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POLINA ROITBURG, EXECUTOR OF THE ESTATE OF DAVID ROITBURG,
PLAINTIFF,

VS.

LEONID ROITBURG A/K/A LEON ROITBURG, DESIGN OF TOMORROW INC. A/K/A EDUCATIONAL & LABORATORY SYSTEMS ("ELS") A/K/A ELS, NATIONAL PRECISION TOOL COMPANY, INC. A/K/A NPTC,
DEFENDANTS.

LEON ROITBURG, DESIGN OF TOMORROW INC. AND NATIONAL PRECISION TOOL COMPANY INC.,

THIRD PARTY PLAINTIFFS,

VS.

POLINA ROITBURG AND IGOR ROITBURG PERSONALLY,

THIRD PARTY DEFENDANTS.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002257-23-T4

SAT BELOW
HON. STEPHEN H. HANSBURY, J.S.C.
LAW DIVISION
MORRIS COUNTY

DOCKET NO. MRS-L-1478-16

Civil Action

BRIEF OF APPELLANTS

LEONID ROITBURG, AND
NATIONAL PRECISION TOOL COMPANY, INC.

Of Counsel and on the Brief:
Mark D. Miller, Esq.

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PRELIMINARY STATEMENT

This is the third time this case has been before this Court. In its initial opinion and judgment dated December 14, 2020, this Court remanded this case to the Law Division to decide the single issue of fraudulent conveyances alleged by Plaintiff Polina Roitburg as Executrix of the Estate of David Roitburg ("Plaintiff") against Design of Tomorrow, Inc. ("DOT") and Leon Roitburg ("Leon") and DOT and National Precision Tool Corporation ("NPTC") (sometimes Leon and NPTC collectively "Defendants").

This Court left the form of that proceeding to the remand Court. While refusing to exercise original jurisdiction in the First Appeal Decision, this Court set forth the fundamental law of fraudulent conveyances and the analysis the remand court was to follow. On remand after briefing and oral argument, The Honorable Stephen H. Hansbury, J.S.C. ruled that none of the alleged conveyances were fraudulent because each was a regular expense in the ordinary course of business.

Just as she did in her original cross-appeal, on remand, Plaintiff identified six transfers totaling $736,105.22 that she sought to undo as an "outside" creditor under the NJ Uniform Fraudulent Transfer Act. Her "claims," however, are brought on behalf of the Estate of David Roitburg, Leon's brother and former shareholder in DOT, an insider himself.

During oral argument, this Court restricted itself to looking at the ordinary course defense. Although Defendants argued new value and a reasonably equivalent value, these arguments were relegated to a footnote in the opinion. In that opinion, this Court remanded to Judge Hansbury, directing him only to consider the ordinary course defense and deciding for him that there was no way that the Defendants could meet that test. In its opinion, this Court also acknowledged that the Plaintiff could be an insider, not entitled to the protections of the NJUFTA. It encouraged the judge to evaluate that issue and, if he decides that Plaintiff was an insider, come up with an equitable remedy, essentially putting all the insiders on an equal footing.

Although he voiced his displeasure with the direction coming from this Court and his continuing difficulties with the case, Judge Hansbury ultimately followed this Court's direction and awarded judgment to the Plaintiff in the original amended amount awarded by the Trial Court. Defendants, believing that Judge Hansbury had found all transfers voidable at this Court's direction, made a motion for reconsideration on the issue of Plaintiff being an insider.

During oral argument, Judge Hansbury disabused Defendant's assumption that he had simply followed this Court's specific direction and held that all the transfers were voidable. Instead, clarifying that was not what he had decided. At that hearing, Judge Hansbury also explained that he ruled that because the term "estate" is not part of the specific statutory language of NJUFTA, the Estate of David Roitburg, the

named Plaintiff, could not be an insider while acknowledging that the Decedent, the Executor of the Estate and all the beneficiaries of the Estate were all statutory insiders. As part of his opinion, he ruled, as a matter of law, that an insider could, regardless of familial relationship, at some point become an outsider.

Defendants filed this appeal because Plaintiff is a non-statutory insider, both by law and fact, not entitled to the protections of the NJUFTA. Defendants also maintain that the Plaintiff's Debt is insider debt, which should not be recharacterized as "outsider" debt because the insider has died.

PROCEDURAL HISTORY

This case was filed in July 2016 and tried over 11 partial and full days in the Summer of 2018 before the Honorable Phillip Maenza, J.S.C., resulting in a judgment entered on December 5, 2018. On December 26, 2018, DOT and the Defendants filed a motion for reconsideration, resulting in an amended judgment entered on March 12, 2019. DOT and the Defendants filed an appeal of the Amended Judgment, and Plaintiff filed a Cross-Appeal. The result of that appeal was the First Appeal Decision in which this Court reversed the Trial Court's judgment against Leon and NPTC in its entirety, finding that there was no basis for piercing the corporate veil against either Leon or NPTC and remanding the case to the trial court to decide the single issue of fraudulent conveyances claimed by Plaintiff against them.

During the first remand, the trial Court found that all transfers were ordinary course expenses of the Debtor and thus were non-voidable because Plaintiff had not carried her burden of proving the badges of fraud by clear and convincing evidence. In the Second Appeal, Plaintiff argued that the ordinary course defense was misapplied, and this Court agreed, reversed the second trial court decision, and directed that the Trial Court follow a particular analysis which they opined would lead to a specific result.

The direction of this Court was also to consider whether all the parties were insiders, and if he found that they were, any remedy he fashioned should be adjusted accordingly. The trial Court found, as instructed in the remand, that Plaintiffs were entitled to the amount of the Amended Judgment. The trial Court rejected the Defendant's argument that all the players here are insiders based upon familial definitions and elements of influence and control.

On Defendant's motion for reconsideration, the Trial Court held that an estate could not be an insider because the statutory definition under the NJUFTA did not include the word "estate." Defendants filed this appeal, arguing that the Estate could be an insider under the non-statutory definition of an insider. The Court did not adequately examine the facts to determine that the Plaintiff could be an insider under the non-statutory definition. The Defendants also have appealed the issue of whether "insider loans" monies become outsider loans made at arms-length upon the death of

the insider. Defendants maintain that this cannot be the law in New Jersey and that this fact pattern with this Plaintiff is not one to create new law.

STATEMENT OF FACTS

A: The Buy-Sell Agreement

On June 21, 2006, brothers David and Leon, 50/50 shareholders in DOT, a woodworking cabinetry company, entered into the "Design of Tomorrow Buy-Sell Agreement" ("the Buy-Sell Agreement"). (Da400).

The Buy-Sell Agreement directed that insurance for $1,000,000 be taken on the lives of both David and Leon, naming each brother as the beneficiary of the other's policy. The Buy-Sell Agreement provided that in the event of the death of David or Leon, the surviving brother would use the $1,000,000 received from that policy to purchase the interest of the deceased brother. (Da400).

David and his wife Polina's only livelihood came from DOT, where he served as president. From 2008 to 2013, David collected between $104,000 and $108,000 in salary annually, and Polina collected $52,000 annually as DOT's bookkeeper. (8T59-1 to 19; Da121; Da122). In addition to their wages, DOT leased their luxury automobiles, paid for their health insurance, car insurance, personal life insurance, and disability insurance, and paid their personal credit cards, which included their

daily personal living expenses. (8T64-5 to 7; 8T64-24 to 65-14; 8T65-25 to 66-18; 8T69-16 to 71-10; Da125; Da123; Da124).

Polina was the sole judge of what was a "personal expense." (8T66-20 to 68-3; 8T98-17 to 99-12; Da126). David and Polina took these salaries and perks regardless of DOT's performance, profitability, or cash flow. (8T68-1 to 25; Da125).

Although he was a 50% shareholder in DOT until May 2014, Leon was a silent partner, having nothing to do with the day-to-day activities of DOT. (8T10-1 to 4; 11T110-11 to 20). He received no salary from DOT and no perks. (8T64-20 to 23; 10T34-4 to 6). Leon made his living from NPTC, a machine shop predominantly manufacturing medical devices owned 100% by Leon. DOT and NPTC were housed in Fairfield, New Jersey, in a building owned by NPTC. Each had separate entrances, separate signage, separate parking lots, separate offices, separate conference rooms, separate workshops, and separate restrooms. (1T72-8 to 16; 10T114-5 to 25). From the time DOT moved into the Fairfield property, it paid below-market rent to NPTC until sometime in 2012, when it could no longer afford to pay any rent to NPTC. (8T45-7 to 17; Da125; Da127).

DOT lost $444,911 in 2010 and operated in a state of insolvency from that year forward (8T 11-1 to 11; 8T58-15 to 22). Due to its poor financial condition, DOT could not pay its 2012 rent onwards (8T51-4 to 54-6; 8T 52-17 to 18; 8T 72-17 to 25; Da125). DOT had accrued rents payable of $64,000 on its books when it ceased

recording this liability to prevent further damage to its financial statement. (8T72-17 to 25; Da083; Da088).

NPTC sent invoices and continued to accrue rent, utilities, and taxes until September 2012. NPTC's books reflect that $114,761.20 was accrued from April 2011 to September 2012. (Da127). Those monies are still outstanding. (Da127). To keep DOT afloat, David borrowed $100,000 from Plaintiff's niece, Irene Fisher, and her husband, Joel, in January 2012 and $100,000 from his friends Ilya and Ludmilla Shmuler in June 2013. (8T39-23 to 40-8; Da128; Da129).

David had been long suffering from lung cancer that had metastasized to his brain. (1T40-18 to 41-3; 41-15 to 22). In September 2013, David had his second brain surgery and returned to work in December. (11T39-20 to 40-7; 4T38-10 to 15). In late 2013, DOT bid on a subcontract from J. Kokolakis Contracting, Inc. ("Kokolakis") to restore and modernize the Scott Barracks at the United States Military Academy at West Point, New York (the "Project"). (8T13-15 to 25). Before DOT was awarded the Project, David personally ordered materials and organized the building of a sample barracks on site. (11T105-10 to 107-21; Da130). Based upon the sample barracks, DOT ultimately was awarded a subcontract dated March 31, 2014. (11T107-11 to 13).

The total award price of the Project was $2,050,000, but it required that DOT secure payment and performance bonds in that amount. (8T13-15 to 25; 15-4 to 9).

Company accountant Joseph Brescia ("Brescia") prepared a 12-month financial statement for the period ending December 31, 2013, and submitted it to DOT for use as part of the bond application. (8T40-9 to 11; Da131). At David's direction and with David's approval, the total $200,000 outstanding in loans from the Fishers and the Shmulers were cast in the financial statement as "Shareholder" loans. (8T41-16 to 42-10; 11T47-17 to 49-5; 5T209-3 to 211-2; 5T225-19 to 230-22).

DOT's tax returns for the year ended 2013, prepared by Brescia and signed by David, accurately reflect shareholder loans of $309,000 and the $200,000 in "friends and family" loans. (8T43-20 to 44-10; 44-21 to 45-6; 5T226-15 to 228-22; Da131; Da092; Da106).

Because of DOT's dire financial straits and inability to secure commercial credit, the bonding company, Ironshore Indemnity Inc. (the "Surety"), required an additional cash infusion of $250,000 into DOT. (8T15-20 to 16-3). Having no source for these funds, David asked Leon for the money. Because it was his brother David and Leon knew how much the Project meant to him, Leon agreed. (8T15-20 to 16-3).

