

DEVANG SHAH, in his individual capacity and derivatively on behalf of NUPUR TRADING, LLC,

*Plaintiff/Appellant,*  
v.

NUPUR TRADING LLC, ALKA H. AMIN, HEMANG SURESHBHAI AMIN, RUPAL A. PATEL, ANISH P. PATEL, HAVMOR CORPORATION USA LLC, AARYAN IMPORTS LLC, KRISHNA TRADING, LLC, ARYA TRADING LLC d/b/a DIVYA FOODS, AMIN TRADING AGENCY, LLC d/b/a ANSU FOODS, and AMIN TRADING, LLC,

*Defendant/Respondent.*

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-00994-24**

**ON APPEAL FROM ORDERS OF THE  
SUPERIOR COURT OF NEW JERSEY  
MIDDLESEX COUNTY, LAW DIVISION**

**DOCKET NO.: MID-C-0052-21**

**TRIAL JUDGE:**

**HON. THOMAS D. MCCLOSKEY, J.S.C.**

**CIVIL ACTION**

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**APPELLANTS BRIEF**

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## **STATEMENT OF FACTS/PROCEDURAL HISTORY<sup>1</sup>**

Defendant in the Trial Court, Nupur Trading LLC (“Nupur Trading”), is a limited liability company that was established on June 20, 2012. Nupur Trading is an importer of Indian groceries and other products from the Republic of India, the United Arab Emirates, the Kingdom of Thailand, Canada, and other countries, which it then, in turn, sells to retailers, wholesalers, and distributors.

Devang Shah (“Plaintiff”) [Appellant herein] holds a 33.33% membership interest in Nupur Trading. Defendant[/Respondent] Alka H. Amin (“Alka”) holds a 33.34% membership interest in Nupur Trading. Defendant[/Respondent] Hemang Sureshbhai Amin (“Hemang”), the husband of Alka, is not a member of Nupur Trading. Defendant[/Respondent] Rupal A. Patel (“Rupal”) holds a 17% membership interest in Nupur Trading and is also the sister of Alka. Defendant[/Respondent] Anish P. Patel (“Anish”) holds a 16% membership interest in Nupur Trading and is married to Rupal, therefore is Hemang’s brother-in-law.

Prior to December 1, 2015, Alka was the sole member of Nupur Trading. On November 30, 2015, Alka – who was residing in Ahmedabad, State of Gujarat, Republic

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<sup>1</sup> This Appeal centers mainly on the Trial Court’s denial of Plaintiff/Appellant’s Motions to Replace An Expert with another expert or allow the Plaintiff to testify as to damages at trial. As these issues are predominantly procedural in form, the Concise Statement of Facts and Procedural History are combined as they are interwoven intricately in this matter. The Statement of Facts/Procedural History is excerpted from the Court’s Opinion in the Record (AA0076 to AA084).

of India at the time – signed a general power of attorney<sup>2</sup> in favor of her husband, Hemang, with respect to all acts necessary to further Nupur Trading’s business. The Power of Attorney stated that Hemang “can do all types of business-related transactions to Nupur Trading,” “can carry out all business operating transactions on behalf of Alka,” and “all the acts done by Hemang will be bound to Alka.” It also empowered Hemang “to perform in Alka’s name and on behalf of [her] to sign any legal documents mentioned [in the Power of Attorney].”

Lastly, the Power of Attorney stated that Hemang “hereby accepts this appointment subject to its term and agrees to act and perform in the said fiduciary capacity consistent with Alka’s best interest as he [sic] best decision deems and affirm and ratify all acts so undertaken.”

On December 1, 2015, Plaintiff, Rupal, and Anish became new members of Nupur Trading and a revised Operating Agreement<sup>2</sup> which they all signed along with Hemang, who signed on behalf of Alka, using the Power of Attorney.

Notwithstanding the non-compete and duty of loyalty provisions of the Operating Agreement, it is alleged that Hemang used his position at Nupur Trading, including all of the knowledge and skills he has gained from having unrestricted access to Nupur Trading’s confidential and proprietary information by virtue of the Power of Attorney

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<sup>2</sup> See Plaintiff’s Complaint, Exhibit A [AA0111 to AA0149].

and his role as head of the Department of Purchase and Product Development, to form competitor limited liability companies for the purpose of importing the same or similar products in direct competition of Nupur Trading.

In May 2017, Hemang formed Havmor Corporation USA, LLC, for the purpose of importing, selling, retailing, and distributing various Indian groceries and other food products. Havmor allegedly imported the same or similar products as Nupur Trading, which it then sold to Nupur Trading's existing and prospective customers using information that Hemang had acquired through his association with Nupur Trading, thereby depriving Nupur Trading of these opportunities. Similarly, in November 2018, Hemang formed Aaryan Imports, LLC ("Aaryan"), for the purpose of importing, selling, retailing, and distributing various Indian groceries and other food products. Aaryan then imported the same products as Nupur Trading, which it then sold to Nupur Trading's existing and prospective customers using information than Hemang had acquired through his association with Nupur Trading. Hemang allegedly caused Nupur Trading to lose continued business from its existing customers and from brands with which it had negotiated agreements authorizing international sales.

On January 7, 2021, Hemang resigned from Nupur Trading. In the next 48 hours, Hemang formed Amin Trading and Ansu Foods, both of which are in the same line of business as Nupur Trading. Within days, Hemang acquired a 38,000 square foot warehouse in Edison, New Jersey for Amin Trading and Ansu Foods, and, shortly

thereafter, began transacting business with Nupur Trading’s existing and prospective customers in direct violation of the non-compete provision of the Operating Agreement . . . . On April 22, 2021, the Plaintiff filed a Complaint and Jury Demand. Following, Alka, Rupal, and Anish (“Member Defendants”), filed an Answer, Cross-Claim, Counterclaim, and Jury Demand on June 3, 2021, with a corrected Answer and Counterclaim due to a clerical error filed June 4, 2021. On June 7, 2021, the Member Defendants filed an Amended Answer, Separate Defenses, Counterclaim and Jury Demand. Defendants, Hemang, Havmor, Aaryan, Ansu and Amin Trading (“Amin Defendants”) filed an Answer to Complaint, Demand for Jury Trial, with supporting documentation on June 17, 2021.

The Plaintiff, on June 21, 2021, filed an application for an Order to Show Cause with Temporary Restraints Pursuant to R. 4:52.

On July 2, 2021, Hon. Vincent Le Blon entered an Order to Show Cause with Temporary Restraints Pursuant to R. 4:52 therein ordering<sup>3</sup> as follows:

- 1) All Defendants must immediately cease any and all business in direct competition with Nupur;
- 2) All Defendants are restrained from selling any and all products marked for distribution by Nupur through any entity other than Nupur;
- 3) All Defendants are restrained from selling any and all products imported from any of Nupur’s suppliers through any entity other than Nupur;

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<sup>3</sup> See Order To Show Cause Order [AA0150 to AA0154]

- 4) All Defendants are restrained from selling products through any entity other than Nupur to any and all businesses, companies, entities, and/or individuals that are customers or clients of Nupur;
- 5) Defendants Hemang Sureshbhai Amin and Alka Amin are restrained from taking any and all actions on behalf of Nupur and must return any and all proprietary information, business records, and products which belong to Nupur. Defendants Hemang Sureshbhai Amin and Alka Amin are restrained from entering the premises located at 2500 Hamilton Boulevard, South Plainfield, New Jersey 07080;
- 6) Defendants Hemang Sureshbhai Amin and Alka Amin are restrained from removing any documents, computer records, or other business-related information from the premises located at 2500 Hamilton Boulevard, South Plainfield, New Jersey 07080;
- 7) All Defendants must provide Plaintiff with access to any all books and records for Nupur, specifically including records related to imports and purchases.

On July 8, 2021, the Plaintiff/Counterclaim Defendant filed an Answer to the Counterclaims. The Amin Defendants filed a motion to dissolve and/or modify the temporary restraints, or alternatively, for security pursuant to R. 4:52-3. The Plaintiff filed an objection to said motion on July 21, 2021. The Member Defendants filed a Cross Motion on July 23, 2021.

Following, the Amin Defendants filed an opposition to the Order to Show Cause filed by the Plaintiff on July 23, 2021. On July 26, 2021, Judge Le Blon entered an Order denying the Amin Defendants' motion without prejudice. In addition, Judge Le Blon entered an Order to Appoint a Special Fiscal Agent and Mediator on July 26, 2021, which was Hon. Travis L. Francis, A.J.S.C. (Ret.). On July 28, 2021, the Plaintiff filed a request

for entry of default against the Defendants Krishna Trading, LLC (“Krishna Trading”) and Arya Trading, LLC d/b/a Divya Foods (“Arya Trading”) (collectively, Krishna Trading and Arya Trading are sometimes referred to herein as “Krishna/Arya Trading”).

On August 4, 2021, Judge Le Blon entered an Amended Order to Appoint a Special Fiscal Agent and Mediator, which was Hon. Travis L. Francis, A.J.S.C. (Ret.). Judge Le Blon, on August 12, 2021, filed an Order on Defendants’ Cross Motion, vacating the temporary restraints, authorizing the Member Defendants to retain the law firm of Giordano, Halleran & Ceisla, and all proceeds derived from the liquidation of Nupur Trading’s asserts shall be deposited into Nupur Trading’s operating account. Following, Judge Le Blon entered an Order on August 12, 2021 denying the Plaintiff’s application for a preliminary injunction to issue for the pendency of these proceedings, accompanied by a written Statement of Reasons and a Case Management Order.

On September 8, 2021, Arya Trading and Krishna Trading filed an Answer to the Plaintiff’s Complaint. Judge LeBlon, on September 23, 2021, vacating his prior appointment of Judge Francis as a Special Fiscal Agent, instead, re-appointing him to serve as a Special Discovery Master and Mediator.

On December 1, 2021, the Plaintiff filed a motion to dismiss the First Count of the Defendants’ Amended Counterclaim. The Member Defendants filed a letter brief in opposition dated December 9, 2021. On December 13, 2021, the Plaintiff filed a more formal brief in further support of his motion to dismiss the first count of the

Defendants/Counterclaim Plaintiffs Amended Complaint. On January 18, 2022, Judge LeBlon entered an Order denying the Plaintiff's Motion to Dismiss the First Count of Defendants' Amended Counterclaim Complaint. The Plaintiff filed an Answer to the Amended Counterclaims on January 28, 2022.

Thereafter, the Member Defendants filed a motion to quash a Subpoena Ad Testificandum and Duces Tecum on April 19, 2022. On the same date, the Plaintiff filed a motion for contempt and other relief. The Member Defendants filed a letter brief in response to Plaintiff's Opposition on May 12, 2022. This Court, on May 27, 2022, entered an Order that Motion-1 of the Defendant, Amin, be granted and the Subpoenas be Quashed, but denied the further application for an award of attorneys' fees and costs; and, denied Motion-2 for contempt of the Plaintiff/Counterclaim- Defendant.

The Member Defendants filed a motion to compel the Plaintiff to return funds to Nupur Trading's operating account on July 1, 2022. The Plaintiff, on July 14, 2022, filed an opposition, with an additional letter brief on July 22, 2022. This Court, on August 5, 2022, entered an Order granting in part and denying in part the motion ordering the Plaintiff to immediately return to Nupur Trading the sum of \$18,330.00, holding the Plaintiff in contempt of this Court's Order dated August 12, 2021, but denied the imposition of sanctions and an award of attorneys' fees.

On June 13, 2023, the Plaintiff filed a motion to extend discovery. On June 15, 2023, the Amin Defendants filed a motion to quash Subpoenas to International Logistics

Associates LLC, Pegasus Maritime, Inc., and Pegasus Shipping, Inc. The Member Defendants filed an opposition to the motion to extend discovery on June 21, 2023. On the same date, the Amin Defendants filed an Opposition to Plaintiff's motion to extend discovery. The Plaintiff, on June 26, 2023, filed a reply brief. In addition, on June 29, 2023, the Plaintiff filed an opposition to the Defendants' motion to quash the Subpoena. On July 3, 2023, the Amin Defendants filed a reply brief in support of the motion to quash.

As a result of the above, this Court, on July 7, 2023, entered its "Order Granting the Motion to Extend Discovery in Part and Denying in Part", therein extending discovery until July 31, 2023, and amended the Court's Case Management Order entered on May 4, 2023.<sup>4</sup>

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<sup>4</sup> Of particular relevance to the Plaintiff's Motion-3 currently before the Court was the Court's admonition set forth in its Statement of Reasons that accompanied the July 7<sup>th</sup> Order:

Put simply, the time has come to bring closure to discovery and prepare the case for dispositive motions and trial, and any intervening issues that may result from this Order shall be referred to the Special Discovery Master for appropriate resolution within, and so long as, outstanding discovery is completed by the adjusted discovery end date of July 31, 2023. Enough is enough.

### CONCLUSION & DECISION.

For the foregoing reasons, the Plaintiff's Motion to Extend Discovery is **GRANTED IN PART**. However, to lessen the prejudice of the Defendants from further delay in the matter which has been pending since April 22, 2021, and as the Defendants each have a strong interest in having the matter concluded, the Court shall enter an Order extending the discovery end date but only to **JULY 31, 2023**. Furthermore, the Order will provide for no further extensions of discovery absent *exigent or unforeseen circumstances.* \* \* \*

Additionally, this Court, on July 7, 2023, entered an Order granting the motion to quash in part and modifying the Subpoena. Specifically, the Court ordered that the Subpoenas to International Logistics Associates, LLC, Pegasus Maritime, Inc. and Pegasus Shipping, Inc., be quashed, but, modified and limited them to cover only the duration for which the Defendant, Hemang, had power of attorney; and that except as modified and provided, any documents received in response to the subpoenas were to be returned to the producing party and not received by the Plaintiff or his counsel.

On August 9, 2023, the Member Defendants filed a motion to bar the Plaintiff's named expert, Dharmendra Jain, ("Mr. Jain") of RR Accounting & Tax Services, Inc. and his report dated July 30, 2023. On the same date, the Amin Defendants filed a motion to suppress the Plaintiff's use of any documents produced within 20 days of July 31, 2023, and also to exclude the report of the Plaintiff's expert. An objection was filed by Krishna Trading and Arya Trading on August 17, 2023, along with the Plaintiff's objection.

On August 21, 2023, a letter brief was filed by the Member Defendants in reply to the Plaintiff's opposition to their motion to bar Plaintiff's expert's report. A similar reply letter brief was filed by the Amin Defendants on August 21, 2023, and as further support for their motion to bar.

On September 19, 2023, the Court entered an Order that denied the motions to suppress the Plaintiff's use of any documents produced within 20 days of July 31, 2023; denied the motions to seek to bar the Jain Report from evidence, but without prejudice

to their reconsideration following the Court's permitted deposition of the Plaintiff's expert, Mr. Jain; granted the Defendants leave to depose Mr. Jain and thereafter move for reconsideration if deemed appropriate; and carried the summary judgment motions to a new date to be determined following any motion for reconsideration.

Thereafter, the deposition of Mr. Jain was taken on October 13, 2023. As a result of the deposition, the Defendants filed a motion to preclude the report and opinions of the Plaintiff's expert, Dharmendra Jain, and for attorneys' fees and costs on November 29, 2023. On the same date, the Member Defendants filed a motion for reconsideration. Additionally, on the same date, the Plaintiff filed a motion to replace his expert and serve a supplemental expert report. Krishna and Arya filed a letter on December 6, 2023, joining in on the motions for reconsideration, which sought to bar the Plaintiff's expert report. Objections to the motions were filed by all parties. The Court, on December 18, 2023, entered an Order granting the motions to bar and preclude the Jain Report and the opinions of the expert, and denied the Plaintiff's motion seeking to replace Mr. Jain as an expert with an altogether new expert (Joseph Pretrucelli, CPA) to proffer a new, so-styled "supplemental report." (AA2981 to AA2990).

On April 2, 2024, Plaintiff then sought, by way of a Supplemental Submission, to allow the Plaintiff to testify at trial as to Plaintiff's damages. [AA0185 to AA0190]. The Trial Court denied this request as well. [AA0072 to AA0110]. Finally, the Court granted the Defendant's Motions For Summary Judgment and dismissed the Plaintiff's Case.

[AA0072 to AA0110]. This was largely based upon the fact that Plaintiff, in the Court's Opinion, did not have a viable way to prove damages [AA0072 to AA0110].

In addition, in the December and April Orders, the Court awarded sanctions against the Plaintiff for the fact that the Plaintiff's first expert, Mr. Dhamendra Jain, filed what the court termed a "sham" affidavit. [AA057 to AA071]. The Plaintiff vehemently denied having any knowledge of the Plaintiff's Expert's deficiencies and did not know that Mr. Jain would testify as he would at trial. [AA0004 to AA0056]. The Plaintiff stated that he did not know that the Expert was deficient. [AA2979 to AA2980].

The Trial Court reduced the Award of Sanctions against the Plaintiff to a specific dollar amount. [AA0057 to AA0071]. Thereafter, having dismissed the Plaintiff's case, the Trial Court then granted the Defendant's Motion To Dismiss the Defendant's Counterclaim. [AA0001 to AA0003] which had been filed in this matter. [AA0155 to AA00175].

The October 25, 2024, was the Final Judgment in this matter that disposed of all issues by dismissing the Defendants' Counterclaim. See Order. [AA0001 to AA0003].

**LEGAL ARGUMENT --- POINT I.**

**The Trial Court Erred In Not Allowing Plaintiff To Testify As To Damages At Trial** (*found AA0105 to AA0108*)

As stated in the Statement of Facts/Procedural History above, the Plaintiff sought as part of a Supplemental Submission to the Defendant's Summary Judgment motion, to allow the Plaintiff to testify as to Plaintiff's damages. The Trial Court had already ruled

that Mr. Jain could not testify and would not allow Plaintiff to substitute Mr. Petrocelli as an Expert to testify as to damages.

Upon further reflection of the matter, the Plaintiff deduced that he could testify as to some of the damages in the matter (i.e., not as to value of the business or value of any trademark that would require an expert). The Plaintiff proffered that Plaintiff could testify as to Nupur Sales as there was no dispute that Plaintiff was the salesperson for Nupur and an Owner and would have unique knowledge of these numbers and processes.

N.J.R.E. 602 states:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

“[W]hen a person testifies as to the value of personal property of another there must be evidence to show that the possessor possesses knowledge of the market value or reasonable selling price at the time and place of the theft.” State v. Romero, 95 N.J. Super. 482, 487 (App. Div. 1967) (citing 2 Wharton, op. cit., sec. 449, pp. 71—75 (1957); 3 Wigmore, op. cit., secs. 716—719, pp. 48—54. (Cf. Berkowitz v. Pierce, 129 N.J.L. 299, 301, 29 A.2d 552 (Sup.Ct.1943)). In Romero, the court allowed the party to testify as to the value of property within which the Party had personal knowledge. The Romero Court stated:

It has consistently been held in this State that the owner of an article of personal property, whether or not he is generally familiar with the value of like articles, is competent to testify as to his estimate of the value of his own property and that the extent of its probative value is for the consideration of the jury [citations

omitted but discussed below]

Id. at 487. Further, the Romero Court emphasized:

when a person testifies as to the value of personal property of another there must be evidence to show that the possessor possesses knowledge of the market value or reasonable selling price at the time and place of the theft. 2 Wharton, op. cit., sec. 449, pp. 71—75 (1957); 3 Wigmore, op. [] cit., secs. 716—719, pp. 48—54. Cf. Berkowitz v. Pierce, 129 N.J.L. 299, 301, 29 A.2d 552 (Sup.Ct.1943).

Id. at 488. In a case cited by the Romero Court, Teets v. Hahn, 104 N.J.L. 357, 359, 140 A. 427 (E. & A.1928), the Court found that because the Plaintiff was a carpenter and builder, he was competent to testify as to the value of the vehicle that he owned and used regularly for business.

In another similar case, Nixon v. Lawhon, 32 N.J. Super. 351, 355—356, 108 A.2d 480 (App.Div.1954), the Nixon Court opined:

The cost of the car, furnishings and repair are elements of value to be considered by a jury.’ This statement was referred to with approval by the Court of Errors and Appeals in Teets v. Hahn [citations omitted] . . . The Teets opinion and other authorities sustain the right of the appellant-owner to give an estimate of the worth of the automobile before it was smashed in the collision although the extent of its probative value is for the consideration of the jury. 3 Wigmore on Evidence (3d ed.), sec. 716, p. 48; 32 C.J.S., Evidence, s 545, p. 315.

In Teets, [supra] [104 N.J.L. at 359—360] the Court said:

‘Furthermore, it appears that when the plaintiff was asked what the car was worth before the collision the question was objected to by defendant's counsel on the ground that he was not qualified to testify to the question, because it involved expert knowledge, and the trial judge sustained the objection. This ruling on part of the trial judge was erroneous. We think the plaintiff, \* \* \*, was competent to give his opinion as to the value of his car before the collision. To give such testimony did not involve expert knowledge.

Nixon, supra, 32 N.J. Super. at 482-83.

Further in, Kazanjian v. Atlas Novelty Co., 34 N.J. Super. 362, 369, 112 A.2d 592 (App. Div. 1955), the Plaintiff Rug merchant, who occupied first floor in building, brought action against occupant of upper floor to recover for damage to rugs from water poured into building by fire department in extinguishing fire on upper floor, on ground that fire was caused by negligence of occupant of upper floor.

In this case, the Kazanjian Court found:

. . . [t]he matter may arise on the retrial and we therefore observe that since the ultimate criterion of damage in this situation is the difference in the value of the articles before and after the fire . . . plaintiff's 40 years of experience as a rug merchant should serve to qualify him. Leider v. Pitcock, 15 N.J. Super. 592, 83 A.2d 796 (App.Div.1951). Moreover, as owner of the articles, he is competent to testify to their value. See Teets v. Hahn, 104 N.J.L. 357, 359, 140 A. 427 (E. & A.1928); Anderson v. Electric Laundry Co., 146 A. 683, 7 N.J. Misc. 567 (Sup.Ct.1929); Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J. Misc. 412 (Sup.Ct.1931); Nixon v. Lawhon, 32 N.J. Super. 351, 356, 108 A.2d 480 (App. Div. 1954); 3 Wigmore, Evidence (3rd ed. 1940), sec. 716, p. 48.

The question of whether a witness, called as an expert, is qualified to give expert testimony, is one to be primarily passed upon by the trial court, whose decision will not be reversed if there is any evidence to support it, or unless it is clearly shown to be erroneous in matter of law. Leider v. Pitcock, 15 N.J. Super. 592, 594 (App. Div. 1951) (citing Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 72 A.2d 204 (1950)).

Similarly in Atlas v. Silvan, 128 N.J. Super. 247, 251 (App. Div. 1974), the court allowed a purchaser of property who had personal knowledge of the property to be competent to testify as to the general size of the property.

In Leider, the Appellate Division found that the proffered Expert in that case was qualified to testify as an Expert Witness “has been engaged in the rug and carpet business all of his life and was familiar with all operations involved in their production. Defendant unduly stresses the fact that the witness never sold the same make of carpet as that involved in the present litigation. While this might properly affect the weight accorded his opinion by the trial court, it would not affect his competency as an expert witness, properly and factually established.” Id. at 594.

It is evident that the law in New Jersey is that someone with requisite industry experience can be called to testify as an expert witness. Leider, supra, 15 N.J. Super. at 594. Furthermore, a party, with such requisite knowledge is assumed to be able to testify as to value of products sold. Kazanjian, supra, 34 N.J. Super. at 369.

This case, *sub judice*, is no different than the foregoing precedent. Plaintiff was the salesperson and intimate knowledge of the cost of goods and sales prices for which Nupur products were sold. Plaintiff, as the salesperson and one of the Owner’s of Nupur can actively testify as to the sales processes, costs of the goods and the price for which the goods were sold. All of this information is contained within company documents that were already exchanged in discovery. [AA0185 to AA2976].

In Plaintiff’s Certification, the Plaintiff lays out, at length, how Plaintiff can compute damages. Plaintiff has also attached numerous documents that support Plaintiff’s theory. See Plaintiff’s Certification [AA0185 to AA0190] and Exhibits [AA0191 to AA02976].

This is laid out in paragraphs 26 to 28 in Certification [AA0185 to AA0190]:

26. So, in view of the above:
  - a. First, we know what products came into the US;
  - b. Second, we know the price of the products coming into the US;
  - c. Third, we know how many and which products were diverted to away from Nupur and to the Defendants newly formed entities (all related parties) or Third-Party customers;
  - d. Fourth, we know the price that the Defendants and third-parties' paid for the products;
  - e. Fifth, we have the data, via Nupur price lists, that shows what the products would have sold for had they been sold through Nupur; and finally,
  - f. From this data, I know the net profit.
  
27. I was a 33.33% owner of Nupur and involved in sales. I had knowledge of:
  - a. The products that we sold;
  - b. The suppliers of the goods;
  - c. The importation of these products;
  - d. How much was paid for the importation of the products;
  - e. Through records we received, I can see easily to which entity the products were sold and for what price; and,
  - f. We exchanged the lists of what the Nupur product lists were.
  - g. Having been involved in Nupur sales invoicing, I would be able to determine the recurring revenues related to those sales.
  
28. Thus, I have all the information I need to compute the resulting Net Profit from the diverted sales at trial.

It is clear that the Plaintiff is able to testify as to what was paid for Goods coming into the United States from the Volza data and other exhibits attached to his certification and he can also testify as to what Nupur would have sold those products for had the products not been wrongly diverted. Discovery also contained the requisite list of the exact products that were diverted by the Defendants and where those products were sold. Plaintiff knows what

the cost of those products would have been had they been offered through Nupur as they should have been. No additional discovery is needed and no additional documents are needed.

It is clear through the case law above, that as long as a witness has requisite knowledge, which Plaintiff does in this matter, they should be permitted to testify. The weight given to that testimony is one for the fact-finder to consider. Leider, supra, 15 N.J. Super. at 594.

It was set out in the Court's Opinion and at trial that there had been no calculation of damages in the record. However, this is inaccurate. Mr. Jain, the former proffered expert had set out damages at 3.7 million. See March 28, 2024 Transcript [Tr. 25:5-9]. Respondent's Counsel, Mr. Douglas Kinz, Esq. remarked at oral argument:

We need to know what the damages are. As we sit here today, we still don't know what the damages are. Mr. Jain had come up in his report with the damage figure of \$3.7 million.

There was no dispute between the parties that Plaintiff was both an owner of Nupur and in charge of sales. Defendants concede this point at Oral Argument. See March 28, 2024, Oral Argument Transcript, TR. 34: 7-10, Mr. Kinz states:

You see, Mr. Shah plays two roles in this company. He's an owner, and no one disputes that and no one disputes that Mr. Shah was in charge of sales.

As part of this motion wherein Plaintiff proposed testifying to a limited number of damages, the Plaintiff had set out the calculation on five different products. However, later and included in Plaintiff's response to the Amin Defendants' Motion To Dismiss, the

Plaintiff included a full analysis for every product that was diverted. See Certification [AA0185 to AA0190] and Exhibits [AA0191 to AA02976].

In the Plaintiff's Certification, he lays out how easy it is for him to calculate his damages in this matter:

6. With respect to the information provided herein, either the actual exhibit was exchanged prior to the end of the Discovery End Date of July 31, 2023, or the information set out below is drawn from documents and data that was exchanged prior to the discovery end date of July 31, 2023.
7. Contrary to the accusation, I was highly esteemed by vendors and customers.
8. As Sales & Marketing Head, I propelled the business from \$1 million to \$11.260 million in five years through relentless effort, exceptional customer relationships, and unwavering dedication to the business. See **Exhibits 1 and 2**. [AA0191 to AA0192].
9. Meanwhile, the defendants engaged in diverting products and sales from the business to their own entities. Refer to which include testimonials from Nupur's vendors and customers. See **Exhibits 3 to 6**. [AA0193 to AA0214].
10. These documents detail their dissatisfaction with Rupal Patel's business ethics and highlight their praise for my business meticulous & stellar customer relationships . . .

26. I suffered substantial damages and the amount is:  $\$2,129,526 + \$299,324 =$  **\$2,428,850**.

27. Those damages are calculated as follows:

- a. Nupur's lost sales as calculated below (see **Exhibit 8** [AA0233 to AA0236] which shows defendants paying freight & duties for their personal competing entities from Nupur's bank. See **Exhibit 9** [AA0237 to AA0400] for data showing Defendants purchase price and Nupur's sales price for the same product):

**[PLEASE REFER TO CHART IN AA0237, APPDNX. VOL. II]**

- b. Defendant's unauthorized markup and diversion of products imported from vendors. I have attached the calculations for these damages hereto as **Exhibit 10** [AA3189 to AA3200]:

**[PLEASE REFER TO CHART IN AA3186 (APPNDX Vol. XVI)]**

28.I have attached Nupur's purchase Volza record **Exhibit 9** [AA0237 to AA0589].

29.I have attached Nupur's customer sales data **Exhibit 11**. [AA0590 to AA02976].

As such, it is easy to see that the data upon which Plaintiff would rely to conduct this analysis were documents exchanged during the discovery period. Furthermore, Plaintiff, as a lay person, with experience in sales and marketing, would have this unique knowledge.

It is conceded that this analysis was not part of the record until the Amin Defendants' Motion To Dismiss, but it is clear that the information upon which the Plaintiff would rely had already been exchanged in discovery.

Furthermore, Plaintiff had been offered as a witness during the discovery period. See March 28, 2024, Transcript; Tr. 40:13-16 (wherein Plaintiff's Counsel discusses emails exchanged between Counsel about offering Plaintiff as a witness for a deposition). The Defendants never took the Plaintiff's deposition.

