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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GILA DWECK, on her own behalf, as Trustee of the NAOMI DWECK KIDS INTERNATIONAL TRUST and MAURICE DWECK KIDS INTERNATIONAL TRUST and in her capacity as a shareholder of and on behalf of KIDS INTERNATIONAL CORPORATION, SUCCESS APPAREL LLC and PREMIUM APPAREL BRANDS LLC, Plaintiffs-Below/ Appellants, Cross-Appellees, v. ALBERT NASSER, Defendant, Third-Party Plaintiff-Below/ Appellee, Cross-Appellant, and KIDS INTERNATIONAL CORPORATION, Nominal Defendant-Below/Appellee, Cross-Appellant, v. KEVIN TAXIN and BRUCE FINE, Third-Party Defendants-Below/ Appellants, Cross-Appellees	No. 65, 2013 Court Below: Court of Chancery of the State of Delaware, Vice Chancellor J. Travis Laster (Cons. C.A. No. 1353-VCL)

APPELLANTS' REPLY BRIEF ON APPEAL AND
CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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Nasser has no meritorious answers to the issues Appellants raise. Nasser argues that Vice Chancellor Lamb's ruling, which bars the parties' claims if Nasser's tax scheme is illegal, could be ignored by his successor, because Vice Chancellor Lamb did not determine whether Nasser had engaged in illegal conduct. On the contrary, Vice Chancellor Lamb's ruling requires the court to determine whether the parties engaged in illegal conduct. This is the law of the case and consistent with well-established Delaware law. It was reversible error for the court to ignore Vice Chancellor Lamb's ruling and "assume" there was no illegality.

Nasser cannot rebut Appellants' argument that if the court was going to award damages, it should have ordered Nasser to either disgorge the $15.1 million in Kids' profits he unilaterally sent to his overseas entities, or pay Dweck her share of the profits as Nasser represented to the trial court he would do, but failed to do. Nasser's principal response is that Dweck "acquiesced" to the payments, which were all made after her termination from Kids. Dweck did not acquiesce to these payments, but rather sought to restrain them, through this action, from being made.

Nasser also contends that the Court properly set prejudgment interest rates to prevent Dweck from receiving a windfall. But it is Nasser, a wrongdoer, who is getting a windfall with an award of compound interest at the legal rate, which does not pass any of the fairness tests used by Delaware courts to determine prejudgment interest.

SUMMARY OF ARGUMENT IN OPPOSITION TO CROSS-APPEAL

1. DENIED (CROSS-APPEAL ISSUE IV). The trial court correctly (a) denied Nasser valuation damages; (b) calculated lost profits; and (c) denied Nasser attorneys' fees. Nasser's argument for valuation damages fails because as the trial court correctly found, Kids had little or no value without Dweck and Taxin, and Dweck and Taxin had every right to leave Kids and to compete with Kids. Further, Appellants' "malfeasance" did not destroy Kids. The trial court also correctly calculated Kids' lost profits based upon the profits earned by Success and Premium rather than speculate on what Kids might have earned without Dweck and Taxin. Finally, the trial court properly exercised its discretion in refusing to award fee shifting under the America Rule.

2. DENIED (CROSS-APPEAL ISSUE V). The trial court properly ordered Nasser to disgorge the bogus consulting fees paid to RAJN, particularly given that Nasser admitted that RAJN performed no consulting services, and properly ordered Nasser to repay the $2.4 million for which he failed to account. The trial court correctly did not find Dweck to have "acquiesced" to the RAJN payments. The claims related back to the amended complaint and were timely. Further, it was not Dweck's burden to prove Nasser's accounting, and Nasser presents no reason to reverse the court's well-reasoned findings.

REPLY ARGUMENT IN SUPPORT OF APPEAL

I. THE TRIAL COURT ERRED IN AWARDING NASSER RELIEF WITHOUT CONSIDERING HIS WRONGDOING

As set forth in Appellants' Opening Brief, [1] Nasser engaged in an illegal tax evasion scheme that was at the heart of the parties' dispute.[2] While Vice Chancellor Lamb ruled that the trial court would not render relief to parties engaged in illegal activity, Vice Chancellor Laster ignored Vice Chancellor Lamb's ruling, "assumed" the scheme to be legal, and refused to consider its illegality. (Op. at 40-42.) It was reversible error for the trial court not to have considered whether Nasser's illegal conduct barred granting relief as a matter of law and public policy.[3] (OB at 12-18.)

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[1] Citations herein to Appellants' Opening Brief (the "Opening Brief") are cited as "OB," and to Appellees' Answering Brief and Cross-Appellants' Opening Brief (the "Answering Brief") are cited as "AB." All other defined terms have the meanings ascribed to them in the Opening Brief.

[2] Nasser contends that Appellants "arguably" failed to raise this issue below. (AB 22-23 & n.9.) He is wrong. Appellants made these arguments in pre-trial briefing (A0223-24), post-trial briefing (A0405-07), and post-trial oral argument (A0722-29). Moreover, Nasser explicitly acknowledged these arguments and attempted to rebut them in his own post-trial briefing. (A0454-55 ("That is precisely the point of Dweck's purported 'unclean hands' defense . . . .").)

[3] Nasser contrives an apparent dispute concerning the standard of review by reframing Appellants' argument as challenging a damages award. (AB at 17.) Appellants are challenging the trial court's failure to adhere to the law of the case and established public policy by refusing to consider the illegality of Nasser's tax evasion scheme, which are questions of law with a *de novo* standard of review. (OB at 12-18.) Nasser's attempt to recast the standard of review is particularly disingenuous where Nasser previously argued to this Court that "*[d]e novo* judicial review is appropriate for any issue that turns on public policy grounds, such as illegality." A0155.

Nasser's response is notable for what he fails to dispute. He does not argue that the tax scheme was, in fact, legal. (OB at 12.) While Nasser (wrongly) states that he "*never told* this Court that the Overseas Payments were" illegal; Nasser's attorney testified that he *never believed* it to be illegal; and the trial court *never found* that (because it never considered whether) the scheme was illegal (AB at 18-19) (emphasis added), Nasser never denies that the scheme was illegal or that he was the architect and primary beneficiary of the scheme.

Instead, Nasser makes four meritless arguments to justify the trial court's decision, which Appellants address *seriatim*.

