IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GILA DWECK, SUCCESS APPAREL LLC, and PREMIUM APPAREL BRANDS LLC,

Plaintiffs and Counterclaim-Defendants,

v.

ALBERT NASSER and KIDS INTERNATIONAL CORPORATION,

Defendants and Counterclaim-Plaintiffs.

ALBERT NASSER and KIDS INTERNATIONAL CORPORATION,

Third-Party Plaintiffs,

v.

KEVIN TAXIN and BRUCE FINE,

Third-Party Defendants.

Consol. C.A. No. 1353-VCL

MEMORANDUM OPINION

Date Submitted: November 3, 2011
Date Decided: January 18, 2012

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LASTER, Vice Chancellor.

In 2005, after thirteen years in business together, Gila Dweck and Albert Nasser parted ways. Their messy split spawned nearly seven years of litigation.

Before the split, Dweck was the CEO, a director, and 30% stockholder in Kids International Corporation ("Kids"). Both before and after the split, Nasser was the Chairman and controlling stockholder of Kids. Dweck and Nasser accused each other of breaching their fiduciary duties, and Nasser asserted third-party claims for breach of fiduciary duty against Dweck's colleagues Kevin Taxin, Kids' President, and Bruce Fine, Kids' CFO and corporate secretary. Both factions appended traditional tort claims to their core breach-of-fiduciary-duty theories.

In this post-trial decision, I find that Dweck and Taxin 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. Dweck further breached her fiduciary duties by causing Kids to reimburse her for hundreds of thousands of dollars of personal expenses. Fine breached his fiduciary duties by abdicating his responsibility to review Dweck's expenses and signing off on them wholesale. In the months leading up to the final split, Dweck, Taxin, and Fine 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. Dweck, Taxin, and Fine are liable to Kids for the damages caused by their breaches of duty. I do not reach the duplicative non-fiduciary claims.

By contrast, I largely reject Dweck's breach of fiduciary duty claims against Nasser. Nevertheless, Nasser failed to carry his burden of proving that it was entirely fair for Kids to pay him a consulting fee that compensated him equally with Dweck when he performed no work for Kids. Nasser is liable to Kids for those fees. Dweck also established her entitlement to an accounting from Nasser for $3,076,400 of the $18,312,555 in cash that Kids had on hand at the time of the split. I again do not reach the duplicative non-fiduciary claims.

I. FACTUAL BACKGROUND

This case was tried on July 11-15, 2011. The parties introduced approximately 930 exhibits, submitted deposition testimony from twenty-three fact witnesses, and adduced live testimony from six fact witnesses and three expert witnesses. The parties joined issue over the authenticity of important documents, debated whether key conversations actually took place, and disputed whether critical agreements were reached. Even allowing for the frailties of human memory and subjective perception, I cannot reconcile the conflicting accounts.

Each of the party-witnesses exhibited credibility problems under cross-examination. Dweck's testimony was particularly suspect. She repeatedly contradicted her deposition testimony, responded evasively, and suffered convenient failures of memory. On several occasions, she appeared to have invented entirely new accounts for trial. Most notably, despite overwhelming evidence to the contrary, Dweck denied having any ownership interest in cash payments made by Kids to certain foreign entities. By contrast, the most credible witness at trial was Amnon Shiboleth, a member of the New York and Tel Aviv bars who acted as corporate counsel to Kids. Having weighed the parties' testimony, evaluated their demeanor, and considered the evidence as a whole, I make the following factual findings.

A. The Dabah Family Business

Morris Dabah had three sons: Haim, Ezra, and Isaac.[1] Morris and his sons founded the Gitano Group, a large, multi-division apparel wholesaler.

Morris' fourth and youngest child was a daughter: Gila Dweck. While still in college, Dweck began working at Gitano as a receptionist. After graduating, Dweck joined the childrenswear division, known as EJ Gitano, as a salesperson. She rose rapidly through the ranks to become President of EJ Gitano.

In 1993, Haim and Isaac pleaded guilty to criminal violations of United States customs regulations and spent time under house arrest. Wal-Mart, Gitano's largest customer, refused to continue selling Gitano's lines of clothing. Gitano defaulted on its debt and teetered on the verge of bankruptcy.

In the debacle, Dweck saw opportunity. She suggested to Haim that they purchase EJ Gitano. It was profitable, and Dweck thought the existing pipeline of orders made the purchase "essentially risk free." Tr. 448.

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[1] First names are used for clarity and without suggesting familiarity or intending disrespect.

But there was a problem. Because of Gitano's default, its lender had the right to veto any sale of assets, and the bank would not approve a sale of EJ Gitano to the Dabah family. Dweck needed a third party.

Enter Albert Nasser, a successful entrepreneur with numerous holdings in the apparel sector. Nasser was a cousin of Dweck's mother, and despite maintaining his primary residence in Switzerland, he moved within the same tightly-knit New York community as the Dabah family. Even before Isaac arranged a formal introduction, Dweck knew of Nasser "through family acquaintances and family functions, weddings, bar mitzvahs." Tr. 347.

B. The Formation Of Kids

In September 1993, Dweck, Haim, and Nasser purchased the assets of EJ Gitano. The basic deal was straightforward. Nasser agreed to provide 100% of the funding, comprising \$8.2 million for acquisition financing plus \$1 million in start-up capital. In return, Nasser originally would own 100% of the new company's equity. Once Nasser received payments equal to his original investment plus 10% interest, Nasser would transfer 50% of the equity to Dweck and Haim. Nasser would serve as Chairman of the Board; Dweck and Haim would be in charge of day-to-day management.

Shiboleth implemented the basic concept in a complex manner. Kids was formed under Delaware law and designated for tax purposes as a Subchapter S Corporation. A corporation that qualifies under this section of the tax code is treated as a pass-through entity for tax purposes, so Kids' profits would be attributed *pro rata* to Kids stockholders (originally only Nasser) regardless of whether any dividends were paid. To minimize the amount of taxes that Kids stockholders would pay domestically, Shiboleth designed a structure that 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.

Under the resulting structure, a New York Subchapter S Corporation named RAJN Corporation ("RAJN") made a $1 million capital contribution to Kids in return for 100% of Kids' common stock. RAJN was and remains wholly owned by trusts organized for the benefit of Nasser's children.

Next, Woodsford Business S.A. ("Woodsford") loaned Kids $4 million at an interest rate of 13.5%. Woodsford is the investment arm of Ninwieneched, a Liechtenstein trust whose beneficiaries are Nasser's yet unborn great-grandchildren. Woodsford did not loan Kids money directly. Rather, Woodsford loaned the funds to Maubi Investment N.V. ("Maubi"), a Netherlands Antilles corporation. Maubi in turn made the loan to Kids (the "Maubi Loan"). Using the capital from RAJN and the loan from Maubi, Kids purchased all of the assets of EJ Gitano, other than its trademarks.

EJ Gitano's trademarks were acquired separately. For this part of the transaction, Woodsford advanced $4.2 million to Hocalar B.V. ("Hocalar"), a Netherlands corporation. Hocalar then paid the money to Gitano for a perpetual license to the Gitano trademarks. Hocalar immediately sub-licensed the trademarks to Kids in return for a 5% royalty on Kids' sales of Gitano products (the "License Agreement"). To take advantage of favorable tax treaties, Hocalar later transferred its rights to a Hungarian company, Good Fortune Holdings, R.T. ("Good Fortune"), and Good Fortune subsequently transferred its rights to Heckbert 14Kft. I refer to Hocalar, Heckbert, and Good Fortune collectively as the "Foreign Licensors."

