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Case Number 65,2013

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,	)	No. 65,2013
v.	)	
ALBERT NASSER,	)	Court Below: Court of Chancery of the State of Delaware, Cons. C.A. No. 1353-VCL
Defendant/Third-Party Plaintiff Below, Appellee,	)	
and	)	
KIDS INTERNATIONAL CORPORATION,	)	
Nominal Defendant Below, Appellee,	)	
v.	)	
KEVIN TAXIN and BRUCE FINE,	)	
Third-Party Defendants Below, Appellants.	)	

APPELLANTS' OPENING BRIEF

OF COUNSEL:

William B. Wachtel, Esquire
John H. Reichman, Esquire
WACHTEL MASYR & MISSRY, LLP
885 Second Avenue, 47th Floor
New York, NY 10017
(212) 909-9500

Bruce L. Silverstein (No. 2495)
Martin S. Lessner (No. 3109)
Kathaleen St. J. McCormick (No. 4579)
Thomas E. Williams (No. 5668)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Plaintiffs and Third Party Defendants/Appellants

Dated: April 1, 2013

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NATURE OF PROCEEDINGS

This case involves claims and counterclaims that Plaintiff Gila Dweck and Defendant Albert Nasser ("Nasser") have brought against each other with respect to Kids International Corp. ("Kids").[1]

This is the second time this case has been before this Court. Nasser appealed Vice Chancellor Lamb's earlier decision granting Plaintiffs' motion to enforce a settlement agreement, arguing that the settlement agreement was "void as against public policy" because overseas payments made by Kids "were part of an illegal tax evasion scheme[.]" (A0132 (emphasis added).) The subsequent proceedings before Vice Chancellor Laster established that Nasser was the architect and primary beneficiary of this "illegal tax evasion scheme." In this appeal, Dweck argues that the trial court erred as a matter of law (i) in granting certain relief to Nasser while refusing to consider whether Nasser had engaged in a pattern of illegal conduct; (ii) in allowing Nasser to retain $15.1 million in profits he received pursuant to his scheme and did not distribute to Kids' shareholders; and (iii) in awarding Nasser an undeserved prejudgment interest windfall.

[1] Dweck, Success Apparel, LLC ("Success") and Premium Apparel Brands LLC ("Premium") and third-party defendants Kevin Taxin ("Taxin") and Bruce Fine ("Fine") (together "Appellants" or "Plaintiffs" or "Dweck") timely appealed on February 13, 2013 from the Court of Chancery's January 18, 2012 Memorandum Opinion ("Op.")(Ex. A), February 8, 2012 Post-Trial Order ("Post-Trial Order")(Ex. B); February 27, 2012 Order Granting Motion for Clarification (Ex. C); August 2, 2012 Memorandum Opinion Concerning the Accounting Hearing ("Accnt. Op.") (Ex. D); September 10, 2012 Accounting Order (Ex. E); January 15, 2013 Order Resolving Issues Relating to Final Order ("Order Resolving Final Order") (Ex. F); and January 15, 2013 Final Order and Judgment ("Final Order")(Ex. G). Defendants Nasser and Kids have cross-appealed.

SUMMARY OF ARGUMENT

1. The trial court erred in granting Nasser relief when he engaged in an illegal tax scheme at the heart of the parties' disputes. Nasser and Dweck were partners in Kids. Nasser funneled tens of millions of dollars of Kids' profits to overseas agents and accounts in the guise of phony license and interest payments.

The two Vice Chancellors who presided over this action came to diametrically different answers with respect to how to deal with this illegality. Vice Chancellor Lamb, who initially presided over this case, stated that the Court of Chancery should not be used to resolve disputes between parties engaged in an illegal enterprise:

> And there are allegations [made] that . . . the parties . . . were engaged in a pattern of illegal activity, which is actually right at the heart of what they're fighting about.
>
> . . . I or whatever judge -- whoever gets the case after me, we're not going to sit in equity and work out [the] disputes . . . . It's not going to happen. And you can tell Mr. Nasser that. (A0614 (emphasis added).)

Vice Chancellor Laster erred in contradicting Vice Chancellor Lamb's ruling and assuming the legality of the tax evasion scheme in granting relief to Nasser. (Op. at 40-41.) This violated the law of the case doctrine, contradicted well-established Delaware law, and ignored the position Nasser took before this Supreme Court, that parties engaging in an illegal enterprise should not be granted relief as a matter of public policy.

2. Having decided it should ignore the illegality of the tax evasion scheme and grant relief, the trial court erred in not ordering

Nasser to return to Kids $15.1 million in earnings that Nasser unilaterally seized and sent overseas. The trial court denied this relief, citing Nasser's representation to the court that Dweck (as a stockholder) could receive her share of that money. (Op. at 41-42.) This ruling was erroneous for two reasons. First, the earnings should have never left Kids and should have been used to satisfy all legitimate creditor claims, including those of taxing authorities, and then distributed by Kids to all of its shareholders *pro rata*. Second, the misappropriation of funds cannot be excused by a promise to make one of the victims whole. The trial court compounded its initial error by not ordering Nasser to provide Dweck with access to her share of the retained earnings after he refused to do so in breach of his representation to the trial court.

3. The trial court erred in awarding Nasser an undeserved prejudgment interest windfall. Fairness is the guiding principle in determining prejudgment interest. The interest award by the trial court (the legal rate compounded quarterly) was unfair and excessive because it rewarded a wrongdoer interest at nearly twice the amount a prudent investor would have earned. The Court found Nasser liable to Kids for wrongfully paying his company, RAJN Corp. ("RAJN"), $3,864,583 in consulting fees, (Op. at 43), and for failing to account for another $2,461,085 of Kids' funds (Acct. Op. at 11). These findings alone, which constitute only a fraction of Nasser's misconduct, were enough to preclude Nasser from receiving the benefit of compound interest at the legal rate.

STATEMENT OF FACTS

A. The Illicit Tax Evasion Scheme

Nasser, Dweck, and Dweck's brother Haim Dabah ("Dabah") formed Kids in 1993 to design, manufacture, and sell children's clothing and specifically to purchase the assets of EJ Gitano. (Op. at 4.)

Nasser agreed to provide the financing through $1 million in start-up capital, a $4 million subordinated loan to Kids, and paying $4.2 million to obtain Gitano licenses. (Op. at 4-5.) Nasser originally owned 100% of Kids' equity. (Op. at 4.) After Nasser was repaid his $8.2 million with 10% interest, Nasser was to transfer 50% ownership to Dweck and Dabah. (*Id*.) Dweck and Dabah were to manage Kids' day-to-day operations, and Nasser was to be the Board Chairman. (*Id*.)