A. There Is Evidence of and an Admission of Illegality

Nasser claims that "there has been no finding by a tribunal, and no admission by Nasser, concerning the existence of an illegal tax evasion scheme." (AB at 3.) Nasser cites no authority, and Appellants are aware of no such authority, for the proposition that there had to be a prior finding of illegality. There only had to be evidence of illegality for a court to consider such evidence as Vice Chancellor Lamb ruled and as Nasser argued in his 2008 brief to this Court. (A0153-55.)

Further, Nasser's attempts to parse the prior admission he made to this Court are unsuccessful. Appellants' Opening Brief cited Nasser's 2008 brief to this Court, in which Nasser argued that the overseas payments "were part of an illegal tax scheme." (OB at 17.) Nasser responds that he did not admit that the entire scheme was illegal, but only admitted that the scheme was illegal as to the funds paid to "*Dweck, as a U.S. citizen*." (AB at 19.) This alleged caveat does not

change the fact that it was still an illegal scheme (OB at 14-15) and that Nasser was indisputably the architect, proponent and primary beneficiary of the scheme.

B. The Trial Court Violated the Law of the Case Doctrine

Nasser argues that Vice Chancellor Laster did not violate the "law of the case" doctrine because Vice Chancellor Lamb did not find the tax scheme to be illegal. This misses the point: the trial court issued a ruling in conflict with Vice Chancellor Lamb's without any showing that the prior ruling was wrong.

Vice Chancellor Lamb ruled, as a matter of (well-supported) law, that "*if*" the scheme is proven illegal, then "we're not going to sit in equity and work out disputes between people who are engaged in illegal enterprise." (OB at 14, citing A0613-14.) Rather than following this ruling and considering whether the tax scheme was illegal, the trial court "assumed" the scheme to be legal. (Op. at 40-42.) The law of the case doctrine and "[c]onsiderations of courtesy and comity" dictate that a subsequent judge abide by the interlocutory rulings of an earlier judge in the same case, even where the subsequent judge could otherwise "vacate or contravene the interlocutory order or ruling . . . .'" *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 719 (Del. 1983) (quoting Anno., 132 A.L.R. 14, 15 (1941)). This ensures that parties are not "entrapped by varying philosophies of different judges of the same Court in the case." *Id.* "[E]xceptions should be entertained only in extraordinary circumstances[,]" and then only where the prior ruling was "obviously incorrect[.]" *Id.* (citations omitted).

Neither Vice Chancellor Laster nor Nasser has given any reason why Vice Chancellor Lamb's ruling was obviously incorrect. Indeed, as noted above Nasser

previously stated to this Court that evidence of illegality must be examined *sua sponte* even when it had not been raised by a party.

Nasser also states in a footnote that *Frank G.W.* is "inapposite" because it involved a motion for summary judgment. (AB at 19 n.8.) The broad language of *Frank G.W.* does not support such a restrictive application of the law of the case doctrine. This Court has previously applied *Frank G.W.* to enforce a similar forward-looking ("if . . . then") legal standard issued by a predecessor judge. *See Miller v. Wolstenholme*, 540 A.2d 1088, 1988 Del. LEXIS 114, at *5-6 (Del. Apr. 18, 1988) (applying law of the case doctrine to enforce legal standard established by predecessor judge, who decided that "*[i]f* a petition for custody were filed in the future by either party *then* the custodial question would still be decided pursuant to best interest" (emphasis added)). Here, Vice Chancellor Lamb similarly established a forward-looking legal standard when he ruled that continued litigation would be subject to dismissal *if* the parties' dispute centered on illegal activities. Like the subsequent judge in *Miller*, Vice Chancellor Laster should be bound by the prior ruling.

Nasser next argues that Nasser's criminal conduct is irrelevant because the trial court awarded damages to Kids. (AB at 21-24.) But Kids was a party to this illegal scheme, albeit under Nasser's direction and control, because Kids manufactured bogus expenses so that earnings went unreported and taxes evaded.[4]

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[4] The two cases Nasser cites in support of the proposition that Kids can recover damages even if Nasser could not are inapposite. In *In re HealthSouth Corp. Shareholders Litigation*, 845 A.2d 1096, 1107 (Del. Ch. 2003), the court prohibited a self-dealing CEO to use the clean hands doctrine as a shield against the innocent

This argument also puts form over substance. Kids has not operated since 2008 (Op. at 22) and is simply a litigation vehicle. (A0739.) In similar circumstances, Delaware courts have held that the "entity is simply an artifice representing the relationship between two legally juxtaposed parties and is no longer relevant as a distinct legal creature for the purpose of resolving the final claims between these parties." *In re Cencom Cable Income P'rs, L.P. Litig*., 2000 Del. Ch. LEXIS 10, at *19 (Jan. 27, 2000). *Cf. Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (observing that the corporate form may be disregarded "when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved") (citation omitted).

Further, Nasser would be the ultimate recipient of any award because Nasser still controls Kids. (AB at 1.) And, there is every reason to believe that Nasser will use any damages paid into Kids for his sole benefit. Between 2006 and 2008 Nasser breached his fiduciary duty to Kids and dissipated approximately $18,000,000 of Kids' retained earnings. (OB at 8-9.)

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company that made payments to him. The court found defendant's argument to be "transparency silly" because it would leave "corporate entities – including public stockholders and creditors – with no recourse when their corporation is injured by managers." *Id.* at 1108. In *Kousi v. Sugahara*, 1991 Del. Ch. LEXIS 194, at *7 n.2 (Nov. 21, 1991), the court rejected an unclean hands defense because the alleged misconduct was "vague and unspecific" and unrelated to the claims in the case.

C. Nasser's Conduct Affected the Equitable Relations of the Parties

Nasser does not dispute that (1) regardless of the merits of his claim, a court of equity does not grant relief to persons arising from those persons' illegal or inequitable conduct, (2) there is a societal interest in not providing an accounting between wrongdoers, (3) whether the principle is referenced as "unclean hands" or "public policy" or "in pari delicto" is immaterial – a court will not aid a party in implementing schemes to avoid paying taxes. (OB at 12-14.)