By means of this structure, Kids could send $540,000 out of the United States annually, tax free, in the form of interest-only payments on the Maubi Loan. At the same time, Kids could claim the payments as deductible business expenditures, thereby lowering the taxable profits attributed to Kids stockholders. Not surprisingly, Kids never made any principal payments on the Maubi Loan until after Dweck and Nasser parted ways and litigation ensued. Until that time, the loan remained outstanding so that interest payments could leave the United States each year.

The structure likewise enabled Kids to send 5% of its sales of Gitano products out of the United States, tax free, through royalty payments under the License Agreement, while again claiming these payments as deductible business expenses that lowered Kids' taxable profits. Because Kids' annual sales quickly grew to over $100 million, the License Agreement became the primary means by which payments left the country. Consistent with the License Agreement's true purposes of funneling money out of the United States and generating tax deductions, the License Agreement did not terminate when Kids stopped selling Gitano-branded products in 1996. Instead, the scope of the License Agreement *expanded* to a 5% royalty on all sales of Kids products. In other words, just when Kids no longer needed the Gitano trademarks and could forego paying any royalties at all, Kids agreed instead to pay a 5% royalty on all sales. Kids eventually terminated the License Agreement in 2000 for a payment of $5.5 million to the Foreign Licensors. Kids paid off this amount, plus interest, over time.

Notably, for the tax-avoidance structure to work, it was critical that Nasser, Dweck, and Haim *not* appear to control any of the companies receiving funds from Kids. The intermediary companies—Maubi and the Foreign Licensors—were therefore structured to avoid indicia of control. Maubi and the Foreign Licensors are each owned and controlled by Henk Keilman, a resident of Holland and professional acquaintance of Shiboleth. As compensation for providing the intermediary entities, Keilman's firm receives 7% of all amounts that the intermediaries receive. Originally, all of the funds received by Maubi and the Foreign Licensors, net of the 7% paid to Keilman's firm, were passed on to Woodsford. Later, after the Nasser-Dweck split, Keilman refused to pay out any funds without joint instructions from both Nasser and Dweck. To circumvent Keilman, Nasser caused Kids to wire funds directly to Woodsford.

C. Dweck Builds Kids' Business.

Kids was profitable from day one. Although the transaction closed at the end of September 1993, the sale was effective as of June and included EJ Gitano's substantial order base from the pre-closing period. Nasser agreed to indemnify EJ Gitano's lender for its letters of credit, which enabled Kids to take the profits on the existing orders. The new company continued selling Gitano-branded products, primarily jeans. Kids also continued as a major supplier of private label (non-branded) childrenswear for Wal-Mart, which originally comprised approximately 90-95% of Kids' business. In the private label business, a retailer like Wal-Mart outsources to a manufacturer like Kids the work of producing a house brand owned by Wal-Mart and sold only in Wal-Mart's stores. The retailer-specific nature of private label (non-branded) business distinguishes it from branded business, where a particular brand (such as Gitano) is sold through multiple retailers.

In 1994, Taxin joined Kids as Vice President of Sales and Merchandising. He previously worked at Gitano as a sales executive for nearly a decade, but left the company in 1992. Taxin expanded Kids' business dramatically. He had strong ties to Target and K-Mart, which he used to win new private label business for Kids. He expanded Kids' existing relationship with Wal-Mart and established relationships with other discount retailers such as Hills and Ames. With Taxin on board, Kids' sales increased by a factor of five over a four-year period.

Because of its significant sales, Kids was able to distribute substantial amounts via the License Agreement in addition to the interest-only payments on the Maubi Loan. By 1998, Nasser had received back his original investment plus 10% interest, and it was time for Dweck and Haim to receive equity in Kids. Dweck and Haim were issued 45% of Kids' outstanding equity, paid for out of the corporation's retained earnings. The original deal had been 50%, but it turned out that Nasser had issued a warrant to Shiboleth for 5% of the equity as compensation for his role in setting up Kids. Dweck and Haim acquiesced to the new arrangement, and Nasser left it to Dweck and Haim to divvy up their shares. Dweck received 27.5% of Kids' stock, which she held individually and through trusts for the benefit of her children. Haim received the remaining 17.5%. Around the same time, Taxin was promoted to President of Kids.

Dweck testified at trial that at some point in 1998, after she received her stock, she complained to Nasser that Kids had not yet paid off the Maubi Loan and was continuing to make interest-only payments. Dweck also testified at trial that she thought once Nasser had been repaid and she and Haim became stockholders, Kids would distribute its profits in the United States. Dweck claimed that she never understood that Kids had been set up to funnel money tax-free out of the United States, that she was not financially sophisticated, and that Nasser handled everything.

I reject Dweck's testimony. It seems true that when Shiboleth originally set up Kids in September 1993, Dweck was not aware of the details. Sadly for Dweck, her husband had cancer and passed away a month later, she had two small children, and she understandably deferred to Shiboleth and Haim to handle the financial and legal aspects of the transaction. But Dweck testified that Haim described the deal to her "a month or two" later. Tr. 341. She also testified that Nasser explained the structure to her. Tr. 367. Dweck knew that when Nasser was paid back, she would receive stock in Kids, and I am confident that she quickly became educated about the Maubi Loan, the payments to the Foreign Licensors, and their efficacy in channeling money out of the country while generating tax deductions for Kids. Dweck is an intelligent, savvy woman. Granting that she would not have been able to cite the particular tax code sections or explain the nuances of the attribution rules, she certainly got the gist. Fine testified that beginning in 1995, he regularly prepared schedules showing the total payments to Maubi and the Foreign Licensors and reviewed them with Nasser and Dweck.

Even crediting Dweck's 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*. From then on, Dweck closely tracked her share of the "pot," as she and Nasser called the overseas payments, and she was consistently credited with her percentage share of those payments. To the extent Dweck complained from time to time, *she only complained about whether she was getting her full share*. She questioned, for example, why deductions were taken for Keilman's 7% fee. She never complained about the overarching scheme.

From 1998 until 2001, Dweck was credited with 27.5% of the overseas payments. In 2001, Dweck and Nasser repurchased the 5% of Kids' stock from the Shiboleth warrant. They split the 5%, and from that point on Dweck was credited with 30% of the overseas payments. The balance was credited to Woodsford.

Dweck even took distributions from the "pot." In 1999, Dweck repatriated $1.5 million through a loan from Nelux, a Netherlands entity owned by Keilman. She has not made payments on the loan. In a November 2001 memo to Nasser, Dweck noted that her share of the "pot" then amounted to $1,662,100 and that she should be paid that amount. A 2004 accounting showed that Dweck had received $126,000 out of $489,250.28 due her from the "pot" for that year. It is possible that Dweck took additional distributions, but the record on repatriation is understandably spotty and incomplete.

Still other evidence confirms Dweck's knowledge of the foreign payments, participation in the scheme, and beneficial ownership of her share of the funds. In early 2005, as their disputes were coming to a boil, Dweck jointly determined with Nasser that Kids would pay $5.2 million to the Foreign Licensors, and Dweck personally delivered the check to Nasser in Geneva. In 2007, two years into this litigation, Dweck declined on the advice of counsel to sign a letter for Kids' auditors in which she would have represented that neither she nor her children (i) were directly or indirectly related to either the nominal or beneficial owners of Maubi or the Foreign Licensors, or (ii) had any direct or indirect interest in the royalty or interest payments to Maubi or the Foreign Licensors. The logical inference is that Dweck and her counsel realized she could not truthfully make the representations. Likewise, Dweck has discussed with her counsel how to resolve any tax problems that she might face as a result of the payments Kids made to Maubi and the Foreign Licensors.