Simultaneously with the Gitano transaction, Nasser and his attorney, Amnon Shiboleth ("Shiboleth"), designed a scheme that would allow Kids to send profits out of the United States without paying taxes. (Op. at 5.) Nasser's $8.2 million investment to fund Kids came from a Liechtenstein Trust that Nasser created for the supposed benefit of his great grandchildren (the "Trust"). (A0761.) Nasser uses the Trust to pay his personal expenses. (A0778.3.) Nasser does not put assets in his own name. Nasser testified, "I don't own anything and I don't have any personal records." (A0778.3.) The $8.2 million first went from the Trust into Woodsford Business S.A. ("Woodsford") (A0784), the Trust's investment arm (Op. at 5). Nasser was the principal manager of both the Trust and Woodsford. (A0763; A0785; A0808.)

Using money from Woodsford, Nasser had Maubi, a Netherlands Antilles corporation, make the loan to Kids. (Op. at 5.) The Maubi note had a 13.5% interest rate and could be repaid at any time without penalty. (A0900.) Kids was immediately profitable. (Op. at 7.) Nevertheless, Nasser caused the loan to remain outstanding "so that interest payments could leave the United States each year." (Op. at 6.) Ultimately, Kids paid Maubi and Woodsford more than $9 million in interest, including compounded interest on delinquent interest on the $4 million Maubi "loan." (A1499; A1512.)[2]

The License agreements "became the principal means by which payments left the country." (Op. at 6.) Nasser and Shiboleth first caused the Gitano trademarks to be purchased by Hocalar, B.V. ("Hocalar"), a Netherlands corporation. (Op. at 5.) As one of Nasser's lawyers testified, Hocalar was beneficially owned by the "Albert Nasser families." (A0841.) "Hocalar immediately sub-licensed the trademarks to Kids in return for a 5% royalty on Kids' sales of Gitano products." (Op. at 5.) The Shiboleth firm acted as both Kids' attorney and Hocalar's agent and attorney-in-fact. (A0838-39, A0841; A0913.) "To take advantage of favorable tax treaties," Nasser first transferred the license to a Hungarian company, Good Fortune Holdings, R.T. ("Good Fortune"), and then to Heckbert, 14 Kft ("Heckbert"). (Op. at 5-6.) Hocalar, Good Fortune, and Heckbert are collectively referred to as the "Foreign Licensors."

The 1993 Gitano license agreement required Kids to pay a royalty

[2] A chart showing the funds Nasser received from Kids is included at page A1523 of the Appendix hereto.

only on the sale of Gitano products. (Op. at 5.) Once Kids stopped selling Gitano products by 1996 (A0678), there was no longer a legitimate business reason to make license payments. Nonetheless, in order to generate (phony) tax deductions, the Hocalar license agreement was amended so that Hocalar would receive a 5% royalty on all Kids' sales, regardless of the brand. (Op. at 6.) Kids then continued to make phony license payments to the Foreign Licensors, including $5.5 million with interest to terminate the license agreement. (*Id.*; A1499-1504; A1512-13.)

Maubi and the Foreign Licensors were managed by Henk Keilman ("Keilman"). (Op. at 7.) Keilman worked with Nasser's attorneys on many different matters (A0842), and had offices in the same building in Amsterdam (A0854).

It is undisputed that Dweck had no role in setting up Nasser's illicit tax scheme. (Op. at 8-9.) The trial court found that Dweck subsequently learned how it worked and acquiesced to it (Op. at 9), and that she received some unknown portion of the foreign payments made between 1999 and 2004 (Op. at 10).

"By 1998, Nasser had received back his original investment plus 10% interest[.]" (Op. at 8.) Individually and through trusts which they established, Dweck and Dabah respectively purchased 27.5% and 17.5% (collectively, 45%) of Kids' stock. (Op. at 8.) Although Nasser had promised to make Dweck and Dabah 50% stockholders, he instead caused Kids to issue "a warrant to Shiboleth for 5% of the equity" of Kids "for his role in setting up Kids." (Op. at 8.) Later, Dweck and Nasser each purchased 2.5% of Shiboleth's equity.

(Op. at 10.) Ultimately, Kids was owned by the following shareholders: Nasser (through trusts) (52.5%); Dweck (individually and through trusts) (30.0%); and Dabah (through trusts) (17.5%). (A0162.)

B. Kids Pays RAJN Bogus "Consulting Fees"

In addition to the payments to the Foreign Licensors and Maubi, Nasser caused Kids to pay Nasser's company, RAJN, $8,026,116 in bogus "consulting" fees as part of another tax evasion scheme. (A1518-19; A1372-75.)[3] As agreed to at the start, Dweck received a salary for running the day-to-day business of Kids. (A0665.) Nasser then unilaterally decided that no working partners should receive a salary, and he directed that RAJN receive retroactive "consulting fees" proportionate to the salary and consulting fees paid to Dweck and Dabah. (Op. at 11.) By Nasser's own admission, RAJN did not have a single employee, performed no services for Kids, and "does not operate." (A0697; Op. at 11.) Nasser has admitted that the RAJN payments were actually profit distributions that RAJN alone received. (A0804.)

C. Nasser and Dweck Compete with Kids

Nasser competed directly with Kids through a number of entities: (i) Gelmart, which sold childrenswear to Walmart, Kids' largest customer, through its Tiny Tots division; (ii) Tom Togs, Doe Spun, and Boscorale, which successively owned the Rumble Tumble childrenswear brand, among other brands; and (iii) Regatta (U.S.A.) LLC, which directly competed with Kids for the girls 4-to-16 business. (A0366-69

[3] Exhibit A to Trial Exhibit JX884 (A1517-19) should include an additional $1.5 million payment to RAJN, as supported by JX192 (A1372-75).

(internal citations contained within appendix filed herewith).)

Dweck ultimately "began to feel exploited" by Nasser's appropriation of Kids' profits. (Op. at 11.) Dweck and Taxin then formed Success to acquire the Bugle Boy license, and then other licenses, most notably John Deere. (Op. at 12, 14.) Dweck also formed Premium to acquire the Gloria Vanderbilt license. (Op. at 14-15.) Dweck and Taxin operated Success and Premium "out of Kids' premises." (Op. at 13, 15.)

D. Dweck's and Taxin's Departure from Kids

In December 2004, Nasser's secretary and confidante, Lidia Lozovsky ("Lozovsky"), told Nasser that "'there were other companies' operating out of Kids' offices." (Op. at 16.) At a January 5, 2005 Board meeting, Nasser announced that he was hiring his nephew, Itsak Djemal ("Djemal"), to be Vice Chairman of Kids and to take over production and corporate finances. (Op. at 16.) Nasser called another Board meeting for March 11, 2005, at which he terminated Dweck's employment. (Op. at 18-19.) Thereafter Dweck, Taxin, and Fine left Kids and continued to operate Success. (Op. at 19-20.) Dweck and Taxin, however, ensured that the Fall 2005 orders were fulfilled. (Op. at 21.) As Kids obtained no new orders (Op. 21-22), its 2005 profits of $13,345,444 are almost entirely attributable to the Fall 2005 orders. (A1396.)

