Hemant Prajapati (Exhibit I)[11] Da1410-17 — $209,945
- Expert fee for Sanjay Sagar (Exhibit J) Da1419-20 — 30,100
- QuickBooks Support (Exhibit L) Da1436-38 — 500
- Cynthia Bopp (Accounting Consultant for Quickbooks, (Exhibit M) Da1440-57 — 10,245.75

[11] Exhibits are to the certification of Michael Cohen, filed in support of plaintiffs' motion for final judgment. Da1013.

- Lit-E-gation depositions and trial support services (Exhibit K) Da1422-34 — 25,546.48
- Court reporting for trial (Exhibit N) Da1454-1457 — 20,314.22

The trial court explained the basis for the award as follows:

> Mr. Mehta was wronged, and there are various provisions, and the testimony in the record will speak for itself. He is entitled to attorney's fees.
>
> I mean, he shouldn't have had to bring this case, but he had to bring it. And I don't know how a case like this could have been brought really any differently.
>
> . . .
>
> So, again, the counsel fees, costs, expenses, are [$1,181,874.51], and that includes [the attorneys], and the expert, and all the other fees.
>
> [25T92:16-93:2]

In Bucinna v. Micheletti, 311 N.J. Super. 557 (App. Div. 1998), this court rejected an award of expert fees based upon similar reasoning as error:

> The trial judge may have been under the impression that because the expenses sought by defendants were arguably necessary to properly prepare the case for trial, . . . that those expenses equated with reimbursable litigation costs that could be taxed by the court. In this respect the judge erred.
>
> [Id. at 562.]

The court observed,"[E]xpenses for either an expert preparing for trial or obtaining an expert's report are merely costs incident to trial preparation. In the absence of statute or rule, they are part of the expenses that must be borne by every litigant in their own case." Id. at 566 (citing Hirsch v. Tushill, Ltd., Inc., 110 N.J.

644, 648-49 (1988)). See also, Josantos Constr. v. Bohrer, 326 N.J. Super. 42, 47-48 (App.Div.1999)("[L]itigants bear their own expenses for fees and costs, except where specifically authorized by statute, rule, or agreement."); Velli v. Rutgers Casualty Ins. Co., 257 N.J. Super. 308, 309 (App.Div.), certif. denied, 130 N.J. 597 (1992).

This is true even in the cases, unlike here, where the party seeking payment of expert fees is entitled to and received a attorney's fee award.

For example, the Franchise Practices Act, N.J.S.A. 56:1 to -31 (FPA) provides that a franchisee may bring an action "to recover damages sustained by reason of any violation of this act and, . . . if successful, shall also be entitled to the costs of the action including but not limited to reasonable attorney's fees." N.J.S.A. 56:10. In Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc., 408 N.J. Super. 461 (App. Div.), certif. denied, 200 N.J. 502 (2009), this court considered whether that section of the FPA authorized an award of expert fees and concluded it did not. Id. at 481-83. The court noted, "Our State's jurisprudence . . . has been marked by a strong adherence to the general prohibition of expert fee awards in the absence of manifest statutory authority," id. at 482. The court acknowledged the general rule that "litigants bear their own expenses for fees and costs, except where specifically authorized by statute, rule, or agreement." Id. at 481-82 (quoting Josantos, 326 N.J. Super. at 47-48).

The authorization required must be specific and is not provided by statutory language that allows a successful plaintiff to recover "reasonable costs of suit." In Josantos, the court considered the scope of the fee-shifting provision of the Law Against Discrimination, N.J.S.A. 56:8-19, and determined "expert witness fees are not encompassed within the phrase 'reasonable costs of suit.'" 326 N.J. Super. at 47. Similarly, awards of expert fees have been denied to prevailing plaintiffs under the no-fault auto insurance statutes. Velli, 257 N.J. Super. at 309-10; Helton v. Prudential Prop. & Cas. Ins. Co., 205 N.J. Super. 196, 204 (App. Div.1985). In contrast, the Legislature did provide express authorization for recovery of such fees in N.J.S.A. 39:6A-34 (expert fees recoverable in de novo trial after rejected automobile arbitration award) and N.J.S.A. 54:51A-22 (expert fees recoverable as litigation costs by prevailing taxpayer).

None of the contract provisions cited by plaintiffs provide such express authorization for the award of expert fees.

The trial court awarded $45,860.70 for deposition and trial support services and for court reporting at trial. Although N.J.S.A. 22A:2-8 does allow a party entitled to an award or allowance of costs the "costs of taking depositions when taxable, by order of the court," our case law makes clear that depositions should not be routinely taxed as expenses. To the contrary, our cases make clear that deposition

costs are not generally recoverable as taxed costs. See Hirsch., 110 N.J. at 649. They should not have been awarded here.

C. Plaintiffs Failed To Prove The Fees They Sought Were Reasonable.

The party who seeks an award of attorneys' fees bears the burden of proving they are reasonable. Green, 215 N.J. at 455. Although plaintiffs prevailed, their victory fell far short of their objective, raising significant doubt regarding the reasonableness of the amount of their attorney fees.

The trial court explicitly acknowledged plaintiffs' objective, stating, "This case is about the buyout." 24T47:4. All the proofs, legal work and expenses presented were to support the claim that Mehta had been fraudulently induced to agree to an artificially depressed value for plaintiffs' interests in MRL and Chemtech. Plaintiffs contended they were entitled to nearly $10 million in compensatory damages. 25T85:7-8. The court rejected this claim and dismissed the Counts 9 and 10, which alleged "fraud in the inducement." 24T31:2-10.

The compensatory damages awarded was $2,872,358.93, Da723 less than one-third of the amount plaintiffs sought. Clearly, this result represents only "limited relief" when compared to the damages plaintiffs set out to prove in their failed claim of fraudulent inducement. Under the circumstances, it was appropriate

for the court to reduce any award to an amount that "was reasonable in relation to the actual relief obtained." N. Bergen Rex Transp., 158 N.J. at 572.

In conclusion, defendants fully appreciate that "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). However, "such determinations are not entitled to any special deference if the judge 'misconceives the applicable law, or misapplies it to the factual complex." Porreca v. City of Millville, 419 N.J. Super. 212, 224 (App. Div. 2011) (citation omitted). That exception to deference exists here.

The trial court's flawed interpretation and application of the cited contract provisions and application constituted error as a matter of law, warranting reversal by this court.

POINT III

PLAINTIFFS FAILED TO PROVE THEIR CONVERSION CLAIMS (24T 47:18-50:9)

After rejecting plaintiffs' fraudulent inducement claims, the trial court stated its belief that the conversion claims were "paramount." (24T52:10-11). Plaintiffs alleged that defendants "converted monies belonging to Plaintiffs in the form of unauthorized withdrawals, expenditures and expense payments from" MRL (Count 5) and Chemtech (Count 6). Da42-43. However, the proofs fail as a matter of law.

Conversion is a common law tort that applies to 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. denied, 199 N.J. 133 (2009). Historically, the tort was applied to chattels, rather than to money. Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div. 2009). This distinction is not an arcane vestige of the common law, but rather, a purposeful distinction. "[C]ourts have restricted its application to money to avoid turning a claim based on breach of contract into a tort claim." Id. at 455. To serve that purpose, when a conversion of money is alleged, it is "essential that the money have belonged to the injured party and that it be identifiable," "as a specific fund set aside for the owner."

Id. at 455-56. See also, Meisels v. Fox Rothschild LLP, 240 N.J. 286, 304 (2020); Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 431 (App. Div. 2011).

The judgment on the conversion counts is fatally flawed as a matter of law for three reasons: (1) The money allegedly converted did not "belong" to a plaintiff and was not a discrete "identifiable" sum. (2) The economic loss doctrine prohibits the recovery in a tort action of economic losses arising out of a breach of contract. (3) Plaintiffs failed to prove the elements of demand and repudiation essential to a conversion claim.

A. Plaintiffs failed to prove the money that was allegedly converted "belonged" to them and was "identifiable."

The conversion claims here allege that defendants made "unauthorized withdrawals, expenditures and expense payments" from funds belonging to MRL and Chemtech Da42-43. However, the lawsuit was not initiated to recoup such sums for MRL and Chemtech. Rather, plaintiffs Divyajit Mehta and DGNS sought damages "in an amount, as yet undetermined, but . . . not less than $7,500,000.00" they allegedly suffered. Da42-35,51-53.

These allegations are properly viewed within the context of the litigation as a whole. As the trial court observed, "This case is about the buyout." 24T47:4. The trial court elaborated:

> This is a situation where the plaintiff alleges he was fraudulently induced to sell respective ownership interest in Chemtech and MRL, which ultimately was

> approximately $6.3 million, by fraudulently manipulating the company's books and records, which the theory is, in turn, reduced the company's value. Therefore, the buyout was for a lower price than would have been warranted had the books been accurate.
>
> [24T7:15-23]

The trial court properly rejected these fraud claims. 24T31:2-10.

Failing in their primary objective, plaintiffs sought to characterize the various transactions as conversions. However, rather than seeking a return of the "unauthorized" distributions to MRL and Chemtech, plaintiffs contended they were damaged by the distributions, and that Mehta specifically was entitled to receive sums equal to the distributions at issue. This argument does not equate in law with proof that the funds in question were "identifiable" as "specific funds set aside for" plaintiffs Divyajit Mehta or DGNS.

Notably, the trial judge's findings on the conversion counts also fail to reflect that any of the sums allegedly converted were discrete, "identifiable" sums that "belonged" to either plaintiff. To the contrary, each of the court's findings on the conversion counts identifies the moneys as coming from MRL's or Chemtech's funds, with no designation of the funds as belonging to either plaintiff:

- "Mr. Prajapati concluded that, based on his review of Chemtech and A3I, that Mr. Hedvat diverted a Chemtech customer 432 Owners Corp., also known as Arbor Hills, to his own company A3I from 2013 onward, resulted in 629,217.85 of payments that were diverted." 24T34:23-35:3

- "December 26, '08, Mr. Hedvat transferred 2 million dollars out of the MRL's Merrill Lynch checking account. . . . So these resulted in negative balance in the stockholder's loan account and somehow the accounting was rectified. But, again, it was also contended that part was used to purchase Jersey City and then there was a series of four deposits. There was a dispute over whether that was repayment or not. There really wasn't any connection between the 2 million from December in '08 and then the subsequent monies coming in." 24T35:13-36:10

- "I think another one, 500,000 in disburse funds from MRL Bank of America's account November 2013, which was deposited into an account that was testified being a personal account of defendant. It wasn't in Quickbooks. In November of '14 there was a correction made the next year. It was Schedule 27 of Mr. Prajapati's report. It was labeled "bank activity not recorded, 500,000," and there was some notion that this was taken and Mr. Mehta agreed to it. There's really no proof of that and that he would have been allowed to take the same amount. Well, if that's true, I guess he could take it now." 24T36:11-22

- "Then there's the series of these smaller transactions. Fifty thousand transfer [from Chemtech's MR Line of credit] on December 5th, 2014, again into, I believe the same – well, it was a different account, actually, which Mr. Prajapati testified was an account belonging to A3I, a company controlled by the Hedvats. Mr. Mehta didn't get an equal $50,000 distribution, or there's no proof of it." 24T36:23-37:4

- "There was [a $50,000 transfer] on September 8, 2015 from [Chemtech's] MRL line of credit to 0319 checking account, which was identified belonging to the Hedvats; 90,000 [from Chemtech's MR Line of Credit] on October 7, 2015, again going into account 0319, which is identified as belonging to the Hedvats; 50,000 on October 28, 2015 from Chemtech's account to A3I account ending 8309; 75,000 on August 22nd, 2014, which went from [Chemtech's] MRL line of to credit account to A3I account ending in 8309. And, again, in this Court's mind, it wasn't identified that a similar distribution went to Mr. Mehta." 24T37:5-16

- "[T]here was a 2.3 million dollar transfer on November 26th from MRL to A3I's account ending in 8309 again, and that was schedule 21. . . . [I]t was testified to that somehow this money was used to purchase DGNS's interest

in MRL. Rather than use A3I, used MRL funds in order to purchase DGNS's interest." 24T37:17-23

[Emphasis added.]

Thus, the proofs failed to show and the trial court failed to make a specific and necessary finding as to each transaction that the sum allegedly diverted actually "belonged" to a plaintiff or was "identifiable" as a fund set aside for any plaintiff, as opposed to general corporate funds. Rather, the court adopted plaintiffs' false premise that the transfer of funds to defendants without a corresponding distribution to Mehta somehow satisfied the elements of a conversion. It was error to find the conversion claims had been proven on this record.

B. The economic loss doctrine prohibits the recovery in a tort action of economic losses arising out of a breach of contract.

The linchpin to the contention that the funds "belonged" to plaintiffs is the argument that, pursuant to the agreements, Mehta was entitled to receive an amount equal to any distribution made to Hedvat. This argument fails to establish the necessary proof that any fund actually belonged to a plaintiff; it can only support a claim for potential entitlement in the event a breach of contract is proven.[12] Therefore, the argument is clearly rooted in the breach of contract claims alleged in Counts 7 and 8 of the amended complaint. See, Count 7 (alleging MRL and A3I

[12] The nebulous nature of the claimed entitlement is further apparent in the fact that Mehta is not a party to the MRL Operating Agreement.

breached their obligations under the MRL Operating Agreement "to share profits according to the percentage of the member's respective membership interests") Da43.

A dispute that so "clearly arises out of and relates to [a] contract and its breach should be resolved pursuant to contract law rather than tort law." See Wasserstein v. Kovatch, 261 N.J. Super. 277, 286 (App. Div. 1993). Indeed, "the economic loss doctrine, which evolved as part of the common law as an effort to establish the boundary line between contract and tort remedies," Dean v. Barrett Homes, Inc., 204 N.J. 286, 295 (2010), "prohibits the recovery in a tort action of economic losses arising out of a breach of contract." Sun Chemical Corp. v. Fike Corp., 243 N.J. 319, 328, n.2 (2020); see also, Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002).

Accordingly, plaintiffs may not use the vehicle of a conversion tort to recover any claimed economic loss that arose from alleged breaches of the contracts here.

C. Plaintiffs failed to prove the elements of demand and repudiation essential to a conversion claim.

Plaintiffs elected to pursue conversion claims, rather than file a derivative suit on behalf of the corporations whose funds were allegedly converted.[13] Had they

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[13] "A corporation is regarded as an entity separate and distinct from its shareholders," Tully v. Mirz, 457 N.J. Super. 114, 123 (App. Div. 2018) (quoting Strasenburgh v. Straubmuller, 146 N.J. 527, 549 (1996)). "It is a principle of corporation law that . . .

done so, they would have been required – prior to commencing the derivative suit -- to issue a demand upon Chemtech to take appropriate action and then allow ninety days to elapse, unless notified the demand was rejected or futile. N.J.S.A. 14A:3-6.3. Their choice to allege the tort of conversion did not relieve them of the obligation to make a demand and prove that it was repudiated before filing suit.

To prove conversion, the injured party must "establish that the tortfeasor exercised dominion over its money and repudiated the superior rights of the owner." Bondi, 423 N.J. Super. at 432. The repudiation element requires the injured party to make a demand "at a time and place and under such circumstances such that the defendant is able to comply and any refusal to comply must be wrongful." Ibid.

The importance of the demand and repudiation elements as threshold requirements for the tort of conversion is evident in light of the fact that other elements regarding knowledge and intent commonly associated with torts are not required. For example, the tort of conversion does not "require that defendant have an intent to harm the rightful owner, or know that the money belongs to another." Chicago Title, 409 N.J. Super. at 456. As the court explained:

> The elements of good faith, intent or negligence do not play a part in an action for damages in conversion . . . . While an intent to convert consummated by some positive act, is necessary to constitute conversion, it is very generally held that it is not essential to conversion that the

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suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation." Strasenburgh, 146 N.J. at 549 (citation omitted).

> motive or intent with which the act was committed should be wrongful, or willful or corrupt. . . .
> The general rule is that one who exercises unauthorized acts of dominion over the property of another, in exclusion or denial of his rights or inconsistent therewith, is guilty of conversion although he acted in good faith and in ignorance of the rights or title of the owner. The state of his knowledge with respect to the rights of such owner is of no importance, and cannot in any respect affect the case.
>
> [Id. at 456-57 (citations omitted).]

The demand and repudiation requirements thus provide a valuable demarcation between conduct that the accused tortfeasor may reasonably believe he is entitled to engage in and conduct that exposes him to tort liability. In this case, the plaintiffs failed to make any demand as required by both principles of tort law and N.J.S.A. 14A:3-6.3.

Accordingly, their conversion claims fail as a matter of law.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING PLAINTIFFS' EXPERT TO PRESENT NET OPINION TESTIMONY AT TRIAL. (1T51:21-56:22)

Before the trial even began, the trial court observed, "This case is about the buyout." 1T47:4. It was evident that, despite their receipt of $6.3 million, plaintiffs' overarching goal was to prevail on their claim they had been fraudulently induced to sell their interests in MRL and Chemtech for artificially depressed values. They claimed damages of nearly $10 million, based upon the opinion of their expert, Hemant A. Prajapati. There was no business evaluation conducted to support that contention. As Prajapati freely conceded, he was not retained to perform one. 8T38:13-16. Nonetheless, he opined that there were transactions in the companies' books and records he considered questionable. He set these forth on various schedules and compiled a "summary of damages." 7T116:10-117:12. His theory was that the amount of each questioned disbursement should be added, dollar for dollar, to the net value of the companies, resulting in a loss of nearly $10 million to plaintiffs.