At trial, Dweck refused to admit that she had an interest in the funds that Kids sent overseas. She would admit only that it was "possible." Tr. 639-40.

D. Dweck Forms Success To Gain A Bigger Share Of The Profits.

With Kids enjoying continued success under her management, Dweck began to feel exploited. Despite receiving stock in 1998, Dweck believed she was doing all of the work for less than a third of the profits. To Dweck's further frustration, 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. 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. RAJN received the payments as "consulting fees," even though Nasser never rendered any services to Kids in return. When Dweck's salary increased, Nasser's "consulting fees" increased proportionately.

Dweck felt she should own a percentage of Kids equity that more fairly represented her responsibility for Kids' success. She complained to Nasser and Haim, but to no avail. Nasser would not give Dweck any more equity, nor would he sell her any of his shares. Even though Haim stopped working actively for Kids in 1995, he declined to part with any of his stock. The 2.5% bump from purchasing half of the Shiboleth option in 2001 did not come close to satisfying Dweck.

Unable to gain a greater share of Kids' profits, Dweck decided to bypass Kids by starting a new company into which she would channel "new opportunities." Tr. 461. As she admitted on cross-examination, she decided to compete "because it was [her] only way to . . . receive more income." Tr. 469.

In October 2001, Dweck formed Success Apparel LLC ("Success"), a New York limited liability company, to operate as a wholesaler of children's clothing. The impetus to form Success came from Taxin, who also had grown dissatisfied with his remuneration. Taxin felt that he was primarily responsible for Kids' success and deserved a share of Kids' profits. He asked Dweck repeatedly for equity, but she consistently turned him down on the grounds that Nasser "only takes in family." Tr. 259. When the President of Bugle Boy, Mary Gleason, offered Taxin the opportunity to purchase the Bugle Boy license in 2001, Taxin decided he was "only interested in doing the opportunity with [Dweck], not Kids . . . ." Tr. 258. Taxin made the decision despite meeting with Gleason in his capacity as President of Kids, and even though Gleason did not restrict the opportunity or indicate that Kids could not pursue it. Taxin discussed the matter with Dweck, and they decided to take it for themselves. Dweck granted Taxin a 20% membership interest in Success and retained 80% for herself.

From 2001 until 2005, Success operated out of Kids' premises using Kids' employees. Success drew on Kids' letters of credit, sold products under Kids' vendor agreements, used Kids' vendor numbers, and capitalized on Kids' relationships. Ostensibly to compensate Kids, Dweck decided that Success would pay an administrative fee equal to 1% of total sales. Dweck selected the 1% figure unilaterally without disclosure to or consultation with Nasser. The only mention of the fee was an opaque entry on Kids' financial statements entitled "Due from affiliates." *See, e.g.,* JX 783. The identity of the affiliates was not specified, and Fine never discussed it with Nasser. The 1% fee appears to have been grossly inadequate.

Success also reimbursed Kids for the salaries of certain employees (but not for their benefits) and for a portion of Kids' rent. The only employees were those Dweck deemed to be working exclusively for Success. Dweck admitted that most Kids employees performed some work for Success. No effort was made to compensate Kids for their services. Taxin estimated at trial that he spent approximately 20% of his time on Success, which likely was a self-interestedly conservative figure. Numerous other Kids employees performed work for Success without reimbursement, including Pauline Pei, Mark Simonetti, Stanley Bernstein, Joseph Ezraty, Steve Golub, Leah Justice, and Kim Epps. Taxin estimated (doubtless conservatively) that these employees spent approximately 10-20% of their time on Success. Success also used Kids' overseas quality control inspectors and internal quality control employees. The rental reimbursements further illustrate the inadequacy of Success' payments to Kids. In 2004, for example, Dweck's companies reimbursed Kids for rent of $14,594. In 2005, after obtaining space of its own, Dweck's companies paid $437,689 for rent.

In its first three years of operation, Success signed license agreements to manufacture and distribute a number of brands, including Bugle Boy, Everlast, and John Deere. In the pitches to obtain the licenses, Success used marketing materials that listed the logos of Kids and Success side by side, cited industry awards won by Kids, and touted Kids' lengthy record in the apparel business. This resulted in confusion amongst the licensors. John Deere originally drafted their license agreement with Kids as the licensee, and the document was only changed to name Success at Dweck's request. The draft agreement for a license to the Mack brand was also prepared in Kids' name. A press release issued by Everlast described its licensee as "Success Apparel Group LLC, also known as Kids International . . . ." JX 531.

Inside Kids' offices, 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. Kids and Success used the same showroom and displayed their brands in the same space. There were no references to Success, and nothing suggested that the brands were not all owned by Kids. The only name on the door was Kids.

E. Dweck Forms Premium.

In June 2004, Dweck founded Premium Apparel Brands LLC ("Premium"), a New York limited liability company. Like Success, Premium was a clothing wholesaler, operated out of Kids' premises, and used Kids' employees and resources. Dweck owned 100% of Premium and served as its CEO. Taxin had no equity stake in Premium.

Dweck founded Premium to serve as licensee and manufacturer for the Gloria Vanderbilt brand. When Dweck originally negotiated the Gloria Vanderbilt license, the owner of the brand, Jones Apparel, understood that the license could be with Kids. Dweck switched the agreement to Premium.

F. Dweck Charges Personal Expenses To Kids.

Not content with her compensation from Kids and the profits from her parasitic companies, Dweck billed Kids for a luxurious lifestyle. Between 2002 and 2005, Dweck charged at least $466,948 in expenses to Kids. At trial, she admitted that at least $171,966 was for personal expenses, including Club Med vacations and assorted luxury goods from Armani, Prada, Gucci, and Bergdorf Goodman. Dweck could not determine whether another $170,400 was for business or personal expenses. She asserted that the remaining $124,582 was for legitimate business expenses. During the same period, Dweck was being paid $850,000 to $1.3 million per year in salary.

Fine countersigned each reimbursement check. Fine admitted at trial that part of his responsibilities included reviewing and signing off on expense reimbursements. He further admitted that he knew Dweck was seeking reimbursements for personal expenditures. Fine nevertheless signed off on Dweck's reimbursements without conducting any review.

G. Nasser Becomes Concerned.

During 2004, Kids stopped sending Nasser quarterly financial reports. Nasser repeatedly requested the reports, but Dweck and Fine ignored him. In November 2004, Lidia Lozovsky, a secretary at Kids who worked for Nasser, Dweck, and Fine, mentioned to Nasser that Dweck appeared to be handling a Gloria Vanderbilt line. In December, Lozovsky warned Nasser in stronger terms that there was "something going on" at Kids and that "there were other companies" operating out of Kids' offices. Tr. 807.

To get a handle on what was going on, Nasser had Shiboleth notice formal meetings of the board and stockholders for January 5, 2005. They were the first formal meetings in Kids' history. In advance of the meetings, Dweck and Fine told Nasser that Kids would book $115 million in sales for 2004. Days later, they lowered the sales figure to $95 million. During the January 5 board meeting, Dweck and Fine revealed that the actual sales figure was $72 million, a decline of roughly $18 million from the previous year. Nasser testified that after hearing the sales figure, "everybody looked at each other. And we knew that something [was] wrong because we were not told the truth at the beginning." Tr. 705.

Because of his growing suspicions, Nasser came to the January 5 meetings ready to take action. Nasser elected Lozovsky and his nephew, Itzhak Djemal, as directors of Kids. He appointed Djemal to the position of Vice Chairman and gave him authority equal to Dweck's: Djemal would handle production and corporate finances while Dweck would handle sales and design. Nasser privately tasked Djemal with uncovering what was going on at Kids.