E. Nasser Loots the Company and Then Dissolves It

By the end of 2005, Dweck had been gone from Kids for seven months, and Nasser was in charge. Kids had "more than $18 million in cash or cash equivalents[.]" (Op. at 22.) Nasser dissipated all of

it by, among other things, sending $8.3 million to his overseas entity, Woodsford, with whom Kids had no contractual relationship (Op. at 22); paying Nasser's various lawyers (A0717); paying RAJN consulting fees (A1518-19; A1372-75); and paying Djemal salary and consulting fees of more than $1 million (A1528-29). Djemal's consulting fees were paid through a sham entity, Tee Plus, whose only employee was Djemal's wife. (A0715-16.)

Nasser also had Kids enter into a "joint venture" with SeaBreeze, a division of Boscorale. (Op. at 22.) "As the controlling shareholder of both entities, Nasser set the terms for the joint venture." (*Id.*) Under those terms, Kids paid all of Boscorale's expenses, plus an additional 25% markup, yet only received 50% of all profits. (*Id.*) Upon the sale of Boscorale's existing inventory, much of which had remained unsold for years (A0885), Boscorale received all of its costs in producing and shipping the inventory (the "LPD Cost") plus 25% of those costs, regardless of the price it was sold for. (A1431.) Subsequently, Kids agreed to immediately purchase all of Boscorale's ancient inventory at its LPD cost plus 25%. (Op. at 22.)

F. <u>The Post-Trial and Accounting Opinions and Orders</u>

After a five-day trial in July 2011, the court found that Plaintiffs had wrongfully competed with Kids and were liable to Kids in the amount of $9,022,825, representing the lost profits Success and Premium earned from the founding of those entities through 2004. (Op. at 33-34.) Those parties also were ordered to account for other profits made after December 31, 2004, from certain orders and business lines. (Op. at 34-35.) In addition, Dweck and Fine were held liable

to Kids for $342,366 in personal expenses that Dweck charged to Kids between 2002 and 2005. (Op. at 37-38.)

Nasser was found liable for the consulting fees paid to RAJN from May 2002 onward in the amount of $3,864,583. (Op. at 43.) The trial court held that Kids' recovery of $4,161,533 in earlier RAJN payments was time-barred (Op. at 43).

The trial court rejected Plaintiffs' argument that the Seabreeze joint venture constituted a breach of fiduciary duty and was not entirely fair to Kids. (Op. at 44-45.) The court accepted the accounting prepared by Kids' controller, Joseph Niyazov, that the joint venture generated a profit of $356,808. (Op. at 22, 44; Accnt. Op. at 9.) This, however, did not explain the dissipation of Kids' funds after Dweck's departure. Even after accounting for the payments to Woodsford, Nasser's attorneys, Tee Plus, and RAJN, this left millions of dollars in unexplained operating losses. Thus, the trial court required Nasser to account for expenses Kids incurred between January 1, 2006, and December 31, 2008. (Op. at 45; Order Granting Motion for Clarification.)

At a subsequent accounting proceeding in July 2012, Nasser could not account for Kids' expenditures. Nasser's "accounting" was prepared by Niyazov. This time, the trial court found that Niyazov "revealed a pervasive lack of understanding of basic accounting principles and the corporate records he supposedly maintained." (Accnt. Op. at 9.) The court concluded that Nasser failed to account for $2,461,085 of Kids' funds, for which Nasser was found liable. (*Id.* at 11.)

G. Final Order

Three significant events occurred or came to light after trial that Plaintiffs believed were relevant to the final relief the trial court should have ordered. *First*, Kids came under investigation by the New York County District Attorney with respect to Nasser's operation of Kids subsequent to Dweck's departure. (A1544-45.) *Second*, Kids became subject to an Internal Revenue Service audit for 2008, focusing on the consulting fees paid to RAJN. (A0894-97.) Kids expended at least $287,165 responding to the audit. (A0556.) *Third*, Nasser had Woodsford "loan[]" millions of dollars back to Kids at 7% interest with Djemal and his company Tee Plus taking a 1% fee. (A0744-54.) Djemal and Nasser had failed to disclose this loan prior to trial despite having a clear obligation to do so. (A0745-50; A0597.)

As a result of these new events and Nasser's history of dissipating Kids' assets, Plaintiffs asked that the trial court order damages to be paid into escrow. (A0534-38; A0592-93.) The court denied this request. (Order Resolving Final Order ¶ 6.c.)

The trial court also decided that prejudgment interest on all damages should be compounded at the legal rate. (*Id.* ¶ 1.) This was to Nasser's advantage, because the damages against Plaintiffs are greater than the damages against Nasser and because Nasser still controls Kids. Given Nasser's history, there is every reason to believe that Nasser will send damages payments to Kids overseas, beyond the reach of Kids' other stockholders and any United States court.

ARGUMENT

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

A. Question Presented

Did the trial court err in refusing to consider the illegality of the parties' scheme and granting Nasser relief when (1) Vice Chancellor Lamb previously ruled that the court would not "work out disputes" between the parties if the parties were engaged in a "pattern of illegal activity . . . at the heart of what they're fighting about"; (2) the record establishes that Nasser conducted an illegal tax evasion scheme, as Nasser acknowledged to this Court; (3) Nasser caused Kids to pay RAJN bogus consulting fees which also were not reported as income; (4) Nasser engaged in other serious misconduct; and (5) Nasser has retained tens of millions of dollars in phony license and interest payments paid by Kids? (A0223-24; A0405-07; A0722-29.)

B. Standard of Review

This Court applies *de novo* review when an appeal is based on the law of the case doctrine and issues of public policy. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36 (Del. 2005); *Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1353 (Del. 1992).

C. Merits of the Argument

We start with first principles: a court of equity does not grant relief to persons arising from those persons' illegal or inequitable conduct. *Am. Int'l Gp., Inc., Consol. Deriv. Litig.*, 976 A.2d 872, 882 (Del. Ch. 2009) ("[T]here is no societal interest in providing an accounting between wrongdoers"). Whether the principle is referenced

as "unclean hands" or "public policy" or "in pari delicto" is immaterial. *Id*. at 882 n.21 ("in pari delicto" based on "public policy" of denying relief to a wrongdoer so as to deter illegal conduct); *In re Trust for Grandchildren of Gore*, 2010 Del. Ch. LEXIS 188, at *25-27 (Sept. 1, 2010) (the doctrine of "unclean hands" is a "rule of public policy" providing that a litigant who has "acted in violation of any fundamental concept of equity" in regard to the matter in controversy is not entitled to relief regardless of the merits of its claim).