Defendants filed a summary judgment motion to limit the expert testimony of plaintiffs' expert on the grounds that (1) he was not qualified to offer expert opinions on business valuation and damages and (2) a number of his conclusions constituted net opinions. Defendants explicitly asked the court to exclude Prajapati's opinion

regarding the intent of the defendants, a subject generally ill-suited for expert opinion testimony. 1T34:24-36:2. The motion was denied. 1T51:21-56:22.a Defendants continued to press their objections to Prajapati's net opinion testimony at trial. 8T69:24-25, 70:7-10, 71:9-12, 102:4-6, 119:25-120:5; 9T18:20-22, 21:17-19, 35:2-4.

The trial court ultimately rejected Prajapati's premise that a value could be ascertained by merely adding the amounts of the transactions he questioned to the sale price agreed upon by the parties, ending plaintiffs' quest for a $10 million recovery on their fraudulent inducement claims. See, 24T23:8-28:15. Nonetheless, defendants were severely prejudiced by the court's decision to permit Prajapati to give testimony that included improper assessments of defendants' motives regarding certain transactions because that net opinion testimony was the basis for the trial court's judgment against defendants. See, Point V. The court selected transactions from Prajapati's summary of damages and, accepting Prajapati's conclusory testimony that each was "unauthorized," considered them evidence of the remaining claims in plaintiffs' complaint. 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 upon Prajapati's net opinion testimony in reaching its conclusions.

Defendants' motion to limit Prajapati's testimony required the trial court to determine whether Prajapati's opinions that transactions were made with the intent to harm plaintiffs constituted an inadmissible net opinion. However, the trial court failed to do so, stating he was "certainly not going to preclude their expert before the trial starts." 1T55:10-11. If he had done so and properly limited the expert's opinion testimony, a major defect in the proceedings would have been averted.

Defendants do not challenge Prajapati's credentials as an expert in the area of accounting and acknowledge "[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court," Townsend, 221 N.J. at 52. However, "the rules governing expert opinion testimony do not allow the wholesale admission of every expert's opinion, even those of qualified experts opining in an area appropriate for expert opinion." Polzo v. Cnty. of Essex, 196 N.J. 569, 582 (2008).

The permissible bases of opinion testimony by experts are set forth in N.J.R.E. 703, which requires that an expert opinion be based on "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject." State v. Townsend, 186 N.J. 473, 494 (2006) (citation omitted). The corollary of that rule is the net opinion rule, which "forbids the admission into

evidence of an expert's conclusions that are not supported by factual evidence or other data." Ibid. It serves as a "prohibition against speculative testimony." Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997). Thus, "bare conclusions, unsupported by factual evidence, [are] inadmissible." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

The application of the net opinion rule is straightforward: "A judge should not admit expert testimony 'if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div. 1990).

Experts must "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1991). That was not the case here.

In this case, Prajapati assumed that, because he questioned certain transactions in the books and records of the entities, the transactions were orchestrated by defendants, without any authorization from plaintiffs, to wrongfully divert funds. The record reveals that this opinion is no more than a "mere guess or conjecture."

Prajapati was retained for the express purpose of reviewing "Exhibit S," (P-50), the schedules prepared during the negotiations between Mehta and Hedvat, "to

verify the validity of that spreadsheet and to determine if it was false and misleading." 7T82:17-83:11. He performed that task by reviewing QuickBooks data files and bank statements for Chemtech, Inc, MRL, A3I, VIP, EFJ Realty, Chemtech, LLC, Cubic 29 and the entities in India, E-Chem and Chem-e-tech. 7T101:9-103:1; 105:22-106:1. He opined that the values on Exhibit S "false and mislead" based his conclusion that there were inconsistencies between books of accounts, Exhibit S and . . . between the books of accounts and the tax returns of the entities in question." 7T114:3-7.

Prajapati's report reveals he accepted the allegations of the complaint as true:

"I understand that there are allegations of unauthorized expenditures and disbursements from the U.S. entities during the afore mentioned periods that in the aggregate exceed $7.5 million. If these allegations are true; the unauthorized expenses should not have been taken as deductions . . . ." 8/30/21 report at 5 (emphasis added). He surmised that each transaction he questioned had a negative impact on the value of the companies sold and concluded "Exhibit S was inaccurate and misleading. As a result, the Plaintiff was induced to sell at significantly depressed values and incurred damages in excess of $10 million . . . ." Da781.

But Prajapati failed to explore whether there was a factual basis for labeling specific transactions he cited as "unauthorized."

Henry Fuentes, the accounting expert called by the defense, testified "it happens all the time" that questions arise as to specific transactions when reviewing accounts. 17T34:4-25. The typical means of resolving the questions is to ask the client or, if an opposing party cannot be asked directly, to submit questions to go through the attorneys to get an explanation of what is being questioned. 17T35:1-13. Fuentes stated those steps were necessary "before you draw a final conclusion . . . that there was an intentional misleading here." 17T22-36:6.

The approach described by Fuentes is simply common sense. Yet, Prajapati failed to do any of that before adopting plaintiffs' allegations as fact. He did not speak to Myers, Hedvat or any of the bookkeepers for MRL or Chemtech about any of the transactions he questioned. 9T125:3-126:15. He did not interview any vendors to determine if expenses in QuickBooks he labeled "fictitious" were valid. 10T43:16-21.

If, for example, Prajapati had spoken to Hedvat or submitted questions through attorneys about the Arbor Hills transactions, he would have learned that Hedvat and Mehta had an agreement that Hedvat would be paid a portion of his salary from Chemtech through A31, which would be accomplished by billing the Arbor Hills client. On cross-examination, Prajapati conceded that such an agreement would change his opinion that it was improper for Hedvat to receive these funds. 10T89:10-90:14.

Prajapati also acknowledged he lacked knowledge regarding facts necessary to support some of those conclusions. For example, although he concluded that certain journal entries were made for the purpose of diverting funds, he conceded he could not tell what the purpose of the entries was. 10T25:6-23. He found fault in the Chemtech overpayment accounts but admitted he did not know for a fact what the purpose of the accounts was, 10T26:12-20, and did not know for a fact that the Chemtech customer overpayment account was used to divert money. 10T64:4-9. He labeled transactions in the MRL Bank of America account as "fictitious," but admitted, "I cannot tell definitively" that the transactions were fictitious. 10T61:5-63:5. He also conceded making errors, such as including in his damages summary payments that were actually made to plaintiffs Mehta and DGNS. 10T79:2-80:22

And, as to his sweeping conclusion that the transactions were "unauthorized," Prajapati admitted that a premise for his opinions was his "understanding that Mr. Mehta was not involved in the finances of Chemtech." 9T134:13-18. Yet, he failed to make even rudimentary efforts to test that premise. He did not review Mehta's certifications for DBE status, which state that Mehta and Hedvat had joint responsibility for financial decisions. 9T1344:24-135:21. He did not review or consider Mehta's answers to interrogatories or deposition testimony. 9T133:3-11. Similarly, he did not review or consider Myers' affidavit in which the accountant stated that, based upon his years of experience doing accounting work for Mehta and

Hedvat, "Divyajit and Emanuel were aware and approved of all significant financial transactions that are reflected on Chemtech and MRL's financial books and records each year, including intercompany transfers and loans, shareholder/member loans and expenses processed and reimbursed." 9T133:12-16.

In short, Prajapati's opinion that transactions were "unauthorized" and conceived with wrongful intent is so devoid of factual support that it might be considered willful ignorance of the facts. Certainly, his assumptions do not rise above mere conjecture.

While the full measure of the defects in Prajapati's opinion was more clearly evident at trial, the absence of factual support for his opinion was amply demonstrated in the summary judgment motion. Accordingly, the trial court erred in failing to "squarely address" the evidence question and denying the motion to exclude such net opinion from Prajapati's testimony.

As set forth in Point V, the court exacerbated this error by relying extensively, if not exclusively, upon Prajapati's unsupported opinion that specific transactions were "unauthorized." "[A] party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record." Townsend v. Pierre, 221 N.J at 55; see also, Polzo, 196 N.J.at 583. It was, therefore, reversible error for the court

to find plaintiffs proved their claims based upon Prajapati's net opinion that transactions were "unauthorized."

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ENTERING JUDGMENT FOR PLAINTIFFS ON THE BREACH OF CONTRACT AND QUASI-CONTRACT CLAIMS. (24T50:10-17)

The heart of plaintiffs' contract claims was the opinion of their expert, Prajapati, who questioned various transactions in furtherance of their failed fraudulent inducement claims. The trial court observed that all the questioned transactions could be called "a diversion or misappropriation, or just sloppy bookkeeping." 24T33:23-25. The record fails to establish anything more than sloppy bookkeeping.

A. The Breach of Contract Claims

There are four essential elements to a breach of contract action: (1) the parties entered into a contract containing certain terms, (2) plaintiffs did what the contract required them to do, (3) defendant did not do what the contract required, and (4) defendant's breach or failure to do what the contract required, caused a loss to the plaintiff. See, Globe Motor Co. v. Igladev, 225 N.J. 469, 482 (2016); Model Jury Charge (Civil), § 4.10A "The Contract Claim—Generally" (May 1998).

To support its conclusions that there were breaches of the MRL Operating Agreement and the Chemtech Stockholders Agreement, 24T50:10-17, the court was

required to find that each of these elements was proven. It did not do so. And, the fact is the court could not do so because plaintiffs failed to prove these elements.

Count 7 alleged that MRL and A3I breached their obligations to DGNS under the MRL Operating Agreement. The alleged breaches included obligations "to share profits according to the percentage of the member's respective membership interests and for decisions and actions of MRL to be determined by a majority in interest of MRL's member[s]." Da43.

The parties to the MRL Operating Agreement were DGNS and A3I. Nonetheless, the trial court stated "Mr. Hedvat, A3I, [and] Fariba, breached their obligations" under the agreement and made the following findings :

> So withdrawals were made of capital from the company without approval and authorization from . . . the other shareholder, Mr. Hedvat.[14] He didn't get to share in all the profits and he didn't get the distributing and receiving and/or causing to be distributed or received by MRL and A3I more than their share of the profits. And these are decisions that should have been made together. And these diverting of the funds were detrimental to the interest.
>
> [24T50:18-51:9.]

As a preliminary matter, the Hedvats could not, as a matter of law, "breach" a contract when they were not parties to the contract. Globe, 225 N.J. at 482.

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[14] It is assumed that the court misspoke and intended to identify "the other shareholder" as plaintiff Mehta.

Turning to the court's findings, the foundational premise was that Mehta did not authorize the transactions in question or share in the profits. Again, it must be noted that it was DGNS, not Mehta, who was the other party to this contract. Moreover, despite the threshold premise that these transactions were unauthorized, Mehta did not testify that this was the case.

The trial court did not articulate findings regarding the absence of approval for any particular transaction or reference any evidence that showed DGNS failed to receive its share of profits as to the three transactions related to MRL that it included as support for the judgment:

- Transfer of $2 million from MRL's Merrill Lynch checking account to Emanuel Hedvat's bank account on December 26, 2008 (24T35:8-36:10)
- Transfer of $500,000 from MRL's Bank of America account to Emanuel and Fariba Hedvat's account on November 5, 2013[15] (24T36:11-22)
- Transfer of $2.3 million from MRL's bank account to A3I's account on November 26, 2014. (24T37:17-23)

Count 8 alleged breach of contract against Hedvat and Chemtech, specifically identifying a failure to abide by "the requirement that the operation of the Chemtech business and the expenditure of Chemtech funds be made upon the majority vote of the Chemtech stockholders." Da44.

The court made the following findings regarding the Chemtech contract:

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[15] As noted in Point I, the December 2008 and November 2013 transactions, as well as the Arbor Hills transactions in 2013 are time-barred.

> And similarly, with the same applying to the Chemtech Stockholders Agreement, that the 2007 agreement indicates that expenditure of funds should be a vote of the stockholders. So expending company funds without authorization, failing to maintain sufficient cash to cover expenses, which I don't think is really applicable; distributing profits; having failed to maintain sufficient cash – I mean, they're just citing provisions and distributing profits inequitably, you know, which does.
>
> [24T10-21.]

The court did not attribute any particular breach to a specific defendant, ultimately finding all defendants liable, despite the established principle that corporate officers and employees cannot be charged individually for a breach of contract by the corporation. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303-05 (2002); Vosough v. Kierce, 437 N.J. Super. 218, 233 (App. Div. 2014). Again, the trial court failed to identify evidence showing the expenditure of funds was unauthorized or that any distribution was inequitable regarding the transactions related to Chemtech that it included in the judgment:

- Transfer of $629,217.85 from Chemtech's customer Arbor Hills to A3I between 2013-2015 (24T34:20-35:7)
- Transfer of $50,000 from Chemtech's MR Line of Credit account to A3I's bank account on December 5, 2014 (24T37:1-4)
- Transfer of $50,000 fu rom Chemtech's MR Line of Credit account to Emanuel and Fariba Hedvat's account on September 8, 2015 (24T37:5-7)
- Transfer of $90,000 from Chemtech's MR Line of Credit account to Emanuel and Fariba Hedvat's account on October 7, 2015 (24T37:7-9)
- Transfer of $50,000 from Chemtech's bank account to A3I's bank account on October 28, 2015 (24T37:9-11)

- Transfer of $75,500 from Chemtech's MR Line of Credit account to A3I's bank account on August 22, 2014 (24T37:11-13)

1. Plaintiffs failed to prove a breach of contract based on any of the subject transactions.

Plaintiffs did not present evidence from a fact witness that these transactions were unauthorized. Instead, as the court observed, plaintiffs identified the transactions he incorporated in the judgment "through Mr. Prajapati." 24T34:20-37:23. It is evident that the court adopted and relied upon conclusions proffered by plaintiffs' expert, Prajapati as if they were proven facts. See 24T34:23-35:3, 36:16-17, 36:23-37:4.

In fact, the "support" for all but three of the MRL and Chemtech transactions appears to be the extremely limited testimony Prajapati gave – over objection – during his second re-direct examination. 11T11:1-13:3. As defense counsel argued, the testimony amounted to "cherrypicking random fund transfers that don't relate to anything that's in Mr. Prajapati's report." 11T24:1-3. He could have added that the transactions did not relate to anything in Mehta's testimony, either.

Mehta, the only fact witness presented by plaintiffs, did not testify about any of these transactions. Instead, at the very end of his testimony on direct examination, Mehta gave the following testimony in response to questions that spoon-fed him answers:

> Q. And has Mr. Prajapati calculated a damage claim on your behalf?

A. Yes.

. . .

He calculated around $16 million total.

Q. And of that $16 million, what does that represent, Mr. Mehta?

. . .

A. The $16 million is total amount between Chemtech and MRL that Emanuel took that money.

Q. And is it your claim that you are entitled to one half of that sum?

A. Yes.

Q. And is that predicated on the fact that you were a fifty percent shareholder in each of MRL and Chemtech?

A. Yes, I was 51 percent shareholder at Chemtech and percent shareholder of – DGNS was 50 percent shareholder of Mountainside Realty.

[4T80:21-81:20.]

Recalled by the defense, Mehta reiterated his complete reliance upon his expert's opinion:

Q. Mr. Mehta, isn't it true that you testified during trial that P-48 and P-50 are fraudulent, right?

A. According to my expert, yes.

Q. And that is your contention in this lawsuit, right?

A. Yes, it is. My expert told me that this is fraudulent.

[21T7:8-14.]

2. The conclusions of plaintiffs' expert constituted net opinions and were erroneously relied upon by the trial court as proven facts.

Prajapati was retained to challenge the accuracy of the values assigned to the parties' interests in support of plaintiffs' primary objective – to convince the court that they had been fraudulently induced to accept a buyout number almost $10 million lower than the actual value of the companies. He recognized the threshold question for liability contained in the plaintiffs' allegations: "I understand that there are allegations of unauthorized expenditures and disbursements . . . that in the aggregate exceed $7.5 million." Da781. But Prajapati failed to explore whether there was a factual basis for labeling specific transactions as unauthorized. As set forth in Point IV, his conclusions to that effect constituted no more than a net opinion.

As noted in Point IV, Prajapati failed to develop any facts to support his overarching conclusions that the subject transactions were unauthorized. Further review of Prajapati's testimony shows additional weaknesses in his analyses.

For example, Prajapati characterizes a December 26, 2008 transfer of $2 million as a diversion of funds that "would have had a net impact of $2 million" on the value of MRL. 8T131:19-23. He does not provide any support for a conclusion

that the expense was unauthorized and, indeed, relates this transaction to MRL's purchase of the 29 Cottage Street property in Jersey City, 8T128:25-131:10.

As Prajapati acknowledged, the $2.3 million transfer from MRL to A3I on November 26, 2014 was made after the parties had agreed upon the amounts DGNS would receive for its interest in MRL and was related to A3I's purchase of DGNS's interest. 8T124:16-125:8. Even if the fraudulent inducement claims had not been rejected, a transfer that occurs after a price was agreed upon could hardly be pertinent to the claim that the transaction was used to convince plaintiffs to accept a lower value for their interests. Turning to the breach of contract claims, no evidence was presented that this transaction occurred without plaintiffs' knowledge or approval.

Despite the lack of evidential support for Prajapati's labeling the transactions "unauthorized," the court relied extensively, if not exclusively, upon his conclusions. See, 24T15:12-21 ("according to Mr. Prajapati, [some tax returns] showed significant unexplained-type transactions"; "He discovered conduit accounts. He discovered what he determined fake accounts."); 24T19:23-20:21 (emphasis added); ("quoting from his testimony"); 24T33:14-25; 24T34:20-37:23.