In response to the Plaintiff's proffer to have Plaintiff testify as to the losses related solely to sales, the Trial Court responded:

Plaintiff has not demonstrated, and cannot demonstrate, an amount of damages claimed, or how such an unspecified quantum can or will be computed. And yet, he asks the Court to accept his "lay" opinion on a number that has still not been either calculated or presented, but will present at trial through purported testimony that, at best, crosses over to the realm of expert testimony that he is admittedly unqualified to give. As our case law instructs, in general, "lay" opinion testimony may not cross into the realm of expert testimony. See, e.g., Bardis v. First Trenton Ins. Co., 397 N.J. Super. 138, 153 (App. Div. 2007), rev'd on other grounds, 199 N.J. 265 (2009).

Quote pg. 36 [AA072 to AA0110].

The Trial Court did not discuss any of the caselaw above, suffice to quickly distinguish a few cases, but did not do an in-depth analysis. It is clear that all documents had been exchanged, no new discovery would be needed, the Defendants had the opportunity to depose the Plaintiff and failed to do so. Finally, the case law supports the

fact that an Owner of a business can testify as to products sold by that business that are within the knowledge of that witness.

Thus, the Appellants respectfully request that this Court reverse the Trial Court below and find that Plaintiff can testify as to Plaintiff's damages with respect to the lost profits related to sale of goods at trial as set forth herein.

**POINT 2:**

**If Plaintiff Is Not Allowed To Testify, then Plaintiff Should Have Been Allowed To Substitute Mr. Petrucelli for Mr. Jain** (*found AA0037 to AA0054*)

First, it is important to note, that in the Court's Order to Extend the Discovery, the July 7, 2024, Order wherein the Court extended the Discovery period just over 3 weeks to July 31, 2024, the Court included the following language:

**IV. CONCLUSION & DECISION.**

For the foregoing reasons, the Plaintiff's Motion to Extend Discovery is **GRANTED IN PART**. However, to lessen the prejudice of the Defendants from further delay in the matter which has been pending since April 22, 2021, and as the Defendants each have a strong interest in having the matter concluded, the Court shall enter an Order extending the discovery end date but only to **JULY 31, 2023**. Furthermore, the Order will provide for no further extensions of discovery absent ***exigent or unforeseen circumstances.***"

First, New Jersey law defines "exigent circumstances" as "situation that demands unusual or immediate action and that may allow people to circumvent usual procedures" Norfolk Southern Ry. Co. v. Intermodal Properties, LLC, 215 N.J. 142, 167, 71 A.3d 830, 845 (2013) (citing Black's Law Dictionary 277 (9th ed. 2009)). In tandem, "Unforeseen Circumstances"

is defined as: “not predicted or expected : unexpected”. Brittanica Dictionary, (2021 ed.).

In this case, the testimony of Mr. Jain at his deposition was certainly unexpected, unforeseen and caused Plaintiff to have to face exigent circumstances. The fault for how the Mr. Jain testified was not the fault of the Plaintiff or Plaintiff’s Counsel. Mr. Jain had represented that he had all the requisite qualifications and indeed New Jersey law allows people to testify as an expert based upon experience. Kazanjian, supra, 34 N.J. Super. at 369.

As one of Plaintiff’s Applications, the Plaintiff requested that the Court allow the Plaintiff to replace Mr. Jain with Mr. Petrucelli.

The Defendants took Mr. Jain’s deposition on October 13, 2023. During Mr. Jain’s deposition on October 13, 2023, it became evident that despite his extensive experience, Mr. Jain faced some challenges in fully comprehending certain aspects of American Accounting Law under Generally Accepted Accounting Principles (“GAAP”), This was further complicated by language barriers which led to some misunderstandings during questioning. In their briefs, Defendants laid out at length that at times in the deposition, Mr. Jain was not able to support his opinions on the valuation of Goodwill and Trademark and his computation of damages due to language barriers and other issues.

In the aftermath of the Deposition, the Plaintiff was informed that Mr. Jain, for

personal reasons, was going to resign as the expert. See Jain Certification [AA0x to AA0x[30]]. This unexpected development necessitated the Plaintiff to seek a new expert to continue with the case. It was also brought to the Plaintiff's attention that Mr. Jain had failed to spend adequate time to fully prepare the Expert report.

There is no question that as a result of Mr. Jain's deposition and Mr. Jain's stepping down, the Plaintiff would essentially be completely unable to put on a case at trial. This both resulted in "**exigent circumstances**" for the Plaintiff and certainly was "**unforeseen**".

Furthermore, as a result of the deposition, it was clear that Mr. Jain's opinion amounted to a "net opinion" and, as such, is unhelpful to the Plaintiff. Moreover, Mr. Jain resigned and is unable to continue. After much time and examination and expense, Mr. Shah located Mr. Joseph Petrucelli, CPA.

Mr. Petrucelli testifies regularly throughout the State of New Jersey as a Financial Accounting Expert. Upon retention of Mr. Petrucelli, Mr. Petrucelli immediately jumped into the case and identified several areas in Mr. Jain's report that needed attention and was able to highlight these using the documents already exchanged in discovery and to point out the fact that Mr. Jain's report failed to properly value damages with respect to the business.

Mr. Petrucelli was prepared to contribute and ready to come in and testify for the Plaintiff at trial. Plaintiff then asked the Trial Court to allow the Plaintiff to substitute Mr. Petrucelli for Mr. Jain.

In similar situations, the Appellate Division has twice insisted that Courts strive to uphold justice and not undermine a litigant's rights, particularly when, as in this case, Mr. Jain's shortcomings are not attributable to the Plaintiff and were not caused by the Plaintiff. Allowing the Plaintiff to substitute an expert would align with the principle of achieving justice and preserving the litigant's rights, especially when the challenges faced were beyond the Plaintiff's control.

The New Jersey Supreme Court has declared that in deciding cases "justice is the polestar and our procedures must ever be moulded [sic] and applied with that in mind." New Jersey Highway Auth. v. Renner, 18 N.J. 485, 495 (1955). This maxim is often applied in the context of a Motion To Vacate A Judgment. Id. Our New Jersey Rules of Court, of which R. 1:5-6 is but one, are a means of serving the ends of justice. Sattelberger v. Telep, 14 N.J. 353, 363 (1954).

Public policy favors the disposition based on the merits of the case, not on default. See Medford v. Dugan, 323 N.J. Super. 127 (App. Div. 1999). The Appellate Division has stated that the law's policy considerations and principals mandate that a judgment should be opened in order that a just result is achieved. Marder v. Realty Construction Co., 84 N.J. Super. 313, 318 (App. Div. 1946). In addition, the Appellate Division has stated that New Jersey courts have always had the inherent power to vacate defaults and that a court should exercise great liberality in doing so in order for cases to be decided on the merits. Nowosleska v. Steele, 400 N.J. Super. 297, 303 (App. Div. 2008).

Although this is not in the context of vacating a default judgment, the foregoing shows that the mandates of achieving justice is paramount in the law. The substitution of Mr. Petrucelli for Mr. Jain will achieve the guiding maxims as set forth in New Jersey law. Luckily for the Plaintiff, the Appellate Division has addressed similar circumstances in two similar cases.

Having one expert come in to replace another expert is not a novel idea and is set forth in the case law as a mechanism utilized throughout New Jersey litigation. See, e.g., New Jersey Division of Youth and Family Services v. In re A.J.M.W., (unpublished) 2011 WL 284955, at 9 (App. Div. 2011) (Docket No. FG-07-258-08) [AA0x to AA0X].

In New Jersey Division of Youth, the Court allowed the parties to hire “replacement experts” and actually delayed the trial by six to seven weeks in order to achieve a just and equitable result:

October 24, 2008, he [the Court] directed the parties to “contact replacement experts in the interim and to ascertain their availability.” As of the October 31 plenary hearing, all parties “had in fact contacted their replacement experts in the interim, and ... all replacement evaluations, if necessary, could be completed during the month of November 2008.”

The judge noted that his ruling delayed “the commencement of ... trial ... a little over six weeks. On balance, a six or seven week delay is reasonable in order to ensure that the trial is conducted properly with no outward appearance of a conflict, especially with respect to competing experts.”

Id. at 9.

In another case discussing replacement expert reports, the Court in Schroer v. Bredin, (unpublished) 2014 WL 9883911 at 5 (App. Div 2015) (Docket No. A-2741-

13T1) [AA0x to AA0X], the Court discussed issues also presented by this Court. “At the outset we note, generally, discovery extensions should be liberally granted where no trial or arbitration date has been fixed and there would be no prejudice to the other party.” Id. (citing Leitner v. Toms River Reg’l Sch., 392 N.J. Super. 80, 91–92 (App.Div.2007)); see also, Ponden v. Ponden, 374 N.J. Super. 1, 9–11 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005).

Furthermore, “any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.” R. 1:1–2(a). However, “discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel.” Schroer, *supra* (citing (Abtrax Pharm. v. Elkins–Sinn, 139 N.J. 499, 512 (1995))).

However, in the first case that is similar to the present matter, the seminal case of Ponden v. Ponden (cited above and cited here for convenience purposes), 374 N.J. Super. 1 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005), the Appellate Division had a very similar set of facts and ruled to allow the litigant to utilize a replacement expert. First, the Ponden Court summarized:

In this appeal, we consider the extent of a trial court’s discretion, in the wake of the 2000 rule amendments known as “Best Practices,” to extend the time for the submission of expert reports after the discovery end date has passed and in the absence of a scheduled arbitration or trial date . . .

we reverse the trial judge’s refusal to allow plaintiff to submit and rely upon

an expert report beyond the discovery end date, and we vacate the summary judgment entered against plaintiff as a result.

The facts in Ponden were pretty simple. The Appeal was for a malpractice case that followed a divorce. The Plaintiff/Appellant Ponden had been part of a divorce action wherein her husband, according to the Appellant had absconded with millions of dollars and left the country. In the malpractice action (of which the appeal concerned) the Appellant had alleged, in the trial Court, that her attorney had made mistakes and that the attorney's mistakes allowed her ex-Husband to disappear with millions of dollars of marital assets.

In the malpractice action, both parties retained experts and pursued discovery. However, there was an issue with the production of the Plaintiff Ponden's Expert Report (of which Plaintiff/Appellants had previously produced]:

On August 3, 2002, the trial court issued a notice that discovery would end on October 10, 2002 . . . on November 19, 2002, the court sent a notice that extended the discovery end date to December 9, 2002.

While these events were occurring, plaintiff was also taking steps to change attorneys. On the same date that the trial court sent the last discovery end date notice, plaintiff's present counsel obtained a substitution of attorney from former counsel. That substitution of attorney was filed with the trial court on December 2, 2002. New counsel was then unaware of the discovery end date . . . Ferreri [the attorney/Defendant] submitted his expert report on December 9, 2002, the very last day of the discovery period . . .

Following the service of his [Ferreri] own expert's report, Ferreri moved for summary judgment, asserting that plaintiff's expert had rendered only a legally-insufficient, net opinion. Plaintiff cross-moved for permission to serve a new expert report out of time [because new Counsel for Plaintiff was concerned the prior report was a net opinion] . . .

In seeking permission to serve the new expert report, plaintiff's present counsel filed his own certification, asserting that, upon his review of the file, he believed plaintiff's existing expert had to be replaced.

Ponden, *supra*, 374 N.J. Super. at 6-7.

The Ponden Appellate Court continued the background of the Trial Court Ruling:

In considering these contentions, the trial judge held that the first expert report consisted only of a net opinion . . . [a]s a result, Ferreri [the Defendant/Attorney] was undoubtedly entitled to summary judgment in the absence of the trial court granting plaintiff the opportunity to serve and rely upon her new expert report.

While the trial judge accurately indicated that the pre-“Best Practices” approach would have provided ample discretion to grant relief from the discovery cutoff date, he incorrectly opined that, under “Best Practices,” his discretion was “streamlined considerably,” and denied plaintiff's motion for relief from the discovery end date.

The Ponden Court then undertook to analyze the Trial Court's decision in light of the prevailing mandates of Best Practices (emphasis in original):

R. 4:17–7 was also modified. It had previously permitted amendments to answers to interrogatories, including those interrogatories seeking expert information, up until twenty days prior to trial. The rule, as amended, now prohibits any such amendments later than twenty days “prior to the end of the discovery period, as fixed by the track assignment or subsequent order.”

We adhere to our recent decision in Tucci [Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 53 (App. Div. 2003)] that the “Best Practices” rule amendments “were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to secure a just determination.” (citations and internal quotations omitted) . . .

It perhaps suffices to say that *Tucci*'s application, notwithstanding the minor differences in the facts and circumstances upon which it was based, compels reversal of the order denying an extension of discovery presently under review

in the case at hand. We write further, however, to point out that the absence of an arbitration or trial date at the time of the trial judge’s ruling is of critical significance in a court’s exercise of its discretion to extend discovery . . .

In keeping with the philosophy adopted in *Tucci*, we conclude that in the absence of a scheduled arbitration or trial date, a trial court’s approach to an application to extend discovery, for the purpose of submitting a late expert report, should not be materially different from the pre-“Best Practices” approach. See Mason v. Sportsman’s Pub, 305 N.J. Super. 482, 493–94 (App. Div. 1997); [Glowacki v. Underwood Memorial Hosp, 270 N.J. Super. 1, 13–14 (App. Div. 1994)]. . .

This is not to suggest that the “Best Practices” rules do not “mean something.” We do not agree with Ferreri [the Defendant/Attorney] that a contrary holding represents an evisceration of “Best Practices.” The proper application of the “Best Practices” rule amendments has had, and will continue to have, a salutary effect on the fair and efficient administration of justice . . .

But these rule amendments are not a means unto themselves. Their *raison d’être* was to render trial dates meaningful and, thus, the enforcement or relaxation of discovery end dates are chiefly governed by the presence of an existing trial or arbitration date and whether the late discovery can be completed without jeopardizing the arbitration or trial date. See *Tucci*, supra, 364 N.J. Super. at 53 [] . . .

In the absence of a scheduled arbitration or trial date, the rigid enforcement of the discovery end date and the mechanical refusal to relax that date even where the adverse party would not suffer irremediable prejudice, would quickly force litigants and their attorneys into the unwarranted circumstance of being required to diligently complete discovery significantly in advance of the court’s ability to schedule a meaningful trial date.

We are disinclined to believe that the “Best Practices” rules were intended to create a “hurry up and wait” approach to the processing of civil actions. Instead, we are satisfied that the rules remain equipped to allow a trial judge to render substantial justice in all cases and that where the court system is not in a position to schedule a meaningful arbitration or trial date, a sanction that results in a deprivation of a litigant’s day in court on the merits is anathema to the fair and efficient administration of justice.

We are reminded of Justice Clifford’s apt comment that “[o]ur rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip.” Stone v. Old Bridge Tp., 111 N.J. 110 (1988) (dissenting opinion).

The rules do not exist for their own benefit. The rules, instead, are only a framework for the fair and uniform adjudication of cases brought into our system. Ragusa v. Lau, 119 N.J. 276, 283–84, 575 A.2d 8 (1990) (the rules “should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.”).

In the present case, because the court had not scheduled a trial date, and because there was no evidence that the scheduling of such a date was imminent and would be delayed by the brief extension of discovery sought by plaintiff, the salutary purposes of the “Best Practices” rule amendments were neither impacted nor jeopardized.

In applying these principles to the present case, we are satisfied that plaintiff raised good and sufficient reasons for a brief extension of discovery. While the record does not fully explain how the prior expert was placed in a conflict of interest warranting his replacement, in the absence of a scheduled trial date and in light of the fact that the prior expert had rendered only a net opinion that would undoubtedly prove fatal to plaintiff’s claim, we are satisfied that the trial judge mistakenly exercised his discretion by denying a brief extension of discovery in order to allow plaintiff to submit a new expert report and in order to allow the parties an additional reasonable amount of time necessary to deal with the new report.

There was no harm to the administration of justice in the granting of a brief extension because of the absence of a trial date. In addition, any resulting harm faced by Ferreri, who undoubtedly “played the game according to the rules,” could have been redressed through some lesser sanction than that which was issued and which proved impermissibly fatal to plaintiff’s claim.

Id. at 7 to 12 (underline added). Then the Ponden Court concluded:

We conclude that the trial judge misapplied his discretion by refusing to extend the discovery end date, and reverse and remand for the entry of an

order extending the discovery end date for a sufficient period of time to allow plaintiff to serve a new expert report and to allow Ferreri to take such additional discovery as warranted as a result of plaintiff's new expert report.

While we have concluded that a refusal to extend discovery or a refusal to consider plaintiff's new expert report are foreclosed as sanctions that may be imposed against plaintiff for delaying the completion of discovery, we nevertheless do not foreclose, upon remand, whether or to what extent the trial judge may, in the sound exercise of his discretion, impose a lesser sanction upon plaintiff.

The Second Case similar to the present circumstances is Javanovic v. Boiardo, (unpublished) 2016 WL 4547431 (App. Div. 2016) (Docket No.: A-2717-14T4) [AA0x to AA0X]. Similar to Ponden above, this matter concerned the submission of replacement expert report after discovery. This was a medical malpractice action wherein the Plaintiffs had a hard time finding an expert of the same profession to opine on negligence. After some back and forth, the Plaintiffs were forced to hire a new expert after discovery was completed. Unfortunately for Plaintiffs in this matter, the Plaintiff's second lawyer (who later appeared in the action) failed to appear for a Summary Judgment argument and inform the Court of the new expert that Plaintiffs had hired.

The Jovanovic Court stated:

new counsel, with whom plaintiffs were consulting, did not appear. Concluding plaintiffs had no expert evidence of malpractice, the judge granted defendant's motion for summary judgment. The resultant order dismissed plaintiffs' complaint . . .

Plaintiffs, who were self-represented, timely moved for reconsideration. The certification filed in support of the motion averred Michael C. Raklewicz, M.D., concluded his examination September 3, 2014 and attached his nine-page report. The report identified "two errors, which were substandard care"

in performing the surgery. Plaintiffs also related what transpired, requiring them to obtain Dr. Raklewicz after learning the expert identified during the summary judgment hearing was unqualified to opine on the specific orthopedic surgery performed. New counsel filed his notice of appearance . . .

The motion was not heard until [much later]. In her review, the [trial] judge determined plaintiffs could and should have obtained the expert's report earlier. She noted the expert, who was consulted prior to dismissal, rendered an opinion without reviewing the missing x-ray films, therefore no new evidence came to light. She denied reconsideration in a January 23, 2015 order. This appeal was filed on February 12, 2015 . . .

**When reviewing circumstances such as those presented, a judge must consider the basis for noncompliance**, the prejudice to other parties, and alternative available remedies that address prejudice caused by delay. See *Estate of Santos*, supra, 217 N.J. Super. at 414 (“To assure that justice not be delayed, we must efficiently manage the litigation calendar while simultaneously affording litigants and their attorneys adequate time to prepare and try their cases.”).

The ultimate objective must be tempered with this timeless policy expressed by our Supreme Court:

**[C]ourts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective.**

[*Allegro v. Afton Village Corp.*, 9 N.J. 156, 161 (1952)] (bold added).

When summary judgment was first considered, plaintiffs stated they paid the new expert to review the medical files. No evidence shows plaintiffs delayed in rendering payment to the expert, rather the uncontroverted facts show the expert was not qualified.

The facts show, however, Dr. Raklewicz expeditiously reviewed the available records, examined Mrs. Jovanovic, and opined on whether the standard of care was properly followed.

Following our review, we conclude the judge abused her discretion. Once plaintiffs' timely moved for reconsideration, demonstrated an expert was retained and a report issued to support their claims, the judge should have considered plaintiffs' explanation regarding circumstances causing their inability to meet the prior deadline and weighed whether defendant suffered prejudice by the delay and whether the harm, if any, could otherwise be compensated. The ultimate sanction of dismissal was not appropriate. See Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 447 (2011) (holding dismissal only should be used sparingly); Zaccaridi v. Becker, 88 N.J. 245, 253 (1982) (same).

**The record does not support a finding that plaintiffs themselves created or caused delay in retaining a new expert.** Nor can we agree with the notion Dr. Raklewicz should have rendered a report sooner. We cannot ignore that the expert opinion required involves a meticulous review of sophisticated evidence by a highly qualified medical professional, who met all specialized requisites to render an opinion regarding the standard of care governing defendant's conduct. To suggest the expert should have been located quicker and his review should have been rendered faster is specious.

Importantly, "there has been no showing of prejudice to [defendant] that would outweigh the strong preference for adjudication on the merits rather than final disposition for procedural reasons." [internal citations omitted]. Other than delay, including the additional twenty days from dismissal to the filing for reconsideration (which, incidentally, is compensable), defendant did not articulate an inability to present witnesses or evidence that would impede his ability to present his defense. See Baskett v. Cheung, 422 N.J. Super. 377, 384-85 (App. Div. 2011) (listing possible prejudices eroding a defendant's ability to defend an action).

In the interests of justice, we conclude the judge should have considered the efforts undertaken to secure Dr. Raklewicz to replace Dr. Shapiro and evaluated whether proven prejudice to defendant outweighed review of the merits of plaintiffs' claims.

We conclude the judge's failure to do so rose to an abuse of discretion. The order is reversed and the matter remanded to the trial court for reinstatement of plaintiffs' complaint and further proceedings.

Thus, the Ponden and Javanovic cases are clear that one of the main considerations of the Court when considering a replacement expert report (not asked for in the present circumstance) is the achievement of the interests of justice. Before we apply the facts of this case to the law, a brief statement about the Certifications is necessary.

The Certification of Dhamendra Jain (the “Jain Cert.”) attached hereto [AA2977 to AA2978] is clear that Mr. Jain would no longer be able to serve as the expert. Furthermore, it is clear, from his own words he failed to “dedicate” time to his report (para. 5). He admits that he did not have the requisite time in July of 2023 to work on the report (para. 6). In fact, Mr. Jain admits the reports was “deficient”.

Mr. Jain states he did not even understand many of the answers and that he had failed to adequately review the accounting rules and the basis for his opinion prior to his deposition (paras. 9 – 11). In paragraph 13, Mr. Jain states he is having “personal issues” (para. 13) and this has caused issues with concentration (para. 13). Finally, he states he is unwilling to continue and apologizes to this Court (paras. 14-17).

The Certification of Plaintiff found at: [AA2979 to AA2980], Mr. Shah, exhibits clearly as discussed above, that these issues of the expert report are not the fault of Mr. Shah. Mr. Shah undertook to retain the expert long before the Discovery End Date in this matter (Mr. Jain was retained at the end of April 2023 and the DED was July 31, 2023).

Instead of doing nothing, upon realizing that there were issues after the deposition, Mr. Shah immediately began the search for a new expert and retained (even before Mr.

Shah knew if the new expert could testify) Mr. Petrucelli. Mr. Shah worked extensively with Mr. Joseph Petrucelli, CPA, to teach him the massive amount of information of this case. Mr. Shah retained Mr. Petrucelli so Mr. Petrucelli could immerse himself in this case and replace Mr. Jain.

There is no question that Mr. Joseph Petrucelli, CPA/CFF/CGMA/ABV, FCPA, CVA, MAFF, PSA, is a qualified expert. In fact, Mr. Petrucelli is clear that he has already been certified as an expert approximately 30 times in New Jersey alone. Mr. Petrucelli was retained and has already spent countless hours analyzing this matter and has set forth preliminary points in his Certification. See Certification of Joseph Petrucelli, CPA. [AA2981 to AA2990].

What is clear from the record is that the Plaintiff pursued this action to the best of his ability and relied upon the experts that he hired. Although Plaintiff has knowledge in sales and, as proffered above, should be able to testify to that, Plaintiff could not perform valuations or give market valuations. He only knows what he actually sells products for on a daily basis.

What is most clear from the Petrucelli Certification is how the Defendants diverted the business from Nupur to other entities controlled by the Defendants and the Defendants' family members. It is worth noting that Mr. Shah is the only non-family member involved in Nupur. Mr. Petrucelli also sets forth the basis upon which he would calculate many of the other damage theories in this case.

New Jersey courts have adopted a liberal approach when assessing an expert witness's qualification. State v. Jenewicz, 193 N.J. 440, 454 (2008). The guiding principles “tilt in favor of the admissibility of expert testimony.” State v. Rosales, 202 N.J. 549, 562 (2010). “The modern tendency is to permit expert testimony whenever it would help the [fact finder] decide the ultimate issue of the case.” State v. Chatman, 156 N.J. Super. 35, 41 (App. Div.), certif. denied, 79 N.J. 467 (1978); see also, Jobes v. Evangelista, 369 N.J. Super. 384, 399 (App. Div.), certif. denied, 180 N.J. 457 (2004).

Any deficiencies in the qualifications of an expert or in the testimony offered are subject to testing during cross-examination. State v. Simon Family Enterp., 367 N.J. Super. 242, 255 (App. Div. 2004). A lack of experience, unfamiliarity with the data underlying an opinion, or a suggestion that an expert offers an opinion that is not truly his own all may affect the credibility of the expert's testimony and the weight, if any, that the court will give to the opinion offered by the expert. Id.

There is no question that Mr. Petrucelli is duly qualified to testify in this matter and his appearance will not delay or hold up this matter in any way. I would note the recent text from Your Honor's Order:

ORDERED, that by reason of the foregoing, the Pre-Trial Conference scheduled for October 23, 2023 and **the Trial Date scheduled for October 30, 2023 as per the Court's Order filed on July 7, 2023 are both ADJOURNED**<sup>5</sup>, without dates, but will be re-scheduled for dates to be

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<sup>5</sup> In the Trial Court's Opinion on this matter, the Court stated:

the Court already scheduled a trial date – not once, but twice - and it is

determined after the Court issues its decision on the pending summary judgment motions, including any intervening application made by any Defendant to re-open discovery for the limited purposes herein set forth and/or for reconsideration of the Court's denial of their respective applications to bar the Jain Report and the expert testimony of Mr. Jain at the time of trial as hereinabove provided.

At the Trial Court, the Plaintiff asked for time for discovery. For purposes of this appeal, the Plaintiff is not requesting further discovery time, but consents to any time requested by the Defendants.

Obviously, the Trial Courts ruling on these issues resulted in the dismissal of the Plaintiff's case. This result is not in keeping with the Ponden and Javanovic cases above.

In this matter, the interests of Justice are best served by allowing a blameless Plaintiff his day in Court to present the matter on the merits of the Case. Allowing Mr. Petrucelli to testify would be in keeping with the mandates of the case law which is to allow the Plaintiff his day in Court to try the matter on the merits.

**POINT III**  
**Plaintiff Presented Sufficient Evidence on Liability**

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misleading and disingenuous to argue that no trial date has been set. There were two firm trial dates set; this Court's May 4, 2023, Order set a firm trial date for September 18, 2023; the Plaintiff then moved to extend discovery and by Order dated July 7, 2023, the trial date was adjourned to October 30, 2023, which was adjourned again – and, precisely, in order to permit the Plaintiff to pursue and introduce the now debunked Jain Report and proposed opinion testimony

pg. 45 of [AA0004 to AA0056].

However, this was not a “disingenuous argument”. When this application was made, both trial dates had been adjourned and there was no trial date set.

**to defeat Summary Judgment (AA0085 to AA0109)**

With respect to Summary Judgment, it was very clear that, not unlike most partnership litigation, there are numerous he said/she said facts already wrapped and entangled in this matter which will be enough to occupy a fact-finder at trial for some time. The Defendants, Alka Amin, Rupal Patel and Anish Patel (“Defendants”) did not present any certifications with supporting evidence and did not really include affirmative statements as part of the Defendants’ Statement of Material Facts.

Prior to the end of discovery, Plaintiff was able to amass a large amount of evidence that begins to uncover and shed light upon how the Defendants ultimately diverted business away from Nupur and then ultimately, through a Vendor/Friend assured the death and dissolution of Nupur. To this end, Plaintiff worked tirelessly to produce an expert report to set out Plaintiff’s damages.

Defendants Motion for Summary Judgment filed in the Trial Court should have been denied as the following summary makes it clear that there are numerous issues of material facts between the parties.

In a motion for summary judgment pursuant to *R. 4:46-2(c)*, a court should grant summary judgment when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J.

520, 528-529 (1995).

A genuine issue of material fact is present when the evidence on the motion record, considered in light of the applicable burden of persuasion at trial and in a manner most favorable to the non-movant, would allow a factfinder to resolve the dispute in favor of the non-movant. *Id.* at 540. In order to ensure that the evidence on motion is viewed in a manner most favorable to the non-movant, the Court is compelled to accept the non-movant's version of the facts as true and grant the non-movant "[t]he benefit of all inferences that those facts support." *Baird v. Am. Med. Optics*, 155 N.J. 54, 58 (1998).

On a motion for summary judgment a court must "review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact." *Bhagat v. Bhagat*, 217 N.J. 22, 38 (2014). "[A]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Id.* (citing R. 4:46-2(c)). As the Defendant's Response to the Plaintiff's Statement of Material Facts make clear, there are numerous issues of facts that are required to be resolved by the trier of fact in this matter.

**N.J.S.A. 42:2C-39(b)(1)(c): Misappropriation of Company Opportunity**

In this case, Plaintiff is alleging that the Defendant, Hemang, Alka, Rupal and

Anish went out of their way to steal financial opportunities and divert business slowly from Nupur and then completely undermine and shut-down Nupur. As set forth in the Shah Cert., this is exactly what happened as Hemang and the other Defendants began diverting business, then creating businesses to compete with Nupur and then working with J.R. Shah and Shriji Marketing to completely shut down Nupur. It is clear that all Defendants worked in concert and against the Plaintiff. Again, all of the Defendants are close family members.

The Statute states:

c. The duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law

The factual dispute is not complicated. Clearly, the Defendants took the position over and over in the Trial Court that the Defendants did nothing wrong. The record bears this out.

On the opposite end of that assertion is Plaintiff's position that the Defendants worked in concert against him to divert revenue and run Nupur into the ground. The Plaintiff has listed out a very long litany of evidence showing that there is a substantial amount of documentation that shows that Hemang and the Defendants did their best to undermine Nupur and compete with Nupur.

The Plaintiff's Certification in support of the Opposition and the Exhibits are part of the Appellate record. Certification [AA2991 to AA3003] and Exhibits [AA3004 to

AA3101].

