EFiled: May 01 2013 10:25PM EDT
Filing ID 52073307
Case Number 65,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GILA DWECK, SUCCESS APPAREL, LLC and PREMIUM APPAREL BRANDS LLC, Plaintiffs/Counterclaim Defendants Below, Appellants/Cross-Appellees, v. ALBERT NASSER and KIDS INTERNATIONAL CORPORATION, Defendants/Counterclaim Plaintiffs Below, Appellees/Cross-Appellants, v. KEVIN TAXIN and BRUCE FINE, Third-Party Defendants Below, Appellants/Cross-Appellees.	No. 65, 2013 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, CONS. C.A. NO. 1353-VCL

APPELLEES' ANSWERING BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

SEITZ ROSS ARONSTAM &
MORITZ LLP

Bradley R. Aronstam (No. 5129)
Eric D. Selden (No. 4911)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

*Attorneys for Appellees/
Cross-Appellants Albert Nasser and
Kids International Corporation*

OF COUNSEL:

BAKER BOTTS L.L.P.
Richard Harper
30 Rockefeller Plaza
New York, New York 10112-4498
(212) 408-2675

Aaron M. Streett
Amy Pharr Hefley
Lauren Tanner
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234

Dated: May 1, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This case centers on brazen duty of loyalty breaches by appellants Gila Dweck (the former CEO and director of, and current 30% stockholder in, clothing manufacturer Kids International Corporation ("Kids")), Kevin Taxin (Kids' former President), and Bruce Fine (Kids' former CFO) who established and operated competing companies that ultimately "destroy[ed] Kids' business." Op. 1, 19.

"In 2005, after thirteen years in business together," Dweck and Albert Nasser, who controls 52.5% of Kids' shares and was its Chairman, "parted ways." *Id.* 1. The events giving rise to their split culminated on May 18, 2005 when, after having "transferr[ed] Kids' expected orders and customer accounts" to their competing companies, Dweck, Taxin, and Fine ("Appellants") "crippled" Kids by taking its property and files and "organizing a mass employee departure." *Id.* The same day, Dweck and her competing companies filed this action against Kids and Nasser, asserting claims for breaches of purported stockholder agreements and a breach of fiduciary duty claim for the appointment of Nasser's nephew as Kids' Vice Chairman. B1-23. Nasser and Kids responded with various counterclaims against Dweck, B24-47, and later added Taxin and Fine as defendants. B48-75.

Following extensive discovery and motion practice, the Court of Chancery held a five-day trial in July 2011, which involved the live presentation of 9 witnesses, the lodging of 23 depositions, and the submission of 930 exhibits. Op. 2. On January 18, 2012, following post-trial briefing and argument, the Court of Chancery issued its post-trial opinion ("Op."), finding, among other things, that:

- Appellants "breached their fiduciary duties to Kids by establishing competing companies that usurped Kids' corporate opportunities and converted Kids' resources to the point of literally using Kids' own employees, office space, letters of credit, customer relationships, and goodwill to conduct their operations" (the "corporate usurpation claim") and that Kids was entitled to the "lost profits" it would have made from the diverted business as a result, *id.* 1, 33-34;

- Appellants "again breached their duties by transferring Kids' customer relationships and business expectancies to their competing companies, packing up Kids' documents and other property and moving them to the competing companies, and organizing a mass employee departure that left Kids crippled" (the "destruction claim") and that Kids was entitled to "the damages [it] suffered over and above where [it] would have been had Dweck and Taxin resigned in an appropriate manner," *id.* 1, 36;

- Dweck "breached her fiduciary duties by causing Kids to reimburse her for hundreds of thousands of dollars of personal expenses," *id.* 1;

- Dweck could not challenge certain licensing and royalty payments made by Kids (the "Overseas Payments") because she acquiesced in the structure under which they were made and was unharmed by them, given her beneficial ownership of her pro rata share, *id.* 41; and

- Nasser failed to establish that it was entirely fair to pay him "consulting fees," and Dweck was entitled to an accounting for a portion of Kids' cash on hand at the time of the split, *id.* 43, 45.

On August 2, 2012, after holding a two-day evidentiary hearing, the Court of Chancery issued its accounting opinion ("Acct'g Op."), awarding Kids additional sums from both Dweck, based on certain profits of her competing companies, and Nasser, based on certain of Kids' expenses after Dweck's departure. Acct'g Op. 4, 11. Appellants appealed, and Nasser and Kids cross-appealed.

SUMMARY OF ARGUMENT

Appellants go to great lengths in their opening brief to avoid acknowledging, much less challenging,[1] the Court of Chancery's extensive findings concerning their "striking breaches of the duty of loyalty," Op. 46, which comprise the heart of this case. Appellants' efforts to run from the Court of Chancery's findings about their own misconduct and the resulting damages and interest awards to Kids is telling and drives the resolution of each of their appellate arguments. By contrast, Nasser and Kids' cross-appeal challenges discrete aspects of an otherwise sound set of rulings by the Court of Chancery.

1. DENIED (APPELLANTS' ISSUE I). Despite the Court of Chancery's findings that Appellants breached their duties of loyalty to Kids by forming and operating competing businesses that usurped Kids' corporate opportunities and ultimately destroyed its business, Appellants maintain that they should pay no damages to Nasser because he was the purported "architect and primary beneficiary of" an "illegal tax evasion scheme." Br. 1. That argument fails for three reasons: (1) there has been no finding by any tribunal, and no admission by Nasser, concerning the existence of an "illegal tax evasion scheme," nor was there any prior "law of the case" ruling requiring the Court of Chancery to decide the legality of the profit-sharing structure before awarding Kids damages for Appellants' unrelated wrongdoing; (2) the Court of Chancery awarded damages to *Kids*, and not *Nasser* as Appellants erroneously claim; and (3) there is no authority

[1] *See, e.g.*, Br. 34 ("While excoriating Dweck for her misconduct (again, findings with which Plaintiffs strongly disagree, but *do not challenge on this appeal*) . . . .") (emphasis added).

for imputing Nasser's purported (and disputed) role in the "illegal tax evasion scheme" to Kids to bar it from recovering damages from Appellants for their wrongdoing. *See* Part I, *infra* 17-25.

2. DENIED (APPELLANTS' ISSUE III). The Court of Chancery correctly awarded Kids prejudgment interest based on the nature of Appellants' wrongdoing, Kids' cost of borrowing, and Appellants' own litigation conduct. Appellants' efforts to recharacterize the evidence below, based largely on their arguments in connection with their Issue I, do not establish that the Court of Chancery abused its discretion in awarding pre-judgment interest. *See* Part II, *infra* 26-31.

3. DENIED (APPELLANTS' ISSUE II). The Court of Chancery correctly held that Dweck could not challenge the Overseas Payments because she acquiesced in the structure that gave rise to them. Dweck has not challenged that finding, which was one of two grounds for the Court of Chancery's ruling, and she has therefore waived any complaint about the Overseas Payments on this appeal. But even if Dweck had not waived her complaint, the Court of Chancery did not abuse its discretion when it concluded, in issuing its final judgment, that any inability on the part of Dweck to access her share of the funds after trial did not undermine the Court of Chancery's prior acquiescence finding and had not been litigated in this case. *See* Part III, *infra* 32-35.

4. ON CROSS-APPEAL. Respectfully, given its factual findings that Appellants "destroy[ed] Kids' business," the Court of Chancery abused its discretion in awarding "lost profits" rather than valuation damages, which would have more adequately addressed the devastating harm to Kids caused by

Appellants' breaches. Op. 19. But even if lost profits were appropriate as a remedy for Kids' destruction, the Court of Chancery miscalculated Kids' lost profits, both as to the destruction claim and as to the corporate usurpation claim for the period January 1 to May 18, 2005 (the "Stub Period"). The Court of Chancery further abused its discretion in denying Kids attorneys' fees given its factual findings in this case. *See* Part IV, *infra* 36-44.

5. ON CROSS-APPEAL. Respectfully, the Court of Chancery erred in finding that Nasser's so-called "consulting fees" were not entirely fair when the evidenced showed, and the Court found, that the payments were profit distributions pursuant to a structure in which Dweck acquiesced and benefited from them ratably. The Court of Chancery also abused its discretion by subjecting Nasser's accounting evidence to too strict an evidentiary burden and rejecting it accordingly. *See* Part VI, *infra* 45-49.