Nasser states he is nevertheless entitled to relief because his illegal and inequitable conduct was purportedly unrelated to Appellants' misconduct. (AB at 22-25.) Nasser is wrong factually and legally. To quote Vice Chancellor Lamb, the illegal tax evasion scheme was at the "heart" of the parties' dispute, that is, the dispute of who is entitled to Kids' profits. (A0614.) As the trial court found, the impetus behind Dweck moving Kids' opportunities to Success and Premium was Dweck's dissatisfaction with Nasser taking a grossly disproportionate amount of Kids' profits. (Op. at 11-12.) Dweck objected to only getting 30 percent "of a small piece of profits" because Nasser was sending the bigger piece of Kids' profits overseas. (AR0054)

Nasser also misapplies the "unclean hands" case law, which he cites and quotes at length. (AB at 24.) Fundamentally, the doctrine applies where "violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court of adjudication." *E. States Petrol Co. v. Universal Oil Prods. Co.*, 8 A.2d 80, 82 (Del. 1939). That standard fits this case to a tee. At its core, this case is also about who is entitled to

receive the profits of Kids, Success and Premium. Nasser's receipt and retention of tens of millions of dollars in disguised profits is directly related to the "equitable relations between the parties."

Nasser's last argument is that Dweck's "acquiescence" precludes her from contesting Nasser's claims. This is wrong as a matter of law. Whether or not Dweck acquiesced to Nasser's wrongdoing, the trial court, sitting in equity, should not be divvying up profits between wrongdoers. (OB at 12-14.)

II. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST AT AN EXCESSIVE RATE IN LIGHT OF NASSER'S WRONGDOING

Appellants' Opening Brief demonstrates that the trial court abused its discretion by granting the highest potential prejudgment interest award based on Nasser's prejudgment interest model[5] (compounded at the legal rate), which does not pass any of the fairness tests commonly applied by Delaware courts in determining the appropriate amount of prejudgment interest. (OB at 25.) The court awarded an interest at the legal rate, which in these circumstances is an unfair windfall to wrongdoer Nasser, and more than doubles Appellants' liability: adding $10,222,689 in prejudgment interest on $9,905,128.20 in damages. (OB at 26.) Equity, recent precedent, and market conditions necessitate awarding simple interest at the 30-day U.S. Treasury bill rate. (OB at 26-29.)

Appellants also demonstrated that the trial court's rationale for its interest award was legally flawed. (OB at 29.) The trial court misapplied the cost of borrowing analysis by decoupling it from a prudent investor analysis and erroneously held that "'Nasser has not been adjudicated as a wrongdoer.'" (*Id.*)

A. Nasser Is a Wrongdoer

Nasser attempts to defend the trial court's legal ruling that Appellants were the primary wrongdoers by merely referencing the very language in the Opinion

[5] Nasser alleges that Appellants' arguments concerning prejudgment interest "misidentif[y] the recipient of the award (Kids) in an effort to shift the focus away from the wrongdoing being remedied[.]" (AB at 26.) But Nasser does the same thing (when it benefits him). (*See* AB at 36 (arguing that the lower court's damage award fails "to adequately compensate Kids (and Nasser, as its majority shareholder)".) Nasser cannot have it both ways.

that Appellants challenge. Nasser concludes that, because the trial court "expressly considered" both parties' behavior and "found" that Nasser's wrongs were not as bad, it must be so. (AB at 28-29.)

Not so. In finding that Nasser had "not been adjudicated a wrongdoer" (Order Resolving Final Order ¶ 1), the trial court ignored (1) its own factual findings that Nasser failed to prove entire fairness of the $3.9 million in bogus "consulting" fees, and to account for $2.4 million in Kids funds; (2) that Nasser was the architect and primary beneficiary of an illegal tax evasion scheme; (3) that Nasser repeatedly lied to the trial court; and (4) that a person who engaged in multiple fiduciary breaches should not obtain a favorable prejudgment interest rate ruling. (*See* OB at 27 (citing *Patel v. Dimple, Inc.*, 2007 Del. Ch. LEXIS 121, at *47 (Aug. 16, 2007) ("[W]here, as here, both parties are found liable for concomitant breaches, it would have been appropriate to deny prejudgment interest entirely").) Nasser likewise ignores all this. The failure of the trial court to apply its own findings and to consider other evidence of wrongdoing when entering the prejudgment interest award was reversible error.

B. The Cost of Borrowing Reasoning Is Wrong

As explained in Appellants' Opening Brief, where Delaware courts have employed a cost of borrowing analysis, they have examined both the prudent investor rate and the cost of borrowing analysis to determine the applicable interest rate. (OB at 29.)

Nasser never advocated the cost of borrowing standard. (*See* B174-B180; B208-B215.) Now, Nasser argues that the standard was properly used because it

ensured that Dweck does not reap a windfall. (AB at 29.) But the interest rate awarded punishes Dweck far in excess of what she conceivably gained and gives Nasser a windfall. As Appellants previously demonstrated without contradiction, Kids' actual investment return rate was 3.5% and prudent investor analyses show a 3.37% and 3.99% return over the prejudgment interest period. (OB at 26-28.) This is the standard the trial court should have applied, as compared to speculating on what interest rate Kids would have had to pay if it had needed to borrow money. (Order Resolving Final Order ¶ 1.)

Nasser also argues that the legal rate is a "benchmark for pre-judgment interest" and thus the trial court acted within its discretion. (AB at 27.) As then-Vice Chancellor Chandler stated, "[t]he legal interest rate serves as a useful default rate when the parties have inadequately developed the record on the issue . . . ; however, when the parties introduce sufficient evidence for the Court to determine a fair interest rate, reliance on the legal rate adds an element of arbitrariness into the Court's effort to be precise." *Chang's Hldgs., S.A. v. Universal Chems. & Coatings, Inc.*, 1994 Del. Ch. LEXIS 222, at *8 (Nov. 22, 1994) (citations omitted). Here, the trial court arbitrarily selected its interest rate award, without supporting law or evidence. Such arbitrariness constitutes an abuse of discretion.

C. Nasser Delayed the Proceeding

In responding to Appellants' arguments that the trial court should have awarded a lower interest rate because "Nasser was *partially* to blame for the protracted resolution of this litigation" (OB at 27 (emphasis added)), Nasser argues that Dweck was also responsible for delays. This misses the point of Appellants'

argument: Nasser is at least equally to blame for the protracted nature of the litigation, and should not benefit from that delay. (*See id.* (citing *Ryan v. Tad's Enters.*, 709 A.2d 682, 705 (Del. Ch. 1996) (proportionate reduction in interest award to avoid "windfall" due to party's delay)).)