In the interest of not having to jump around, the evidence will be reprinted here:

- a. Certification of Devang Shah (the “Shah Cert.”), para. 8, Hemang imported the same or similar products as Nupur, which he sold to Nupur’s existing and prospective customers using information that he acquired through his association with Nupur, thereby depriving Nupur of these opportunities;
  - i. Here and below, it should be known that the Defendants are all closely related (Shah Cert., para 44):
    - a. Rupal and Anish are husband and wife;
    - b. Hemang and Alka are husband and wife;
    - c. ***Rupal and Hemang are sister and brother;***
    - d. Chirag Patel, owner of Krishna, is the cousin of Rupal and Anish; and,
    - e. Mohil Patel, owner of Divya, is the son of Rupal and Anish.
  - ii. Thus, Plaintiff is not family with the Defendants, but all the Defendants benefit greatly from their relationship. Shah Cert., para. 45.
  - iii. Shah Cert., para. 10: Hemang caused Nupur to lose continued business from its existing customers and from brands with which it had negotiated agreements authorizing international sales, including by diverting sales from companies which regularly purchased products from Nupur, and

causing them to import products directly from several of Nupur's Indian suppliers.

- iv. Shah Cert., para. 11: attached as **Exhibit 3** [AA3015 to AA3016] are pictures of two products marked for distribution by Nupur but fraudulently sold by the Defendants.
- v. Shah Cert., para 15: another example, attached as **Exhibit 4** [AA3017 to AA3048] are pictures of two products marked for distribution by Nupur (and corresponding receipt) with expiration dates of November 2020 and January 2021 (pictured to the left). The pictures show the same products marked for distribution by Amin Trading with expiration dates of December 2021.
- vi. Shah Cert., paras. 21-23: See **Exhibit 5** [AA3019 to AA3021], this shows more products diverted by the Defendants.
- vii. Shah Cert., paras. 33-35: Hemang's wife, Alka, made a first-time distribution ever obviously done to help Hemang open his new warehouse, there had never before been distributions to the partners, this was obviously done to undermine the Plaintiff.
- viii. Shah Cert., para 43: Alka Amin, Rupal Patel and Anisha Patel all participated in the fraud as well.

1. Shah Cert., para. 49(a): Email shows Hemang and Rupal working together to use Nupur resources to pay for business that was being diverted, see **Exhibit 6** [AA3025];
  2. Shah Cert., para. 49(b): Email shows Hemang and Rupal working together to use Nupur resources to help Rupal's family, Chirag, to divert business away, see **Exhibit 7** [AA3026];
  3. Also attached from Shah Cert., **Exhibit 8** [AA3027], it shows how the Defendants charged expenses from other companies to Nupur.
- ix. Shah Cert., para. 52: Rupal and Anish were using the email [mohman9498@yahoo.com](mailto:mohman9498@yahoo.com) – this email help set up competing streams of business with Nupur – **Exhibit 13** and pg. 8 FN 4 [AA3033 to AA3037].
- b. Shah Cert., para. 56: In this paragraph we see how Anish and Hemang worked together to set up a company that would also be owned by family named Divya. Nupur should have been an exclusive dealer, but eventually all of their business was diverted away.
- c. Shah Cert., para. 57: **Exhibit 15** [AA3039] clearly shows Hemang and Anish working together to set up another competing company and another non-Nupur email [aryatrading2019@gmail.com](mailto:aryatrading2019@gmail.com)
- d. Shah Cert., para. 59: **Exhibit 16** [AA3040] also shows Hemang and Anish working together to divert business.

- e. Shah Cert., para. 61: **Exhibit 17** [AA3041] shows Hemang working with family and Defendants to divert business away from Nupur.
- f. Shah Cert., para 62: “Hemang with the help of Mr. & Mrs. Patel also caused Nupur to lose continued business from its existing customers and from brands with which it had negotiated agreements authorizing international sales.”
- g. There are numerous examples of Plaintiff’s damages set forth in the Shah Certification wherein damages are examined as set forth above and in Certification and Exhibits.

What is unfortunate is that Plaintiff was unable to collect the entirety of all the private emails the Defendants used to hide their stealing from the company (i.e., [hamin72@hotmail.com](mailto:hamin72@hotmail.com) and [mohman9498@yahoo.com](mailto:mohman9498@yahoo.com)).

Thus, it is clear that under this Count in the Complaint, there are very clear issues of fact that preclude summary judgment. In fact, other than citing the complaint the Defendant’s Motion For Summary Judgment does not really rely upon any facts whatsoever.

**A. N.J.S.A. 42:2C-39(b)(3): Unjust Competition**

Similar to the above, it is clear that the Defendants are taking the position that they did nothing wrong whatsoever. To answer that the Plaintiff asserts all of the evidence above in Plaintiff’s SJ Evidence. It is clear that facts be viewed in light most favorable to the non-moving party and Plaintiff’s facts were accepted as true, then the

Defendants would lose. Thus, Summary Judgment is precluded as this time.

In fact, although I could go through each and every one of the outstanding causes of action, each of the conclusions would be the same. The facts viewed, in light most favorable to the Plaintiff would preclude all of the following causes of actions being determined in favor of the Defendant: N.J.S.A. 42:2C-39(d): Breach of Good Faith and Fair Dealing; Breach of Contract; Breach of the Common Law Implied Covenant of Good Faith and Fair Dealing; Breach of Common Law Fiduciary Duty.

As stated above, A genuine issue of material fact is present when the evidence on the motion record, considered in light of the applicable burden of persuasion at trial and in a manner most favorable to the non-movant, would allow a factfinder to resolve the dispute in favor of the non-movant. Id. at 540.

In order to ensure that the evidence on motion is viewed in a manner most favorable to the non-movant, the Court is compelled to accept the non-movant's version of the facts as true and grant the non-movant "[t]he benefit of all inferences that those facts support." Baird, supra, 155 N.J. at 58.

Thus, viewing the facts in light most favorable to the Plaintiff, there are numerous issues that must be reserved for a factfinder at trial.

At the hearing, it appeared that the Court disregarded much of the Plaintiff's Certification in support of this matter and focused on Interrogatories produced early in the litigation. The Certification and Exhibits accompanying the Plaintiff's Opposition

to Summary Judgment make it clear that the motion should not have been granted by the Trial Court. There are numerous issues that preclude Summary Judgment.

Thus, the Court erred when it found that Plaintiff could not defeat Summary Judgment. Thus, it is respectfully requested that the Appellate Division reverse the Trial Court's ruling.

**Point IV**  
**Sanctions Awarded Against the Plaintiff Were**  
**Not Warranted** (*found AA0028 to AA0036, AA0057 to AA071*)

In this matter, the Court also awarded very substantial sanctions against the Plaintiff. Even though the Plaintiff is blameless for the errors of Mr. Jain. As seen in the Order attached hereto [AA0057 to Aa0071], the Trial Court awarded \$91,894.07 in fees in costs against the Plaintiff in favor of the Defendants.

Unlike normal fee battles, the Plaintiff did not take issue with the hourly rates and time spent on the matter except with respect to a few Defendants. There was no need as it was clear with respect to one Defendant they had not billed time to which they were entitled and the other Defendant had discounted their rate.

In this matter, the Plaintiff raised the solitary argument that the fees awarded were unjust and not supported by the law because Plaintiff is blameless in the actions of Mr. Jain. In fact, it is inconceivable that not only does Plaintiff have to pay almost \$100,000 in fees and costs for something that is not the Plaintiff's fault, the case was dismissed as well.

Rule 1:4-8 requires attorneys to sign papers filed with a Court and thereby affirm the

legitimacy of the asserted positions. R. 1:4-8(a). A filing is “frivolous” under Rule 1:4-8 if “no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.” First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007) (quoting Fagas v. Scott, 251 N.J. Super. 169, 190 (Law Div. 1991)).

Rule 4:46-5 provides that “if the court is satisfied, at any time, that any of the affidavits submitted pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of reasonable expenses . . . .”

In this matter and as argued at oral argument, Plaintiff had no idea what was going to happen at Mr. Jain’s deposition. Plaintiff had relied completely upon what Mr. Jain had represented to him and what Mr. Jain had said to put his in Certification. Plaintiff is a salesman and has knowledge of product and prices but not valuations and methodologies of valuations. See Shah Cert. [AA2979 to AA2980].

Plaintiff spent countless hours in May, June and July trying to prepare documents and reviewed other papers in order to support the former expert, Mr. Jain. There were many meetings and discussions. Most disconcerting, Plaintiff has paid a substantial sum of money to Mr. Jain.

Also, the rule states specifically that the sanction is awarded wherein a party presents an affidavit in “bad faith”. In this matter, there is no evidence in the record and neither is

there evidence anywhere that Plaintiff or Plaintiff's Counsel submitted the Affidavit in bad faith. Plaintiff was relying solely upon the guidance from Mr. Jain. Plaintiff was not aware of issues until the deposition when it was too late. In the equitable analysis, Mr. Shah relied upon a professional, put his trust and confidence in him, and then the professional was unable to support the expert report and Certification submitted and positions stated therein at his deposition. This was not the fault of Plaintiff and the Plaintiff now faces sanctions and a dismissed case. This is not the "polestar" of Justice to which Best Practices aspires to be. Thus, it is respectfully requested that the award for sanctions be vacated or reduced.

**Point V**

**The Krishna/Divya Claims Should Not Have  
Been Dismissed On Summary Judgment** (*found AA0102 to AA0104*)

The Plaintiff objects to the granting of Summary Judgment in favor of the Defendants Krishna Trading, LLC and Arya Trading, LLC (d/b/a Divya Foods) as these two entities owe money to Nupur Trading, LLC. Thus, Plaintiff objects to the granting of Summary Judgment as to Counts XIII (Unjust Enrichment) and Count XIV (Conversion).

Mr. Shah opposed this motion and attached exhibits. See Certification (AA3105 to Aa3106) and Exhibits (AA3107 to AA31067).

In the Certification of Devang Shah, **Exhibit 4** (AA3150 to AA3167), Mr. Shah sets forth relevant and substantial evidence that the Defendants Divya and Krishna owe money to Nupur. Mr. Shah sets forth:

- Divya Owes: \$65,540.00;
- Krishna Owes: \$48,776.00;

- **Total Owed:** \$114,316.00 plus interest.

In addition to setting out exactly what is owed by Divya and Krishna (via invoices and correspondence on the invoices), **Exhibit 4** makes it clear that the Defendants Hemang, Anish, Alka and Rupal did not want to collect on this money. The reason for this is clear as the Defendants Hemang, Anish, Alka and Rupal are related by blood to the principals of Divya and Krishna.

Notwithstanding this fact, Plaintiff's claims for Unjust Enrichment and Conversion survive the Defendants' Motion For Summary Judgment. The numerous correspondences to the Collection Agencies to collect this debt make it clear that the Plaintiff, via collection people, made demands for the amounts due Nupur, but the Defendants Krishna and Divya never paid the amounts due.

Thus, the Plaintiff has come forth with credible and substantial evidence showing that Plaintiff's claims for Unjust Enrichment and Conversion should allowed to be tried.

Had the Trial Court viewed these facts in light most favorable to the Plaintiff, it is clear that Plaintiff has met its burden of persuasion to show there is a genuine fact in dispute about money owed by Divya and Krishna to Nupur with respect to Counts XIII and XIV. Baird, supra, 155 N.J. at 58.

Thus, for all the reasons set forth above, Plaintiff respectfully requests that this Court reverse the Trial Court with respect to the Trial Court's dismissal of Counts XIII and XIV (Unjust Enrichment and Conversion) with respect to Krishna and Divya's Motion For

summary Judgment.

### CONCLUSION

For all the reasons set forth above, the Plaintiff respectfully requests:

1. That this Appellate Division reverse the Trial Court's decision to bar Plaintiff testifying as to lost profits within the knowledge of the Plaintiff at trial;  
  
- Or in the alternative -
2. As both "exigent" and "unforeseen circumstances" certainly arose, in conformance with the Court's Express Order, allow the Plaintiff to substitute Mr. Petrucelli for Mr. Jain and issue an expert report without any further paper or other discovery with respect to the Plaintiff;
3. Should this Court permit the Plaintiff to have an avenue to prove damages at trial, then reverse the Trial Court on its granting of Summary Judgment to the Defendants as genuine issues of material fact exist;
4. Either vacate the award for sanctions and fees entirely or reduce it as Plaintiff is blameless for Mr. Jain's gross errors;
5. Reverse the Trial Court with respect to the Divya/Krishna Summary Judgment Motion and deny their Motion as genuine issues of material facts preclude Summary Judgment.

**Respectfully Submitted,**

*/s/ Paul I. Perkins*

**Paul I. Perkins, Esq. (NJ#007372006)**



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### PRELIMINARY STATEMENT

This appeal relates to an action commenced in the Superior Court of New Jersey, Middlesex County, Chancery Division by plaintiff/appellant Devang Shah ("Plaintiff"), in his individual capacity and derivatively on behalf of Nupur Trading LLC ("Nupur"), arising from a dispute between the members of Nupur over the ownership and operation of Nupur.

The Counts of the Complaint subject to this appeal which relate to defendant/respondent Arya Trading LLC d/b/a Divya Foods ("Arya") are both pleaded derivatively on behalf of Nupur and include: Count Thirteen which alleges unjust enrichment, and Count Fourteen which alleges conversion.

This brief is submitted on behalf of Arya in opposition to the appeal filed by Plaintiff. Arya relies upon the appendix submitted by the plaintiff/appellant ("Aa").

Arya is a former customer of Nupur and had no involvement in the ownership or operation of Nupur. Arya is a peripheral defendant in this matter who was

joined in this action merely because its members have family connections to certain members of Nupur.

Plaintiff's remaining claims against Arya were dismissed with prejudice by the trial court because Plaintiff failed to produce any evidence substantiating the claims against Arya, and the dissolution and termination of Nupur resulted in Plaintiff having no ability to maintain claims derivatively on behalf of Nupur.

Plaintiff initially also pled causes of action against Arya for tortious interference with contractual relations, and tortious interference with prospective business/economic advantage, but admitted in opposition to Arya's Motion for Summary Judgment before the trial court that the claims were unsupported and unsustainable. Plaintiff voluntarily dismissed those causes of action.

Likewise, the appeal filed by Plaintiff points to no evidence substantiating the claims against Arya and does not address the dissolution and termination of Nupur, which the trial court correctly found resulted

in Plaintiff having no ability to maintain claims derivatively on behalf of Nupur.

As a matter of law, the trial court correctly determined that the dissolution and termination of Nupur resulted in Plaintiff having no ability to maintain claims derivatively on behalf of Nupur. In addition, the trial court correctly awarded fees and costs to all defendants in association with a blatantly deficient expert report proffered by Plaintiff.

The trial court's orders and determinations should be affirmed.

### PROCEDURAL HISTORY

Plaintiff filed a Complaint against Alka H. Amin, Rupal A. Patel, Anish P. Patel (collectively, the "Member Defendants"), Hemang Sureshbhai Amin ("Mr. Amin"), Havmor Corporation USA LLC ("Havmor"), Aaryan Imports LLC ("Aaryan"), Amin Trading Agency LLC d/b/a Ansu Foods ("Ansu"), Amin Trading LLC ("Amin") (collectively, the "Amin Defendants"), Nupur, Krishna Trading LLC ("Krishna"), and Arya on or about April 22, 2021 bearing docket number MID-C-52-21. (Aa0011 to Aa0012; Aa0079; and Aa0111 to Aa0149)

Plaintiff's Complaint utilizes the defined term "Company Defendants," which includes Havmor, Aaryan, Krishna, Arya, Ansu, and Amin. Havmor, Aaryan, Ansu and Amin are referenced collectively herein as the "Entity Amin Defendants."

The Member Defendants filed an Answer, Crossclaim, and Counterclaim on or about June 3, 2021. (Aa0011 to Aa0012; Aa0079; and Aa0155 to Aa 0175) The Member Defendants filed an Amended Answer and Counterclaim on or about June 7, 2021. (Aa0012 and Aa0079) The Amin

Defendants filed an Answer on or about June 17, 2021.  
(Aa 0012 and Aa0079)

Plaintiff filed an application for an Order to Show Cause on or about June 21, 2021. (Aa0012 and Aa0079) An Order to Show Cause with Temporary Restraints was entered by the trial court on or about July 2, 2021. (Aa0012 to Aa0013; Aa0079 to Aa0080; and Aa0150 to Aa0154) Plaintiff filed an Answer to the Member Defendants' Counterclaim on or about July 8, 2021. (Aa0013 and Aa0080)

The trial court entered an Order appointing Hon. Travis L. Francis, A.J.S.C. (Ret.) as Special Fiscal Agent and Mediator on or about August 4, 2021. (Aa0013 and Aa0080 to Aa0081) Thereafter, Plaintiff, the Member Defendants, and the Amin Defendants engaged in mediation, and agreed to wind down the business and cease operations of Nupur. (Aa0013 and Aa0080 to Aa0081)

In the meantime, default was entered as to Arya and Krishna on or about July 28, 2021. (Aa0013 and Aa0080) Arya and Krishna had no prior involvement in the case,

nor did they participate in the mediation overseen by Judge Francis.

On August 12, 2021, following a telephonic Case Management Conference, the Court entered Orders vacating the temporary restraints previously entered; denying Plaintiff's request for a preliminary injunction during the pendency of these proceedings; permitting the Member Defendants to retain counsel to represent Nupur in a federal lawsuit unrelated to this matter; and vacating default as to Arya and Krishna and permitting them to file an Answer out of time.' (Aa0013 and Aa0080 to Aa0081)

Arya and Krishna filed separate Answers to Plaintiff's Complaint on or about September 8, 2021. (Aa0013 to Aa0014 and Aa0081) The Court entered an Order vacating the previous Order appointing Judge Francis as Special Fiscal Agent and Mediator, and entered another Order appointing Judge Francis as

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<sup>1</sup> Krishna and Arya retained this firm at that time, and this office represented both entities during the lower court proceedings. This office represents only Arya during these appellate proceedings.

Special Discovery Master, on or about September 23, 2021. (Aa0014 and Aa0081)

On or about November 12, 2021, the Member Defendants filed an Amended Answer and Counterclaim, adding to their counterclaims against Plaintiff. (Aa0014 and Aa0081) Plaintiff filed an Answer to the Amended Counterclaim on or about January 28, 2022. (Aa0014 and Aa0081) The parties proceeded to engage in discovery and motion practice related to same throughout the course of 2022. (Aa0014 to Aa0015 and Aa0081 to Aa0082)

On June 13, 2023, Plaintiff filed a motion to extend discovery, which was opposed by the defendants. (Aa0015 and Aa0082) On July 7, 2023, the trial court entered an Order granting the motion in part, extending discovery until July 31, 2023. (Aa0015 to Aa0016 and Aa0082 to Aa0083) The Statement of Reasons which accompanied the Order stated in pertinent part:

**Put simply, the time has come to bring closure to discovery and prepare the case for dispositive motions and trial,** and any intervening issues that may result from this Order shall be referred to the Special Discovery

Master for appropriate resolution within, **and so long as, outstanding discovery is completed by the adjusted discovery end date of July 31, 2023. Enough is enough.**

[Aa0015 and Aa0083] (Emphasis added.)

On August 9, 2023, the Member Defendants filed a motion to bar the Plaintiff's named expert, Dharmendra Jain of RR Accounting & Tax Services, Inc. and his report dated July 30, 2023 (the "Jain Report"). (Aa0016 and Aa0083) The Amin Defendants also filed a motion seeking to exclude the Jain Report. (Aa0016 and Aa0083) These motions were supported by Arya. (Aa0016 and Aa0083)

On August 18, 2023, the Member Defendants filed a motion for summary judgment. (Aa0016 and Aa0085) Arya and Krishna filed a motion for summary judgment on August 25, 2023, and the Amin Defendants filed their own motion for summary judgment on August 28, 2023. (Aa0016 and Aa0085) Plaintiff opposed all motions for summary judgment. (Aa0016 and Aa0085)

On September 19, 2023, the trial court entered an Order that denied the motions seeking to bar the Jain

Report, but without prejudice to their reconsideration following the trial court's permitted deposition of Plaintiff's expert, Mr. Jain. (Aa0016 to Aa0017 and Aa0084) The trial court also granted defendants leave to depose Mr. Jain and thereafter move for reconsideration if deemed appropriate. The trial court carried the summary judgment motions to a new date to be determined following any motions for reconsideration. (Aa0016 to Aa0017 and Aa0084)

The deposition of Mr. Jain was taken on October 13, 2023. (Aa0027; Aa0036; and Aa0084) On November 29, 2023, as a result of the deposition, the defendants filed motions for reconsideration seeking to preclude the Jain Report and the opinions of Mr. Jain, and for attorneys' fees and costs; and Plaintiff filed a motion to replace Mr. Jain as his expert and seeking leave to serve a supplemental expert report. (Aa0084) Oppositions to the motions were filed by all parties. (Aa0084)

On December 18, 2023, the trial court entered an Order granting the motions to bar and preclude the Jain

Report and the opinions of the proffered expert, and denied Plaintiff's motion seeking to replace Mr. Jain with a new expert, Joseph Petrucelli, CPA. (Aa0004 to Aa0056 and Aa0084) The trial court also awarded the defendants fees and costs incurred. (Aa0004 to Aa0056)

The parties filed supplemental briefs in support of, and in opposition to, the motions for summary judgment in January 2024. (Aa0084) Following extensive oral argument, on April 2, 2024, the trial court issued an Order and accompanying Statement of Reasons granting the defendants' motions for summary judgment and dismissing Plaintiff's claims, including all claims against Arya, with prejudice. (Aa0072 to Aa0110)

On October 25, 2024, the trial court, upon the motion of the Member Defendants, dismissed the Member Defendants' counterclaims against Plaintiff without prejudice, bringing the lower court proceedings to conclusion. (Aa0001 to Aa0003)

### COUNTERSTATEMENT OF FACTS

Arya is a limited liability company organized under the laws of the state of Texas. (Aa0113) Jyoti Patel and Mohil Patel are the Managing Members of Arya and have each held a fifty (50%) percent interest in Arya since Arya was formed on June 11, 2019. (Aa0100) Mr. Amin has never been a member of Arya, or held any other role with the company. (Aa0100)

The Complaint generally alleges that Mr. Amin used his position at Nupur, "including all of the knowledge and skills he has gained from having unrestricted access to Nupur's confidential and proprietary information" to "form competitor limited liability companies for the purpose of importing the same or similar products in direct competition with Nupur." (Aa0111 to Aa0136)

Specifically, Plaintiff alleges that Mr. Amin caused Arya, as well as other entities, "all of which regularly purchased products from Nupur, to begin importing products directly from several of Nupur's Indian suppliers, including J.R. Shah Exports Ltd.,

Shiv Traders, Shriji Marketing, and Laxmi Protein.”  
(Aa0111 to Aa0136) However, Nupur was never the only supplier from which Arya purchased products, and Plaintiff has produced no evidence whatsoever demonstrating that Arya only began to import products directly from other companies at the behest of Mr. Amin. (Aa0072 to Aa0110)

Plaintiff also contends that “in or around 2019, while working in Nupur’s offices, Plaintiff heard Hemang while he was speaking on the telephone and discussing steps to setup” Arya. (Aa0090 to Aa0091) Plaintiff has produced no evidence that Mr. Amin was involved in the formation of Arya, or that he has been involved in the operations of Arya. (Aa0072 to Aa0074 and Aa0092 to Aa0093) Plaintiff has also failed to produce any evidence that Mr. Amin has diverted the corporate resources of Nupur to Arya. (Aa0072 to Aa0074 and Aa0092 to Aa0093) As a result, as the trial court correctly held, the claims against Arya fail as a matter of law. (Aa0072 to Aa 0110)

Importantly, Nupur was dissolved pursuant to a Dissolution Agreement entered into by Plaintiff and the Member Defendants on or about October 20, 2021. (Aa0100 to Aa0102) The Dissolution Agreement states in pertinent part that “[u]pon the processing of the Statements of Dissolution and Termination by the State of New Jersey, any and all claims asserted on behalf of Nupur only shall be dismissed without prejudice, each party to bear their own fees and costs.” (Aa0100) (Emphasis added)

A Certificate of Dissolution and Termination was filed with the State of New Jersey on behalf of Nupur on or about December 13, 2022. (Aa0100 to Aa0101) As a result, as the trial court correctly found, all claims asserted by Plaintiff against Arya, which are asserted derivatively on behalf of Nupur only, fail as a matter of law. (Aa0072 to Aa 0110)

**LEGAL ARGUMENT**

**POINT I**

**THE STANDARDS OF REVIEW APPLICABLE TO THE  
ERRORS ALLEGED BY PLAINTIFF/APPELLANT**

**A. REVIEW OF THE TRIAL COURT'S GRANT OF ARYA'S  
MOTION FOR SUMMARY JUDGMENT IS PLENARY**

R. 4:46-2(c) provides that upon the filing of a motion, summary judgment shall be granted

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Ibid. The rule is designed to provide a prompt, businesslike, and inexpensive method of disposing of any cause in which a discriminating search of the merits in the pleadings, depositions, and admissions on file, together with the affidavits submitted on the motion, clearly show the absence of any genuine issue of material fact requiring disposition at trial. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the motion judge is to consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520, 523 (1995).

"An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citations omitted). The "appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012) (citations omitted).

**B. THE TRIAL COURT'S AWARD OF COUNSEL FEES AND COSTS SHOULD NOT BE DISTURBED UNLESS IT CONSTITUTED A CLEAR ABUSE OF DISCRETION (Aa0057 to Aa0061)**

A "reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001)). "[A]n abuse of discretion 'arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

POINT II

**SUMMARY JUDGMENT IN FAVOR OF ARYA ON COUNT THIRTEEN OF THE COMPLAINT FOR UNJUST ENRICHMENT WAS PROPERLY GRANTED (Aa0072 to Aa0074)**

To sustain a claim for unjust enrichment, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citations omitted).

The doctrine "requires that plaintiff 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." Ibid. (Citations omitted.) Stated differently, "[s]uch liability will be imposed only if plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendants, at the time the benefit was conferred." Castro v. NYT Television, 370 N.J. Super. 282, 299 (App. Div. 2004) (citation omitted).

In Cameco, Inc. v. Gedicke, 299 N.J. Super. 203 (App. Div. 1997), the plaintiff goods importer filed a suit against its former warehouse manager, generally alleging that he utilized the company's confidential shipping information when forming a competitor truck brokering business known as Newton. Id. at 207-08. The court dismissed the plaintiff's claim for unjust enrichment, finding that

Cameco conferred no benefit upon Gedicki and Newon, for which Cameco reasonably could have expected compensation. At the time that Cameco exposed Gedicki to its shipping information, Cameco did not expect any remuneration for that 'benefit.' Moreover, it is not clear that it would be unjust for Gedicke to retain the benefits (profits of Newton) of the benefit (shipping information) he 'received' from Cameco, at least as to his customers who were not competitors of Cameco ... Therefore, Cameco does not have a cause of action for unjust enrichment.

Id. at 218 (citation omitted) (aff'd as modified on other grounds, 157 N.J. 504 (1999)).

In this case, defendant Hemang Amin is alleged to have engaged in similar conduct to the defendant in Cameco. Plaintiff alleges that "Mr. Amin diverted the

resources, assets, and nonmonetary benefits of Nupur to [Arya and the Entity Amin Defendants] for his own benefit, including Nupur's confidential and proprietary information which he used to seize Nupur's existing customers and brands."

The claim is predicated upon Plaintiff's mistaken belief that Mr. Amin held an ownership interest in, or was involved in the operations of, Arya. Plaintiff had no direct relationship with Arya. Arya has no legal obligation to Plaintiff under the cause of action asserted.

Plaintiff's brief now states that summary judgment was not warranted because Arya owed money to Nupur in the amount of \$65,540.00, which Plaintiff wanted to collect.

Plaintiff fails to acknowledge that the Dissolution Agreement of Nupur provides for the dismissal of all claims "asserted on behalf of Nupur only" upon the filing of a Statement of Dissolution and Termination with the State of New Jersey. A Certificate of Dissolution and Termination was filed on behalf of

Nupur on or about December 13, 2022. Count Thirteen of the Complaint is asserted derivatively on behalf of Nupur only and not as a claim brought by plaintiff, individually. Pursuant to the Dissolution Agreement, which was signed by Plaintiff, the trial court correctly found that summary judgment was warranted.

POINT III

**SUMMARY JUDGMENT IN FAVOR OF ARYA ON COUNT FOURTEEN OF THE COMPLAINT FOR CONVERSION WAS PROPERLY GRANTED (Aa0072 to Aa0074)**

Conversion is defined as the “unauthorized assumption and exercise of the right of ownership over goods or 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. 2009) (citations omitted). Conversion is an intentional tort, in that “the defendant must have intended to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff’s rights.” Ibid. (Citation and punctuation omitted.) However, “the defendant need not knowingly or intentionally act wrongfully for a conversion to occur.” Ibid. (Citation omitted.) Conversion is “the wrongful exercise of dominion and control over property owned by another inconsistent with the owners’ rights.” Ibid. (Citations omitted.)

Here, Plaintiff alleges that “Mr. Amin diverted the resources and assets of Nupur to [Arya and the Entity

Amin Defendants] for his own benefit, specifically including international shipments of products procured by Nupur and intended to be delivered to Nupur's warehouse." (Aa0134)

Plaintiff had no direct and individual relationship with Arya, and he therefore has no legal claim to damages against them, nor has Plaintiff asserted such an individual claim.

Consistent with the claim for unjust enrichment, Plaintiff's brief now states that summary judgment was not warranted on the cause of action for conversion because Arya owed money to Nupur in the amount of \$65,540.00, which Plaintiff wanted to collect.