Dweck was extremely unhappy with Djemal's appointment. She "knew [she] couldn't work for him or with him." Tr. 433. She decided that either she would buy out Nasser or leave Kids. Nasser refused to sell, so Dweck prepared to leave.

Dweck promptly met with Taxin and discussed the prospect of leaving Kids. With Taxin and Fine's assistance, she located separate office space for Success and Premium. More importantly, Dweck and Taxin organized a campaign to divert Kids' future orders to Success. Over the next three months, Kids employees carried out the campaign by contacting Kids' customers on behalf of Success.

The order cycle for a private label manufacturer takes approximately four to six months. It begins with a manufacturer like Kids designing and presenting samples to a retailer like Target for sale during a future season. If the retailer decides to proceed with a specific product, then a few weeks later the manufacturer receives a "commit" specifying the quantity, size, color, and other purchase details. The manufacturer starts production when the commit is obtained, but the order does not become final and binding until months later, five to seven days before shipment, when the manufacturer issues an electronic data information form to the retailer.

In early 2005, Kids was working to fill orders for the Fall 2005 season and had started product development and design work for the Holiday 2005 and Spring 2006 seasons. At the direction of Dweck and Taxin, 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. Taxin instructed Paul Cohn, the Kids salesperson for Wal-Mart, to switch the Wal-Mart orders. Taxin instructed Pat

Zobel, the Kids salesperson for Target, to switch the Target orders. At the time he gave these instructions, Taxin was President of Kids. Taxin also communicated directly with Wal-Mart and Target about switching purchases from Kids to Success.

H. The March 11, 2005 Meetings

Despite active resistance from Dweck, Djemal soon found evidence that Dweck was operating her own businesses from Kids' premises. When pressed for information, Dweck admitted it but insisted that she had Nasser's permission. Djemal reported his findings to Nasser.

Because Dweck disputed whether the January meetings were properly noticed, Nasser had Shiboleth notice a second round of board and stockholder meetings for March 11, 2005. The agenda for the stockholder meeting included confirming the identity of Kids' directors. The agenda for the board meeting included confirming the identity of Kids' officers. Going into the meeting, Nasser expected Dweck to continue as a director and CEO. Nasser did not know that Dweck already was preparing to leave.

Shiboleth noticed the meetings to be held at Kids' offices. After arriving at Kids, Nasser and Shiboleth were asked to wait in a conference room. Samples for Gloria Vanderbilt and other brands handled by Success and Premium covered the walls. Meanwhile, Haim, Dweck, and Dweck's counsel, Barry Slotnick, showed up at Shiboleth's office. After learning that Nasser and Shiboleth were at Kids, Dweck told Nasser and Shiboleth that they would be right over. She then instructed one of her employees to remove the samples. As Nasser and Shiboleth waited, an employee entered and removed the samples without explanation. It was a less-than-adroit maneuver, but consistent with Dweck's efforts to conceal her activities.

When the stockholder meeting convened, Shiboleth proposed that Dweck stand for re-election as a director. Dweck's lawyer, Slotnick, then announced that Dweck could not serve as a director because she had a conflict of interest as a result of operating competing businesses. Nasser and Shiboleth were nonplussed. Shiboleth assumed Slotnick made a mistake, so he suggested that he and Dweck consult privately. When they returned after fifteen minutes, Slotnick reiterated that Dweck declined to serve as a director because of a potential claim of a conflict of interest from selling competitive product from Kids' premises. All eyes turned to Dweck, who admitted that she was selling "overlapping product" from Kids' premises. Tr. 567. Nasser and Shiboleth were shocked: it was the first time Dweck had indicated that she was competing with Kids from Kids' premises. During the board meeting convened immediately after the stockholder meeting, Nasser observed that Dweck should not be an officer if she declined to serve as a director. The board formally elected a slate of officers that excluded Dweck, with Djemal as President and CEO.

I. Dweck, Taxin, And Fine Destroy Kids' Business.

Although no longer employed by Kids after the March 11 meetings, Dweck worked out of Kids' offices until April 11, 2005. Dweck and Taxin continued their campaign to divert Kids' business to Success, and they succeeded in transferring all of the Wal-Mart and Target business from the Holiday 2005 season onward. Kids did not receive any orders after May 2005.

Dweck and Taxin also arranged for Kids' employees to join Success. In early May 2005, Dweck and Taxin met with Kids' managers to inform them that Dweck would be operating her own companies separately from Kids and to offer them positions at her companies. Dweck told the managers to make the same offer to the employees under their supervision. She indicated that if they chose to accept her offer, "they would receive word to pack shortly." JX 636. Taxin later met with Kids' managers, reiterated the plan to leave Kids, and promised them jobs at Success. Fine met with at least one Kids employee and offered him a job at Success.

On May 17, 2005, Taxin informed the employees that May 18 was departure day. In the early morning of May 18, Kids employees began loading a moving truck with roughly 100 boxes of Kids' documents and materials. Fine supervised the process and attempted to conceal the move from Nasser and Djemal. Nasser, however, was tipped by a Kids employee the day before, and he arranged for Djemal and Lozovsky to arrive early at Kids' offices. Lozovsky found the move already underway and Kids' materials loaded in the moving truck. Lozovsky called Nasser, who demanded to speak to the driver. Fine took the phone, claimed that he was a driver named "Gregory," and listened while Nasser threatened to summon the police. Djemal arrived at Kids' offices just in time to stop the truck. He could not stop many of the former employees from taking boxes with them. A computer consultant whom Djemal hired later determined that a number of the hard drives from Kids' computers had been wiped clean.

As part of the May 18 mass departure, Taxin resigned to join Dweck at Success. Fine remained at Kids until May 25, 2005, when he too joined Dweck.

While Fine was overseeing the move and mass departure, Dweck and Taxin met with key Wal-Mart managers at Success' new offices. After Dweck explained the situation, the Wal-Mart managers expressed concern about their Fall 2005 orders. Dweck and Taxin assured the Wal-Mart managers that there would be no issues.

On May 20, Dweck and Taxin flew to Wal-Mart's headquarters in Bentonville, Arkansas to meet with more senior Wal-Mart managers. After the meeting, Wal-Mart recognized Success as its existing supplier and no longer recognized Kids. Dweck and Taxin then met with Target managers and achieved the same transition.

To protect their customer relationships, Dweck and Taxin made sure that a handful of employees remained at Kids to fill the Fall 2005 orders. Dweck and Taxin oversaw their efforts, effectively running Kids from afar. Kids received the profits on the Fall 2005 orders. Beginning with the Holiday 2005 and Spring 2006 seasons, Success took all of the orders and profits for itself. The employees who remained at Kids were offered jobs at Success once the Fall 2005 orders were completed.

J. Nasser And Djemal Fail To Revive Kids.

Having lost nearly all its employees and with its pipeline diverted to Success, Kids had to start over from scratch. Djemal began hiring new employees and attempted to solicit orders from the retail giants that had been Kids' customer base. He immediately encountered difficulties. The Hong Kong factory that Kids relied on for samples was working for Success and would not return his calls. The manufacturing facilities Kids used also would not respond. When Djemal visited Wal-Mart headquarters with a new line of samples, Wal-Mart told him that Success was the recognized supplier and that

Djemal would have to reestablish Kids as a new vendor. When he met with Target, the representative told Djemal that she only gave him an appointment because "'I thought you were Success.'" Tr. 1081.