As in this case with Nasser, when a party has engaged in conduct that would violate federal law or fiduciary duties, a court of equity should deny relief or, at the least, factor that conduct into the relief it does fashion. *See Neumeister v. Herzog*, 2007 Del. Ch. LEXIS 99, at *25 (July 12, 2007) ("[U]nclean hands" bars claim of equitable interest in property because "[i]t is not the task of this court to aid parties in implementing schemes to avoid . . . their responsibility to pay taxes.") (citing *Caudle v. Hazelwood*, 2002 WL 32627768, at *1 (E.D. Va. 2002) (refusing under the unclean hands doctrine to grant relief to a group of plaintiffs based on their improper motives to avoid capital gains taxes)); *see also Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 107 (D. Md. 1989)(holding that unclean hands bars claims for damages for lost income because plaintiff provided defendants false tax returns for the five year period of lost income); *Mona v. Mona Elec. Gp., Inc.*, 934 A.2d 450, 476-79 (Md. Ct. Spec. App. 2007)(finding that unclean hands bars claims for dividends because taking loss on tax return was contrary to

litigation position); *In re Silver Leaf, L.L.C.*, 2005 Del. Ch. LEXIS 119, at *46-49 (Aug. 18, 2005) (denying claims of members of LLC for breach of contract and fiduciary duty because LLC was used as part of a scheme in violation of securities laws); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 917-18 (Del. Ch. 2002)(dismissing action to enforce "virtually absolute" right to an annual meeting because meeting was part of plan "to circumvent important registration and disclosure elements of the federal securities laws"); *Gore*, 2010 Del. Ch. LEXIS 188, at *1-3 (holding that breach of a confidential family relationship constitutes unclean hands resulting in denial of personal benefit in trust).

Recognizing the obvious applicability of the cleans hands maxim to this case, Vice Chancellor Lamb ruled that the Court of Chancery would not preside over a dispute if the record establishes that the parties are fighting over the fruits of illegal conduct:

> And there are allegations that are made in the -- in the papers that are before me that both of the parties to this case were engaged in a pattern of illegal activity, which is actually right at the heart of what they're fighting about.
>
> So, I mean, I can assure everyone here that if that turns out to be the case, this Court is not going to resolve this matter. I mean, I or whatever judge -- whoever gets the case after me, we're not going to sit in equity and work out disputes between people who are engaged in illegal enterprise. It's not going to happen. And you can tell Mr. Nasser that. (A0613-14 (emphasis added).)

Vice Chancellor Lamb had good reason to believe that there was a "pattern of illegal activity." When a corporation distributes its profits to a shareholder, or to another party at the shareholder's

request, the payment is a "constructive dividend," which is taxable income to the shareholder and not deductible by the corporation. *United States v. Mews*, 923 F.2d 67, 68-69 (7th Cir. 1991); *Hagaman v. Comm'r*, 958 F.2d 684, 689-90 (6th Cir. 1992) (corporation's payments to shareholder's children, at his direction, were constructive dividends to him). Further, when a person pays sham fees to off shore entities and does not declare those fees as income, it is criminal tax fraud. *See, e.g.*, *United States v. Ellefson*, 655 F.3d 769, 776-77 (8th Cir. 2011)(defendants convicted of tax fraud where sham management fees paid to offshore corporation were constructive dividends and hence unreported income to them); *Mews*, 923 F.2d at 68 (defendant's transfers of cash among corporations he controlled were constructive dividends to the defendant).

Vice Chancellor's Laster acknowledged Vice Chancellor's Lamb's ruling, but then erred in not following the ruling and not considering the illegality of Nasser's conduct. Prior to trial, the court ruled:

> And I know Vice Chancellor Lamb was quite strong about saying that if there is some notion of criminality here, that this Court certainly isn't in the business of divvying up people's wrongful gains.
>
> . . . [I]n case it helps you all for trial preparation, I am not a tax expert, and I don't plan to delve into the ultimate tax legality of these things. . . .
>
> . . . I don't want this trial suddenly to be a lot of stuff about whether certain transactional forms violate the U.S. tax code. . . . [T]hat will not be terribly interesting to me. . . . I don't think it is really core to what I am supposed to do.
>
> I am not saying –- I am not telling you how to try your case. I am just saying that at least

> sitting here today, that is going to be less interesting to me. (A0633-35.)

After trial, Vice Chancellor Laster again refused to heed Vice Chancellor's Lamb's ruling, refusing to consider the illegality of the scheme because it was not "in [his] lane" and he was "trying to cabin [him]self to . . . the corporate issues among the parties." (A0722; A0732.) While recognizing that the IRS may be "livid," the trial court explained that this was "not an issue for the Delaware Court of Chancery to worry about." (A0722-23.) The court's opinion then explicitly "assumed" the scheme's legality. (Op. at 40-42; Post-Trial Order ¶ 6; Final Order ¶ 5.)

Procedurally and substantively, the trial court erred in contradicting Vice Chancellor Lamb's prior ruling. As a threshold matter, "[t]he doctrine of the law of the case normally requires that matters previously ruled upon by the same court be put to rest." *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983). Accordingly, this Court "take[s] a dim view of a successor judge in a single case overruling a decision of his predecessor." *Id.* It is "firmly established" in Delaware that a judge should abide by the prior rulings of his predecessor in the same case. *Id.* at 719. "[E]xceptions should be entertained only in extraordinary circumstances[,]" and then only where the prior ruling was "obviously incorrect[.]" *Id.*

Vice Chancellor Laster did not find that there were extraordinary circumstances or that Vice Chancellor Lamb was "obviously incorrect." Indeed, Vice Chancellor Lamb was obviously correct, and it was particularly egregious for a court of equity to assume the legality of

the tax evasion scheme, especially given that both parties have acknowledged that the scheme was illegal and precludes the granting of relief. Indeed, Nasser has acknowledged the illegality to this Court.

In 2007, Nasser reneged on a settlement the parties had reached. *Dweck v. Nasser,* 959 A.2d 29, 31-32 (Del. Ch. 2008). After a one-day evidentiary hearing in May 2008, Vice Chancellor Lamb granted Plaintiffs' motion to enforce the settlement agreement. *Id*. at 31-32, 46. Nasser appealed, arguing that the settlement agreement was unenforceable as a matter of public policy because the overseas payments "were part of an illegal tax evasion scheme." (A0132.) Nasser further argued that "issues of illegality" should be raised *sua sponte* by a court, whether at the trial court or appellate level[.]" (A0153-54.)

While Nasser was writing about Dweck's possible receipt of the foreign money, the record and indeed the post-trial opinion establish beyond any doubt that Nasser was the architect and primary beneficiary of the "illegal tax evasion scheme."