Again, Plaintiff fails to acknowledge that the Dissolution Agreement of Nupur provides for the dismissal of all claims "asserted on behalf of Nupur only" upon the filing of a Statement of Dissolution and Termination with the State of New Jersey. A Certificate of Dissolution and Termination was filed on behalf of Nupur on or about December 13, 2022. Count Fourteen of the Complaint is asserted derivatively on

behalf of Nupur only and not as a claim brought by plaintiff, individually. Pursuant to the Dissolution Agreement, which was signed by Plaintiff, the trial court correctly found that summary judgment was warranted.

POINT IV

**PLAINTIFF HAS FAILED TO ESTABLISH THAT THE TRIAL COURT'S AWARD OF COUNSEL FEES AND COSTS CONSTITUTED AN ABUSE OF DISCRETION (Aa0057 to Aa0061)**

Plaintiff's brief does not so much as attempt to demonstrate an abuse of discretion by the trial court. Plaintiff instead asserts that counsel fees and costs should not have been awarded to defendants because the award was "unjust" and Plaintiff was "blameless in the actions of Mr. Jain."

On December 18, 2023, the trial court issued an Opinion and extensive Statement of Reasons which granted the defendants' motions for reconsideration, barred and precluded the Jain Report and opinions of Mr. Jain from evidence, and awarded the defendants

attorney's fees and costs incurred from and after the Court's Order of September 19, 2023 to the date hereof, which sum shall be determined by the Court upon a submission of a Certification of Counsel that complies with the requirements of R. 4:42-9(b) and N.J. Prof. Conduct 1.5(c) within twenty (20) days of the date hereof.

[Aa0007]

The Statement of Reasons explained that the Jain Report was barred because

Mr. Jain is certainly not qualified to be considered an expert in the field of accounting and business valuations, is barred by statute from even holding himself out as an accountant or even using the terms "accountant" or "accounting", and for the specific reasons more fully articulated below, is disqualified as an expert witness. To be frank, **the Certification he previously offered to the Court to support his claimed qualifications, and which was considered by the Court with respect in initially denying the motions to bar, turned out to be riddled with falsehoods, at best, and a sham affidavit violative of R. 1:4-4, R. 1:6-6 and N.J.R.E. 702, at worst.** Mr. Jain's opinion results in an inadmissible "net opinion" as he does not and cannot rely on GAAP or any generally accepted principles that might support the valuations he rendered.

[Aa0027] (Emphasis added.)

The trial court further stated that

Mr. Jain's Certification of August 17, 2023 and **on which the Court initially relied in denying the earlier motions to bar** purported accounting qualifications and credentials to render his opinions that he later admitted in his deposition of October 13, 2023 that he did not have; and that, resultantly, rendered his report

of July 30, 2023 and proposed opinion testimony completely invalid.

[Aa0027] (Emphasis added.)

In addition, the trial court found that

Mr. Jain's report and testimony was entirely employed by an unreliable methodology. In fact, Mr. Jain, during his deposition could not even explain what methodologies were used and how he got to the conclusions. Mr. Jain could not explain the methodology used to arrive at an opinion and the underlying data used in the formulation of his opinion as required by In re: Accutane. Mr. Jain's opinion must be reliable, and the Court does not view it as so. If anything, in addition to his lack of qualifications, his report and proffered opinions are wholly unreliable. As the Defendants stated, the Court would be confused by the report since there is no explanation for how Mr. Jain got to his conclusions. And, as above noted, even Plaintiff's brief in support of his motion for leave to replace the expert and submit a "supplemental" report, states, "[i]t is clear that Mr. Jain's opinion now amounts to a 'net opinion' and, as such, is unhelpful to the Plaintiff."

Mr. Jain should not - and most certainly will not be - be qualified as an expert in this case. The Court views the expert report as completely unreliable and therefore will preclude it from the evidence.

[Aa0034]

The trial court concluded:

Accordingly, insofar as the Defendants' application seeks an award of attorneys' fees and costs, the Court agrees that they are entitled to recoup that which they incurred at least from and since the Court's September 19<sup>th</sup> Order. **But for Mr. Jain's sham Certification, now firmly demonstrated and undeniable lack of qualifications, coupled with the unsupportable, inexcusable "net opinion" of a report he submitted, the Defendants would not have had to incur the additional expenses they did to support this Court's reconsideration of its prior without prejudice denial of the motions to bar. Nor would the time and resources of the Court have been unduly taxed. Nor further would the advancement of this case to hearing the previously filed and still pending dispositive motions for summary judgment that had been originally made returnable for hearing on September 22, 2023 (adjourned to November 3, 2023, and adjourned again, in accommodation of the Plaintiff,) have been stalled and avoidably attenuated.** The parties will be required to supply a Certification of Counsel Fees and Costs and Fees and annexed exhibits so that the Court can determine that such Certification complies with the requirements of R. 4:42-9(b) and N.J.F.Prof.Conduct 1.5(c). Therefore, this part of the Defendants motion is granted.

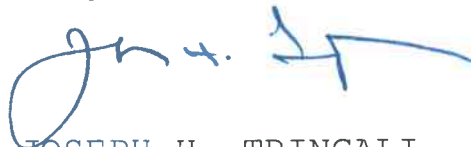
[Aa0037] (Italics and underline emphasis in original; bold emphasis added.)

As a result, it is clear that the trial court's award of counsel fees and costs to the defendants was not "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis" such that it constituted an abuse of discretion. Flagg, 171 N.J. 561 at 571.

CONCLUSION

For the forgoing reasons, Plaintiff's appeal should be denied in its entirety. We note that this brief does not address Plaintiff's contentions that he should have been permitted to testify as to damages at trial or allowed to substitute Mr. Petrucelli for Mr. Jain. No such expert testimony would cure the defects in Plaintiff's causes of action against Arya, nor would the allowance of same impact the trial court's proper award of counsel fees and costs to defendants in connection with the barred Jain Report.

Respectfully submitted,



JOSEPH H. TRINGALI

Dated: June 27, 2025

DEVANG SHAH, in his individual capacity and derivatively on behalf on NUPUR TRADING, LLC,

Plaintiff/Appellant,

v.

NUPUR TRADING, LLC, ALKA H. AMIN, HEMANG SURESHBHAI AMIN, RUPUAL A. PATEL, ANISH P. PATEL, HAVMOR CORPORATION USA LLC, AARYAN IMPORTS, LLC, KRISHNA TRADING, LLC, ARYA TRADING LLC d/b/a DIVYA FOODS, AMIN TRADING AGENCY, LLC d/b/a ANSU FOODS and AMIN TRADING, LLC,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-994-24

CIVIL ACTION

On Appeal from Orders of the Superior Court of New Jersey, Chancery Division, Middlesex County

Docket No. MID-C-52-21

Sat Below:

Hon. Thomas D. McCloskey,  
J.S.C.

**BRIEF OF RESPONDENTS HEMANG SURESHBHAI AMIN, HAVMOR CORPORATION USA LLC, AARYAN IMPORTS, LLC, and AMIN TRADING AGENCY, LLC d/b/a ANSU FOODS and AMIN TRADING, LLC**

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**PRELIMINARY STATEMENT**

This firm represents Defendants/Respondents Hemang Sureshbhai Amin, Havmor Corporation USA, LLC, Aaryan Imports, LLC, Amin Trading Agency, LLC d/b/a Ansu Foods and Amin Trading, LLC (collectively, “Amin Defendants”).

Plaintiff brings this appeal out of his dissatisfaction with the trial court’s decisions (1) denying Plaintiff from testifying on his own behalf as to his alleged damages, (2) denying Plaintiff’s request to replace his expert witness, (3) awarding attorneys’ fees and costs to Defendants, and (4) granting summary judgment in favor of Defendants. However, in coming to these decisions, the trial court painstakingly examined and analyzed the arguments and rendered detailed and thorough written opinions setting forth its reasonings. Indeed, throughout this case, Plaintiff was given a long leash as to discovery deadlines and even the trial court acknowledged that it bent over backwards for Plaintiff. Yet, the trial court also recognized that “enough is enough.”

After two years of discovery, the trial court, at Plaintiff’s request and over Defendants’ objections, extended the discovery end date. On the last day of the extended discovery end date, Plaintiff submitted an expert report (the “Jain Report”) and an additional 12,000 pages of discovery. Defendants moved to bar the Jain Report on the grounds that it was not served within the time permitted for amending interrogatories set forth in R. 4:17-7, Mr. Jain was not qualified to render the

opinions expressed in the report, and that Mr. Jain's damages calculations were not conducted in accordance with Generally Accepted Accounting Principles and otherwise amounted to net opinion. In opposition, Plaintiff fought vigorously and even doubled down on Mr. Jain's qualifications, methodology, and analysis by submitting a certification of Mr. Jain, which promised his extensive skills and experience. Nothing that ultimately happened with Mr. Jain's report or deposition as discussed below should have been a surprise to Plaintiff with even the most minimal amount of review of his report or discussions with him in preparation of the report.

The trial court relied on Plaintiff's arguments and allowed the Jain Report and certification to stand subject to Defendants' ability to take Mr. Jain's deposition. At the deposition, Mr. Jain was dismantled and it became obvious to all—including Plaintiff—that Mr. Jain was not qualified. Thereafter, Defendants moved for reconsideration to bar Mr. Jain's report because Plaintiff refused to withdraw it. In response, Plaintiff moved to replace Mr. Jain with Mr. Petrucelli, which would have required, at minimum, a new report and another deposition. The trial court, in recognizing "enough is enough", barred Mr. Jain and did not allow Mr. Petrucelli to serve as a replacement. Then, in a last-ditch effort, Plaintiff argued he should be permitted to testify as to his damages, despite his prior admission that he was not a financial person and he could not prove his case without an expert. (AA98-AA99). The trial court denied the request and awarded fees and costs to Defendants related

to time spent concerning the belated and barred Jain Report. Ultimately, the trial court granted summary judgment in favor of Defendants as Plaintiff could not demonstrate damages and, even more so, could not even put forth a number or calculation of his damages.

Plaintiff's appeal now is a result of his dissatisfaction with the trial court's decisions. However, this dissatisfaction does not warrant reversal of any of the trial court's decisions. As to each decision, the trial issued detailed and thorough written opinions and afforded Plaintiff every possible benefit within reason. But, enough was enough. Plaintiff's dissatisfaction is the result of his own failures to properly vet Mr. Jain and obtain an expert during the two-year discovery period. Ultimately, his failure to establish his damages led to summary judgment being entered against him. Plaintiff's arguments on appeal are simply a rehashing of the arguments he made below. But those arguments were thoroughly examined and analyzed below, and in no way amounted to an abuse of discretion. Likewise, Plaintiff has never put forth any genuine issue of material fact sufficient to withstand or reverse summary judgment.

For these reasons, and those discussed in more detail below, the trial court's decisions should be affirmed.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Plaintiff's brief sets forth the trial court's recitation of the facts and procedural history of this case as written in the trial court's Statement of Reasons issued on April 2, 2024. (AA76-AA84; see also the detailed Statement of Facts set forth in the trial court's December 18, 2023 Order and Statement of Reasons at AA09-AA17). The Amin Defendants incorporate those recitations here to the extent they are taken directly from the trial court's written decision, but add the following critical points of emphasis.

Plaintiff filed his Complaint on April 22, 2021. (AA111-149). On September 23, 2021, seven months into the litigation, the trial court entered a Discovery Order which directed that all parties serve their interrogatories and document requests by October 22, 2021, and that responses would be due "pursuant to the Court Rules." (ADa04). Despite being asked during discovery, Plaintiff failed to provide detailed information and documentation as to any expert witness he intended to utilize, including submission of an expert's report. (ADa12). Over a year later, on November 3, 2022, all counsel participated in a telephonic Case Management Conference with the trial court in order to address outstanding paper discovery. Prior to and during that conference, Plaintiff had still failed to identify any expert that he was intending to use and had still not provided any report. At that time, Plaintiff had

different counsel, but even so, his counsel at the time made no mention that an expert would be employed.

In December 2022, Plaintiff retained his current attorney. In February 2023, on a zoom Case Management Conference with the trial court and all counsel, the trial court made clear that given the age of the case, he was putting the parties on a “tight leash” in finishing up discovery. Again, there was no mention by Plaintiff of the intent to use an expert.

Then, on April 26, 2023, Plaintiff’s counsel for the first time advised that Plaintiff intended to use an expert – Dharmendra Jain of RR Accounting Services and Tax Services, Inc. However, no further information was provided as to Mr. Jain’s qualifications, the substance of the facts and opinions to which he was expected to testify, or his curriculum vitae, nor was any report provided. Additionally, Plaintiff did not attempt to revise his prior interrogatory responses regarding this now-retained expert.

On May 4, 2023, the trial court entered a Case Management Order which, consistent with his desire to keep the parties on a “tight leash” in order to complete discovery, ordered that all paper discovery be completed no later than May 19, 2023. (ADa44). Because Plaintiff never advised the court of the intent to use an expert, no provision in the May 4, 2023 Case Management Order addressed expert reports or depositions.

On June 13, 2023, weeks after the deadline for paper discovery as set forth in the May 4, 2023 Order, Plaintiff moved to extend discovery. In support of his motion, Plaintiff's counsel submitted a certification which averred that the Plaintiff was intending to use an expert to assist the trial court in following the "transactions of diversion" in the case, as well as offering an opinion regarding damages. As part of the motion, Plaintiff requested that the trial court allow him to serve his expert's report by August 28, 2023 and that expert depositions be completed by September 12, 2023. Notably, when the motion was filed, Plaintiff had still not provided the substance of the facts and opinions to which his expert was expected to testify, a summary of the grounds for each such fact and opinion, or any of the other information/documentation requested in the interrogatories. The Amin Defendants vigorously opposed the motion.

Following oral argument on the motion, on July 7, 2023, the trial court entered an order granting in part and denying in part Plaintiff's extension request. The trial court extended discovery from July 14 to July 31, 2023, but rejected the request for extra time to submit expert reports and the taking of expert depositions. (ADa49-ADa52). Instead, the trial court ordered that the depositions of all witnesses, fact and expert, be completed on or by July 31, 2023 – the Discovery End Date. Additionally, the trial court set a "firm Trial Date" for October 30, 2023. (Id.). In

addition, to that July 7 Order, the trial court issued a Statement of Reasons, which provided in part:

Put simply, the time has come to bring closure to discovery and prepare the case *for dispositive motions and trial*, and any intervening issues that may result from this Order shall be referred to the Special Discovery Master for appropriate resolution within, and so long as, outstanding discovery is completed by the adjusted discovery end date of July 31, 2023. **Enough is enough.**

For the foregoing reasons the Plaintiff's Motion to Extend Discovery is GRANTED IN PART. However, to lessen the prejudice of the Defendants from further delay in the matter which has been pending since April 22, 2021, and as the Defendants each have a strong interest in having this matter concluded, the Court shall enter an Order extending the discovery end date but only to July 31, 2023. Furthermore, the Order will provide for **no further extensions of discovery absent exigent or unforeseen circumstances.**

Finally, in accommodating this limited extension, the Court will modify its Case Management Order of May 4, 2023 to (i) re-schedule the dispositive motion deadline to September 22, 2023, (ii) adjourn and re-schedule the Pre-Trial Conference to October 23, 2023, and (iii) adjourn and re-schedule the Trial Date for October 30, 2023.

[(ADa61-ADa62)].

Following the entry of the July 7, 2023 Order, there were no communications from Plaintiff concerning his expert until July 31, 2023 – the discovery end date. Indeed, that evening, in the eleventh hour of discovery, Plaintiff's counsel emails Defendants' counsels enclosing the expert report of Mr. Jain along with over 12,000

pages of additional discovery documents Plaintiff obtained via subpoena. Plaintiff's counsel also submitted a "Certification of Counsel Pursuant to Rule 4:14-7," which purported to attest to the reasons why the report could not be submitted as an amendment to interrogatories within the time limitation of that Rule.

On August 9, 2023, the Amin Defendants as well as the Member Defendants moved to bar Mr. Jain's report dated July 30, 2023 on the grounds that it was not served within the time permitted for amending answers to interrogatories set forth in Rule 4:17-4, the Mr. Jain was not qualified to render the opinions expressed in the report, and that Mr. Jain's damage calculations were not conducted in accordance with Generally Accepted Accounting Principles and otherwise amounted to net opinion. The Amin Defendants also moved to suppress the Plaintiff's use of any documents produced within 20 days of July 31, 2023.

Plaintiff opposed the motions to bar Mr. Jain's report, and in doing so submitted a 12-page certification from Mr. Jain promoting his extensive skills and experience in the accounting industry for over 25 years, attesting to his "systematic and comprehensive" investigation of Nupur's books, sales records, and financial statements in the case, and setting forth in detail the methods by which he had calculated Plaintiff's damages, including a "Trademark Analysis", "Goodwill Analysis", and "Bypassed Sales Analysis."

By way of Order and Statement of Reasons dated September 19, 2023, the trial court denied the Defendants' motions to bar the Jain Report, without prejudice to reconsideration thereof, and subject to the following:

To the foregoing ends, and in order to appropriately balance the interests of all sides, the [Defendants] shall have leave to depose the Plaintiff's expert, Mr. Jain, with respect to (i) the Jain Report, (ii) the documents produced by the Plaintiff within 20 days of July 31, 2023 to the extent those documents are included and referred to in the Jain Report, and (iii) the subject matter of the Jain August 17<sup>th</sup> Certification and its referenced exhibits (with particular reference to, without limitation, "the Trademark Analysis" set forth in Paragraphs 55-72 and "The Good Will Analysis" set forth in Paragraphs 73-80 thereof). Such deposition shall be noticed for and completed . . . no later than October 13, 2023. No other discovery shall be permitted, except as provided below.

Furthermore, the pending summary judgment motions that have been made returnable for hearing on September 22, 2023, shall be carried to November 3, 2023 . . . The parties shall have leave to supplement their respective moving, opposition and reply papers (as the case may be) following the completion of the deposition of the Plaintiff's expert, Mr. Jain . . . .

. . . .

Finally, by reason of the foregoing, the Pre-Trial Conference scheduled for October 23, 2023 and the Trial Date scheduled for October 30, 2023, as per the Court's Order filed on July 7, 2023 are both ADJOURNED[.]

[(ADa85-ADa86)].

Mr. Jain was deposed on October 13, 2023. During that deposition, it became readily apparent that Mr. Jain did not have the qualifications or expertise to be a damages expert, nor did he use any accepted methodology in coming to his damage figures. Nor did Mr. Jain use any reliable, generally accepted or other standard in connection with his expert report. He also made numerous admissions that the Jain Certification was a complete and utter fraud. As a result, on November 29, 2023, the Amin Defendants, along with the co-defendants, filed a motion to preclude the Jain Report and the opinions therein, as well as moved for fees and costs.

Recognizing Mr. Jain's lack of qualifications, Plaintiff opposed Defendants' motions and moved to replace his expert with Joseph Petrucelli and serve a "supplemental report." Indeed, Plaintiff even conceded that Mr. Jain's report should never have been accepted by the court and that Mr. Jain lacked the qualifications to serve as an expert. Defendants opposed Plaintiff's motion to replace Mr. Jain. In support of his motion to replace his expert, Plaintiff could not set forth any "exceptional circumstances" warranting same as Plaintiff's counsel, who was representing Plaintiff since December 2022, knew of the July 31, 2023 discovery end date; was aware he was issuing the Jain Report; and was aware of the substance of the report. In sum, he knew that Mr. Jain was not qualified and failed to properly vet Mr. Jain and his qualifications.

Ultimately, the trial court barred Mr. Jain and his report, denied Plaintiff's motion to replace his expert as well as denied Plaintiff's request to testify as to his damages, and awarded fees and costs to Defendants. (AA04-AA71). Following those decisions, the trial court granted summary judgment in favor of Defendants. (AA72-AA110). Noting that once those issues regarding the experts were resolved, "the matter as a whole is now quite simple." (AA105). Put simply, Plaintiff could not put forth his damages and "failed to even present an amount or how such damages would or could be calculated even if his claims could be supported by his 'lay' opinion." (AA108). Indeed, without the damages, and even affording Plaintiff all possible, reasonable inferences, the evidence was "so one-sided" that Defendants had to prevail as a matter of law. (*Id.*). The trial court even went so far as to assume for a moment that there was any sustainable basis for the imposition of liability against any of the Defendants such that a trial was necessary, but

the simple fact of the matter is that the Plaintiff has not even calculated what the amount of his alleged damages are, has not disclosed how or by what methodology he would compute them from the documentary evidence exchanged in discovery, the defense remains in the dark to the very day of oral argument on these motions as to what that amount is and/or what their relative exposures are; and thus, the Plaintiff cannot even establish a *prima facie* case for damages, much less prove a case for damages. As in any civil matter such as this, without a showing of liability **and** damages, the Plaintiff's Complaint should and must fail as a matter of law. Bluntly stated, its "evisceration" here is self-executing.

[AA109 (emphasis in original)].

Thus, the trial court was left with no other option but to grant summary judgment in favor of Defendants. It was only many months after summary judgment was granted and when the Amin Defendants were out of the case that Plaintiff even attempted to quantify his damages. In fact, in October 2024, when counsel for the Member Defendants moved for a voluntary dismissal of their counterclaim, Plaintiff filed an “opposition” that was in support of the Member Defendants’ request for dismissal, but also included a certification from Plaintiff attempting to relitigate the merits of the case and now claiming his damages were \$2,428,850. (AA185-AA190). Regardless of how Plaintiff framed his “opposition”, the trial court granted the Member Defendant’s request for a voluntary dismissal of the counterclaims on October 25, 2024. This brought the lower court proceedings to a final conclusion. (AA01-AA03).

This appeal by Plaintiff now follows. For the reasons discussed more thoroughly below, the trial court’s decisions should be affirmed.

## ARGUMENT<sup>1</sup>

### I. Standard of Review

#### A. Summary Judgment

A trial court's grant or denial of summary judgment is reviewed de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any show that there is no genuine issue as to any material facts challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). To avoid summary judgment, the non-moving party must submit properly admissible evidence that creates a genuine issue of material fact for each challenged essential element of her claims. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 521, 529, 540 (1995) (citing R. 4:46-2). The evidence must be "sufficient to permit a rational fact finder to resolve the alleged dispute" in the non-moving parties' favor. Id. at 540. Indeed, "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. at 529. Rather, the disputed fact issues must be substantial, "not imaginary, unreal, or apparent only." Id. at 529-30.

As detailed below, Plaintiff has failed to demonstrate any disputed issue of material facts sufficient to warrant the reversal of summary judgment.

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<sup>1</sup> Amin Defendants also rely on and incorporate the arguments made by the other respondents.

## **B. Fee Awards and Precluding an Expert**

A trial court's award of fees and costs is reviewed in "accordance with a deferential standard." Matter of A.D., 477 N.J. Super. 288, 297 (App. Div. 2023) (quoting Hansen v. Rite Aid Corp., 253 N.J. 191, 211 (2023)). "Such an award will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Id. at 297-98 (quoting Hansen, 253 N.J. at 211-12) (internal quotation marks omitted). "An appellate court may reverse a trial court's award of fees and costs for abuse of discretion when the court's decision was based on irrelevant or inappropriate factors, or amounts to a clear error in judgment." Id. at 298 (quoting Hansen, 253 N.J. at 212) (internal quotation marks omitted).

Similarly, a trial court's decision to preclude late expert reports and attempts to extend discovery for submission of expert reports is reviewed under an abuse of discretion standard. See, e.g., Rivers v. LCS Partnership, 378 N.J. Super. 68, 80-81 (App. Div. 2005) (finding no abuse of discretion in denial of discovery extension "where the 'delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner.'") (quoting Huszar v. Great Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473-74 (App. Div.), rev'd on other grounds, 185 N.J. 290 (2005)); Bender v. Adelson, 187 N.J. 411, 428 (2006) (finding no abuse of discretion in trial court's ruling barring expert testimony because of late discovery).

Notably, Plaintiff's brief is devoid of an acknowledgment of this standard to his claims that the fee award should be reversed, and that he should have been able to testify as to damages or he should have been allowed to substitute a new expert witness. Nevertheless, the trial court did not abuse its discretion in its decision on either issue, and set forth detailed reasons for his decision as to both. (AA62-71 (as to the fee awards); AA37-AA54 (as to the preclusion of allowing Plaintiff a new expert witness after discovery)). Plaintiff's dissatisfaction with those decisions does not amount to an abuse of discretion. Thus, the trial court's decision awarding fees to the Amin Defendants and the preclusion of Plaintiff to provide testimony or substitution of an expert should be affirmed.

**II. The Trial Court Did Not Abuse Its Discretion In Barring Plaintiff From Testifying As To Damages Because, As Plaintiff Admitted In Certifications, He Is Neither An Account Nor A Financial Person And Thus Was Attempting To Give Expert Testimony Disguised as "Lay" Testimony.**

Plaintiff contends he should have been permitted to testify at least as to some of his damages because he was both an owner and salesman for Nupur Trading, and thus, has "unique knowledge" of the relevant "numbers and processes," sufficient under N.J.R.E. 602. (Pb12). Plaintiff further contends that no additional discovery or documents would have been needed for him to testify because everything he needed was already exchanged in discovery. (Pb15-Pb20). In support of his position, Plaintiff relies on State v. Romero, 95 N.J. Super. 482 (App. Div. 1967),

Teets v. Hahn, 104 N.J.L. 357 (E & A 1928), Nixon v. Lawhon, 32 N.J. Super. 351 (App. Div. 1954), Kazanjian v. Atlas Novelty Co., 34 N.J. Super. 362 (App. Div. 1955), Atlas v. Silvan, 128 N.J. Super. 247 (App. Div. 1974), and Leider v. Pitcock, 15 N.J. Super. 592 (App. Div. 1951). Plaintiff uses these cases for the proposition that “someone with requisite industry experience can be called to testify as an expert witness” and that “a party with such requisite knowledge is assumed to be able to testify as to value of products sold.” (Pb15). Plaintiff’s arguments are unavailing.

First, the cases Plaintiff relies on are inapplicable because in each of those cases the testimony was permitted because it was in relation to value of **personal property**, not complex financial damages arising from ownership in a now dissolved entity, external factors, third party data, and other complex matters that Mr. Jain could not even explain competently. See Romero, 95 N.J. Super. at 487-88 (allowing victim to testify as to value of his own personal property (a ring) but not that of his wife (a ring) or daughter (a watch) because there was no personal knowledge of the market value or reasonable selling price at the time of the theft); Teets, 104 N.J.L. at 359-60 (allowing plaintiff to testify as to the value of his automobile that was damaged in an accident); Nixon, 32 N.J. Super. at 354-56 (relying on and being bound by Teets, the court concluded plaintiff could testify at to the value of his automobile that was damaged in an accident, provided that the property is of a common class or in general daily use, “except in those extreme cases

where it is clear that he has not the slightest knowledge of such value”); Kazanjian, 34 N.J. Super. at 367-69 (allowing the plaintiff to testify regarding the value of his personal property (rug inventory that was water-damaged) emphasizing his qualifications as an experienced rug merchant and owner for 40 years); Atlas, 128 N.J. Super. at 251 (allowing party to testify about the size of the property at issue, but did not directly address testimony about the property’s monetary value); Leider, 15 N.J. Super. at 594 (concluding that recalled witness who was now called for the purpose of determining value of defective carpet was qualified as expert because he was in the rug and carpet business his whole life and familiar with all production operations).

Unlike these cases which all involve the value of tangible personal property to which an owner could testify, here, it is not personal property that was damaged, and instead Plaintiff is seeking to testify as to complex lost profits and financial damages to which an expert is needed – a fact conceded by Plaintiff in certifications before the trial court.

Nevertheless, the trial court did not abuse its discretion in barring Plaintiff from testifying because Plaintiff acknowledged that he is neither an accountant nor a financial person. (AA98). Thus, he would not possess the requisite capability or qualifications to testify as to complex financial damages. Indeed, Plaintiff could not

even recognize the deficiencies in Jain's report until Jain was dismantled at his deposition.

Moreover, Plaintiff's attempt to testify as to lost profit damages is opinion testimony. N.J.R.E. 702 provides that "if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception; and (2) will assist in understanding the witness' testimony or determining a fact in issue." Lay opinion testimony may not be based primarily on inadmissible hearsay, see Neno v. Clinton, 167 N.J. 573 (2001), whereas expert testimony may sometimes be based on out of court statements. See N.J.R.E. 703. Courts reject lay opinion testimony about lost profits. Desai v. Bd. of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586 (App. Div. 2003) (the Appellate Division affirmed the trial court's rejection of plaintiff's claim for lost profits since it was not based upon sound fact, but instead based on the mere opinion of plaintiff without any factual support).

Here, Plaintiff is a lay witness and his own submissions to the trial court confirmed that he could not testify as to lost profits. Indeed, Plaintiff had previously certified that: "I relied completely upon what Mr. Jain had told me. I am a salesman; and thus there was no way for me to evaluate Mr. Jain's report." (AA3103). Plaintiff further certified that he was consulting with "many experts" (AA99; AA176) and argued that he "was actively examining his damages theories with the help of Mr.

Petrucelli . . . .” (AA99). It was obvious to the trial court that Plaintiff’s purported attempt to testify as to damages was not based on his own perceptions as required by N.J.R.E. 701 or his own personal knowledge as required by N.J.R.E. 602, but instead that of an expert. (AA105-AA108). Plaintiff could not even tell Jain was incompetent and yet wanted the trial court, and now this Court, to believe that he could testify about an extremely complicated calculation of lost profits based on purported diverted sales amongst different companies over various markets; the same thing Jain was not competent to testify about.

Additionally, the documents in discovery that Plaintiff argues he would rely on for his testimony are hearsay and things he does not have personal knowledge such as information from third parties to compute damages, which Plaintiff certified he could use to “calculate damages *based upon my personal knowledge* at trial.” (AA176-AA183(emphasis added)). Furthermore, even if Plaintiff could have testified about lost profits, his opinion testimony would be a net opinion as he was trying to reframe or recast Jain’s disqualified report as his own.