STATEMENT OF FACTS[2]

A. Nasser and Dweck form Kids, which is immediately successful.

In 1993, Nasser, Dweck, and Dweck's brother Haim Dabah formed Kids, a Subchapter S Corporation under Delaware law. Op. 4. Through this vehicle, they purchased the assets of EJ Gitano, a division of the large, multi-division apparel wholesaler Gitano Group, which had been founded, in part, by Haim and was facing bankruptcy, in part, due to his criminal violations of U.S. customs laws. *Id.* 3-4. Dweck, then President of EJ Gitano, wanted to purchase the business but needed funding. *Id.* 4. Nasser, "a successful entrepreneur with numerous holdings in the apparel sector," fit the bill and ultimately provided 100% of the capital, comprising $8.2 million in acquisition financing and $1 million in start-up capital. *Id.* In return, the three agreed that Nasser would receive 100% of Kids' equity but would transfer 50% to Dweck and Haim after receiving payments equal to his original investment plus 10% interest. *Id.* Nasser became Chairman of the Board, and Dweck and Haim were put in charge of day-to-day operations. *Id.*

1. Kids, like most corporations, has a tax-minimizing structure.

In forming Kids, Amnon Shiboleth, "a member of the New York and Tel Aviv bars who acted as corporate counsel to Kids," "designed a structure that

---

[2] Recognizing that Supreme Court Rule 14(b)(v) provides that the "[a]ppellee's counterstatement of facts need not repeat facts recited by appellant," Kids and Nasser nevertheless submit a fulsome counterstatement because Appellants' statement is incomplete, inappropriately argumentative, and contrary to the Delaware Court of Chancery's findings. *Compare, e.g.*, Br. 5 ("'To take advantage of favorable tax treaties,' *Nasser* first transferred the license to a Hungarian company, Good Fortune Holdings, R.T.. . . ." (emphasis added)) *with* Op. 5 ("To take advantage of favorable tax treaties, *Hocalar* later transferred its rights to a Hungarian Company, Good Fortune Holdings, R.T. . . ." (emphasis added).).

would allow Kids to send large amounts of money out of the United States free of tax, while at the same time generating deductible business expenses to reduce Kids' profits." Op. 3, 4. First, RAJN Corporation ("RAJN") made a $1 million capital contribution to Kids in return for 100% of its common stock. *Id.* 5. Second, Woodsford Business SA ("Woodsford") advanced Maubi Investment N.V. ("Maubi") $4 million, which Maubi then loaned to Kids at a 13.5% interest rate (the "Maubi Loan"). *Id.* Kids used the funds to purchase most of EJ Gitano's assets and acquired the remaining assets, Gitano's trademarks, via a $4.2 million loan from Woodsford to Hocalar B.V. ("Hocalar"). *Id*. Hocalar used this money to purchase a perpetual license to the Gitano trademarks, which Hocalar then sublicensed to Kids for a 5% royalty on Kids' sales of Gitano products (the "License Agreement"). *Id.* Hocalar later transferred its rights to other foreign licensors for additional tax advantages. *Id.* 5-6.

Consistent with how most corporations that rely on foreign financing structure their businesses, the effect was to minimize substantially the tax liability of Kids' stockholders. For example, Kids made tax-free, interest-only payments on the Maubi Loan that it could deduct as business expenses to lower the taxable profits attributable to its stockholders. *Id.* 6. Similarly, Kids could "send 5% of its sales of Gitano products out of the United States, tax free, through royalty payments under the License Agreement," which it could likewise deduct as business expenses. *Id.*

2. Due to Kids' immediate success, Dweck and Haim receive equity, and a new profit-sharing arrangement is reached.

"Kids was profitable from day one," Op. 7, and, in 1996, Nasser amended the profit-sharing agreement to ensure that he and soon-to-be stockholders Dweck and Haim were fairly sharing in Kids' proceeds. *Id.* 11. "Nasser decided . . . that Kids was a de facto partnership, that partners should not receive salaries, and that Dweck's salary as Kids' CEO should be deemed a distribution of profits." *Id.* "Believing he should receive a similar distribution, Nasser directed that Kids pay him a proportionate amount, grossed up for his greater stock ownership, and make catch-up distributions for the earlier years that he had missed." *Id.* "RAJN received the payments as 'consulting fees,'" and "[w]hen Dweck's salary increased, Nasser's 'consulting fees' increased proportionately." *Id.* Thus, contrary to Appellants' characterization of the distributions to RAJN as "bogus," *e.g.*, Br. 7, the Court of Chancery correctly found that the payments were profit distributions made pro rata and in conjunction with distributions to Dweck.[3]

By 1998, Nasser had recouped his investment, and Dweck and Haim received their equity stake. Op. 8. Although originally promised 50%, Dweck and Haim ultimately agreed to receive 27% and 17.5%, respectively, because Shiboleth received 5% as compensation for his role in structuring the company. *Id.*

3. Dweck understood Kids' structure and acquiesced to it.

Although Dweck claimed that she had complained to Nasser about Kids' tax structure after receiving her equity, the Court of Chancery expressly "reject[ed]"

[3] Although the Court of Chancery correctly characterized the payments as profit distributions in its factual findings, it later erred in directing their repayment for certain years on the ground that they were "consulting fees for which Nasser had not done work." *See* Part V, *infra* 45-49.

her testimony as not credible. Op. 8-9. It further found that, “[e]ven crediting [her] testimony that she only realized the purpose of the structure in 1998 and raised it with Nasser, *Dweck agreed at that point to leave the structure in place and take her share of the tax-free profits*,” *id.* 9, and, “[t]o the extent Dweck complained from time to time, *she only complained about whether she was getting her full share.*” *Id.* 10. Despite Dweck’s efforts to distance herself from the tax structure, Br. 4-6, the Court of Chancery found that she “[had] knowledge of the foreign payments, participat[ed] in the scheme, and [benefitted from] . . . her share of the funds.” Op. 10.

B. To keep more profits for themselves, Appellants commit “striking breaches” of their duties of loyalty and “destroy Kids’ business.”

Although Appellants try to turn the record on its head by asserting Nasser improperly competed with Kids, Br. 7, the Court of Chancery rejected that position, *see* Op. 2, and instead found that *Appellants* “crippled” and ultimately “destroy[ed]” Kids through their equitable competition. *See id.* 1, 19. Appellants studiously avoid these findings, devoting approximately 3 paragraphs of their 35-page brief to their own actions. Br. 8, 33-34. Nasser and Kids lay out Appellants’ malfeasance more fully below because it drives the liability or damages analysis in this case.

1. Dweck forms competing businesses that usurp Kids’ corporate opportunities.

Despite receiving millions in salary and distributions, Dweck felt that her 30% interest in Kids did not fairly compensate her for her role in Kids’ success. Op. 11. Accordingly, she “decided to compete [directly with Kids] because it was

[her] only way to receive more income." *Id.* 12 (internal quotation marks and alterations omitted). She did so, in part, at the urging of Taxin, who had similarly grown discontent with his inability to obtain equity in Kids. *Id.*

Accordingly, in 2001, Dweck formed Success Apparel LLC ("Success"), a children's clothing wholesaler. *Id*. Dweck gave Taxin a 20% stake and retained 80% for herself, and the two began competing with Kids, violating their fiduciary duties to it. *Id.* 12-13. For example, in Success' first three years, "it signed license agreements to manufacture and distribute a number of brands, including Bugle Boy, Everlast, and John Deere." *Id.* 14. In obtaining these agreements, Dweck and Taxin acted as Kids' principals, "used marketing materials with the logos of Kids and Success side by side, cited industry awards won by Kids, and touted Kids' lengthy record in the apparel business." *Id*. "This resulted in confusion amongst the Licensors," who believed they were doing business with Kids. *Id.*

Adding to the confusion, Success operated out of Kids' premises, used Kids' employees and showroom, and displayed its and Kids' brands in the same space. *Id.* Success drew on Kids' letters of credit, sold products under Kids' vendor agreements, and capitalized on Kids' relationships. *Id.* Indeed, "Success and Kids operated so seamlessly that many of the Kids employees who routinely worked for Success never suspected that Success was a separate company or had different ownership from Kids." *Id.* Although Success purported to compensate Kids for use of its premises and employees, the Court of Chancery found that the reimbursements to Kids were "grossly inadequate." *Id.* 13.

In 2004, Dweck formed another clothing wholesaler, Premium Apparel

Brands LLC ("Premium"), which also operated out of Kids' premises using its employees and resources, *id.* 14-15, and through which Dweck stole additional opportunities of Kids, including a Gloria Vanderbilt licensing agreement. *Id.* Significantly, all opportunities usurped by Success and Premium were directly competitive with Kids. *See id.* 27.

2. Appellants "destroy Kids' business."

In 2004, Kids stopped sending Nasser quarterly financial reports, despite his repeated requests. Op. 16. Later that year, a Kids secretary warned Nasser that other companies were operating out of its offices. *Id.* "To get a handle on what was going on," Nasser requested a formal meeting of the board and stockholders for January 5, 2005. *Id.* During the meeting, Dweck and Fine reported that Kids' sales had declined by roughly $18 million. *Id.* Realizing that something was wrong but not knowing quite what, Nasser named his nephew, Itzhak Djemal, Kids' Vice Chairman. *Id.* Unwilling to work with Djemal, Dweck offered to buy Nasser out, but she did not disclose her competing businesses. *Id.* 17, 29.

Over the next three months, Dweck and Taxin prepared to leave Kids while implementing a campaign to divert its business to Success. *Id.* On their instructions, "Kids employees systematically switched the vendor information and customer contacts from Kids to Success, thereby ensuring that when the orders came in, they came to Success." *Id.* "Taxin also communicated directly with Wal–Mart and Target about switching purchases from Kids to Success." *Id.* 18.

Meanwhile, another round of Kids board and stockholder meetings was noticed for March 11, 2005. *Id.* Before the meetings, Nasser and Shiboleth were asked to wait in a Kids conference room, the walls of which were covered with samples for brands handled by Success and Premium. *Id.* As they waited, Dweck instructed an employee to remove the samples. *Id.* 18-19. After this clumsy attempt to conceal her wrongdoing, Dweck announced that she could no longer serve as a Kids director due to a conflict of interest and, *for the first time*, confessed that she was "selling 'overlapping product' from Kids' premises." *Id.* 19. After this announcement, Dweck no longer served as an officer or director. *Id.*

Dweck's downplayed suggestion that she simply "left Kids and continued to operate Success" after her employment with Kids ended, Br. 8, completely ignores the extensive findings about her departure. Op. 19. Specifically, the Court of Chancery found that Dweck and Taxin continued to divert Kids' business to Success. They "succeeded in transferring all of the Wal–Mart and Target business from the Holiday 2005 season onward; in fact, "Kids did not receive any orders after May 2005." *Id.* They also orchestrated a mass exodus of nearly all of Kids' employees. *Id.* 20. Supervised by Fine, Kids employees "load[ed] a moving truck with roughly 100 boxes of Kids' documents and materials," and "a number of the hard drives from Kids' computers [were] wiped clean." *Id.* Not content with having "crippled" and "destroy[ed]" Kids, *id.* 1, 19, Dweck dealt Kids and Nasser a final blow by filing this lawsuit against them the very same day. B1-23.

