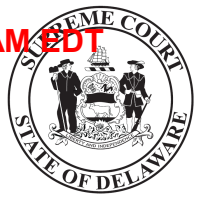

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BHOLE, INC., OUTLET LIQUORS, LLC, HIGHWAY I LIMITED PARTNERSHIP, and ALEXANDER J. PIRES, JR., Defendants Below, Appellants, v. SHORE INVESTMENTS, INC., Plaintiff Below, Appellee.	)	No. 305, 2012 On appeal from C.A. No. S09C-09-013 (ESB) in the Delaware Superior Court, Sussex

APPELLANTS' REPLY BRIEF
AND ANSWERING BRIEF ON CROSS-APPEAL

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Dated: October 15, 2012

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NATURE OF PROCEEDINGS

Appellants incorporate by reference the Nature of Proceedings set forth in their Amended Opening Brief. Appellee/Cross-Appellant ("Shore") has filed its joint Answering Brief/Opening Brief on Cross-Appeal. This brief contains Appellants' Reply Brief supporting their Appeal as well as Appellants' Answering Brief responding to Shore's Opening Brief on Cross-Appeal.

REPLY BRIEF

I. THE TRIAL JUDGE ERRED WHEN HE FOUND PIRES, OUTLET, AND HIGHWAY ONE LIABLE FOR TORTIOUS INTERFERENCE.

A. Established privileges protect Pires, Outlet, and Highway One from liability for tortious interference.

i. The privilege issues may be considered by this Court.

The application of the privileges to Pires should be fully reviewed. Shore does not disagree that the Trial Judge relied on innapposite law to hold Pires personally liable. The Trial Judge's cited authority to hold Pires liable is about tortious acts of an employee. The law of tortious interference is different. Further, Shore did not address Appellants' argument that issues raised *sua sponte* by a trial court can be addressed on appeal even if the question was not presented below.[1] Accordingly, this Court should allow the parties to be fully heard on whether the privileges protect Pires from liability, and the standard of review should be *de novo*.

Second, the application of the privileges to the entity Appellants should be reviewed for plain error. Appellants conceded that the issue was not raised below, and the Trial Judge did not raise the issue *sua sponte* like he did regarding Pires' liability.

Third, Shore contends that the privileges are affirmative defenses that were waived because they were not pled. This assertion, however, is without legal support. Shore cited to three non-Delaware cases, but failed to address the Delaware cases directly on point, which state that it is the plaintiff's burden to overcome the Section 770 "manager"

[1] Appellants' Op. Br. at 15, n.90.

privilege[2] and the affiliate privilege.[3] Under those cases, if the facts suggest that the manager and/or affiliate privileges apply, it is the plaintiff's burden to prove that the privilege does not apply.[4] Accordingly, Shore's affirmative defense argument is without merit.

ii. A recap of the critical facts and Appellants' arguments.

Bhole was owned and run by Patel until November 2008, when Bhole's stock was bought from Patel by Outlet. From November 2008 until April 2009, Outlet, through Bhole, operated the Old Store as a liquor store and paid Shore rent. In April 2009, the DABCC approved the transfer of the liquor license from the Old Store to the New Store. Outlet then used the Old Store as storage and paid rent until Shore demanded and regained possession in September 2009. The Trial Judge found that the stock purchase in November 2008 was not a breach,[5] but he did find that the closing of the Old Store liquor business in April 2009 was a breach.[6] Also important, Pires acted as the principal of Bhole, Outlet, and Highway One throughout this time period, and there is no evidence in the record that he acted outside his scope as principal.[7]

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[2] *See Grand Ventures, Inc. v. Paoli's Restaurant, Inc.*, 1996 WL 30022, at *4 (Del. Super.); *Ferko v. McLaughlin*, 1999 WL 167833, at *3 (Del. Super.); *Local Union 42 v. Absolute Envtl. Servs.*, 814 F. Supp. 392, 401 (D. Del. 1993).

[3] *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994); *see Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1039 (Del. Ch. 2006).

[4] *Shearin*, 652 A.2d at 591.

[5] Post-Trial Op. at 7, n.1.

[6] Post-Trial Op. at 13.

[7] A51 (Shore admitted in the pre-trial stipulation that Pires was principal of Bhole, Outlet, and Highway One); A105 (Jones admitting that Bhole was being operated as a liquor store by a Pires-controlled entity); A146-47 (Jones admitting that he knew Pires was negotiating an assignment of the lease on behalf of Highway One); A191 (Pires testifying that he is the managing partner of all of the entities);

With those facts in mind, it is clear that these established privileges protect Pires, Highway One, and Outlet from liability for tortious interference with Bhole's Lease.[8] The affiliate privilege protects Outlet and Highway One because they became affiliates of Bhole five months before the breach occurred. Outlet is a wholly-owned subsidiary of Highway One, and Outlet owns the stock of Bhole. Accordingly, Highway One and Outlet were not strangers to the Lease between Bhole and Shore when the Lease was breached. Moreover, the decision to transfer the liquor license was done in furtherance of the affiliated enterprises' shared goal of revitalizing the liquor store business that was failing while trapped in the Old Store. Regarding Pires' liability, his role as principal of the Bhole-Outlet-Highway One enterprise means he is entitled to the benefit of the affiliate privilege and the Section 770 "manager privilege." Morever, the evidence plainly shows that Pires was acting on behalf of the affiliated enterprises as a whole, and there is no evidence that he was motivated by personal benefit to the exclusion of his responsibilities as manager. Thus, all Appellants are protected from liability because of the privileges.

iii. Shore's counter-arguments are without merit.

Shore responded with an array of counter-arguments. Those arguments, however, are haphazardly presented, making it difficult to respond concisely. Shore's contentions fit into four broad categories which are addressed below.

A203 (Pires stating, "Everything I do is on behalf of any entity. I don't have any personal interest in any of the companies.").

[8] Appellants in their opening brief cited many Delaware cases that explain the Section 770 "manager privilege" and the "affiliate privilege." Appellants' Op. Br. at 17-20, n. 96-108.

a. Appellants came too late to the Lease so they still were strangers to that contract.