After first lying about it, *see* Argument III.C.3, *infra*, Nasser admitted that the 70% of foreign money went to Woodsford, the investment arm of his Trust. (A0701-02; Op. at 5.) Foreign money was also distributed to other Nasser entities, including Adamsberg, Beredi, Distrigas, and NYREL. (A1380-82.) Nasser also used the foreign funds to support his domestic companies.[4] Nasser's tax evasion

[4] A 1996 Hocalar financial statement showed that Hocalar booked $1.35 million out of a $1.4 million payment from Kids as a repayment of a loan to RAJN. (A1202-09.) Nasser also had Kids loan $700,000 to one

scheme further extended to the RAJN payments, which the court found were profit distributions disguised as "consulting fees." (Op. at 11.)

Denying Nasser relief is not only called for under Delaware law, but also would be more than fair to Nasser, who, through his agents and entities, would still be retaining tens of millions of dollars in bogus consulting fees and phony interest and license payments. While the trial court ordered Nasser to disgorge $3,864,538 of the RAJN payments, it found that Kids was time-barred from recovering the bogus consulting fees paid prior to 2002 (Op. at 43), amounting to $4,161,533 in unwarranted distributions to Nasser (A1518-19; A1372-75). With regard to the foreign money, assuming that the $11,035,664 paid to Nasser's entities from 1993 to 1999 constituted Nasser's return on his $8.2 million at 10% interest, Nasser entities received an additional $14,198,121 after his investment was paid back and before Dweck's termination from Kids and another $15,211,201 after Dweck's termination. (A1495-1507; A1509-19; A1525-26.) If no relief was granted to either party, Nasser also would not have to pay the damages ordered by the trial court.

Given the illegality of Nasser's tax evasion schemes and his retention of tens of millions of dollars of phony consulting fees and license payments, this Court should order the dismissal of Nasser's claims or, at a minimum, remand this matter to the trial court with instructions to consider the illegality of the tax evasion scheme. *See also* (A0159.25-26.)

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of his companies, Doe Spun, only to then direct that the $700,000 be considered a payment owed to Good Fortune. (A1197-200.)

II. THE TRIAL COURT ERRED IN ALLOWING NASSER TO KEEP KIDS' $15.1 MILLION IN RETAINED EARNINGS

A. Question Presented

Did the trial court err in not ordering Nasser to return to Kids $15.1 million in earnings that Nasser sent to his overseas accounts or in not ordering Nasser to pay to Dweck her *pro rata* share of the earnings, as he represented to the trial court he would do? (A0529-33.)

B. Standard of Review

The factual findings concerning this issue are not disputed: Nasser acknowledges that $15.1 million in Kids' earnings were paid to his overseas entities and not distributed to Kids' shareholders other than himself. Whether the Court correctly applied the facts in denying Dweck any relief in connection with the $15.1 of Kids' retained earnings is a question of law and subject to *de novo* review. *See Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of the Argument

Once the trial court determined that it should ignore the illegality of the tax evasion scheme and grant relief, it should have required Nasser to disgorge the $15.1 million Nasser sent to his overseas entities after Dweck's departure from Kids. Nasser sent (i) $1,493,233 to Maubi in April 2005 (A1384; A1470); (ii) $5,249,256 to Heckbert in May 2005 (A1385); and (iii) $8,368,771 to Woodsford in 2008 (collectively the "foreign funds") (Op. at 22).

As noted above, Nasser admitted that all of the foreign funds were earnings of Kids. His defense to returning the money was that Dweck was entitled to and could directly receive her share. Under the

heading "Dweck is entitled to her share of the Undistributed Foreign Monies," Nasser argued:

> Dweck is entitled to her pro rata share (30%) of the undistributed monies that Kids sent to Maubi and the Foreign Licensors (after appropriate deductions including a 7% fee owed to Maubi and the Foreign Licensors), of which there are two pools: $8.3 million held by Woodsford, and another pool held by Keilman/Maubi, which Plaintiffs note is approximately $6.7 million. (A0495 (emphasis and citations omitted).)

The trial court accepted Nasser's representations, finding that:

> Woodsford continues to hold the $8.3 million, and Nasser agrees that Dweck is entitled to her 30%. Keilman holds roughly $7 million for distribution, subject to his 7% service charge. Again, Nasser agrees that Dweck is entitled to her 30%. (Op. at 23.)

The trial court also held that:

> The trial record established that Dweck beneficially owns her *pro rata* share of the funds, comprising 30% of the $8.3 million held by Woodsford and 30% of the roughly $7 million held by Keilman, net of his fees. Nasser conceded both points and made clear that Woodsford would send Dweck her share and issue instructions jointly with Dweck to Keilman. Dweck can obtain her portion of these overseas funds at any time. She cannot claim a wrong or obtain a remedy with respect to monies that she currently owns and can access. (Op. at 41-42.)

Instead of only acknowledging that Dweck "owns and can access" her share of the foreign funds, the trial court should have ordered the funds returned to Kids for two reasons. *First*, the funds should not have left Kids in the first place and should have been used to satisfy all legitimate creditor claims, including those of taxing authorities. Then, they should have been distributed *pro rata* to all of Kids' shareholders. *Pro rata* distribution of corporate profits to

shareholders of the same class is required under corporate law. *See Telvest, Inc. v. Olson*, 1979 Del. Ch. LEXIS 347, at *18 (Mar. 8, 1979) (citing 11 Fletcher, Cyclopedia Corporations § 5352) ("Generally, a dividend must always be *pro rata*, equal and without discrimination or preference."); *see also Twenty Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028, 1040 (D. Md. 1982) ("It is hornbook law that unless the corporate charter properly provides otherwise, all shareholders of the same class must participate in dividends on a pro rata basis without discrimination or preference.") (citations omitted).

Second, the misappropriation of converted funds cannot be excused by a promise to make one of the victims whole. Under the trial court's reasoning, a thief could obtain dismissal of a conversion claim by promising to return the money to the victim, even if he never does it.

The validity of this common sense principle was borne out after trial when Nasser's representation to the trial court proved to be false. When Dweck demanded access to the foreign funds (A1535), Shiboleth responded that the Maubi and Heckbert funds were not available to Dweck because they supposedly had been embezzled by Keilman. (*See* A1537-38.) Further, in direct conflict with his representations to the trial court, Nasser disclaimed any obligation to provide Dweck her share of the foreign funds, including the Woodsford funds. (A1541-42.) Dweck was told that, if she wanted her share of the funds sent to Woodsford, she should contact Nasser's cousin, Albert Nasser Shayo, who is purportedly somewhere in Argentina. (*Id.*) With respect to the Maubi and Heckbert funds, Dweck

was advised to contact Keilman, who is presumably somewhere in the Netherlands. (*Id.*; A0532)

But as Nasser previously admitted to the trial court, Nasser controls Woodsford and he is "responsible for transferring Dweck's share of the funds being held by Woodsford, after appropriate deductions." (A0497.) Further, Nasser had enough control over Woodsford to cause Woodsford to "loan" over $3.3 million back to Kids so that Kids could pay Nasser's legal fees and the cost of the IRS audit. (A0554-57.)