3. Despite their best efforts, Nasser and Djemal cannot revive Kids.

"Having lost nearly all its employees and with its pipeline diverted to Success, Kids had to start over from scratch." Op. 21. Nasser and Djemal attempted to resuscitate Kids but, without its customer base, employees, and manufacturing facilities, immediately ran in to difficulties. *Id.* For example, despite having an almost 15-year relationship with Kids, Wal–Mart and Target would no longer recognize Kids as a vendor, and its manufacturing facilities would not return its calls. *Id.* After a year of fruitless efforts, Kids, as a temporary life saving measure, entered into a joint venture with Seabreeze Apparel, which generated a modest profit but ultimately was shut down two years later. *Id.* Before closing its operations, Kids paid off the Maubi Loan, including interest.[4] *Id*; B1140. Kids has not engaged in active business since the end of 2008. Op. 23.

C. After nearly nine years of litigation, the Court of Chancery awards Kids relief for Appellants' "striking breaches" of their fiduciary duties.

Dweck, Success, and Premium filed suit against Nasser and Kids on May 18, 2005, asserting, among various claims, a single breach of fiduciary duty claim based on Djemal's appointment as Vice Chairman. B1-23. Nasser and Kids counterclaimed against Dweck, asserting breach of fiduciary duty claims for her usurpation of Kids' corporate opportunities and her improper personal expenses, along with misappropriation of trade secrets, deceptive trade practices, tortious interference, and conversion claims. B24-47. Nasser and Kids later added Taxin and Fine as third-party defendants, asserting counterclaims against them.[5] B48-75.

---

[4] Although Dweck complains that Nasser wrongfully "dissipate[d]" all of Kids' assets after she left and accuses him of "looting" the Company, Br. 8-9, the Court of Chancery expressly considered each of the expenditures about which Dweck complains, including the Maubi Loan payment, *see* Op. 9, and found only that Nasser should reimburse the Company for certain "consulting fees" and expenses. *See id.* 40-45.

[5] On March 3, 2010, the Court of Chancery allowed Appellants to file an amended complaint that added new breach of fiduciary duty allegations against Kids and Nasser. B88, B89-108.

On July 2, 2008, the Court of Chancery issued an opinion and judgment enforcing a purported settlement agreement between the parties, over Nasser's and Kids' objection. *See* A92-123. After Nasser and Kids appealed and the parties filed their briefs, Dweck, Taxin, and Fine withdrew their opposition to the appeal, resulting in the vacatur of the judgment and remand of the case. B78-79.

Extensive discovery and motion practice ensued. *See* A17-56. For example, on July 24, 2009, the Court of Chancery heard argument on a motion in limine aimed at precluding further discovery of settlement-related issues and, after ruling on that motion, expressed frustration at the tone the litigation had taken. A613-14. Thereafter, on June 23, 2011, the Court of Chancery heard argument on a motion for sanctions or to compel further re-deposition of Dweck and, before granting the motion, separately advised the parties as to how it viewed the tax issues presented by the Overseas Payments. B321-23 (recognizing that the Overseas Payments presented a "looming question about whether there are adverse tax consequences" for Dweck and Nasser, but noting that the issue before the Court was simply "who received or should have received what" and "the civil issues of where the evidence shows this money went or should have gone and when").

After a five-day trial in July 2011 and post-trial briefing, the Court of Chancery issued its post-trial opinion, concluding that:

- "Dweck and Taxin breached their fiduciary duties to Kids by establishing competing companies that usurped Kids' corporate opportunities," Op. 1;

- Dweck "breached her fiduciary duties by causing Kids to reimburse her for hundreds of thousands of dollars of personal expenses," *id.*;

- “Fine breached his fiduciary duties by abdicating his responsibility to review Dweck’s expenses and signing off on them,” *id.*; and
- Appellants again breached their duties by “destroy[ing] Kids’ business.” *Id.*

In light of these findings, the Court of Chancery held Dweck, Taxin, Success, and Premium jointly and severally liable to Kids for $9,022,825 in lost profits from 2001 through 2004 and a to-be-determined amount of lost profits for the Stub Period for the corporate usurpation claim. *Id.* 34. For the destruction claim, the Court of Chancery determined that Kids was entitled to “the damages [it] suffered over and above where [it] would have been had Dweck and Taxin resigned in an appropriate manner” but awarded Kids only “the profits generated by Success [and Premium].” *Id.* 36. Finally, the Court of Chancery found Dweck and Fine liable to Kids for $342,366 in personal expenses impermissibly charged to Kids. *Id.* 40.

By contrast, the Court of Chancery “largely reject[ed] Dweck’s breach of fiduciary duty claims against Nasser,” finding him liable to Kids only for the consulting fees paid to RAJN from 2002 onward. *Id.* 2, 43. The Court of Chancery also ordered Nasser to account for a portion of Kids’ expenses after Dweck’s departure. *Id.* 45. The Court of Chancery failed to reach the parties’ non-fiduciary claims, which it considered “duplicative,” *id.* 2, and refused to award Kids and Nasser their attorneys’ fees, despite Dweck’s “striking breaches of the duty of loyalty and her frequently non-credible testimony.” *Id.* 46. The Court awarded interest at the legal rate, compounded quarterly. *Id.*

Both the Court of Chancery’s post-trial opinion and its February 8, 2012 post-trial order required the parties to submit accountings. Op. 34; B123-26.

Specifically, the Court ordered that Dweck, Taxin, Success, and Premium "provide an accounting of and are jointly and severally liable to Kids for profits generated between January 1, 2005 and May 18, 2005" as well as "profits generated by Success and Premium after May 18, 2005 for the duration of the license agreements then in effect, including any rights of renewal or extension." Op. 34. The Court further ordered Nasser to account for $3,076,400 in post-split expenses. *Id.* 45. After significant briefing and an evidentiary hearing, the Court held Dweck, Taxin, Success, and Premium jointly and severally liable for an additional $539,947.20, held Nasser liable for an additional $2,461,085, and again awarded prejudgment interest at the legal rate compounded quarterly.[6] Acct'g Op. 11.

Thereafter, the parties submitted extensive briefing on the form of the final order. A505-45; A560-609; B168-98; B202-33. Despite recognizing the Court of Chancery's previous rulings that prejudgment interest would accrue on all damages at the legal rate compounded quarterly, Appellants asked the Court to reconsider its prejudgment interest measure. A512-13. The Court of Chancery addressed and rejected Appellants' request, B234-35, and issued its Final Order and Judgment on January 15, 2013. B239 ¶ 1. Both parties timely appealed. B243-46; B247-60.

[6] Nasser and Kids moved for reargument, arguing that the damages award did not afford Kids meaningful relief for Appellants' significant breaches and that the Court of Chancery erroneously rejected Nasser's reasonable accounting for Kids' expenses after March 2005. B127-29; B130-57. The Court of Chancery denied the motion. B158-62.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOCUSED ON APPELLANTS' MISCONDUCT IN CALCULATING THE DAMAGES OWED TO KIDS FOR THEIR LOYALTY BREACHES.

A. Question Presented

Did the Court of Chancery correctly determine that Appellants' complaints about the purportedly "illegal tax evasion scheme," of which Nasser was the purported "architect and primary beneficiary," Br. 1, do not affect the amount of damages that Appellants owe Kids for their unrelated loyalty breaches?

B. Standard of Review

Damages awards are reviewed for abuse of discretion. *See Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1220-21 (Del. 2012). Abuse of discretion review also applies to unclean hands and *in pari delicto* decisions. *See SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 448 (Del. 2000).

C. Merits of the Argument

Appellants' singular focus on Nasser's purported misdeeds is a diversion tactic aimed at shifting the Court's attention away from the Court of Chancery's extensive and correct findings regarding Appellants' multiple breaches of their fiduciary duties that effectively destroyed Kids. Op. 46. To make their argument about the purportedly "illegal tax evasion scheme," Appellants misquote Nasser's prior statements to this Court and mischaracterize the Court of Chancery's pretrial rulings and post-trial opinion. Because neither a prior Court of Chancery ruling nor Delaware law countenanced a reduction in the damages awarded to Kids for Appellants' misconduct, Appellants' first point of error should be rejected.

1. The Court of Chancery did not ignore an admission by Nasser or contravene a prior ruling in remedying Appellants' loyalty breaches.

Appellants' first issue hinges on a purported admission—that the parties were engaged in an "illegal tax evasion scheme"—that Nasser never made and a purported decision—that a determination of the legality of the shareholders' profit-sharing structure was a prerequisite to awarding Kids any relief for Appellants' unrelated fiduciary breaches—that the Court of Chancery never made. According to Appellants, the Court of Chancery "ruled that [it] would not preside over a dispute if the record establishe[d] that the parties [we]re fighting over the fruits of illegal conduct," and this "ruling" constituted the law of the case. Br. 14, 16. Because Nasser purportedly admitted, and the evidence at trial purportedly established, that the profit-sharing structure was illegal, Appellants insist that the "ruling" required the Court of Chancery to dismiss the claims against Appellants or, at a minimum, determine the legality of the structure in calculating the damages that they owe. *Id.* 16-18. Appellants are wrong on all counts.