Shore's main argument is that Appellants came too late to the Lease to be protected by the manager and affiliate privileges. In particular, Shore asserts that Appellants improperly "bought" into those privileges through "crafty lawyering," and that the acquisition of an entity should not give the acquiring parties the privilege to direct the acquired entity to breach its existing contract.

This argument fails because it confuses the facts of the case, is reliant upon distinguishable non-Delaware law, and is contrary to Delaware precedent.

Shore focuses on the Bhole stock purchase as if that was the key fact in this analysis. It is not. The Trial Judge rightly found that the stock purchase was legal and not a breach of the Lease. The breach actually occurred five months later, and prior to that Shore had taken on the responsibilities of Bhole under the Lease by operating the liquor store and paying rent. Accordingly, Shore's focus on the stock purchase is misplaced. Pires, Outlet, and Highway One were not "strangers" to the Lease when the breach occurred; they had been manager and affiliates of Bhole for five months.

The two Pennsylvania cases Shore relies on are distinguishable. In both cases, the court found that the change of control transaction was itself an improper act because it breached an agreement providing exclusive rights, necessitating equitable relief.[9] Here, the stock sale

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[9] *The York Group, Inc. V. York Town Caskets, Inc.*, 924 A.2d 1234, 1245-46 (Pa. Super. 2007) (involving a stock sale and an exclusive agreement to sell caskets; also notable that the defendant's did not argue that their efforts were justified or privileged); *Temporaries,*

was proper, the Lease did not provide an exclusive right to a liquor store, and Chancellor Chandler denied Shore's request for equitable relief as "meritless."

Furthermore, Shore's argument is contrary to Delaware precedent. In *Tenneco Auto., Inc. v. El Paso Corp.*,[10] a controversy about insurance contracts, the plaintiff argued that the defendant was a stranger to the contracts because, at the time of contracting, it had no interest in the entity that had entered into the contracts. The defendant only obtained rights in the contracts later when its wholly-owned subsidiary acquired the contracting-entity. The Court rejected the plaintiff's argument and ruled that the acquisition had the legal effect of making the defendant a party to the contract and thus it was not a "stranger." Consequently, the tortious interference claim was dismissed.[11]

b. Not in the best interests of Bhole.

Shore's next argument is that Appellants' actions were not in the best interests of Bhole, thus they cannot be protected by the privileges. Shore begins this argument by asserting without record support that Pires was acting on his own behalf. This is refuted by the un-rebutted evidence that Pires was acting on behalf of the entities at all times.[12]

Inc. v. Krane, 472 A.2d 668, 679 (Pa. Super. 1984) (involving transfer from father to son for no consideration of substantially all assets of company subject to franchise agreement).

[10] 2007 WL 92621, at *5-6 (Del. Ch.).

[11] *Id.* Shore cites to *UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697 (Del. Ch.) for the proposition than an anticipatory breach may be actionable as intentional interference. *UbiquiTel* is distinguishable because it is applying Pennsylvania law, and its focus is on a merger being an improper act. Moreover, *UbiquiTel* involved inevitable future breaches after a merger, and here the breaching act of transferring the liquor license was conditional on DABCC approval.

[12] *Supra*, note 7.

Similarly, Shore contends that it was improper for Pires to direct Outlet to purchase Bhole's stock; but, as explained above, the stock purchase was legal and not a breach of the Lease, so it is irrelevant here.

The core of Shore's argument is its claim that Appellants' actions were not in Bhole's best interests, but rather in Appellants' selfish interests at the detriment of Bhole. This argument misunderstands the basis of the privileges. The affiliate privilege applies if the actions were taken in furtherance of the affiliates' shared legitimate business interests. Similarly, the manager's privilege applies if he is acting in order to benefit the entities as a whole. Together, those privileges protect Appellants because they acted in order to benefit the legitimate business interests of the affiliated enterprises. All of these entities were organized to make a profit for their owners, and Bhole was not accomplishing that goal under Patel's ownership and while confined to the Old Store. Appellants wanted to open a new, profitable liquor store. Using recognized business combination methods, Appellants invested in Bhole, took a chance on the liquor license transfer being denied, sold alcohol out of the Old Store until approval, then set up the New Store. These efforts served the overall goal of the affiliated enterprises - unlock the valuable assets of Bhole to make it, and its owners, a profit by running a better liquor store. Consequently, it is appropriate to afford Appellants the protection of the privileges.

c. Prospective contracts versus existing contracts

Shore posits that the privileges may only apply to prospective contracts and not existing contracts. This argument is based on the role of the "fair competition" defense in tortious interference claims, and

a Pennsylvania case. While it is true that "fair competition" may only be asserted as a defense in cases involving prospective contracts and not existing contracts, that point has no relevance here. The "fair competition" defense and its applicability is based on RESTATEMENT (SECOND) OF TORTS §768, which clarifies that "fair competition" is a defense and not a privilege.[13] Of course, the manager and affiliate privileges are "privileges," so the distinction in Section 768 is not applicable. In fact, the manager privilege is based upon Section 770, which states that it applies to both existing and prospective contracts.[14] Regarding the Pennsylvania case quoted by Shore,[15] it fails to consider Section 770 in its discussion about privileges. Further, the Pennsylvania court noted that Pennsylvania courts had not applied the privileges to existing contracts; however, Delaware courts have done so.[16]

d. Use of wrongful means

Finally, Shore argues that Appellants used wrongful means in their efforts advancing the common interests of the affiliated enterprises. In particular, Shore cites to Section 770, which provides in part that a manager is privileged to interfere with his entity's contracts if he "does not employ wrongful means."[17] Shore alleges that the $700,000 price

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[13] RESTATEMENT (SECOND) OF TORTS §768, cmt. a.

[14] *Id.* at §770("One who, charged with responsibility for the welfare of a third person, intentionally causes that person *not to perform a contract* <u>or</u> *enter into a prospective contractual relation* with another, does not interfere improperly...") (emphasis added).