After Nasser refused to provide Dweck with access to her share of the foreign funds, Dweck asked the trial court to, at least, order Nasser to comply with his representation to the court and to pay Dweck's share of the $15.1 million, equal to $4,533,147, plus interest, in partial satisfaction of Dweck's damages. (A0529-33; A0548-49.) The trial court refused to "revisit" its decision, stating instead that "Plaintiff's remedy lies in appeal." (Order Resolving Final Order ¶ 6.a.) The trial court gave no substantive explanation for denying Dweck any relief with respect to the Woodsford funds. The court should not have tasked this Supreme Court with addressing Nasser's misrepresentations when those misrepresentations were the basis for the trial court's ruling.

As for the Maubi and Heckbert funds, the trial court refused "to adjudicate any potential responsibility for alleged defalcation by Henk Keilman" because the theft "does not undercut Nasser's trial testimony that Dweck was entitled to those funds, nor does this testimony make Nasser a guarantor of Keilman's performance." (Order

Resolving Final Order ¶ 6.b.) The court further reasoned that Nasser's "involvement or knowledge" in Keilman's theft "has not been litigated." (*Id*.)

The trial court's rationale fails for numerous reasons. *First*, the retained earnings should have never been sent oversees in the first instance. *Second*, regardless of whether Nasser knew that his representation to the court was false, he was judicially estopped from disclaiming his earlier position that Dweck was entitled to her *pro rata* share of the foreign funds and that "Woodsford would send Dweck her share." *See Osborne v. City of Wilm.*, 2011 Del. Ch. LEXIS 165, at *20-21 n.24 (Oct. 31, 2011) (quoting *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008)) ("[J]udicial estoppel . . . prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling.")). *Third*, the issue was not "litigated" because Nasser failed to advise the trial court that the funds were missing and specifically represented that the funds would be available.

Fourth, as the trial court recognized in post-trial argument, Maubi and Heckbert are "Mr. Nasser's entities." (A0721.2.) Nasser chose Keilman to run those entities (Op. at 7), which, as Nasser's attorneys stated, were created for the sole purpose of "collecting payments on behalf of Woodsford." (A0626.) Thus, Maubi, the Foreign Licensors, and Keilman were each Nasser's agent. *Sutter Opportunity Fund 2 LLC v. Cede & Co*., 838 A.2d 1123, 1128 (Del. Ch. 2003) (agency results from the mutual consent of one person acting on behalf of and

subject to the control of another).

Nasser should also know that he is liable for Keilman's purported theft as he was a party to a Delaware case that established this principle. In *KE Property Management Inc. v. 275 Madison Management Corp.*, 1993 Del. Ch. LEXIS 147, at *7 (July 21, 1993), Nasser owned an interest in the managing general partner (the "GP") of a limited partnership. The person operating the GP misappropriated partnership funds. *Id.* at *8. One of the other limited partners then sought to remove the GP. *Id.* at *10. The GP argued that it should not be liable for the acts of its agent because the agent acted outside the scope of his authority and in his own interest. *Id.* at *10-11.

The Chancery Court disagreed, holding that the "underlying principle" is that "[t]he principal, having selected his representative and vested him with apparent authority, should be the loser in such case, and not the innocent party who relied thereon." *Id.* at *15-16 (citing 3 N.Y. Jur.2d *Agency and Independent Contractors* § 249; *Exch. Bank v. Monteath*, 26 N.Y. 505 (1863)). This result was also required for two other reasons applicable here: the agent was the principal's "sole representative" and the agent's conduct violated a principal's contractual or relational duty to the injured person. *Id*. at *16-17.

Once the trial court decided to award damages, it should have ordered the return of Kids' profits to Kids or, at a minimum, should have enforced Dweck's *pro rata* entitlement to the foreign funds.

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

A. Question Presented

Did the trial court err in awarding a wrongdoer interest that was almost twice the amount a prudent investor would have earned? (A0512-28; Order Resolving Final Order ¶¶ 1-5; Final Order ¶¶ 1-3.)

B. Standard of Review

Interest awards are generally reviewed for abuse of discretion. An interest award made arbitrarily or capriciously would be an abuse of discretion. *Cede,* 884 A.2d at 42. However when the Court of Chancery's interest award involves questions of law, that award will be subject to a *de novo* standard of review. *Id.*

C. Merits of the Argument

Fairness is the guiding principle in determining prejudgment interest. *See, e.g.*, *Gentile v. Rossette*, 2010 Del. Ch. LEXIS 190, at *5 (Sept. 10, 2010) ("[T]he Court will look to *principles of fairness* in determining the appropriate interest rate to apply to the award.") (emphasis added).

The trial court abused its discretion by awarding interest (compounded at the legal rate) that does not pass any of the fairness tests commonly applied by Delaware courts in determining the appropriate amount of prejudgment interest. It does not align prejudgment interest with the rate of return for a prudent investor or market realities. Investments, including those in the S&P 500 and the Dow Jones Industrial Average, would have yielded the equivalent of a 3.68% compound interest rate (A0516; A1531), and prudent investor analyses previously employed by the Court of Chancery yield effective

rates of returns for the relevant period of 3.37% and 3.99% (A0522-23; A1533). The trial court awarded an average prejudgment interest rate of 7.47%, nearly twice what a prudent investor would have earned. (A0522-23; A1533.)

1. Prejudgment Interest Should Be Simple, Not Compound

The rationale for awarding compound interest is that it more closely represents the return on investment a sophisticated party could receive in the financial markets. *See ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 926-27 (Del. Ch. 1999). In keeping with this reasoning, compound interest has not been awarded where, as here, such an award would represent a windfall in comparison to the market rate of return a damages recipient would have likely obtained. *See Seibold v. Camulos P'rs LP*, 2012 Del. Ch. LEXIS 216, at *93-100 (Sept. 17, 2012).

In *Seibold,* the court awarded simple interest for three reasons: (1) the higher rates did not accurately reflect "market realities" and equity returns applicable during the relevant period; (2) plaintiff was found liable for his own fiduciary and contractual breaches, and he was not in a position to invoke equity in his favor; and (3) the plaintiff was "in part to blame for the protracted nature of [the] litigation[.]" *Id.*; *see also In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 30 A.3d 60, 64, 117 (Del. Ch. 2011) (granting simple interest due to plaintiffs' "pattern of litigation delay").