The circular nature of plaintiffs' "evidence" is thus complete. The premise for Prajapati's opinion was that there were "allegations of unauthorized expenditures and disbursements" and, in turn, Mehta testified that the representations on the negotiation schedules were fraudulent because his expert told him so. Since no

factual evidence was presented to support Prajapati's conclusory statements that these transactions were unauthorized, his net opinions fail to provide the requisite evidence to support a judgment based on breach of contract. Absent evidential support for the conclusion that the subject transactions were unauthorized, they are not evidence of any breach of contract. As a result, the judgment must be reversed.

B. Unjust enrichment and breach of covenant of good faith and fair dealing claims.

In Count 11, plaintiffs alleged that Emanuel Hedvat, Fariba Hedvat, Chemtech, MRL and A3I breached the covenants of good faith and fair dealing implied in the Chemtech Stockholder Agreement and the MRL Operating Agreement by "causing Chemtech and MRL to historically and continually issue false financial records, which Defendants knew Plaintiffs would rely on at the dates of the SPA and Purchase Agreement, while at all times concealing the falsity of the financial records from Plaintiffs." Da50-51.

It is evident that this allegation relates to plaintiffs' failed contention that defendants used "false" representations regarding the values of MRL and Chemtech to fraudulently induce them to accept a depressed value for their interests in those entities. As a result, the trial court should have dismissed Count 11 when it rejected and dismissed the fraudulent inducement claims.

To prove a breach of the implied covenant of good faith and fair dealing, a plaintiff must prove that "the defendant, with no legitimate purpose: 1) acted with bad motives or intentions or engaged in deception or evasion in the performance of contract; and 2) by such conduct, denied the plaintiff of the bargain initially intended by the parties." Model Jury Charge (Civil), § 4.10J "Implied Terms – Covenant of Good Faith and Fair Dealing" (December 2011).

The evidence failed to establish these essential elements and the trial court did not make the requisite findings that such elements were proven. Rather, the court spoke only of conduct that equated with a breach of contract. 24T50:18-51:21. And, again, the linchpin for the court's ruling was that the challenged transactions were unauthorized, a premise that plaintiffs failed to prove.

Count 12 alleged that Chemtech LLC, Cubic 29, EFJ and VIP were unjustly enriched at Mehta's expense as a result of "illegal transfers"[16] made by Emanuel Hedvat. Count 13 alleges that the same defendants were unjustly enriched at DGNS's expense as a result of such "illegal transfers." The damage allegedly suffered by each plaintiff is that, at the time each plaintiff sold his/its shares in the entity, plaintiff "expected full and complete remuneration for the sale of its shares and the receipt and retention of the monies to which [plaintiff] was entitled . . . ." Da52-53.

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[16] No proof was even offered that any transfer here was "illegal."

It is further evident that these allegations are similarly rooted in plaintiffs' failed claims of fraudulent inducement. As a result, this count also should have been dismissed when the fraudulent inducement claims were dismissed.

Instead, the trial court referenced its findings that there had been unauthorized withdrawals in which Mehta did not gave his fair share and stated, "all of this would result in unjust enrichment. It's not fair if one gets one thing and the other gets the other thing. . . . I do believe that Mr. Mehta was shortchanged on certain monies." 24T51:1-52:4.

A claim for unjust enrichment requires that (1) the defendant be enriched (2) at the expense of the plaintiff, and (3) it is against equity and good conscience to permit the defendant to retain what plaintiff seeks to recover. See VRG Corp. v. GKN Realty Corp.. 135 NJ. 539, 554 (1994). In addition, a plaintiff must show that "it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016) (quoting Iliadis v.Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007).

Again, the threshold premise for the court's conclusion was that the subject transactions were unauthorized. Just as the failure of proof defeats plaintiffs' breach of contract claims, so too, the unjust enrichment and breach of the covenant of good faith and fair dealing must be reversed.

POINT VI

THE TRIAL COURT ERRED IN ENTERING THE JUDGMENT AGAINST ALL DEFENDANTS, JOINTLY AND SEVERALLY. (25T63:23-25, 79:13-80:13)

Defendants objected to plaintiffs' request that all defendants be held jointly and severally liable for all damages on all counts. In rejecting defendants' argument, the trial court stated, "The fact of the matter is, joint and several liability is presumed in the law. Several liability is the exception generally, not the rule." 25T63:23-25.

This is a patently erroneous statement of the law.[17] So, too, is the justification the court provided for imposing joint and several liability. The court stated that, because all the corporate entities were "controlled by the same person," it would be "inequitable to the plaintiff" 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." 25T79:13-80:13.

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[17] The apparent source for the court's misstatement is a passage taken out of context from Bendar v. Rosen, 247 N.J. Super. 219 (App. Div. 1991), in which the court discredited the trial court's reliance upon Hill v. Macomber, 103 N.J. Super. 127, 232 (App.Div.1968) ("[Hill] does not stand for the proposition that an indivisible injury cannot be allocated between tortfeasors. Rather, it stands for the principle that 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."). This phrase, which speaks of the allocation "between tortfeasors," does not support the application of joint and several liability to all defendants here.

It hardly needs to be argued that the trial court's role here was to enter a judgment reached by applying the law to the facts, not to fashion a judgment that would be easier for plaintiffs to collect. Even if the court harbored a suspicion that defendants might move funds to avoid collection, the Uniform Fraudulent Transfer Act (UFTA), N.J.S.A. 25:2-20 to -34, provides "broad" remedies to a successful claimant. See, Banco Popular N. Am. v. Gandi, 184 N.J. 161, 176 (2005). The court overstepped in its effort to secure collection of the judgment by plaintiffs.

Quite remarkably, the trial court found all defendants liable for all damages awarded on all counts, without regard to whether a defendant was even named in the count. In fact, no defendant – not even Emanuel Hedvat – is named as a defendant in all the counts in which the court entered judgment for plaintiffs.[18] It is further evident that an individual defendant's liability must be proven before a judgment may be entered against that defendant. A review of the essential elements of each cause of action alleged shows clearly that plaintiffs did not prove and the trial court did not find the requisite elements against all defendants.

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[18] The defendants and the counts in which judgment was entered for plaintiffs are as follows: MRL (Counts 5, 7, 11); Chemtech, LLC (Counts 5, 6, 12, 13); Cubic 29 (Counts 5, 6, 12, 13); EFJ (Counts 5, 6, 12, 13); VIP (Counts 5, 6, 12, 13); A3I (Counts 7, 11); Emanuel Hedvat (Counts 8, 11); Chemtech (Counts 8, 11); Fariba Hedvat (Count 11).

A. Conversion claims

Counts 5 and 6 alleged the tort of conversion against MRL (Count 5 only). Chemtech (Count 6 only) and Chemtech LLC, Cubic 29, EFJ and VIP (Counts 5 and 6). Da42-43.

It is a "general rule of tort law" that "liability must be based on personal fault." Walker v. Choudhary, 425 N.J. Super. 135, 149 (App. Div.), certif. denied, 211 N.J. 274 (2012). N.J.S.A. 2A:53A-1 defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury." Yet, the judgment was entered against defendants who are clearly not liable for the torts alleged in Counts 5 and 6.

B. Contract claims

Plaintiffs alleged a breach of contract claim against MRL and A3I based upon the MRL Operating Agreement in Count 7 and sought a judgment against those entities "of not less than $7,500,000.00." Da43-44. Count 8 alleged that Emanuel Hedvat and Chemtech breached their obligations under the Chemtech Shareholders Agreement and also sought a judgment against those defendants "of not less than $7,500,000.00." Da44-45.

Although a defendant must be a party to a contract to be liable for damages in a contract action, See, Globe Motor, 225 N.J. at 482; Model Jury Charge (Civil), § 4.10A "The Contract Claim—Generally" (May 1998), the judgment was not so limited.

The same fatal flaw exists regarding the judgment based on Count 11. Plaintiffs alleged that the Chemtech Stockholder Agreement and the MRL Operating Agreement each included implied covenants of good faith and fair dealing that were breached by defendants Emanuel Hedvat, Fariba Hedvat, Chemtech, MRL and A3I. Only parties to a contract may be held liable for a breach of this covenant. The Model Jury Charge explains, "it is implied or understood that each party to the contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract." Model Jury Charge (Civil), §4.10J "Implied Terms – Covenant of Good Faith and Fair Dealing (December 2011) (emphasis added). Yet, the judgment lumped in defendants who are not parties to the contracts allegedly breached and held them liable for damages plaintiffs claimed they suffered in Count 11.

Finally, Counts 12 and 13 allege claims of unjust enrichment that are closely tied to the fraudulent inducement claims asserted in Counts 9 and 10 rejected by the trial court. (24T28:13-31:10). The premise for the counts is that the named defendant entities derived a benefit form certain transfers and that, as a result, Mehta and DGNS did not receive "full and complete remuneration for the sale of" their interests. Da52. To prove these claims, Mehta and DGNS were required to prove "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). As a result, even if proven, liability on these counts must be limited to those business entities that plaintiffs alleged received a unjust benefit.

The wholesale inclusion of all defendants in the judgment, making each jointly and severally liable without regard to whether they were named in a count and what the proofs were against them was clearly error, warranting reversal.

POINT VII

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST FARIBA HEDVAT (1T101:9-11; 24T50:18-25)

"Wives never represent anything. They don't talk, wives." 6TT27:25-28:1.

Plaintiff Mehta's testimony regarding Fariba Hedvat's involvement effectively sums up the absolute dearth of evidence presented against her. It also reflects plaintiffs' utter indifference to securing evidence against her. She was not deposed, (1T64:22-23), and did not testify at trial. The lack of evidence warranted a dismissal of all claims against Fariba Hedvat. Even more obviously, the full amount of the judgment should not have been entered against her. See, Point VI.

The trial court entered judgment in favor of plaintiffs against all defendants on seven counts of the amended complaint. Fariba Hedvat was a named defendant in three of those counts: Counts 5 (conversion – MRL),[19] 11 (breach of the covenant of good faith and fair dealing) and 13 (unjust enrichment – MRL). Da42,50-553.

It is important to recognize precisely what Fariba Hedvat's position in this dispute was, rather than to view her through the distorted lens used by plaintiffs. The fact that she is the wife of Emanuel Hedvat does not provide any legal basis for the imposition of liability upon her.

[19] Although the fifth cause of action does not name Fariba Hedvat as a defendant, Paragraph 24 of the amended complaint lists her as one of the defendants in that count. Da17.

Fariba is the principal in A3I, a corporation that purchased a 50% interest in MRL from DGNS for $4,960,000 in 2014. (P-82) Da948. She also became the purchaser of Mehta's interest in Chemtech pursuant to a December 2017 agreement. (P-103) Da1528. No allegation has been made and no evidence presented that Mehta and DGNS failed to receive the full amounts due under the agreements, an aggregate amount of $6.3 million. 5T160:8-14. Quite simply, the ownership interests of A3I and Fariba in MRL and Chemtech were initiated upon the departures of DGNS from MRL and Mehta from Chemtech. The notion that Fariba wrongfully diverted sums from Mehta after she bought his interest in Chemtech and he had no interest in any Chemtech funds lacks any factual or legal basis. Neither Fariba nor A3I breached any duty owed to plaintiffs arising from the contracts to which they were a party.

In setting forth reasons for entering judgment against Fariba, the trial court made few references to her, merely oting that she became the purchaser of Chemtech, see 24T9:2-7; T10:10-21; and made the following conclusory statement:

> With regard to the [MRL] Operating Agreement, Mr. Hedvat, A3I, Fariba breached their obligations. I know it was mentioned that she should be out. I mean, the Court doesn't take pleasure in holding people into cases, but in 2017 it became the minority owned business. These accounts and different transactions that are occurring, she was legally part of it in this Court's mind.
>
> [24T50:18-25.]

This reasoning fails because the only defendant who was a party to the MRL Operating Agreement was A3I. Accordingly, the proofs fail to support the imposition of any liability upon Fariba Hedvat.

CONCLUSION

For the reasons and authorities cited in this brief, defendants, Emanuel 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, respectfully request that the judgment entered against all defendants be reversed in its entirety.

Respectfully submitted,

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Dated: January 25, 2023

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-000386-22T1 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 considered virtually all of the evidence that either side sought to present. Prior to trial the lower court proclaimed: "I am not a precluder," and then abided by that principle. During the weeks-long affair, the trial court was solicitous of each parties' right to fully present their case, even permitting the defense to recall two key plaintiff witness when the defense purported to uncover new evidence in the middle of the trial. In fact, during the entire trial, there was only one occasion when the trial court sustained an objection that resulted in the preclusion of witness testimony, and that issue that isn't even the subject of this appeal.

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, the appellants raise several arguments, none of which has merit. Some – like the economic loss doctrine, the statute of limitations, and the failure to satisfy a pre-suit demand for conversion – were never raised below. Most of the other issues the appellants raise inappropriately ask this Court to recast itself as a finder of fact, quibbling with weight of the evidence. Over and over, the appellants argue that the trial court erred because the proofs at trial failed to establish a right to relief. What appellants continually ignore, 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, the appellants say nothing at all about the trial court's finding that the Plaintiffs' principal witnesses, Mehta and Prajapati, 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 the principal defendant, Emanuel Hedvat, in concert with his wife and the other defendant entities, misappropriated funds from two defendant companies in which the Plaintiffs had an interest: Chemtech Consulting Group, Inc. ("Chemtech") and Mountainside Realty, LLC ("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. (4T39:3-18; 4T45:12-17).[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. (14T13:1-16; 4T45:12-14).

Over time, Mehta and Hedvat became good friends. Hedvat hired Mehta's

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

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

1T = 02/10/21	8T = 01/27/22	15T = 02/22/22	22T = 03/09/22
2T = 02/15/21	9T = 02/08/22	16T = 02/23/22	23T = 03/10/22
3T = 12/20/21	10T = 02/09/22	17T = 02/24/22	24T = 03/16/22
4T = 01/18/22	11T = 02/10/22	18T = 03/01/22	25T = 03/17/22
5T = 01/20/22	12T = 02/15/22	19T = 03/02/22	26T = 06/30/22
6T = 01/25/22	13T = 02/16/22	20T = 03/03/22	27T = 09/09/22
7T = 01/26/22	14T = 02/17/22	21T = 03/08/22	

wife as a chemist, the Mehtas attended Hedvat's wedding, and Hedvat gave the Mehtas some money to purchase their first home. (4T45:7-16). Together, they built Chemtech into a multi-million-dollar enterprise.

In 1990, Mehta and Hedvat acquired ownership interests in Chemtech, and in 2007 became the sole shareholders in the company. (4T47:18-24). In the interim, the company grew and became successful. Chemtech acquired and operated new labs in Englewood, Edison, Forked River, and eventually Mountainside. (4T Tr. 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. 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. (9T39:8 to 41:23; 7T92:10-20). 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." (26T9:23 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. (4T60:13 to 61:10; Da 935-46).

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. (4T61:18-23). 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. (4T62:6 to 63:12). Chemtech leased the space from MRL for $40,000.00 per month. Hedvat set the lease terms. (4T63:23 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. (18T125:1-15; Pa107). In fact, Hedvat was a real estate agent and personally handled MRL's acquisitions. (4T69:9-13).

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. Mehta had no role in drafting the operating agreement. (Da935; 4T64:16 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. (4T95:25 to 96:23; 9T111:19 to 113:12). The "Admin" username for QuickBooks registered via Intuit to Chemtech, MRL, and other affiliated companies was Hedvat's. (11T87:7-20). Hedvat also controlled the administrative password for QuickBooks. (12T35:10-19). 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. (7T106:8-10; 22T140:8-11).[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. (4T126:15 to 128:2). Although Mehta knew that Myers became the accountant for Chemtech and MRL, Myers mainly liaised with Hedvat, not Mehta. (5T12:24 to 15:8; 16:11 to 18:3; 18:6-17; 21:24 to 22:18; 13T83:9 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." (Pa92-97). When Myers would come to the office, Hedvat took the meeting; Mehta joined later for lunch. (Pa354; 1T109:18 to 110:24).

[3] The trial court rejected the defendants' theory 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).

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." (4T112:5-22). Business was booming and both men were well-compensated for their efforts. (4T109:21 to 110:6; 5T32:9 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." (4T118:1-15).

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. (4T120:11-18). They executed a revised Chemtech shareholder agreement made effective as of July 26, 2007 (Da1458-80). Each also executed an employment agreement with the company. (P-6; P-7). At that time, Mehta acquired a 51% interest in the company and Hedvat acquired a 49% interest. (Da1479). 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. (4T120:19 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. (1T 113:2 to 114:7; 4T125:24 to 126:14; 9T9:21 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; 15T34:19 to 36:5; Pa122, 136, 161, 184).

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. (5T40:22 to 41:23).

Hedvat put forth a series of proposals beginning in March 2014. (Da977-78). Mehta was skeptical of the initial proposal from Hedvat because he did not believe it accurately reflected his investment and interest in certain properties. (5T46:16 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. (5T49:21 to 51:9).

Hedvat continued to put forth proposals for consideration in the following months. (Da979; Da980). 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. (5T66:12 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] (5T67:15-22; Da981-82; Da1497-1500). 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. (5T71:16 to 72:24).