[15] *PSC Info Group v. Lason, Inc.*, 681 F. Supp. 2d 577, 594-595 (E.D. Pa. 2010).

[16] *See e.g. Tenneco,* 2007 WL 92621, at *5-6 (involving existing insurance contracts); *Wallace v. Wood*, 752 A.2d 1175, 1182-83 (Del. Ch. 1999) (involving existing partnership agreement); *Shearin*, 652 A.2d at 590 (involving existing employment contract).

[17] Shore Ans. Br. at 15.

paid to Patel for Bhole's stock was a "bribe" that was all part of a "deliberately orchestrated scheme" to open the New Store and harm Shore.[18]

The means used by Appellants were not "wrongful" under Section 770. "Wrongful means" are defined in the Restatement as "predatory" and includes physical violence, fraud, and threats of illegal conduct.[19] Appellants' actions do not fit that definition. Shore characterizes the stock purchase price as a "bribe," and notes with incredulity that Appellants paid $700,000 for the stock of a business netting only thousands of dollars in the recent past. That narrow-minded view ignores the reason a high price was paid for Bhole's stock – Bhole's liquor license was a valuable asset that was completely underutilized in the Old Store but could lead to much success if it was transferred to the New Store. Likewise, Appellants' so-called "scheme" does not fit the definition of "wrongful means," because it was a plan carried out using recognized business combination tools and was motivated by a desire to make a profit and not any intent to injure Shore. In short, an intentional breach of contract, done for legitimate profit-seeking activities of the affiliated enterprises, is not "wrongful."

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[18] *Id.*

[19] RESTATEMENT (SECOND) OF TORTS § 767, cmt. c.

B. The Trial Judge failed to apply the Restatement Section 767 factors as required.

Appellants argued in their opening brief that numerous Delaware cases require that the Trial Judge consider and apply the factors of RESTATEMENT (SECOND) OF TORTS §767 to determine if Appellants' actions were improper. The Trial Judge did not mention the factors or apply them; therefore, a remand is required. Shore responded by making it seem like Appellants' argument rests on one case, stating that the Section 767 factors are "murky," and again noting the distinction between existing and prospective contracts.

None of Shore's arguments have merit. First, Shore claims that Appellants' argument is based on one case.[20] To the contrary, Shore cited five Delaware cases which all state that a fact-finder must consider the Section 767 factors when determining whether the defendant's conduct was improper.[21] Indeed, the opinions in the *Wave Division* case, cited by Shore, both from this Court and the Superior Court, state that the Section 767 factors need to be considered.[22] Second, while the Section 767 factors may be considered "murky" by some, a consideration of them are nonetheless required. Lastly, the Section 767 factors must be considered regardless of whether the contracts at issue are existing or prospective. Both the text and comments of Section 767 make this clear.[23]

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[20] Shore Ans. Br. at 21.

[21] Appellants' Op. Br. at 24, n. 115.

[22] *Wave Div. Holdings, v. Highland Capital Mgmt.*, 2012 WL 2928604, 4 (Del.); *Id.*, 2011 WL 5314507, at *11-13 (Del. Super.) (citing *Hursey Porter & Assocs. v. Bounds*, 1994 WL 762670, at *13-14 (Del. Super.)).

[23] RESTATEMENT (SECOND) OF TORTS § 767 ("In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: ....) (emphasis added); *Id.*, cmt. a. ("This Section applies to each form of the tort

II. IT WAS LEGAL ERROR TO IMPOSE PUNITIVE DAMAGES.

Appellants asserted in their opening brief that it is unclear what standard of review should apply to determine whether a party is liable for punitive damages. Appellants cited to both Delaware and Federal decisions which show that a *de novo* review is appropriate.[24] Shore agreed that the standard is unclear, and proposed using the clearly erroneous standard, but failed to offer a relevant citation or address the many cases collected by Appellants. Therefore, Appellants contend that this Court should engage in a *de novo* review of the record to determine if the Trial Judge's decision to award punitive damages was proper under the law and based on sufficient evidence.

A. There is not sufficient evidence in the record to support imposing punitive damages.

Punitive damages are only appropriate when there is evidence of egregious conduct of an intentional or reckless nature.[25] There is no evidence of egregious conduct in this case. Delaware courts have used terms like "outrageous," "malicious," "fraudulent," and "reprehensible," to describe the type of behavior that must be present to justify an award of punitive damages.[26] That strong language shows how serious a decision it is to find liability for punitive damages. Here, there is no evidence that meets the high standard necessary to justify punitive damages. Consequently, because there is no evidence in the record of egregious conduct, which is necessary to justify punitive damages, the Trial

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as stated in §§ 766-766B"; §766 is for existing contracts, §766B is for prospective contracts).

[24] Appellants' Op. Br. at 25, n. 119.

[25] *Winkler v. Delaware State Fair, Inc.*, 1992 WL 53412, at *3 (Del.).

[26] *See Williams v. Manning*, 2009 WL 960670, at *12 (Del. Super.).

Judge's award of punitive damages must be reversed.

Shore emphasizes the fact that the Trial Judge found that Appellants acted intentionally. That is a necessary finding, but it is not sufficient - there must also be egregious conduct.

Appellants carried out their business plan with intent. But their purpose was not animated by malice or evil motive; rather, the purpose was to improve Bhole's failing business and open a profitable liquor store. This was done openly, using recognized business combination methods, and getting DABCC approval to transfer the liquor license. And they transferred the business between the stores only after having been told by Chancellor Chandler that Shore's belief that it had a right to a perpetually liquor-licensed store was "meritless." Appellants' conduct cannot be characterized as egregious, outrageous, reprehensible, etc. And, tellingly, the Trial Judge did not describe it that way.