Finally, during the course of discovery, Plaintiff had never even identified himself specifically as someone with knowledge of the facts or that would testify at trial. He also never identified the documents he now claims he can testify about as ones he would use to calculate damages.

The trial court took all of this into account when it issued its detailed and thorough written opinion, and therefore there was no abuse of discretion in barring Plaintiff from testifying as to the complex financial damages he sought. (AA76-AA110). Indeed, it is worth quoting the trial court at length in its decision as there can be no serious contention that the trial court considered any inappropriate or irrelevant factors:

In prior certifications, the Plaintiff asserted that he was neither an accountant nor a financial person and that he had to rely completely on Mr. Jain and his now barred report to establish his alleged damages. The Plaintiff now states that he is able to testify as to his alleged lost profits and damages on his own – without ever producing what he was claiming to the defense and how he computed it—because he had help from another, but qualified consultant whose involvement in this case has been barred for the reasons set forth in the Court’s decision of December 18, 2023.

His statements contradict. The Plaintiff has not ever amended his pleadings, made any assertions, or responded to repeated defense requests for more specific responses to their discovery demands, that he was qualified or even capable of giving a damages calculation based on prevailing and generally accepted financial methodologies and accounting principles. For certain, allowing the Plaintiff to testify as to unspecified damages would violate, if not make a mockery of not only our Court Rules, our rules of evidence, and the very procedures previously mapped out for the benefit of all parties in the Court’s multiple case management orders in this matter, but also violate the demands of justice and good conscience.

Setting aside the issue of liability, as in any civil case it is the Plaintiff’s burden to demonstrate by a

preponderance of the evidence that which the Plaintiff seeks in damages. After twenty-seven (27) months from inception of the case on April 22, 2021 to the expiration of the final discovery end date on July 31, 2023, within which period ample opportunity had been given to develop evidentiary support in discovery, the Plaintiff's earlier and only attempt to establish his alleged damages in this case was through the proffered "expert" testimony of the Plaintiff's expert, Mr. Jain. The Plaintiff alleged that he was entitled to lost profits and by reason of that which was allegedly diverted from Nupur to the defendant entities, and yet, for the reasons detailed in the Court's Order and Statement of Reasons of December 18, 2023, Mr. Jain was neither qualified nor competent to render opinions as to "profitability" and "valuation", and his report and any anticipated testimony was excluded as unreliable net opinion.

Indeed, the belated but rejected proffer of a replacement expert, Mr. Petrucelli, and the so-styled "supplemental report" Plaintiff sought to have the Court allow—long *after* multiple extensions of discovery end dates and the expiration of discovery—underscored the necessity of having a qualified expert capable of rendering a competent opinion for the Court's consideration as the trier of fact under N.J.R.E. 702 and N.J.R.E. 703 as support for the damages claimed. Such an opinion, by necessity, had to be predicated upon computations made in accordance with industry-wide approved methodologies and generally accepted accounting principles.

With the exclusion of Mr. Jain and his report (which preclusion Plaintiff's counsel candidly admitted was appropriate after Jain's deposition was taken), and the further bar against the belated proffer of Mr. Petrucelli, the Plaintiff, like the proverbial "phoenix rising from the ashes" to further quote defense counsel at oral argument, claims in opposition to the Motions that he was now capable of giving his own lay opinion as to the damages

he suffered and would intend to adduce and establish at trial. This, after (i) the Plaintiff repeatedly failed to specifically itemize the nature, extent, and quantum of damages he was claiming in the written discovery demands made upon him by the defense in discovery, after repeated follow-up requests for the same; and (ii) Plaintiff's counsel further candidly admitted at oral argument he had failed to calculate as to any amount or quantum still, nor had provided the defense with at any time either during discovery, on prior motions heard by this Court, or even again at and as of oral argument on these motions.

In short, the Plaintiff has not demonstrated, and cannot demonstrate, an amount of damages claims, or how such an unspecified quantum can or will be computed. And yet, he asks the Court to accept his "lay" opinion on a number that has still not been either calculated or presented, but will present at trial through purported testimony that, at best, crosses over to the realm of expert testimony that he is admittedly unqualified to give. As our case law instructs, in general, "lay" opinion testimony may not cross into the realm of expert testimony. See, e.g., Bardis v. First Trenton Ins., Co., 397 N.J. Super. 138, 153 (App. Div. 2007), rev'd on other grounds, 199 N.J. 265 (2009).

At worst, the Plaintiff's lay opinion would be, and is grounded upon inadmissible hearsay. His opposing Certification smacks as a bootstrapping attempt to parrot, through himself, the bases under which the rejected replacement expert he consulted would have undertaken to do had he been permitted to testify at this late stage of over 3 years' worth of litigation, and yet, which could have and should have been done within the procedures, mandates, and guidelines of the Court Rules and timely compliance with this Court's clear and unequivocal case management orders. Mr. Shah is not Mr. Petrucelli, yet he asks this Court to deny summary judgment to the Defendants and allow him to testify as to what he tacitly acknowledges he

is not qualified to do, but by channeling instead through himself as a conduit that which Mr. Petrucelli, as consulted, might have done if permitted into the case on the eve of trial.

[AA105-AA108 (emphasis in original)].

Given the trial court's detailed explanation and analysis as to why Plaintiff was not permitted to testify as to his damages, there was no abuse of discretion, and as a result, the trial court's decision should be affirmed, and Plaintiff's appeal be denied as to this issue.

**III. The Trial Court Did Not Abuse Its Discretion In Not Allowing Plaintiff To Obtain A New Expert After Discovery Had Ended And Trial Dates Had Been Set Because The Proposed New Expert Would Be Seeking Additional Documents, Submitting A New Report, And Including A Measure Of Damages That Was Never Disclosed Which Would Be "Extremely Prejudicial" To The Defendants.**

Plaintiff admits that Mr. Jain's report and opinion was a "net opinion" and thus unhelpful to Plaintiff. A "net opinion" from an expert is not an "exigent or unforeseen circumstance" to serve as a basis to allow the Plaintiff to replace his expert after service of the report, the expert deposition, and expiration of the discovery end date.

In support of his position that he should have been allowed to substitute Mr. Petrucelli as an expert witness, Defendant points to language from the trial court's July 7, 2023 Order, specifically that that no further discovery extensions would be provided "absent exigent or unforeseen circumstances." (Pb21). According to

Plaintiff “exigent and unforeseen circumstances” were present because of the fact that neither he nor his counsel knew Jain would get dismantled at his deposition, and that they were under the impression Jain had all the requisite qualifications necessary to be an expert. (Pb22). Plaintiff further contends that after that deposition, Jain resigned as an expert, and that “[t]his unexpected development necessitated the Plaintiff to seek a new expert to continue with the case.” (Pb23). Plaintiff adds that the trial court’s failure to let Plaintiff substitute Mr. Petrucelli as his expert was unjust, undermined a litigant’s rights, and was against public policy. He further claims that Mr. Petrucelli would somehow not be issuing a replacement report.

In support of his position that justice demanded he be allowed to substitute his expert, Plaintiff relies on Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005) and Jovanovic v. Boiardo, 2016 WL 4547431 (App. Div. 2016) – which he did before the trial court and which the trial court readily distinguished. Plaintiff cites each case at length and purports that they stand for the proposition that “one of main considerations of the Court when considering a replacement expert report (not asked for in the present circumstance) is the achievement of the interests of justice.” (Pb34). Plaintiff also points to Jain’s Certification wherein Jain admits that his report was deficient, he did not dedicate the time to it, and was having personal issues. (Id.). And further adds that Mr. Petrucelli “is a duly qualified to testify in this matter and his appearance will not

delay or hold up this matter in any way.” (Pb36). Plaintiff’s arguments are without merit for several reasons.

**A. There is nothing in the record to support Plaintiff’s contention that “exigent or unforeseen circumstances” were present.**

First, Plaintiff failed to demonstrate any exceptional circumstances warranting the replacement of his expert nor did any “good cause” exist even if the trial court were to apply a less stringent standard. “No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.” R. 4:24-1(c). Thus, Plaintiff was required to meet the exceptional circumstances standard because there had already been two firm trial dates set and then postponed due to Plaintiff’s requests. Exceptional circumstances are legitimate problems beyond mere attorney negligence, inadvertence, or the pressure of a busy schedule. O’Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law Div. 2003). Courts require a movant to demonstrate four items to meet the “exceptional circumstances” threshold:

- (1) Why discovery has not been completed within the time and counsel’s diligence in pursuing discovery during that time;
- (2) the additional discovery or disclosure sought is essential;
- (3) an explanation for counsel’s failure to request an extension of the time for discovery within the original time period; and
- (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

[Rivers v. LCS P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005)].

New Jersey courts routinely bar late expert reports and attempts to extend discovery for submission of expert reports. See id. at 80-81 (finding no abuse of discretion in denial of discovery extension “where the ‘delay rests squarely on plaintiff’s counsel’s failure to retain an expert and pursue discovery in a timely manner.’”) (quoting Huszar v. Great Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473-74 (App. Div.), rev’d on other grounds, 185 N.J. 290 (2005)); Bender v. Adelson, 187 N.J. 411, 428 (2006) (finding no abuse of discretion in trial court’s ruling barring expert testimony because of late discovery).

Even if the trial court had applied a “good cause” standard (which was not required), Plaintiff would still not have been permitted to substitute his expert and submit a new or supplemental report. In Tynes v. St. Peter’s, 408 N.J. Super. 159 (App. Div.), cert. denied., 200 N.J. 52 (2009), the Appellate Division found that even though the good cause standard applied, the trial court correctly found that the plaintiff failed to meet the standard. The plaintiffs’ dilatoriness in furnishing its expert report even after multiple court orders extending discovery proved fatal to their cause. The Court explained that:

If plaintiffs are deemed to have establish “good cause” in this case, notwithstanding the length of time in which this matter has been pending, the many discovery extensions previously granted by the trial court and plaintiffs’ failure to complete discovery by the

prescribed discovery end date, the “good cause” standard would have little efficacy. Such a result would be a step back in time.

[Id. at 173].

Similarly, Rule 4:17-7 provides that amendments to interrogatory responses “shall be served not later than 20 days prior to the end of the discovery period . . . [but that] amendments may be allowed thereafter only if the party seeking to amend certified therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date.” Rule 4:17-4 is harmonized with Rule 4:17-7 such that “the outlier deadline for an answering party to amend his or her answer annexing a copy of the expert’s report is 20 days prior to the end of the discovery period, unless the time is extended.” Pressler & Verniero, Rules Governing the Court of the State for New Jersey, cmt. 5.1, R. 4:17-4 (2023). “Because such late provision of [an expert report] can cast a burden both on the propounder [of the discovery request] and the court, R. 4:17-4(e) provides that the propounder of the interrogatory may seek an earlier deadline by moving for an appropriate order.” Id.

Here, despite Plaintiff’s contentions otherwise, there were no exigent or unforeseen circumstances nor any exceptional circumstances to permit Mr. Pertrucelli to “substitute” for Mr. Jain. And the trial court did not abuse its discretion in coming to that conclusion. The trial court carefully weighed the parties’

arguments regarding the replacement of Mr. Jain for Mr. Petrucelli. Indeed, the court issued an almost 50-page statement of reasons explaining its rationale, which bears repeating here:

Plaintiff’s motion seeking leave to “replace” his disqualified expert and to further belatedly serve a so-called “supplemental” expert report must be viewed and evaluated within the crucible of the Court’s prior Case Management Orders and explicit directives that long before preceded the motion. As the record reveals, after the Hon. Travis L. Francis, A.J.S.C. (Ret.) was appointed to serve as the Special Discovery Master in this case by Order entered by this Court’s predecessor, Judge Le Blon, back on September 23, 2021, this Court entered its Case Management Order on May 4, 2023. Though that Order made no provision for experts at that time—nor has any party’s counsel contacted the Court to request a telephonic conference to consider amending discovery deadlines to the end that paper discovery demonstrated a need for experts—the May 4 Order forbid any pleadings amendments beyond June 19, 2023; set a discovery end date of July 14, 2023; required dispositive motions to be filed and made returnable for hearing on August 25, 2023; set the matter down for a Pre-Trial Conference on September 11, 2023; and, set a “firm Trial Date” for September 18, 2023.

....

Subsequently, on motion made by the Plaintiff to extend discovery, the Court granted the motion and by Order entered on July 7, 2023 amended its Case Management Order of May 4, 2023, in material part, to allow for the Plaintiff’s expert report by extending the discovery end date from July 14, 2023 to July 31, 2023; re-calibrated dispositive motions to be filed and made returnable for hearing on September 22, 2023, re-

scheduled the Pre-Trial Conference for October 23, 2023, and adjourned and re-scheduled the “firm Trial Date” for October 30, 2023. . . . Notably, the Order also provided that “[t]here shall be no further extensions of discovery absent *exigent or unforeseen circumstances.*”

In the instant matter, acknowledging that Mr. Jain was and is unqualified and his report excludable, the Plaintiff now belatedly asserts that the substitution of Mr. Joseph Petrucelli for Mr. Jain will achieve the guiding maxims as set forth in New Jersey law. The Plaintiff argues that the Ponden and Jovanovic cases are clear that one of main considerations of the Court when considering a replacement expert report is the achievement of the interests of justice.

[(AA39-AA44)].

The trial court further details the Certification of Mr. Jain and the reasons claimed as to why Jain will no longer be serving as an expert and Mr. Pertrucelli’s qualifications. (AA44). The trial court then details the arguments of all parties. (AA44-AA48).

The trial court also distinguishes the Ponden case. Plaintiff cites that case at length in his Appellate Brief. But, as the trial court noted, the critical distinction between the present matter and Ponden is that there, the Court considered “the extent of a trial court’s discretion . . . to extend the time for the submission of expert reports after the discovery end date has passed and in the absence of a scheduled arbitration or trial date.” 371 N.J. Super. at 2. Plaintiff buries this critical distinction in his brief. As the trial court explained, in Ponden, “the Court’s reasoning . . . focused on

the fact that there was no trial or arbitration date, and that granting the motion would not delay the scheduling of a trial. Here, there were two (2) firm trial dates that have already passed, with the most recent trial date adjourned and pending.” (AA47-AA48).

Likewise, Jovanovic v. Boiardo, 2016 WL 45474331 (App. Div. 2016)<sup>2</sup> is cited at length in Plaintiff’s brief, but again, Plaintiff buries the critical distinction in a large block quote. In Jovanovic, the Appellate Division reasoned that the trial court erred by not considering plaintiff’s explanation regarding the circumstances causing her inability to meet the prior deadline. Id. at \*3. The plaintiff had suffered a serious illness requiring her hospitalization and recuperation. Id. The plaintiff was also between two attorneys, and self-represented when she moved for reconsideration. Here, Plaintiff was represented by the same attorney during the entirety of the relevant time period. Plaintiff has staunchly defended his expert, and the request for the replacement expert came after Mr. Jain’s deposition. Plaintiff’s counsel had all of the facts and information available to him in July 2023 to determine whether or not he would proceed with Mr. Jain as the expert. He chose to proceed, and only upon realizing the deficiencies at the deposition did he try to obtain a new expert.

As noted by the trial court, here two firm trial dates had been set, both of which were adjourned

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<sup>2</sup> This unpublished decision can be found in the Appellant’s Appendix at AA3182-AA3185.

in order to permit the Plaintiff to pursue and introduce the now debunked Jain Report and proposed opinion testimony. The Plaintiff has had ample time to obtain a qualified expert and produce an expert report and given not one but two additional opportunities to do so in a case now approaching three (3) years in age. And yet, remarkably but correctly so, now admits that his expert is unqualified and further admits his report is invalid but requests more time for a replacement. As the Court remarked in its Order and Statement of Reasons of July 7, 2023, “enough is enough.”

.....

[T]he Plaintiff’s abject failures to vet and screen his expert’s qualifications and to ensure the represented reliability of his proffered opinions were not the fault or failure of the Defendants, and especially when the Court bent over backwards and over the Defendants’ vigorous objections to extend discovery to allow for the production of the Jain Report, Mr. Jain’s deposition, and the filing of their motions for reconsideration. Those are “exceptional circumstances” that defeat the Plaintiff’s motion and underscore the manifest prejudice to befall the defense if the Plaintiff’s motion were to be granted.

[(AA48-AA49, AA51)].

Thus, it cannot be said the trial court abused its discretion as there were no “exceptional circumstances” in favor of Plaintiff as the “Court bent over backwards” for Plaintiff.

**B. It is clear that Plaintiff was seeking an entirely new expert report, and that this report would fundamentally change the nature of the matter and would be extremely prejudicial to Defendants.**

While Plaintiff notes that he was not seeking a new expert report, that is exactly what he was doing. The certification submitted by Mr. Petrucelli indicated that he was seeking to introduce an entirely new theory of damages that has never been identified, nor was even sought in the Complaint. Mr. Petrucelli's certification made clear that he intended to do a business valuation of Nupur Trading as of the date Mr. Amin resigned from the company. However, the Jain Report and Jain Certification do not provide a fair value of Plaintiff's interest, nor has Plaintiff sought that in damages as part of the case. Furthermore, Mr. Petrucelli's certification indicated that he needed to rely on documents not previously produced in discovery, and that Plaintiff will seek to obtain said documents.

As the trial court correctly noted: "Plaintiff's purported replacement expert has certified that he will need additional documents, and also that he will rely on documents not produced. Allowing this will essentially reopen discovery. That will not happen or be permitted here. Again, enough is enough." (AA49). The trial court recognized that Plaintiff was given every opportunity to present discovery and experts in a timely fashion. Thus, it cannot be said that the trial court abused its discretion. Indeed, the trial court offered yet another detailed explanation as to why Mr. Petrucelli would not be permitted as a "substitute":

[T]he Plaintiff argues that he only seeks to “supplement” the expert report with Mr. Petrucelli. This report that the Plaintiff seeks to file is a supplemental report that includes a valuation. Query: What report does Mr. Petrucelli’s purportedly “supplement?” The invalid and now excluded Jain Report? The characterization of it as a “supplement” is, itself, contradicted by the motion that seeks to “replace” it—the one that is altogether new. As the Court observed above, Mr. Petrucelli’s certification and proposed expert testimony, if permitted, do fundamentally change the nature of the matter and would be extremely prejudicial to the Defendants. He has certified that he will need additional documents, and also that he will rely on documents not produced. Discovery closed on July 31, 2023.

In this case, there have been two trial dates that have been set. The dates have been adjourned—and pending summary judgment motions carried—due to the sole purpose of permitting Mr. Jain’s report and his ensuing deposition. In addition, the trial date has been put on hold to determine the admissibility of the Jain Report and Mr. Jain’s qualifications. In denying the motions to bar, without prejudice to reconsideration, the Court’s “hunch” concerning the potential inadmissibility of the Jain Report and Mr. Jain’s qualifications, and the requirement for his deposition and possible retention of defense experts, was resoundingly confirmed and validated.

.....

Allowing a so-called “supplemental”—but in reality, a “replacement” expert, which is what the Plaintiff’s motion seeks leave to do—would put an additional hold on the case and stretch out the litigation longer than it should be. The Plaintiff should have put time into researching and vetting his expert before arguing, and certifying, that Mr. Jain was qualified. He clearly was not and is not.

[If the Court] was to allow Mr. Petrucelli to replace Mr. Jain and submit a “supplemental” report, it would be an entirely new report that would burden the Defendants to have to conduct yet another deposition and review further reports. Put simply, the Plaintiff has failed to establish “exceptional circumstances” within the meaning and intendment of our Court Rules and interpretative case law to allow a replacement expert at this very late stage of the litigation. As happens on rare occasions, it is not as though the expert had suddenly, unexpectedly passed away, or has become medically compromised, or has been precluded from further participation in the litigation or at trial because of unforeseen or exigent circumstances beyond Plaintiff’s control. Quite the contrary.

....

And although Mr. Petrucelli has been certified as an expert on other matters in the past, he has not been certified by this Court, in this action, which would take additional time. The Court is not persuaded by the Plaintiff’s arguments, which have come too little and too late. When considering the allowance of a late replacement expert and expert report of a party, achievement of the interest of justice is a two-way street—not one way for the Plaintiff and no way for the Defendants.

Under the circumstances and procedural history of this case, no just cause of exceptional circumstances have been presented to allow for the Plaintiff’s requested expert replacement. To the contrary, the manifest prejudice to befall the Defendants at this late stage and procedural posture of the matter far outweighs that which has been effectively self-inflicted by the Plaintiff.

[(AA51-AA54)].

Put simply, Plaintiff raises the same argument here as he did before the trial court. However, the trial court considered these arguments and provided a detailed

almost 50-page statement of reasons explaining why it was not going permit Plaintiff to replace its expert at such a late stage. The trial court addressed all of Plaintiff's concerns and gave Plaintiff every benefit up until this denial. Accordingly, it simply cannot be said that the trial court abused its discretion. As a result, Plaintiff's appeal on this issue should be denied and the trial court's decision affirmed.

**IV. Plaintiff Failed To Demonstrate Any Disputed Issue Of Material Fact Sufficient To Warrant The Reversal Of Summary Judgment.**

Plaintiff contends that there were too many "he said/she said" statements "wrapped and entangled in this matter" such that summary judgment was not warranted. (Pb38). Plaintiff relies on his own self-serving certification to support his contention that genuine issues of material fact remain disputed. (Pb39-Pb44). However, Plaintiff fails to point to or submit properly admissible evidence that creates a genuine issue of material fact for each challenged essential element of his claims. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 521, 529, 540 (1995) (citing R. 4:46-2). Instead, Plaintiff just posits that "viewing the facts in light [sic] most favorable to the Plaintiff, there are numerous issues that must be reserved for a factfinder at trial." (Pb45).

What the Plaintiff ignores is that the trial court gave him every reasonable inference it could, but the problem remained that Plaintiff could not establish his damages, and therefore could not establish liability. In fact, the trial court set forth in great detail its reasoning for granting summary judgment in favor of the

Defendants, which includes the extensive block quote above and continues as follows:

Here, the Court agrees with [all the Defendants]. After a viewing of the Plaintiff’s pleadings, deposition transcripts, answers to interrogatories, together the affidavits, certifications and exhibits presented in the motion record, in the Court’s view, there is no genuine issue as to any material fact that would enable or entitle the Plaintiff to withstand the entry of summary judgment against him. Based on the record, the Defendants are absolutely entitled to summary judgment. The Plaintiff is unable to prove damages without an expert, and has failed to even present an amount or how such damages would or could be calculated *even if* his claims could be supported by his “lay” opinion—that is, if the Court also believed there to be viable causes of action on which any of the Defendants could be held liable.

As to the issue of damages, upon viewing the competent evidential materials presented in the motion record, as the Court is required to do, in a light most favorable to the non-moving party—the Plaintiff—and after according all legitimate inferences that could be drawn therefrom in his favor, the evidence is not sufficient and instead woefully inadequate to permit a rational factfinder to resolve the alleged dispute as to damages in the favor of the Plaintiff. Indeed, the evidence presented is “so one-sided” that the Defendants must prevail as a matter of law. There is no genuine issue that exists to require this matter be subjected to a trial on the issue of damages. In fact, the Plaintiff has failed to show and cannot show the nature, extent, components, acceptable calculation methodology(ies) and/or actual quantum of the damages that he seeks against Defendants.

Further, the motion record fails to reveal any sustainable legal basis on which any of the moving Defendants could be held liable under the causes of action asserted. Among other deficiencies, without limitation, it has been conceded that two of the four counts alleged against the Krishna/Arya Trading Defendants are – as they have been—rendered non-actionable by reason of the waiver and dismissal provisions contained in the Nupur Dissolution Agreement. Nor can the Court glean from the motion record any basis for certain other claims levelled against the Member Defendants and the Amin Defendants. Stated differently, there is no evidence of tortious interference, breach of contract, or unjust enrichment, and the Plaintiff could not and did not provide any. For reasons touched upon earlier in this opinion, as well as those brought out in the original moving and supplemental papers of the defendants, the Plaintiff failed to satisfy all required elements for such claims.

Put simply, even assuming, *arguendo*—but rejecting outright—there was or is any sustainable bases for the imposition of liability against any of the moving Defendants in this matter such that a trial is necessary to resolve them, the simple fact of the matter is that the Plaintiff has not even calculated what the amount of his alleged damages are, has not disclosed how or by what methodology he would compute them from the documentary evidence exchanged in discovery, the defense remains in the dark to the very day of oral argument on these motions as to what that amount is and/or what their relative exposures are; and thus, the Plaintiff cannot even establish a *prima facie* case for damages, much less prove a case for damages. As in any civil matter such as this, without a showing of liability **and** damages, the Plaintiff’s Complaint should and must fail as a matter of law. Bluntly stated, its “evisceration” here is self-executing.

[AA108-AA109] (emphasis in original).

Much like Plaintiff's showing in the trial court, here before this Court, he has failed to set forth any genuine issue of material fact aside from his own self-serving certification. Moreover, and of significant importance is that Plaintiff could not demonstrate his damages or even put forth a number or any calculation. Without an expert, Plaintiff cannot prove damages, nor did Plaintiff specify damages in discovery to allow the case to proceed to trial. See Fornaro v. Payret, 2006 WL 2872496 (App. Div. Oct. 11, 2006) (affirming the trial court's grant of summary judgment "as the fatal flaw in plaintiff's case was the absence of any prima facie showing that she could prove damages"); Make-Up Bar, LLC v. Cooper, Levenson, Apr., Niedelman & Wagenheim, P.A., 2008 WL 2122341 (App. Div. May 21, 2008) (affirming the trial court's granting of summary judgment to defendants because the plaintiff could not prove any damages suffered by a preponderance of the evidence); Scully v. Guardian Life Ins., Co., 2008 WL 723835 (App. Div. Mar. 19, 2008) (explaining that in affirming summary judgment for defendant that the Appellate Division agrees "that expert testimony is necessary first, to show plaintiff suffered damages, second, to show causation, and finally, to show the amount of damages"); Middlebrooks & Shapiro, P.C. v. Esdale, 2005 WL 3691314 (App. Div. Jan. 20, 2006) (affirming a party from testifying on damages because they had previously advised the court and other side that they were going to present an expert to prove

damages and they were required to prove proximate cause of the loss of profit by expert testimony).<sup>3</sup>

Accordingly, the trial court's decision in granting summary judgment in favor of Defendants should be affirmed.

**V. The Trial Court Did Not Abuse Its Discretion In Awarding Fees In Favor of Defendants.**

Plaintiff argues that the award of fees against him was unjust because he was not aware of the errors Jain was making and was duped by Jain into thinking that Jain was qualified to testify as an expert. According to Plaintiff, he is “blameless in the actions of Mr. Jain” and that it is unfair he must pay fees and costs for a case that was dismissed. (Pb46). Despite Plaintiff's arguments otherwise, the trial court did not abuse its discretion in awarding fees because (1) Plaintiff fought strenuously to have Jain added as an expert and to be deposed, which was ultimately permitted, and (2) Plaintiff ignores the injustice to the Defendants who had to, after discovery had ended, summary judgment filed, and a trial date been set (twice), conduct an expert deposition and further delay a case that had been pending at two and a half years. Justice is not a one-way street.

“An appellate court may reverse a trial court's award of fees and costs for abuse of discretion when the court's decision was based on irrelevant or

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<sup>3</sup> Unpublished opinions cited herein were made part of the record below and were provided to the trial court. (ADa91-ADa109).

inappropriate factors, or amounts to a clear error in judgment.” Matter of A.D., 477 N.J. Super. at 298 (quoting Hansen, 253 N.J. at 212) (internal quotation marks omitted).

Here, in its December 18, 2023 Statement of Reasons, wherein the trial court barred the Jain Report and awarded attorneys’ fees and costs to defendants, the trial court explained:

Here, in regard to the motions to reconsider, the Court agrees with the Defendants. Mr. Jain is certainly not qualified to be considered an expert in the field of accounting and business valuations, is barred by statute from even holding himself out as an accountant or even using the terms “accountant” or “accounting”, and for the specific reasons more fully articulated below, is disqualified as an expert witness. **To be frank, the Certification he previously offered to the Court to support his claimed qualifications, and which was considered by the Court with respect in initially denying the motions to bar, turned out to be riddled with falsehoods, at best, and a sham affidavit violative of R. 1:4-4, and R. 1:6-6 and N.J.R.E. 702, at worst.**

.....

Mr. Jain, during his deposition could not even explain what methodologies were used and how he got to the conclusions. Mr. Jain could not explain the methodology used to arrive at an opinion and the underlying data used in the formation of his opinion as required by In re Accutane. Mr. Jain’s opinion must be reliable, and the Court does not view it as so. If anything, in addition to his lack of qualifications, his report and proffered opinions are wholly unreliable. As the Defendants stated, the Court would become

confused by the report since there is no explanation for how Mr. Jain got to his conclusions. And, as above noted, even **Plaintiff’s brief in support of his motion for leave to replace the expert and submit a “supplemental” report states, “[i]t is clear that Mr. Jain’s opinion now amounts to a ‘net opinion’ and, as such, is unhelpful to the Plaintiff.”**

Mr. Jain should not—and most certainly will not be—be qualified as an expert in this case.

....

Accordingly, insofar as the Defendants’ application seeks an award of attorneys’ fees and costs, the Court agrees that they are entitled to recoup that which they incurred at least from and since the Court’s September 19 Order. ***But for* Mr. Jain’s sham Certification, now firmly demonstrated and undeniable lack of qualifications, coupled with the unsupportable, inexcusable “net opinion” of a report he submitted, the Defendants would not have had to incur the additional expenses they did to support this Court’s reconsideration of its prior without prejudice denial of the motions to bar.** Nor would the time and resources of the Court have been unduly taxed. Nor further would the advancement of this case to hearing the previously filed and still pending dispositive motions for summary judgment that had been originally made returnable for hearing on September 22, 2023 (adjourned to November 3, 2023, and adjourned again, in accommodation of the Plaintiff) have been stalled and avoidably attenuated.

[AA26-AA27; AA34-AA37 (underlines and italicized in original; bolding emphasis added)].