D. There Is No Waiver

Lastly, Nasser raises a throwaway argument that "Appellants waived any right to argue for a different [prejudgment interest award]" because "Appellants themselves submitted proposed forms of post-trial and accounting orders that provided for interest at the legal rate, compounded quarterly[.]" (AB at 31.)[6] As is routine, the trial court ordered the parties to draft conforming final orders. Nasser is thus absurdly suggesting that in order to preserve an issue for appeal, a party must refuse to submit a form of order. If Nasser's standard were to apply, then Nasser would have waived his right to appeal, since his own proposed forms of final order encompassed the liability and damages rulings that he appeals. (AR0042-44 at ¶¶ 1-3, 6, 9; AR0048-49 at ¶¶ 1-2.)[7]

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[6] Nasser also argues that "Appellants waited until the eve of the final judgment" to raise their interest rate arguments. (AB at 31.) But it was understood by all parties that there would be disputes concerning the calculation of prejudgment interest, which would be resolved by the Court in connection with the form of Final Order. (*See* AR0052-AR0053 (Nasser's counsel observing that "it wouldn't shock me if there are disputes" concerning the calculation of prejudgment interest.").) In any event, the parties made the trial court aware following the Accounting Hearing that interest would be an issue between the parties and the court indicated that it was not settled on the issue. (*Id.*)

[7] *Salovaara v. SSP Advisors, L.P.*, 2003 Del. Ch. LEXIS 142, at *12-13 & n.22 (Dec. 22, 2003), which Nasser cites, is inapposite to this case, as the waiver in that case arose from the defendants' "voluntary actions" *during briefing*.

III. THE TRIAL COURT ERRED IN ALLOWING NASSER TO KEEP $15.1 MILLION IN RETAINED EARNINGS

A. The $15.1 Million Should Have Been Returned to Kids

As Appellants' Opening Brief demonstrates, once the trial court decided to ignore the illegality of the tax evasion scheme and to award damages, it should have then required Nasser to disgorge $15.1 million in Kids' earnings that Nasser unilaterally sent to his overseas entities after Dweck's departure from Kids. The trial court should not have accepted Nasser's defense to returning the money – his undisputedly false representation that Dweck could directly receive her *pro rata* share of the funds – when the funds should have been returned to Kids to pay creditors, including the government, and only then distributed to shareholders. (OB at 19-24.)

Nasser responds that Dweck acquiesced to the money going overseas, citing the trial court's finding that Dweck went along with Nasser's scheme. (AB at 33-34.) Nasser's acquiescence defense fails for three reasons.[8]

First, there was no acquiescence. The Opinion did not distinguish between the funds sent overseas before Dweck's departure from those after she was terminated and long gone from Kids. Rather, the court linked Dweck's acquiescence to the benefits she supposedly received from the payments. (Op. 41-

[8] Strangely, Nasser argues that Dweck has waived her right to contest this because Dweck did not challenge this finding in her Opening Brief. (AB at 33.) But Argument II of Appellants Opening Brief specifically argues that Nasser was solely responsible for sending the $15.1 million overseas after Dweck's departure. (OB at 19-24, 33.)

42.) But it is undisputed that she never benefited from the post-termination payments.

The Opinion is unsupportable to the extent it is applied to the post-termination payments. To prove acquiescence, Nasser was required to show that Dweck "(1) ha[d] 'full knowledge of his [or her] rights and all material facts'; (2) possess[ed] a 'meaningful choice' in determining how to act; and (3) act[ed] voluntarily in a manner 'show[ing] unequivocal approval' of the challenged conduct." *In re Celera Corp. S'holders Litig.*, 2012 Del. Ch. LEXIS 66, at *33 (Mar. 23, 2012) (citations omitted), *rev'd on other grounds*, 59 A.3d 418 (Del. 2012). While Nasser must "show all three elements" to establish this equitable defense, *id.* at *36, there is no evidence to support even one of the three elements.

Notably, Nasser does not even suggest that Dweck unequivocally approved or had a "meaningful choice" with respect to the $15.1 million, post-termination payments Nasser unilaterally made. Nor could he, given that Dweck was seeking to stop them. Dweck's initial March 30, 2005 complaint in this action (AR0001-0025), filed before any portion of the $15.1 million was sent overseas (OB at 19), sought the appointment of a custodian because Nasser "would squander or take for himself the over $10 million in retained earnings that is under his control . . . ." (AR0019 at ¶ 58.) Dweck later sought a temporary restraining order and preliminary injunction against Nasser dissipating Kids' assets, specifically citing Nasser's "past practices of transferring the company's cash overseas." (AR0032-33 at ¶ 12.) Dweck demanded that Nasser distribute Kids' retained earnings to Kids' shareholder and not to his overseas accounts. (*Id.*) (AR0030 at ¶ 10.)

The acquiescence argument reaches the absurd when applied to the $8.3 million Nasser sent to Woodsford in 2008. Dweck had been terminated from Kids three years earlier and the parties had been in litigation almost all of this time. Dweck did not give her consent to Nasser sending $8.3 million to Woodsford, an entity that Nasser controlled (A0763, A0785, A0808), that Kids had no contractual relationship with, and Dweck had not heard of until after the litigation began. (AR0088 at Tr. 62.)

Because Nasser cannot argue that Dweck unequivocally consented to the payments, he argues that Dweck acquiesced to the "structure" of the arrangement. (AB at 33.) But (i) payments to Woodsford were never part of the "structure" (Op. at 7); (ii) Dweck never acquiesced to a structure whereby Nasser or his agent kept for themselves all of Kids' earnings; and (iii) when Dweck was terminated in March 2005, she demanded an end to the overseas payments and a distribution of retained earnings directly to shareholders.

Second, there was no acquiescence by Kids or Kids' creditors. Nasser's argument is irreconcilable with the first point of his Answering Brief, where he argues that Appellants are improperly conflating Kids and Nasser, and that Nasser's conduct is not a bar to Kids recovering damages. (AB at 21-23.) Applying this same logic, Dweck, a minority shareholder, could not have acquiesced to Nasser's seizure of Kids' funds. Nasser cannot have it both ways: if the court is going to award damages to Kids even though it was a conduit for Nasser's activities and ignore the public policy against awarding damaging to wrongdoers, then Nasser should have been ordered to return Kids' profits to Kids.