Moreover, an intentional breach of contract alone does not justify an award of punitive damages. It must be an "egregious case[] of wilful or malicious breach of contract."[27] This Court has recognized that awarding punitive damages for intentionally breaching a contract is in direct conflict with the efficient breach theory, which allows a party to break a contract if he gains enough from the breach that he can compensate the injured party and still profit.[28] Due to that concern, Delaware courts have only permitted punitive damages in a limited group of breach of contract actions, namely in the fiduciary and insurance

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[27] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

[28] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996); *see Allied Capital Corp. v. GC-Sun Holdings*, 910 A.2d 1020, 1039 (Del. Ch. 2006).

context.[29] A commercial lease is not in that limited group.

The Trial Judge's only other finding supporting his award of punitive damages is that Appellants breached the Lease despite "knowing full well how important it was to Shore to have an operating liquor store on its premises."[30] That finding is flawed and does not support an award of punitive damages. Shore wanted a liquor store on its premises into perpetuity, but it did not have that right. This was made clear to the parties by Chancellor Chandler, who explained that only the liquor license holder had an interest in the license, and Shore's beliefs to the contrary were unreasonable. Shore received the rights it had in the Lease - rent or possession. The fact that Appellants' actions defied Shore's unreasonable belief that it could forever have a liquor store in the Old Store is not enough to support imposing punitive damages.

Appellants also contend that they did not have a sufficiently culpable state of mind to justify imposing punitive damages, because they had a good faith belief that their course of action was legally permissible.[31] Shore responded that a belief that one's actions were permitted does not prevent the imposition of punitive damages, but the Pennsylvania case it cited does not discuss punitive damages.

In summary, there is not sufficient evidence in the record to justify the Trial Judge's imposition of punitive damages, because the nature of Appellants' conduct was not egregious.

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[29] *Pressman*, 679 A.2d at 446; *Pack & Process, Inc. v. Global Paper & Plastics*, 1996 WL 490264, at *9-11 (D. Del).

[30] Post-Trial Op. at 27.

[31] Appellants' Op. Br. at 28 (citing *Littleton v. Young*, 1992 WL 21125, at *2 (Del.)).

III. THE TRIAL JUDGE ERRED WHEN DETERMINING THE AMOUNT OF RENT DUE.

A. There is no record support for the Trial Judge's finding that Shore reasonably mitigated its damages from February 2010 to March 2011.

Shore failed to act reasonably to mitigate its damages. Specifically, there is no evidence in the record to support the Trial Judge's finding that Shore made reasonable mitigation efforts from February 2010 to March 2011. Seventeen months passed between the time Shore gained possession of the Old Store and trial. There is virtually no evidence about what Shore did to mitigate its damages for the last thirteen months of the time period. With such a threadbare record, it was clear error for the Trial Judge to conclude that Shore mitigated its damages reasonably during that thirteen month period.

Shore counters that Appellants are being "hypercritical" about its efforts, and that it did not need to reduce its expectations and was permitted to demand the same rent.

Shore's arguments miss the point. The negotiations with prospective tenants were unsuccessful primarily because Shore was unwilling to renovate the store and insisted on the same rent. If Shore was acting reasonably, it would have tempered its expectations for the rent obtainable from a new tenant with the reality that the Old Store had not been renovated in thirty-three years. After those negotiations failed, Shore simply listed the Old Store with a realtor and then rejected the realtor's advice about making the store more marketable. In short, Shore made almost no effort to mitigate in those thirteen months, and the efforts taken were not reasonable. It is from this paltry record, which mostly cuts against Shore, that the Trial Judge found Shore's mitigation efforts reasonable. That finding is not supported by the record.

B. It was legal error to award Shore the rent that had not yet come due at the time of trial because the Lease did not contain an acceleration clause.

A commercial landlord is not entitled to rent that comes due post-trial unless the lease contains an acceleration clause.[32] Here, the Lease did not contain an acceleration clause. Accordingly, Shore is not entitled to the five months of rent that came due after trial concluded, which was when the evidence closed on March 8, 2011.

Shore barely addressed this argument in its answering brief. Instead, Shore discussed the surrender/acceptance issue that was a focus below. Appellant did not appeal the Trial Judge's ruling on that issue because it involved factual findings on a developed record. Regardless, Shore decided to re-litigate the surrender/acceptance issue in an apparent response to Appellants' acceleration clause argument. While these issues may appear interrelated, careful consideration reveals they are not. Whether a landlord has "accepted" a tenant's "surrender" of possession affects the tenant's rent obligation *after possession is relented*. On the other hand, whether a lease has an acceleration clause determines the amount of rent damages a landlord is entitled to *at the time of trial*. Accordingly, the surrender/acceptance issue and the acceleration clause issue present distinct questions that must be analyzed differently. Shore presented no analysis of Appellants' acceleration clause argument.

While there is no Delaware authority directly on point, there is a significant amount of persuasive authority which holds that, without an acceleration clause in the lease, rent that comes due post-trial may not

[32] *See* Appellants' Op. Br. at 33, n. 143 (collecting authority).

be recovered. Appellants collected that authority in its Opening Brief and thus do not cite to all of it again here.[33]

A brief review of the underlying rationale of this rule, however, is appropriate. A tenant is paying the landlord for the right to possess its land, and thus rent comes due in increments based upon the tenant's time present on the land.[34] Thus, acceleration of the rent for the whole term is inequitable because it creates the possibility of double recovery -- the landlord being awarded rent from a prior out-of-possession tenant while being paid rent from a new tenant. Accordingly, with accelerated rent in disfavor, it is only awarded if the parties agreed to it in the lease. Now, this rule is in tension with the concept of expectation damages, and the double-recovery concern can seemingly be dealt with by requiring the landlord to mitigate its damages. This is where the date of trial comes into play. Leading up to and at trial, a court can prevent the double-recovery result from happening. Once the record is closed and the trial is over, however, the court can no longer play this role. Accordingly, unless the landlord bargained for the benefit of an acceleration clause, it may only recover the rent that has come due up to the date of the conclusion of the trial.

Shore did respond to Appellants' argument that trial ends when the evidence is closed. Shore argues that a bench trial actually ends when the judge issues a decision. Shore's argument, in addition to being against common sense, does not consider the fact that the judge cannot

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[33] *Id.*

[34] RESTATEMENT (SECOND) PROPERTY, *Land. & Ten.* § 12.1 (1977) cmt. k (explaining the rule and making an illustrative comparison to a promissory note).

prevent double recovery of rent once the evidence closes, since the judge will not be receiving new information while a decision is pending.