The three factors that counseled in favor of simple prejudgment interest in *Seibold* are all present here. The legal interest rate set by the trial court is nearly twice as high as what a prudent investor

would have earned. As discussed above, Nasser also has committed numerous egregious, unlawful acts. To say the least, Nasser is "unfit to call on an equity court's authority to be generous in setting an interest rate when fairness counsels that action." *Seibold*, 2012 Del. Ch. LEXIS 216, at *94-95. Indeed, where, as here, both parties are found liable for concomitant breaches, it would have been appropriate to deny prejudgment interest entirely. *See, e.g.*, *Patel v. Dimple, Inc.*, 2007 Del. Ch. LEXIS 121, at *47 (Aug. 16, 2007) (denying prejudgment interest to both sides who committed wrongdoing).

Finally, as the trial court found, Nasser was partially to blame for the protracted resolution of this litigation, which began in 2005,[5] and which is reason alone to reduce Nasser's interest award. *See Ryan v. Tad's Enters.*, 709 A.2d 682, 705 (Del. Ch. 1996) (reducing the legal rate of prejudgment interest in proportion to the plaintiffs' delay because without accounting for "the plaintiffs' excessive delay in prosecuting this case," the rate would "constitute an undeserved windfall for the plaintiffs and an unjustified penalty for the defendants").

[5] There was a fifteen month delay when Nasser reneged on a settlement, which does not include the year spent negotiating the settlement, during which little occurred with respect to the prosecution of this action. After the litigation resumed, Nasser opposed Plaintiffs' request for a June 2009 trial date (A0056), causing this case to run past Vice Chancellor Lamb's time on the bench and requiring Vice Chancellor Laster to push the November 2009 trial beyond January 2010 (A0039, A0041.) Nasser then opposed a motion to amend the complaint, which took five months to resolve. (A0029-30, A0038.) Nasser also delayed identifying his own damages expert in response to Plaintiffs' interrogatory requests for nine months. (A0028.)

2. Prejudgment Interest Should Accrue at a Treasury Bill Rate, Not the Legal Rate

The "'legal rate is a mere guide, not an inflexible rule.'" *Gentile*, 2010 Del. Ch. LEXIS 190, at *4 (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)); *cf. Chang's Hldgs., S.A. v. Universal Chems. & Coatings, Inc.*, 1994 Del. Ch. LEXIS 222, at *8-9 (Nov. 22, 1994) ("The 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.") (citations omitted).

Seibold recognized that because "[i]nterest rates have been at historic lows for several years," an award of prejudgment interest at a legal rate of 8.5%, "whether simple or compound, would be a windfall" to the damages recipient. *Seibold*, 2012 Del. Ch. LEXIS 216, at *95. The court in *Cantera v. Marriott Senior Living Servs., Inc.*, also rejected the legal rate as "a matter of equity" where a party had helped itself to partnership assets, and applied the 30-day treasury rate without compounding. *See* C.A. No. 16498, at 9, 13-15 (Del. Ch. June 25, 1999) (TRANSCRIPT); *cf. In re Barnes & Noble S'holder Deriv. Litig.*, C.A. No. 4813-CS, at 12-15, 86 (Del. Ch. Sept. 4, 2012) (TRANSCRIPT) (applying a "sensible" 2.5% interest rate, and rejecting the 12% rate for which the corporation argued).

The same outcome was required here given that Nasser has helped himself to tens of millions of dollars in Kids' retained earnings that were not shared with Kids' other shareholders. The trial court should

have applied the 30-day U.S. Treasury bill rate instead of the default legal rate.

3. The Court's Justifications for Its Interest Award Are Erroneous

The trial court offered two reasons for rejecting Plaintiffs' argument for lower interest awards.[6] The court stated that the interest "dramatically underprice[d] the risk involved in a forced loan to Kids." (Order Resolving Final Order ¶ 1.) This is not the proper standard to use. Kids never needed or obtained any such loan. Further, while the cost of borrowing analysis has been considered in appraisal actions, *see Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 343-44 (Del. Ch. 2006), this is not an appraisal case, and even in appraisal cases, courts have examined both the prudent investor rate and the cost of borrowing analysis to determine the applicable interest rate, *id.*

Recognizing that a wrongdoer would not be entitled to the high interest rate it awarded, the trial court also held that "Nasser has not been adjudicated as a wrongdoer" and that Dweck was the "primary wrongdoer." (Order Resolving Final Order ¶ 1.) This rationale fails for four reasons.

First, as a matter of law, Nasser has been adjudicated a "wrongdoer." The trial court found that Nasser failed to prove that self-dealing transactions were entirely fair to Kids and held Nasser liable for the $3,864,583 in bogus consulting fees paid to RAJN. (Op.

[6] The court also stated that it had decided the issue earlier, (Order Resolving Final Order ¶1), but it had done so without Plaintiff's having had an opportunity to address the issue.

at 43.)[7] As the trial court recognized, Nasser and RAJN performed no services of any kind warranting the so-called "consulting" fees. (Op. at 43.) Under Delaware law, a self-interested transaction is either fair and proper or it is unfair and wrongful – there is no state of "neutral fairness." *Cf. Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, 2009 Del. Ch. LEXIS 13, at *15-16 (Jan. 22, 2009) ("I find no basis to innovate and articulate a doctrine of 'neutral faith' in which a contracting party has acted in a manner that, while not in bad faith, is also not in good faith."); *see also Julian v. E. States Constr. Serv.*, 2008 Del. Ch. LEXIS 86, at *61-62 (July 8, 2008) (observing that a failure to prove the fairness of a transaction constitutes a breach of the duty of loyalty). Thus, contrary to the trial court's holding, the court's finding that Nasser failed to prove entire fairness is also a finding that he breached his duty of loyalty and an "adjudication" of "wrongdoing."

Nasser's inability to account for more than $2.4 million in Kids' funds (Accnt. Op. at 11) was also a breach of Nasser's fiduciary duties and constituted "wrongdoing." "Where . . . fiduciaries exercise exclusive power to control the disposition of corporate funds and their exercise is challenged by a beneficiary, the fiduciaries have a duty to account for their disposition of those funds, i.e., to establish the purpose, amount, and propriety of the disbursements." *Technicorp Int'l II, Inc. v. Johnston*, 2000 Del. Ch. LEXIS 81, at *52-53 (May 31, 2000). Thus, Nasser's failure to meet an evidentiary

[7] RAJN also received more than $4 million in other bogus fees that Kids was time-barred from recovering. (Op. at 43; A1518-19; A1372-75.)

burden was a failure to meet his fiduciary duty to Kids and its shareholders. *See id.* at *62 (accounting involves both a fiduciary duty and an evidentiary burden).