First, Nasser never told this Court that the Overseas Payments were part of an "illegal tax evasion scheme." Br. 1. Appellants argue that Nasser admitted to this Court that he created an "illegal tax evasion scheme" for distributing company profits, but they misquote the record to do so. Specifically, Appellants assert that:

> Nasser . . . argu[ed] that the settlement agreement was "void as against public policy" because overseas payments made by Kids "<u>were part of an illegal tax evasion scheme</u>[.]"

Br. 1 (alterations and emphasis in the original). Nasser's brief actually stated:

> The record below reveals that these payments were part of an illegal tax evasion scheme *that benefited [] Gila Dweck*, who sought enforcement of the settlement agreement.

A132 (emphasis added).[7] Thus, what Nasser acknowledged was that *Dweck*, as a U.S. citizen, may have been involved in an "illegal tax evasion scheme" to the extent that she was not reporting her share of the Overseas Payments as income:

- "Dweck, in turn, received monies from the Offshore Entities, and [Nasser] was not certain that *she* had paid taxes on the payments *she* received from them," A135 (emphases added);

- "If *Dweck or entities controlled by her* received any payments or derived any income from the Offshore Entities and did not declare such payments or income to the Internal Revenue Service, this constituted tax evasion," A156 (emphasis added); and

- "The record leaves little doubt as to whether *Dweck* was engaged in an illegal tax evasion scheme through the Offshore Entities. . . ." A157 (emphasis added).

Second, despite Appellants' repeated characterizations of the shareholders' profit-sharing structure as "illegal," there has been no such finding by any adjudicative body in Delaware or elsewhere. On the contrary, Shiboleth—"a sophisticated international lawyer," Op. 40, and "the most credible witness at trial," *id.* 3—designed the structure and believed it to be legal, *id.* 40. And, as the Court of Chancery correctly found, "[t]he Internal Revenue Service is currently auditing Kids and its principals, and the propriety of the structure is best addressed in that forum." Op. 40-41; *see also* B321-23.

---

[7] Appellants knew Nasser's true position, as shown by their counsel's statements at post-trial argument. B845 ("[T]hey went to the Supreme Court of Delaware and accused her of a tax fraud affirmatively, and they said the settlement shouldn't be enforced because this is a tax fraud.").

Third, the Court of Chancery issued no rulings concerning the profit-sharing structure, let alone a "law of the case" ruling that required the court to decide the legality of the structure before Kids could be awarded damages for Appellants' breaches. In arguing otherwise, Appellants quote the transcript of a discovery hearing before Vice Chancellor Lamb, Br. 14, that was unrelated to the corporate opportunity and destruction claims. *See* B263-64 ("This is plaintiffs' motion in limine to preclude evidence of settlement. . . . We're presented here with a rather simple proposition, and that is whether or not an instrument that arose out of the settlement discussions . . . should be allowed to be used in the case in chief."). Unsurprisingly, whether or how the profit-sharing structure might affect the remedy for Appellants' usurpation of Kids' corporate opportunities and destruction of its business was not raised, let alone decided, at the hearing. *See* B261-89.

Instead, after hearing argument on the discovery motion before him, and ruling that no "further discovery into settlement discussions or settlement documents" would be permitted, Vice Chancellor Lamb went on to make the comments that Appellants selectively quote in their brief. B284-85. It is apparent from the comments themselves, however, that they are his reflections at the time and do not constitute a ruling that the profit-sharing structure was somehow illegal:

> Now, I want to say to you what I said to Mr. Wachtel. I am concerned that this case is getting out of control and that counsel involved in the case have reached the point where they're not going -- you're not going to be able to work together. 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.

Id. (emphases added). Nor do these comments constitute a ruling that the corporate opportunity and destruction claims against Appellants—which, again, were not at issue in the hearing—would somehow be dismissed if the unrelated profit-sharing structure turned out to be illegal. *See id.* Because the Court of Chancery issued no ruling with respect to the legality of the structure or its implications for the corporate opportunity and destruction claims against Appellants, the law of the case doctrine does not apply.[8]

In short, nothing that Nasser acknowledged or that the Court of Chancery ruled compelled the dismissal of the corporate opportunity and destruction claims against Appellants or a reduction in the amount of damages that they owes Kids.

2. The Court of Chancery awarded damages to Kids, not Nasser, for Appellants' loyalty breaches to Kids.

But even assuming that Nasser was the "architect and primary beneficiary" of an "illegal tax evasion scheme," as Appellants insist, Br. 1, Appellants' first point of error still should be denied because it is built upon another false premise: namely, that the Court of Chancery awarded damages to *Nasser*. *E.g.*, Br. 12 ("Did the trial court err in . . . granting *Nasser* relief . . . .") (emphasis added).

[8] Dweck's sole case, Br. 16, is inapposite. *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 717-19 (Del. 1983) (holding judge abused discretion by overruling predecessor's summary judgment).

From this premise, Appellants seek reversal of the damages award, arguing that the Court of Chancery erroneously failed to consider Nasser's "illegal tax evasion scheme" in calculating it. *Id.* ("The trial court erred in awarding Nasser relief without considering his wrongdoing."). Their premise is wrong and so are the conclusions that it drives.

The centerpiece of the Court of Chancery's post-trial opinion is its finding that Appellants breached their duties of loyalty by "establishing competing companies that usurped Kids' corporate opportunities and converted Kids' resources" and by leaving "Kids crippled." Op. 2. Again, Appellants do not even address, let alone challenge, these troubling findings on appeal. *See, e.g.*, Br. 34. To remedy Appellants' breaches, the Court of Chancery ordered them to pay damages not to Nasser, as Appellants claim, but rather to Kids, the victim of the breaches. The post-trial opinion repeatedly makes that fact plain. *See, e.g.*, Op. 1-2 ("[Appellants] are liable to *Kids* for the damages caused by their breaches of duty.") (emphasis added); *id.* 33, 34 ("[Appellants] are jointly and severally liable to *Kids* . . . .") (emphasis added); *id.* 37 ("Dweck, Taxin, Fine, Success, and Premium shall account for and pay over to *Kids* . . . .") (emphasis added). That Nasser was the Chairman and majority stockholder of Kids does not change the fundamental fact that Kids was the recipient of the remedy that the Court of Chancery fashioned for Appellants' breaches of their duty of loyalty to Kids.

3. Appellants cannot escape liability for their "striking breaches of the duty of loyalty" to *Kids* by pointing to unrelated conduct of *Nasser*.

Finally, Appellants insist that the Court of Chancery should have considered

Nasser's "wrongdoing" in fashioning the damages award against them, relying on the unclean hands and *in pari delicto* doctrines. *See* Br. 12-14. Appellants arguably failed properly to raise this argument in the Court of Chancery,[9] but even if they had, their argument suffers from three fundamental flaws.

First, Appellants cannot use the purported misconduct of *Nasser* to shield themselves from liability to *Kids*. As Appellants' brief acknowledges, the doctrines of unclean hands and *in pari delicto* prevent *the person who engaged in wrongdoing* from obtaining relief. Br. 12 ("[A] court of equity does not grant relief to persons arising from *those persons*' illegal or inequitable conduct.") (emphasis added). Appellants' argument that the doctrines bar recovery in this case thus fails, as it rests on the purported wrongdoing of *Nasser*, not Kids. *E.g.*, *id.* ("[T]he record establishes that Nasser conducted an illegal tax evasion scheme . . . . Nasser caused Kids to pay RAJN bogus consulting fees . . . .").

To the extent Appellants suggest that Nasser's purported role in the "illegal tax evasion scheme" can be imputed to Kids, they cite no authority for the novel proposition that the wrongdoing of one shareholder can bar the corporation from collecting damages from another shareholder for that shareholder's independent wrongdoing. On the contrary, Delaware courts have rejected breaching fiduciaries' invocation of the unclean hands and *in pari delicto* doctrines in such

[9] In fact, at one point during the post-trial argument, Appellants' counsel affirmatively told the Court of Chancery that it need not decide the tax issue. B836 ("[L]ook, if Your Honor does want supplemental briefs about this tax thing, I mean, in fairness, I've done it; but for your sake, Your Honor, you know, I don't think it's necessary for Your Honor to -- as you said, to determine what the tax ramifications are of the transactions. I do a lot of that work, and I'm not even sure I completely would be in a position to write a decision about that.").

circumstances. *See Kousi v. Sugahara*, 1991 WL 248408, at *3 n.2 & *4 (Del. Ch. Nov. 21, 1991) (rejecting majority shareholders' argument that unclean hands barred minority shareholders' derivative claims, noting that, "to the extent this action is derivative, it is brought on behalf of [the corporation], which is not a subject of any arguable unclean hands defense"); *cf. In re Healthsouth Corp. S'holders Litig.*, 845 A.2d 1096, 1107 (Del. Ch. 2003) ("[A]pplication of the *in pari delicto* doctrine has been rejected in situations when corporate fiduciaries seek to avoid responsibility for their own conduct vis-à-vis their corporations.").

Second, even if Nasser's conduct could be imputed to Kids, Appellants still could not escape liability for usurping Kids' corporate opportunities and destroying its business because there is no relationship between forming and operating competing businesses and setting up a profit-sharing structure that minimizes taxes. Under Delaware law, for unclean hands to apply, there must be a direct link between the wrongdoer's conduct and the relief that the wrongdoer seeks:

> [C]ourts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court of adjudication.