In summary, this Court should adopt the widely accepted rule that a commercial landlord may not recover rent that comes due post-trial unless the lease contains an acceleration clause. Here, it is undisputed that there is no acceleration clause in the Lease, the last pre-trial rent payment accrued in March 2011, and the last payment was to accrue in August 2011. Thus, five months of rent must be deducted from the awarded amounts, and the interest award must also be reduced. A remand is therefore necessary.

SUMMARY OF ARGUMENT FOR ANSWERING BRIEF ON CROSS-APPEAL

I.A. The Trial Judge committed legal error when he found that Cross-Appellees were not liable for tortious interference with Shore's business expectancy.

DENIED. The Trial Judge did not commit legal error regarding this claim, and the Trial Judge's finding that Shore did not prove this claim was not clearly erroneous and was instead supported by record evidence. Moreover, the default judgment against Patel did not establish the facts needed to prove this claim.

I.B. Shore's [sic] requests instructions on remand for its tortious interference with is business expectancy claims.

DENIED. See Response to I.A. By way of further response, the Trial Judge properly rejected Shore's experts, and this Court should not instruct the Trial Judge to reconsider that decision.

II.A Although the Trial Judge properly assessed an award of punitive damages against Pires, et. al., the amount of $25,000.00, is grossly inadequate.

DENIED. Assuming *arguendo* that the imposition of punitive damages was not legal error, the amount awarded was not an abuse of the Trial Judge's discretion.

III.A The Trial Judge erred when he declined to assess damages against Patel, as Patel knowingly and intentionally enabled Pires, et. al., to breach the lease with Shore; and Patel is liable due to a default judgment of liability.

DENIED, to the extent this argument applies to Appellants. To the extent that Shore seeks a judgment against Patel, the Trial Judge

properly exercised his discretion in finding no liability.

IV.A. The Trial Judge erred as to the amount of attorney's fees awarded to Shore, the prevailing party in this action, as he improperly allocated percentages to the amount of time spend on each claim.

DENIED. The Trial Judge properly applied the relevant law and did not abuse his discretion in setting the attorney's fee award.

STATEMENT OF FACTS

Appellants incorporate by reference the Statement of Facts set forth in their Amended Opening Brief. The parties competing statements of fact have adequately included that facts necessary to determine the points in controversy.

Appellants are compelled to highlight Shore's failure to support a number of its key factual assertions with adequate references to the record. Appellants will not burden the Court with a recitation of each instance where this occurred. Two examples, however, require discussion. Shore asserted that "BHole was considered Shore's anchor tenant."[35] That statement is not supported by a reference to the record. That is not an oversight — there is no support in the record for that statement. There was no testimony, from Jones or anyone else, that the Old Store was an "anchor" tenant, and the Lease does not include the provisions typically found in an anchor lease. Along the same lines, Shore used the loaded idiom "white elephant" nine times in its brief to describe the Old Store, including three times in its statement of facts; yet, none of the witnesses used that phrase at trial.

[35] Shore Op. Br. at 4.

ANSWERING BRIEF ON CROSS-APPEAL

I. THE TRIAL JUDGE'S FINDING AGAINST SHORE'S TORTIOUS INTERFERENCE WITH BUSINESS EXPECTATIONS CLAIM MUST BE AFFIRMED.

A. The Trial Judge did not commit legal error by requiring Shore to prove its claim against Appellants, and the Trial Judge's finding that Shore did not have a reasonable business expectancy is supported by the record.

i. Question Presented

Whether the Trial Judge properly found against Shore on its claim of tortious interference with business expectancy.

ii. Scope of Review

A judge's factual finding is only reversible if it is not supported by the record or is clearly wrong.[36] Legal issues are reviewed *de novo*.[37]

iii. Merits of Argument

The Trial Judge found against Shore's claim for tortious interference with business expectations. Shore challenges the specific finding that Shore did not have a reasonable expectation that Bhole would exercise its option to renew the lease until August 2018.[38] This finding has ample support in the record, and thus must be affirmed.

Shore's primary argument is built on the premise that the default judgment against Patel had the effect of proving all of its allegations against Appellants regarding this claim. Indeed, Shore relies almost exclusively on its complaint as record support for this argument.[39] Shore's argument, however, is contrary to both the law and public policy.

It is well-settled that a default judgment does *not* establish liability or admit facts as it relates to other active co-defendants.

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[36] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).
[37] *Id.*
[38] Post-Trial Opinion at 28-29.
[39] Shore Op. Br. at 36-37.

"The default of one defendant, although an admission by him of the allegations of the complaint, does not operate as an admission of such allegation as against a contesting co-defendant."[40] A default judgment has no effect on a co-defendant that has answered the complaint, contested the allegations, and defended the case all the way to a trial.[41] The *Gebelin* case Shore relies upon is distinguishable because all of the defendants defaulted in that case, and the main issue was whether a hearing on damages should go forward despite some bankruptcy filings. Consequently, the default judgment against Patel does not prove Shore's tortious interference with business expectations claim.

Likewise, Shore's argument goes against public policy. If Shore's position was embraced, a party's efforts defending itself would be for nought if a co-defendant defaulted. Taking Shore's argument to its logical extreme, a plaintiff could sue a non-existent entity, level identical allegations against that entity as it does its main target, then essentially win the case against its true target due to the default judgment. That does not comport with our jurisdiction's concern for due process and reaching the merits of a case.

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[40] *Dade County v. Lambert*, 334 So.2d 844, 847 (Fla. App. 1976); *see* 49 C.J.S. *Judgments* § 273 ("A default by one defendant is not binding upon a codefendant as an admission of liability.").