[4] Hedvat testified at deposition that he could not recall whether he ever lied to Mehta about the business of Chemtech and MRL. (13T78:6-21).
[5] P-48 and P-50 together are colloquially known in this litigation as "Exhibit S."

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 preparing them. (5T72:25 to 73:11; 73:25 to 74:6). In fact, Hedvat testified that Mehta was not even supposed to have seen these documents. (13T69:2 to 70:25). This marked the first time that Hedvat had shown Mehta balance sheets for MRL and Cubic. (5T73:25 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. (Da981-82; 1497-1500; 5T74:7-16; 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. (9T91:16 to 92:20; 93:4 to 95:19; 20T85:1-21).

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. (Da981-82). A similar discussion ensued about P-50, including for each of the cash and liability accounts and fixed assets for MRL and Cubic. (5T82:12 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. (Da1500). 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. (Da1500). 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. (5T90:13-23).

For MRL and Cubic, DGNS' share of that $8.3 million figure would have been 50%, or $4.15 million. (5T96:13 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. (5T97:2-21). Thus, using these figures, Mehta's total interest in MRL, Cubic, and Chemtech would have been about $5.9 million. (5T97:2 to 98:1).

Discussions continued into the summer and Hedvat presented a few additional proposals. (Da983; Da985). 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. (Da983). 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. (Da985 vs. Da983). 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. (5T106:22 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. (Da985; 5T107:8 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. (5T109:17-23). 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. (5T109:24 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. (5T110:11-14; 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. (5T111:23 to 113:11). Mehta provided the attorney's name to Hedvat so that counsel could assist in the contract drafting. (Pa120). However, Mehta's attorney played no role in negotiating the purchase price for the deal. (5T113:18-22).

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. (Da904-19). 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. (Da947-67).

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. (5T115:18-21). 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. (5T116:6 to 118:1; Da904-19; Da968-75; Da947-67). Hedvat insisted on this reallocation to ensure Chemtech could maintain its MBE/DBE status. (5T116:14-18).

According to the SPA, the closing to the transaction was delayed until December 31, 2017. (Da907). 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. (Da906-07).

Mehta did not, however, receive the final $40,000 payment as anticipated by the original SPA. (5T120:11-15). 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 Fariba, not Emanuel, would serve as purchaser of Mehta's interest. (Da1481-95). With Fariba purchasing Mehta's 51% interest in Chemtech, the company could continue as a DBE and Woman-Owned Business Enterprise ("WBE"). (5T121:21 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. (5T122:12-23; Da1495).

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. (6T38:2-6; 57:24 to 59:19). Mehta completed his additional three-year stint with Chemtech as the SPA contemplated as of December 31, 2017. (Da1483).

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. (Da127-31). 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. (6T69:4 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. (9T79:7 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. (9T80:23 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. (9T82:17-24). However, the records that Hedvat provided were insufficient, and Prajapati asked Mehta to request a complete set of

the books of account for MRL. (9T83:12 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. (6T71:13 to 72:10; Da142-51).

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. (9T84:21 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. (6T72:11 to 73:21; 9T84:21 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. (Da150). Neither Hedvat nor the defendants ever turned over the full set of much sought-after backup documentation prior to Mehta commencing suit. (6T74:24 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. (Da157-58). Still, neither Mehta nor Prajapati received any underlying documentation to explain this supposed error. (6T76:21 to 77:2). On October 1, 2019, Mehta requested from Hedvat Chemtech QuickBooks files up to January 2018. (Pa121). 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. (6T77:22 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. (Da160). 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." (17T14:11-22; Pa157). Myers ultimately prepared and signed the requested affidavit himself. Despite the affidavit, the State still refused to refund any of the amounts Mehta paid pursuant to the tax deficiency notice. (6T80:7-20).

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. (Da1). 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. (Da8-10). On July 20, 2022 Mehta

and DGNS filed a new Complaint. (Pa1).[6] The defendants filed an answer with a counterclaim and third party complaint. (Pa29).[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. (26T15:23 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.

(27T75:7-21). 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." (27T75:22 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

[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. (Pa29; 20T15:13-23).

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. (Da11-630). The defendants again filed an answer with counterclaims and a third-party complaint.[8] (Da694-714).

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. (Da715-17; Pa90-91).

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. (Da719-20). They are not the subject of the present appeals. The trial court concluded that the counterclaims were "just brought basically in retaliation" (26T38:23 to 39:2), and that they were, in essence, "noise" around the issue of whether Mehta received his fair share. (26T53:10-13).

qualifications or scope of testimony could be addressed via voir dire and objections at trial. (3T 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.

(3T 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." (3T 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." (3T 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." (3T

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. (3T 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 3T-19T, 23T-24T). 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. (14T6:11 to 7:6; 25T52:17 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. (9T100:20 to 106:8; 113:13-23; 26T Tr. 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. (9T114:11 to 115:17; 11T120:7-21; Da981-82; 1497-

1500). 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. (Pa350-51).

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. (11T118:12 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. (13T36:17 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. (Pa350-51; 9T107:24 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. (26T15:10-22). Conduit accounts, Prajapati explained, are generally transitory accounts that accumulate certain activities or funds, which are then disbursed out of the account elsewhere. (10T74:23 to 75:19). He identified several such accounts in his report and examinations. (*E.g.*, 10T69:15 to 73:3; 10T109:25 to 113:22; 114:20-24; 116:4 to 117:14; 11T76:17 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. (13T28:13 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. (13T31:6 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. (10T72:4-8; 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. (Pa189-351).

The trial court afforded the defendants a full opportunity to respond to Prajapati's analysis. They cross-examined him over two days. (11T-12T). 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. (20T27:21-23; 30:10-13). Fuentes admitted on cross-examination that he refused to review records necessary to validate or debunk Prajapati's conclusions. (20T39:20 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. (26T55:14-20). 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. (26T6:8-20). In the end, the trial court rejected almost wholesale the defendants' theory:

> 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.*

(27T74:21 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." (26T22:21-25; 53:9-10; 27T73:3-13; 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." (26T33:6-13). Moreover, the Court identified conduit accounts, co-mingling, and step transactions in the entity-defendant financial records. (26T33:14-16).

Based on these and other findings, the trial court found that the defendants converted funds that rightfully belonged to the Plaintiffs. (26T47:18 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. (26T50:18-25; 51:10-19; 27T87:20 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. (26T51:19-21; 27T95:24 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. (26T51:1 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." (27T86:16-17).

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." (27T86:13-15). 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. (26T36:11-22).

- Misappropriation #2: On various dates from 2013-2015, Hedvat paid himself $629,217.85 from Chemtech customer, Arbor Hills, to A3I's bank account. (26T34:20 to 35:7).[10]

[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 Da866.

- Misappropriation #3: $2,000,000 transfer from MRL's Merrill Lynch checking account on December 26, 2008 to the Hedvats' Bank of America account. (26T35:8 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. (26T36:23 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. (26T37:5-7).

- Misappropriation #6: $90,000 transferred from Chemtech's MR line of credit account on October 7, 2015 to the Hedvats' bank account #0319. (26T37:7-9).

- Misappropriation #7: $50,000 transferred from Chemtech's bank account on October 28, 2015 to A3I's bank account ending in #8309. (26T37:9-11).

- 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. (26T37:11-16).

- Misappropriation #9: $2,300,000 transferred from MRL's bank account on November 26, 2014 to A3I's bank account ending in #8309. (26T37:17-23).

The foregoing confirms that the diverted funds were ultimately 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 Fariba Hedvat was purportedly the sole member. (23T 9:23 to

[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).

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. (Da718-20).

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.

(27T88:1-8).

J. Post-Trial Motions

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),

[12] Although Fariba was the sole member of A3I, Emanuel was purportedly the President of the company. (Da956).

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

and for attorneys' fees and costs of suit, and taxed costs. (27T4:15-16). 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. (27T88:9-24). 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. (Pa364-66; Da1012-1014) The trial court rejected that approach and instead awarded $190,480.68 in pre-judgment interest, calculated on the principal judgment dating back to July 20, 2020, when Plaintiffs' filed suit. (27T77:7 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. (27T4:16-18). The trial court granted reconsideration solely as to the miscalculation issue and modified the principal amount of the judgment to $2,872,358.93. (27T72:4-25). 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.

(27T79:7 to 80:14). The trial court agreed to stay the judgment pending appeal, conditioned on the posting of a bond. (27T93:24 to 95:6).

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. (Da721-25). The defendants filed separate appeals: one by Fariba Hedvat (A-385-22), and one by Emanuel Hedvat and the entity defendants (A-386-22). (Da726-59) Plaintiffs' filed a cross-appeal limited to the issue of whether the trial court properly calculated pre-judgment interest. (Da760-75).

LEGAL ARGUMENT

I. AFTER 22 DAYS OF TRIAL, THIS COURT MUST DEFER TO JUDGE JEREJIAN'S WEIGHING OF THE EVIDENCE AND CREDIBILITY DETERMINATIONS. (26T4:1 to 56:13; 27T71:25 to 97:1).

The bulk of the appellants' 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 I, III-V, VII). 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 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.

II. THE TRIAL COURT FOUND PRAJAPATI CREDIBLE, WEIGHED THE OPINIONS HE PRESENTED, AND REACHED PROPER CONCLUSIONS BASED ON THE EVIDENCE AT TRIAL. (26T4:1 to 56:13; 27T71:25 to 97:1).

Because the appellants 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. (26T23:8-11; 55:21-25; 27T75:10-13). 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. <u>The Trial Court Properly Allowed Prajapati's Testimony at Trial.</u>

Initially, the appellants 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. (26T23:8 to 28:5).

The admission of expert testimony is committed to the trial court's sound 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. (3T 42:2 to 44:1).

Contrary to appellants' 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." (3T 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. (3T 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." (10T69:20 to 71:17; 11T35:2-24). 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. (10T120:19 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. (10T70:22 to 71:8; 11T18:20 to 19:22). In fact, the trial court sustained the defendants' objections when Prajapati's testimony went too far afield. (11T21:15 to 22:5).

The appellants mistake 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 v. Pierre*, 221 N.J. 36, 54-55 (2015). 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 appellants advance here 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 appellants' 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. (26T47:18 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.

Appellants attack the trial court for relying on what they characterize as Prajapati's net opinion testimony, particularly as to whether certain transactions were authorized. (Db55-62). 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.

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. (Pa189-351). 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. (24T75:15-23).

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. (13T9:23 to 29:9).

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.,* 12T122:16 to 124:11). Cross examination focused heavily on issues of intent and whether Prajapati knew if certain transactions where authorized. (12T26:12 to 28:11; 78:21-24; 80:19-21; 80:13-16). The trial court credited Prajapati and rejected the defense's 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. (15T152:4-11; Tr. 152:23 to 153:3; 154:25 to 155:5; 16T6:10 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." (26T33:6-13).

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. (18T74:15 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. (18T94:3-20).

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. (20T27:21-23). 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. (20T50:24-51:3). Nor could Fuentes explain the $500,000 that Hedvat took. (20T54:6-19).

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. (26T23:8 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." (26T28:13-20). Ultimately, the appellants are 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 appellants spill 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, the appellants disregard 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. (26T36:11-22).**

- 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. (Da902; 11T26:7 to 28:12; 13T10:24 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. (18T74:15 to 76:14).

- Hedvat testified that he allowed Mehta to take the same amount. (18T92:18 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. (20T54:15 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. (18T107:22 to 108:17).

***Misappropriation #2:* Hedvat paid himself $629,217.85 from Chemtech customer, Arbor Hills. (26T34:20 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. (Da866; 10T96:21 to 99:14).

- While Hedvat represented to Mehta that when Chemtech encountered cash flow problems (which happened all the time – 15T20:5-8), and could not pay

Mehta his full salary, Hedvat was paying himself his Chemtech salary from Arbor Hills without making similar payments to Mehta. (15T31:13 to 32:23; 18T109:14-17).

- 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. (18T108:7 to 109:13).

***Misappropriation #3:* $2,000,000 transfer from MRL's Merrill Lynch checking account on December 26, 2008 to Hedvat's Bank of America account. (18T114:18 to 115:6; 26T35:8 to 36:10).**[14]

- 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. (16T8:6 to 9:8; 18T114:18 to 115:6; 115:12-22; 24T76:8 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. (Da881; 10T128:25 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. (24T73:8 to 74:25; *and see* Da881).

- 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.

[14] Appellants incorrectly identify the date of this transaction as December 6, 2008 and the destination as Hedvat's Capital One account. (Db7).

(16T10:15-20).

- 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 words, Hedvat would still owe the company $1 million from what he took. (24T67:15 to 70:3). Fuentes did not even know that Hedvat wrote that $2 million check to his own *personal* account. (20T49:5-7).

- 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. (24T70:4 to 72:21; 76:8 to 77:7; 77:21 to 78:2).

***Misappropriation #4:* $50,000 transferred from Chemtech's MR line of credit account on December 5, 2014 to A3I's bank account #8309. (26T36:23 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. (13T15:21 to 22:15; Da844).

- Hedvat conceded that Mehta didn't receive an equal $50,000 distribution on that date. (18T110:16 to 111:6).

***Misappropriation #5:* $50,000 transferred from Chemtech's MR line of credit account on September 8, 2015 to the Hedvats' bank account #0319. (26T37:5-7).**

- 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. (13T15:21 to 22:15; Da844; Da1495).

Misappropriation #6: ***$90,000 transferred from Chemtech's MR line of credit account on October 7, 2015 to the Hedvats' bank account #0319. (26T37:7-9).***

- 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. (Da845; 13T24:14-21).

Misappropriation #7: ***$50,000 transferred from Chemtech's bank account on October 28, 2015 to A3I's bank account ending in #8309. (26T37:9-11).***

- 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. (13T24:22 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. (26T11-16).***

- 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. (Da844; 13T25:18 to 26:19).

- When cross-examined, Hedvat could not identify a similar $75,500 distribution paid to Mehta. (18T111:24 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. (26T37:17-23).***

- 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. (Da880; 13T26:21 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. (10T124:16 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. 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, the appellants attack the trial court's findings on the ground that Mehta did not specifically testify as to his damage claim. Not so. Mehta provided deposition testimony, which was part of the parties' designations at trial concerning his claimed damages. (Pa356-59; 2T 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. (6T80:21 to 81:20; 83:15 to 84:2). In addition, Prajapati testified that he consulted with Mehta concerning damages (23T75:15-23). 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. (26T 55:14-20).

Second, the appellants argue that the trial court's inclusion of certain transactions was improper because they occurred after Hedvat provided Exhibit S to Mehta, the balance sheets for the companies that ultimately formed the basis for Hedvat's buyout offer. (Da981-82; 1497-1500). 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. (13T30:15 to 34:7).

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. (26T33:6-13). The trial court's decision must, therefore, be affirmed.

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

The appellants' statute of limitations argument must be rejected because the issue was never properly raised below. (Db20). 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).[15] It did not.

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. (3T 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 appellants do not identify any section of any transcript where they affirmatively raised this issue in any other context.[16]

[15] Appellants contend that this Court reviews *de novo* whether an action is barred by the statute of limitations. (Db22). But that rule applies only when a party raises the issue below.

[16] 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

Even if the Court does not reject appellants' newly raised statute of limitations issue outright, the Court must still affirm based on the discovery rule. The discovery 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.[17]

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decision. (26T52:7-10).

[17] 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

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 an accountant. He wasn't running the company. That was more of Mr. Hedvat's role." (26T9:23 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." (27T86:16-17).

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." (26T13:14-18). 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. (26T22:21 to 23:7; 33:14-16; 53:9-10; 27T72:13-15; 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

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because the defendants waived the issue by failing to timely raise it at trial.

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." (27T89:12-17). 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 appellants 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 appellants' 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.

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

A. Appellants Waived Their Pre-Suit Demand Argument. (NOT RAISED BELOW).

As a threshold matter, the appellants' argument (Db51) that Plaintiffs' failed to make a pre-suit demand to establish their conversion claim fails on its face

because the appellants never raised the issue below. *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 appellants have 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 their point heading make no reference to the issue of a demand whatsoever. Appellants therefore waived this argument.

But even were the Court to consider the substance of the appellants' 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. (Da137-51). Mehta made a similar demand in early September 2019. (Da150-51). 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. (Da145). 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." (Pa155). 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." (Pa157). 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." (Pa154). If that weren't repudiation enough, the defendants took the position throughout this entire lawsuit that Plaintiffs' claims were frivolous. (27T74:21 to 75:13).

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. (26T15:23 to 17:6; 27T75:22 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. Appellants Waived Their Economic Loss Doctrine Argument (NOT RAISED BELOW).

As with their pre-suit demand argument, the appellants forfeited their economic loss doctrine argument by failing to raise it below. In fact, the appellants failed to identify anywhere in the record where this issue was properly raised, litigated, and ruled upon by the trial court. (Db50-51). Though pled as an affirmative defense, the appellants never litigated the issue on summary judgment, at trial, or in post-trial motions.[18] *Williams*, 132 N.J. at 118-120; *Interchange State Bank v. Veglia*, 286 N.J. Super. 164, 188 (App. Div. 1995).

But even were the Court to consider the appellants' argument, Plaintiffs established an independent duty imposed by law sufficient to ground their right to pursue a conversion claim in addition to their contract-based claims. *See Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 314 (2002). In closely held entities like Chemtech and MRL, principals owe each other the same fiduciary duties of good faith and loyalty in the operation of the enterprise as partners owe to each other. *See*

[18] Though some question exists about whether the economic loss doctrine functions as a defense or an affirmative defense, courts that have recently considered the issue have reasoned that it operates more like an affirmative defense. *E.g., Intermed Res. TN, LLC v. Green Earth Techs., LLC*, 2022 U.S. Dist. LEXIS 174794, at *12 (M.D. Tenn. Sep. 27, 2022) ("dynamic in which the elements of a claim are technically present, but a doctrine intercedes to preclude liability certainly resembles a conventional affirmative defense.") (cleaned up).