E. States Petrol. Co. v. Universal Oil Prods. Co., 8 A.2d 80, 82 (Del. 1939); *see also* 1 Dan B. Dobbs, LAW OF REMEDIES, § 2.4(2), at 95 (2d ed. 1993) (attached as

Ex. A) ("[C]ourts are agreed that the plaintiff's improper conduct, whatever it is, must be related in some substantial and significant way to the claim he now asserts."). The same is true of in *pari delicto*. *E.g.*, *Burns v. Ferro*, 1991 WL 53834, at *2 (Del. Super. Ct. Mar. 28, 1991) ("Where parties to a contract are *in pari delicto*, a court will . . . refuse to enforce the contract. [One] who participates in a fraudulent scheme may not . . . recover for injuries that arise out of the same transaction.") (citations omitted). Because neither the profit-sharing structure, nor Nasser's "consulting fees," nor any other act, relates in an "immediate and necessary" way to the claims against Appellants, they cannot wield unclean hands and *in pari delicto* as a shield.[10] *See Kousi*, 1991 WL 248408, at *1-3.

Third, Dweck cannot wield Nasser's so-called "illegal tax evasion scheme" as a lever to excuse her misconduct and destruction of Kids because she acquiesced in that scheme. The Court of Chancery expressly found that, even "[a]ssuming for purposes of discussion that Nasser and Shiboleth originally set up a wrongful scheme, Dweck agreed to it"; that "[s]he went along until 1998 and personally benefitted after that"; and that "[h]er actions constitute classic acquiescence, barring her from challenging the overseas payments." Op. 41. Dweck does not challenge these findings on appeal. Because Dweck acquiesced in the allegedly "illegal tax evasion scheme," she waived any right to argue that her liability to Kids should have been reduced on account of it.

[10] Appellants assert elsewhere in their brief that "Nasser competed directly with Kids," Br. 7, but the evidence did not show, and the Court of Chancery did not find, that any such ventures were improper. *See* A341-43, A466-68 (showing Nasser did not compete directly with Kids).

II. THE COURT OF CHANCERY CORRECTLY AWARDED KIDS PREJUDGMENT INTEREST FOR APPELLANTS' WRONGDOING.

A. Question Presented

Did the Court of Chancery act within its discretion in awarding Kids prejudgment interest compounded quarterly at the legal rate?

B. Standard of Review

This Court reviews the Court of Chancery's interest determinations for abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219, 226 (Del. 2005).

C. Merits of the Argument

Appellants' challenge to the Court of Chancery's interest award suffers from one of the same flaws that dooms their challenge to the damages award: it misidentifies the recipient of the award (Kids) in an effort to shift the focus away from the wrongdoing being remedied (usurpation of corporation opportunities and corporate destruction) and the perpetrators of that wrongdoing (Dweck and her colleagues). It also depends on factual findings about *Nasser*'s conduct that the Court of Chancery did *not* make and directly attacks and recharacterizes the factual findings about *Appellants*' misconduct that the Court of Chancery *did* make, when those findings were anything but clearly erroneous and explicitly went the other way. In fact, the Court of Chancery's interest award appropriately compensates Kids for the types of harms that Appellants inflicted on it. And, even assuming that a valid basis for challenging the award existed, the Court of Chancery correctly rejected Appellants' belated complaints, raised for the first time when briefing the form of the final order and only after successfully requesting the same measure of interest for themselves in their proposed accounting order.

1. An award of interest at the legal rate compounded quarterly was well within the Court of Chancery's discretion.

Delaware confers on the Court of Chancery broad discretion to award prejudgment interest based on the record before it. *E.g.*, *Montgomery*, 880 A.2d at 219. Exercising that discretion, the Court of Chancery ordered Appellants to pay Kids prejudgment interest at the legal rate, compounded quarterly. Op. 46; B234-35; B239-40. "Generally, the legal rate of interest has been used as 'the benchmark for pre-judgment interest.'" *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 755-56 (Del. Ch. 2007) (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)). Because this Court has expressly "recognized the discretion of the Court of Chancery to award compound interest," *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002), the Court of Chancery's measure of interest is soundly rooted in Delaware law.

In selecting that measure, the Court of Chancery considered three factors: the relative culpability of the parties, the cost of borrowing to Kids during the pendency of the litigation, and the relative fault of the parties for the protracted nature of the litigation. B234-35. It found that Appellants were the "primary wrongdoers in the case"; that "[a] third party loaning funds to Kids during the pendency of this litigation likely would demand a rate far exceeding the legal rate given the risks inherent the loan"; and that both Nasser and Appellants bore "a degree of responsibility" for the length of time it took to resolve the case. *Id.*

Appellants attack each finding, but none of their arguments reveals an error in the Court of Chancery's exercise of its discretion.

First, the Court of Chancery correctly considered Dweck's "striking breaches" and Appellants' "primary wrongdo[ing]." Appellants incorrectly attempt to paint the wrongdoing in this case as being Nasser's and not their own. *See* Br. 27-34. But their assertion that the post-trial opinion and record demonstrate that they are less culpable than Nasser is unsupportable, given the Court of Chancery's findings, discussed in more detail above, *see supra* 1-2, 14-15, that Appellants intended to and did start companies to take corporate opportunities from and compete with Kids. These findings amply support the Court of Chancery's anointment of Appellants as the "primary wrongdoers." B235.

Appellants nevertheless insist that Nasser "committed numerous egregious, unlawful acts," Br. 27, pointing to the so-called "illegal tax evasion scheme" that Nasser purportedly orchestrated, the so-called "consulting fees" that the Court of Chancery found not to be entirely fair, and the Court of Chancery's rejection of the accounting of certain post-split expenses, *id.* 29-30. According to Appellants, the Court of Chancery "wrongly turned a blind eye to [these] (more serious) transgressions." *Id.* 34. In fact, the Court of Chancery expressly considered these alleged "transgressions" and found the exact opposite—that Nasser had not engaged in the sort of covert, bad faith conduct in which Appellants had engaged:

> The petitioners' proposal also ignores the fact that they were the primary wrongdoers in the case. Nasser has not been adjudicated a wrongdoer. The consulting fees were

> held to be interested-party transactions and not entirely fair, but they were not secret misappropriations or covert breaches of the duty of loyalty. The overseas payments were assumed to be legal and were made with Dweck's full knowledge and acquiescence. The accounting ruling resulted from the defendants' choice to put on a minimalistic case and concomitant failure to carry their burden of proof during that phase of the proceeding.

B234-35.

Second, the Court of Chancery properly considered the effect of Appellants' misconduct on Kids and its cost of borrowing. Appellants also incorrectly assert that it was error to consider what a forced loan during the pendency of the litigation would have cost Kids because Kids "never needed or obtained any [] loan" and "this is not an appraisal case." Br. 29. The first argument is irrelevant because the purpose of examining the prejudgment interest recipient's borrowing rate in a cost of borrowing analysis is "to ensure that the [wrongdoer] does not reap a windfall by being able to use the [victim's] funds without having to pay the equivalent of the cost that the [victim] would have had to incur to borrow the funds in the market." *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *20 (Del. Ch. Aug. 19, 2005). And, tellingly absent from the second argument is any authority for the proposition that the Court of Chancery cannot conduct a cost of borrowing inquiry outside the appraisal context.

Finally, Appellants incorrectly assert that the Court of Chancery erred in declining to reduce the interest rate in proportion to Nasser's responsibility for the protracted nature of the case. Br. 27. First, the cases cited by Appellants, *id.* 26-27, do not mandate such a reduction, nor do they otherwise divest the Court of

Chancery of its broad discretion to determine an appropriate prejudgment interest rate.[11] Second, Appellants base their argument primarily on the time spent on the settlement dispute in this case, *id.* 27 n.5, but the Court of Chancery expressly found that "it would be inequitable to permit plaintiffs to benefit from an appeal that they chose to abandon after briefing and argument." B235. Third, Appellants' one-sided tale conveniently omits their role in delaying the resolution of this case:

- "Dweck was extremely reluctant to testify at her deposition," *Dweck v. Nasser*, 2008 WL 2602169, at *4 (Del. Ch. July 2, 2008), and twice sought to delay it to settle the case instead of appearing;

- Kids had to move to reconvene Dweck's deposition twice because of her counsel's objections at the depositions;

- Subpoena motion practice in New York consumed many months because the parties could not agree on the depositions of Morris Dabah (Dweck's father) and Erwin Braha (who ran Seabreeze). Nasser and Kids proposed that both or neither be deposed, but Appellants insisted that Braha go forward but that Dabah not. The New York court ultimately allowed both depositions;

- Appellants waited more than four years, until September 30, 2009, to move for leave to amend their complaint, which added a host of new allegations and claims that had to be discovered; and

- The trial date was set and postponed several times, with Kids and Nasser typically pushing for an earlier resetting and Appellants typically pushing for a later resetting.

See B211-12; B81-87; B89-108.

---

[11] *See, e.g., Seibold v. Camulos Partners LP*, 2012 WL 4076182, at *24-25 (Del. Ch. Sept. 17, 2012) (recognizing court of equity's "broad discretion" in fixing prejudgment interest rate and awarding simple interest at Federal Reserve discount rate plus 5% where plaintiff "set the tenor of litigation by filing initially baseless criminal and theft charges," "even bringing his complaint to the attention of the Connecticut Attorney General's office").