[41] *West. Heritage Ins. Co. v. Superior Court*, 132 Cal. Rptr. 3d 209, 221 (Cal. App. 2011) ("It is an established principle of law that admissions implied from the default of one defendant ordinarily are not binding upon a codefendant who, by answering, expressly denies and places in issue the truth of the allegations thus admitted by the absent party."); *Taylor v. Socony Mobil Oil Co.*, 51 Cal.Rptr. 764, 766 (Cal. App. 1966) ("The validity of plaintiff's argument rests upon his major premise that an admission implied from the default of one defendant is binding upon an answering codefendant who has denied the relevant allegations of the complaint. His position is untenable."); *Fawkes v. Nat. Refining Co.*, 341 Mo. 630, 637 (Mo. 1937) (same).

Shore's backup argument that the Trial Judge's finding was based upon speculation is unpersuasive. Shore contends that the only evidence in the record regarding Patel's intention came from Jones' testimony that he expected Bhole would renew its lease. Curiously, Shore only cites to Chancellor Chandler's opinion as record support for this assertion.[42]

A review of the record, however, reveals that the Trial Judge's finding on this claim was based on ample evidence. For instance, Jones was aware that Bhole's business was bad in 2006, and that it was even worse in 2007, only netting $4,700 with Patel drawing just a $50,000 salary.[43] Similarly, Pires testified that small stores like the Old Store were less valuable in the marketplace with the emergence of big box stores like the New Store.[44] Moreover, Jones was aware of the negotiations between Patel and Pires,[45] and he knew that Pires intended to move the liquor license from the Old Store to the New Store if he received the necessary approvals.[46] Based on the foregoing evidence in the record, which was discussed in the Post-Trial Opinion,[47] the Trial Judge had a more than adequate basis to find that Shore did not prove that it could reasonably expect that the lease would have been renewed.

Thus, the Trial Judge properly found that Shore failed to prove its tortious interference with business expectations claim, and the default judgment against Patel cannot be used to support that claim against Appellants. Moreover, the requested remand instructions are irrelevant.

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[42] Op. Br. at 36, n. 132-33.
[43] A129-30.
[44] A265-66.
[45] A102.
[46] A98-99. Furthermore, Pires testified that Patel wanted to leave the liquor business and move out of state. A285-86.
[47] Post-Trial Op. at 29.

II. IF THIS COURT HOLDS THAT THE IMPOSITION OF PUNITIVE DAMAGES WAS NOT LEGAL ERROR, THE AMOUNT THE TRIAL JUDGE AWARDED WAS NOT TOO LOW TO BE AN ABUSE OF DISCRETION.

A. Assuming *arguendo* that the imposition of punitive damages was not legal error, the amount awarded was not an abuse of the Trial Judge's discretion.

i. Question Presented

Was the Trial Judge's decision to award $25,000 in punitive damages an abuse of discretion?

ii. Scope of Review

The question presented concerns findings of fact by the Trial Judge. This Court will only reverse the Trial Judge's finding if it is not supported by the record or is clearly wrong.[48] To the extent the question presented involves issues of law, review is *de novo*.[49]

iii. Merits of Argument

It must first be noted that Appellants are contesting the Trial Judge's decision to impose punitive damages, as more fully argued in Appellants' Opening Brief Section II and Appellants' Reply Brief at Section II. The arguments presented here shall not be construed as a waiver of those arguments.

Turning to Shore's argument, the issue presented is not whether punitive damages may be imposed, but rather whether the *amount* awarded constitutes reversible error. That distinction is critical because it determines what standard of review applies. Regarding the amount of a punitive damages award, the decision is reviewed for an abuse of discretion.[50]

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[48] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

[49] *Id.*

[50] *Int'l. Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000) (reviewing for an abuse of discretion an award of damages

Shore has not shown that the Trial Judge, in setting the punitive damages award at $25,000.00, abused his discretion. Shore complains that the amount awarded does not achieve its own subjective view of justice or adequately take into account the apparent wealth of Appellants (of which there is no record evidence beyond mere generalities). Further, Shore cites to no authority for its argument that a punitive damages award can be upset on appeal due to supposed gross inadequacy.[51] Instead of legal citations, Shore relies upon a colorful recap of its perspective on Appellants' actions. That is not enough under the applicable standard of review. Finally, it must be kept in mind that Shore, arguing in the name of society at large, ultimately receives the windfall punitive damages award.

At bottom, the Trial Judge observed the parties at trial, considered the entire record, and decided upon an "adequate sanction." In such a scenario, the Trial Judge's award amount is entitled to significant deference, and Shore has not demonstrated that the amount chosen was an abuse of discretion.

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by the Court of Chancery).

[51] Indeed, the case law on the issue is almost always about the opposite concern - excessive punitive damages awards. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

III. THE TRIAL JUDGE HAD A REASONED BASIS TO CONCLUDE THAT PATEL DID NOT CAUSE ANY DAMAGE TO SHORE.

A. The Trial Judge properly found that Patel was not legally responsible for any damages suffered by Shore.

i. Question Presented

Did the Trial Judge err by not assessing damages against Patel?

ii. Scope of Review

The question presented concerns findings of fact by the Trial Judge. This Court will only reverse the Trial Judge's finding if it is not supported by the record or is clearly wrong.[52] To the extent the question presented involves issues of law, review is *de novo*.[53]

iii. Merits of Argument

Patel has not filed an appeal, and he has not entered an appearance in this appeal. Further, Appellants are not representing Patel's interests in this appeal. Indeed, a judgment against Patel could benefit Appellants by providing a source of contribution. That said, Appellants briefly respond here to ensure that none of their arguments are waived and to provide an adversarial perspective.