Therefore, the trial court set forth a thorough and detailed statement of reasons and did not award counsel fees and costs without a rational explanation, on

an impermissible basis, or in a manner inconsistent with established policies. Indeed, the trial court acknowledged that the fees expended by Defendants would not have occurred but for the “sham certification” of Mr. Jain, of which is the fault of Plaintiff for failing to properly vet his alleged “expert.” But for Plaintiff holding out Mr. Jain as a qualified expert and the trial court giving Plaintiff the benefit and relying on those representations, the fees incurred by Defendants would not have existed.

Furthermore, the trial court’s calculation of fees to be awarded was reasonable, fair, and consistent with and satisfying the requirements of the court rules. When reviewing any fee application for attorneys’ fees and costs, the court must find and determine two things: (1) the fees for services charged by applying counsel for what was required to be performed, and the result attained, were and are fair, reasonable and satisfy the requirements of R. 4:42-9(b) and N.J. R. Prof. Conduct 1.5(a); and (2) that the expense disbursements for which reimbursement is also sought were supported and are reasonable and appropriate. See Walker v. Giuffre, 209 N.J. 124 (2013); Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372 (2009); Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004); Rendine v. Pantzer, 141 N.J. 292 (1995).

Here, the trial court recognized, consistent with the instruction from the Supreme Court in Rendine, 141 N.J. at 334-35, 337, that it must determine the

“lodestar” by assessing “the reasonableness of the hourly rates sought to be charged in this instance vis-à-vis the itemization of expended time previously furnished by the respective offices of defendants’ counsel.” (AA64-AA65). In making that determination, it concluded that counsel for the Amin Defendants was an experienced trial lawyer in New Jersey and offered his services at a discounted rate, and that the supporting certification “contains a detailed itemization of the services performed, the attendant costs and expense incurred, for the Fee Award Period” of September 19, 2023 though and including December 18, 2023. (AA66-AA67). Additionally, included in the costs was the amount the Amin Defendants were charged for having to retain an accounting consultant in connection with the denial of the motions to bar Mr. Jain. (AA67). Moreover, Plaintiff’s counsel did not “dispute or take issue with the hourly rates or fees charged by” counsel for the Amin Defendants. (AA69). Accordingly, the trial court, after a thorough and scrutinizing analysis, determined that fees charged for the services performed during Fee Award Period were fair, reasonable, and satisfied the requirements of R. 4:42-9(b) and N.J. R. Prof. Conduct 1.5(a). (AA70).

Indeed, and in addition to the above, the Amin Defendants join in the argument made by Defendant/Respondent Arya Trading LLC d/b/a Divya Foods concerning the fee awards. (See Respondent Arya Trading LLC d/b/a Divya Foods Br. at 24-28).

## VI. CONCLUSION

For the foregoing reasons, Plaintiff's appeal should be dismissed in its entirety, and the trial court's determinations should be affirmed.

Respectfully submitted,

/s/ Michael J. Lauricella

Michael J. Lauricella, Esq.  
Alexis M. Way, Esq.

Dated: July 2, 2025

230661103 v6

DEVANG SHAH, in his individual capacity, and derivatively on behalf of NUPUR TRADING, LLC,

Plaintiff/Appellant,

V.

NUPUR TRADING, LLC, ALKA H. AMIN, HEMANG SURESHBHAI AMIN, RUPAL A. PATEL, ANISH P. PATEL, HAVMOR CORPORATION USA LLC, AARYAN IMPORTS LLC, KRISHNA TRADING, LLC, ARYA TRADING LLC d/b/a DIVYA FOODS, AMIN TRADING AGENCY, LLC d/b/a ANSU FOODS, and AMIN TRADING, LLC,

Defendants/Respondents.

: SUPERIOR COURT OF NEW JERSEY  
: APPELLATE DIVISION  
: DOCKET NO. A-00994-24

:  
: ON APPEAL FROM ORDERS OF THE  
: SUPERIOR COURT OF NEW JERSEY  
: MIDDLESEX COUNTY, CHANCERY  
: DIVISION  
: DOCKET NO.: MID-C-52-21

:  
: TRIAL JUDGE

: HON. THOMAS D. MCCLOSKEY, J.S.C.

:  
: CIVIL ACTION

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**APPELLATE BRIEF OF RESPONDENTS,  
ALKA H. AMIN, RUPAL A. PATEL AND ANISH P. PATEL**

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## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

Nupur Trading, LLC ("Nupur") is a New Jersey limited liability company which defendant, Alka Amin, founded in 2012. The LLC was formed to import Indian groceries and other food products from India, the United Arab Emirates and other countries, and in turn sell the products to restaurants and grocers in the United States. (Da217). On December 1, 2015, the plaintiff, Devang Shah, as well as defendants, Rupal Patel, and Anish P. Patel, became members of Nupur and signed an Operating Agreement which governed their rights and obligations with regard to the business. (Da 218). According to the Operating Agreement, Alka retained a one-third membership interest; Devang Shah was given a one- third membership interest; and the remaining one-third interest was divided between Rupal Patel and her husband, Anish Patel. (Da 217). In addition, before she left for India Alka Amin executed a Power of Attorney which appointed her husband, Hemang Amin, as her agent to make decisions on her behalf in regard to the conduct of the business. (Da 218).

Notwithstanding the duty of loyalty provisions of the Operating Agreement, plaintiff alleges that Hemang used his position at Nupur to form competitor companies, including defendants, Havmoor Corp. USA, LLC and Aaryan Imports, LLC, to divert business way from Nupur, causing it to lose money. (Da 219).

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<sup>1</sup> Based on the points raised in the plaintiff's brief, the Statement of Facts and Procedural History have been combined as they are inextricably entwined.

On April 22, 2021, plaintiff filed this lawsuit against Nupur, its other members, Alka Amin, Anish Patel and Rupal Patel (collectively the “Member defendants”), Hemang Amin, and other corporate entities and affiliates in which Hemang was alleged to have an interest. (AA 0111). The Complaint sought monetary damages for Breach of Contract, Breach of Fiduciary Duty, Tortious Interference with Contractual Relations, Fraud and under other grounds. Notably, virtually all of the Complaint’s allegations against the Member defendants were premised on their having “refused to intervene” as Members of Nupur to stop defendant, Hemang Amin, from diverting Nupur’s business. On June 7, 2021 the Member defendants filed an Amended Answer, Separate Defenses, Counterclaim and Jury Demand. (Da 220). On November 12, 2021, the Member defendants filed a Second Amended Answer and Counterclaim. On June 17, 2021, defendants, Hemang Amin, Havmor Corp., Aaryan Imports, LLC, Amin Trading Agency, LLC and Amin Trading, LLC (the “Amin defendants”), filed an Answer . (Da 220).

On September 23, 2021, the trial court entered a Discovery Order directing that all parties serve paper discovery demands by October 22, 2021, and that responses to same would be due “pursuant to Court Rules.” (ADa 04). Despite being asked in the Member defendants’ interrogatories to provide detailed information and documentation as to any expert which plaintiff intended to use, he failed to furnish any. (Da 64-65).

On November 3, 2022, all counsel participated in a telephonic Case Management Conference in order to address outstanding discovery. Plaintiff's counsel made no mention at that time that plaintiff would be engaging an expert.

On February 9, 2023, during a Zoom Case Management Conference with the trial court and all counsel, the court made it clear that, given the age of the case, it was going to put the parties on a "tight leash" in finishing up discovery. Once again, plaintiff's counsel made no mention that plaintiff had any intention to utilize an expert.

On April 26, 2023, plaintiffs counsel for the first time advised that plaintiff intended to use an expert witness, Dharmendra Jain of RR Accounting & Tax Services, Inc. However, no information was provided as to Mr. Jain's qualifications, the substance of the facts and opinions to which he was expected to testify or his curriculum vitae.

On May 4, 2023, the trial court issued a Case Management Order which, consistent with its previous admonishment that the parties would be kept on a "tight leash", required that all paper discovery be completed by no later than May 19, 2023, and that depositions of all parties and fact witnesses be completed no later than June 19, 2023. (ADa 44). Since plaintiff had never previously advised the Court that he intended to utilize an expert, the May 19th Order did not contain any provision regarding expert's reports or depositions.

On June 13, 2023, well after the deadline for paper discovery set forth in the May 4, 2023 Order, plaintiff filed a Motion to extend discovery. (Da 10-11). In support of the motion, plaintiffs counsel submitted a certification which averred that plaintiff was intending to utilize the testimony of an expert to "help the fact-finder follow the numerous transactions of diversion in this matter, as well as offering an opinion as to the net profit realized upon sales of goods in this matter in the United States." However, as of the date of filing of the motion plaintiff still had not served an expert's report, or even given the substance of the facts and opinions to which his expert was expected to testify. Nevertheless, plaintiff requested that the Court extend the Discovery End Date to September 12, 2023, that he be permitted to serve his expert's report by August 28, 2023, and that expert depositions be completed by September 12, 2023. The defendants submitted opposition to the motion.

Following oral argument on the motion, The trial court issued an Order dated July 7, 2023, which granted plaintiffs application to extend discovery in part and denied it in part. (Da 1). According to the Order, the trial court extended discovery from July 14th to July 31, 2023. However, the Order rejected plaintiff's request to extend the time for submission of expert's reports and take expert's depositions. Instead, the Order required that depositions of fact and expert witnesses, if any, must be completed on or before the July 31st Discovery End Date. (Da 2). As reflected in the

Order, the trial court scheduled a Pretrial Conference for October 23, 2023, and a "firm Trial Date" for October 30, 2023. The Order also stated in bold that "there shall be no further extensions of discovery absent exigent or unforeseen circumstances." (Da 3). The record demonstrates that no further communications were received from plaintiff in regard to his expert until July 31, 2023, which was the Discovery End Date. At 6:01 p.m. that evening, plaintiffs attorney sent an email to the defendants' counsel enclosing an expert's report from Dharmendra Jain. (Da 14). With the expert's report plaintiff furnished over 12,000 pages of additional discovery documents he had obtained by subpoena.

On August 9, 2023, the Member defendants filed a Notice of Motion to bar plaintiff's expert's report on the ground that: (1) the report was not served within the time permitted for amending answers to interrogatories set forth in Rule 4:17-7; (2) Mr. Jain was not qualified to render the opinions expressed in the report; (3) Mr. Jain's damage calculations were not conducted in accordance with generally accepted accounting principles and otherwise amounted to a "net opinion"; and (4) the report was replete with legal opinions that involved questions of law which were for the Court to decide. (Da 30). On the same day, Michael J. Lauricella, Esq., representing the Amin defendants, also filed a Notice of Motion to bar plaintiffs expert's report on the same or similar grounds. Subsequently, Joseph A. Tringali, Esq., representing defendants, Krishna Trading, LLC and Arya Trading, LLC, joined in the motions. Plaintiff's

counsel thereafter filed opposition to the motions. The opposition included a lengthy certification from Mr. Jain attesting to his qualifications and experience as an accountant and the methodologies he used in preparing his report. (Da 33).

On August 18, 2023, while the motion to bar plaintiff's expert's report was pending, the Member defendants also filed a Notice of Motion for summary judgment (Da 45).<sup>2</sup> That motion sought to dismiss all Counts of the Complaint pertaining to the Member defendants on the ground that there existed no genuine issue of material fact as to the Member defendants' liability for the claims asserted therein. Plaintiff filed a Certification in opposition to the motion. (AA 2991). As set forth in that Certification, plaintiff entirely abandoned the essential premise of his Complaint against the Member defendants that they had allegedly "refused to intervene" to stop Hemang's diversion of business from Nupur to Hemang's company. Instead, for the first time in the case plaintiff contended that the Member defendants had *conspired* with Hemang to divert Nupur's business. In response to this, on September 18, 2023 the Member defendants filed a Reply Certification which demonstrated that each of the plaintiff's newfound allegations of conspiracy were utterly without merit. (Da 54).

Following oral argument on the motions, the trial court issued an Order and accompanying Statement of Reasons on September 19, 2023. (Da 67). As set forth in

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<sup>2</sup> The attached motion includes the Member defendants' Statement of Material Facts not in Genuine Dispute.

the Order, The trial court denied the defendants' motions to bar Mr. Jain's report without prejudice, subject to the defendants' being permitted to depose Mr. Jain and file motions for reconsideration of the Court's decision pursuant to Rule 4:49-2. As recognized by the Court in its accompanying Statement of Reasons, although at "first blush" Mr. Jain appeared to have the credentials and qualifications necessary to express the accounting opinions in his report, his opinions and methodologies had been placed into "serious question" by the defendants, and the reliability of his opinions had been met with a "stiff and viable challenge." As indicated in the Statement of Reasons, whether or not the Court ultimately decided to accept Mr. Jain's methodologies used to arrive at his conclusions was for the Court to assess and conclude, "but only after the expert testifies and is subjected to the crucible of examination and cross-examination, first, at his deposition and/or thereafter at trial." (Da 87). Consequently, the Order granted defendants leave to depose Mr. Jain by October 13, 2023 and, depending on the outcome of the deposition, file motions for reconsideration of the Order. In view of this directive, the trial court adjourned the defendants' pending summary judgment motions, and also adjourned the trial date. (Da 90).

Mr. Jain's deposition went forward on October 13, 2023. During the course of his deposition, Mr. Jain admitted that: (1) He was a "Chartered Accountant from India" but was not a licensed or certified professional accountant in the United States; (2) Since the United States does not recognize "Chartered Accountants" and Mr. Jain was not

certified by the International Board of Chartered Accountants, the only place in the world where he can hold himself out as an accountant is in India; (3) Accountants practicing in the United States are governed by certain accounting standards and principles adopted and published by the Financial Accounting Standards Board (FASB) and Government Accounting Standards Board (GASP), which do not recognize the accounting standards for Chartered Accountants set forth by the International Financial Reporting Standards Board (IFRS); (4) Mr. Jain was not qualified to render opinions based on Generally Accepted Accounting Principles (GAAP) adopted and published by the FASB because he was not a licensed accountant; (5) all of Mr. Jain's damage calculations were based on the foreign accounting standards set forth by the IFRS which are not recognized in the United States; and (6) because of this, his entire report was invalid. (Da 159 - 161).

On November 29, 2023, the Member defendants filed a Notice of Motion for reconsideration of the Court's September 19, 2023 Order denying without prejudice defendants' previous motion to bar plaintiff's expert's report submitted by Dharmendra Jain. (Da 91). The other defendants filed similar motions.<sup>3</sup> On the same day, plaintiff filed a Notice of Motion, supported by a brief and certification, seeking to substitute a new accountant, Joseph R. Petruccelli, in place of Mr. Jain, and permit Mr. Petruccelli to serve a "supplemental report." (Da 94). The Member defendants opposed the motion

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<sup>3</sup> All defendants' motions also sought an award of counsel fees and costs based on Mr. Jain's sham report.

on the ground that: (1) based on Mr. Petruccelli's certification submitted in support of plaintiff's motion, his report did not merely supplement Mr. Jain's report, but rather constituted an entirely new report with new damage calculations based on whole new methodologies; and (2) plaintiff's belated attempt to engage a new expert was a flagrant violation of the Court's discovery Orders and Rules of Court.

Following oral argument, the trial court issued a 53-page decision on December 18, 2023. (Da 129). After undertaking an exhaustive review of the case history and legal authorities, the court granted defendants' motions to bar Mr. Jain's report and prohibit him from testifying as plaintiff's expert. The court also denied plaintiff's last minute attempt to substitute Mr. Jain with a new expert on the ground that plaintiff had failed to demonstrate exceptional circumstances to allow him to replace plaintiff's expert. The court concluded that this would necessitate yet a further reopening of discovery and would cause "manifest injustice" to the defendants at that late stage of the case. (Da 177-179). Notably, as part of its analysis, the trial court determined that Mr. Jain's certification (Da 33) was a "sham", that he was thoroughly unqualified as an accountant, and that his report was riddled with "unsupportable, inexcusable net opinion." (Da 152). As a result, the court granted defendants' applications for an award of fees and costs, subject to defendants' counsel filing Certifications of Services. (Da 161, 162).

As set forth in its December 18, 2023 Order, the trial court also rescheduled the

defendants' summary judgment motions which had been pending since August, 2023 for hearing on January 12, 2024. In preparation for the hearing, the court permitted the parties to supplement their moving and opposition papers filed in connection with the initial motion. (Da 180).

On December 28, 2023, counsel for the Member defendants, Douglas J. Kinz, Esq., filed a Certification of Services relative to the Court's prior Order awarding counsel fees and costs in connection with the proceedings to bar plaintiff's expert. (Da 182). As set forth in the Certification, the Member defendants incurred legal fees totaling \$31,169.75 with reference to all the work that was done to bar plaintiff's expert, not including \$5,248.50 which the Member defendants had to pay to Withum, Smith & Brown for accounting consultant services, plus \$1,316.25 for the court reporting services in connection with Mr. Jain's deposition. On January 6, 2024, plaintiff filed a certification in opposition to the fee application. (Da 194). Notably, plaintiff's certification did not take issue with any of the statements made in Mr. Kinz's Certification of Services, including those statements addressing the criteria set forth in Rule 4:42-9 and RPC 1.5; nor did plaintiff dispute the reasonableness of Mr. Kinz's \$450.00 per hour fee. Rather, plaintiff's certification claimed that he lacked the financial resources to pay defendants' legal fees. On January 10, 2024, the Member defendants filed a reply certification in response to plaintiff's certification opposing the

fee application. (Da 197).

On January 12, 2024, all parties filed supplemental briefs in support of their respective positions with regard to the still pending summary judgment motions. The thrust of the Member defendants' brief was that: (1) plaintiff had failed to establish the existence of a genuine issue of material fact regarding any wrongdoing committed by the Member defendants; and (2) in the absence of an accounting expert, plaintiff could not prove his damages.

In response, plaintiff submitted a certification which for the first time in the case asserted that *he himself* should be permitted to testify as a lay person in regard to "lost profit" damages. (Da 204). In reply, the Member defendants filed a rebuttal brief contending that plaintiff's request should be rejected due to the fact that: (1) plaintiff was not competent to testify as to "lost profit" damages; (2) plaintiff's proposed lay person testimony was, by his own admission, based on inadmissible hearsay; (3) plaintiff's certification failed to set forth any calculation of the total damages he was claiming; and (4) plaintiff's discovery responses never revealed he was to testify as to lost profit damages or what the damages were.

Defendants' motions for summary judgment came on for hearing on March 28, 2024. Following extensive oral argument, on April 2, 2024, the trial court entered an Order granting the motions and dismissing plaintiff's Complaint as to all defendants

with prejudice. (Da 213). In support of the Order, the court issued an exhaustive 34 page Statement of Reasons thoroughly analyzing the respective arguments of the parties and providing detailed legal and factual support for the Court's decision (Da 217). Also on April 2, 2024, the trial court issued a companion Order granting defendants' respective fee applications. (AA 0057).

As a result of the Court's April 2, 2024 Order, the only claim remaining in the case was the Member defendants' Second Amended Counterclaim, which had never been adjudicated. On September 16, 2024, the Member defendants filed a Notice of Motion to voluntarily dismiss their Counterclaim without prejudice. (Da 252). On October 24, 2024, the Court granted the motion, thereby ending the case at the trial level. This appeal followed.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW PLAINTIFF TO TESTIFY AS TO "LOST PROFIT" DAMAGES AT TRIAL.**

In Point 1 of his appellate brief, plaintiff contends that the trial court should have allowed him to testify as to damages he claims to have sustained as a result of the defendants' wrongful conduct. Plaintiff's brief concedes that he could not testify as to the loss of value of Nupur's business or the loss in value of its trademark, which he acknowledges would require expert testimony.(Pb 12). However, as one of the owners

of Nupur and the person in charge of the company's sales, plaintiff contends that he had knowledge of the products that were sold by the company, the suppliers of the product, the cost of the product, and what the product would have sold for had the product not been allegedly diverted by defendants. Consequently, plaintiff asserts that he had all the information he needed "to compute the resulting net profit from the diverted sales trial." (Pb 6). According to plaintiff, due to the "lost sales" Nupur allegedly sustained because of the products diverted by the defendants, he sustained damages totaling \$2,428,850.00.

As recognized by Judge McCloskey in his Statement of Reasons supporting his April 2, 2024 Order, with the exclusion of Mr. Jain as an expert witness and the further bar against the belated proffer of Mr. Petruccelli, the plaintiff's last minute claim that he was suddenly capable of giving his own lay opinion as to lost profit damages was like the proverbial "Phoenix rising from the ashes." (Da 247). Aside from this, as noted by Judge McCloskey in his Statement of Reasons, the plaintiff's claim was devoid of merit, for several reasons:

1. Plaintiff was not competent as a lay person to testify as to "lost profits" damages. Despite plaintiff's contention that he had sufficient personal knowledge about Nupur's operations to be able to calculate its lost profits, the reality is that plaintiff by his own previous admission was not an accountant or financial person and

had only "limited knowledge" of accounting principles. Indeed, as set forth in plaintiff's brief submitted in support of his motion to replace Mr. Jain with Mr. Petrucelli and serve a supplemental expert's report, he argued as follows:

The certification of plaintiff, Mr. Shah, exhibits clearly as discussed above that these issues of the expert report are not the fault of Mr. Shah. Mr. Shah undertook to retain the expert long before the Discovery End Date in this matter... Finally, Mr. Shah is not an accountant or financial person (he is in sales) and he had to rely completely on Mr. Jain's report. Mr. Shah attended the deposition and admits, even with his limited knowledge, he was concerned... [Da 108].

Further, in the certification of plaintiff's proposed new expert, Joseph R. Petrucelli, CPA, he averred that "in order to calculate damages in a case that involves the shifting of sales a review of profitability and value would have to be performed as of the date closest to the apparent breach of fiduciary responsibilities, which in this case is January 7, 2021..." (Da 118). However, plaintiff's certification was utterly lacking in any analysis of "profitability and value" that Mr. Petrucelli indicated was a prerequisite to calculating damages. Nor was there any indication that plaintiff was capable of conducting such an analysis, since he did not have an accounting or financial background and there was no evidence that he was familiar with generally accepted accounting principles established by the Financial Accounting Standards Board.

Moreover, plaintiff's inability to prove damages through his own testimony was

previously conceded by his own counsel as a reason for allowing plaintiff to retain Mr. Petrucelli as an expert. In fact, in his brief submitted in support of plaintiff's motion to replace Mr. Jain, Mr. Perkins asserted:

The alternative is that this Court strikes Mr. Jain's report and does not allow an amendment and the plaintiff's case is essentially over save a few small points the plaintiff might be able to make on his own, but, in truth, just ruling the Jain report out is simply eviscerating the plaintiff's case. This action would be, in reality, dismissing the plaintiff's case. Except as set forth in detail above, we believe the Court could impose lesser sanctions upon the plaintiff than dismissal. [Da 111].

Clearly then, the fact that plaintiff may have had personal knowledge as to the cost and pricing of Nupur's products did not make him competent as a lay person to give what amounted to expert opinion on the calculation of lost profits damages. As Judge McCloskey recognized in his Order of April 2, 2024:

...the belated but rejected proffer of a replacement expert, Mr. Petrucelli, and the so-styled "supplemental report" plaintiff sought to have the Court allow - long after multiple extensions of Discovery End Dates and the expiration of discovery - underscored the necessity of having a qualified expert capable of rendering a competent opinion for the Court's consideration...as support for the damages claimed. [Da 247].

As a lay person with no accounting expertise and no ability to conduct a lost profits damage analysis, plaintiff clearly was not competent to so testify.

2. Plaintiff's certification failed to set forth any calculation of total damages or

the appropriate methodology for calculating them.

Aside from the fact that he was not at all competent to testify as an expert on damages, the plaintiff's January 12, 2024 certification submitted in support of his damage claim utterly failed to state what his total damages were. (Da 204). While plaintiff's January 12, 2024 certification set forth a purported calculation of lost profits for a sampling of five different Nupur products, there was no reference in the calculations as to what costs or profit margins plaintiff used for these calculations. Under the case law, this methodology is essential for a lost profits analysis. See, *Cromartie v. Carteret Savings and Loan*, 277 N.J. Super. 88, 103 (App. Div. 1994)(lost profits must include an analysis of a company's gross income and the costs or expenses which had to be expended to produce the income). Nor was there any calculation of lost profits for the numerous other Nupur products which plaintiff claimed were diverted to Hemang Amin's companies. Presumably, defendants would not have been provided with the total damage calculation for all Nupur products, assuming that plaintiff was even capable of computing it, until the trial. As recognized by Judge McCloskey in his Statement of Reasons filed in support of his April 2, 2024 Order:

...the simple fact of the matter is that the Plaintiff has not even calculated what the amount of his alleged damages are, and has not disclosed how or by what methodology he would compute them from the documentary evidence exchanged in discovery, the defense remains in the dark to the very day of oral argument on these motions as to what that amount is and/or what their relevant exposures are; and thus, the

Plaintiff cannot even establish a prima facie case for damages, much less prove a case for damages. [Da 250].

In his appellate brief, plaintiff argues that his total damages *had* been established at \$3.7 million. (Pb 17). However, this was the figure calculated in Mr. Jain's report which was barred by the Court. Obviously, plaintiff could no longer rely on that report when the summary judgment motions were argued.

Plaintiff's appellate brief also makes the disingenuous argument that a certification which he submitted to the court long after the summary judgment hearing, in which he calculated total damages at \$2,428,850.00, should be considered in assessing the propriety of Judge McCloskey's decision.(Pb 17-18). However, the Certification in question (AA0185 to AA0190), was filed with the Court on October 14, 2024, in response to the Member defendants' motion to voluntarily dismiss their Counterclaim so that the case could be brought to an end. This was more than nine months after the summary judgment motions were argued and more than six months after Judge McCloskey entered his Order granting the motions. It appears that the Certification was filed by plaintiff solely for the purpose of bootstrapping his damage claim on the appeal, since there was absolutely no reason to raise the damage issue in response to the Member defendants' motion to dismiss their Counterclaim. Such scullduggery should not be countenanced by this Court. Obviously, plaintiff's October 14, 2024 Certification was not part of the summary judgment record and could not have been considered by Judge McCloskey in ruling upon the motions. It should, therefore

be disregarded by the appellate court.

3. Plaintiff's proposed lay opinion testimony was largely based on inadmissible hearsay.

Essentially, plaintiff's request that he be allowed to render a lay opinion as to damages was based on *N.J.R.E.* 701, which provides that:

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

- (a) is rationally based on the witness' perception:  
and
- (b) will assist in understanding the witness' testimony or determining a fact in issue.

It is well-established that the essential purpose of Rule 701 is to ensure that lay opinion is based on a reliable sufficient foundation, and not inadmissible hearsay. See *Neno v. Clinton*, 167 N.J. 573, 581-585 (2001); *Rice v. Miller*, 455 N.J. Super. 90, 107 (App. Div. 2018). As stated by the Court in *State v. McLean*, 205 N.J. 438, 460 (2011), "lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay."

In the case at bar, plaintiff's January 12, 2024 certification clearly stated that he had been able to prove his damages only after "consultation with many experts." (Da 204). Indeed, in his accompanying legal brief plaintiff's counsel, Paul Perkins, Esq., asserted that plaintiff was able to testify as to damages based on his having "actively

examin[ed] his damages theories with the help of Mr. Petrucelli..." Clearly then, plaintiff's lay opinion testimony regarding damages was based on hearsay information and/or advice that he had received from accounting experts, including Mr. Petrucelli. This was most poignantly demonstrated at page 8 of plaintiff's January 12, 2024 certification (Da 211), which incorporated verbatim the Summary of Sales tables that appeared in the report of plaintiff's barred expert, Mr. Jain. (Da 22). As Judge McCloskey recognized, the plaintiff's certification "smacks as a bootstrapping attempt to parrot, through himself, the basis under which the rejected replacement expert (Mr. Petrucelli) he consulted would have undertaken to do had he been permitted to testify at this late stage... (Da 248).

While expert witnesses are ordinarily permitted to rely upon hearsay in formulating their opinions pursuant to N.J.R.E. 703, lay testimony does not have that latitude. See, *Rice v. Miller*, supra, at page 104-105. Plaintiff's proposed testimony contravened this bedrock principle.

It is well-established that a trial court's decision to admit or exclude evidence generally is entitled to deference absent a showing that the court abused its discretion, such that the decision was so wide off the mark as to constitute a manifest injustice. *Griffin v. City of East Orange*, 225 N.J. 400, 413 (2016); *State v. Marrero*, 148 N.J. 469, 484 (1997). Based on the record in this case, Judge McCloskey's decision to

prohibit plaintiff from testifying as to the issue of damages was not only appropriate, but compelled. Plaintiff was not competent to testify as to “lost profits” damages since he was not an accountant and had no financial background. Further, his proffered testimony in the form of his January 12, 2024 certification was entirely lacking, since it did not contain an analysis of Nupur’s gross income and the costs or expenses which had to be expended to produce that income. Nor did the Certification even contain a calculation of the total damages plaintiff was claiming. Aside from this, the contents of the Certification were based on inadmissible hearsay that the plaintiff had obtained from the damage experts that had previously been barred by the court. Under all of these circumstances, it is preposterous to suggest that Judge McCloskey abused its discretion in barring plaintiff from testifying as to damages.

POINT II  
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
IN NOT PERMITTING MR. PETRUCELLI TO SUBSTITUTE  
IN FOR MR. JAIN AS PLAINTIFF’S DAMAGES EXPERT.