The Surety also required that the then-approximate liability of $500,000 be categorized as long-term shareholder loans, evidenced by notes to be subordinated to that of the Surety. (8T16-14 to 23; 11T47-17 to 48-5). As president of DOT, David executed two $250,000 notes on April 28, 2014, one with him as the creditor and the

other with Leon as the creditor. (11T48-20 to 24; 11T80-2 to 24; 11T82-11 to 83-6 Da147; Da151). These notes were subordinated to the Surety on May 2, 2014, through David, Leon, and DOT's execution of Subordination Agreements. (11T83-7 to 86-5; Da155). The Surety also required that DOT, David, Leon, and their respective spouses (both named Polina) each execute an Indemnity Agreement ("Indemnity Agreement") as personal indemnitors, putting their personal assets at risk until the Project was completed. (11T51-9 to 52-11; Da159). The Indemnity Agreement was executed by all the indemnitors on April 30, 2014, and the signatures were all witnessed by Alex Gizersky, a cousin and notary who had been working at DOT with David for several years. (11T86-7 to 87-15; 11T88-2 to 4; 11T89-15 to 90-16; 11T91-5 to 24; Da159).

On May 13, 2014, Leon, using a check from NPTC on his behalf, deposited the promised $250,000 into DOT. (11T54-5 to 55-23; 11T94-21 to 25; Da078; Da080). Plaintiff personally deposited the check. (11T96-8 to 10). When the Surety received evidence that Leon's new $250,000 was deposited after Leon's subordination agreement was signed, the Surety insisted that DOT memorialize the new infusion of cash with a new note and new subordination agreement reflecting this actual deposit. (11T55-24 to 56-5; 56-18 to 58-24; 92-2 to 94-8; Da166). On May 14, 2014, on behalf of DOT, David executed the "second" Note, and DOT and Leon executed a

"second" subordination agreement on forms provided by the Surety. (11T58-25 to 60-2; 96-97-2; 100-5 to 14; Da168; Da172).

Paragraph 4 of Section III of each of the Subordination Agreements provides that "until Surety has been provided with competent legal evidence that every bond has been released, the mentioned indebtedness shall remain unchanged and unliquidated, and neither will by act or omission procure or permit the reduction of such indebtedness nor will the Creditor (David) sell, transfer, or hypothecate said indebtedness." (Da155; Da157; Da159; Da172).

David became progressively weaker in or about June 2014 and eventually stopped coming to the office. (11T113-13 to 17). Leon, who was now managing the Project, visited his brother daily, keeping David apprised of the progress of the Project. (11T113-17 to 19). DOT continued to pay David $2,000 per week until his death and continued to pay Plaintiff $1,000 per week, even though she was at home caring for her husband. (8T4-18 to 20; 6-1 to 6; 10T111-9 to 16; Da122; Da123). David died on October 13, 2014. (1T48-22 to 23).

As one of Leon's first orders of business after his brother's death, Leon repaid the Shmuler and the Fisher loans in November 2014. (Da128; Da129). In December 2014, Leon paid Plaintiff the $1,000,000 he received from the proceeds of David's life insurance policy, becoming the sole owner of DOT. (Da174; Da175). Polina also

received an additional $1,000,000 from a second life insurance policy on David's life, paid for by DOT. (1T52-1 to 12).

B: Igor Roitburg, Plaintiff's Son, Gets Involved

Soon after his father's death in November 2014, Igor Roitburg communicated with Brescia by email and telephone regarding the amount of monies DOT owed his father. (Da108; Da117; Da176; Da178; Da184; Da185; Da378).

On November 21, 2014, Brescia prepared a 10-month financial statement for DOT from January 1, 2014, to October 31, 2014, and emailed a copy to Igor, Leon, and the Surety. (8T88-18 to 89-23; Da188). The 10-month financial statement showed that the total of David's and Leon's loans to DOT as of October 31, 2014, were $490,325 combined. (Da188: Page 8, Note 5).

On November 26, 2014, Brescia emailed Igor a Note Payable Analysis for David's Note. (8T86—21 to 87-2; Da108). Igor received Brescia's email and Note Payable analysis that same day. (Da108). The Note Payable analysis provided by Brescia to Igor showed, in detail, a running total of David's loans to DOT and the reductions made to those loans through distributions made to David by direct pay down of loans from DOT and DOT's payment of David and Plaintiff's personal living expenses as identified by Plaintiff. (8T87-23 to 91-4; 93-4 to 94-7 to 10; 95-3 to 12; 97-3 to 9; 98-9 to 99-12; 99-23 to 101-1; Da108). By email on December 15, 2014,

Brescia advised Igor that DOT owed each of Leon and David approximately $245,000. (Da176). In emails and via telephone, Igor questioned Brescia on the deductions made for American Express charges on the Note Payable analysis. (8T88-7 to 91-4; Da108). Brescia explained to Igor that the deductions credited for American Express bills were charges his parents had identified as personal living expenses. (8T98-11 to 99-9; Da108). Plaintiff identified their personal living expenses by noting a "DR" on David and Plaintiff's American Express bills paid by DOT. (10T57-14 to 58-19; 10T55-10 to 57-7; Da108; Da126).

Igor also questioned Brescia about why his father was giving an interest-free loan for any monies he had loaned to DOT. (8T108-6 to 24; 109-1 to 7; 109-14 to 21; Da108). Brescia explained to Igor that David knew he had not charged interest to the Company. David did not charge interest because he did not want the Company to show any additional losses, and any interest charged to DOT would have been subject to tax on his parents' personal tax returns. He also advised Igor that any loan interest that David paid personally was already a deduction on his parents' tax return, as Brescia was also their personal accountant. (8T109-14 to 21; Da108). Brescia explained to Igor that David had signed off on these accountings and all the DOT corporate tax returns. Leon had nothing to do with any of the accounting practices of DOT during David's life. Until David's death, Leon had never previously dealt with Brescia. (8T10-1 to 8; 5T213-20 to 25).

Brescia answered and addressed Igor's concerns regarding the American Express charges and loan interest Igor raised from the end of 2014 through January 2015. (8T97-22 to 99-12; 8T108- 6 to 24; 8T109-14 to 21). Brescia heard nothing further from Igor until January 2016. (8T113-17 to 24; 114-19 to 25; Da178).

C: Plaintiff Pays Equity Line Of Credit From Design Of Tomorrow

After David died, Plaintiff returned to her role as the DOT bookkeeper and often complained to Leon that DOT had inadequate funds to pay its bills (11T169-25 to 170-2). With the Project in full swing, beginning on February 27, 2015, NPTC began loaning monies to DOT for cash flow purposes to make payroll, pay suppliers, pay the union for workers at the Project, and pay DOT's debt service to TD Bank. (Da204; Da210).

Once NPTC started loaning monies to DOT, Leon began to pay greater attention to the checks written by DOT and for what purpose. (5T232-4 to 233-20). At that point, Leon discovered that, regardless of DOT's financial condition, from April 24, 2013, to February 27, 2015, DOT was paying Plaintiff's home equity line of credit at Chase Bank. (1T58-2 to 7). During that period, DOT paid Chase $147,686.47 for Plaintiff and David's benefit, of which $74,417.25 was transferred after David executed his Subordination Agreement on May 2, 2014. (Da300).

Plaintiff, using David's signature stamp, issued the checks to Chase from April 24, 2013, to November 3, 2014, yet testified that she did not use David's signature stamp after he died. (10T48-6 to 23; Da300). Then, using Leon's signature stamp, she issued the last four checks to Chase dated November 19, 2014, December 17, 2014, January 28, 2015, and February 27, 2015. (Da331; Da332; Da333; Da334).

By writing these checks to Chase, Plaintiff effectively reduced David's loan to $309,089 by the end of 2013 and $245,289.07 as of October 31, 2014, the financial statement date. (Da188). The checks remitted to Chase after October 31, 2014, further reduced the amount of David's loan to $226,030.62. (8T101-12 to 102-4; 8T129-22 to 25; Da084).

D: Design Of Tomorrow Needs Funding For Cash Flow To Finish The S.B. Project

Leon stopped the practice when he discovered that Plaintiff was continuing to pay down David's loan rather than DOT's legitimate ongoing operating expenses. Leon advised the Plaintiff that DOT had no money to make these payments (5T232-1 to 233-20).

The date that NPTC wrote its first loan check of $15,000 to DOT is the same date that Plaintiff issued DOT's last check to Chase. (Da204; Da210-211; Da334). From February 27, 2015, through September 13, 2017, on 43 separate occasions,

NPTC loaned DOT monies for cash flow to pay company payroll, insurance, union wages and benefits, TD Bank loan service, fees, materials, supplies, taxes, etc. (Da204; Da210). In total, NPTC loaned DOT $776,500. (Da204). Of that $776,500, DOT repaid NPTC $214,000 on December 16, 2015, and $50,000 on December 18, 2017. (Da204-207). DOT still owes NPTC $512,500 for working capital loans made during this period. (Da204-207). Of the $512,500 still owed NPTC, $427,500 was loaned to DOT by NPTC after the December 16, 2015 repayment of $214,000. (Da204-207)

In addition to NPTC lending money to DOT for ongoing expenses, Leon's wife Polina loaned DOT another $300,000 in July 2015, which she borrowed from her personal line of credit at Morgan Stanley. DOT paid the interest charged by Morgan Stanley to Leon's wife, Polina, on her line of credit until the loan was repaid in December 2015. (Da294; Da335; Da336; Da337).

As part of her duties as DOT's bookkeeper, Plaintiff issued checks in December 2015 for the repayment of $214,000 to NPTC and $301,000 to Morgan Stanley, representing the repayment of principal and the last month of interest.

E: Plaintiff Takes Matters Into Her Own Hands

After issuing the checks for the repayment of $214,000 to NPTC and the repayment to Morgan Stanley of $301,000, Plaintiff immediately called her son Igor,

complaining to him that DOT had made payments to NPTC and Morgan Stanley but that Leon had stopped her practice of paying off her home equity line. After that, Igor bombarded his uncle with a barrage of texts and emails demanding that DOT resume repayment of his mother's line of credit. Additionally, he demanded that DOT pay all the monies "owed to his mother." (5T274-20 to 24; Da339; Da344).

Igor Roitburg's demands continued in disregard to the fact that he already knew that DOT had owed David's Estate $245,289.07 as of October 31, 2014. Leon was confused by Igor's demands because he knew that Igor had discussed these numbers with Brescia a year earlier and that Brescia had spent much time and energy addressing this issue and all of Igor's concerns. (4T83-20 to 84-7; 5T277-22 to 278-22; 5T279-12 to 281-11). Igor demanded Leon leave his daughter's wedding dress fitting to meet with him at DOT. (5T272-18 to 274-25; Da344). Leon's $250,000 cash infusion from May 13, 2014, remained in DOT, which meant nothing to Igor. The fact that the ongoing NPTC loans were only partially paid meant nothing to Igor. Leon asked Igor to leave the premises. Igor did, but not for long.

On Saturday evening, January 2, 2016, while Leon and his wife Polina were on vacation outside of the United States (5T275-6 to 7), Plaintiff, without Leon's permission, provided Igor access to DOT's premises. (5T275-3 to 5; 10T104-5 to 12). Plaintiff further provided Igor with unauthorized and unfettered access to DOT's

computers, corporate books, property, and records. (1T72-2 to 73-12; 1T76-9 to 77-13; Da375).

Igor downloaded and removed reports and other information from DOT's computers. Plaintiff removed the original physical files from DOT's premises. (Da352; Da355; Da357; Da366). After returning from vacation, Leon did not know that Igor and Polina were in DOT's offices on January 2, 2016. (5T275-8 to 19).

F: Igor Gets Involved Again

Shortly after Igor and Plaintiff's Saturday night plunder at DOT, Plaintiff resigned from DOT's employ. (5T224-12 to 22). After Igor visited DOT premises, he prepared his version of the schedule, purporting to be the amount of monies owed to his father by DOT, and forwarded it to Leon and Brescia. [8T119-11 to 21; Da375]. In preparing his unauthorized schedule of monies owed to his father, Igor ignored the American Express payments made by DOT, which his parents had identified as personal expenses over the years and which he had discussed with Brescia a year earlier. (8T86-21 to 87-2; 87-24 to 91-4; 92-7 to 25; 97-3 to 9; 97-22 to 99-12; 8T130-21 to 131-9; 3T40-3- to 41-15; Da108; Da118; Da124; Da178; Da375).