Konsuvo v. Netzke, 91 N.J. Super. 353, 375 (Ch. Div. 1966); *68th Street Apts., Inc. v. Lauricella*, 142 N.J. Super. 546, 560 (Law Div. 1976). Controlling principals cannot, consistent with those duties, utilize control of the entity to obtain special advantages and disproportionate benefits, which is precisely what the trial court found that Hedvat and the other defendants did. These independent duties are also well-established by statute. In the case of Chemtech, *N.J.S.A.* 14A:6-14, for example, imposes an independent duty of good faith upon corporate directors and officers. As to MRL, *N.J.S.A.* 42:2C-39 imposes on LLC members fiduciary duties of loyalty and care. As this Court previously explained, the existence of a fiduciary relationship between parties creates an "independent duty imposed by law" sufficient to permit imposition of a tort remedy separate from a contract remedy. *Hirsch v. Phily*, 4 N.J. 408, 416 (1950) (holding personally liable officers of corporation who personally participated in conversion of proceeds of accounts receivable assigned to plaintiff); *see Estate of Barry Gimelstob v. Holmdel Fin. Servs.*, 2021 N.J. Super. Unpub. LEXIS 5, at *36 (App. Div. Jan. 4, 2021); *Pilkington N. Am., Inc. v. Mitsui Sumitomo Ins. Co. of Am.*, 420 F. Supp. 3d 123, 136 (S.D.N.Y. 2019) (existence of special relationship akin to a fiduciary duty was sufficient to overcome economic loss doctrine); *CLI Interactive, LLC v. Diamond Phil's, LLC*, 2023 U.S. Dist. LEXIS 21116, at *19 n.15 (D.N.J. Feb. 8, 2023) (defendants' argument that plaintiff's conversion claim was barred by the economic loss doctrine

failed because tortious conduct (*i.e.*, conversion) was extrinsic to the contract).

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

The appellants intimate that the Plaintiffs were required to proceed on their conversion claims derivatively, rather than via a direct action. (Db51-52). However, the appellants misconstrue the governing legal principles, which the trial court correctly articulated and applied.

The 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. "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).

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 (initially on summary judgment, and ultimately at trial) 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 record establishes that Emanuel, in concert with his wife and the other entity defendants, 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 he and his wife controlled. These facts were also borne out at trial and are more than sufficient to sustain the trial court's judgment. (3T 90:21 to 97:4; 26T48:5 to 50:9; 27T87:20 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.[19]

Section 7.01(d) does not go so far as to convert all intracompany disputes that

[19] *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.

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 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, the trial court correctly exercised its discretion to allow this suit to proceed directly, calling it the "exception" to the need to file derivatively. (26T47:18 to 50:9). First, the lawsuit did 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 did not materially prejudice Chemtech and MRL creditors. The Amended Complaint alleges (and Prajapati's testimony and report schedules confirm) 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 Hedvat, Mehta, and their wives, 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 Hedvat controls if Plaintiffs prevailed at trial, which they ultimately did. 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 directly, rather than derivatively. Finally, *Brown* also confirms that allowing Plaintiffs' to proceed directly was a matter of discretion for the trial court. 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.

D. 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 Point II, *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* II.C, *supra*).[20] 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. (13T9:23 to 29:9). The appellants' dispute as to the trial court's factual

[20] The defendants engage in semantic gamesmanship when arguing that the converted sums were not discrete or identifiable. (Db47-50). Plaintiffs identified the discrete sums they alleged the defendants converted in their Amended Complaint (Da32-38), which they filed shortly after obtaining the financial information they had long been seeking; in the 44 schedules appended to the Prajapati report (Pa189-351); and in extensive trial testimony. (*See* Point III, *supra*). Contrary to the defendants' argument, the trial court was clear in its findings that the sums that formed the basis for its judgment were both identifiable and belonged to the Plaintiffs. Because Plaintiffs were equal owners with the defendants in Chemtech and MRL, half of what the defendants took for themselves rightfully belonged to the Plaintiffs. (26T54:3-10; 55:21 to 56:3).

findings is not a sufficient reason to reverse the trial court's well-founded conclusions based on the weight of the evidence. *Rova Farms*, 65 N.J. at 484.

V. 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 appellants urge 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." (27T79:4-6; 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." (27T72:13-15; 73:3-18).

The trial court found that this was all being done without the Plaintiffs' knowledge. (27T75:7-21). 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. (26T6:21 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. The Defendants Are Liable for Breach of Contract.

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).

The MRL Operating Agreement is a contract between A3I and DGNS and is enforceable against any member who violates its terms. (Da936). The document

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." (Da938-39). 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. (Da939). 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." (Da940). 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." (Da941).

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. (26T35:16 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." (Da1461). 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." (Da1474).

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. (26T35:16 to 37:23; 50:10 to 51:21).

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." (Da910, 952, 925). 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. (Da908-09; P-80 § 3.2(b)(ii) & 4.2(ii) and (iii); Da923-24). 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, 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."

(27T87:20 to 88:1).[21]

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. They did so by presenting balance sheets and financial information to Mehta that were "inaccurate" because they had diverted funds from the companies, and compounded the issue when Hedvat used that inaccurate

[21] 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. (Da906, 948, 921).

information to induce Plaintiffs' to sell their interests for $6.3 million when Hedvat knew "the numbers were wrong" and "bogus." (27T87:23 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." (27T88:19-20; 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 Hedvat produced for Chemtech and MRL (on behalf of himself and A3I), and that formed the basis for

the purchase prices in the MIPA and the SPAs were "bogus." (27T87:20 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, or entities they controlled. (27T79:7-12). He used accounting tricks to conceal his conduct from the Plaintiffs' view. (27T89:12-17). 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 Plaintiffs' reasonable expectations. (26T51:19-21). 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." (27T95:24 to 96:5).

D. The Defendants Were Unjustly Enriched.

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. Hedvat acted inequitably for the reasons already set out above, including that he was taking funds from the companies and not paying out an equal amount of Mehta. (26T51:22 to 52:23). Hedvat was controlling the various defendant entities and moving money among them as instrumentalities of his broader scheme. (27T79:7-12). It would have been inequitable for the Plaintiffs to have had to chase those funds from defendant to defendant and account to account to be made whole. (27T79:7 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.

VI. THE TRIAL COURT CORRECTLY FOUND THE DEFENDANTS JOINTLY AND SEVERALLY LIABLE. (27T79:7 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. (27T44:6-13). They now press that argument on appeal. (Db74).

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 this was the "classic case that would warrant" joint and several liability. (27T79:7 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." (26T22:21-25; 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. (13T33:24 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 webs and mazes that the defendants created.

Second, the trial court found that Hedvat controlled the defendants' finances.

(26T30:15-19; 33:6-9; 37:1-3; 27T79:7-16; 88:21-25). He moved funds where and when he wanted, 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. Appellants argue that the trial court should not have apportioned 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.

VII. THE TRIAL COURT CORRECTLY ENTERED FINAL JUDGMENT AGAINST FARIBA HEDVAT. (36T 4:1 to 56:13; 37T 71:25 to 97:1).

Emanuel and the entity defendants bizarrely contend in Point VII of their brief that the trial court erred in failing to dismiss the claims against Fariba Hedvat, even though she filed her own separate appeal and is not an appellant in this matter, A-386-22. (Db79). In fact, appellants here opposed Plaintiffs' motion to consolidate the two appeals. To the extent a response is warranted in these circumstances, in addition to the arguments in this brief, Plaintiffs incorporate herein by reference the facts and arguments presented in their brief in Fariba's separate appeal, A-385-22, which the Court ordered be calendared back-to-back with this case.

VIII. THE AWARD OF LEGAL FEES AND COSTS WAS PROPER. (27T79:4 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.

(Da945). 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.[22] The Plaintiffs prevailed on their MRL breach of contract claim. (26T50:10 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.[23] *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

[22] Though appellants argue (Db39) that the exclusion of an express reference to attorneys' fees in Section XX warrants reversal, the provision's language requires the breaching party to indemnify "the other members" (*i.e.*, DGNS) from any claim of any nature whatsoever that may arise out of the violation of the terms and conditions of the agreement. The appellants' cramped interpretation would render this provision surplusage because without it any violation of the agreement could be addressed by a simple breach of contract claim seeking compensatory damages. Section XX's indemnity is far broader.

[23] Appellants suggestion (Db32) that the trial court erred by considering Plaintiffs' Section XX argument because it was raised on reply ignores the broader context of the application below. More than a month passed between full briefing and argument. The defendants could easily have sought leave to file a sur-reply, and the lower court had generally been solicitous of such requests in the past. (27T57:1 to 58:6). In any event, any error was harmless because the defendants raised both their procedural objection and substantive response to the Section XX issue at argument. (27T36:12 to 38:10).

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.

Contrary to the appellants' position (Db35), 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."[24] *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.,*

[24] Appellants argue that Plaintiffs lose because their "Losses" were not incurred "after" the date of the SPAs. (Db35). Incorrect. Section 6.3 entitles Plaintiffs to indemnity for legal fees, accounting fees, and other costs of suit, all of which Plaintiffs incurred *after* the SPAs were executed in connection with this lawsuit.

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 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." (Da908). 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." (Da909). Fariba made similar representations in the 2017 SPA. (Da923-24). These representations (and those on behalf of Chemtech) survived closing. (Da910, 925).[25] The trial court found breaches of the Chemtech

[25] Appellants' argument that the SPA merger clauses vitiate Plaintiffs' right to fees lacks merit. (Db37-38). First, appellants never raised this argument below. Second, the SPAs integrate other agreements to which Hedvat and Chemtech were bound, and which they breached. Third, appellants' reliance on *Moynahan v. Lynch*, 250 N.J.60, 90-91 (2022), is misguided. There, the Court considered whether the parties written palimony agreement superseded a prior alleged *oral* agreement. The written document did not reference the prior oral agreement. Here, however, the SPAs expressly referenced prior *written* agreements (including the Chemtech Stockholder's Agreement), and specifically contemplated that the failure to abide by those earlier agreements could subject Emanuel and Fariba to an indemnity obligation and damages, including an award of attorneys fees, expenses, investigation costs, and other costs of suit.

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. (26T50:10 to 51:21; 27T87:20 to 88:1).

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 by Buyer as required by this Agreement.

(Da952). "Damages" is defined in Section 6.2 of the MIPA (Da952) 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."[26]

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." (27T87:23 to

[26] This is not merely an indemnity for third party claims. A3I separately agreed to indemnify DGNS from and against certain third-party claims by Company lenders with respect to personal guaranties. (Da951).

88:18). The trial court correctly held that this qualified as a "material inaccuracy" that triggered Section 6.3's indemnification provision.[27]

Appellants further argue that the trial court erred in awarding expert fees and other costs. However, they rely on cases that address the specific *statutory* language needed to trigger an award of expert fees, not contractual language. (Db41-42). None of the cases appellants rely on address the breadth of language that can entitle a claiming party to expert fees, in addition to attorneys' fees, under a contractual fee shift. Here, 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." (Da925, 952). This language covers all of the expert and other litigation expenses that the 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

[27] Appellants complains that Fariba was ordered to pay fees for contracts that the trial court did not find she breached. (Db79-81). Not so. Fariba executed the 2017 SPA and acquired Mehta's interest in Chemtech. (Da931). The trial court found the 2017 SPA breached because the buyer's representations were "materially inaccurate" under Section 6.3, and Hedvat breached the Chemtech Stockholders Agreement which she represented he had not done under Sections 3.2 and 4.2.

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 extensively analyzed 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, results obtained, and the experience and reputation of counsel, and concluded that Plaintiffs' fees were appropriate and reasonable. (27T80:15 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. (27T89:12-17; 91:10-18; 92:16 to 93:13).[28]

[28] 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. (Da1028-29; 1031-1409). While not dispositive, that degree of proportionality imbues the Plaintiffs' fee application with an imprimatur of reasonableness. *Litton Indus.*, 200 N.J. at 389.

Appellants nonetheless urge that the trial court should have reduced the award because Plaintiffs did not achieve 100% of their objectives. That misstates the analysis. As the trial court rightly pointed out, Plaintiffs' work was necessary to achieve the result they did. They could not have obtained the relief that they did without pursuing litigation. *See Litton Indus.*, 200 N.J. at 386. Contrary to the appellants' argument, proportionality between the amount awarded and the original claim is but one component of a multi-pronged analysis under R.P.C. 1.5. Indeed, there is no "precise formula" for this portion of the reasonableness analysis. *Id.* at 388. Here, 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. (27T75:7 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. (27T79:7-9; 86:18-20). Appellants also forget 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." (26T11:23 to 12:15; 26T38:18 to 39:20).

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. (27T77:7 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. (Pa364-66; Da1012-14). 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. (27T77:7 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. (27T77:9 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." (27T78:6-8). 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.

Plaintiff-Respondents/Cross-Appellants,

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/Cross-Respondents.

CHEMTECH CONSULTING GROUP INC., MOUNTAINSIDE REALTY LLC, and VIRTUAL INSTITUTE PERSONNEL, LLC,

Third-Party Plaintiffs-Appellants,

vs.

ARECON LTD., GAYATRI MEHTA, JOHN DOES 1-10 and ABC CORPS. 1-10,

Third-Party Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000386-22T1

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.

REPLY BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS AND BRIEF IN OPPOSITION TO PLAINTIFFS'-RESPONDENTS' CROSS-APPEAL

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PRELIMINARY STATEMENT

Defendants' appeal demonstrated that the judgment here is fatally flawed by legal error and a dearth of evidence to support plaintiffs' claims. There is one factual premise for all plaintiffs' claims of conversion, breach of contract and other quasi-contract causes of action: that the targeted transactions were not "authorized" by plaintiff Divyajit Mehta.

But Mehta never testified that the transactions were unauthorized by him.

Plaintiffs' efforts to pave over that hole in their case validate, rather than rebut, defendants' arguments. Challenged to cite evidence that proved their claims, they rely upon sweeping assertions that they produced enough evidence to convince the judge to rule in their favor. Yet, they fail to identify competent evidence that would support the court's conclusions.

The expert never asked Mehta if he authorized the transactions. Instead, he assumed that was the case, accepting as true the allegations in the complaint. Plaintiffs attempt to minimize the court's reliance upon this expert opinion that lacked a factual basis. But their compilation of "evidence" that allegedly supports the trial court's conclusions is hopelessly mired in the expert's flawed opinion.

Plaintiffs' remaining arguments as to the award of fees, the statute of limitations bar, the imposition of joint and several liability, their claims against Fariba Hedvat and their cross-appeal all lack merit.

POINT I

THE STATUTE OF LIMITATIONS DEFENSE WAS NOT WAIVED.

(24T52:7-10) [1]

The statute of limitations was asserted as an affirmative defense in defendants' answer and counterclaim, Da642, and also explicitly referenced in defendants' summary judgment motion. Dra 3-4.[2]

Although plaintiffs contend the statute of limitations defense was waived, they have presented no evidence that defendants did so "clearly, unequivocally and decisively," as is required to deprive defendants of this defense. Moreover, the

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[1] In their opposition brief, plaintiffs employ different references to the transcripts than those used by defendants in their initial brief. Defendants will continue to use the following references:

1T = 12/20/21	10T = 2/15/22	19T = 3/08/22
2T = 1/18/22	11T = 2/16/22	20T = 3/09/22
3T = 1/20/22	12T = 2/17/22	21T = 3/10/22
4T = 1/25/22	13T = 2/22/22	22T = 3/16/22
5T = 1/26/22	14T = 2/23/22	23T = 3/17/22
6T = 1/27/22	15T = 2/24/22	24T = 6/30/22
7T = 2/08/22	16T = 3/01/22	25T = 9/09/22
8T = 2/09/22	17T = 3/02/22	
9T = 2/10/22	18T = 3/3/22	

Db and Da refer to defendants' initial brief and appendix.
Dra refers to defendants' reply appendix
Pb refers to the brief of plaintiffs-respondents and cross-appellants

[2] Pursuant to R:2:6-1(a)(2), Point III of defendants' motion for summary judgment is included in the defendant' reply appendix to rebut plaintiffs' assertion this issue is raised for the first time on appeal. Dra2-6.

magnitude of the injustice caused by the inclusion of nearly $1.4 million in compensatory damages for transactions that were time-barred warrants reversal, even under a plain error standard.

A. There was no clear, unequivocal and decisive waiver here.

In Knorr v. Smeal, 178 N.J. 169 (2003), the defense counsel in a malpractice action failed to file a dismissal motion pursuant to the Affidavit of Merit statute, N.J.S.A. 2A:53A-26 to -29, after the deadline for receipt of the affidavit passed. 178 N.J. at 173-74. Instead, fourteen months later, after discovery was essentially complete, defense counsel filed a motion to dismiss the complaint based upon plaintiff's failure to produce a timely affidavit of merit. Ibid.

The Court found defense counsel's delay inexplicable. Yet, it declined to apply the doctrine of waiver, id. at 178, observing, "The party waiving a known right must do so clearly, unequivocally, and decisively." Id. at 177. The Court concluded, "We cannot find on this record that defendant intentionally elected to forgo his right to seek the remedy of dismissal by his tardy filing of the motion." Ibid. (emphasis added).