After failing for over a year to restart Kids' business, Nasser and Djemal began to search for alternatives. With more than $18 million in cash or cash equivalents, Kids had resources. Nasser and Djemal eventually settled on a joint venture with Seabreeze Apparel, a division of a company owned by Nasser. As the controlling shareholder of both entities, Nasser set the terms for the joint venture.

Under the joint venture agreement executed on July 15, 2006, Seabreeze contributed all of its pending orders and existing inventory to the joint venture. Seabreeze received its costs in producing and shipping the inventory plus a 25% markup, with any further profits divided equally between Seabreeze and Kids. The joint venture agreement was later amended to require Kids to purchase outright Seabreeze's existing inventory at cost plus 25%, which Djemal testified was consistent with industry standards. The joint venture generated a modest profit of $356,808 before it was shut down effective December 31, 2008.

K. Nasser Pays Off The Maubi Loan.

After the split with Dweck, Kids continued making interest payments on the Maubi Loan. In November 2008, before shuttering Kids' operations, Nasser caused Kids to wire more than $8.3 million overseas to pay off the Maubi Loan. But rather than paying Maubi, Kids sent the funds to Woodsford. Nasser made the switch because after learning of Nasser and Dweck's dispute, Keilman refused to distribute any funds without joint instructions. Paying Woodsford directly also allowed Nasser to avoid Keilman's 7% deduction. 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%.

Since the end of 2008, Kids has not engaged actively in business. It has served primarily as a litigation vehicle for the parties' competing derivative claims. Kids and its principals are currently being audited by the Internal Revenue Service.

II. LEGAL ANALYSIS

Nasser alleges that Dweck, Taxin, and Fine breached their fiduciary duties by usurping Kids' corporate opportunities. Nasser also contends that Dweck and Fine breached their fiduciary duties by charging Dweck's personal expenses to Kids. Nasser re-styles the allegations supporting the fiduciary breaches as claims for (i) misappropriation of Kids' trade secrets, (ii) deceptive trade practices, (iii) tortious interference with Kids' prospective business relations, and (iv) conversion. Nasser seeks damages equal to Kids' purported going-concern value at the time of the split, which his expert values at between $70.8 million and $458.2 million.

Dweck claims primarily that Nasser breached his fiduciary duties by causing Kids to make payments to Maubi and the Foreign Licensors, taking unearned consulting fees through RAJN, and engaging in post-split activities such as the Seabreeze joint venture. Dweck contends that Nasser should pay $25.4 million in damages to Kids and account for an additional $21 million.

A. Success And Premium

Dweck and Taxin formed Success and Premium, took Kids' business opportunities for their new entities, competed directly with Kids, ran their businesses out of Kids' premises, used Kids' employees, and appropriated Kids' resources. In doing so, Dweck and Taxin breached their duty of loyalty to Kids.

1. The Nature Of The Breach

"The essence of a duty of loyalty claim is the assertion that a corporate officer or director has misused power over corporate property or processes in order to benefit himself rather than advance corporate purposes." *Steiner v. Meyerson*, 1995 WL 441999, at *2 (Del. Ch. July 19, 1995) (Allen, C.). "At the core of the fiduciary duty is the notion of loyalty—the equitable requirement that, with respect to the property subject to the duty, a fiduciary always must act in a good faith effort to advance the interests of his beneficiary." *US W., Inc. v. Time Warner Inc.*, 1996 WL 307445, at *21 (Del. Ch. June 6, 1996) (Allen, C.). "Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision." *Id.* "The doctrine of corporate opportunity represents . . . one species of the broad fiduciary duties assumed by a corporate director or officer." *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del. 1996). The doctrine "holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation." *Id.* at 154-55.

Dweck was a director and officer of Kids. Taxin was an officer of Kids. In these capacities, they owed a duty of loyalty to Kids. *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009). Dweck and Taxin breached their duty of loyalty by diverting what they decided were "new opportunities" to Success and Premium, including license agreements with Bugle Boy, Everlast, John Deere, and Gloria Vanderbilt, Wal-Mart private label business, and Target direct import business. Kids was a profitable enterprise with the financial capability to exploit each of these opportunities. Indeed, Dweck and Taxin used Kids' personnel and resources to pursue each opportunity, demonstrating that Kids just as easily could have pursued the opportunities in its own name. After appropriating the opportunities, Dweck and Taxin operated Success and Premium as if the companies were divisions of Kids, but kept the resulting profits for themselves. By doing so, Dweck and Taxin placed themselves "in a position inimicable to [their] duties to [Kids]." *Broz*, 673 A.2d at 155.

Dweck and Taxin's conduct bears a striking resemblance to the continuing exploitation of corporate resources in *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939), the seminal corporate opportunity case in Delaware jurisprudence. In *Guth*, a director and the President of Loft Incorporated, Charles Guth, appropriated for himself the opportunity to purchase the secret formula and trademark for Pepsi-Cola from then-bankrupt National Pepsi-Cola Company. *Guth*, 5 A.2d at 505-06. Guth then operated Pepsi-Cola as a division of Loft, secretly using its employees and resources but keeping all the profits for himself. *Id.* at 507. The Delaware Supreme Court agreed that Guth breached his duty of loyalty and affirmed that Guth was required to disgorge all profits and equity from the venture to Loft. *Id.* at 515. Like Guth, Dweck and Taxin established a competing company into which they channeled new opportunities, then used Kids' "materials, credit, executives and employees as [they] willed." *Id.* at 506.

2. The Line Of Business Defense

To defend their actions, Dweck and Taxin tried to distinguish between the private label clothing business and the branded clothing business, then argued that Kids only operated in the private label business. Supposedly this distinction left them free to take the branded business. To the contrary, Kids had an interest in the branded business.

When determining whether a corporation has an interest in a line of business, the nature of the corporation's business should be broadly interpreted. "[L]atitude should be allowed for development and expansion. To deny this would be to deny the history of industrial development." *Id.* at 514; *see Fliegler v. Lawrence*, 361 A.2d 218, 220 (Del. 1976) (holding that antimony mine was corporate opportunity for corporation engaged in gold and silver mining).

Although Kids primarily operated in the private label business, Kids easily and readily could have expanded into the branded business. If Dweck and Taxin had felt they were getting a fair share of Kids' profits, then Kids doubtless would have done so. Kids faced significant pressure in its private label business as major retailers tried to cut out the middleman and deal directly with overseas suppliers. Moving into the branded business would have been a natural and prudent response to the threat.

It is abundantly clear that Kids could have capitalized on each of the branded opportunities taken by Success and Premium. At trial, Taxin conceded that Kids could have handled the Bugle Boy and John Deere business. Moreover, Success and Premium did not in fact limit themselves to branded opportunities; they also appropriated private label opportunities. When Wal-Mart approached Kids about manufacturing men's clothing for the Wal-Mart private label called No Boundaries, Dweck and Taxin decided it was a "new opportunity" in which Kids had no expectancy. Manufacturing Wal-Mart private label brands had long been Kids' core business, and Kids had manufactured No Boundaries girls' clothing since 2000. At trial, Taxin admitted that Kids could have taken this opportunity. Success also manufactured clothing for the Wal-Mart private label lines Faded Glory and Pure Playaz. When Target offered Kids the opportunity to engage in "direct importing," a process by which a company would have clothing manufactured overseas and shipped directly to Target, Dweck and Taxin again decided to take the opportunity for Success. Taxin obtained the opportunity while visiting Target's headquarters as Kids' President on a business trip for Kids. At trial, Taxin admitted that Kids could have handled the Target direct business. At post-trial argument, Dweck conceded that Success should not have taken the Target direct opportunity.