Third and finally, acquiescence is an equitable defense. *Celera*, 2012 Del. Ch. LEXIS 66, at *33; *Wechsler v. Abramowitz*, 1984 Del. Ch. LEXIS 584, at *4 (Aug. 30, 1984). The defense is unavailable to Nasser as the overseas payments were part of Nasser's illegal tax evasion scheme, and Nasser has failed to provide Dweck with her *pro rata* share of the funds as Nasser represented he would do. To the extent that the trial court accepted Nasser's equitable defense of acquiescence with respect to the $15.1 million, it was improper to do so.

B. Nasser Should Have Been Ordered to Pay Dweck Her *Pro Rata* Share of the Foreign Money

Appellants' Opening Brief demonstrated that after Nasser reneged on his representation to the trial court that he would provide Dweck with her share of the foreign money, the trial court should have, at a minimum, ordered Nasser to pay Dweck her share of the foreign funds, and not have tasked this Supreme Court with addressing Nasser's misrepresentations. (OB at 22.) Nasser does not attempt to contest the fairness and equity of Dweck's argument. Instead, he offers three rationales to support the trial court's decision, the first being that the trial court's prior ruling was the law of the case and should not be revisited. On the contrary, under the standards set forth by this Court, the trial court was required to reexamine its prior ruling. This Court has recognized "three exceptions" to the law of the case doctrine – "it is not an absolute bar to a prior decision that is clearly wrong, produces an unjust result or should be revisited because of changed circumstances." *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 39 (Del. 2005) (citation omitted).

This case qualifies under each one of the three exceptions, (1) the prior ruling was "clearly wrong" as it was based upon Nasser's false representation regarding Dweck's ability to receive her share of the foreign money; (2) it produces an "unjust result" by allowing Nasser and his agent to retain all of the profits and denies Dweck her share; and (3) there are "changed circumstances" – Nasser's refusal to provide Dweck with her share of the foreign money as he represented he would do. Next, Nasser repeats his "acquiescence" argument. Putting aside that Dweck did not acquiesce to the $15.1 million in payments, that argument makes no sense here. Even Nasser does not dispute that Dweck never acquiesced to Nasser keeping all of Kids' profits for himself.

Nasser also argues that the trial court's "reluctance" to reexamine the issue was appropriate because it was "based on post-trial developments on which the parties had not conducted discovery and the Court of Chancery had not held a hearing." (AB at 34-35.) Nasser does not identify a single factual issue for which discovery is required to resolve this matter. As Appellants previously demonstrated, regardless of whether Nasser was intentionally lying to the court or just misrepresenting the facts, he was judicially estopped from disclaiming his earlier position that Dweck was entitled to her *pro rata* share of the foreign funds. (OB at 23.) Further, if the trial court wrongly assumed that discovery or a hearing is needed, then it was required to engage in that effort to remedy a "clearly wrong" decision, and an "unjust result."

Nasser also claims that Appellants' brief "misquotes Nasser and contradicts the court's findings." (AB at 35.) On the contrary, Appellants quote Nasser

verbatim. (OB at 22; A0497.) Nasser's odd contention that while he stated that Dweck was "entitled to her share," he supposedly did not say that he "personally would pay Dweck" (AB at 35) is a distinction without a difference. As the trial court found, Nasser "made clear that Woodsford would send Dweck her share[.]" (Op. at 42.) And Nasser does not dispute his control of Woodsford.

Finally, ignoring Nasser's control of Woodsford and Woodsford's receipt of Kids' earnings, Nasser argues that the trial court should not revisit its decision because Keilman was not Nasser's agent. Nasser cites the court's "findings that Maubi and the Foreign Licensors 'were owned and controlled by Henk Keilman' and 'structured to avoid any indicia of control' by Nasser." (AB at 35.) This argument is flawed, logically and factually. The pertinent inquiry is not how the scheme was supposed to work, but rather, who actually controlled Keilman and the foreign entities and who actually received the funds. And as the trial court recognized, and as the record shows, the foreign entities are "Mr. Nasser's entities." (A0720.2.) The foreign entities were a conduit for Woodsford. After first lying about it, Nasser admitted that 70% of the foreign money went to Woodsford. (A0701-02.) Foreign money was also distributed to other Nasser entities, including Adamsberg, Beredi, and Distrigas (A1380-82) and used to support Nasser's domestic companies. (OB at 17 n.4.)

ARGUMENT IN RESPONSE TO CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY REJECTED NASSER'S VALUATION AND ATTORNEYS' FEES CLAIMS AND DETERMINED THE AMOUNT OF LOST PROFITS

A. Question Presented

Did the trial court correctly (1) calculate Kids' lost profits and deny Nasser valuation damages, where Kids had no value without Taxin and Dweck and Taxin and Dweck had the right to leave Kids and compete with Kids; (2) determine the amount of Kids' lost profits based upon what Success and Premium actually earned as opposed to speculating on what Kids might have earned without Dweck and Taxin; and (3) deny Nasser's fee shifting argument, for which he presents no legal or factual reason to reverse?

B. Scope of Review

Damages awards are reviewed for an abuse of discretion. *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012) (this Court will "not substitute [its] own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason") (internal quotations omitted). Findings of fact are reviewed for clear error. *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000). The denial of attorneys' fees is also reviewed for abuse of discretion. *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010).

C. Merits of the Argument

1. The Trial Court Correctly Denied Nasser Valuation Damages

Arguing for a windfall beyond the windfall he has already received, Nasser contends that Appellants' misconduct destroyed Kids' business, entitling Nasser to valuation damages. Because "one Delaware Court"[9] has awarded damages on "the difference between the value of the business before and after a defendant's wrongful acts[,]" the trial court supposedly abused its discretion by not doing the same thing here. (AB at 38.)

Nasser's argument fails because (a) as the trial court found, Kids had little or no value without Dweck and Taxin, and Dweck and Taxin had the right to leave Kids and to compete with Kids; and (b) Appellants' "malfeasance" did not destroy Kids. Indeed, Nasser's "destruction" claim is belied by (1) Kids' profitability in the year after Dweck left; (2) Nasser's continued operation of Kids for years after Dweck's departure; and (3) Nasser's failure to mitigate Kids' damages.