1. Mr Petrucelli’s report was an entirely new report which, if allowed, would have caused “manifest prejudice” to defendants. In Point 2 of his brief, plaintiff argues that the trial court should have allowed Mr. Petrucelli to substitute in for Mr. Jain as plaintiff’s damages expert. According to plaintiff, Mr. Jain’s deposition testimony was “unexpected, unforeseen and caused plaintiff to have to face exigent circumstances.” (Pb 22). However, this argument overlooks the fact that plaintiff had

over two years to retain an expert before deciding on the eve of the Discovery End Date to retain Mr. Jain; that plaintiff and his attorney vigorously vouched for Mr. Jain's credentials and the merits of his report in opposing defendants' August 9, 2023 motion to bar him as an expert; and that plaintiffs request to substitute in Mr. Petrucelli was made long after discovery had been closed and two trial dates had already been adjourned. Further, contrary to plaintiff's contention that Mr. Petrucelli's report would merely supplement Mr. Jain's, as Judge McCloskey noted in his order of December 18, 2023, the report "would be an entirely new report that would burden the defendant to have to conduct another deposition and review further reports." (Da 178).

A review of Mr. Petrucelli's 16-page certification firmly supports Judge McCloskey's finding, since Mr. Petrucelli set forth entirely new damage calculations based on new methodologies and theories of recovery that were substantially different than those submitted by Mr. Jain. The following examples are illustrative:

(1) In paragraphs 12-18 of his certification, Mr. Petrucelli asserted that this is a case involving alleged "shareholder oppression", since the plaintiff was a minority shareholder who was "squeezed out" from Nupur Trading by the other owners. Mr. Petrucelli then went on to address damages allegedly sustained by plaintiff based on shareholder oppression. However, as acknowledged in paragraph 11 of Mr. Petrucelli's certification, Mr. Jain's report never undertook to account for damages associated with

minority oppression.

(2) In paragraphs 22-27 of his certification, Mr. Petrucelli asserted that the plaintiff formed Jash Distributors, Inc., in August 2021 after the Nupur warehouse closed. According to Mr. Petrucelli, Jash had only \$90,000.00 in sales in 2021 and \$1.6 million in 2022, “clearly showing the damages as a result of Hemang Amin forming multiple related entities and hindering the use of established supply channel suppliers.” However, Mr. Jain’s report made no mention of Jash Distributors, Inc. and made no reference to the company’s sales in any of his damages calculations.

(3) In paragraphs 28-34 of his certification, Mr. Petrucelli undertook an analysis of plaintiff’s share of equity in Nupur based on its Balance Sheet as of December 31, 2020, and claimed that plaintiff’s “net book value equity position” was \$635,054.00 as of that date. No such analysis appeared in Mr. Jain's report or certification.

(4) In paragraphs 36-40 of his certification, Mr. Petrucelli contended that, based on sales of goods allegedly diverted by Hemang Amin between 2017 and 2021, plaintiff’s damages for "lost profits," based on a 17.88% average gross profit, amounted to approximately \$517,000.00. This was a completely different analysis than that which was undertaken by Mr. Jain’s Bypassed Sales analysis which concluded that, based on a profit margin of 22%, plaintiff sustained damages totaling

approximately \$706,000.00.

(5) In paragraphs 58-67 of his certification, Mr. Petrucelli again focused on the sales revenues of plaintiff's company, Jash Distributors, Inc., in an attempt to demonstrate "the mitigation efforts and value considerations Devang Shah was able to recoup despite Hemang Amin's actions." Once again, no consideration whatsoever was given by Mr. Jain to Jash Distributors, Inc. or its impact on the calculation of damages.

(6) According to paragraphs 74-80 of his certification, Mr. Petrucelli acknowledged that Mr. Jain's report failed to include the "entire spectrum of damages," since it made no attempt to value Nupur as of the date of alleged breach of the Operating Agreement. Mr. Petrucelli considered this to be a "major issue" because no valuation conclusion was put before the Court by Mr. Jain. Mr. Petrucelli's certification then elaborated upon the three acceptable approaches as to valuing a business to include the Asset Approach, Market Approach, and Income Approach, none of which were mentioned in Jain's report.

(7) While Mr. Jain's report focused primarily on Trademark and Goodwill damages, Mr. Petrucelli's certification made no reference to these types of damages or the calculations made by Mr. Jain to support them.

As recounted in the Member defendants' Statement of Facts and Procedural History, the defendants in this case had to wait patiently for over two years before

finally being served with Mr. Jain's expert report on the last possible date permitted by the Court for serving the report. In the interim, at least two Discovery End Dates had to be extended in order to accommodate submission of the report. Further, when the defendants finally received the report they were forced to expend an enormous amount of time and money to: (1) review and digest the report, the voluminous exhibits attached thereto, and over 12,000 pages of documents supplied with the report that had been subpoenaed by plaintiff's counsel; (2) retain an independent accountant, Thomas Hoberman, CPA of Withum Smith & Brown, to review and comment on the report; (3) prepare and file motions to bar Mr. Jain's report on the ground that he was not qualified to render the opinions expressed therein and the report itself amounted to "net opinion"; (4) review plaintiff's opposition to the motions and file extensive briefs in reply thereto; and (5) prepare for and attend in-person oral argument before the trial court on September 19, 2023.

Furthermore, the Court itself had to expend significant resources to review all of the pleadings filed in connection with defendants' motions to bar, to conduct oral argument and then issue its Order of September 19, 2023 and Statement of Reasons in support thereof. In reliance upon that Order, the defendants thereupon expended substantial further time and effort to: (1) arrange and prepare for the taking of Mr. Jain's deposition; (2) attend the deposition on October 13, 2023, which lasted an entire

day; (3) review Mr. Jain's deposition transcript when it became available; and (4) prepare and file motions for reconsideration of the Court's prior Order. Clearly, an enormous amount of time, energy and expense was undertaken by the Court and the parties to accommodate, evaluate, litigate and finally adjudicate the qualifications and expertise of plaintiff's expert, Mr. Jain. Under these circumstances, plaintiff's request for a "do over" with a new expert was simply unfathomable.

Further, had Mr. Petrucelli been permitted to substitute in for Mr. Jain and submit a report, there is no question that the Member defendants would have had to analyze the report, engage Mr. Hoberman or some other expert to prepare and serve a rebuttal report, take Mr. Petrucelli's deposition, and, if appropriate, file another round of motions to limit or bar the conclusions in the report.<sup>4</sup> This obviously would have required yet another extension of the Discovery End Date, not to mention forcing the Member defendants to expend even more time, effort and money to defend the case. Under all of these circumstances, the trial court's finding that allowing plaintiff to replace Mr. Jain with Mr. Petrucelli would result in "manifest injustice" to defendants (Da 179), was absolutely correct.

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<sup>4</sup> For example, Mr. Petrucelli's certification was replete with legal conclusions regarding the Member defendants' alleged acts of "shareholder oppression" and "diverting of sales" of Nupur's products through other companies allegedly formed by the Member defendants for the purpose of defrauding Nupur. These were clearly legal opinions involving questions of law upon which Mr. Petrucelli was not competent to opine and which were otherwise inadmissible.

2. Plaintiff's attempt to substitute in a new damages expert amounted to a blatant violation of the discovery rules.

Pursuant to the Best Practice Rules, Rule 4:17-7 was amended in 2000 to demand stricter compliance with discovery time frames in regard to late amendments to interrogatories. Plaintiff's motion request to substitute in a new expert and issue a new report effectively amounted to an amendment to his answers to interrogatories. Consequently, plaintiff's request was governed by Rule 4:17-7. However, in support of the request plaintiff conspicuously failed to attach any certification which averred that, as required by the Rule, the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the Discovery End Date of July 31, 2023. The reason for this failure was obvious: no such new information existed. Rather, as plaintiff himself had acknowledged, his new expert, Mr. Petrucelli, would simply be relying upon the same information and documentation that Mr. Jain relied upon. Essentially, the only reason for amending plaintiff's answers to interrogatories with a new expert and new report was that plaintiff's previous expert performed poorly at his deposition. Plaintiff has failed to cite any legal authority which establishes that this is a sufficient basis for allowing a late amendment to answers to interrogatories under the Rule.

In addition, although plaintiff's motion did not request that the Court extend the

Discovery End Date of July 31, 2023, such an extension would of course have been necessary if the Court was going to allow the new report and permit the defendants to serve a rebuttal report and depose plaintiff's new expert. However, pursuant to Rule 4:24-1(c), "no extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." Since the record demonstrates that two trial dates had already passed at the time plaintiff made his motion request on January 12, 2023, he had to demonstrate exceptional circumstances for submitting a new report in lieu of the old one. On this point, it is well-established that a movant must satisfy four criteria for meeting the "exceptional circumstances" test:

- (1) Why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time;
- (2) The additional discovery or disclosure sought is essential;
- (3) An explanation for counsel's failure to request an extension of the time for discovery within the original time; and
- (4) The circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

See *O'Donnell v. Ahmed*, 363 N.J. Super. 44:5-1 (Law Div. 2003); *Zadigan v. Cole*, 369 N. J. Super 123, 132-133 (Law Div. 2004). Indeed, in *Zadigan* the Court upheld the barring of an expert's report submitted after the third extension of discovery where no exceptional circumstances were demonstrated.

It is noteworthy in this case that plaintiff's motion failed to even address any of

the four criteria necessary to establish exceptional circumstances, much less establish that the criteria had been satisfied. In fact, based on the record in this case it is abundantly clear that plaintiff could not have satisfied any of the criteria. For example, as to the fourth prong of the test plaintiff must have demonstrated that the need to replace Mr. Jain with a new expert was due to circumstances “beyond the control of he and his attorney.” However, plaintiff himself selected Mr. Jain as his expert, was integrally involved in furnishing Mr. Jain with much of the information and documentation relied upon by him in preparing his report and vigorously defended Mr. Jain's accounting experience and qualifications in connection with the initial motions to bar his report. Consequently, the circumstances regarding Mr. Jain’s retention and the submission of his report were at all times clearly within the control of plaintiff and his counsel. There is no factual basis to argue to the contrary. Therefore, Judge McCloskey’s finding that plaintiff had failed to establish exceptional circumstances was well-supported by the record. As noted by the judge in his Order of December 18, 2023 (Da 129):

Put simply, the Plaintiff has failed to establish “exceptional circumstances” within the meaning and intendment of our Court Rules and interpretive case law to allow a replacement expert at this very late stage of the litigation. As happens on rare occasions, it is not as though the expert had suddenly, unexpectedly passed away, or has become medically compromised, or has been precluded from further participation in the litigation or at trial because of unforeseen or exigent circumstances beyond the Plaintiff’s control. Quite

the contrary.

New Jersey Courts have not hesitated to bar attempts to extend discovery to allow for submission of an expert's report in the absence of compelling circumstances. For example, in *Smith v. Schalk*, 360 N.J. Super. 337 (App. Div. 2003), which was an automobile negligence case, plaintiff's initial MRI's failed to show either a herniated disc or disc bulges. Upon completion of discovery, however, plaintiff sought to introduce a new expert report containing the results of subsequent MRI's that were performed. The proposed new report suggested that disc bulges were present in the cervical and lumbar areas of the plaintiff's spine. The trial Court permitted the late report despite Rule 4:24-1(c), finding that no prejudice would result. However, the Appellate Division reversed a subsequent verdict in favor of plaintiff, finding that the Rule applied. According to the Court, since no exceptional circumstances were shown to justify the late filing, the trial Court abused its discretion in permitting its receipt. *Id.* at 345.

In this appeal, plaintiff relies principally on two cases – *Ponden v. Ponden*, 374 N.J. Super. 1 (App. Div. 2004) and the unpublished case of *Javonavic v. Boiardo*, 2016 WL 454743 (App. Div. 2016). However, both cases are clearly distinguishable from the one at bar. In *Ponden*, plaintiff filed a legal malpractice action against her former attorney, Richard Ferreri, Esq. In that case, plaintiff contended that Mr. Ferreri had

negligently failed to pursue proper and effective means to protect her in a divorce action involving her former husband, who had absconded with marital assets. On September 26, 2002, plaintiff's expert submitted a report which, in rather conclusory terms, stated that Mr. Ferreri had failed to undertake routine discovery devices that could have protected the assets, thereby deviating from accepted standards of practice of a matrimonial attorney. On October 31, 2002, plaintiff's former attorney wrote to the Court seeking a 60-day extension of discovery, to which Mr. Ferreri readily consented. As a result, on November 19, 2002 the Court sent a notice that extended the Discovery End Date to December 9, 2002. While this was going on plaintiff was also taking steps to change attorneys. On the same date that the trial Court sent notice of the new Discovery End Date, plaintiff's new counsel obtained a Substitution of Attorney from former counsel. That Substitution was filed with the Court on December 2, 2002. However, new counsel was never made aware of the new Discovery End Date.

Mr. Ferreri submitted his expert report on December 9, 2002, following which he moved for summary judgment on the ground that plaintiff's expert had rendered only a legally-insufficient net opinion. Plaintiff cross-moved for permission to serve a new expert's report out of time. In support of the motion, plaintiff's new counsel filed a certification asserting that, upon his review of the file, he believed that plaintiff's existing expert had to be replaced as a result of a conflict of interest. He also stated that

the file obtained from his predecessor did not contain the Discovery End Date, and he was unaware of same. Considering these contentions, the trial judge held that the first expert report consisted only of net opinion and that, due to the Best Practices rules, plaintiff was not entitled to relief from the Discovery End Date. In reversing, the Appellate Division emphasized that since a trial date had neither been scheduled nor was imminent, the Best Practices Rules would neither be impacted nor jeopardized. Further, the Appellate Division noted that the plaintiff raised "sufficient reasons" for a brief extension of discovery based on the fact that the prior expert appeared to be in a conflict of interest and that her attorney was unaware of the Discovery End Date when he assumed his representation. As a result, the Appellate Division held that the trial court abused its discretion.

Clearly, the facts of the case at bar are worlds apart from those in *Ponden*. For one thing, two trial dates had already been scheduled and adjourned in this case, and, based on the Court's September 19, 2023 Order, the scheduling of a third date was imminent.<sup>5</sup> Therefore, the primary reason for the Appellate Division's decision in *Ponden* is absent here. Further, unlike in *Ponden* counsel in this case was well aware of the Discovery End Date of July 31, 2023, as well as the Discovery End Dates that

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<sup>5</sup> As confirmed at page 45 of Judge McCloskey's Order of December 18, 2023 (Da 124), two "firm" trial dates (September 18, 2023 and October 30, 2023) had been scheduled by the Court but adjourned in order to permit plaintiff to introduce and defend Mr. Jain's expert report.

preceded it. Nor has plaintiff's request for a new expert been necessitated by an alleged "conflict of interest." Rather, plaintiff has simply sought to replace his existing expert because he did not like his deposition testimony.

Similarly, the facts of the *Javonavic v. Boiardo* case are totally inapposite to those here. In *Javonavic*, plaintiffs filed a medical malpractice case alleging that the defendant deviated from accepted standards of care when performing knee replacement surgery. The allegation was supported by an Affidavit of Merit authored by Dr. Jeffrey F. Shapiro. Approximately two years later, prior to the Discovery End Date and before a trial date had been scheduled, plaintiff's counsel notified her that she intended to withdraw from the case because plaintiff's expert advised that he could not render a report opining that defendant was negligent. A second expert with whom plaintiff consulted also agreed that there was no deviation from accepted standards of care. When these circumstances were made known to the trial court, the court extended the Discovery End Date for 60 days to allow plaintiff to obtain a new expert report and possibly new counsel. The trial was scheduled on a date two months following the renewed Discovery End Date. Plaintiff's counsel moved to be relieved, and defendant cross-moved for summary judgment. By the time the motions were heard, plaintiff advised the Court that a new expert had been hired, but that his report had not been issued because he had to review x-ray films that had not yet become available.

Concluding that plaintiff had no expert evidence of malpractice, the Judge granted defendant's motion for summary judgment. In reversing the trial court's decision, the Appellate Division held that the ultimate sanction of dismissal was not warranted given the fact that: (1) two weeks before the Discovery End Date plaintiff's expert had retracted his initial opinion upon which the Complaint was grounded; (2) plaintiff acted expeditiously to retain new counsel to represent her with a new expert to submit a liability report; (3) the new expert expeditiously reviewed the available records and eventually prepared a report; and (4) there was no showing of any prejudice that would result to the defendant in allowing the new report.

Contrary to the *Javonavic* case, in this case plaintiff was represented by the same attorney, Mr. Perkins, throughout the relevant time period. Further, plaintiff steadfastly defended Mr. Jain's credentials and his report, and only sought to replace him following Mr. Jain's deposition, which took place by specific authorization of the Court well after the Discovery End Date. In addition, unlike the defendant in *Javonavic*, the defendants in the present case would have been significantly prejudiced by having to spend substantial time and money to analyze a new report with new damage calculations, retain an expert to rebut the report and depose the plaintiff's new expert. Further, all of this would have implicated the need for further judicial resources to oversee and manage the additional discovery and entertain motions (including but not

limited to supplemental motions for summary judgement) addressing the new report. Fundamentally, plaintiff has not and cannot cite to any case authority which stands for the proposition that a party should be free to replace an expert after the Discovery End Date has expired and a trial date has been fixed simply because the expert's report was discovered to be deficient and/or the expert not qualified.

POINT III  
PLAINTIFF FAILED TO ESTABLISH ANY SPECIFIC  
EVIDENTIAL FACTS TO WITHSTAND THE MEMBER  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS  
TO LIABILITY.

In Point 3 of his brief, plaintiff argues that the Member defendants' summary judgment motion as to liability should have been denied, since plaintiff's Certification filed in opposition to the motion raised numerous issues of material fact between the parties. (Pb 38). However, as determined by Judge McCloskey in his April 2, 2024 Order, plaintiff's Certification was thoroughly undermined by his own answers to interrogatories, as well as his refusal to provide any supporting documentation. (Da 230-233).

As is evident from his Complaint, plaintiff alleges that the defendant, Hemang Amin, acted "fraudulently and in an oppressive manner" by competing with Nupur and usurping Nupur's business opportunities, using companies that Mr. Amin owned or were owned by members of his family. According to the Complaint, this alleged

“pattern of improper conduct” constituted a breach of Mr. Amin’s duty of loyalty to Nupur, as well as a breach of the covenant of good faith and fair dealing, tortious interference with Nupur’s contractual relations, and other causes of action. As to the Member defendants, the causes of actions asserted against them are contained in Counts Three through Eight of the Complaint. These causes of action include Misappropriation of Company Opportunity (Count Three), Unjust Competition (Count Four), Breach of Obligation of Good Faith and Fair Dealing (Count Five), Breach of Contract (Count Six), Breach of the Common Law Implied Covenant of Good Faith and Fair Dealing (Count Seven), and Breach of the Common Law Fiduciary Duty (Count Eight).

It is noteworthy that each cause of action asserted against the Member defendants in these Counts is predicated upon plaintiff’s allegation that the Member defendant’s “refused to intervene and stop Mr. Amin’s pattern of improper conduct despite repeated requests to do so by Plaintiff.” In fact, this is the exact language which appears in all of the Counts, with the exception of Count Seven, which alleges that the Member defendants breached the implied covenant of good faith and fair dealing “by failing to carry out their obligations in the Operating Agreement..” Indeed, with the exception of Count Seven the allegation of “refusal to intervene” is the only allegation of wrongdoing asserted by plaintiff against the Member defendants in

Counts 3, 4, 5, 6 and 8. Further, all of the Counts, including Count Seven, seek damages against the Member defendants based on their “deliberate inaction.” Clearly then, with the exception of Count Seven, the sole basis for liability asserted against the Member defendants is their passivity in failing to intervene to stop Mr. Amin’s alleged wrongful conduct.

The problem with these allegations is that, despite exhaustive discovery and tens of thousands of documents exchanged between the parties, plaintiff utterly failed to identify any specific facts to support the allegation of “refusal to intervene,” much less a witness statement, email, document or business record to corroborate his claim. As noted by the trial court, this failure was highlighted by plaintiff’s answers to the Member defendants’ interrogatories, which conveyed no meaningful information to support the allegations of the Complaint. (Da 259). For example, as set forth in interrogatory #33, the Member defendants requested that plaintiff set forth the date that plaintiff first demanded that the Member defendants intervene in order to address Mr. Amin's alleged misconduct, as well as provide supporting documentation. Plaintiff's response to this interrogatory was as follows:

See general objection numbers 1, 2, 4, 5, 7, and 9. This Interrogatory is improper as it is overly broad and overly burdensome; requires speculation; calls for a legal conclusion; calls for an allocation of facts to legal theories; seeks to invade the attorney/client privilege; and calls for the disclosure of counsel's work product or trial strategy.

Furthermore, plaintiff has not completed discovery or preparation for trial and has requested this information from Defendants.

Subject to and without waiver of these objections, Plaintiff refers Defendants to the allegations contained in his Complaint, specifically including paragraph 35, and Plaintiff's Response to Defendants' Request for Documents. Please also see the answer to Interrogatory No. 6. Plaintiff reserves the right to amend this response as discovery continues.

In reviewing plaintiff's answer to interrogatory #6, the only relevant portion appears at page 9 of the interrogatory answer, as follows:

In or around 2019, Plaintiff informed fellow Nupur members, Rupal and Anish Patel ("Anish") of Hemang's actions, expressed concern that Hemang was improperly competing with Nupur and using Nupur's assets and resources for his own purposes, and asked that they intervene and address the situation. He also reported that Hemang was improperly using Nupur's employees to perform work for his own personal businesses. Plaintiff also began requesting that a member meeting be held to address his concerns of misconduct by Hemang. All of his requests were ignored.

Clearly then, plaintiff's answer to #6 did not provide any specific information as to the date requested in #33. Nor did the answer reference any documentation supporting plaintiff's demand for intervention as requested in #33. In fact, no such documentation was ever provided in discovery.

Further, the defendants' interrogatory #34 requested that plaintiff set forth in detail all facts upon which he would rely in support of the allegation contained in

paragraph 36 of the Complaint that Anish and Rupal Patel dismissed his concerns about Hemang and claimed that the transactions in question were "mere isolated occurrences." Interestingly, plaintiff's response to this interrogatory was the same as his response to #33. Specifically, the only responsive information he provided was to refer to interrogatory #6. However, the answer to #6 furnished no specific facts in support of the allegation in question. Nor was any document ever provided in support of the allegation.

In addition, the defendants' interrogatory #35 requested that plaintiff itemize "with particularity" all requests allegedly made by him for a Member meeting to be held in order to address his concerns about Hemang's conduct, as alleged in paragraph 38 of the Complaint. Once again, plaintiff's answer was identical to his responses to interrogatories #33 and #34. Once again, plaintiff's general reference to interrogatory #6 was non-responsive, since his answer to #6 did not identify with any particularity any of the requests allegedly made by him for a Member meeting to be held. Further, plaintiff never furnished a single document to corroborate any such request.

More on point to the allegations contained in Counts Three through Eight of the Complaint, interrogatory #44 requested as follows:

Set forth in detail all facts upon which plaintiff will rely in support of the allegation contained in paragraph 75 of the Complaint that Anish Patel, Rupal Patel and Alka Amin refused to intervene and stop Hemang's alleged pattern of

improper conduct. In addition, attach hereto copies of all documentation which supports the allegation.

However, as he did with his answers to interrogatories #33, #34 and #35, plaintiff's response to #44 was simply to refer back to the conclusory allegations of his Complaint and his answer to interrogatory #6, which conveyed no specific facts regarding the information sought. Plaintiff did make a general statement in his answer to #6 that he had "expressed concern" to the Member defendants that Hemang was improperly competing with Nupur, and asked the Member defendants to "intervene and address the situation." However, this was simply a repeat of the conclusory allegations in the Complaint. In reality, plaintiff never provided any specific facts to support the allegation, such as when, where and how he asked the Member defendants to intervene, the substance of the communications that were exchanged between the parties, the basis for plaintiff having concluded that the Member defendants would not intervene, and what, if anything, plaintiff did in response. Nor was any specificity provided as to the "repeated requests for intervention" that were supposedly made. Aside from this, plaintiff never furnished a single document to support the allegation. As determined by the trial court, plaintiff's proofs regarding defendants' "refusal to intervene" were utterly lacking.

As to Count Seven of the Complaint, which alleges that the Member defendants failed to carry out their obligations under the Operating Agreement, interrogatory #45

requested that plaintiff set forth all facts upon which he would rely in support of the allegation, and attach copies of any supporting documentation. As reflected in his interrogatory answer, plaintiff's response was identical to his response to interrogatories #34, #35 and #44, once again referring back to his answer to interrogatory #6. In his answer to interrogatory #6, plaintiff did provide some detail about Rupal having allegedly failed to carry out her obligations under the Operating Agreement, but no detail whatsoever as to the other Member defendants, Anish Patel or Alka Amin. (Please refer to pages 9-10 of the interrogatory answers). Specifically, plaintiff claimed that Rupal threatened him with "bogus criminal charges," attempted to exclude plaintiff from the operation of Nupur, concealed Hemang's misconduct by manipulating Nupur's employees, used abusive language toward the plaintiff, disrupted Nupur's business operations by turning off Nupur's computer server, allowed the camera system in Nupur's warehouse to become disabled, refused to collect debts owed to Nupur by debtor companies and instructed Nupur's suppliers to communicate via her personal email despite "multiple requests" by plaintiff that she utilize Nupur's email accounts.

Notably, however, plaintiff failed to correlate any of these allegations to the breach of a specific provision of the Operating Agreement, which was the thrust of Count 7. Certainly, the mere fact that the plaintiff and Rupal may have had

disagreements or even that she was abusive to him does not necessarily translate to a violation of the Agreement. It is also noteworthy that, as with the other Counts of the Complaint, plaintiff failed to furnish a single witness statement, email, business record or other document corroborating his claim that Rupal breached the Operating Agreement. On the other hand, defendants not only denied the allegations, but had previously furnished the Court with corroborating documentation, such as three witness statements from Nupur's employees, attesting to the fact that it was the plaintiff, and not Rupal, who had abused and harassed not only Rupal but other Nupur employees, as well.

By letter dated October 4, 2022, the Member defendants' attorney, Mr. Kinz, made formal demand of the plaintiff's prior counsel, Ashley V. Whitney, Esq., that plaintiff furnish more specific answers to various interrogatories, including #6, #33, #34, #35, #44, and #45. (Da 295). By letter dated October 12, 2022, Ms. Whitney responded. (Da 301). As set forth in the response, Ms. Whitney refused to provide any of the supporting documentation requested by Mr. Kinz in his October 4th letter other than to refer to what had already been furnished in discovery, none of which was responsive to the interrogatories in question. In addition, Ms. Whitney objected to every single request for more specific answers.

In response, Mr. Kinz wrote back to Ms. Whitney on October 31, 2022. (Da

310). As set forth in the letter, Mr. Kinz pointed out that Ms. Whitney's October 12<sup>th</sup> letter failed to convey any meaningful information regarding the more specific answers being sought, much less provide any documents. Unfortunately, Mr. Kinz's October 31<sup>th</sup> letter was patently ignored.

Ultimately, plaintiff's refusal to provide more specific answers to interrogatories was brought to the attention of the Discovery Master, the Hon. Travis S. Francis (Ret.). As a result of Judge Francis' ruling, plaintiff was required to provide more specific answers to many of the Member defendants' interrogatories, including critical interrogatory #44. By letter dated December 9, 2022, plaintiff's new counsel, Paul I. Perkins, Esq., purportedly provided a more specific answer to #44, as well as the other interrogatories required by Judge Francis. (Da 313). However, as reflected in the letter, once again no specific facts or documentation was provided as to #44. Curiously, Mr. Perkins' response contended that Rupal had failed to let plaintiff know about "what was going on with Hemang" and did not "update the plaintiff at any time." However, these statements had nothing to do with the allegations in the Complaint that the Member defendants "refused to intervene and stop Mr. Amin's pattern of improper conduct despite repeated requests to do so by the plaintiff."

In view of the foregoing, it is abundantly clear that plaintiff has never furnished specific evidential facts, much less corroborating documentation of any kind, to

support his allegation that the Member defendants refused to "intervene and stop Mr. Amin's pattern of improper conduct despite repeated requests to do so by plaintiff." Since this allegation was fundamental to the causes of action asserted in Counts 3, 4, 5, 6 and 8 of plaintiff's Complaint, those Counts were properly dismissed by the trial court due to the absence of proofs giving rise to a genuine issue of material fact. Further, Count 7 was also properly dismissed, since plaintiff persistently failed to identify any specific provision in the parties' Operating Agreement which the Member defendants had allegedly violated; nor did he ever provide any corroboration, either in the form of a witness statement, email, business record or other document, as to the specific allegations of Rupal's violations of the Agreement set forth in plaintiff's answer to interrogatory #6.

Being obviously aware that there was nothing of substance in the record to support plaintiff's "refusal to intervene" allegation, which was the fundament of his entire Complaint against the Member defendants, plaintiff effectively abandoned that allegation in the supplemental certification he filed in opposition to the summary judgment motion on January 12, 2024. (AA2991 to AA3003). Instead, for the very first time in the litigation plaintiff's certification alleged that the Member defendants conspired with Hemang by actively helping him form companies that he used to allegedly compete with Nupur (Devang Shah's Certification, ¶27); assisting Hemang in

“diverting business away from Nupur” (Devang Shah’s Certification, ¶49 and ¶53); and otherwise “participat[ing] in the fraud with Hemang.” (Devang Shah’s Certification, ¶49). Remarkably, despite exhaustive discovery and over 60,000 pages of documents exchanged between the parties, there was never any direct proof of any of these new allegations. Rather, plaintiff simply attempted to manufacture a genuine issue of material fact solely on the basis of “guilt by association” and several documents that he grossly distorted to fit his false narrative. This was made clear by the Member defendants’ reply certification filed in connection with their summary judgment motion. (Da 54)

As demonstrated in the Member defendants' reply certification, every single document which plaintiff produced in support of his newfound theory – Shah Exhibits 6, 7, 13, 15, 16, 18, 19 and 22 – had been distorted, exaggerated and/or conflated by him in an attempt to fit his fanciful narrative. In actuality, not one of these exhibits affirmatively demonstrated that the Member defendants either participated with Hemang Amin in diverting business and revenues away from Nupur or attempted to do so.<sup>6</sup> As the Court is well aware, it is the plaintiff's burden in a fraud case to prove each element of the fraud by "clear and convincing evidence." *DepoLink Court Reporting*

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<sup>6</sup> All of the other exhibits comprising plaintiff's opposition - Shah 1, 2, 3, 4, 5, 10, 11, 12, 14, 17 and 18 - may have had relevance to plaintiff's claims against Hemang Amin, but did not in any way implicate any of the Member defendants in any alleged scheme to defraud Nupur.