Igor initially calculated that his father was owed $387,458.78 and provided a schedule to Leon. (Da375 to Da377). Igor insisted that they meet at DOT, and Igor advised Leon that the short-term loans that NPTC and Leon's wife's Morgan Stanley

loan to DOT were "Leon's investments" in DOT and, by law, subordinated to his father's loan. (1T64-22 to 65-2). Igor's view did not sit well with Leon, especially since these lifeline loans by NPTC and Leon's wife enabled DOT to complete the Project, thus eliminating Plaintiff's personal exposure on the Indemnity Agreement. (8T131-11 to 132-20; Da399).

Igor then unsuccessfully tried to enlist the help of Brescia to his cause. Brescia reminded Igor that his father had agreed with and signed off on the numbers that he had provided and that he had discussed the numbers with Igor a year earlier. (8T113-17 to 23; 8T114-19 to 25; 8T120-19 to 121-17; Da184; Da378). Brescia also explained to Igor that he disagreed with Igor's characterization of the NPTC loans and loans of Leon's wife as "investments" but recognized them as what they were: short-term working capital loans needed by DOT to complete the Project for which his mother and his father's Estate were personally liable. (8T116-12 to 21; 8T117-6 to 25; 8T131-11 to 132-20; Da378).

Although Igor requested Brescia's assistance to confirm his numbers, Brescia advised that he could not do anything without Leon's approval and direction but volunteered to assist in a meeting with Leon if Igor wanted him to do so. (8T120-19 to 121-17; 127-18 to 128-6; Da378). Igor never took Brescia up on his offer. (8T128-2 to 3).

Then, in a string of increasingly aggressive and insulting emails to Leon, Igor threatened his uncle, culminating in the March 12, 2016, email starting with "It is obvious that our relationship is finished" and comparing him to Bernie Madoff. (Da339). Igor continued his rants against his uncle in meetings with his cousin Leon Sirota, telling him that Leon was a criminal, that Leon had forged his father's signature on the Note, and that Igor's team of "Ivy League lawyers" was going to contact the FBI and the IRS and that Leon was going to prison. (7T16-22 to 18-7). Similarly, Plaintiff repeatedly told David and Leon's aunt, Plaintiff's self-described "best friend," Laura Titievsky, that Leon had forged David's signature on the Note, that it was a fraud, and that Leon was going to prison. (11T168-19 to 169-2; 169-12 to 22).

G: Operations Of DOT/ELS While The Project Was Being Completed

Although Leon had been operating as President of DOT since June 2014, he received no salary from DOT in 2014, 2016, or 2017. Even though Leon was paid in 2016, the payment was for his 2015 salary, the year the bulk of the Project was substantially completed. (8T131-11 to 132-10). DOT did not have the cash flow to pay Leon until late 2016, which it did in one lump sum, less federal withholding taxes.

Similarly, besides Leon's salary, Brescia believed it appropriate for DOT to accrue $93,000 in rent for DOT's shop and offices and $23,000 in utilities for 2015. Hence, those expenses matched against the accrued income. (8T73-1 to 74-9). As

with Leon's salary, these monies were not available to be dispersed until December 2016, when the utilities and $90,000 of the rent were paid. (11T7-18 to 8-3; Da383).

DOT sustained a net loss of $343,000 for the calendar year ending December 31, 2016. It did not make a profit in 2017 and ceased active operations in January 2018 (6T42-13 to 21).

LEGAL ARGUMENT

Standard of Review

There are two standards of appellate review in a non-jury trial. The first is the review of the fact-finding of the trial judge, and the second is the legal analysis of the Court. A trial judge's factual findings are "binding on appeal when supported by adequate, substantial, and credible evidence." Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974) citing New Jersey Turnpike Authority v. Sisselman, 106 NJ Super. 358 (App. Div. 1969) cert. denied. 54 N.J. 565 (1969).

Thus, the trial court's factual findings and legal conclusions should be disturbed only when the Appellate Court finds that they are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id., quoting Fagliarone v. Twp. of North Bergen, 78 N.J. Super 154, 155 (App Div. 1963). Thus, the function of the Appellate Court is "to determine whether there is adequate evidence to support the judgment at trial." Id.

POINT ONE

Plaintiff Is An Insider, And The NJUFTA Was Never Intended To Benefit Insiders

A. The Trial Court Did Not Apply The Test Of An Insider By Analyzing Its Actions And Interaction With The Debtor (Da047-048; 1R7-1 to 19-12)

When a creditor brings a NJUFTA claim, the Court must examine the totality of the circumstances on a case-by-case basis. Gilchinsky,v. National Westminster Bank N.J., 159 N.J. 463 at 477 (1999). Plaintiff's actions should be considered in determining whether she is a "creditor" intended to be protected by the act and whether it is worthy of such protection. As this Court pointed out, the purpose of the NJUFTA was to protect the interests of unrelated creditors, not insiders. Roitburg v. Roitburg, A-0047-21 (App. Div, Decided August 31, 2023, hereinafter "Roitburg 2" at pages 25-26, quoting Smith v. Whitman 39 N.J. 397, 402 (1963) citing Rednor v. First Mechanics National Bank, 131 N.J. Eq. 141 (E&A 1942) and Flood v. Caro Corp., 272 N.J. 398, 403 (App. Div. 1994).

The Plaintiff is the Estate of David Roitburg. David was Leon's brother. Thus, statutorily and definitionally, Plaintiff is an insider for the purposes of the NJUFTA. As this Appellate Court pointed out, the NJUFTA was derived from the

preference section of the US Bankruptcy Code Section 547(b). The NJUFTA was not enacted to prefer one insider to another insider. Id.

To understand whether, in this case, Plaintiff is entitled to be treated as an unrelated creditor, we must examine the actions and access of Plaintiff here versus those available to third-party unrelated creditors. The test of an insider is not limited to the four categories listed in the NJUFTA or the bankruptcy code. Matter of Holloway 955 F3d 1008,1010-1011 (5th Circuit 1992) That list was provided for "exemplification" Id. "An insider is generally an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny" Holloway 955 F. 3d at 1011. The Holloway Court continued, "The legislative history of Section 101(31) defines an insider as a person or entity with a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." Holloway at 11011 citing S. Rep. no 95-989 95th Congress 2d Sess. reprinted in 1978 U.S. Code Congressional & Administrative News 5787, 5810.

Closer to home, a New Jersey Bankruptcy Court Matter of Montanio 15 B.R. 307-310 Bank D. NJ.1981 defined an insider "is one who has such a relationship with the debtor that their dealing with one another cannot be characterized as an arm's length transaction" Id.

B. The Plaintiff Is A Non-Statutory Insider (1R48-1 to 55-6; Da047-048; Da072)

After David died, an "estate" was automatically created, holding all of David's property, rights, and obligations. It does not matter whether a will was probated or an Executrix was appointed. Until Leon purchased David's shares, David's Estate owned those shares. Therefore, David's Estate is an insider beyond the time of his death. Plaintiff's actions with the Debtor, in the same capacity that she sues from the time of his death, must be viewed against those of an arms-length transaction between unrelated creditors. The Court never did this analysis in adopting a narrow view of the law. Both before and after David's death, the Plaintiff, now a representative of the Estate, continued to cut checks from the debtors' coffers whenever she wanted to pay down the mortgage on their real property. (Da300-334). These unauthorized checks were written by Plaintiff both before and after his death using David's signature stamp and later Leon's signature stamp until she was discovered on February 27, 2015. (Da328-334). At that point, Leon put a stop to it. This cannot be considered an arms-length transaction in any universe.

Similarly, the Estate of David received one million dollars from Leon to purchase shares in a company that Plaintiff and David caused to be insolvent. (Da121; Da122; Da123; Da124; Da125; Da126; Da175). The price of the shares of a worthless company was set between two insiders, not an arms-length

transaction between unrelated parties reflecting the actual value of those shares. (Da400; Da194). That value was negotiated between two insiders and was paid to and accepted by a third insider, the Estate. (Da400; Da194; Da175). Even the source of those monies, an insurance policy on David's life, was paid by the Debtor. (Da174). It is hardly an arms-length transaction.

No arms-length creditors are entitled to have their personal credit cards paid by the debtor, monitored only by themselves. (8T69-16 to 71-10; Da339; Da344; Da375; Da378; Da383; Da108). No arms-length creditor is accorded unfettered access to misappropriate the debtor's books, records, and computers while the debtor's owner is on vacation. (5T275-3 to 7; 10T104-5 to 12; Da108; Da117; Da176; Da178; Da184; Da185; Da188). No arms-length creditor is entitled to secret a relative into debtor's offices on a Saturday night to steal, download, and manipulate company information. (10T104-5 to 12; Da352; Da355; Da375; Da357; Da366; Da375; 5T275-3 to 7; 10T104-5 to 12).

Arms-length creditors are not entitled to rewrite debtor history, ignoring corporate books, records, and tax returns. (Da123; Da124; Da083; Da088). They are also not entitled to file a lawsuit seeking almost $400,000 more than they were owed when Plaintiff, the creditor herself, made the debt entry. (Da005; Da188)

Arms-length creditors are not entitled to seek repayment several months before a debt is due. (Da001). Arms-length creditors are not provided daily access to the

debtor's bank accounts. (Da300-334). Arms-length creditors are not entitled to disregard a note signed by itself capping its loan at $250,000. (Da147). Arms-length creditors are not entitled to disregard that Note, calling it a fraud and a forgery, refusing to abide by its mandatory arbitration terms, and then, ironically, demanding attorney fees under that "fraudulent note." Every one of these acts was perpetrated here by Plaintiff

Arms-length creditors are not entitled to claim amnesia, have their son, an attorney, fabricate a story, deliver it under oath, and deny events memorialized by emails he received or originated. Arms-length creditors do not continue to refigure the amount of their alleged debt, which she memorialized in the debtor's books throughout the trial. (8T87-23 to 91-4; 8T93-4 to 94-10; 8T95-3 to 12; 8T97-3 to 9; 8T98-4 to 99-12; 8T99-23 to 101-1; Da108; Da117; Da124).

All the forgoing actions were perpetrated by Plaintiff here as the Administrator of the Estate to collect a debt allegedly owed to that Estate. Plaintiff's unfettered access to the DOT's premises, computers, books, and monies, which She took as she pleased for five months after David's death, makes the Estate an insider. Plaintiff's continued access to all the same premises, computers, books, and records 14 months after David's death shows she was still an insider on January 2, 2016, when she brought Igor in.

There is no action of any kind that Plaintiff or her son Igor took on behalf of

the Estate that would qualify as an "arms-length transaction" Plaintiff's well-documented and undisputed access and control over monies and information after David's death as a representative of the Estate takes us well beyond the position of a bookkeeper. Therefore, the Estate is a non-statutory insider whose test is action rather than relationship-driven. (Da339; Da344; Da375; Da378).

C. At Least $519,335 Of The $736,105.22 Of Transfers Occurred While The Estate Was An Insider. (Da047-048)

In his judgment of February 9, 2024, and the Amended Judgment dated March 22, 2024, Judge Hansbury finds, as a matter of law, that the Estate ceased having any control after the shares were transferred to Leon. (Da043 at Da048; Da068). Unbeknownst to Leon, after David's death, Plaintiff first continued to write checks to herself using David's signature stamp and then continued that practice, issuing four checks to herself from November 19, 2014, to February 27, 2015. Three of those four checks, December 17, 2014, January 28, 2015, and February 27, 2015, were written after Leon paid for David's shares, which for Judge Hansbury constituted a watershed moment.