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[9] *Zaleski v. Mart Associates*, which Appellees cite, is inapposite. There, the defendant literally destroyed the plaintiffs' retail business through a fire and the business ceased operating. 1988 Del. Super. LEXIS 260, at *1 (July 25, 1988). Similarly, *Boyer v. Wilmington Materials, Inc.*, also cited by Nasser, involved the sale of virtually all the company's assets to insiders at an unfair price, rendering the business insolvent and incapable of resuming operations. 754 A.2d 881, 893-94, 899 (Del. Ch. 1999). In contrast, Kids had $18,000,000 in assets nine months after Dweck was terminated and continued operations for years.

a. Kids Had No Value Apart From Dweck and Taxin, Who Had the Right to Leave and Compete

As the Opinion recognizes, Appellants had the right to compete as a matter of law because (at Nasser's insistence) no Kids' employees, including Dweck and Taxin, had employment agreements or any contractual limitations on their right to compete. (Op. at 35-36.) In the absence of a covenant not to compete, an employee may properly solicit trade from those customers whom he dealt with in his previous employment. *Wilmington Trust Co. v. Consistent Asset Mgmt. Co. Inc.*, 1987 Del. Ch. LEXIS 409, at *19 (Mar. 25, 1987); *Rypac Packaging Mach., Inc. v. Coakley*, 2000 Del. Ch. LEXIS 64, at *37 (May 1, 2000). Employees without restrictive covenants are also free to make reasonable preparations to compete while still employed and to compete thereafter. *Science Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 965 (Del. 1980) (citation omitted).

Further, Nasser recognized Dweck's right to compete after her departure. Dweck remained at Kids for approximately six weeks after her termination and openly made arrangements to compete with Kids. (AR0120; AR0122.) On April 6, 2005, well before the so-called "mass exodus" of May 18, 2005, Dweck emailed Djemal that she was going to be moving even "more personnel" to Success. (AR0120.) On April 8, 2005, Nasser emailed Djemal that they should prepare for the substantial number of employees who had left and would be leaving with Dweck. (AR0122.) Until the eve of trial, Nasser never suggested that Dweck could not compete directly with Kids once she left.

Thus, the trial court correctly found that Nasser's claim for valuation was "inconsistent with the business reality that Dweck and Taxin were key employees, Kids depended upon them, and they were not bound by any restrictive covenants." (Op. at 36.) The trial court correctly concluded:

> Dweck and Taxin could have departed from Kids at any time and taken the bulk of Kids' goodwill and going concern value with them. As an entity distinct from Dweck and Taxin, Kids had minimal (if any) goodwill or going concern value. [. . .] If Dweck and Taxin had left Kids legitimately, they likely would have competed successfully with Kids and won its non-branded business. (Op. at 36.)

The trial court acted well within its discretion in ruling that Kids' remedy "should be limited to the damages Kids suffered over and above where Kids would have been had Dweck and Taxin resigned in an appropriate manner." (Op. at 36.) Those damages were lost profits from the diverted orders. (Op. at 36-37.) This is consistent with long-established case law that damages are generally based upon profits lost from the specific opportunities that were misappropriated. *All Pro Maids v. Layton*, 2004 Del. Ch. LEXIS 116, at *38 (Aug. 9, 2004) (the "proper measure of damages for breach of covenant not to compete is APM's lost profits"), *aff'd* 880 A.2d 1047 (Del. 2005).

Recognizing that "Kids had minimal (if any) goodwill or going concern value" as an entity without Dweck or Taxin (Op. at 36), Nasser argues that the court nonetheless erred in not calculating that minimal amount. (AB at 41.) Nasser fails to acknowledge that if he obtains valuation damages, he could not then also obtain damages for lost profits. The lost profits Nasser has already been

awarded are greater than the minimal going concern value he now believes this Court should order.

b. Appellants' "Malfeasance" Did Not Destroy Kids

Appellants' "malfeasance" did not destroy Kids.[10] (AB at 40.) That malfeasance supposedly consisted of Appellants (i) organizing a "mass exodus" of Kids' employees; (ii) diverting Holiday and Spring 2006 orders from Kids to Success; (iii) stealing 100 boxes of Kids' documents and (iv) wiping clean a number of hard drives. (AB at 40.)[11]

None of these things, collectively or separately, support a claim for valuation damages. The first item did not constitute "malfeasance." There was no prohibition on Dweck or Taxin orchestrating a "mass exodus of employees." No Kids employees had employment contracts and they all could choose to work for Dweck and Taxin rather than Nasser.

Diverting certain orders also did not "destroy" Kids. Kids' primary customers gave Kids a full opportunity to do business with them. Walmart witness, Daria Beckom, testified that after Dweck's departure, Kids could have continued to do business with Walmart. (AR0104 at Tr. 5.) Walmart provided Kids and Djemal with ideas, color schemes and direction. (AR0116 at Tr. 282.)

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[10] Appellants may, of course, argue alternative grounds for affirmance that were fairly presented to the Court. *Unitron v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (1995); *see also* A0428-30.

[11] Nasser argues that Appellants did not challenge these findings in their Opening Brief. (AB at 40.) There was no reason to. Appellants were not challenging this part of the judgment.

The "100 boxes" of Kids' documents never left Kids, much less damaged Kids. Contrary to Nasser's contention on brief, no material was removed from Kids. The Opinion found that Djemal stopped 100 boxes from leaving Kids (Op. at 20), and that there was an "*attempted* removal of Kids' property." (Op. at 37) (emphasis added).)[12]

Finally, the alleged wiping of hard drives never happened and never caused Kids any harm. Djemal, the last fact witness at trial, testified that a forensic expert supposedly found that Kids' electronic files had been deleted. (AR0064 at Tr. 1071-73 (Djemal).) Nasser never made any such an allegation before trial. This argument is not in his pleadings or pre-trial brief and it was not revealed during discovery even though there were numerous requests, demands and questions propounded to Nasser that required disclosure of this phantom claim. (A0430-A0431.) At trial Nasser and Djemal also failed to produce any evidence with respect to who performed the deletions, what was deleted or how the deletions were effectuated. None of this is explained either by Nasser or the Opinion because the file deletion never happened.