Plaintiffs have identified nothing in the record to support the necessary finding that there was a clear, unequivocal and decisive abandonment of the right to have plaintiffs' claims limited by the statute of limitations.

And, most important, the trial court's reference to the statute of limitations and the discovery rule in determining which transactions to include in the judgment makes it evident the trial court did not view the defense as waived. See 1T57:8-15; 24T52:7-10. One reason for treating an issue as waived is that the party's failure to raise the issue deprived the trial court of the opportunity to address the issue and cite the reasons for its decision. Because the trial court applied the discovery rule, even if erroneously, that rationale for treating an issue as waived is absent here.

B. The trial court relied upon an erroneous interpretation of the discovery rule.

The trial court stated the discovery rule delays the accrual of a cause of action until "you find something out." 24T52:7-10. In ruling accordingly, the trial court erred as a matter of law.

The discovery rule only postpones the accrual of a cause of action 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." Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div. 2016). It is not necessary "that plaintiff knew for a certainty that the factual basis was present. It is enough that plaintiff had or should have discovered that he 'may have' a basis for the claim." Burd v. N.J. Tel. Co., 76 N.J. 284, 293 (1978).

The party who seeks the indulgence of the discovery rule must produce evidence "that a reasonable person in [his] circumstances would not have been aware

within the prescribed statutory period that [he] was injured through the fault of another." Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 194 (2012) (citing Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 339 (2010)).

All the transactions that formed the basis for the judgment here were recorded in the books of the companies in which Mehta was either a corporate officer or had a major economic interest. Yet, to support their argument that the discovery rule applies here, plaintiffs contend Mehta had no knowledge of the facts underlying the transactions. The record simply does not support that contention or the application of the discovery rule here.

1. A reasonable person in Mehta's circumstances would have been aware of the facts underlying his claims within the statute of limitations.

Characterizing Mehta as a "scientist" cannot pass muster as a blanket excuse for his decades-long, claimed ignorance of what was contained in the books and records of companies in which he was either a corporate officer or had a major economic interest. He had access to those records and acknowledged that no actions were taken by anyone to prevent him from reviewing those records. See, e.g., 5T14:3-6, 94:16-19, 104:10-105:1, 162:23-163:4; 166:18-167:2. Indeed, his access to and understanding of the financial records was sufficient for him to be "skeptical" about the valuations Hedvat placed on his investment and interest in certain properties, six years before the complaint was filed in March 2014. See Pb10.

Although he testified he did not know how to use the QuickBooks software prior to 2019, Mehta admitted on cross-examination that in 2010, DGNS maintained accounting records using QuickBooks software in Mehta's personal files kept on his office computer at Chemtech. 5T105:21-108:13. Significantly, Hedvat had no interest in DGNS, a company owned by Mehta's wife. As Sandy Myers, the accountant for the parties' companies certified, Mehta "controlled and operated [DGNS] and was responsible for all financial decisions," communicating with him "about DGNS' tax returns and approving them before they were signed by his wife and filed." Da995-96.

His familiarity with QuickBooks is further evident from a series of emails between Mehta and Myers. (Dra18-22); see also, 5T108:24-111:19. One email was from Mehta, providing Myers with DGNS's 2010 QuickBooks file. In another, dated September 27, 2011, Myers provided journal entries to Mehta for him to update his QuickBooks. In an email dated December 8, 2015, Myers asked Mehta for his QuickBooks file for DGNS. The email exchange shows that DGNS used QuickBooks; that the records were maintained in Mehta's personal files on his Chemtech computer and that Mehta was actively engaged in maintaining those records and providing Myers with the information necessary from those files for the preparation of tax documents.

Yes, Mehta was a "scientist," but it is important to consider the role that played in the parties' companies. He was the IT (Information Technology) Manager for both Chemtech and MRL, routinely solving technical issues for the companies and their clients. 3T34:15-17. Given that fact, it must be said that a person in his circumstances exercising "reasonable diligence and intelligence should have discovered" the allegedly unauthorized transactions that are the subject of the judgment.

2. Mehta had a duty to be familiar with the financial records of Chemtech.

Moreover, Mehta actually had a duty to be more familiar with the books and records than he is now willing to admit.

To obtain and retain the status of a Minority Business Enterprise (MBE), it was necessary for Mehta to comply with the reporting requirements of §52:27H-21.22(a)[3] and (b). Clearly, the detailed nature of these requirements imposes a duty

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[3] N.J.S.A. 52:27H-21.22(a) provides that the director may require:

a. Names and addresses of the owner, partners or shareholders, as applicable, and their representative shares of ownership;
b. Names and addresses of members of the board of directors, in the case of corporations;
c. Names and addresses of the officers of the business;
d. Names and addresses of capital investors;
e. Number of shares of stock issued and outstanding, in the case of a corporation;
f. Articles of incorporation, bylaws, partnership agreements, or joint venture agreements, as applicable;
g. The capacity of the business to be bonded;

on the applicant – in this case, Mehta - to be sufficiently familiar with the business records to attest to their accuracy. Indeed, supplying false information in the applications submitted to the State subjects the applicant to criminal liability. N.J.S.A. 52:27H-21.22(c).

As the Chief Operating Officer (COO), Mehta regularly submitted financial documents and certifications to maintain Chemtech's status as a Minority Business Enterprise and a Disadvantaged Business Enterprise (DBE). 2T50:4-9; 4T138:16-144:17. He testified he understood he faced criminal liability if he supplied false information in those submissions. 4T138:16-144:17, 150:3-155:5; 5T38:24-55:13.

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h. The affiliation of the business or any of its owners, officers or directors with any other business entity;
i. A representative list of prior and current clients;
j. Major real and personal property holdings of the business;
k. Financial statements and balance sheets;
l. Banking institutions with which the business is affiliated; and
m. Organizational charts;
n. An applicant's certificate of birth and motor vehicle driver's license;
o. Personal or corporate federal or State income tax returns;
p. An affidavit certifying that the applicant is a minority business or women's business, as defined in section 2 of P.L. 1986, c. 195 (C. 52:27H-21.18); and
q. Any other information the director deems necessary to effectuate the purposes of this act.

([Emphasis added).]

Recertification is required every five years and calls for the same classes of documentation. N.J.S.A. 52:27H-21.22(b).

By way of example, in his capacity as COO, he submitted a DBE Certification Affidavit Renewal in 2014 in which he certified the gross receipts for Chemtech were: $5.1 million in 2011, $6.5 million in 2012 and $4.9 million in 2013. Dra12. The form required him to "swear that the foregoing statements and attachments are true, accurate and complete and include all material information necessary to identify and explain the ownership and operation of Chemtech Consulting group, Inc." Dra14. If there was a "willful provision of incorrect information," possible penalties included debarment procedures and referral to Department of Justice for prosecution under 18 U.S.C. 1001, which subjects a defendant to a fine and imprisonment of up to five years.

In May 2014, Mehta submitted a Small Business Vendor Registration Application to the State of New Jersey in which he stated the gross revenue for Chemtech was $6.5 million in 2013, $4,928,957 in 2014 and $5.2 million in 2015. Dra16. Mehta was required to attest to the accuracy of the information and confirm he understood that falsified information could subject the firm to prosecution for fraud, with civil or criminal penalties and a two-year possible disbarment from bidding on State contracts. Dra17. These serious reporting obligations imposed a duty upon Mehta to exercise reasonable diligence in reviewing Chemtech's records.

3. Plaintiffs are not permitted to delay the accrual of their causes of action until they received the advice of their expert, Hemant Prajapati.

Although every single transaction was included in the business records, it is argued that plaintiffs could not have appreciated their loss until Prajapati conducted his analysis, an argument accepted by the trial court. Pb51. Plaintiffs' argument and the trial court's conclusion rest upon legal error.

Where the facts of the transactions were present in the records and available to plaintiffs, the accrual of the cause of action is not delayed until a professional confirms the existence of a cause of action or the plaintiff understands the legal significance of the facts. See, Kendall, 209 N.J. at 193 ("a plaintiff may not delay his filing until he obtains an expert to support his cause of action."); Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56, (2000); Burd, 76 N.J. at 291.

The application of this legal principle is particularly appropriate here because the premise for labeling the transactions as losses was that Mehta did not authorize them. Plainly, he did not need an expert to inform him that he did not authorize a transaction on the books. It is, therefore, clear that, in the exercise of reasonable diligence and intelligence, Mehta could have "discovered" the facts he contends are the basis for his claims and he should not enjoy the indulgence of the discovery rule.

C. Even under the plain error standard, the legal error here warrants reversal.

Rule 2:10-2 authorizes this court to notice "plain error" in the interests of justice when the error "is of such a nature as to have been clearly capable of

producing an unjust result." See, Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 2:10-2 (2023).

As a preliminary matter, the nature of the legal issue itself is significant. The statute of limitations is hardly an arcane legal theory. It is a basic principle applicable to all causes of action. The trial court's reference to the statute of limitations shows the court was well aware it applied here. 1T57:8-15. And, the magnitude of the consequences of the legal error is a potent indication of the resulting injustice.

The trial court awarded plaintiffs $2,872,358.93 in compensatory damages based upon specific transactions. The date of each transaction and whether or not the transaction occurred within six years of the complaint are readily apparent facts. However, nearly one-half of the amount awarded - $1,375,533.25 - is based upon transactions that occurred more than six years before the complaint was filed. Indeed, the largest transaction – for $ 2 million – occurred twelve years before the complaint was filed. The deletion of that transaction alone would reduce the compensatory damages by $1 million. The amount of plaintiffs' potential recovery for these time-barred transactions is further increased by the award of pre-judgment interest on that amount.

Because the legal error here resulted in the inclusion of over $1.3 million in compensatory damages based on time-barred transactions, the court's error clearly produced an unjust result that satisfies the standard set forth in Rule 2:10-2.

POINT II

THE AWARD OF COUNSEL FEES AND OTHER EXPENSES WAS ERROR AS A MATTER OF LAW.

(25T80:15-89:4; 25T89:23-93:13)

A prevailing party can recover counsel fees only if they are expressly authorized by statute, court rule, or contract. Dep't of Envtl. Prot. v. Ventron, 94 N.J. 473, 504 (1983). The fee awards here were purportedly based upon contractual provisions.

A. This court's review of the question whether any counsel fee was expressly authorized by contract is de novo.

Because the question whether an award was expressly authorized by a contractual provision is a question that "is purely legal in nature," this court owes "no deference" to the trial court's conclusions of law. State v. Pomianek, 221 N.J. 66, 80 (2015); see also, Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995). This court's review of the legal question is, therefore, de novo. Balsamides v. Protameen Chems., 160 N.J. 352, 372 (1999).

Plaintiffs attempt to avoid this standard of appellate review, arguing that the trial court's "fee determination" should not be disturbed unless there was a clear

abuse of discretion. Pb80. However, there is a difference between the legal question whether an award is expressly authorized by a contractual provision and the determination of what an appropriate fee is once that legal question has been resolved. None of the cases cited by plaintiffs to promote the abuse of discretion standard presented an issue as to whether a fee award was authorized by contract. In each case, a fee was clearly authorized, whether by statute, Rendine v. Pantzer, 141 N.J. 292, 298 (1995) (Law Against Discrimination, N.J.S.A. 10:5-27.1); C.E. v. Elizabeth Pub. Sch. Dist., 472 N.J. Super. 253, 267 (App. Div. 2022) (Open Public Records Act, N.J.S.A. 47:1A-6); or by judicial decision, Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440-41 (2001) (authorizing award of attorney fees to successful legal malpractice plaintiff).

The authorities cited by plaintiffs therefore fail to support the contention that an abuse of discretion standard, rather than de novo review, applies here.

B. The indemnification provisions relied upon by plaintiffs do not support an award of fees.

Plaintiffs argue that indemnification provisions contained in the MRL Operating Agreement and the contracts for the purchase of Chemtech and MRL expressly authorize the award of attorney fees and other litigation expenses. The MRL Operating Agreement does not include any authorization for an award of

counsel fees and, although attorneys' fees are available as damages in the purchase agreements[4], none of the provisions relied upon support such an award in this case.

1. MRL Operating Agreement

Plaintiffs argue that the "broad indemnity" provided by Section XX of the MRL Operating Agreement supports an award of attorneys' fees, fees, expenses, and costs of suit" to them. This assertion is not supported by the facts or the applicable legal standard.

As plaintiffs tacitly acknowledge, there is no language in Section XX that "expressly authorizes" an award of counsel fees or other fees and expenses to them.[5] Plaintiffs extract language out of context from Metex Mfg. Corp. v. Manson, No. 05-2948 (HAA), 2008 U.S. Dist. LEXIS 25107 (D.N.J. Mar. 28, 2008), an unpublished District Court opinion, as ostensible support for the contention that "broad indemnity as to 'any liability' arising from 'any' claim, including claims by other members [is] sufficient to warrant [an] award of counsel fees." Pb81-82. However, Metex does not provide such support:

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[4] Plaintiffs correctly note that defendants failed to address Paragraph 6.2 of the Chemtech SPAs and the Membership Interest Purchase Agreement in their initial brief. This was an unfortunate oversight and not intended to mislead the court.

[5] The Operating Agreement explicitly states it is "enforceable by the Company against any member who violates its terms." Da936. In this case, the Company is actually one of the defendants, Mountainside Realty, LLC. While Section XX does provide the Company with the option to seek indemnification for itself or other members, the Company clearly has not done so.

> [A]ttorneys' fees "are not recoverable absent express authorization by . . . contract." If a fee-shifting provision is vague, the Court resorts to the American Rule that attorneys' fees are not recoverable. Because of the general policy disfavoring fee-shifting arrangements, contractual provisions establishing such arrangements are "strictly construed."
>
> [Id. at 27.]

Quoting Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 191 (App. Div. 1997), the court further observed, "ambiguous indemnification clauses should be strictly construed against the indemnitee." Metex at 27-28.

The indemnification language in Metex did not suffer from any ambiguity:

> [MEC] agrees to indemnify [Metex] and its customers for and hold each of them harmless from any liability, loss, cost and expense (including reasonable attorneys' fees) which [Metex] and its customers or either of them may directly or indirectly incur arising from any alleged breach of [MEC's] warranties and/or obligations hereunder.
>
> [Id. at 28-29 (emphasis in original).]

Therefore, rather than support plaintiffs' notion that broad indemnification language can suffice as authority for the award of attorneys' fees, Metex exemplifies the established principles that: contractual provisions relied upon for an award of counsel fees must expressly authorize such an award; such provisions are strictly construed and ambiguities will be construed against the indemnitee.

These principles were most recently reinforced by our Supreme Court in Gannett Satellite Information Network, LLC v. Tp. Of Neptune, ___ N.J. ___ (June 20, 2023):

> Our law "recognizes that 'a party may agree by contract to pay attorneys' fees,' but our courts 'strictly construe' such provisions 'in light of the general policy disfavoring the award' of such fees. In recognizing the discrete exceptions to the American Rule, this Court has consistently "reaffirm[ed] its commitment to 'New Jersey's "strong public policy against the shifting of attorney's fees.'"
>
> [Ibid., slip. op. at 20-21 (citations omitted).]

2. The Stock Purchase Agreements

Plaintiffs also rely upon Paragraph 6.3 of the Chemtech Stock Purchase Agreements, Da910-11, and Paragraph 6.2 of the Membership Interest Purchase Agreement, Da952, as providing the express authorization for an award of attorneys' fees here.

a. Chemtech Stock Purchase Agreements

As a preliminary matter, it seems an odd choice to rely upon the Chemtech Stock Purchase Agreements (SPAs) as justification for an award of counsel fees. As the name of the contracts state, these contracts were for Mehta's sale of his interest in Chemtech rather than an agreement that governed the business relationship between Mehta and Hedvat. And, it is undisputed that Mehta was paid in full. 13T140:21-141:18.

It is true that the definition of "losses" contained in Paragraph 6.2, which establishes the parameters of "Indemnification for Buyer's Benefit," includes reasonable attorney's fees and applies to Paragraph 6.3, the indemnification clause applicable to Mehta as the seller. That fact does not resolve the issue, however, because the indemnification provision must be strictly construed. Accordingly, it was necessary to establish not only that an indemnification provision existed that allowed for an award of attorneys' fees; proof was also required that the criteria for invoking the indemnification clause were met. That is not the case here. See, Db29-30.

There were two iterations of the Chemtech SPA. The initial SPA was executed in 2014 between Hedvat, as purchaser, and Mehta as seller. (Da906-934). Before the last payment was made, a new SPA was executed in 2017 in which Fariba Hedvat became the purchaser so the business could obtain the advantage of being a WBE (woman-owned business enterprise); Mehta remained the seller. (Da987).

Paragraph 8.5 of the 2017 SPA declares that all other "known or unknown agreements are null and void." Da929. Moreover, any reliance upon alleged misrepresentations made before the 2017 SPA is barred by the integration clauses contained in Paragraph 7.1 of each of the SPAs. See, Db37; Da911, Da1530. Therefore, the operative agreement in determining whether fees are authorized is the

2017 SPA in which Fariba Hedvat is the purchaser and the controlling provision is Paragraph 6.3 of that agreement.

As noted in defendants' initial brief, the breaches that trigger the indemnification under Paragraph 6.3 are limited to losses incurred after the date of the Agreement. None of the alleged misdeeds relied upon to support the judgment or the award of fees occurred after the 2017 SPA.