The Plaintiff remained an insider beyond that date because, on Saturday night, January 2, 2016, Plaintiff and her son Igor went to DOT without managerial consent and removed original documents, downloaded, and manipulated DOT's

books to formulate a spreadsheet that contradicted the amount of David's loan on the books. (Da184; Da339; Da344; Da375; Da378). This Saturday night was chosen intentionally as Leon and his wife were on vacation, and Plaintiff did not want their visit to be discovered.

This exercise of control occurred just two weeks after Morgan Stanley was repaid for Leon's wife's $300,000 lifeline loan, including $5,335 in interest paid, and a partial repayment of $214,000 of NPTC's recurring loan on December 16, 2015. (Da335; Da336; Da337; Da338; Da204; Da207).

Therefore, $519,335 of the transfers Plaintiff seeks to recoup were made before this midnight mission occurred. The record is clear that after that visit, Plaintiff weaponized Igor and sent him after his uncle and the Company's CPA, Joseph Brescia, to which he and Plaintiff had unfettered access. (Da176 Da178; Da339; Da344; Da378). Although Igor swore in Court that it never occurred, the emails and testimony show that Joseph Brescia directly addressed and explained all of Igor's and Plaintiff's questions. Id. These are hardly the actions and responses to an arms-length creditor.

Moreover, Plaintiff, personally and as the Estate, remained guarantors under the performance bond until DOT completed the Scott Barracks project under Leon's watch. (Da159). Arms-length creditors are not personal guarantors of a company's business performance bonds. Although Plaintiff was eventually

released from the bond after the Project was completed, that date was far after Leon purchased David's shares. The behavior of Igor, as a representative of his mother as Executor of the Estate and the degree of access they exercised through January 2016, which differentiated them as insiders, happened after December 2015, when $519,335 of the transfers were made.

Although Defendants disagree with the Trial Court's premise as a matter of law that an insider can become an unrelated party, in this case, that is not until after $519,335 in transfers of the $736,105.22 Plaintiff seeks were made. Following the Court's reasoning as to the timing of the transfers is dispositive; only $216,770.22 of the transfers were made after Plaintiff no longer had unfettered access, influence, and a daily direct line to principals and professionals. On Saturday night, January 2, 2016, Plaintiff and Igor were not doing DOT's business. This is no unrelated employee. Plaintiff was the one who put DOT into a state of insolvency, requiring Leon's wife and NPTC to make the loans at issue. (Da204; Da210 to Da293; Da294; Da125).

D. <u>All The Representatives And Beneficiaries Of The Estate Are Statutory Insiders. (2R4-23 to 15-9)</u>

In addition to her actions and transactions with the Debtor as a representative for the Estate, which makes the Estate a non-statutory insider, all the persons

associated with the Estate are statutory insiders under the NJUFTA. As an insider, the Estate is not an arms-length creditor intended to be protected by N.J.S.A. 25:2-27(b) or the NJUFTA. Based upon the facts of this case, Plaintiff should not be accorded the protection of a legitimate unrelated arms-length creditor. N.J.S.A. 25:2-22 b (3) and (6).

Even in its remand, this Court recognized that everyone involved could be an insider and directed Judge Hansbury to make that determination based on the tests used to determine whether a party was an "insider" or an "arms-length" creditor. Of course, there is no question that under Leon's tutelage, unlike David's, all the arms-length creditors were paid off, leaving the Plaintiff and Defendants as the only creditors of the Debtor of any kind. (Da128; Da129; Da084; Da091).

The trial Court failed to do that analysis and based its decision on the statutory definition being all-inclusive and the fact that the word "estate" is missing from what he deemed an all-inclusive list. (2R51-14 to 52-1). It never analyzed Plaintiff's continuing transactions with and against the Debtor before and after David's death.

Whether a person or entity is an insider or an arms-length creditor is a legal conclusion to which this Court owes the trial Court no deference. This Court can and should compare the "Estate's" actions with and against the Debtor and make that determination as a matter of law that Plaintiff is an insider at least through

January 2016.

POINT TWO

The Conclusions Of The Trial Court Must Be Read As "Insider" Money Can Become Outsider "Money." (1R7-1 to 19-12)

There is no question that David was an insider. His wife was an insider. There is also no question that when the monies at issue were "loaned" to the Debtor, it was all "insider money." This can be seen in all the Equity Credit Line charges and payments to David, the Plaintiff, and the Estate. (Da124; Da084; Da091; Da096). The fact that David died does not change the characteristics of that money and make it an "arms-length" loan that one might get from an unrelated party. If we accept Judge Hansbury's premise that the Estate was not an insider, the very character of that money changes from insider money, which was always listed on DOT's books, to an "arms-length" market loan, much like the monies borrowed by Leon's wife from Morgan Stanley to save the Project. (Da294).

However, that is not the law in New Jersey. Although Judge Hansbury never specifically addressed this issue, no event changed the character of these monies. The amount of the loans and the determination on a tax return as "shareholder" versus shareholders' loans is why Judge Maenza was confused and gave David (now the Estate) credit for the monies the Shmulers and the Fishers deposited. (11T47-17 to 49-4; 5T209-3 to 211-6; 5T225-19 to 230-22).

In its initial opinion, this Court would not touch that number even though the record was replete with testimony of Leon, Joe Brescia, the Accountant, and the corporate books through entries made by Plaintiff that the number is $226,000. (8T43-20 to 44-10; 8T44-21 to 45-6; Da084; Da091). Not to beat a dead horse, that number is not going to change, but to bring an action, on behalf of the Estate in advance of a due date, for $400,000 more than the corporate entries Plaintiff herself purposefully made is another act that does not qualify as an "arms-length transaction." (Da001 at Da005).

Nevertheless, the amount of the loan notwithstanding, there is no rational basis to recharacterize "insider money" as an arms-length loan. The death of David cannot recharacterize the nature of the debt's origin. (11T47-17 to 48-5). Leon purchasing the Estate's shares does not recharacterize the nature of the debt's source. Even after Leon paid the Plaintiff, she continued to write herself checks after David's death in October 2014 until February 27, 2015, using David's and later Leon's signature stamp. (Da300-334). She continued until Leon discovered Plaintiff draining the Debtor's coffers and stopped the practice. This was when legitimate creditors existed. Plaintiff's resignation from her role at the Company does not change the genesis of the debt. There was no explanation by the Trial Court, nor could there be, that insider money somehow becomes third-party arms-length debt entitled to the protections accorded unrelated creditors by NJUFTA.

Like Defendant's loans, Plaintiff's judgment results from an insider loan and should be accorded the same weight as loans still owed by the Debtor to NPTC and Leon. Any other treatment is a gross miscarriage of justice. The motion for reconsideration attempted to demonstrate how the judgment and the unpaid loans would be treated on a level playing field. (Da051). Because insiders' treatment is so different from that of an "arms-length" third-party creditor, with these facts and the Plaintiff's actions, this is not the case to make new law. Unfortunately, if Judge Hansbury's ruling is left undisturbed, that seems to be the case.

POINT THREE

In Fashioning A Remedy, The Court Should Consider The Facts And Circumstances And Apply Fairness And Equity To The Process

(1R7-1 to 19-12)

To any objective observer, Leon should be a hero in this case. He paid Plaintiff one million dollars for David's interest in a failing company, worth less than zero, against the advice of the Company's accountant and legal counsel. He was able to complete the Scott Barracks Project, getting Plaintiff personally and David's Estate off the hook on a performance bond that could have cost Plaintiff millions. (Da159). While completing the Scott Barracks, Leon employed all of DOT's employees yet provided his services, rent, and utilities gratis to DOT until the Project was completed.

Leon also funded the Project through his initial $250,000 loan necessary to secure the performance bond (Da081), his wife's $300,000 infusion of capital to keep the Project moving when DOT had no other source of funds (Da294), and NPTC's 43 loans totaling $767,000, of which $512,000 has not been repaid. (Da204-207).

Let us look at Plaintiff's side of the ledger. She received $2 million in cash, $1 million paid to the Estate in a buyout policy from Leon as beneficiary, and another $1 million from a personal life insurance policy on David's life with Plaintiff as beneficiary paid for by DOT. On behalf of the Estate, she used David's and Leon's signature stamps to reduce a mortgage on her own home as well as using DOT as a virtual ATM, paying all their day-to-day expenses in addition to their inflated salaries, which they received regardless of DOT's ability to pay and whether they showed up or not.

Despite having this fantastic deal, Plaintiff and her son orchestrated a campaign of hate against Leon within the extended family, forcing them to choose a side and forever severing family bonds. She allowed her son Igor full access to DOT's offices and computers on a Saturday when Leon and his wife were on vacation. She allowed Igor to convert original company documents and steal all DOT's corporate records, which he manipulated to demand ever-changing numbers from Leon from his visit until the last day of trial. At the trial, he perjured himself again repeatedly, saying he had never spoken to Joe Brescia about the fact that his father's loan to DOT was

$226,000. Joe Brescia and the emails between the two told a far different story. (Da108; Da117; Da176). Plaintiff has continued this unnecessary litigation for over eight years, filing motion after motion, appeal over appeal when she knew $226,000 was all she was ever entitled to. She would have been paid if she went by DOT's corporate books, its accountant, and reality.

Under these circumstances, the Court must ask itself whether the Plaintiff, as an "insider" defined by both statute and deed, deserves the protections of the NJUFTA and, more importantly, its remedies. Judge Hansbury's finding that the Plaintiff is not an insider as a matter of law is flawed, and the Plaintiff's judgment should be reduced to its appropriate portion of the total DOT loans.

Conclusion

For all the foregoing reasons, Defendants respectfully ask that this Court decide that all the parties in this matter are insiders and that DOT's total debt to the Defendants be used to reduce the number of Plaintiff's judgment to put all the insiders on a level playing field.

Respectfully submitted,

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POLINA ROITBURG, EXECUTOR OF THE ESTATE OF DAVID ROITBURG, Plaintiff, vs. LEONID ROITBURG A/K/A LEON ROITBURG, DESIGN OF TOMORROW INC. A/K/A EDUCATIONAL & LABORATORY SYSTEMS ("ELS"), NATIONAL PRECISION TOOL COMPANY, INC. A/K/A NPTC, Defendants.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** Docket No. A-002257-23-T4 **SAT BELOW** **HON. STEPHAN C. HANSBURY, J.S.C.** **LAW DIVISION** **MORRIS COUNTY** DOCKET NO.MRS-L-1478-16
LEON ROITBURG, DESIGN OF TOMORROW INC. AND NATIONAL PRECISION TOOL COMPANY INC., Third-Party Plaintiffs, vs. POLINA ROITBURG AND IGOR ROITBURG, personally, Third-Party Defendants.	*Civil Action*

PLAINTIFF-RESPONDENT-CROSS-APPELLANT'S BRIEF

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PRELIMINARY STATEMENT AND PROCEDURAL HISTORY[1]

This memorandum of law is submitted on behalf of Plaintiff/Respondent/Cross-Appellant Polina Roitburg ("Plaintiff"), as executor of the Estate of David Roitburg ("David's Estate"). This matter has been in litigation for over eight years and has previously been before the Superior Court of New Jersey Appellate Division twice. In or about March 12, 2019, the trial Court, *inter alia*, rendered judgment in the amount of $459,103.14 to Plaintiff. (Pa000199-203) Appellate practice ensued. In the first appeal, the Appellate Division affirmed that Defendant/Appellant/Cross-Respondent Leon Roitburg ("Leon") caused Defendant/Appellant/Cross-Respondent Design of Tomorrow a/k/a Educational & Laboratory Systems ("DOT") to violate that certain Buy-Sell Agreement executed by David Roitburg ("David") and Leon on or about June 21, 2006

[1] The Preliminary Statement and Procedural History are combined because the introduction of the procedural history is necessary in light of the prior proceedings before the Appellate Division.