Delaware law requires that "an opponent . . . be given a fair chance to plan his defense[.]" *Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 Del. Ch. LEXIS 57, at *49 (May 21, 2008), *aff'd* 962 A.2d 916 (Del. 2008) (citations omitted). Introducing evidence for the first time in support

[12] The Opinion found that Djemal "could not stop any of the former employees from taking boxes with them." (Op. at 20.) There was no evidence that those boxes contained anything other than employees' personal property.

of one's claim in the last witness of trial unfairly prejudices an opponent. *Cf. id.* at *41 n.73 ("Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue.") (citing 6A Wright & Miller § 1493); *Whittington v. Dragon Grp. L.L.C.*, 2011 Del. Ch. LEXIS 26, at *19 (Feb. 11, 2011). The trial court should not have considered and then accepted Djemal's testimony.

While Appellants' malfeasance did not destroy Kids, Nasser's did. As Shiboleth testified, Dweck's termination meant that Kids then needed to hire a professional CEO. (B0586.) But Nasser made no such effort. Instead, on the day he fired Dweck, he made his nephew, Djemal, Kids' CEO (Op. at 19) and kept him in that position.

Djemal never even bothered to try to retain most of Kids' employees. Djemal testified that "I had no reason to." (AR0070 at Tr. 1178.) Djemal had "no reason" to keep Kids' employees because Nasser and Djemal did not even attempt to keep Kids' business functioning. While Dweck was terminated in March 2005, Djemal and Nasser waited until August 2005, to even attempt to get any orders. (AR0113 at Tr. 269-270.) Doing business or hiring competent people was never the point. As Nasser admitted, he kept Kids open so he could use Kids' retained earnings to pay his legal fees. (AR0087 at Tr. 470-71.)

"A party has a general duty to mitigate damages if it is feasible to do so." *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995) (citation omitted). "'As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.'" *West Willow-Bay Crt., LLC v. Robino-Bay Crt. Plaza, LLC*, 2009 Del. Ch. LEXIS 23, at *11 (Feb. 23, 2009) (quoting Restatement (Second) of

Contracts § 350 cmt. b). Nasser failed to mitigate his damages by: (1) not seeking experienced replacements for Dweck and Taxin; (2) not making any effort to retain Kids' employees; and (3) not even attempting to operate Kids' business for months after Dweck's termination.

2. The Trial Court Properly Determined Kids' Lost Profits

Without citing any legal authority to support his position, Nasser argues that the trial court improperly calculated lost profits because it "focused on the profits gained by Success and Premium, rather profits lost by Kids." (AB at 42.) Because Kids was a "13 year old business" and Success and Premium were start-ups, Kids supposedly was "likely" to have earned more profits. (AB at 42.)

This argument fails for numerous reasons. To begin with, Nasser never argued to the trial court that Success's and Premium's profits were an improper measurement of Kids' lost profits, and it should not be considered by this Court. Supr. Ct. R. 8.[13] As for the merits, Nasser cites no legal authority to show that the trial court abused its discretion in calculating lost profits. For all the reasons set forth above, Nasser also cannot show that Kids would have been able to earn any profits under his management much less more profits than the Appellants could have earned. Djemal and Nasser were incapable of running Kids, as demonstrated by (among other things) the significant decline in Kids' value during their years of management (Op. at 42), and refused to hire anyone who could. On the other hand, Appellants had every reason to make Success and Premium successful and

[13] *See also Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("Parties are not free to advance arguments for the first time on appeal.").

had the capability that Nasser lacked. There is no logical reason to believe that Nasser could have done better.

Finally, Success and Premium were not "start-ups" as Nasser inexplicably alleges. (AB at 42.) Nasser's entire case is premised upon Success and Premium operating for years before Dweck's departure. It was not an abuse of discretion for the trial court to calculate damages based upon actual operating results obtained by experienced management, rather than speculate about what Kids' ineffectual management would have earned.

3. The Trial Court Did Not Abuse Its Discretion in Not Awarding Attorneys' Fees

Nasser argues that "[b]ecause the evidence shows that Dweck exhibited bad faith, the Court of Chancery should have awarded Kids its reasonable attorneys' fees." (AB at 43.) The trial court correctly found that "the case as a whole does not warrant fee shifting." (Op. at 46.) Nasser, the proponent and would-be beneficiary of the fee shifting, repeatedly engaged in illegal conduct, breaches of fiduciary duty, and acted throughout the parties' relationship and this litigation in bad faith. (OB at 31-32.) There is no abuse of discretion in declining to award fees under the American Rule.

II. THE TRIAL COURT DID NOT ERR IN HOLDING NASSER LIABLE FOR BOGUS CONSULTING FEES AND FAILING TO ACCOUNT FOR $2.4 MILLION

A. Question Presented

Did the trial court correctly (1) require Nasser to repay $3.8 million in "consulting" fees Kids paid to an entity Nasser controlled that did not perform any "consulting" services to Kids; and (2) hold Nasser liable for $2.4 million in Kids' "expenses" for which Nasser failed to account?

B. Scope of Review

Damages awards are reviewed for an abuse of discretion. *Gatz*, 59 A.3d at 1220-21. The Court of Chancery's findings concerning the RAJN payments are reviewed for clear error. *Cede*, 758 A.2d at 491. Damages awarded pursuant to the accounting hearing are reviewed for an abuse of discretion. *See Gatz*, 59 A.3d at 1220-21.

C. Merits of the Argument

1. The Trial Court Properly Ordered Nasser to Disgorge the Bogus Consulting Fees

Nasser challenges the trial court's order requiring Nasser to disgorge the approximately $3.8 million of bogus consulting fees RAJN received when RAJN performed no consulting services whatsoever. (Op. at 43.)[14] In seeking to overturn the decision, Nasser audaciously argues that the trial court's

[14] The trial court allowed Nasser to keep an additional $4.1 million in bogus consulting fees made before 2002 on the grounds that Appellants were time-barred from challenging them. (OB at 10, 18 & 30 n.7.)