3. The Consent Defense

As their next defense, Dweck and her colleagues claimed that Nasser gave Dweck permission to compete. According to Dweck, she approached Nasser before forming Success and disclosed that she was planning to start a company that would compete with Kids. In her direct testimony, she claimed to remember "very vividly" a meeting with

Nasser in February 2002, at his offices, when she sat with him at “a little round table by the window.” Tr. 409. She asserted that she brought with her an unsigned, draft letter dated February 22, 2002, that she allegedly prepared, then decided not to send, then chose to use as a list of discussion points when meeting with Nasser in person. She supposedly “went to [Nasser] and discussed every single point.” Tr. 410. She recalled telling Nasser that “I’m not motivated to kill myself, continue to work, you know, so many hours a day and weekends, and therefore I would take any new opportunities outside of Kids.” Tr. 461. She asserted that Nasser encouraged her to start her own business, declaring “‘I’m not standing in your way for improving yourself.’” Tr. 495. According to Dweck, this statement gave her the go-ahead to use Kids’ employees and Kids’ resources to run a business out of Kids’ offices that competed directly with Kids.

Dweck’s trial testimony conflicted with her sworn interrogatory response, in which she averred that the February 22 letter was sent to Nasser on or about February 25 and that she could not recall the method of transmittal. The interrogatory response did not mention anything about a face-to-face meeting with Nasser. On cross-examination, Dweck admitted that at the time she drafted the letter, Nasser was out of the country, likely in Tel Aviv. She admitted never discussing with Nasser what new opportunities she might pursue. She admitted never suggesting to Nasser that she would take opportunities from Wal-Mart or Target, Kids’ largest customers. She admitted never mentioning that her business would operate from Kids’ premises, use Kids’ resources, or compete with Kids.

Nasser did not recall any meeting or conversation with Dweck. Instead, he remembered a call from Shiboleth, who told him that Dweck wanted to start her own business. After Nasser expressed concern that Dweck's new venture would compete with Kids, Shiboleth assured him that Dweck planned to operate in the upscale department store market. This would have differentiated Dweck's new company from Kids, which sold almost exclusively to discount retailers. Having been assured that Dweck's business would not compete with Kids, Nasser offered to help Dweck and told Shiboleth to advise her on how to set up the business. Taxin's trial testimony comported with Nasser's account. Taxin testified that when he asked Dweck whether she had disclosed their plan to start a new company to Nasser, Dweck answered that Nasser told her "it's fine, so long as you're not competing with me." Tr. 261. Fine similarly understood that Dweck and Nasser had a conversation in which Nasser generally expressed support for Dweck pursuing her own business. Fine could not say that Nasser knew Success and Premium were competing with Kids or using Kids' employees and resources. Fine never discussed these facts with Nasser.

Having considered the witnesses' testimony and demeanor, I reject Dweck's version of events. I do not believe Dweck ever disclosed to Nasser that she intended to compete directly with Kids and use Kids' employees and resources. I rather believe that she initially conveyed to Shiboleth in consciously vague terms that she was thinking about starting a distinct and separate apparel business. Shiboleth relayed the message to Nasser, who expressed his support so long as Dweck did not compete with Kids, and he suggested that Shiboleth help her on that basis. Nothing about the work that Shiboleth's firm performed for Dweck would have given the firm any reason to suspect that Dweck would be competing directly with Kids and using Kids' employees and resources.

To the extent that Dweck subsequently had conversations with Nasser and Shiboleth, I find that she continued to be intentionally vague about her business and never gave them reason to believe that she was using Kids' employees and resources to compete directly with Kids. I reject as inauthentic the unsigned February letter and do not believe it was ever sent or its contents ever communicated to Nasser. Rather, I think that it was a draft that Dweck located during discovery, regarded as helpful, and used to shape her testimony.

Nasser never consented to Dweck competing directly with Kids, using Kids' employees and resources, and operating out of Kids' premises. In a real sense, that was not competition at all. It was conversion and theft. Regardless, Dweck and Taxin cannot rely on Nasser's purported consent to justify their conduct.

4. The Stockholder Agreement Defense

For yet another defense, Dweck and Taxin contended that Nasser agreed in substance to allow Dweck to compete as evidenced by drafts of a Kids stockholders' agreement. In total, eight iterations of the proposed stockholders' agreement were drafted by Shiboleth's law firm. Each draft contained a clause that would have granted the parties broad latitude to take corporate opportunities that otherwise belonged to Kids. The parties called it the "free-for-all" provision. Tr. 353.

Nasser never signed the agreement or approved any of the drafts. Nasser testified and Shiboleth credibly confirmed that Nasser rejected the free-for-all provision for Kids because he depended on Dweck's management. Dweck conceded on cross-examination that "Albert said he wasn't willing to sign" the stockholders' agreement. Tr. 394. Dweck elsewhere testified that she later sought an employment agreement in part because she and Nasser never agreed on the stockholders' agreement. In short, Nasser and Dweck never had a meeting of the minds over the stockholders' agreement. The free-for-all provision never became effective, and Dweck cannot rely on it to justify her conduct. I therefore need not reach the complex legal issues that the provision would raise.

5. The Essential Childrenswear Defense

As their final defense, Dweck relied on the operating agreement of Essential Childrenswear ("Essential"), a company formed by Nasser, Dweck, and Haim in 1998. The Essential operating agreement contained a free-for-all provision, which stated:

> Any Member and any of their respective affiliates may engage in or possess any interest in other business ventures of any kind, independently or with others, including but not limited to any business similar in nature to or competitive with the business of [Essential]. The fact that a Member or any of their respective affiliates may encounter business opportunities and may take advantage of such opportunities himself and/or herself and/or itself or introduce such opportunities to entities in which he/she/it has or has not any interest, shall not subject such Member or affiliate to liability to [Essential] or any of the other Members on account of the lost opportunity. Neither [Essential] nor any Member shall have any right by virtue of this Agreement or otherwise in or to such ventures, or to the income or profits derived therefrom, and the pursuit of such ventures, even though competitive with the business of [Essential], shall not be deemed wrongful or improper. . . . [Essential] and each Member hereby waives all right or remedy against the Members with respect to any damage, injury, lost profits or revenue as a result of any competitive business activities on the part of any Member.

JX 13 at 5. Dweck contended that this provision authorized her to compete with Kids because (i) Dweck and Nasser were Members of Essential, (ii) Kids, Success, and Premium were among "their respective affiliates," and (iii) "[t]he fact that a Member or any of their respective affiliates may encounter business opportunities and may take advantage of such opportunities himself and/or herself and/or itself or introduce such opportunities to entities in which he/she/it has or has not any interest, shall not subject such Member or affiliate to liability to [Essential] or any of the other Members on account of the lost opportunity."

I cannot agree. Under Dweck's reading, the company-specific language in the Essential agreement would eliminate broadly the duty of loyalty for all other business entities formed by the same parties. But contrary to Dweck's reading, the Essential provision does not unambiguously extend to any opportunities belonging to another entity such as Kids, nor does it excuse the taking of that entity's opportunities by its fiduciaries. The far more reasonable reading is that the provision addressed Essential's opportunities and the taking of those opportunities by Essential's Members.

"[A] contract is ambiguous . . . when the provision[] in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)). Assuming for purposes of analysis that Dweck advanced a reasonable interpretation, the evidentiary record comes down decidedly against Dweck's position.