(the "Buy-Sell Agreement"). (Pa00019-46) The Appellate Division also affirmed the $459,103.14 judgment in favor of Plaintiff. The matter was remanded to the trial court to determine if Appellants violated the New Jersey Fraudulent Transfer Act, which the trial Court failed to address. (Pa00028)

In the second appeal, the Appellate Division once again found in favor of Plaintiff ruling that Plaintiff established by clear and convincing evidence that Defendants violated section 27(b) of the New Jersey Uniform Fraudulent Transfer Act ("UFTA") when Leon, as the sole remaining shareholder of DOT, made six transfers of DOT assets totaling $728,149.22 to "insiders," specifically, himself, his wife and Defendant/Appellant/Cross-Respondent[2] National Precision Tool Company ("NPTC") – a company in which Leon was the sole shareholder (such six transfers, the "Insider Transfers"). (Pa000163-198). The Insider Transfers were

[2] NPTC, Leon, and DOT are collectively referred to as "Appellants".

made at a time when DOT was insolvent and while its obligation to David's Estate was still extant.

Appellants' liability under the Buy-Sell Agreement and the UFTA are no longer in dispute. Neither is the $459,103.14 judgment which is owed Plaintiff. (Pa000117) These issues have been litigated and decided by the Appellate Division in favor of Plaintiff.

In the second appeal, the Appellate Division determined that the Inside Transfers were violative of the UFTA and remanded this matter back to the trial court ("Remand Court") for the limited purpose of providing the Appellants with another opportunity to prove the affirmative defense that each of the six Insider Transfers were made in the ordinary course of business or financial affairs of DOT and Leon, Leon's wife and NPTC under N.J.S.A. 25:2-30(f)(2).[3] (Pa000163-198) The Appellate Division expressed skepticism that, upon the

[3] The Appellate Division also reviewed and rejected Appellants' argument that subsections (1) and (3) of N.J.S.A. 25:2-30(f) apply. The Appellate Division ruled they do not. This issue is not before this court. (Appellate Decision [Pa000163-Pa000198] at 17 [Pa000179].)

present record, the ordinary course defense was available to Appellants but invited the parties to supplement the record with respect to this affirmative defense. (Pa000186) The Appellate Division also directed the Remand Court to determine whether David's Estate is an insider for purposes of determining any effect on Plaintiff's remedies under the UFTA.

Despite the fact that the parties agreed that there was no additional evidence to supplement the record, Appellants fought Plaintiff tooth and nail in the trial court in an ill-conceived attempt to mischaracterize the Insider Transfers as ordinary course payments. This attempt was soundly rejected by the Remand Court.

Appellants also fabricated arguments as to why Plaintiff should be considered an insider under the UFTA despite the fact that neither David's Estate nor Plaintiff exercised any control whatsoever over DOT as the trial record makes clear. This argument was also soundly rejected by the Remand Court.

Appellants once again appeal, solely on the grounds that Plaintiff should be considered an insider. In doing so, Appellants tacitly concede that its ordinary course defense that it has aggressively pursued for over eight years was in fact meritless from its inception.

The theory underlying this appeal is purely contrived by Appellants and is presented to this Court in the utmost bad faith. But for Appellants' bad faith litigation tactics, Plaintiff would not have had to expend substantial sums in attorneys fees over the last eight (8) years fighting for what David's Estate is clearly owed. The UFTA provides that the Court can fashion equitable remedies designed to make a victim of the UFTA whole. Accordingly, Plaintiff's cross-appeal seeks an award of attorneys fees in this matter in order to make David's Estate whole.

STATEMENT OF FACTS

For over thirty years, David and his brother Leon were co-owners of DOT. Although David and Leon were equal partners in DOT, only David loaned DOT money (Pa000050).

In 2006, the brothers entered into the Buy-Sell Agreement in an attempt to provide for the orderly transition of the company should one of them pass (Pa000081-Pa000097). In addition to the Buy-Sell Agreement providing for the sale of the deceased shareholder's stock to the surviving shareholder, the brothers included a provision for addressing any outstanding loans to the shareholders – Section 2.09(b) which states:

> If the CORPORATION owes money to the deceased SHAREHOLDER, the CORPORATION shall pay such amount to the estate of the deceased SHAREHOLDER in the normal course of business, but no later than two (2) years following the deceased SHAREHOLDER'S date of death.

In mid-May 2013, David was diagnosed with brain cancer (Pa000053-Pa000054). David died on October 13, 2014. (Pa000053-Pa000054) On or about December 10, 2014, Plaintiff as executrix of David's Estate and Leon as the surviving shareholder completed the transfer of David's shares in DOT to Leon in accordance with the Buy-Sell Agreement, after which, Leon became the sole shareholder and owner of DOT.

At the time of David's death, DOT still owed David several hundred thousand dollars and DOT was making monthly payments to David on account of the loans. David's loans to DOT were from David's home equity line of credit and included interest charges from the lender. However, shortly upon seizing control of DOT, Leon – in direct violation of §2.09(b) of the Buy-Sell Agreement – ordered that all loan repayments to David's Estate stop. (5T9-21 to 10-2). As a result, David's Estate was forced to make out-of-pocket payments to David's home equity lender to avoid foreclosure on David's home which was still occupied by his widow. (5T15-23 to 16-6).

Once Leon assumed the helm of DOT, Leon – and Leon alone – maintained full authority over DOT. At the time of the Insider Transfers, Plaintiff Polina and David's Estate had no interest in debtor DOT and certainly had no control of DOT. In fact, Leon (as the sole shareholder at the time of the Insider Transfers) testified that he – and only he – controlled DOT. (5T13-9 to 16-17; 5T20-1 to 20-13; 5T26-8 to 27-16; 5T31-5 to 33-14; 5T43-8 to 44-

22; 5T33-15 to 37-12; 5T52-5 to 53-8; 5T56-5 to 57-24). Plaintiff's lack of control over DOT was recognized by the trial court in its decision. "David's Polina continued to serve as the bookkeeper until she was forced to leave DOT by Leon" (Pa000079).

After Leon took control of DOT, DOT needed an infusion of capital to complete a large project for which Leon was a personal guarantor (Da215-221) (Pa000098-Pa000104. Leon caused his wife and his other company NPTC to provide loans to DOT. One of these loans made by Leon's wife was from an equity account and included interest charges. (Pa000115; 5T13-9 to 16-17). Leon immediately caused DOT to make payments on account of his wife's loans while still refusing to make any payments on account of David's loans. On December 7, 2015, Leon caused DOT to make a $214,000 loan repayment to NPTC. (Pa000116; 5T20-1 to 20-13; 5T26-8 to 27-16). Upon learning that Leon was making loan repayments to NPTC, David's son, Igor, reached out to Leon and requested that Leon resume making payments on account of David's loans

as well. (5T21-9 to 25-14) Leon refused. Instead, three days later, on December 10, 2015 Leon caused DOT to make a $301,000 loan repayment to Leon's wife. Again, no loan repayments were made to David's Estate. (Pa000110; Pa000114; 5T31-5 to 33-14).

After Leon drained DOT of $515,000 without making a single payment to David's Estate, Igor once again approached Leon and requested that he resume making payments of David's loans. Leon refused and cut off communications with Igor shortly thereafter. After months of Igor trying to engage with Leon to amicably resolve the situation and Leon refusing all contact, this lawsuit was filed on or about July 1, 2016. In response, Leon caused DOT to make three additional transfers – two to NPTC and one directly to himself – totaling over $200,000 at the end of December 2016, and shortly thereafter, shuttered DOT's doors. (Pa000113; Pa000115; 5T52-5 to 53-8; 5T56-5 to 57-24); (Pa000111; Pa000115; 5T43-8 to 44-22); (Pa000111; Pa000115; 5T33-15 to 37-12).

Following a bench trial in 2016, the original trial court entered judgment, as modified, in favor of Plaintiff and against DOT in the amount of $459,103.14. This judgment was affirmed on appeal as against DOT, but the Appellate Division remanded the matter to the Superior Court to make a determination as to whether the Appellants violated the UFTA, which was not addressed by the original trial court. (Pa000019-Pa000046) Upon remand, the Superior Court (Hansbury J.) held that the transfers at issue were not violative of the UFTA ("Hansbury Decision"). (Pa000013-Pa000018) Upon further appeal, the Appellate Division vacated the Hansbury Decision and held that the UFTA had indeed been violated by the Appellants. In sum, the Appellate Division:

1. Affirmed the $459,103.14 judgment in favor of Plaintiff; and
2. Determined that Appellants violated §27(b) of the UFTA when Leon caused the following Insider Transfers, three of which were made

after the commencement of this action in June 2016:

a. August 7, 2015 to November 9, 2015 – four payments totaling $4,335.05 to Leon's wife for interest on a loan she had made to DOT from her personal line of credit with her brokerage house ("Insider Transfer #1");

b. December 7, 2015 payment of $214,000 to NPTC as repayment of loans it had made to DOT ("Insider Transfer #2");

c. December 10, 2015 payment of $301,000 to Leon's wife as repayment of the loan she had made to DOT ("Insider Transfer #3");

d. December 22, 2016 payment of $90,000 to NPTC for "rent" ("Insider Transfer #4");

e. December 22, 2016 payment of $23,000 to NPTC for "utilities" ("Insider Transfer #5"); and,

f. December 23, 2016 payment of $95,814.17 to Leon as "salary" ("Insider Transfer #6").

The total amount of the Insider Transfers is $728,149.22. (Appellate Decision at 15 [Pa000177]).

Although the Appellate Division expressed skepticism that Appellants established the "ordinary course" defense based upon the existing record before the Appellate Division (Appellate Decision at 24 [Pa000186]), it invited the Remand Court to obtain additional evidence on this issue to the extent any existed. On or about September 26, 2023, the Remand Court asked the parties if there existed any additional evidence pertinent to the remaining issue before the Court. Both parties confirmed that the existing record contained all facts relevant to the present proceeding.

After briefing and oral argument, the Remand Court issued its decision ("Remand Decision") and determined that Appellants did not establish a defense that the Insider Transfers were made in the ordinary course. The Remand Court further determined that David's Estate had no control over DOT at the time the Insider Transfers were made and thus, was not an insider under the UFTA.

The Remand Court also denied Plaintiff's request for an award of attorneys fees under §26(a)(c)(3) of the UFTA.

Upon reargument, the Remand Court adhered to the Remand Decision.

ARGUMENT

THE REMAND COURT CORRECTLY FOUND THAT APPELLANTS DID NOT ESTABLISH THE "ORDINARY COURSE OF BUSINESS" AND THAT PLAINTIFF WAS NOT AN "INSIDER" UNDER THE UFTA.

This case is a textbook fraudulent transfer case. Leon, who was in full and sole control of debtor DOT after his brother died, siphoned $728,149.22 from DOT to his insiders despite having a clear contractual obligation to repay his brother's estate for monies he had loaned years prior. Even after this lawsuit was filed – more than eight years ago - Leon continued to divert hundreds of thousands of dollars from DOT until the company was forced to close its doors. To date, neither DOT nor Leon has paid David's Estate any monies owed to it.

STANDARD OF REVIEW

A trial court's factual findings are "binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974) citing New Jersey Turnpike Authority v. Sisselman, 106 N.J.Super. 358 (App. Div. 1969) cert denied 54 N.J. 565 (1969). As such, factual findings and legal conclusions of the trial court should not be disturbed by an Appellate Court unless the Appellate Court finds that such factual findings and legal conclusions are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, 65 N.J. at 484 quoting Fagliarone v. Twp. of North Bergen, 78 N.J. Super 154, 155 (App. Div. 1963); see Weiss v. Zapinsky, Inc., 65 N.J. Super. 351, 357, 167 A.2d. 802 (App. Div. 1961) (holding that the function of the appellate court is to determine whether there is substantial evidence to support the trial judge's findings and conclusions).