Once again, the effect a default judgment in a fully litigated case is in question. Here, on this precise issue, the law is less clear. The broad rule is that a default judgment "normally possesses all the attributes of a final judgment."[54] Sometimes, however, a default judgment does not result in the assessment of damages against a defaulted party if the facts proven at trial do not support it.[55] While the law in

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[52] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).
[53] *Id.*
[54] *Werb v. D'Alessandro*, 606 A.2d 117, 119 (Del. 1992).
[55] *See In re Meyer*, 373 B.R. 84, 88-89 (9th Cir. BAP 2007) (discussing default judgments generally, and stating, "[i]f the plaintiff is not entitled to the relief requested, the court should

Delaware on this particular issue is not apparent, a trial court should have the discretion to find that, upon a full examination of the facts, a defaulted party is not liable.[56]

Shore also advances a factual argument that should be rejected. The Trial Judge found that Patel "did not conspire with the other defendants to breach Bhole's lease."[57] Shore challenges this factual finding, pointing specifically to Patel's sale of Bhole's stock. But the Trial Judge rejected this contention in another part of the opinion, finding that "Patel had the right to sell his common stock in Bhole and [Appellants] had the right to purchase it."[58] Shore has not demonstrated that this rationale is incorrect. Accordingly, the Trial Judge did not commit clear error by finding that Patel was not liable to Shore.

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not enter default judgment and may even enter judgment in favor of the defaulted defendant."); 10A FED. PRAC. & PROC. CIV. § 2690 (3d ed.) ("Default Judgments in Actions Involving Several Defendants").

[56] *See New Castle Shopping, LLC v. Penn Mart Discount Liquors, Ltd.*, 2009 WL 5197189, at *2 (Del. Ch.) (stating that a trial court has discretion to decide whether to enter a default judgment based on the circumstances); *Daily Underwriters of Amer. v. Md. Auto. Ins. Fund*, 2008 WL 3485807, at *2 (Del. Super.) (same).

[57] Post-Trial Opinion at 31.

[58] Post-Trial Opinion at 29.

IV. THE TRIAL JUDGE DID NOT ERR BY AWARDING A REDUCED AMOUNT OF ATTORNEY'S FEES.

i. Question Presented

Did the Trial Judge err by declining to award attorney's fees regarding Shore's failed efforts in the Court of Chancery and by reducing the requested amount regarding Shore's efforts in the Superior Court?

ii. Scope of Review

This Court reviews attorneys' fee awards for abuse of discretion.[59]

iii. Merits of Argument

Shore contends that the Trial Judge abused his discretion by declining to award Shore the full amount of attorney's fees and costs it requested. As explained below, the Trial Judge's decision on the amount Shore was entitled to under the prevailing party provision of the Lease was based on a reasoned consideration of the circumstances of this case and an application of established legal principles. Thus, the Trial Judge's fees and costs decision must be affirmed.

Shore is entitled to seek an award of reasonable attorney's fees and costs against Bhole (and successor Outlet) because the Lease contains a "prevailing party" provision. That provision reads:

> 19. ENFORCEMENT OF LEASE
> Tenant and Landlord agree to pay to the prevailing party all reasonable costs, attorney's fees, and expenses which shall be made and incurred by the Tenant or Landlord as the case may be in enforcing the respective covenants and agreements of this lease.[60]

Shore sought nearly $100,000 in attorney's fees, costs, and expenses. The Trial Judge ultimately awarded Shore $43,239.05.[61]

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[59] *Tekstrom, Inc. v. Savla*, 918 A.2d 1171 (Del.).
[60] A249.
[61] Fees and Costs Opinion at 6.

a. Overview of the Trial Judge's Fees and Costs Opinion.

A brief overview of the Trial Judge's April 9, 2012 opinion on fees and costs is necessary to frame and address Shore's confusing arguments. The Trial Judge first ruled that Shore could not recover its fees and costs related to the Court of Chancery action because Shore was not the prevailing party in that court. Next, the Trial Judge ruled that Shore's recovery of fees related to the Superior Court action was limited to those incurred pursuing the breach of lease claim because only the Lease gave Shore a right to fees. Finally, the Trial Judge considered the entire Superior Court fee request and allocated a percentage to the pursuit of the breach of lease claim. Below, Appellants defend each of the Trial Judge's decisions and address Shore's arguments to the extent they seem to apply to each decision.

b. The Trial Judge properly declined to award any fees or costs related to the Court of Chancery Action.

Paragraph 19 of the Lease is a prevailing party provision. "Delaware courts routinely enforce contract provisions allocating costs of legal actions arising from the breach of a contract,"[62] and courts "typically look[…] to the substance of a litigation to determine which party predominated."[63] The specific language of the provision determines its breadth and effect.[64] Generally speaking, a defendant is the prevailing party if its motion to dismiss is granted.[65]

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[62] *AHS N.M. Holdings, Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *9 (Del. Ch.).
[63] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch.).
[64] *Brandin v. Gottlieb*, 2000 WL 1005954, at *27-28 (Del. Ch.).
[65] 20 AM. JUR. 2d *Costs* §23.

The language of paragraph 19 restricts the award of fees and costs to the party that prevails in an effort to enforce the terms of the Lease. Paragraph 19 does not, however, speak to a scenario where there have been multiple efforts in different venues. Applying the plain meaning of paragraph 19 to the facts of this case leads to the conclusion that Shore did not prevail in its effort to enforce the Lease's provisions in the Court of Chancery because Chancellor Chandler granted Appellants' motion to dismiss. Furthermore, fee-shifting provisions can be drafted in a way that deals with multiple-venue litigation,[66] but that is not the case here.

Furthermore, it is appropriate for courts to consider the results obtained when deciding on how much to award in fees.[67] As Chancellor Strine stated in *Fasciana v. Elec. Data Sys. Corp.*, "The idea that an award of attorneys' fees should be reduced to reflect the fact that a party only achieved limited or partial success is not a novel one."[68] The Chancellor ultimately concluded in *Fasciana* that, because the plaintiff had only "achieved partial or limited success ... a diminution in [the plaintiff's] requested fees [was] in order."[69]

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[66] *Salaman v. National Media Corp.*, 1994 WL 465535, at *2-3 (Del. Super.) (following a successful jury trial, the Superior Court awarded fees related to a dismissed Court of Chancery action because of the specific language of the fee-shifting provision, which contemplated multiple efforts in different venues and permitted the recovery of fees and costs as long as those efforts were not frivolous.).