*and Litigation Support Services v. Rockman*, 430 N.J. Super. 325, 326 (App. Div. 2013); *Stochastic Decisions, Inc. v. DeDomeneco*, 236 N.J. Super. 388, 395 (App. Div. 1989). It is noteworthy that plaintiff never even pleaded a common law or equitable fraud claim against the Member defendants in this case. Nor did he ever plead a civil conspiracy claim, which would have been the cause of action that most closely aligned with his new legal theory.

It is well-established that summary judgment cannot be defeated by the "identification of a disputed fact of an insubstantial nature," or by speculation, innuendo or disputes as to irrelevant facts. See: *Investors Bank v. Torres*, 457 N.J. Super. 53, 64-65 (App. Div. 2018), *aff'd* 243 N.J. 25 (2020); *MEMO v. Sun National Bank*, 374 N.J. Super. 556, 563 (App. Div. 2005). In this case, plaintiff's last-minute, desperate attempt to build a fraud case on the basis of a few documents which he had distorted beyond recognition in order to fit his narrative was nothing more than a fairy tale. There were simply no facts before the Court upon which a reasonable fact-finder could conclude that the Member defendants were liable to plaintiff on the basis of a fraud cause of action which was never even pleaded.

POINT IV  
THE TRIAL COURT DID NOT ABUSE ITS  
DISCRETION IN AWARDING ATTORNEY'S FEES  
TO DEFENDANTS.

In Point 4 of his brief, plaintiff contends that the trial court's aggregate counsel

fee award of \$91,894.07 to the defendants was unwarranted, since plaintiff was “blameless for the errors of Mr. Jain.” (Pb 46).<sup>7</sup> Notably, plaintiff does not take issue with the Certification of Services submitted by the Member defendant’s counsel, either in regard to his hourly rate or the time that he spent seeking to bar Mr. Jain as an expert.<sup>8</sup> Rather, plaintiff contends that the award was inappropriate since he did not act in “bad faith” in defending Mr. Jain’s qualifications and expertise, but rather relied completely upon Mr. Jain’s representations. (Pb 47–48).

Plaintiff’s argument overlooks the fact that he was the one who selected Mr. Jain as his expert, supposedly vetted him and, in the face of the defendant’s initial motion to bar his report filed in August, 2023, vigorously defended his qualifications and experience as an accountant. Indeed, in plaintiff’s brief filed on August 17, 2023 in opposition to the defendants’s initial motion, he argued as follows:

Although I won’t reprint it all here, the expert certification lays out in great detail his experience in the area of accounting. He was educated in accounting over 25 years ago. He has a degree in accounting. He became a Chartered Accountant and has his own practice. He works with other professionals in the areas relevant to this matter.

• • • •

I would refer the court to Mr. Jain’s certification for this part

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<sup>7</sup> As set forth in Judge McCloskey’s Supplemental Order of April 2, 2024, the fees and costs awarded to the Member defendants amounted to \$38,859.50.

<sup>8</sup> As set forth in Judge McCloskey’s Order dated December 18, 2023, the relevant time period for the attorney fee award was September 19, 2023 through December 18, 2023.

of the analysis. With respect to the analysis of books and records, and the review of the diversion of the revenue or lost profits, it is clear that Mr. Jain has been asked to perform these functions many times in the past for very large companies. With respect to the Goodwill and Trademark analysis, he has also set out that he performs those functions as part of his practice on a regular basis.

. . . .

Thus, there is no question that Mr. Jain has both a basis for his opinion and a methodology for the computation of value based upon his training and experience.

[Plaintiff's brief dated 8-17-23, pgs. 6–7)

In Mr. Jain's lengthy certification that plaintiff filed in opposition to the motion (Da 33), he asserted that he had conducted financial investigations for large companies, wherein he analyzed revenue, expenses, and conducted internal audits; that he had practiced regularly in the tax and accounting services industry for multiple decades which required him to value assets, like Goodwill and Trademarks; that he had analyzed complex financial data for companies and when required provided testimony; that over the course of his career he had audited some of the most prestigious institutions globally; that he had worked with an accounting team that included a fraud examiner, financial analyst and accountant; that he had conducted over 50 audits spanning a wide spectrum of company sizes; and that the skills that he and his "team" regularly employed included financial analysis, fraud, accounting, partnership dispute support, and research. Mr. Jain's certification went on to describe in detail the

methodologies that he utilized to determine plaintiff's damages in this case, including lost profits, loss of goodwill and damage to Nupur's trademark.

The plaintiff's staunch defense of Mr. Jain and his expert's report forced the defendants to retain their own expert for consultation purposes, prepare for Mr. Jain's deposition, take the deposition, file a Motion for reconsideration to bar Mr. Jain as an expert, defend against plaintiff's last-minute attempt to substitute Mr. Jain with a new expert, and then argue the motion. None of this extensive legal work would have been necessary but for the plaintiff's strident efforts to "prop up" a so-called expert that he knew or should have known was thoroughly unqualified.

In his December 18, 2023 Order, the trial court patently rejected plaintiff's claim that he was not at fault for what happened with Mr. Jain, since there was no way for him to know from the outset that Mr. Jain was not a qualified expert. According to the court:

Bluntly stated, all of these contentions go a long way towards stretching the legal imagination to the point of snapping, and thus are resoundingly rejected by this court.

[Da 175]

In granting defendants' requests for a counsel fee award, the trial court rightfully concluded that the consequences of Mr. Jain's fiasco should be visited upon the plaintiff rather than the defendants:

But for Mr. Jain’s certification, now firmly demonstrated an undeniable lack of qualifications, coupled with the unsupportable, inexcusable “net opinion” of a report he submitted, the defendants would not have had to incur the additional expenses they did to support this court’s reconsideration of its prior Order without prejudice denial of the motions to bar. Nor would the time and resources of the court have been unduly taxed. Nor further would the advancement of this case to hearing the previously filed and still pending dispositive motions for summary judgment that had been originally made returnable for hearing on September 22, 2023 have been stalled and avoidably attenuated.

[Da 161-162)

It is axiomatic in this State that attorney’s fee disputes should not rise to a second litigation, and that a court should only rarely overturn trial judges’ discretionary decisions on the issue. According to our Supreme Court, reversal should only occur for a “clear abuse” of the trial court’s discretion. *Rendine v. Pantzer*, 141 N.J. 282 (1995); *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1 (2004). In the case at bar, the certification of the plaintiff’s “expert,” Mr. Jain, who was hired, vetted and enthusiastically promoted by the plaintiff, proved to be demonstrably false. Nevertheless, plaintiff would have the court impose the financial consequences of this debacle upon the defendants. The trial court rightfully rejected such an unfair result. Under all of the circumstances of this case, his decision can hardly be characterized as a “clear abuse of discretion.”

CONCLUSION

For the reasons herein above set forth, it is respectfully submitted that the plaintiff's appeal is utterly lacking in merit, and the trial court's decision should be affirmed in all respects.

Respectfully,

A handwritten signature in blue ink, appearing to read "Douglas J. Kinz". The signature is fluid and cursive, with the first name "Douglas" and last name "Kinz" being clearly legible.

Douglas J. Kinz

Dated: July 9, 2025

DEVANG SHAH, in his individual capacity and derivatively on behalf of NUPUR TRADING, LLC,

*Plaintiff/Appellant,*  
v.

NUPUR TRADING LLC, ALKA H. AMIN, HEMANG SURESHBHAI AMIN, RUPAL A. PATEL, ANISH P. PATEL, HAVMOR CORPORATION USA LLC, AARYAN IMPORTS LLC, KRISHNA TRADING, LLC, ARYA TRADING LLC d/b/a DIVYA FOODS, AMIN TRADING AGENCY, LLC d/b/a ANSU FOODS, and AMIN TRADING, LLC,

*Defendant/Respondent.*

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-00994-24**

ON APPEAL FROM ORDERS OF THE  
SUPERIOR COURT OF NEW JERSEY  
MIDDLESEX COUNTY, LAW DIVISION

DOCKET NO.: MID-C-0052-21

TRIAL JUDGE:

HON. THOMAS D. MCCLOSKEY, J.S.C.

**CIVIL ACTION**

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**APPELLANTS REPLY BRIEF**

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**LEGAL ARGUMENT --- POINT I.**

**New Jersey Law Favors Plaintiff Testifying At Trial  
As To Damages (*found AA0105 to AA0108*)**

Throughout Respondent's briefing there is a lack of credible opposition to the case law cited by the Plaintiff on the point of letting Plaintiff testify at trial. New Jersey case law, under both equitable and legal principles, supports the finding that Plaintiff should be permitted to testify at trial. Respondents point out that Plaintiff is not an expert, which is true and admitted by him in his certifications. In fact, at oral argument, Counsel for Plaintiff admitted that most of the Plaintiff's case would be "eviscerated" if he did not have an expert "save a few small points." [DA111]. This is absolutely true.

What the Plaintiff/Appellant is not seeking to do is argue anything to do with the valuation of the business before the Defendants' interference in the operations of Nupur or seeking to value the business as a result of the diversion and stealing of Nupur's business and revenue. Admittedly, Plaintiff cannot testify as to value of the business.

Further, the Plaintiff cannot testify as to the market value of the products. The Plaintiff cannot perform a general market analysis and then discount this analysis by import/export costs and inflation over time. Plaintiff is not seeking to do this. In being unable to testify as to these claims, Plaintiff is losing the majority of his claim. Early estimates of his damages were above 9 million dollars.

It is true that the Plaintiff discussed the damages issue with his experts. However, what the Plaintiff would testify to at trial would be an analysis of the documents that were

all exchanged during discovery – not out of court statements made to him by the experts.

As set forth in Appellant’s Moving Brief, in, Kazanjian v. Atlas Novelty Co., 34 N.J. Super. 362, 369, 112 A.2d 592 (App. Div. 1955), the Plaintiff Rug merchant, who occupied first floor in building, brought action against occupant of upper floor to recover for damage to rugs from water poured into building by fire department in extinguishing fire on upper floor, on ground that fire was caused by negligence of occupant of upper floor.

In this case, the Kazanjian Court found:

. . . [t]he matter may arise on the retrial and we therefore observe that since the ultimate criterion of damage in this situation is the difference in the value of the articles before and after the fire . . . plaintiff’s 40 years of experience as a rug merchant should serve to qualify him. Leider v. Pitcock, 15 N.J. Super. 592, 83 A.2d 796 (App.Div.1951). Moreover, as owner of the articles, he is competent to testify to their value. See Teets v. Hahn, 104 N.J.L. 357, 359, 140 A. 427 (E. & A.1928); Anderson v. Electric Laundry Co., 146 A. 683, 7 N.J. Misc. 567 (Sup.Ct.1929); Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J. Misc. 412 (Sup.Ct.1931); Nixon v. Lawhon, 32 N.J. Super. 351, 356, 108 A.2d 480 (App. Div. 1954); 3 Wigmore, Evidence (3rd ed. 1940), sec. 716, p. 48.

The question of whether a witness, called as an expert, is qualified to give expert testimony, is one to be primarily passed upon by the trial court, whose decision will not be reversed if there is any evidence to support it, or unless it is clearly shown to be erroneous in matter of law. Leider v. Pitcock, 15 N.J. Super. 592, 594 (App. Div. 1951) (citing Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 72 A.2d 204 (1950)).

In Leider, the Appellate Division found that the proffered Expert in that case was qualified to testify as an Expert Witness “has been engaged in the rug and carpet business all of his life and was familiar with all operations involved in their production. Defendant

unduly stresses the fact that the witness never sold the same make of carpet as that involved in the present litigation. While this might properly affect the weight accorded his opinion by the trial court, it would not affect his competency as an expert witness, properly and factually established.” Id. at 594.

Contrary to what is asserted by the Respondents, the Plaintiff is seeking to testify as to products that Plaintiff dealt with on a regular basis. Thus, like Kazanjian and Leider the Plaintiff is testifying as to products that were the property of the corporation. This is no different than in Kazanjian and Leider where a party was allowed to testify as to the damages incurred by a loss of revenue from those products.

Unlike Kazanjian and Leider the Plaintiff does not ask this Court to allow him to proceed as far as the Kazanjian and Leider Courts allowed. In Kazanjian and Leider, the Courts allowed the party in those actions to testify as to the difference in value of the products before and after an event. In those cases, the Courts allowed a party to testify as to value which is usually in the purview of an expert.

In this case, Plaintiff simply seeks to testify from documents that set forth the price of the products and what it should have been sold for, what was paid for the product and where it was actually diverted and sold. With simple math, the Plaintiff would then be able to calculate the lost revenue to Nupur and then multiply the lost revenue by his ownership interest to determine his damages.

As set forth above, the Plaintiff should be allowed to testify as to his damages, the

weight given that testimony should be up to the fact-finder. *Id.* at 594. (it is the weight given the testimony that is examined, the witness was competent to testify as to value).

In Plaintiff's Certification, the Plaintiff lays out, at length, how Plaintiff can compute damages. See Plaintiff's Certification [AA0185 to AA0190] and Exhibits [AA0191 to AA02976]. This is laid out in paragraphs 26 to 28 in Certification [AA0185 to AA0190]:

26. So, in view of the above:
  - a. First, we know what products came into the US;
  - b. Second, we know the price of the products coming into the US;
  - c. Third, we know how many and which products were diverted to away from Nupur and to the Defendants newly formed entities (all related parties) or Third-Party customers;
  - d. Fourth, we know the price that the Defendants and third-parties' paid for the products;
  - e. Fifth, we have the data, via Nupur price lists, that shows what the products would have sold for had they been sold through Nupur; and finally,
  - f. From this data, I know the net profit.
  
27. I was a 33.33% owner of Nupur and involved in sales. I had knowledge of:
  - a. The products that we sold;
  - b. The suppliers of the goods;
  - c. The importation of these products;
  - d. How much was paid for the importation of the products;
  - e. Through records we received, I can see easily to which entity the products were sold and for what price; and,
  - f. We exchanged the lists of what the Nupur product lists were.
  - g. Having been involved in Nupur sales invoicing, I would be able to determine the recurring revenues related to those sales.
  
28. Thus, I have all the information I need to compute the resulting Net Profit from the diverted sales at trial.

Thus, it is clear that unlike Kazanjian and Leider where the party was allowed to offer

an opinion as to value, the Plaintiff here does not ask this Court to permit Plaintiff to provide any opinions as to damages. The Plaintiff simply seeks, based upon documents that have been in the Defendant/Respondents possession since July of 2023, to testify as the revenue losses (not on opinion but upon actual documents) and then to compute his damages.

Respondents have been in full possession of the Damages analysis prior to this appeal getting filed. Furthermore, Plaintiff provided as part of his first certification, the entire analysis whereby he would seek to conduct a full damages analysis. From the five products analyzed by the Plaintiff at oral argument, the Defendants were in full possession of the methodology of the computation of the damages, specifically which documents were to be used, how the damages would be computed and how then the Plaintiff would compute his individual damages. Again, there is no surprise to the Defendants on this analysis.

Plaintiff is able to conduct a full analysis for every product that was diverted. See Certification [AA0185 to AA0190] and Exhibits [AA0191 to AA02976].

Again, as discussed in the moving brief, in the Plaintiff's Certification, he lays out how easy it is for him to calculate his damages in this matter:

6. With respect to the information provided herein, either the actual exhibit was exchanged prior to the end of the Discovery End Date of July 31, 2023, or the information set out below is drawn from documents and data that was exchanged prior to the discovery end date of July 31, 2023.
7. Contrary to the accusation, I was highly esteemed by vendors and customers.
8. As Sales & Marketing Head, I propelled the business from \$1 million to \$11.260 million in five years through relentless effort, exceptional

customer relationships, and unwavering dedication to the business. See **Exhibits 1 and 2**. [AA0191 to AA0192].

9. Meanwhile, the defendants engaged in diverting products and sales from the business to their own entities. Refer to which include testimonials from Nupur's vendors and customers. See **Exhibits 3 to 6**. [AA0193 to AA0214].
10. These documents detail their dissatisfaction with Rupal Patel's business ethics and highlight their praise for my business meticulous & stellar customer relationships . . .

26. I suffered substantial damages and the amount is:  $\$2,129,526 + \$299,324 =$  **\$2,428,850**.

27. Those damages are calculated as follows:

- a. Nupur's lost sales as calculated below (see **Exhibit 8** [AA0233 to AA0236] which shows defendants paying freight & duties for their personal competing entities from Nupur's bank. See **Exhibit 9** [AA0237 to AA0400] for data showing Defendants purchase price and Nupur's sales price for the same product):

**[PLEASE REFER TO CHART IN AA0237, APPDNX., VOL. II]**

- b. Defendant's unauthorized markup and diversion of products imported from vendors. I have attached the calculations for these damages hereto as **Exhibit 10** [AA3189 to AA3200]:

**[PLEASE REFER TO CHART IN AA3186 (APPNDX., Vol. XVI)]**

28. I have attached Nupur's purchase Volza record **Exhibit 9** [AA0237 to AA0589].

29. I have attached Nupur's customer sales data **Exhibit 11**. [AA0590 to AA02976].

Thus, it is clear that the Plaintiff would not be testifying as to any opinion or hearsay statements or information. It would be based upon the documents exchanged and the Plaintiff's personal knowledge as former head of sales of how the sales process went.

Again, under Kazanjian and Leider, the Plaintiff is competent to testify; however, the weight given the testimony is in the hands of the fact-finder. Leider, at 594.

Finally, this Court should keep in mind that Plaintiff is the only non-family member in the parties of Defendants. All of the Defendants' and Defendant Entity principals are related either by blood or marriage. It is very clear that the Plaintiff was pushed out because he was the only non-family member. It is clear that the Defendants sought to divert sales and revenue in order to push the Plaintiff out.

**POINT 2:**  
**In the Alternative, Plaintiff Should Have Been**  
**Allowed To Substitute The Expert** (*found AA0037 to AA0054*)

First, as stated in the moving brief, in the Court's Order to Extend the Discovery, the July 7, 2024, Order wherein the Court extended the Discovery period just over 3 weeks to July 31, 2024, and the Court included the language discussed in the moving Appellant's Brief that said "Furthermore, the Order will provide for no further extensions of discovery absent **exigent or unforeseen circumstances.**" (bold underline added).

Again, New Jersey law defines "exigent circumstances" as "situation that demands unusual or immediate action and that may allow people to circumvent usual procedures" Norfolk Southern Ry. Co. v. Intermodal Properties, LLC, 215 N.J. 142, 167, 71 A.3d 830, 845 (2013) (citing Black's Law Dictionary 277 (9th ed. 2009)). In tandem, "Unforeseen Circumstances" is defined as: "not predicted or expected-unexpected". Brittanica Dictionary, (2021 ed.).

In this case, the testimony of Mr. Jain at his deposition was certainly unexpected, unforeseen and caused Plaintiff to have to face exigent circumstances. The fault for how the Mr. Jain testified was not the fault of the Plaintiff or Plaintiff's Counsel. Mr. Jain had represented that he had all the requisite qualifications and indeed New Jersey law allows people to testify as an expert based upon experience. Kazanjian, supra, 34 N.J. Super. at 369.

There is no question that as a result of Mr. Jain's deposition and Mr. Jain's stepping down, the Plaintiff would essentially be completely unable to put on a case at trial. This both resulted in "**exigent circumstances**" for the Plaintiff and certainly was "**unforeseen**".

Defendant's Counsel urges that Mr. Jain's lack of CPA status should have let the Plaintiff know he was automatically barred. That somehow only a CPA can issue an expert report in an accounting matter. Mr. Kinz cites a New Jersey Statute for this proposition.

When one views the statute, N.J.S.A. 45:2B-62 on Westlaw, there are no reported or unreported cases (in fact no information at all) wherein the mandate that Mr. Kinz seeks is adopted by a Court. In the case of Reese v. Weiss, 430 N.J. Super. 552 (App. Div. 2013), the litigants had experts with similar, if not exact credentials as in this matter. This was a family law matter and in that case, Steven Reiss who is a tax preparer, testified for one of the parties in the matter. In fact, the Court stated in its decision, "[d]efendant offered expert testimony from Steven Reiss, an accountant."

Thus, notwithstanding Mr. Kinz's prolific and constant urging, there is not one decision, reported or unreported where a non-CPA or PA was booted from a case based

upon the statute cited by Mr. Kinz.

In fact, there is case law, involving a familiar expert that goes the exact opposite way. People with Mr. Jain's credentials are often able to testify throughout the Superior and Family Courts of New Jersey. Thus, Mr. Jain's lack of CPA status was not an automatic bar to his testimony. In fact, Mr. Jain represented to the Plaintiff that he had the requisite expertise to testify. As was clear by his deposition, this was not the case and this was certainly unforeseen and the Plaintiff was blameless for this event.

Thus, Plaintiff offered Mr. Petrucelli as the expert. Mr. Petrucelli testifies regularly throughout the State of New Jersey as a Financial Accounting Expert.

Having one expert come in to replace another expert is not a novel idea and is set forth in the case law as a mechanism utilized throughout New Jersey litigation. See, e.g., New Jersey Division of Youth and Family Services v. In re A.J.M.W., (unpublished) 2011 WL 284955, at 9 (App. Div. 2011) (Docket No. FG-07-258-08).

In New Jersey Division of Youth, the Court allowed the parties to hire "replacement experts" and actually delayed the trial by six to seven weeks in order to achieve a just and equitable result:

The judge noted that his ruling delayed "the commencement of ... trial ... a little over six weeks. On balance, a six or seven week delay is reasonable in order to ensure that the trial is conducted properly with no outward appearance of a conflict, especially with respect to competing experts."

Id. at 9. In another case discussing replacement expert reports, the Court in Schroer v. Bredin, (unpublished) 2014 WL 9883911 at 5 (App. Div 2015) (Docket No. A-2741-13T1),

the Court discussed issues also presented by this Court. “At the outset we note, generally, discovery extensions should be liberally granted where no trial or arbitration date has been fixed and there would be no prejudice to the other party.” *Id.* (citing Leitner v. Toms River Reg’l Sch., 392 N.J. Super. 80, 91–92 (App.Div.2007))[other citations omitted].

Contrary to Respondent’s assertions, the seminal case of Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005) is directly on point. The Ponden Court reversed the trial judge on not allowing the replacement expert and also reversed the Order for Summary Judgment.

we reverse the trial judge’s refusal to allow plaintiff to submit and rely upon an expert report beyond the discovery end date, and we vacate the summary judgment entered against plaintiff as a result.

The facts of Ponden are discussed at length in Appellants and Respondent’s briefs. However, the following is notable from the decision in response to the Opposition:

We adhere to our recent decision in Tucci [Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 53 (App. Div. 2003)] that the “Best Practices” rule amendments “were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to secure a just determination.” (citations and internal quotations omitted) . . .

In keeping with the philosophy adopted in Tucci, we conclude that in the absence of a scheduled arbitration or trial date<sup>1</sup>, a trial court’s approach to an application to extend discovery, for the purpose of submitting a late expert report, should not be materially different from the pre-“Best Practices” approach. See Mason v. Sportsman’s Pub, 305 N.J. Super. 482, 493–94 (App. Div. 1997); [Glowacki v. Underwood Memorial Hosp, 270 N.J. Super. 1, 13–14 (App. Div. 1994)]. . .

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<sup>1</sup> As laid out in Appellant’s Moving Brief, at the time of the request for the replacement expert, the Trial Date had been adjourned and there was no presently scheduled trial date.

We are reminded of Justice Clifford’s apt comment that “[o]ur rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip.” Stone v. Old Bridge Tp., 111 N.J. 110 (1988) (dissenting opinion) . . .

Id. at 7 to 12 (underline added). Then the Ponden Court concluded:

We conclude that the trial judge misapplied his discretion by refusing to extend the discovery end date, and reverse and remand for the entry of an order extending the discovery end date for a sufficient period of time to allow plaintiff to serve a new expert report and to allow Ferreri to take such additional discovery as warranted as a result of plaintiff’s new expert report.

The Second Case similar to the present circumstances is Javanovic v. Boiardo, (unpublished) 2016 WL 4547431 (App. Div. 2016) (Docket No.: A-2717-14T4). Similar to Ponden above, this matter concerned the submission of replacement expert report after discovery had ended. The Jovanovic Court stated:

**When reviewing circumstances such as those presented, a judge must consider the basis for noncompliance**, the prejudice to other parties,<sup>2</sup> and alternative available remedies that address prejudice caused by delay. See [citation omitted] (“To assure that justice not be delayed, we must efficiently manage the litigation calendar while simultaneously affording litigants and their attorneys adequate time to prepare and try their cases.”).

The ultimate objective must be tempered with this timeless policy expressed by our Supreme Court:

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<sup>2</sup> Although the Defendants had incurred the cost of a brief analysis by Mr. Hoberman, a CPA, there was no report produced by the Defendants in this matter; in fact, it appears they incurred on 5,000 or so for a brief analysis – it is not the case where a party is prejudiced where they have to pay tens of thousands for a Defense Report and then produce a new entirely new report. Moreover, the Plaintiff has already been charged with this cost (although this imposition was not fair to the Plaintiff).

**[C]ourts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective.**

[Allegro v. Afton Village Corp., 9 N.J. 156, 161 (1952)] (bold added).

Following our review, we conclude the judge abused her discretion. Once plaintiffs' timely moved for reconsideration, demonstrated an expert was retained and a report issued to support their claims, the judge should have considered plaintiffs' explanation regarding circumstances causing their inability to meet the prior deadline and weighed whether defendant suffered prejudice by the delay and whether the harm, if any, could otherwise be compensated. The ultimate sanction of dismissal was not appropriate. See Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 447 (2011) (holding dismissal only should be used sparingly); Zaccaridi v. Becker, 88 N.J. 245, 253 (1982) (same).

**The record does not support a finding that plaintiffs themselves created or caused delay in retaining a new expert. . . .**

We conclude the judge's failure to do so rose to an abuse of discretion. The order is reversed and the matter remanded to the trial court for reinstatement of plaintiffs' complaint and further proceedings.

Thus, the Ponden and Javanovic cases are clear that one of the main considerations of the Court when considering a replacement expert report (not asked for in the present circumstance) is the achievement of the interests of justice and whether or not the party seeking to issue the replacement expert report "created or caused delay."

In this case, it is clear that the Plaintiff should have been given time to substitute an adequate expert and pursue his case on the merits. Mr. Jains' actions are not the fault of the Plaintiff. The Plaintiff issues the report upon the deadline in accordance with the

Discovery Deadline. The Plaintiff's claims were clearly laid out in the Complaint and The Defendants failed to issue any report whatsoever.

**POINT III**  
**There are Issues of Fact Precluding**  
**Summary Judgment** (*AA0085 to AA0109*)

With respect to contesting liability. The parties could not be more clearly in exact opposition positions. The Plaintiff's Certification in support of the Opposition and the Exhibits are part of the Appellate record. Certification [AA2991 to AA3003] and Exhibits [AA3004 to AA3101]. These certifications clearly mark out the issues of fact between the parties. The Plaintiff cites to the record and cites specific issues that will need to be addressed at trial. This is laid out at length in the Appellant's Moving Brief.

Respondents argue from the Plaintiff's Interrogatories that were turned over prior to much of the discovery having been conducted. This fact was not disclosed by the Respondents. It is clear in the Plaintiff's Certifications submitted that there are numerous factual issues.

**Point IV**  
**Sanctions Awarded Against the Plaintiff Were**  
**Not Warranted** (*found AA0028 to AA0036, AA0057 to AA071*)

In this matter, the Court also awarded very substantial sanctions against the Plaintiff. These sanctions were awarded notwithstanding the fact that the Plaintiff was not to blame for the Affidavit submitted by Mr. Jain. Mr. Jain certified and signed his affidavit and represented to the Plaintiff that it was true.

As stated in the Appellant’s Moving Brief, Rule 4:46-5 provides that “if the court is satisfied, at any time, that any of the affidavits submitted pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of reasonable expenses . . . .”

The Affidavit Submitted by Mr. Jain was not presented by the Plaintiff in “bad faith” or “solely for purpose of delay”. Mr. Jain represented that the information in the Certification was true. It is unfair to the Plaintiff that he is sanctioned for Mr. Jain’s misrepresentations. Finally, as stated above, the fact that Mr. Jain is a chartered accountant and not a CPA is not fatal to his issuance of a report. See N.J.S.A. 45:2B-62 on Westlaw, there are no reported or unreported cases (in fact no information at all) wherein the mandate that Mr. Kinz seeks is adopted by a Court. In fact, it is exactly the opposite. See also, Reese, *supra*, 430 N.J. Super. at 552 (non-CPA’s rendered expert opinions).

**Point V**  
**The Krishna/Divya Claims Should Not Have  
Been Dismissed** (*found AA0102 to AA0104*)

Mr. Shah sets forth that the following was owed by Krishna/Divya:

- Divya Owes: \$65,540.00;
- Krishna Owes: \$48,776.00;
- **Total Owed:** \$114,316.00 plus interest.

In response, Divya/Krishna cites the Dissolution Agreement wherein claims on behalf of Nupur were released. This is irrelevant to the present analysis. Nowhere in their submission do they show that Plaintiff, Devang Shah, released any of his claims for the

money he would have been entitled to from these Defendant entities. Finally, this Court must keep in mind that all of the Defendants are related as are the owners of these entities and clearly they are seeking to get out of paying what is owed the Plaintiff. This claim should not have been dismissed against these Defendants.

**CONCLUSION**

Thus, Plaintiff requests all the relief set forth in the Conclusion section of Appellant's Moving Brief.

**Respectfully Submitted,**

*/s/ Paul I. Perkins* \_\_\_\_\_

**Paul I. Perkins, Esq. (NJ#007372006)**