When reviewing a judgment entered in a non-jury case, the findings on which such a judgment is based should not be disturbed unless "they are so wholly insupportable as to result in a denial of justice." Greenfield v. Dusseault, 60 N.J. Super. 436, 444, 159 A.2d 433 (App. Div. 1960). An appellate court should exercise its original fact-finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter. Id.

POINT I

APPELLANTS CONCEDE THAT THE INSIDER TRANSFERS WERE NOT MADE IN THE "ORDINARY COURSE OF BUSINESS"

On August 31, 2023, the Appellate Division remanded this matter back to the Remand Court. In so doing, the Appellate Division instructed the Remand Court to first determine if Appellants could prove by a preponderance of evidence that the Insider Transfers were made in the ordinary course of business. If not, the Remand Court was to enter judgment in favor of Respondents. (8/31/23 AC, p27}

In its February 9, 2024 decision, the Remand Court concluded that the Insider Transfers were "not normal when reviewed in light of DOT's history of business practices." (Pa000121). Accordingly, the Remand Court concluded that the Insider Transfers were not made in the ordinary course of business and Appellants were not entitled to the defense under NJSA 25:2-30(f)(2). The Remand Court thus entered judgment in favor of Plaintiff.

On February 23, 2024, Appellants filed a Motion for Reconsideration. This Motion made no mention of Appellants' ordinary course of business defense. Likewise, Appellants' current Brief of Appellants does not argue that Appellants are entitled to the ordinary course of business defense under NJSA 25:2-30(f)(2). As such, Appellants finally concede that the Insider Transfers were made in violation of the UFTA and are not payments made in the ordinary course of business.

POINT II

THE REMAND COURT WAS CORRECT IN FINDING THAT DAVID'S ESTATE IS NOT AN "INSIDER" UNDER THE UFTA

Once it was established that that the Insider Transfers were not made in the ordinary course of business, the only issue left for the Remand Court to consider was "whether David's estate is an "insider" for purposes of the UFTA and, if so, the effect of that finding upon the court's fashioning of a proper remedy." {AD page28}

With this clear directive in hand, the Remand Court found that "[once David's estate] transferred its interest to Leon it lost its control and therefore could no longer be considered an insider." {TC 2/9/24 p 5} In denying Appellants' Motion for Reconsideration, the Remand Court added that "[a]s the question of an insider stems from when the transfers were made, the fact that the Estate had no present interest in DOT was pivotal in the Court's conclusion that Plaintiff was not an insider." {TC MFR p.5} Both the law and the facts clearly support this conclusion.

First, it is important to note that the Plaintiff is David's Estate and David's wife as the executor of David's Estate. Despite Appellants' repeated attempts to focus on David himself and when the loans were originally made, David was deceased when the Insider Transfers were made so his status as Leon's brother and prior co-owner of DOT is irrelevant. The only relevant relationship is the one between David's Estate and DOT, and the only relevant time period is when the Insider Transfers were made.

With the proper relationships and time frame in mind, it is clear that David's Estate is not an "insider" under the UFTA. N.J.S.A. 25:2-22(b)(3), defines an "insider" of a corporate debtor to be a "person in control of the debtor." N.J.S.A. 25:2-22 also defines "Person" to mean "an individual, **estate**, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." (emphasis added). The statute is direct and on

point: whether an estate is an "insider" hinges on whether or not the estate controls the debtor.

The notion of control being central to insider status under the UFTA is consistent with the case law in New Jersey as stated by the Gilchinsky court: "[t]he unifying theme among [insiders] is that they stand in such close relation to the debtor as to give rise to the inference that they have the ability to influence or control the debtor's actions." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 478, 732 A.2d 482 (1999).

As the Remand Court found, it is beyond legitimate dispute that neither David's Estate nor Plaintiff had any ability to influence or control DOT or Leon's actions. In fact, the record is crystal clear that Leon – and Leon alone – maintained full authority over DOT. Leon proudly testified to his unilateral control over DOT and how he exercised that sole control to make the Insider Transfers. (Pa000104; Pa000108; 5T31-5 to 33-14); (Pa000109; 5T20-1 to 20-13; 5T26-8 to 27-16); (Pa000107; Pa000109; 5T52-5 to 53-8; 5T56-5 to 57-24); (Pa000105;

Pa000109; 5T43-8 to 44-22); (Pa000105; Pa000109; 5T33-15 to 37-12); (Pa000109; 5T13-9 to 16-17). Leon's sole control of DOT is not in dispute. In their brief, Defendants confirm that no action could be taken on DOT's behalf without Leon's approval.

Appellants ignore the clear meaning of the statute and attempt to establish insider status of Plaintiff by pointing to the fact that Plaintiff had access to DOT's books and records and issued checks on behalf of the company. Plaintiff Polina was DOT's bookkeeper at the time. Of course, she had access to DOT's accounts and records and issued checks as instructed. It was part of her daily duties (until Leon fired her) to maintain those accounts, records and process payments. The fact that Polina did things a typical bookkeeper would do – subject to Leon's direction and supervision – does not, however, mean that Plaintiff had influence or control over DOT. In fact, the record before the Remand Court establishes the opposite. Again, as Leon himself testified, that power was uniquely his and his alone.

Appellants' claims of misconduct and Plaintiff Polina's purported status as an "insider" are based on the same tired arguments Appellants have been making since the onset of this case. These arguments have – each and every time – been rejected by both the trial court and the Appellate Division. Specifically, in his trial decision, Judge Maenza found as follows:

> "The evidence established that…David's Polina continued to serve as the bookkeeper until she was forced to leave DOT by Leon. The only payments made by David's Polina from DOT to plaintiff were appropriate payments based upon the established protocol since the inception of DOT."

Plaintiff's Appendix (Pa000079) (Docket No.: MRS-L-1478).

These trial court findings were specifically affirmed on appeal as follows:

> "To the extent any of defendants' arguments imply the [trial] judge erroneously found a breach of the buy-sell agreement, or plaintiff violated the implied covenant of

> good faith and fair dealing regarding the buy-sell agreement, or she and David wrongfully diverted DOT funds, those arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The findings made by the judge were supported by the credible evidence at trial and we will not disturb them."

December 14, 2020 Opinion at page 11 (Docket No.: A-2963-18T4). (Pa000029).

(Pa000125-Pa000152).

Appellants also seem to argue that because David made the loans at a time that he was an officer of DOT, those loans are forever to be characterized as what they refer to as "insider debt". This is simply not what the UFTA says and Appellants cite no statute or case law to support their fabrication. The UFTA and N.J.S.A. 25:2-22(b)(3) in particular could not be more clear that insider status is determined at the time the transfers are made with "control" over DOT being the only determinant. The fact that David made the loans when he was an officer of DOT

is completely irrelevant because by the time DOT made the Insider Transfers, David was deceased, Leon was the sole shareholder and only Leon had control over DOT.

The undisputed evidence, including Leon's own testimony, the Remand Court's findings and the Appellate Division's affirmations, is that Leon, who was the sole shareholder at the time of the Insider Transfers, was the only person who could influence or control DOT. Indeed, if Plaintiff actually had the ability to control DOT, she would have continued to repay David's loans (which Leon unilaterally stopped). Plaintiff would not have needed to sue Defendants and participate in this eight-plus-year odyssey. The Remand Court correctly relied on Plaintiff's lack of control over debtor when the Insider Transfers were made to conclude that Plaintiff is not an "insider" under the UFTA. As such, Plaintiff's remedies thereunder remain unaffected. (5T13-9 to 16-17; 5T20-1 to 20-13; 5T26-8 to 27-16; 5T31-5 to 33-14; 5T43-8 to 44-22; 5T33-15 to 37-12; 5T52-5 to 53-

8; 5T56-5 to 57-24).

Appellants have offered no evidence to suggest that the Remand Court's factual findings and legal conclusions are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." As such, the Appellate Division should affirm the Remand Court's decision that Plaintiff is not an insider under the UFTA.

POINT III

THE REMAND COURT ERRED WHEN IT REFUSED TO CONSIDER DEFENDANTS' BAD FAITH AND IMPROPERLY DENIED PLAINTIFF'S REQUEST FOR LEGAL FEES UNDER THE UFTA

When the Appellate Division declined to exercise original jurisdiction and remanded this case to the Remand Court, the Appellate Division explained that it was doing so in part because it "would be necessary to decide an appropriate remedy for Appellants' violation of the UFTA." (Pa000186). In outlining the potential remedies available to Plaintiff, the Appellate Division specifically highlighted that the award of counsel fees under the UFTA was a potential remedy, stating:

> Plaintiff asserts the appropriate remedy [under the UFTA] is defendants' refund of $736,105.22 to DOT…and an award of counsel fees [under the UFTA] to the estate in an amount to be determined payable by DOT and "respondents". On its face, the requested relief requires the remand court to have further involvement in the litigation. (emphasis in original). (Pa000187).

In addition, the Appellate Division specifically acknowledged that the laws of other jurisdictions as well as bankruptcy courts may be used to inform and guide New Jersey law:

> "A prime purpose of [UFTA] [wa]s to align state law on fraudulent transfers with the federal Bankruptcy Act, see 11 U.S.C. §§ 547 and 548, and the Uniform Commercial Code-Secured Transactions. N.J.S.A. 12A:9-101 et seq. Another goal [wa]s to make uniform the law among the states that adopt the [UFTA]. (citing Flood v. Caro Corp., 272 N.J. Super. 398, 403 (App. Div. 1994)). As the Third Circuit has stated, in applying the UFTA, courts 'may look to the law in other jurisdictions that have adopted the [UFTA], and decisions construing analogous provisions of the Bankruptcy Code.'" (citing Motorworld, 228 N.J.

> at 325 n.4 (quoting Klein v. Weidner, 729 F.3d 280, 283 (3d Cir. 2013)).”

The Remand Court initially rejected Plaintiff’s request for legal fees based on the erroneous belief that the Appellate Division had already decided the legal fees issue. When Plaintiff, in its Motion for Reconsideration, pointed out that the Appellate Division had not decided this issue, the Remand Court rejected the award of legal fees again. While acknowledging that other jurisdictions had awarded legal fees under similar circumstances based on identical UFTA provisions, the Remand Court declined to follow this precedent because it believed other courts’ interpretations of the UFTA “has no bearing on New Jersey’s statutory language and caselaw.” {AD 3/22/24 Hansbury p 7}

The Remand Court’s reasoning, however, ignores the Appellate Division’s instructions that when it comes to matters regarding the UFTA, the law of other jurisdictions is relevant. The Remand Court erred because legal fees are permitted and warranted under

§29(a)(3)(c) of the UFTA which provides that a court may order "[a]ny other relief the circumstances require" for a violation of the UFTA.

As the Appellate Division has noted, "[e]quitable principles control the court's authority in fashioning such a [UFTA] remedy." (see Sec. & Exch. Comm'n v. Antar, 120 F.Supp. 2d 431, 447 (D.N.J. 2000; court citing "[T]he UFTA expressly recognizes the availability of equitable remedies against debtors who engage in fraudulent transfers.").

Bankruptcy courts have consistently held that 11 U.S.C. § 550 (the corresponding section in the Bankruptcy Code) "is designed to restore the estate to the financial condition that would have existed had the transfer never occurred." *In re Kingsley*, 518 F.3d 874, 877 (11th Cir. 2008) (citing *In re Sawran*, 359 B.R. 348, 354 (Bankr.S.D.Fla. 2007) (citation omitted); *see also In re Centennial Textiles, Inc.*, 220 B.R. 165, 176 (Bankr.S.D.N.Y. 1998)).