"characterization" of the fees as "consulting fees" was "clear error" because they were profit distributions. (AB at 45.) It was Nasser, not the trial court, who "characterized" the payments as consulting fees as part of one of his illegal tax evasion schemes. RAJN was not a shareholder at Kids and thus was not entitled to any profit distributions. Further, it is irrelevant how the trial court "characterized" the payments. As profit distributions that Nasser alone received, they had to be disgorged.

Nasser next argues that Dweck supposedly "acquiesced" to the payments. (AB at 45-46.) This argument suffers two fatal flaws. *First*, like Nasser's argument on the foreign money, it is inconsistent with Nasser's argument that Kids should be treated separately from its shareholders. Kids is entitled to the return of the bogus consulting fees and one of its shareholders could not acquiesce to Nasser's illegal conduct under Nasser's logic.

Second, Dweck never acquiesced to the payments. She vehemently opposed them. As the trial court found, Dweck complained about this to no avail. This was what led her to begin competing with Kids. (Op. at 11-12.)

In order to reverse the trial court's finding that the payments of bogus consulting fees to RAJN were entirely fair, this court must find that the court's findings were not sufficiently supported by the record and that its conclusions were not "the product of an orderly and logical deductive reasoning process." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1180 (Del. 1995) (citation omitted). Nasser has not met this standard.

Finally, Nasser argues that some unidentified portion of the Kids' claim are time-barred because the claim did not relate back to Nasser's initial complaint. (AB at 48.) This argument fails for two reasons. First, $903,333.37 was paid in the period 2006-2008, within three years of the filing of the amended complaint. (A1519.) Second, the trial court correctly found that the claim relates back to Dweck's initial complaint in 2005. Court of Chancery Rule 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when … the claim arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." In making this determination, "[t]he crucial consideration is whether a defendant had notice from the original pleadings that the plaintiff's new claim might be asserted against him." *Grace Bros. v. Siena Hldgs., Inc.*, 2009 Del. Ch. LEXIS 107, at *5 (June 5, 2009) (quoting *Texlon Corp. v. Bogomolny*, 792 A.2d 964, 972 (Del. Ch. 2001)).

As noted above, Appellants' original March 2005 complaint sought the appointment of a custodian (AR0018-20, AR0024) and cited, among other things, Nasser's dissipation of Kids' assets in support of this request (AR0019-20). Nasser was on notice that claims regarding the taking or dissipation of Kids' assets could be brought against him.

2. The Trial Court Did Not Abuse Its Discretion in Ordering Nasser to Return $2.4 Million in Unaccounted for Expenses

In asking this Court to overturn the trial court's finding that Nasser failed to account for $2.4 million, Nasser contends that "Dweck failed to present any

evidence that Nasser misappropriated any of the funds at issue, and all of Kids' expenses were fully accounted for . . . ." (AB at 49.)

Nasser erroneously attempts to shift the burden of proof to Dweck and completely misstates the relevant standards for an accounting. "[T]he party responsible for rendering an equitable accounting, ha[s] the burden of coming forward and of proving their expenditures. In such an action, the Court must rely on the party bearing the burden of proof to come forward with sufficient evidence to allow an accurate accounting based on the record created by the parties." *Dolby v. Key Box "5" Operatives*, 1996 Del. Ch. LEXIS 151, at *12-13 (Dec. 17, 1996) (internal citations omitted); *see also DiGiacobbe v. Sestak*, 2003 Del. Ch. LEXIS 158, at *13-14 (Mar. 3, 2003) ("The burden of proof in an accounting is generally stated simply as resting upon the party who is required to account.") (citations omitted). Where unaudited financial statements and certain listed expenses were not supported by sufficient evidence, or appeared to have been inaccurately recorded, an accounting should be rejected. *Debbs v. Berman*, 1986 Del. Ch. LEXIS 449, at *5-15 (Aug. 1, 1986).

The trial court with good reason found that Nasser had failed to meet his burden of explaining where $2,416,085 in Kids' funds went. As the trial court explained in detail:

> The Dweck Group identified $4,171,143 in expenses on Nasser's accounting that were not attributable to (i) amounts previously established at trial, (ii) purchases from third parties, (iii) rent, (iv) expenses found on Kids' general ledger in accounts relating to Kids' business lines that were active during 2006-2008, and (v) expenses found on Kids' general ledger in accounts relating to a joint venture with Seabreeze Apparel. . . .

> The unsupported three-page "accounting" and Niyazov's testimony are wholly insufficient to carry Nasser's burden. To accept such evidence would require a leap of faith. The sketchy document, Niyazov's testimony, and his lack of qualifications inspire skepticism, not belief.
>
> At trial, Kids' acting CEO Itzhak Djemal attempted to provide some support for Nasser's otherwise unsupported figures. Djemal tied $1,604,462 in salary expenses to contemporaneous payroll records. Djemal also traced $105,596 for samples to a worksheet prepared by Niyazov generated by Kids' AS-400 accounting software. I credit these amounts as corresponding to legitimate expenses.
>
> Otherwise, Djemal did not connect the figures in the accounting to Kids' general ledger or other credible documentation. He merely offered generalized explanations to the effect that yes, Kids incurred expenses in a particular category, or he speculated about the types of expenditures that might have been included. His testimony on these issues was not sufficient to carry Nasser's burden.
>
> Nasser properly accounted for $1,710,058 of the $4,171,143 in unsupported expenses identified by Dweck. Nasser has not carried his burden to account for the remaining $2,461,085. He is liable to Kids for this additional amount. (Accnt. Op. at 10-11.)

Nasser has presented no reason whatsoever to reverse any of these well-reasoned findings.

CONCLUSION

For all of the foregoing reasons, and those set forth in the Opening Brief, Appellants respectfully request that this Court (1) reverse the Final Order and Judgment and remand to the trial court for (a) a determination of the appropriate monetary relief under public policy, equity and the law of the case doctrine; (b) an order requiring Nasser to return the $15.1 million he seized and sent overseas or, alternatively, to pay Dweck her *pro rata* share of those funds; (c) an order reducing the amount of pre-judgment interest (if any) owed (if any damages are awarded); and (2) deny the cross-appeal in full.

Respectfully submitted,

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Dated: May 31, 2013

CERTIFICATE OF SERVICE

I, Thomas E. Williams, hereby certify that on May 31, 2013, I caused to be served a true and correct copy of the foregoing document upon the following:

BY FILE & SERVE XPRESS

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