2. Appellants' challenges to the interest measure came too late.

Despite expressly recognizing that the Court of Chancery decided in the post-trial and accounting opinions that prejudgment interest would accrue on all damages at the legal rate, compounded quarterly, Appellants waited until the eve of the final judgment to argue that the Court of Chancery should adopt a lower interest rate and that interest should not be compounded. That challenge came after Appellants themselves submitted proposed forms of post-trial and accounting orders that provided for interest at the legal rate, compounded quarterly, and after the Court entered Appellants' proposed form of accounting order that so provided. B163-64; B165-67. Having themselves submitted proposed forms of order providing for interest at the legal rate, compounded quarterly, Appellants waived any right to argue for a different result. *See Salovaara v. SSP Advisors, L.P.*, 2003 WL 23190391, at *3 n.22 (Del. Ch. Dec. 22, 2003).

III. THE COURT OF CHANCERY CORRECTLY REJECTED DWECK'S CHALLENGES TO THE OVERSEAS PAYMENTS.

A. Question Presented

Should the Court of Chancery's decision that Dweck could not challenge the Overseas Payments, and its refusal to revisit that decision, be affirmed?

B. Standard of Review

Nasser disputes Dweck's bald assertion that "Nasser acknowledges that $15.1 million in Kids' earnings were paid to his overseas entities and not distributed to Kids' shareholders other than himself." Br. 19. The Court of Chancery found that Dweck acquiesced in the profit-sharing structure, and that finding is reviewed for clear error. *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000).

C. Merits of the Argument

The Court of Chancery held that "Dweck cannot assert any causes of action relating to the [overseas] payments" or obtain a remedy with respect to them because (1) "she acquiesced to them" and (2) "she was not harmed by them because she beneficially owns her *pro rata* share." Op. 41. Critically, Dweck attacks only the second rationale; at no point, either below or in her opening brief on appeal, did Dweck attack the first rationale—that she cannot complain about or seek a remedy for payments made under a structure to which she acquiesced. *Id*. Dweck thus waived any challenges to the Overseas Payments. But even if Dweck had not waived the issue, the Court of Chancery did not abuse its discretion in making this decision or declining to revisit in issuing the final judgment.

1. The unchallenged finding that Dweck acquiesced in the profit-sharing structure precludes her challenges to the Overseas Payments.

According to Dweck, the Court of Chancery should have ordered the return of the Overseas Payments to Kids or, "at a minimum, . . . enforced [her] *pro rata* entitlement to the foreign funds," Br. 24, because (1) "the funds should not have left Kids in the first place," and (2) "the misappropriation of converted funds cannot be excused by a promise to make one of the victims whole." *Id.* 19-21. Both of these arguments presume that the Overseas Payments were wrongful and, thus, depend on Dweck's ability to challenge their propriety. Both arguments fail as a result, because the Court of Chancery expressly held that Dweck could not "assert any causes of action relating to the [overseas] payments." Op. 41.

The Court of Chancery gave two reasons for barring Dweck's challenges to the Overseas Payments: "First, she acquiesced to them. Second, she was not harmed by them because she beneficially owns her *pro rata* share of the funds." *Id.* In making its acquiescence determination, the Court of Chancery found that, "[a]ssuming for purposes of discussion that Nasser and Shiboleth originally set up a wrongful scheme, Dweck agreed to it. She went along until 1998 and personally benefited after that. Her actions constitute classic acquiescence, barring her from challenging the overseas payments." *Id.* Importantly, Dweck has not challenged these findings in her opening brief. Accordingly, she has waived any right to complain about them. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012) ("This Court's rules specifically require an appellant to set forth the issues raised on appeal and to fairly present an argument in support of those issues in their opening brief. . . . Neither of the Defendants' opening briefs properly raised the issue set forth in the limited motion for reargument. . . . Therefore, th[at] issue . . . is procedurally barred, as a matter of Delaware law, because it has been waived."); *accord* SUP. CT. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

2. The Court of Chancery correctly declined to revisit its decision that Dweck could not challenge the Overseas Payments based on developments after trial.

Dweck insists that the Court of Chancery should have revisited its decision to deny her relief in connection with Overseas Payments, when, after trial, "Nasser refused to provide [her] with access to her share of the foreign funds" despite having previously represented that she was entitled to her share. Br. 21-24. The Court of Chancery acted within its discretion in rejecting Dweck's argument, which is legally and factually flawed.

As a threshold matter, the Court of Chancery acted within its discretion in declining to "revisit its decision that 'Dweck cannot assert any causes of action relating to the payments,'" B236 ¶ 6(a), because that decision had become the law of the case. *Frank*, 457 A.2d at 718 ("[T]he doctrine of the law of the case normally requires that matters previously ruled upon by the same court be put to rest."). Though not prohibited from reconsidering its interlocutory ruling, *see id.* at 719, the Court of Chancery was appropriately reluctant to revisit the issue of Dweck's ability to challenge the Overseas Payments, given that Dweck's complaints (1) did not undermine her acquiescence in the structure that gave rise to the payments; and (2) were based on post-trial developments on which the parties had not conducted discovery and the Court of Chancery had not held a hearing.

Moreover, Dweck's argument that Nasser should have been ordered "to pay [her] share of the [Overseas Payments] . . . in partial satisfaction of [the] damages" that Dweck owes to Kids, Br. 22, misquotes Nasser and contradicts the Court of Chancery's findings. For example, Dweck insists Nasser told the Court of Chancery that he personally would pay Dweck her *pro rata* share of the Overseas Payments, *see, e.g., id.* 19, 21-22, when the cited portions of the record show Nasser argued that Dweck was "entitled to her share" of the payments, *e.g.*, A495.[12] The Court of Chancery specifically considered Nasser's representations in light of Henk Keilman's "alleged defalcations" and concluded they were not false. B236-37 ("The fact that funds cannot now be obtained because of alleged defalcations by Henk Keilman, standing alone, does not undercut Nasser's trial testimony that Dweck was entitled to those funds, nor does that testimony make Nasser a guarantor of Keilman's performance."). Dweck attacks this finding, arguing that the Court of Chancery should have treated Maubi, the Foreign Licensors, and Keilman as Nasser's agents, Br. 23-24, but that argument contradicts the Court's supported findings that Maubi and the Foreign Licensors were "owned and controlled by Henk Keilman" and "structured to avoid any indicia of control" by Nasser. Op. 7. The record amply supports those findings.

[12] Although Dweck claims Nasser is "judicially estopped from disclaiming his earlier position Dweck was entitled to her pro rata share of the foreign funds and that "Woodsford would send Dweck her share,'" Br. 23, the issue (along with Nasser's response regarding disposition of the funds) was submitted to and rejected by the Court of Chancery. *See* B192; B199-202; A0587.

IV. THE COURT OF CHANCERY'S DAMAGES AWARD FAILED TO ADEQUATELY COMPENSATE KIDS.

A. Question Presented

Did the Court of Chancery err in both (i) awarding Kids "lost profits" for the destruction of its business, when only valuation damages would adequately compensate Kids, and (ii) miscalculating the lost profits that it did award, both as to the destruction claim and the corporate usurpation claim for the Stub Period? Did the Court of Chancery also abuse its discretion in refusing to award Kids its reasonable attorneys' fees, given Dweck's bad faith conduct during the litigation?

B. Standard of Review

This Court reviews the Court of Chancery's damages award for an abuse of discretion, *see Gatz*, 59 A.3d at 1220-21, and its findings of fact for clear error, *Cede*, 758 A.2d at 491. The denial of attorneys' fees also is reviewed for abuse of discretion. *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010).

C. Merits of the Argument

The Court of Chancery made two fundamental, interrelated errors in calculating Kids' damages for the destruction of its business, resulting in a failure to adequately compensate Kids (and Nasser, as its majority shareholder). First, despite expressly finding that Appellants "destroy[ed] Kids' business," Op. 19, the Court of Chancery erroneously chose a damages methodology other than diminution in the value of the business. Courts roundly recognize that, when a party's wrongdoing causes the total destruction of a business, the appropriate measure of damages is the fair market value of the business before its destruction.

Although the Court of Chancery initially indicated that it would award such damages for Kids' destruction, *see* B676-77;[13] *see also* Op. 36 ("Kids' remedy . . . should be limited to the damages [it] suffered over and above where [it] would have been had Dweck and Taxin resigned in an appropriate manner"), the Court ultimately, and erroneously, reversed course," *id.* 33-35, reasoning that the injury to Kids was minimized by the theoretical ability of its key employees to properly leave the company, *id.* 36. That reasoning is erroneous, however, because it disregards the improper way in which Appellants actually left the Company.

Second, the Court of Chancery compounded its error by framing the appropriate remedy in terms of Kids' loss, *id.* ("Kids' remedy for the departure-related breaches should be limited to the damages Kids suffered over and above where Kids would have been had Dweck and Taxin resigned [appropriately]"), but then not awarding the profits that Kids, based on its past performance, likely would have earned but for Appellants' misconduct and, instead, conducting a disgorgement analysis based on the profits disclosed (and minimized) by the competing companies. This combination of rulings yielded damages of only hundreds of thousands of dollars for the total destruction of a multi-million dollar business, effectively giving Appellants a free pass for the illegitimate manner in which they actually left Kids.