The triggering breaches are further limited to material breaches of a representation, warranty, covenant or agreement of the Buyer "contained in this Agreement" or a material inaccuracy in a "document delivered by Buyer as required by this Agreement." Thus, this provision could only be triggered if Fariba Hedvat materially breached a representation, warranty, covenant or agreement contained in the 2017 SPA that governed the sale of the business.

Although the trial court broadly concluded that there were breaches of the SPAs, plaintiffs fail to cite any finding by the court that identified any specific representation, warranty, covenant or agreement "contained in" the SPA breached by the Buyer – Fariba Hedvat, or even Emanuel Hedvat. Thus, neither the trial court nor plaintiffs have identified a "material" breach as defined in Paragraph 6.3 that triggered the indemnification provision.

Instead, plaintiffs claim the indemnification clause is triggered by Emanuel Hedvat's representations in the 2014 SPA, three years before the purchase was actually consummated, 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." Da908
- "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." Da909

Plaintiffs note Fariba Hedvat made similar representations in the 2017 SPA.

The references here are clearly to agreements and obligations other than the SPAs. Plaintiffs rely exclusively upon the representations that the purchase would not breach "any agreement, contract . . . or other arrangement" to which they or the Company are bound. They do not identify what other agreement was breached, let alone explain how such representations constituted a material breach of the SPA. In short, their argument fails to show a material breach, as defined in Paragraph 6.3, that warranted the award of attorneys' fees. Accordingly, the SPAs did not "expressly authorize" the award of counsel fees here.

b. Membership Interest Purchase Agreement (MIPA)

Like the Chemtech SPAs, this contract also documented the sale of a company rather than governed the business relationship between the parties. The sale here was of DGNS's interest in Mountainside Realty, LLC to A3I for the amount of $4,960,000 with a closing date of December 5, 2014. Plaintiffs do not allege that A3I failed to pay the sale price.

Once again, although the definition of "damages" contained in Paragraph 6.2 includes reasonable attorneys' fees, that alone does not support an award of fees based on the MIPA. Like the Chemtech SPAs, the breaches that trigger the indemnification provision are limited to material breaches contained in or required by the agreement itself:

Paragraph 6.3 of Article VI sets forth the scope of the Buyer's obligation to indemnify the Seller:

> Indemnification for Seller's Benefit. Buyer agrees to indemnify and hold harmless Seller and will pay to Seller the amount of any Damages,[6] arising out of, resulting from or relating to:
>
> > (a) 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;
> > (b) Any material breach or violation of the covenants or agreements of Buyer contained in this Agreement or in any other document delivered by Buyer as required by this Agreement; . . . .

[6]Paragraph 6.2 defines "Damages" as "any actual loss, liability, claim, damage (excluding incidental and consequential damages) and expense (including costs of investigation and defense and reasonable attorneys' fees and costs of suit)."

[Da952-53. (emphasis added).]

The Buyer, A3I, is owned by Fariba Hedvat. 2T61:5-10; (P-2) Da935-46. The plain language of Paragraph 6.3 shows the indemnification provision is only triggered if a material breach is committed by either A3I or Fariba Hedvat and, further, that the material breach must be of a representation, warranty, covenant or agreement made by A3I or Fariba Hedvat in the Agreement or in another document required by the agreement.[7]

Neither the trial court nor the plaintiffs identified such a qualifying material breach at trial. See, 24T11:4-8. In their appellate brief, plaintiffs contend the trial court made the requisite finding of a "material inaccuracy" because "the trial court found that [Emanuel] Hedvat knew the numbers he used to establish the sale price for MRL 'were wrong' and 'bogus.'" Pb84-85.

That is clearly insufficient as a basis for triggering the indemnification provision. First of all, Emanuel Hedvat was never the Buyer in this contract. Moreover, the sale price was a sum actively negotiated by Hedvat and Mehta, not unilaterally imposed by Hedvat. And, plainly, any "numbers" Hedvat gave to Mehta

[7]The Buyer's Representations and Warranties contained in the MIPA are set forth in Paragraph 3.2 (Da950). The documents A3I was required to deliver at closing are identified in Paragraph 4.2. (Da951).

during those negotiations were neither "contained in this Agreement" nor delivered in documents "required by this Agreement."

C. The indemnification clauses do not support an award of expert fees and other litigation expenses.

"Our State's jurisprudence . . . has been marked by a strong adherence to the general prohibition of expert fee awards" unless "specifically authorized by statute, rule or agreement." Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc., 408 N.J. Super. 461, 481-82 (App. Div.), certif. denied, 200 N.J. 502 (2009). Plaintiffs attempt to evade this principle, arguing the authorities cited by defendants are inapposite because they address statutory language necessary to trigger an award of expert fees. The suggestion is that there is a different standard for an award of expert fees purportedly authorized by contract than there is for statutory authorization. Pb85. Plaintiffs provide no authority for such a distinction or for defining what the standard would be for contractual language that expressly authorizes an award of expert fees.

As noted, the only contract relied upon that actually governed the working business relationship in MRL was the MRL Operating Agreement, a contract between DGNS and A3I. It did not contain any provision for an award of attorneys' fees, expert fees or other litigation expenses. Plaintiffs seek to rely upon the indemnity language contained in the sales agreements, i.e., the MIPA and the SPAs, for such an award. However, as previously demonstrated, those indemnification

provisions do not apply here. There is, then, no express authorization for the trial court's award of $296,651.45 in expert fees, deposition and court reporting costs to plaintiffs.

D. The award of $886,223.06 in counsel fees was not reasonable.

Defendants do not dispute that plaintiffs prevailed here. But it is important to note they incurred those fees in pursuit of a $ 10 million goal based upon an allegation that defendants defrauded them. Their fraud claim was rejected by the trial court. Instead, they obtained $2,872,358.93 in compensatory damages, significantly less than one-third of their goal. It is therefore submitted that plaintiffs have failed to show that the amount of counsel fees was reasonable.

POINT III

PLAINTIFFS FAILED TO PROVE THEIR CONVERSION CLAIMS.

(24T47:18-50:9)

Conversion is a common law tort that, as our Supreme Court observed, "is long in the tooth. It is related to the common law action of trover, which entitles one to seek damages for the value of property that is not returned or surrendered to the proper owner." Meisels v. Fox Rothschild LLP, 240 N.J. 286, 303 (2020). Historically, it was a streamlined vehicle for the return of property to its rightful owner, not a means of obtaining property based upon a legal claim that one is entitled to the property. As a result, proof of the plaintiff's right to the return of the property

is paramount. Although the tort is not traditionally applied to money, when it is, it is "essential that the money have belonged to the injured party and that it be identifiable" "as a specific fund set aside for the owner." Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 455-56 (App. Div. 2009).

A. Plaintiffs' opposition fails to cure the deficiency in their proofs and the trial court's findings to show that the converted funds "belonged" to them.

To prove the tort of conversion, plaintiffs had to show that the defendants converted an identifiable and specific fund set aside for a plaintiff. They based their conversion counts upon the claim that corporate funds were wrongfully diverted. If such improper diversion were proven, however, the remedy would be to return those funds to the company.

In their motion for summary judgment dismissing the conversion counts,[8] defendants made this point:

> [N]either the Plaintiffs nor their expert Mr. Prajapati has established that any particular defendant wrongfully converted an identifiable sum of money that directly belonged to Plaintiffs. . . . Simply summarizing and critiquing intercompany transfers of funds between commonly controlled and owned entities does not establish the requisite elements to support a claim for conversion.

[8] Pursuant to R:2:6-1(a)(2), Point IV of defendants' motion for summary judgment is included in the defendant' reply appendix to rebut plaintiffs' assertion that defendants waived the argument that plaintiffs were required to make a pre-suit demand. Dra6-10.

[Dra7]

On appeal, plaintiffs fail to meet this deficiency in both their proofs and the trial court's findings. Instead, they counter with the conclusory statement that they "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 . . . ." Db66. The fact the trial court was convinced to rule in Plaintiffs' favor does not, however, suffice as evidence that the conclusion was supported by adequate evidence.

Plaintiffs attempt to skirt their failure to produce evidence that a specific defendant converted an identifiable sum of money that directly belonged to a specific plaintiff with the broad statement: "In closely held entities like Chemtech and MRL, principals owe each other the same fiduciary duties of good faith and loyalty in the operation of the enterprise as partners owe to each other." Konsuvo v. Netzke, 91 N.J. Super. 353, 375 (Ch. Div. 1966). Pb56-57. As to MRL, this argument is wholly inapplicable since neither Mehta nor Emanuel Hedvat were principals in MRL.

Moreover, the supposed "identifiable funds" do not consist of a specific asset or fund of either Chemtech or MRL but rather, are part of the general funds of the companies. The claim that an identifiable fund existed that "rightfully belonged to Mehta and DGNS" is simply not proven by the contention that Mehta was entitled to whatever amount was distributed to any defendant, without regard for the context

of the distribution or the fact Mehta was not even a principal in MRL. Rather than establish the identity of a specific fund already owned by any plaintiff, this argument merely sets the groundwork for a potential claim for breach of contract if plaintiffs could prove such a breach.

B. Defendants did not waive the argument that plaintiffs were required to make a pre-suit demand.

Plaintiffs argue that defendants waived the argument that their conversion claims fail because they did not make a pre-suit demand. Contrary to plaintiffs' assertion, these defendants did argue in their summary judgment motion that a derivative action was the proper way to pursue these claims and that plaintiffs were required to issue a demand upon the corporation to take action pursuant to N.J.S.A. 14A:3-6.3. Dra8-10. Therefore, defendants did not "clearly, unequivocally, and decisively" waive this argument. Knorr, 178 N.J. at 177.

C. The economic loss doctrine is relevant to plaintiffs' claims.

It is true that the precise words "economic loss doctrine" may not have been uttered or specifically referenced in arguments before the trial court. Nonetheless, that doctrine speaks to the fundamental difference between torts and contract actions and the consequences that flow from proof of those claims, and should not be ignored.

In this case, plaintiffs did not prove and the trial court did not identify a specific, identifiable fund earmarked for a plaintiff that one of the defendants

converted. That failure precludes any judgment based upon the tort of conversion. This is not a case in which the proofs support expanding defendants' liability from a contract action to a tort to secure the advantages of a judgment based on tort, such as the pre-judgment interest available in tort actions pursuant to Rule 4:42-11(b) or to be able to claim the indulgence of the discovery rule.[9] It is entirely appropriate for this court to preserve the boundary between tort and contract law that plaintiffs seek to blur.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING PLAINTIFFS' EXPERT TO PRESENT OPINION TESTIMONY THAT WAS NOT SUPPORTED BY FACTS AND, FURTHER, IN RELYING UPON THAT NET OPINION TO FIND PLAINTIFFS HAD PROVEN THEIR CLAIMS.

(1T51:21-56:22; 24T34:23-37:23)
(Points I and II of Plaintiffs' Brief)

A. The trial court erred in allowing Prajapati to present speculative opinion testimony that lacked factual support.

"Expert opinion is valueless unless it is rested upon the facts which are admitted or are proved." Townsend v. Pierre, 221 N.J. 36, 58 (2015) (quoting Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 305 (1954)). The net opinion

[9] Plaintiffs acknowledge that the discovery rule does not generally apply to breach of contract claims. Pb 51.

rule "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Id. at 53-54.

Here, there were no facts that were "admitted" or "proved" to support Prajapati's opinion that various transactions were unauthorized by plaintiff Mehta and, therefore, constituted misappropriations. The trial court's decision to allow such testimony constituted an abuse of discretion, warranting reversal.

Plaintiffs argue it was appropriate for their expert "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." Pb37. (Emphasis added). They contend the court did not err in permitting testimony that transactions "potentially" were the products of fraudulent activity and "factors that might be indicative of fraudulent conduct." Pb38. (Emphasis added).

Such testimony was speculative at best. Oddly, the criteria Prajapati employed to identify such transactions also led him to conclude that even payments made to plaintiffs, Mehta and DGNS were "unauthorized" and properly included in damages suffered by those same plaintiffs. 10T79:1-80:22.

Apparently attempting to address this lack of factual support, plaintiffs represent that Prajapati "testified that he conferred with Mehta to ascertain whether he authorized many of the transactions in question." Pb40. That is not the record. The portion of the transcript relied upon by plaintiffs does not address whether

Mehta authorized any transaction. Rather, as the portion of the transcript that precedes the excerpt makes clear, the testimony concerns Prajapati's assumption that Emanuel Hedvat did not return the $2 million transferred from MRL's Merrill Lynch account in December 2008. See, 22T73:3-76:7. The portion of the transcript relied upon by plaintiffs follows:

Q. You are simply basing that off of reviewing the Quickbooks printout that you did, correct?

A. No. Also discussions with my client and with the plaintiff.

Q. Okay. Well those discussions are nowhere referenced in your report, are they?

A. In general you would have to speak to the client to get an understanding of the matter at hand. Isn't that normal course of business?

Q. Mr. Prajapati, I am asking you a yes or no question.

Yes or no, was the discussion that you had with Mr. Mehta regarding this $2 million specifically referenced anywhere in your report, yes or no?

A. I do not recall.

Q. You don't recall. Do you want to look through your report?

A. No, I don't. I just don't recall it.

[22T73:3-75:14.]

While this excerpt provides some support for a conclusion that Prajapati had some discussions with Mehta, it clearly does not provide any support for the statement that Prajapati "conferred with Mehta to ascertain whether he authorized many of the transactions in question." Plaintiffs do not cite any other evidence in the record that constitutes proof of that statement.

Not only did Prajapati fail "to ascertain" whether Mehta consented to the transactions he questioned, he also failed to speak to Hedvat, the companies' accountant, any of the bookkeepers at Chemtech or MRL or the vendors about any of the transactions he questioned. 9T125:3-126:15; 10T43:16-21. Rather than secure a factual foundation for his opinion, Prajapati anchored his opinion in an assumption that the allegations contained in the complaint were true. ("I understand that there are allegations of unauthorized expenditures and disbursements . . . that in the aggregate exceed $7.5 million. If these allegations are true . . . Da781).

Given the fact that Prajapati's threshold premise is that the transactions in question were "unauthorized," it is mystifying that Mehta never testified that was the case. Plaintiffs have identified no statements from him that would supply the crucial factual premise that all the transactions were orchestrated without his approval.

N.J.R.E. 703 establishes the foundation necessary for the admission of expert opinion testimony:

> It mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" *Polzo, supra*, 196 N.J. at 583, 960 A.2d 375 (citation omitted).
>
> [Townsend, 221 N.J. at 53 (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)).]

The assumption that plaintiffs' allegation is true does not equate with fact established by evidence in the record. Where, as here, the expert's conclusion is "based merely on unfounded speculation and unquantified possibilities," it must be "excluded." Id. at 54 (citation omitted).

B. The trial court's conclusions were not supported by adequate, competent evidence.

In Point I of their opposition brief, plaintiffs argue this court "must" defer to the trial court's weighing of evidence and credibility determinations. The standard for the deference due to a trial court in making such findings is well-established: "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974). Although a finding "based on factual determinations in which matters of credibility are involved is not without significance," the ultimate

question in appellate review is whether "there is substantial evidence in support of the trial judge's findings and conclusions." Ibid.

It is perhaps not surprising that plaintiffs urge this court to pay such deference to the trial court's conclusions. Throughout their opposition, they have relied heavily, and sometimes exclusively, upon statements made by the trial court rather than citations to evidence in the record to counter defendants' arguments that their proofs were deficient. But the fact remains that, even when a credibility determination is involved, the findings a trial court makes must be supported by evidence. Regrettably, that was not the case here.

Rather than making factual findings that relied upon and cited evidence in the record, the trial court made broad, conclusory statements that adopted plaintiffs' arguments and relied heavily upon Prajapati's net opinions that lacked support in the record. Such findings are not entitled to deference by this court and cannot substitute for evidence plaintiffs were required to produce to support their claims at trial and in this appeal.

Apparently sensitive to this failing, plaintiffs contend the trial court relied upon far more than Prajapati's testimony in reaching its decision (Subpoint B of their Point II). They note first that the court had Prajapati's schedules analyzing the financial records and that "for each of the defendants' misappropriations," the 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. . . ." Pb40-41. The transcript reference provided, however, is simply testimony from Prajapati and does not reflect any review or analysis of the underlying records by the court.

Plaintiffs next suggest that Prajapati's opinion should be accorded merit because he "withstood the defense's extensive cross-examination." Pb41. Although it is true that a focus of the questioning was the basis for Prajapati's conclusions that transactions were "unauthorized," none of plaintiffs' citations, all of which were to the February 15, 2022 transcript, show that Prajapati relied upon anything other than his own assumptions regarding the transactions to support his conclusions:

- Prajapati referred to a pattern of activity that suggested an intent to divert funds but admitted he could not offer an opinion as to Emanuel Hedvat's intent. (10T26:12-28:11)
- Prajapati concluded that payroll and payroll taxes paid to Chemtech's service provider were "unauthorized" simply because the expenses were duplicate. (10T78:21-79:1)
- Prajapati concluded that payments made to plaintiffs, DGNS and Gayatri Mehta, were "unauthorized" because the payments were not for valid expenses of Chemtech. (10T79:19-80:22)

The fact that the trial court "credited Prajapati and rejected the defense's position that there was no evidence the transactions were unauthorized" neither sanctions Prajapti's net opinion nor provides a basis for finding merit in the court's conclusion.