In *Morgan Stanley High Yield Sec. Inc. v. Jecklin*, (2020 U.S. Dist. LEXIS 92848), the United States District Court of Nevada, found that Plaintiff was entitled to attorneys' fees based on Nevada's version of the UFTA which also provided that a court may enter "any other relief the circumstances may require."[4] In so ruling, the court relied on the fact that defendants "forced [the] extensive litigation" (*Id.* at 21.) and stated that "the [*any other relief the circumstances may require*] language was taken from the Uniform Fraudulent Transfer Act, and while the Act does not provide explicitly for the award of attorneys' fees, this provision "invites courts to consider themselves empowered to award attorney's fees, punitive damages, or both…" (citing Kenneth C. Kettering, The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act, 70 Bus. Law. 777, 788 (2015) (citing cases)).

[4] See NRS 112.210(1)(c)(3)

In the present matter, Appellants (like those in Morgan Stanley High Yield Sec. Inc.) forced extensive and baseless litigation that has lasted more than eight years over a simple and clear breach of contract matter. Appellants have refused to meaningfully discuss settlement. Appellants willfully and purposefully ensured that any and all moneys in DOT would be paid to Leon and his insiders. In the process, $728,149.22 was siphoned from DOT in Insider Transfers without paying a dime to David's Estate even though there was a contractual obligation to do so. (Pa000081-Pa000097). More than $200,000 was diverted after this litigation started. Appellants have unnecessarily dragged out this litigation for more than eight years to inflict maximum pain – personal and financial - on Plaintiff. They continue to litigate claims not based in fact or law. They repeatedly disparage David, his wife and his son with false claims that have been rejected by the courts each and every time. Appellants assault on David's wife and son has been relentless – in and out of court. All

because Plaintiff rightfully asked to be repaid the loans owed to David's Estate.

CONCLUSION

The UFTA is an equitable remedy. Its very essence is designed to ensure the aggrieved are provided with real remedies, not just Pyrrhic victories. This court should use the powers granted to it under the UFTA to make Plaintiff whole by awarding Plaintiff her legal fees. Otherwise, even though Plaintiff has won, she ultimately loses.

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s/ Linda S. Agnew
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DATED: December 9, 2024

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January 9, 2025

Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
Trenton, New Jersey 08625
Attn: Marcella Coley - File Manager

RE: POLINA ROITBURG, EXECUTOR OF THE ESTATE OF DAVID ROITBURG, PLAINTIFF,

VS.

LEONID ROITBURG A/K/A LEON ROITBURG, DESIGN OF TOMORROW INC. A/K/A EDUCATIONAL & LABORATORY SYSTEMS ("ELS") A/K/A ELS, NATIONAL PRECISION TOOL COMPANY, INC. A/K/A NPTC, DEFENDANTS.

LEON ROITBURG, DESIGN OF TOMORROW INC. AND NATIONAL PRECISION TOOL COMPANY INC., THIRD-PARTY PLAINTIFFS,

VS.

POLINA ROITBURG AND IGOR ROITBURG PERSONALLY, THIRD-PARTY DEFENDANTS.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002257-23-T4

SAT BELOW
HON. STEPHEN H. HANSBURY, J.S.C. LAW DIVISION
MORRIS COUNTY

DOCKET NO. MRS-L-1478-16

Civil Action

Dear Honorable Judges of the Appellate Division:

This firm represents Defendants/Appellants Leon Roitburg ("Leon") and National Precision Tool Company, Inc. ("National Precision"), collectively ("Defendants"), in the above-referenced matter. Please accept this letter brief in lieu of a more formal filing in opposition to Plaintiff's Cross-Appeal for the Award of Attorney's Fees and in further support of Defendant's Appeal to find Plaintiff the Estate of David Roitburg an insider. Defendants will rely upon the preliminary statement, procedural history, and statement of facts set forth in their Appellate Brief as Amended.

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LEGAL ARGUMENT

POINT ONE

Plaintiff Is Not Entitled to Its Attorney Fees, As It Has Not Demonstrated an Exception to The American Rule (1R87-1 to 98-2; 2R45-20 to 51-10)

With respect to the denial of the award of Plaintiffs Attorney Fees, Judge Hansbury has done a masterful job applying the Law of New Jersey and his extensive experience over decades applying that law. New Jersey Courts apply the American Rule in which each party pays its fees win or lose absent 1) a contractual provision, 2) a fee-shifting statute, or 3) a Court Rule. See NJ Rules of Court R.4:42-9a, In re Niles 176 NJ 282, 823 A. 2d 1, 8 (2003). New Jersey has a strong policy against shifting fees. Id. Citing Packard Bamberger & Co. v, Collier 167 NJ 427,444, 772 A2d. 1194 (2001), additional citations omitted. As detailed in Judge Hansbury's opinion, none of these exist here.

Plaintiff's Counsel argues that Judge Hansbury should have used the "equitable language" of the NJUFTA statute to expand the law and should have looked to the laws of the Bankruptcy Courts to award attorney fees. The choice of law provision NJ 25:2-35 (b) states that New Jersey law should apply to claims made under the NJUFTA. As demonstrated above, New Jersey law has quite a rich history concerning attorney fees. Therefore, looking to any other jurisdiction is unnecessary, as Plaintiff encouraged Judge Hansbury and this court to do. Even in creating a judicial exception to the American Rule for the "pernicious tort" of undue influence of a fiduciary over a helpless beneficiary, the

Niles Court made it very clear that the exception was very limited in scope and was in no way meant to affect the American Rule. Id.

Other than her plea for equitable relief, which in this case is not warranted, Plaintiff gave Judge Hansbury no basis to award her attorney's fees because there is none.

POINT TWO

Plaintiff Is an Insider by Statute

(Da047-048; 1R7-1 to 19-12; 2R4-23 to 12-5; 2R17-7 to 19-10; 2R51-16 to 52-1)

Judge Hansbury held that an Estate could not be an insider because the definition in the NJFTA does not include the word "estate." Yet, as specifically pointed out in the Plaintiff Cross Motion brief at p. 18, the definition section of the NJUFTA clearly defines a "person" to include an "**estate.**" NJSA 25:2-22 (emphasis in original).

So, at minimum, Judge Hansbury's restrictive reading of the statute was inaccurate. This brings us back to the fact that the statute expressly defines an insider as "a relative of a general partner, director, officer, or person in control of the debtor" NJSA 25:2-22 (6). If David is a statutory insider, his estate is an insider.

Moreover, Plaintiff wants to forget the history of DOT, which David ruled over unilaterally for over twenty-seven years. He made all the decisions during that time, and they lived off the company together. For sixteen years, Plaintiff was the sole arbiter of what was a personal expense and what was a company expense on the credit cards paid

by DOT, above and beyond their salaries, rendering DOT insolvent. (8T11-1 to 11; 8T58-15 to 22; 8T51-4 to 54-6; 8T52-17 to 18; 8T72-17 to 25; Da125). During that time, Leon was a shareholder in name only and did not even meet with DOT's CPA, Joseph Brescia, until after David became ill. While David was alive and for a year thereafter, Leon never received a salary or any perquisites that David and Plaintiff enjoyed to the detriment of DOT.

Yet, on p. 18 of her brief, Plaintiff boldly claims, "With the proper relationships and time frame in mind, it is clear that David's Estate is not an "insider" under the NJUFTA." David and Plaintiff were "insiders" for twenty-seven years. Even after David died, Plaintiff continued using his signature stamp to write checks to make payments on her home equity line. Unbeknownst to Leon, she also used Leon's signature stamp for the same purpose while complaining that the company had insufficient money to pay its creditors.[1]

The Plaintiff cites no law that the Estate of an Insider is not an insider because none exists. The test Plaintiff cites in her brief of "extent of control" does not apply to a statutory insider. This Court need not go beyond the statutory definition to declare Plaintiff and the Estate statutory insiders. The monies owed to David's Estate are not monies owed to an unrelated third-party lender. When David lent DOT monies, it was insider monies; it was accounted for by DOT as an insider "shareholder loan," as was

[1] In the March 12, 2019, Order Granting Partial Relief from Judgment, Judge Maenza recognized that the series of payments made by Plaintiff to her benefit were clearly paid after David's death. These are actions only a person exercising control over a company's finances could do.

Leon's. The fact that David died does not convert him to a non-relative nor his debt to an unrelated status. Polina Roitburg has no individual standing to try to collect one dime. As detailed in the caption, she is the Plaintiff as Executor for the Estate of David Roitburg, an insider, no more, no less. The Plaintiff's judgment and the Defendant's unpaid loans should be placed on an equal footing.

POINT THREE

The Estate and Its Representative Are Insiders by Deed

(1R48-1 to 55-6; Da047-048; Da072)

Plaintiff's argument that she never exercised control over DOT and its transfers is pure hogwash. For twenty-seven years, she and David were insiders. Plaintiff would like to ignore history and pigeonhole the Court into a specific period, the time of the transfers, as the only relevant period for evaluating whether the Estate is an "insider" through the control test.

However, to do that would be to ignore twenty-seven years of history in which she and David presided over DOT's insolvency. No case law restricts this Court from evaluating the extent of control to the period when the transfers were made. For sixteen years, she and David made every decision at DOT. Even after David's death, when she was the Estate's representative, Plaintiff used both David's and later Leon's signature stamps to pay down her Chase Home Equity Line to the detriment of DOT and its

unrelated creditors. She controlled the pattern of those transfers entirely. They increased in frequency during David's illness and after his death. A party that transfers assets out of the debtor for its own benefit is an insider. Gilchensky v. National Westminster Bank NJ 159 NJ 463, 732 A. 2d 482, 491(1999). Whether Plaintiff made the transfers out of DOT for her and the Estate's benefit as Executor of the Estate or of her own volition, make her and the Estate insiders.

Plaintiff, for purposes of her argument, attempts to limit the time frame in which the Court should consider "insider" status in a vacuum from the time of transfers. However, the law has no such timeframe. Even though the Court need not reach this issue of control because the Estate is a statutory insider, the Court cannot ignore and forget twenty-seven years of control when determining whether Plaintiff is an "insider" versus an "unrelated party." The Plaintiff has provided no law of when an insider becomes an unrelated party because there is none. This "unrelated" party remained liable for the Scott Barracks performance bond until Leon completed that project.

POINT FOUR

Leon And the Defendants Only Provided Benefits to DOT And Performed Good for The Company, Its Employees, And Its Unrelated Creditors as Opposed to Plaintiff (1R7-1 to 19-13; 1R22-17 to 23-9; 1R48-2 to 59-21; see other specific cites below)

The New Jersey Uniform Fraudulent Conveyance Act was changed to the New Jersey Voidable Transfer Act in 2021. The reason for the change is that some transfers are made for the good of the company and, like here, involve zero fraudulent intent. Because Leon overpaid for and took over an insolvent company, all these transfers, **if unrelated creditors existed**, are constructively "voidable" (emphasis added).

In the second appeal, the appellate court prohibited Judge Hansbury from looking at the complete defenses of new value, reasonably equivalent value, or effort to rehabilitate the debtor, restricting him to a very narrow definition of ordinary course. NJSA 25:2-30 f (1) and (3).

As a fail-safe, to ensure that situations are factually examined, NJSA 25:2-32 Supplemental Provisions states: 'Unless displaced by the provisions of the "Uniform Voidable Transactions Act," R.S.25:2-20 et seq., the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions."

To evaluate the facts here versus the Plaintiff's claims for relief, The Court should compare the actions of Leon, his wife, and NPTC against those of the Plaintiff to ascertain whether the Plaintiff, an insider, is entitled to relief under a statute that is designed to promote equity and fairness.