---

[13] Specifically, the Court of Chancery stated that it was unlikely to award "liquidation value, as if somebody had walked out the door appropriately," but that "an undiscounted full going concern value" "seem[ed] . . . punitive" given Appellants' lack of non-competes. B676. Thus, it was likely to craft a remedy "somewhere in between," B677, (1) the $120.3 to $131.2 million going-concern value advocated by Defendants, *see* B1055-56; *see also* B168-98, and (2) the $11.8 to $15.1 million advocated by Appellants' valuation expert "[b]ased upon a going concern assumption," B921.

The Court of Chancery repeated its second error in calculating Kids' lost profits for the Stub Period in remedying the corporate usurpation claim.[14] Accordingly, the damages award should be reversed and remanded with instructions that the Court of Chancery (1) recalculate Kids' damages for both the destruction claim and Stub Period portion of the corporate usurpation claim and (2) reconsider its denial of reasonable attorneys' fees to Kids in determining how to fully compensate Kids for Appellants' misconduct.

1. The Court of Chancery should have awarded Kids its valuation damages for Appellants' destruction of Kids' business.

Because the evidence shows, and Court of Chancery found, that Appellants' misconduct destroyed Kids' business, the Court of Chancery should have awarded Kids its going-concern value as of May 18, 2005.

Appellants conceded below that valuation damages are "recoverable if [they] committed tortious acts which rendered Kids valueless and incapable of operating." B110-11. And for good reason: Delaware courts, consistent with courts in other jurisdictions, recognize that the appropriate measure of damages for destruction of a business is lost enterprise value. Indeed, at least one Delaware court has held that "the proper measure of damages for destruction of a business is *not lost profits*, but the difference between the value of the business before and after the defendant's wrongful acts." *Zaleski v. Mart Assocs.*, 1988 WL 77779, at *1 (Del. Super. Ct. July 25, 1988) (emphasis added); *see also Boyer v. Wilmington*

[14] The Court of Chancery did not make this error in awarding Kids $9,022,825 in lost profits for the 2002-2004 period because Appellants did not challenge that calculation. Op. 34.

Materials, Inc., 754 A.2d 881, 902-05 (Del. Ch. 1999) (awarding damages equal to plaintiff's pro rata share in company's going-concern value after fiduciary defendants rendered company worthless by selling nearly all of its assets in order to exclude plaintiff from ownership and management of the business).

Courts in other jurisdictions similarly embrace valuation damages in circumstances where, as here, a party's wrongful conduct destroys the business. *See, e.g.*, *S.A.B. Enters., Inc. v. Village of Athens*, 164 A.D.2d 558, 564 (N.Y. App. Div. 1991) ("Since plaintiff's claim was that defendant's tortious acts totally destroyed its laundry business, the appropriate measure of that element of damages here was the fair market value of the business before destruction."); *accord Lively v. Rufus*, 533 S.E.2d 662, 669 (W. Va. 2000) ("[T]he proper measure of damages for the destruction of an established business is the difference between the fair market value of the business before and after its destruction."). They do so regardless of the type of claim at issue, *see, e.g.*, *LD Circuit, LLC v. Sprint Commc'ns Co.*, 364 F. Supp. 2d 1246, 1263 (D. Kan. 2005) ("The measure of damages on the tortious interference claim would be the value of the business that [plaintiff] actually lost. . . ."), which highlights why the Court of Chancery should have considered Nasser and Kids' other tort claims (rather than dismissing them as "duplicative," Op. 2) in selecting the damages measure here.

General principles of Delaware law likewise support an award of valuation damages when a business is destroyed. Specifically, "once disloyalty has been established, . . . Delaware courts require that a fiduciary not profit personally from his conduct, and *that the beneficiary not be harmed by such conduct*." *Triton*

Constr. Co. v. E. Shore Elec. Servs., Inc., 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009) (emphasis added) (citing *Boyer*, 754 A.2d at 906); *Thorpe ex rel. Castleman v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). Accordingly, damages resulting from a breach of fiduciary duty "are to be liberally calculated." *Id.* at 444. As long as there is a basis for an estimate of damages, and harm was suffered, mathematical certainty is not required; any uncertainties in the damages calculation are resolved against the breaching fiduciary. *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 814 (Del. Ch. 2011).

These principles confirm the appropriateness of valuation damages here. Appellants' malfeasance destroyed a 13-year-old, highly profitable business. The Court of Chancery expressly found that Dweck and Taxin "continued their campaign to divert Kids' business to Success," and ultimately "succeeded in transferring all of the Wal-Mart and Target business from the Holiday 2005 season onward," such that "Kids did not receive any orders after May 2005." Op. 19. It moreover found that Appellants orchestrated a "mass departure" of Kids' employees, stole "roughly 100 boxes of Kids' documents and materials," and "wiped clean" "a number of the hard drives from Kids' computers." *Id.* 20. And it determined that Appellants effectively "destroyed Kids' business," *id.* 19, forcing it "to start over from scratch." *Id.* 21; *see also id.* 17-18, 35. The evidence supports these findings, and, again, Appellants fail to challenge them. Br. 34.

The Court of Chancery further found that Kids could have continued operating profitably had Dweck and Taxin "resigned in an appropriate manner." Op. 36; *see also* Acct'g Op. 3. If Dweck and Taxin had "legitimately" resigned, then it would have been they, not Kids, who "would have had to start from scratch." Op. 36. Even if they ultimately captured Kids' non-branded business, "it would have taken time." *Id.* During that time, "Kids would have had an intact employee base, access to its records, and a much better shot at preserving some element of its relationships with Wal-Mart and Target." *Id.*

These findings strongly undermine the Court of Chancery's initial statement that Kids, as an entity distinct from Dweck and Taxin, "had minimal (if any) goodwill or going-concern value." *Id.* But even if Kids' value as a going concern were only "minimal," which Kids disputes, the Court of Chancery erred in refusing to ascertain and award that amount to Kids. Such damages, no matter how small, would ensure (1) not only that Appellants not profit from their breaches, but (2) that Kids not suffer harm as a result of Appellants' wrongdoing as well.

2. Even if lost profits were an appropriate measure of Kids' destruction, the Court of Chancery miscalculated them.

Even assuming that Kids' destruction could adequately be remedied by an award of lost profits, the Court of Chancery employed a fundamentally flawed methodology to calculate Kids' "lost profits." Both the post-trial and accounting opinions make clear that the Court of Chancery intended "to remedy the harm that [Appellants] inflicted on Kids by awarding *the profits that Kids would have earned* if [Appellants] departed without breaching their fiduciary duties." Acct'g Op. 3 (emphasis added); *id.* 5 ("Kids is entitled to the profits *it would have received* if Dweck and her colleagues had not breached their fiduciary duties . . . .") (emphasis added); *accord* Op. 36 ("Kids' remedy for the departure related breaches . . .

should be limited to the damages Kids suffered over and above where Kids would have been had Dweck and Taxin resigned in an appropriate manner.”).

“To approximate this loss,” however, it “award[ed] Kids *the [lost] profits generated by Success [and Premium]*.” *Id.* 36; *accord* Acct’g Op. 2-6 (focusing on profits generated by Success and Premium. In other words, the Court of Chancery erroneously focused on the profits gained by Success and Premium, rather than the profits lost by Kids. But these values are not one and the same.

The amount of profit that Success and Premium made from the product lines for which the Court of Chancery ordered them to account bears no relation to the amount of profit that Kids would have made had it been able to exploit the diverted product lines itself. Kids was a 13-year-old business able to spread its costs over time and across product lines and consistently operated at a profit; by contrast, Success and Premium were essentially two start-up companies with high operating costs, in part due to the substantial salaries and bonuses the companies paid to Appellants. Because of these stark differences, Success and Premium likely derived less profit than Kids would have from the same work, and the Court of Chancery erred by failing to account for these differences and simply assuming that the profits of Success and Premium would have been equal to those of Kids.[15]

In effect, the Court of Chancery ordered Appellants to disgorge the profits from their destruction of Kids, but it did not remedy the harm to Kids. Thus, even if the Court finds that lost profits is a proper measure of damages, it should remand

---

[15] Indeed, the Court of Chancery expressly recognized the problematic nature of awarding damages based on competing businesses’ “profits,” given the incentives of private companies “to minimize income and therefore not pay profits and therefore not pay taxes.” B677.

this action to the Court of Chancery to calculate the profits that Kids actually lost.

3. Kids' lost profits from Appellants' usurpation of its corporate opportunities over the Stub Period were similarly miscalculated.

The Court of Chancery made the same error in calculating Kids' lost profits for the Stub Period in remedying the corporate usurpation claim. A comparison of the lost profits awarded for the Stub Period with the lost profits awarded for the 2002-2004 period illustrates this fallacy. For the 2002-2004 period, the Court of Chancery awarded Kids $9,022,825, which is what *Kids*' profits would have been had *Kids* made the sales that Success and Premium made. *See* B1064. By contrast, for the Stub Period, the Court of Chancery awarded Kids the profits that *Success and Premium* purportedly made. Acct'g Op. 2. The latter determination was internally inconsistent and even yielded a *negative* award to Kids for the Stub Period, *see id.* 3, when there was no reason to believe that Kids would have lost money on those opportunities had they gone to Kids. *See* Op. 34.

This example aptly demonstrates the flawed nature of the Court of Chancery's lost profits award. To be sure, the resulting disgorgement remedy did not provide Kids with meaningful relief for Appellants' malfeasance. The Court should remand the case to the Court of Chancery for a calculation of the profits actually lost by Kids, as the Court of Chancery originally intended.