[67] *See* Del. Lawyers R. Prof. Conduct. 1.5(a)(4) ("The factors to be considered in determining the reasonableness of a fee include the following: . . . (4) the amount involved and the results obtained.").

[68] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003).

[69] *Id.* 186.

The Trial Judge's decision to not award fees and costs related to Shore's Court of Chancery action is supported by the above principles of law. Indeed, the Trial Judge cited to some of the same authority.[70] The Trial Judge recognized that Shore was not entitled to its fees and costs related to the Court of Chancery action under paragraph 19 of the Lease "because it was not the prevailing party there."[71] Likewise, the Trial Judge noted how it was appropriate to consider the results obtained, and he found that Shore did not obtain a favorable result in the Court of Chancery. Accordingly, the Trial Judge's decision to not award the fees and costs related to the Court of Chancery action was an appropriate exercise of his discretion.

Shore's argument that it should be awarded fees and costs related to its Court of Chancery action is meritless. Shore contends that the Court of Chancery action was an "instrumental part" of its efforts to enforce the Lease.[72] To the contrary, its Court of Chancery action was hardly instrumental. Chancellor Chandler rejected Shore's specific performance claim - its sole basis for equitable jurisdiction - as a "novel" and "meritless" theory.[73] Furthermore, Shore relies upon a quote from the United States Supreme Court's decision in *Hensley v. Eckerhart* that a plaintiff who wins "substantial relief should not have her attorney's fee reduced simply because the district court did not adopt each contention raised."[74] But Shore failed to include the next sentence, which states, "But where the plaintiff achieved only limited success, the

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[70] Fees and Costs Opinion at 4.
[71] Fees and Costs Opinion at 4.
[72] Shore Op. Br. at 48.
[73] A26.
[74] 461 U.S. 424, 440 (1983), cited at Shore Op. Br. at 48.

district court should award only that amount of fees that is reasonable in relation to the results obtained."[75] Here, the Trial Judge found that Shore only achieved limited success overall, and no success in the Court of Chancery. The Trial Judge correctly recognized that Shore's failed effort in the Court of Chancery meant it was not the prevailing party in that venue.

c. The Trial Judge properly limited Shore to its fees and costs related to the breach of lease claim and correctly did not permit recovery of fees on its tort claims.

Shore seems to argue that the Trial Judge erred when he limited Shore's fees to those incurred proving the breach of lease claim and similarly decided to not award fees for Shore's tort claims. The Trial Judge's decision was correct, because Shore's right to attorney's fees arose from the Lease itself. Without the Lease, Shore would not have had a right to be awarded fees and costs at all.[76] Furthermore, paragraph 19 only contemplates the landlord or the tenant paying the other's fees, so it would be improper for Shore to use the Lease's fee-shifting provision against a third-party. The tortious interference claims were only asserted against third-parties, so the fee-shifting provision does not apply to those claims. Thus, while the Trial Judge found in Shore's favor on its tortious interference with an existing contract claim, that tort claim does not entitle Shore to attorney's fees. Consequently, the Trial Judge's decision on this issue was correct.

Shore asserts that paragraph 35 of the Lease entitles Shore to its

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[75] *Id*. at 440 (quoted in *Fasciana*, 829 A.2d at 185).

[76] *TranSched Systems Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466, at *1 (Del. Super.) (explaining American rule and contract exception).

fees related to the tort claims. This argument fails for two reasons. First, this argument was not raised below. In the parts of the record highlighted by Shore in its question presented section, only paragraph 19 was cited as the reason Shore was entitled to fees and costs.[77] Second, paragraph 35 is irrelevant to the issue of attorney's fees and costs because it is a mitigation of damages provision.[78] Shore contends that Bhole's participation in the tortious interference activities violated paragraph 35; thus Shore's tort claims were asserted to enforce that paragraph, entitling it to fees and costs on those claims. This argument is based on a misunderstanding of paragraph 35. That provision imposes a contractual duty on the non-breaching party to minimize the damages caused by the breaching party. The only way Bhole could breach that provision would be if it failed to minimize any damages caused by *Shore's conduct*. Here, the breach of the Lease was by Bhole, so paragraph 35 imposes a duty on Shore only. In short, paragraph 35 has nothing to do with Shore's tort claims. Thus, paragraph 35 does not entitle Shore to attorney's fees and costs related to those tort claims.

d. The Trial Judge did not abuse his discretion by using percentages to determine the amount of fees to award.

Shore argues that the Trial Judge "arbitrarily assigned percentages" to its request for attorney's fees and costs related to the Superior Court action, resulting in an improper reduction of the award. To the contrary, the Trial Judge acted pursuant to established legal principles and was within his discretion in reducing the award. Courts regularly apportion a prevailing party's fees by assigning percentages on a claim-

[77] Shore Op. Br. at 46, n. 166.
[78] Post-Trial Op. at 16.

by-claim basis relative to the effort expended.[79] Here, the Trial Judge reviewed the entire record, then he considered the elements of the claims, discussed what it would take to prove each claim, and noted that there would be some overlap of those efforts. Based on that careful analysis, the Trial Judge made his allocation of efforts and ultimately concluded that, regarding Shore's pursuit of the breach of lease claim, it was reasonable and appropriate to award Shore 65% of its requested attorneys' fees and all of its costs. Shore has not explained why this decision was an abuse of discretion.

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[79] *See Dias v. Purches*, 2012 WL 4503174, at *10 (Del. Ch.); *Fasciana*, 829 A.2d at 187-188; *Architects Studio v. Sheehy Ford*, 1990 WL 1104271, at *1 (Del. Super.); *see also Relax Ltd. v. ANIP Acquisition Co.*, 2011 WL 4954174, at *4 (Del. Super.) (assigning percentages to claims per success, applying English law).

CONCLUSION

Based on the foregoing reasons, and the reasons stated in the Appellants Amended Opening Brief, Appellants request that this Court reverse in part and remand in part certain decisions made by the Trial Judge in the Post-Trial Opinion, and affirm in its entirety the Trial Judge's Fees and Costs Opinion.

Respectfully Submitted,

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