Actions of Leon and Defendants

1. Infused $250,00 in new money into DOT as an unsecured loan to allow DOT to be bonded to accept the Scott Barracks Project (the "Project"). (8T15-20 to 16-3; 11T54-5 to 55-23; 11T94-21 to 25; Da079; Da081)
2. Leon and his wife signed personal guarantees for the surety bond on the Project. (11T51-9 to 52-11; Da159)
3. Against the advice of counsel, Leon overpaid $1 million for David's 50% of DOT, an insolvent company, to honor David's wishes to keep DOT's employees working. (Da174; Da175; 8T11-1 to 11; 8T58-15 to 22)
4. Paid off the "friends and family" loans of the Fishers and Shmulers, which David had borrowed for an insolvent DOT so that it could continue to support Plaintiff and David's lifestyle. (Da128; Da129)
5. Begged his wife to borrow $300,000 from Morgan Stanley to infuse it into DOT as a "lifeline" loan to allow DOT to continue working on the Project when no commercial lender would loan DOT a dime. (Da294 to Da299)
6. Had NPTC loan DOT $765,000 in 23 installments of unsecured new money to allow DOT to make its payroll, pay vendors, pay unrelated creditors, and complete the Project. Of that total, $512,000 remains unpaid. (Da204 to Da207; Da208 to Da293)
7. Paid off all of DOT's non-insider creditors. (Da084)

8. Finished the Project, releasing the Performance Bond, for which Plaintiff, the Estate, Leon, and his wife were all personally liable. (8T116-12 to 21; 8T117-6 to 25; 8T131-11 to 132-20)
9. He took no salary as president of DOT while he completed the Project and all other open DOT projects. (8T131-11 to 132-10)
10. Had NPTC not charge rent or utilities to DOT before, during, and after the Project was completed. (8T73-1 to 74-9; 11T7-18 to 8-3; Da392 (Note 5), Da127)
11. Paid David until his death and Plaintiff for over a year beyond that, even though she did not work full time. (11T113 to 19; 8T4-18 to 20; 8T6-1 to 6; 10T119-9 to 16; Da121; Da122)

Actions of Plaintiff and David

1. Used DOT as their personal ATM to support their luxury lifestyle, including cars, meals, insurance, vacations, etc., with Plaintiff being the sole and unchecked arbiter of what constituted a "personal expense." (8T59-1 to 19; 8T64-5 to 7; 8T64-24 to 65-14; 8T65-25 to 66-18; 8T69-16 to 71-10; Da125; Da123; Da124; 8T66-20 to 68-25; 8T98-17 to 99-12; Da126; 8T68-1 to 25)
2. Ran DOT into insolvency based on their lifestyle. (8T11-1 to 11; 8T58-15 to 22; 8T51-4 to 54-6; 8T52-17 to 18; 8T72-17 to 25; Da125)

3. Borrowed $200,000 from the Fishers and the Shmulers so DOT could artificially support their lifestyle. (8T39-23 to 40-8; Da128; Da129)
4. Never repaid the Fishers or the Shmulers while writing checks to Chase Bank to repay her and David's equity line of credit. (1T58-2 to 7; Da300 to Da334)
5. Continued and increased her payments to Chase during David's illness and after David's death using his signature stamp. (10T48-6 to 23; Da300 to Da330)
6. Received $2 million after David's death, $1 million from Leon, and another $1 million from a life insurance policy paid for by DOT. (Da174; Da175; 1T52-1 to 12)
7. Continued writing checks to Chase without Leon's knowledge, even after Leon was a 100% shareholder in DOT, by secretly using Leon's signature stamp, all the while as DOT's office manager complaining DOT did not have enough money to pay its creditors. (11T169-25 to 170-2; 5T232-4 to 233-20; 1T58-2 to 7; Da300; Da331 to Da334)
8. While Leon was on vacation on a Saturday night, she secreted her son Igor into DOT's offices, providing him full access to DOT's record to steal, copy, and remove original documents. (5T275-3 to 19; 10T104-5 to 12; 1T72-2 to 73-12; 1T76-9 to 77-13; Da375 to Da377; Da352; Da355; Da357; Da366)

9. Supported Igor's hate campaign against his uncle and the breaking up of the Roitburg extended family because of her greed. (Da339 to Da343; 7T16-22 to 18-7; 11T168-19 to 169-2; 11T169-12 to 22)

10. Filing a lawsuit two months before David's note was due for three times the amount DOT owed as Plaintiff herself entered the correct $226,000 figure in DOT's books. (Da001 to Da013; Da084; Da089; Da118 to Da119)

11. Igor, a New York licensed attorney, was allowed and encouraged to commit perjury by repeatedly denying conversations with DOT's accountant Joe Brescia, for which emails existed to explain the correct $226,000 figure owed to his father by DOT. (8T88-18 to 89-23; Da188 to Da203; 8T86-21 to 87-2; Da109 to Da116; 8T87-23 to 91-4; 8T93-4 to 94-10; 8T95-3 to 12; 8T97-3 to 9; 8T98-9 to 99-12; 8T99-23 to 101-1)

12. Continued to have Igor calculate, recalculate, and calculate again through eleven days of trial and deliver testimony on the stand on day eleven, the "true amount" DOT owed to David. (Da375 to Da377; Da001to Da013; 11T227-8 to 231-24)

13. She used this litigation as a weapon against Leon. An eleven-day trial, three appeals, character assassinations, and the destruction of a family because she is petty, jealous, and miserable and wants Leon to share in her misery.

Because the Defendants and the Plaintiff are on equal footing as insiders, this Court must evaluate their actions and determine what, if any, remedy Plaintiff is entitled to. As enumerated above, the Defendant's actions were all for DOT's good. The Plaintiff's actions were taken for her direct benefit, regardless of the collateral damage to DOT and its personnel, and then purely for the destruction of Leon, NPTC, and Leon's wife.

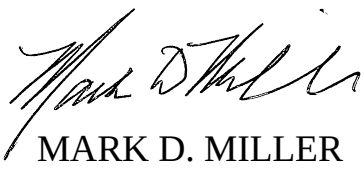
This Court must decide how justice and equity should be accomplished even against legitimate unrelated creditors, of which none exist because Leon paid them off; the transfers at issue are constructively voidable, not void. The remedy that this Plaintiff deserves should be absolutely nothing.

Conclusion

For all the foregoing reasons, this Court should determine that Plaintiff is an insider not intended to be a beneficiary of the NJUFTA and thus should recover nothing. Further, based upon her undisputed actions in bringing and prosecuting this litigation, she is entitled to no remedy.

Respectfully Submitted,

DUBECK & MILLER



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cc: Linda Agnew, Esq.

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January 17, 2025

Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
Trenton, New Jersey 08625
Attn: Marcella Coley – File Manager

Re: Estate of David Roitburg, Polina Roitburg, Executor (Respondent/Cross-Appellant) v. National Precision Tool Company and Leon Roitburg, et al.

Appellate Docket No.: 002257-23-T4;
Below Docket No. MRS-L-1478-16

Sat Below: Hon. Stephan H. Hansbury, J.S.C.; Law Division

Dear Honorable Judges of the Appellate Division:

This firm represents the Plaintiff/Respondent/Cross-Appellant Polina Roitburg as Executor of the Estate of David Roitburg ("Plaintiff") in the above-referenced matter. Please accept this letter brief in lieu of a more formal filing in Reply to Defendants' National Precision Tool Company and Leon Roitburg ("Defendants") Opposition to Plaintiff's Cross-Appeal for the Award of Attorney's Fees. Plaintiff will rely upon the preliminary statement, procedural history, and statement of facts set forth in her Respondent/Cross-Appellant's Brief as Amended.

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LEGAL ARGUMENT

POINT ONE
Plaintiff's Request for Attorney's Fees Is Expressly Based Upon NJSA 25:2-29(c)

In New Jersey, which follows the American Rule, legal fees may be awarded if a statute authorizes it. {citation N.J. Ct. R. 4:42-9} In this case, Plaintiff's request for attorney's fees is grounded in NJSA 25:2-29(c) which broadly affords a creditor "[a]ny other relief the circumstances may require." This language has been interpreted by courts to encompass legal fees, particularly in instances where the opposing party has compelled unnecessary and protracted litigation, as is evident in this case (see *Morgan Stanley High Yield Sec. Inc. v. Jecklin*, 2020 U.S. Dist. LEXIS 92848).

This case should have been resolved long ago. In 2018, the trial court ruled decisively in Plaintiff's favor, holding that she was entitled to the return of loans made to Design of Tomorrow and rejecting every counterclaim brought by Defendants. Despite this unambiguous ruling, Defendants have engaged in conduct designed to delay and frustrate Plaintiff's ability to collect on the judgment awarded nearly seven years ago. Defendants have repeatedly misrepresented facts and advanced baseless claims, twisting the decisions of both the trial court and this Court and attempting to resurrect issues that were resolved long ago.

Defendants' latest letter brief is yet another example of their ongoing effort to distort the record and prolong this litigation. First, Defendants misrepresent Judge Hansbury's ruling on the statutory definition of "insider." Defendants claim Judge Hansbury incorrectly excluded "estate" from the definition, but in fact, the decision did not turn on that at all. Rather, Judge Hansbury properly focused on the requirement that an "insider" must have control over the corporation. He concluded that Plaintiff was not an "insider" because "[o]nce the estate transferred its interest to Leon, it lost its control and therefore could no longer be considered an insider" (*Hansbury*

Decision, 2/9/24, p. 5; see also *Hansbury Order*, 3/22/24, p. 5). Next, Defendants falsely assert that this Appellate Court "prohibited Judge Hansbury from looking at the complete defenses of...NJSA 25:2-30 f(1) and (3)." This claim is demonstrably untrue. In fact, this Court expressly ruled on those defenses, finding that "defendants bestowed no 'new value' on the corporation after the transfers were made, nor were the transfers made in a good faith effort to 'rehabilitate' DOT" (*Appellate Decision 8/31/23, page 17, footnote 4*). Finally, Defendants devote pages to irrelevant and inflammatory attacks on Plaintiff, her deceased husband, and her son, despite repeated findings that such statements have no bearing on the issues at hand.

Defendants' arguments are not merely meritless attempts to advance a position; they are part of a deliberate strategy to prolong this litigation and inflict maximum financial and emotional harm on Plaintiff. Defendants know they cannot prevail. Leon Roitburg's true objective is far more malicious: to punish his brother's widow, now in her late 70s, for seeking the repayment of loans made by her late husband. Rather than offering any support, Defendants are intent on perpetuating this relentless litigation, causing Plaintiff unnecessary hardship and distress.

But for Defendants' deliberate and unnecessary prolonging of this litigation, Plaintiff would not have had to incur substantial attorneys' fees over the past eight years in pursuit of what is clearly owed to David's Estate. As this Appellate Court has recognized, "[e]quitable principles control the court's authority in fashioning such a [UFTA] remedy" (*Sec. & Exch. Comm'n v. Antar*, 120 F. Supp. 2d 431, 447 (D.N.J. 2000)). As an equitable remedy, the UFTA expressly provides that courts may grant any relief necessary to make the aggrieved party whole. Other courts have relied on this provision to award legal fees in similar circumstances when a party engages in prolonged and unnecessary litigation, noting that the UFTA "invites courts to consider themselves empowered to award attorney's fees, punitive damages, or both" (Kenneth C. Kettering, *The Uniform Voidable Transactions Act*, 70 Bus. Law. 777, 788 (2015)). Therefore, Plaintiff's request

for attorneys' fees is fully supported by the UFTA, New Jersey law and the American Rule.

Conclusion

For all of the foregoing reasons, Defendants' Appeal should be dismissed in its entirety and Plaintiff should be entitled to an award of her reasonable attorney's fees on her Cross-Appeal.

Respectfully Submitted,

HARRAS BLOOM & ARCHER LLP

LINDA S. AGNEW

cc: Mark D. Miller, Esq.