4. The Court of Chancery abused its discretion in refusing to award Kids its attorneys' fees.

Because the evidence shows that Dweck exhibited bad faith, the Court of Chancery should have awarded Kids its reasonable attorneys' fees. Under

Delaware law, a court may award attorneys' fees "if it finds that a party brought litigation in bad faith or acted in bad faith during the course of the litigation." *Nichols v. Chrysler Grp. LLC*, 2010 WL 5549048, at *3 n.22 (Del. Ch. Dec. 29, 2010). Delaware courts have found bad faith sufficient to award attorneys' fees where a party "defends the action despite knowledge there is no valid defense," "falsifies evidence," and "changes his or her testimony to suit his or her needs." *Id.* at *3 (internal quotation marks omitted); *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 235 (Del. Ch. 1997) (finding defendants acted in bad faith by altering testimony, changing positions, and falsifying evidence at trial).

Dweck exhibited all of those behaviors. Her "striking breaches of the duty of loyalty," Op. 46, were "not competition at all," but rather "conversion and theft," *id.* 30, for which she failed to assert a credible defense, *id.* 30-31. Her testimony was "frequently non-credible"[16] and "conflicted with her sworn interrogatory response." *Id.* 28, 46. She introduced an "inauthentic" letter purporting to show Nasser's consent to her misconduct. *Id.* 30. And, finally, she "forc[ed] Kids to retain counsel," *id.* 45, and incur substantial attorneys' fees litigating her meritless claims and defenses. Because this evidence demonstrates Dweck's bad faith in this litigation, the Court of Chancery abused its discretion when it refused to award Kids its reasonable attorneys' fees.

[16] Although the Court also had issues with parts of Nasser's testimony, the Court expressly stated that it was Dweck's "frequently non-credible testimony [that] came closest to qualifying under the bad faith exception." Op. 46.

V. THE COURT OF CHANCERY ERRED IN ORDERING NASSER TO RETURN $3.8 MILLION IN PROFIT DISTRIBUTIONS.

A. Question Presented

Did the Court of Chancery err in ordering Nasser to return $3.8 million in payments to RAJN that the court erroneously characterized as "consulting fees," when the evidence conclusively establishes that these payments constituted profit distributions in proportion to Nasser's ownership interest in Kids, and Dweck acquiesced to this profit-sharing arrangement? Did the Court of Chancery err by holding Nasser to an unreasonably high accounting standard and, thereunder, determining that Nasser failed to account for $2.4 million in additional expenditures between 2006 and 2008?

B. Standard of Review

The Court of Chancery's characterization of the RAJN payments are reviewed for clear error. *Cede*, 758 A.2d at 491. Its accounting determination will be reviewed for an abuse of discretion. *See Gatz*, 59 A.3d at 1220-21.

C. Merits of the Argument

1. The Court of Chancery erred in ordering Nasser to return $3.8 million in profit distributions.

The evidence conclusively established that the RAJN payments were pro rata profit distributions made pursuant to a profit-sharing arrangement in which Dweck wholly acquiesced; thus, the Court of Chancery erred in characterizing these payments as "consulting fees," and its order requiring Nasser to return $3.8 million in profit distributions should be reversed.

Indeed, the Court of Chancery's characterization contradicts its own factual findings that the parties understood the payments to have been made as profit distributions in proportion to Nasser's stock ownership in Kids. *See* Op. 11. As explained by the Court of Chancery, "Nasser decided in 1996 that Kids was a *de facto* partnership, that partners should not receive salaries, and that Dweck's salary as Kids' CEO should be deemed a distribution of profits." *Id.*; *see also* B349, B488, B532. "Believing he should receive a similar distribution, Nasser directed that Kids pay him a proportionate amount, grossed up for his greater stock ownership, and make catch-up distributions for the earlier years that he had missed." Op. 11; *see also* B349 (Fine testifying that Nasser believed "that shareholders of companies do not take salary. They only share in the profits," thus "[Dweck and Haim's] salary . . . were actually distributions," and Kids "should start to pay RAJN a consulting fee," including "catch-up payments," equal to the profits distributed as salary to Dweck and Haim); B488 (Dweck testifying that the RAJN payments were proportionate to monies paid to Dweck and Haim in the form of salary); B532 (Nasser testifying that "[t]he payments to RAJN . . . was a [proportionate] distribution of profits").

Although these payments were called "consulting fees," the Court of Chancery found, and the evidence shows, that they were profit distributions proportionate to Nasser's ownership interest. *See* Op. 11 ("When Dweck's salary increased, Nasser's 'consulting fees' increased proportionately."); *see also* B349 (Fine testifying that RAJN's "consulting fees" were "equal" to Dweck and Haim's salaries, "which were actually distributions"); B488 (Dweck testifying that RAJN payments were proportionate to monies paid to Dweck and Haim in the form of salary); B532 (Nasser testifying that the "consulting fees" were "proportionate to the partners' percentage").

The record further shows that, despite Dweck's present protestations to these so-called "unilateral profit distributions," A45, she acquiesced in the longstanding profit-sharing arrangement between the closely held corporation's stockholders and even signed off on the distributions. *See, e.g.*, A1373 (2001 check signed by Dweck making pro rata profit distribution from Kids to RAJN). Under Delaware law, acquiescence occurs "where a complainant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *24 (Del. Ch. Mar. 13, 2000). Dweck's conduct meets all of these criteria. Not only did she wait 13 years to formally contest this agreed-upon profits allocation, she signed the distribution checks. Thus, for the same reasons that the Court of Chancery determined that Dweck had acquiesced to Kids' Overseas Payments, it should have determined that Dweck acquiesced to the shareholders' profit-sharing arrangement.[17] Op. 41.

Despite Dweck's acquiescence to the profit distribution structure, the conclusive evidence that the RAJN payments served as proportionate profit

---

[17] The Court of Chancery failed to consider this defense, despite substantial evidence of Dweck's acquiescence and Dweck's own trial testimony that she was not entitled to share in the funds paid to RAJN. *See* B488 ("Q: And you never had any interest in the payments to RAJN, did you? A: No.").

distributions, and the Court of Chancery's own findings that these fees were, in fact, distributions, the Court of Chancery elevated form over substance and erroneously characterized these payments as "consulting fees" based solely upon their title. Compounding this error, the Court concluded that these payments were not entirely fair, even though the evidence conclusively established that the stockholders agreed to this profit-sharing arrangement. Because there is insufficient evidence to support the Court of Chancery's characterization of these payments and its entire fairness determination, this Court should reverse the judgment ordering the return of $3.8 million in profit distributions.

Moreover, Appellants' fiduciary duty claims based on the RAJN payments were untimely. *See Stevanov v. O'Connor*, 2009 WL 1059640, at *7 (Del. Ch. Apr. 21, 2009); *see* 10 *Del. C.* § 8106. Dweck first challenged "the creation of . . . contract rights and liabilities" in RAJN in September 2009—more than 13 years after Dweck acquiesced to the profit-sharing arrangement. *See Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993). Even if considered on a payment-by-payment basis, however, Dweck cannot challenge any payments made more than 3 years after she filed her amended complaint, which made no mention of the RAJN fees, could not have given Nasser fair notice of these claims, and thus cannot relate back to the original complaint. *See, e.g.*, *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 4503731, at *3-4 (Del. Ch. Oct. 21, 2012) (recognizing that applying equity-based relation-back doctrine would be inequitable where claims arose from transactions that were distinct from those pleaded in the original complaint and the claimant knew about the claims during the limitations period but pleaded them for the first time in an amended complaint after the limitations period expired).

2. The Court of Chancery erred in ordering Nasser to return $2.4 million in expenses.

The Court of Chancery abused its discretion when it held Nasser to an unreasonably high accounting standard and rejected $2.4 million in accounted-for expenses. Specifically, the Court of Chancery required Nasser to account for $3,076,400 in expenses between 2006 and 2008. Op. 45. Although Kids submitted the requested accounting, which reasonably accounted for all $3,076,400, it was largely rejected as not "credible" because it was not prepared by a certified public accountant and did not conform to Generally Accepted Accounting Principles ("GAAP"). Acct'g Op. 9-11. Dweck failed to present any evidence that Nasser misappropriated any of the funds at issue, and all of Kids' expenses were fully accounted for (with no evidence to suggest otherwise). Under these circumstances, requiring a GAAP standard on the financial information is unwarranted and this Court should reverse the order requiring Nasser to pay $2.4 million for which he properly accounted.

CONCLUSION

For all the foregoing reasons, this Court should: (a) affirm the Court of Chancery's judgment that Appellants should be held responsible for their breaches of fiduciary duty to Kids; (b) affirm the Court of Chancery's decision to award prejudgment interest to Kids; (c) affirm the Court of Chancery's refusal to consider Appellants' challenge to the Overseas Payments; (d) reverse and remand the Court of Chancery's damages award against Appellants for the corporate destruction claim and for the Stub Period portion of the corporate usurpation claim, as well as the attorneys' fee decision, for further proceedings; and (e) reverse the Court of Chancery's decision directing Nasser to reimburse certain fees and expenses.

SEITZ ROSS ARONSTAM &
MORITZ LLP

<u>/s/ Bradley R. Aronstam</u>
Bradley R. Aronstam (No. 5129)
Eric D. Selden (No. 4911)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Appellees/
Cross-Appellants Albert Nasser and
Kids International Corporation

OF COUNSEL:

BAKER BOTTS L.L.P.
Richard Harper
30 Rockefeller Plaza
New York, New York 10112-4498
(212) 408-2675

Aaron M. Streett
Amy Pharr Hefley
Lauren Tanner
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234

Dated: May 1, 2013