Second, to the extent Nasser was not already "adjudicated" a wrongdoer, this was due to the trial court's unwillingness to consider whether Nasser had (1) instigated and benefited from the illegal tax schemes discussed above; (2) misrepresented to the trial court that Dweck had access to the overseas funds; (3) wrongfully "loaned" Woodsford money back to Kids and failed to disclose it; and (4) repeatedly lied to the trial court. This was reversible error. Misleading the court alone merits restricting the relief to which that party is otherwise entitled. *See Phillips v. Hove*, 2011 Del. Ch. LEXIS 137, at *72-75 (Sept. 22, 2011) (declining to award attorneys' fees to the plaintiff even though opposing party's conduct merited fee shifting because the plaintiff "testified so evasively and hyper-technically that he came very close to lying on the stand").

The record here is replete with examples of Nasser testifying not merely evasively or hyper-technically, but falsely. This started in the hearing with respect to the enforceability of the settlement agreement, where Vice Chancellor Lamb found that much of Nasser's testimony was "wholly unconvincing." (A0123.) In the post-trial opinion, Vice Chancellor Laster found that Nasser "exhibited credibility problems." (Op. at 2.) This was an understatement.

For example, Nasser repeatedly lied at his deposition and at trial about his control over the Foreign Licensors and Maubi.[8] Nasser falsely testified that he has "absolutely no idea" what Maubi is and that neither he nor Woodsford "have any connection directly or indirectly with this company" and that he has "no idea" who controls Hocalar, and that all the Foreign Licensors "are secretive and you never know exactly who is the owner, because you have some lawyers who are probably owners." (A0683-84.) In fact, as the trial court recognized, all of these companies were "Mr. Nasser's entities." (A0721.2.) Nasser signed the amendment of the license agreement with Hocalar (A1340-42), signed a subsequent extension agreement with Good Fortune (A1344), hand wrote the proposed new terms of the license agreement (A1521), and booked a payment to Hocalar as a repayment of a loan to RAJN (A1202-09). Nasser also knew that Keilman was managing Maubi and the Foreign Licensors. (A0683, A0693.)

Further, Nasser repeatedly lied about his receipt of the foreign funds. Prior to trial, Nasser maintained his ignorance of what happened to the foreign money. (A0788.) Even at trial, Nasser first lied, claiming that he did not know what happened to any of the $40 million his foreign entities received. (A0701.) But after additional questioning by counsel and the court, Nasser admitted that Woodsford received not only Nasser's 52.5% share of the overseas funds, but also

[8] The trial court found that Dweck's testimony was "particularly suspect." (Op. at 2.) But the court did not examine Nasser's testimony through the same prism. None of the countless examples of where Nasser gave false testimony, set forth in Plaintiff's post-trial brief, were considered by the court. (*See* A0407-15.) Space does not permit us to discuss most of them here.

the 17.5% share belonging to the Dabah trusts. (A0701-02.)

Third, if it is (wrongly) assumed that Nasser's misconduct was not as bad as Dweck's, it would still be wrong to reward him with a windfall in interest. *See* Arguments III.C.1 and III.C.2, *supra*.

Fourth, the trial court erroneously attempts to differentiate Dweck's and Nasser's relative culpability by stating that Nasser's wrongdoings "were not secret misappropriations or covert breaches of the duty of loyalty" and that the overseas payments "were made with Dweck's full knowledge and acquiescence." (Order Resolving Final Order ¶ 1.) These conclusions are inconsistent with the post-trial opinion and the record. For example, Dweck never acquiesced to the $8.3 million payment to Woodsford made three years after she left Kids. Nasser also gets no points for openly converting funds prior to Dweck's departure, given his control of Kids.

As for Dweck's conduct, the trial court found Dweck liable because it did "not believe Dweck ever disclosed to Nasser that she intended to compete directly with Kids and use Kids' employees and resources." (Op. at 29.) While Plaintiffs strongly believe the trial court reached the wrong conclusion for all the reasons set forth in Appellants' opening post-trial brief (A0346-47), Plaintiffs do not contest this finding for purposes of this appeal. But it is undisputed that Dweck openly operated Success and Premium at Kids (Op. at 14); the Shiboleth firm, Nasser's lawyers, assisted Dweck in setting up Success and establishing the trusts that own Success (A0649; A1377-78); and Success hired the same accountants, bankers, and insurance brokers that Nasser used (A0674). Further, Lozovsky,

Nasser's friend, confidante, and trusted aide (A0824.1-0825; A0827; A0831), had full, complete, and unfettered access to all the financial information of Success and Premium and easily could have obtained any information that Nasser needed or wanted (A0821.3; A0822; A0828.3-28.4); was never asked or directed to hide anything from Nasser (A0821.5); and was never asked by Dweck to conceal information from Nasser (*id.*). Lozovsky also testified that a person literally could not enter Kids' offices without seeing samples, signs, and posters evidencing Success's and Premium's work on the John Deere and Gloria Vanderbilt brands (A0822-23); and that a huge John Deere tractor was the first thing one saw when entering Kids' showroom (A0674; A0822).

While excoriating Dweck for her misconduct (again, findings with which Plaintiffs strongly disagree, but do not challenge on this appeal), the trial court wrongly turned a blind eye to Nasser's (more serious) transgressions. And even if the trial court was correct that Dweck conducted her fiduciary breaches in secret while Nasser openly breached his fiduciary duties, such a distinction does not merit a finding that only Dweck was a wrongdoer, or more of a "wrongdoer" than Nasser. Nasser orchestrated a criminal conspiracy, and giving him an interest rate windfall was wrong as a matter of law and cannot be justified by Dweck's purported misconduct.

CONCLUSION

Appellants respectfully request that this Court, in light of the serious wrongdoing by Nasser, reverse the Final Order of Judgment and remand to the trial court for a determination of the appropriate monetary relief under public policy, equity, and the law of the case.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Martin S. Lessner
Bruce L. Silverstein (No. 2495)
Martin S. Lessner (No. 3109)
Kathaleen St. J. McCormick (No. 4579)
Thomas E. Williams (No. 5668)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Plaintiffs and Third Party Defendants/Appellants

OF COUNSEL:

William B. Wachtel, Esquire
John H. Reichman, Esquire
WACHTEL MASYR & MISSRY, LLP
885 Second Avenue, 47th Floor
New York, NY 10017
(212) 909-9500

Dated: April 1, 2013

CERTIFICATE OF SERVICE

I, Thomas E. Williams, hereby certify that on April 1, 2013, I caused to be served a true and correct copy of the foregoing document upon the following:

BY LEXISNEXIS FILE AND SERVE

Bradley R. Aronstam, Esquire
Eric D. Selden, Esquire
Seitz Ross Aronstam & Moritz LLP
Wilmington, DE 19801

/s/ Thomas E. Williams
Thomas E. Williams(# 5668)