"It is a familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts." *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939). The evidentiary record reflects that before this litigation, the parties did not believe that the Essential free-for-all provision granted Dweck the right to compete with Kids. Dweck repeatedly sought to have Nasser sign the Kids stockholders' agreement, each draft of which contained a functionally identical free-for-all provision. Nasser refused to sign the draft agreements, specifically objecting to the free-for-all provision. Before founding Success and taking the Bugle Boy opportunity, Dweck sought Nasser's consent (albeit in a vague and ambiguous manner). She received approval only after assuring Shiboleth that her new business would not compete with Kids. If the Essential agreement operated as Dweck now contends, then she had no reason to seek Nasser's consent.

Having considered the parties' contentions in light of the evidentiary record, I find that the scope of the Essential free-for-all provision was limited to corporate opportunities in which Essential had an interest or expectancy. The Essential free-for-all provision did not allow individuals who happened to be Essential Members to usurp Kids' corporate opportunities that came to them in their capacities as Kids fiduciaries.

6. The Remedy

As damages for usurping Kids' corporate opportunities, Dweck, Taxin, Success, and Premium are jointly and severally liable to Kids for the lost profits Kids would have generated from business diverted to Success and Premium. The time period covered by the lost profits award runs from the founding of those entities through May 18, 2005, the date of the split. Nasser's expert quantified the lost profits through the end of 2004 at $9,022,825, and Dweck did not dispute the calculation. Accordingly, Dweck, Taxin, Success, and Premium are jointly and severally liable to Kids for this amount. In addition, Dweck, Taxin, Success, and Premium must provide an accounting of and are jointly and severally liable to Kids for profits generated between January 1, 2005 and May 18, 2005.

Dweck, Taxin, Success, and Premium also are jointly and severally liable for 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. If Dweck and Taxin had been faithful fiduciaries, those license agreements would have been in Kids' name, and Kids could have continued to perform under the agreements together with any renewals or extensions contemplated by the then-existing contracts.

As of May 18, 2005, Success and Premium had signed license agreements for Bugle Boy, Everlast, John Deere, and Gloria Vanderbilt. The Bugle Boy agreement expired on June 30, 2005 and was not renewed. The initial terms of the Everlast, John Deere, and Gloria Vanderbilt licenses expired on December 31, 2006, October 31, 2007, and December 31, 2007, respectively. The John Deere and Gloria Vanderbilt license agreements each contained renewal rights for one additional three-year term. The Everlast license agreement contained renewal options for two three-year terms. The profits from these license agreements and any others that Success or Premium entered into prior to May 18, 2005 are awarded to Kids.

Because the record does not contain evidence sufficient to quantify the amounts, Dweck, Taxin, Success, and Premium shall account to Kids for all profits earned by Success and Premium on these licenses and any others that Success or Premium entered into prior to May 18, 2005.

B. The Mass Departure And The Taking Of Kids' Property And Business Expectancies

Dweck, Taxin, and Fine breached their fiduciary duties by directing Kids employees to transfer Kids' expected orders and customer accounts to Success, taking Kids' property and files, and arranging a mass employee departure on May 18, 2005. "A breach of fiduciary duty occurs when a fiduciary commits an unfair, fraudulent, or wrongful act, including . . . misuse of confidential information, solicitation of employer's customers before cessation of employment, conspiracy to bring about mass resignation of an employer's key employees, or usurpation of the employer's business opportunity." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 602 (Del. Ch. 2010). Dweck cannot limit her liability by citing the termination of her relationship with Kids on March 11. Before that point, Dweck breached her own duties as a fiduciary. After that point, Dweck actively conspired with Taxin and Fine, thereby aiding and abetting Taxin and Fine's breaches of fiduciary duty.

As a remedy, Nasser seeks damages equal to Kids' value as a going concern as of May 18, 2005, which Nasser's expert calculated as $70.8 million to $458.2 million. This measure is far too high and inconsistent with the business reality that Dweck and Taxin were key employees, Kids depended upon them, and they were not bound by any restrictive covenants. Kids' principal customers, including Wal-Mart and Target, had ties to Dweck and Taxin, not Kids. Dweck and Taxin could have departed from Kids at any time and taken the bulk of Kids' goodwill and going concern value with them. As an entity distinct from Dweck and Taxin, Kids had minimal (if any) goodwill or going-concern value.

If Dweck and Taxin had left Kids legitimately, they likely would have competed successfully with Kids and won its non-branded business. But for their fiduciary breaches, however, Dweck and Taxin would have had to start from scratch after leaving Kids. In that alternative universe, 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. Dweck and Taxin likely would have captured the non-branded business eventually, but it would have taken time.

In my view, Kids' remedy for the departure-related breaches of fiduciary duty 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, I award Kids the profits generated by Success in its non-branded business for the Holiday 2005 and Spring 2006 seasons. In May 2005, Kids was hard at work on the Fall 2005 season and had started preparing for the Holiday 2005 and Spring 2006 seasons. Kids' designers already had been traveling and shopping internationally to develop ideas for the Spring 2006 season, and they had a good understanding about what Wal-Mart and

Target's Spring 2006 needs would be. During their departure from Kids, Dweck and Taxin took this business. I award it to Kids and hold Dweck, Taxin, Success, and Premium liable for the profits that Success and Premium earned from these seasons.

Fine is jointly and severally liable with Dweck and Taxin for the Holiday 2005 and Spring 2006 profits. Contrary to Djemal's directives, Fine provided substantial assistance to Dweck and refused to keep Djemal informed about his activities. Fine reported regularly to Dweck about the status of Kids' business and helped Dweck find new premises for Success. Fine helped organize the mass employee departure and oversaw the attempted removal of Kids' property, going so far as to misrepresent to Nasser that he was "Gregory," the driver of the moving truck. As a critical participant in the wrongdoing surrounding Dweck and Taxin's departure from Kids, Fine is jointly and severally liable for the remedy. Accordingly, Dweck, Taxin, Fine, Success, and Premium shall account for and pay over to Kids all profits generated from the Holiday 2005 and Spring 2006 orders.

C. Dweck's Personal Expenses

Between 2002 and 2005, Dweck caused Kids to reimburse her $466,948 in personal and business expenses. Dweck conceded that $171,966 were personal expenses that she wrongfully charged to Kids. She claimed she could not determine whether $170,400 were business or personal, but nevertheless asserted that she should not be ordered to repay that amount to Kids. She testified that $124,582 corresponded to legitimate Kids' business expenses.

Under Delaware law,

> fiduciaries have a duty to account to their beneficiaries for their disposition of all assets that they manage in a fiduciary capacity. That duty carries with it the burden of proving that the disposition was proper. . . . [I]ncluded within the duty to account is a duty to maintain records that will discharge the fiduciaries' burden, and . . . if that duty is not observed, every presumption will be made against the fiduciaries.

Technicorp Int'l II, Inc. v. Johnston, 2000 WL 713750, at *2 (Del. Ch. May 31, 2000). "If corporate fiduciaries divert corporate assets to themselves for non-corporate purposes, they are liable for the amounts wrongfully diverted." *Id.* at *45.

As a Kids fiduciary, Dweck bore the burden at trial of proving that the challenged expenses were legitimate. Dweck failed to meet her burden. Instead, Dweck testified that she "didn't think Mr. Nasser would mind." Tr. 519. She later explained: "I felt that [the expense reimbursement] was part of, really, part of my compensation. In retrospect, I'm sorry I did it and I made a mistake." Tr. 521.

Dweck accordingly is liable to Kids for a total of $342,366 in expenses, comprising both the $171,966 of admittedly personal expenses and the $170,400 of indeterminate expenses. Nasser did not meaningfully challenge Dweck's assertion that $124,582 in expenses were legitimate, and I accept Dweck's testimony on this issue.