Plaintiffs further claim the trial court "weighed Prajapati's testimony against the perfunctory denials offered by Hedvat." Hedvat consistently denied the allegations of misappropriations, and the trial court did not accept his explanations. But, in this argument and in plaintiffs' argument that there was sufficient evidence to support their claims, plaintiffs seem to forget that it was their burden to prove their claims; defendants did not have an obligation to disprove their claims.[10]

Plaintiffs' compilation of the "evidence" that supports their claims of "misappropriations" clearly reveals they failed to prove their claims (Point II, C of plaintiffs' brief).

$500,000 transfer from MRL's BOA account November 5, 2013

The supposed evidence plaintiffs identify as proof there was a "misappropriation" consists of the fact that this transaction was not recorded in the company's QuickBooks until the following year and assertions that Emanuel Hedvat's testimony regarding the transaction was not credible. Although plaintiffs

[10] Plaintiffs also contend that a comparison of Prajapati's analysis with that of the defense expert supported the court's acceptance of Prajapati's analysis. This argument lacks sufficient merit to warrant discussion beyond noting that the defense expert's opinion was focused on a different issue and that, in fact, the court accepted his opinion in rejecting Prajapati's valuation of the businesses.

state that Mehta was unaware that Hedvat was taking part of his salary from Arbor Hills, there is no citation to the record to support that.

Even at face value, this "evidence" does not establish plaintiffs' claims that the transaction constituted a conversion, a breach of contract or any of the other claims alleged by plaintiffs.

Payment of $629,217.85 from Arbor Hills (2013 to 2015)

Emanuel Hedvat testified that, as a result of Chemtech's DBE status, he could not be paid more than Mehta and that, pursuant to an agreement with Mehta, he received his salary from A3I. He testified he never took more in salary than the $300,000 he was entitled to receive under his employment agreement. 13T31:13-32:23.

Plaintiffs do not cite any evidence that contradicts Hedvat's explanation. Instead, they contend their claims are proven because Hedvat failed to prove that such an agreement existed between him and Mehta. Again, plaintiffs do not appreciate that it is their burden to prove their claims, not defendants' burden to prove their explanation. This argument utterly fails to establish that there was sufficient evidence for the court to conclude these payments constituted conversions, a breach of contract or any of the other claims asserted by plaintiffs.

$2 million transfer from MRL's Merrill Lynch account in December 2008

Defendants explained that the transfer was associated with MRL's purchase of property in Jersey City. The gist of plaintiffs' "evidence" that this was a misappropriation is, again, their criticism of Hedvat's explanation. They cite no evidence that this transaction occurred without Mehta's knowledge or authorization. As the trial court observed in describing the various transactions, they might be just "sloppy bookkeeping." (24T33:11-25). Plaintiffs' criticism of defendants' explanations of a transaction that occurred twelve years before the complaint was filed does not equate with evidence that proves a conversion, breach of contract or any other claim asserted by plaintiffs.

$50,000 transfer from MR line of credit, December 5, 2014

The proof plaintiffs cite is that Prajapati identified a transfer on that date to an A3I account. Pb46. Plaintiffs note that Hedvat testified that Mehta did not receive an equal distribution on the same date, relying upon their simplistic premise that unless Mehta received an equal distribution contemporaneously with anything transferred to defendants, there was some misdeed. Plaintiffs fail to acknowledge the context Hedvat provided for this transfer:

> Q. What did you get it for?
>
> A. Mr. Mehta wanted to get paid 11.38 million [sic] in November and he wanted to get paid additional 1.28 million in December early before we signed the contract.

So as per our agreement, we transferred money to I believe it was A3I, and so I could in return write those checks to Mr. Mehta.

Q. So this $50,000 that you took out of Chemtech went to pay Mr. Mehta his purchase price, correct?

A. Yes, that was after our finalizing the numbers, and that is part of the asset sales interest of Mountainside Realty. We paid - - transferred to A3I and A3I paid Mr. Mehta those checks.

Q. So you paid him with his own money, is that correct?

A. No.

[16T111:7-23]

Notably, plaintiffs do not deny Hedvat's explanation. Although it was plaintiffs' burden to prove that this transfer satisfied the elements of a conversion, breach of contract or other claim they asserted, they cite no evidence to support those claims.

Plaintiffs also claim there was sufficient evidence to support a judgment in their favor as to "Misappropriations" #6, 7, and 8, which relate to the following:

- $50,000 transfer from Chemtech's line of credit account on September 8, 2015
- $50,000 transfer from Chemtech's bank account on October 28, 2015
- $75,500 transfer from Chemtech's line of credit on August 22, 2014

(Pb46-47.)

Although plaintiffs argue there was more evidence than Prajapati's conclusions to support the judgment they obtained, the "evidence" they cite as proof that these transactions were "misappropriations" consists only of Prajapati's conclusion that this amount was transferred to an account belonging to the Hedvats. Pb46. Plaintiffs cite no evidence that Mehta was unaware of this transaction or did not authorize it.

The final "misappropriation" plaintiffs claim they proved involved a transfer of $2.3 million from MRL's bank account on November 26, 2014. Pb47-48. Once again, the "evidence" cited by plaintiff is that Prajapati identified this as a transfer to an account belonging to defendant A3I. Citing only Prajapati's conclusory testimony, plaintiffs claim this transfer was "significant" because it showed that DGNS's interest was acquired with the use of MRL funds while DGNS continued to be a member of MRL. 8T125:6-14. Although plaintiffs acknowledge there were "competing explanations" regarding this transaction, they do not cite any explanation by a plaintiff with personal knowledge of the details of the transaction. There is no testimony from Mehta that he did not approve this arrangement. Even if the trial court's rejection of Hedvat's explanation had merit, plaintiffs fail to cite

evidence that this transaction constituted a conversion, breach of contract or any other claim they have alleged.[11]

POINT V

PLAINTIFFS FAILED TO PROVE THEIR BREACH OF CONTRACT AND QUASI-CONTRACT CLAIMS.

(24T50:10-17)

In their initial brief, defendants argued that plaintiffs failed to prove the breaches of contract alleged in the complaint and identified specific gaps in their proofs. In opposition, plaintiffs do not identify evidence in the record to rebut this argument. Instead, they rely exclusively upon citations to the trial court's opinion to support their contention that they proved these claims. See, Pb68-72. This circular argument does not cure the deficiencies in their proofs.

By way of example, regarding the proof necessary to sustain a breach of the MRL Operating Agreement, it is evident that Emanuel Hedvat was not a party to the contract and therefore cannot be liable for a breach of that contract.

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[11] Plaintiffs present two additional arguments, purportedly in response to arguments made by these defendants. To the extent that these arguments are responsive to defendants' brief, they mischaracterize the defense arguments. The fatal flaw in plaintiffs' proofs was not the fact Mehta agreed with his expert's calculation of damages but that he never supplied the crucial factual support for the expert's threshold premise, i.e., that the transactions at issue were not authorized by him. As to plaintiffs' argument regarding the trial court's inclusion of transactions that occurred after Hedvat provided Exhibit S to Mehta, they have not provided any citation to defendants' brief to identify the argument they purport to rebut.

There is an even more glaring absence of proof. The premise for all the breaches alleged was that the transactions were not authorized by Divyajit Mehta. It would seem elementary that, in countering defendants' argument, plaintiffs would identify testimony from Mehta to support their threshold premise that he did not authorize the transactions. Yet, plaintiffs have not identified any testimony from him to that effect. See, Pb67-72.

There is one count alleging a breach of the covenant of good faith in the complaint. Db71. Count 11 alleges that Emanuel Hedvat, Fariba Hedvat, Chemtech, MRL and A3I issued false financial statements for the purpose of duping plaintiffs into accepting an artificially reduced value in the purchase agreements. As noted in defendants' initial brief, this count should have been dismissed by the trial court when it concluded that plaintiffs failed to prove defendants had fraudulently induced them to accept an inaccurate value in the sales. Db71. Once again, plaintiffs do not cite evidence in the record to show that this claim survived the trial court's rejection of their fraudulent inducement claims, but merely cite statements by the trial judge. Pb72-73. The trial court's statements are not the equivalent of evidence.

As to the unjust enrichment claim, plaintiffs again identify no evidence in the record that established the elements of the cause of action. Pb73-75. Instead, curiously, plaintiffs posit that Emanuel Hedvat's control of the various entities and involvement in transactions justified the imposition of joint and several liability.

Ibid. That novel legal theory lacks merit and fails to show that the unjust enrichment claim was proven by competent evidence.

POINT VI

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN FINDINGS ALL DEFENDANTS JOINTLY AND SEVERALLY LIABLE.

(25T63:23-25; 25T79:13-80:13)

Plaintiffs' opposition relies on the trial court's misstatement and misapplication of the law, i.e., that "liability is presumed to be joint and several."[12] The assertion that this presumption controls is analogous to an effort to put the cart before the horse. But there is no horse here because liability was not established for these Defendants. And, therefore, there can be no cart.

Before one can be jointly and severally liable, one must first be individually liable. In fact, under the Comparative Negligence Act, N.J.S.A. 2A:15-5.3a, only a defendant found 60% or more responsible for the total damages is liable for the entire award. Campione v. Soden, 150 N.J. 163, 183 (1997).

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[12] Plaintiffs claim that these defendants press an argument on appeal that calls for specific percentages of the judgment to be allocated to the different defendants. Pb75. Contrary to plaintiffs' assertion that this argument was advanced, Pb74, these defendants have not and do not seek such an allocation on appeal. The suggestion was presented to the trial court in a motion to modify the judgment as an attempt to ameliorate the trial court's erroneous decision to hold all defendants jointly and severally liable. 25T40:8-16. As is evident from the arguments presented on appeal, the court's findings lack sufficient support in the record and are infused with legal error. Accordingly, the allocations suggested in the trial court are irrelevant.

It is a basic principle that the claim must be alleged against a defendant and the factfinder must find that the claim was proven against that defendant before any liability attaches. In this case, plaintiffs attempt to defend the imposition of joint and several liability upon defendants who were not even named in various counts, let alone found to be liable under the law for those counts.[13] Notably, the trial court made no findings at all as to liability by defendants NJ Cubic 29, LLC; 29 Cottage Street, LLC; Virtual Institute Personnel, LLC; Chemtech Group, LLC; and EFJ Realty, LLC. Plainly, all counts should be dismissed and the judgment vacated against those defendants. Moreover, there was no effort made to address the question whether the corporate veil of any defendant was properly pierced.

None of the authorities cited by plaintiffs support the novel proposition plaintiffs seek to advance.

In Kustka v. Batz, 236 N.J. Super. 495 (App. Div. 1989), homeowners discovered termites in their newly purchased home. They sued the termite control company and its principal; the realtor; the home inspection company and its principal. The jury found in plaintiffs' favor and allocated responsibility for the damages among the defendants. Id. at 496. Although the court acknowledged that joint and several liability provided a "mechanism" to provide an injured party with

[13] As noted in defendants' initial brief, no defendant was named in every count of the complaint. See Db75.

full recovery, the court's directive to amend an erroneous judgment "to conform to the verdict and law" was based on the jury's allocation of fault among the tortfeasors. Id. at 498-99. The opinion does not suggest that a judgment should be fashioned to provide a party with "full recovery" without regard to whether defendants were found liable for the injury.

Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372 (App. Div. 1995) addressed the grounds on which a director or officer of a corporation may be liable for conversion:

> To constitute an act of conversion, "[i]t is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. It is the effect of the act which constitutes the conversion." Any corporate officer, or director who participates by aid, instigation, or assistance in a conversion, is liable. 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 a tort, or who directs the tortious act to be done, or participates or cooperates therein, is liable to third persons injured hereby, even though liability may also attach to the corporation for the tort.
>
> [Id. at 381-82 (citations omitted).]

This passage makes clear that the mere status of corporate officer will not support the imposition of liability for a conversion. Rather, it provides support only for the imposition of liability for conversion upon a corporate officer who has actually participated in a conversion. It fails to serve as an authority for the

imposition of joint and several liability upon persons and entities who have not even been named in the conversion counts, let alone proven to have participated in the conversions.

In Bendar v. Rosen, 247 N.J. Super. 219, 224 (App. Div. 1991), the plaintiff was injured in an automobile accident. After receiving x-rays related to her treatment, she discovered she was pregnant despite having had a sterilization procedure. She opted to have an abortion, professing concern that the x-rays would adversely affect the fetus. She asserted a negligence claim against the two drivers and a malpractice claim against the physician who performed the sterilization, seeking damages for her physical injuries and emotional distress related to the abortion. Id. at 224-28. A jury found that the negligence of both the drivers and the doctor were proximate causes of plaintiff's injuries associated with the termination of her pregnancy but did not allocate percentages of fault. Id. at 229. Rather than hold all defendants jointly and severally liable for the full amount of the judgment, the court observed, "A basic unfairness may have been visited upon one of the parties if the jury might have determined that one event was primarily responsible for plaintiff's decision, and the other event only slightly responsible." Id. at 235. The court remanded for a new trial concerning the apportionment of the damages. Ibid. Thus, Bendar actually refutes the proposition advanced by plaintiffs.

Therefore, contrary to providing support for the argument that joint and several liability is warranted merely to ensure plaintiffs' full recovery, the cases plaintiffs relied upon affirm the principle that a defendant's fault must be established and measured against the fault of other defendants before joint and several liability is appropriate.

POINT VII

THE TRIAL COURT ERRED IN FAILING TO DISMISS ALL CLAIMS AGAINST FARIBA HEDVAT.

(1T101:9-11; 24T50:18-25)

Plaintiffs have chosen not to provide any substantive opposition to defendants' argument in Point VII that the court erred in failing to dismiss the claims against Fariba Hedvat. Pb79.

Although this court denied plaintiffs' motion to consolidate the two appeals, plaintiffs seek to "incorporate . . . by reference" the arguments they presented in Fariba Hedvat's separate appeal. This might be acceptable if the court had granted plaintiffs' motion to consolidate the two appeals, but it did not. As plaintiffs have not served a copy of that brief upon these defendants, defendants submit that this argument is unopposed.

The one contention plaintiffs raise in this appeal is that it is "bizarre" for these defendants to challenge the judgment against Fariba Hedvat. However, at plaintiffs' urging, the judgment here was entered against all defendants, jointly and severally.

To secure a fair result for these defendants, the judgment against Fariba Hedvat must be reversed as well.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PREJUDGMENT INTEREST AS OF THE DATE THE COMPLAINT WAS FILED.

(25T77:7-78:23)

(Point IX of Plaintiffs' Brief)

Rule 4:42-11(b) states that, in tort actions, "the court shall . . . include in the judgment simple interest . . . from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later[.]" Yet, plaintiffs contend the trial court abused its discretion by following this rule. This argument lacks any merit.

Plaintiffs argue that the trial court should have awarded pre-judgment interest dating back to the date "for each transaction where the trial court determined the defendants had misappropriated funds." Pb88. This is an extraordinary request since the trial court included transactions that occurred seven and even twelve years before the complaint was filed. In essence, plaintiffs ask this court to reward their dilatoriness, a wholly inequitable result.

Plaintiffs also contend they should receive "the full amount of prejudgment interest" because their claim was for a liquidated sum. This argument is equally unavailing.

Plaintiffs claimed they did not receive their fair share in certain transactions. This does not meet the definition of liquidated damages.

Liquidated damages is defined as "the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs." Green v. Morgan Props., 215 N.J. 431, 453-54 (2013) (quoting Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (App. Div. 1964)); see also, Holtham v. Lucas, 460 N.J. Super. 308, 317 (App. Div. 2019). None of the contracts here contained such provisions.

Plaintiffs' arguments thus fail to establish that the trial court abused its discretion in adhering to R. 4:42-11(b).

CONCLUSION

The track that led to the judgment here can be summarized as follows:

1. A complaint was filed that alleged plaintiffs suffered damages as a result of transactions that they did not authorize.
2. Plaintiffs did not testify the transactions were unauthorized.
3. Plaintiffs' expert accepted as true the allegation of the complaint – unsupported by record evidence - that the transactions were not authorized. Notwithstanding this lack of foundation, and based on this assumption, Plaintiffs' expert identified certain transactions that were improper because they were not supposedly authorized by plaintiffs. This conclusion was bootstrapped solely by the expert's own assumptions.
4. The trial court concluded – based upon the experts' conclusions unsupported by evidential foundation and based only on assumption - that plaintiffs suffered damages as a result of transactions they did not authorize.

Plaintiffs' insuperable problem here is that Mehta never said he did not authorize these transactions. As a result, the justification for the judgment, on the causes of action asserted, is no more than a logical fallacy. The judgment is unsupported in the record. The trial court made numerous legal errors as well.

For the reasons and authorities cited herein, defendants respectfully submit that the judgment against all defendants should be vacated in its entirety.

Respectfully submitted,

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Dated: June 26, 2023

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-000386-22T1 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. (Db30-31). Accordingly, the trial court's judgment on that sole issue should be reversed.

The defendants engage in a bit of rhetorical slight-of-hand by relying on the phrase "liquidated damages" in their brief when the case law actually refers to "liquidated sums." (Emanuel Reply Br. 46-47). *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, 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 the defendants' 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").

Both the Supreme Court and the Appellate Division have recently held that equitable principles require the award of interest under *R.* 4:42-11 to plaintiffs from the date of the defendants' misappropriation of funds, and not just from the date plaintiffs filed suit. (Emanuel Reply Br. 46). *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 from 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 misappropriated funds. (27T 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. (26T22:21 to 23:7; 33:14-16; 53:9-10; 27T72:13-15; 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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