Fine is jointly and severally liable for the amounts due. As Kids' CFO, Fine owed fiduciary duties to Kids. From 2002 through 2005, Fine co-signed for the reimbursement of Dweck's personal expenses. He admitted at trial that he did not perform *any* review of Dweck's expenses before co-signing her reimbursement checks. He simply signed off.

Because Fine was not personally interested in Dweck's expense reimbursements, he can be held liable for a breach of the duty of loyalty only if he consciously facilitated wrongful action by another for a purpose other than advancing the best interests of the corporation. *Hampshire Gp., Ltd. v. Kuttner*, 2010 WL 2739995, at *11-12 (Del. Ch. July 12, 2010). When a fiduciary "fail[s] to act in the face of a known duty to act, thereby demonstrating a conscious disregard for [his] responsibilities, [he] breach[es] [his] duty of loyalty by failing to discharge that fiduciary obligation in good faith." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (footnote omitted)). Fine facilitated Dweck's wrongful conduct by consciously abdicating his duty to review her expenses. Reviewing and approving expenditures was part of his job, yet he knowingly chose not to do it.

Fine's actions differ in kind from the expense-reviewing officer's conduct in *Kuttner*, where this Court declined to hold the officer liable. There, Hampshire Group Limited brought breach of fiduciary duty claims against Roger Clark, the company's former Vice President of Finance and Principal Accounting Officer, for improperly signing off on expense reimbursements for Ludwig Kuttner, the company's free-spending former CEO. Facing impending changes in the accounting rules, Kuttner submitted a backlog of more than $1 million in reimbursement requests from 1989 to 2002. *Id.* at *15. Clark had to review the mountain of paper. *Id.* at *14. Although Clark successfully weeded out the vast majority of Kuttner's personal expenses, several slipped through. *Id.* at *16. In its post-trial decision, the Court primarily faulted Hampshire's board of directors, finding that "[f]or over a *decade*, the Hampshire board knew that Kuttner was not complying with corporate policies and had a large backlog of unsubmitted expense reports." *Id.* at *13. Because of "the board's own torpor and lack of will," Clark was forced to conduct the expense review under severe time pressure. *Id.* at *20. The Court found that the amounts of the overlooked expenditures were *de minimis* and regarded it as understandable that Clark might have missed the challenged items. *Id.* at 18. The Court therefore could not "conclude that [Clark] acted in bad faith or in a grossly negligent manner." *Id.* at *20.

Fine's situation was different. He did not face a huge backlog, nor was he under time pressure. He had the opportunity to review Dweck's expenses on a periodic basis. He simply chose not to. Although some of Dweck's personal expenses were *de minimis*, Fine regularly signed off on thousands of dollars of personal expenditures without considering their validity or asking any questions. By doing so, Fine acted in bad faith. He and Dweck are therefore jointly and severally liable for $342,366.

D. Other Claims Against Dweck, Taxin, And Fine

Nasser pursued other, non-fiduciary tort claims against Dweck, Taxin, and Fine, including (i) misappropriation of trade secrets, (ii) deceptive trade practices, (iii) tortious interference with prospective business relations, and (iv) conversion. Because the tort claims arise from the same conduct as the fiduciary breaches, they are subsumed in the fiduciary analysis. The remedies I have imposed address the resulting harms and do so more completely by deploying the flexible and expansive remedial powers afforded by equity. I therefore do not reach the non-fiduciary tort claims.

E. The Overseas Payments

Dweck advanced a range of claims based on the overseas payments to Maubi and the Foreign Licensors. I will not address the legality of the tax structure. Shiboleth is a sophisticated international lawyer who believed that the structure was legal. The Internal

Revenue Service is currently auditing Kids and its principals, and the propriety of the structure is best addressed in that forum.

In this case, the parties dispute who owns the overseas funds, whether the amounts must be repaid to Kids, and whether Nasser is liable to Dweck for some or all of the monies. Assuming that the structure is legal, I can perceive no reason under Delaware law why the owners of a closely held Delaware corporation could not agree to capitalize an entity using the structure Shiboleth designed. Equally important, Dweck cannot assert any causes of action relating to the payments. First, she acquiesced to them. Second, she was not harmed by them because she beneficially owns her *pro rata* share of the funds.

"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.'" *DiRienzo v. Steel P'rs Hldgs. L.P.*, 2009 WL 4652944, at *7 (Del. Ch. Dec. 8, 2009) (quoting *Cantor Fitzgerald, L.P. v. Cantor,* 2000 WL 307370, at *24 (Del. Ch. Mar. 13, 2000)). Assuming 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.

Equally important, as among Dweck, Nasser, and Kids, Dweck cannot claim any harm from the overseas payments. 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.

F. The Consulting Fees To RAJN

Dweck next claims that Nasser breached his fiduciary duties by ordering Kids to pay "consulting fees" to RAJN. These payments began in 1996 and were made each year until 2008. Dweck's challenges to the pre-2002 payments are barred by laches.

"Laches is an equitable principle that operates to prevent the enforcement of a claim in equity where a plaintiff has delayed unreasonably in bringing suit to the detriment of the defendant or third parties." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §11.06, at 11-61 (2010). "[T]he following factors [are] important in determining whether a party is guilty of laches: (1) knowledge of a claim, (2) unreasonable delay, (3) change of position on the part of those affected by the plaintiff's nonaction, and (4) the intervention of rights of those affected." *Id.* §11.06[b], at 11-62 to -63.

Dweck knew of the RAJN payments since 1996, but did not challenge them until May 2005. "[T]hree years is the measuring rod for the facial timeliness of claims for breach of fiduciary duty . . . ." *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 665 (Del. Ch. 2006) (citing 10 *Del. C.* § 8106). Although a damages claim arising from wrongful conduct of a fiduciary that occurred outside the three-year period is presumptively time-barred, a plaintiff may nevertheless challenge a decision to continue the wrongful conduct if the decision was made in the three years before the filing of the complaint. *Id.* at 666.

In *Aidinoff,* the plaintiff challenged the defendants' decision to perform under an allegedly unfair contract. *Id.* Although the contract was first entered into more than twenty years earlier, it contained a termination provision that gave the defendants "the business option of choosing not to continue that relationship annually . . . ." *Id.* Because the contract could be freely terminated on an annual basis, the plaintiff's claim was not time-barred as to renewals within three years of the complaint. *Id.* at 667.

Like the defendants in *Aidinoff*, Nasser could have discontinued the RAJN payments at any time. Each payment represented a discrete decision to perpetuate an unfair course of conduct. Each payment is therefore evaluated separately for laches. That doctrine bars any challenge to payments made more than three years before Dweck filed her complaint. Challenges to later payments are not time-barred.

The payments to RAJN were interested transactions between a corporation and its controlling shareholder, so Nasser bore the burden of demonstrating their entire fairness to Kids. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994). Neither Nasser nor his entity, RAJN, rendered any services to Kids that would have justified the consulting fees, and Nasser did not proffer any creditable explanation as to how they were fair to Kids. Nasser therefore failed to carry his burden and is liable to Kids for the consulting fees paid to RAJN from May 2002 onward. The total amount due is $3,864,583. JX 884, Ex. A

G. Nasser's Appointment Of Djemal As Kids' CEO

Dweck claims that Nasser breached his fiduciary duty by appointing his nephew, Djemal, as CEO at the March 11, 2005 board meeting. Assuming for purposes of discussion that appointing Djemal was an interested transaction that should be reviewed for entire fairness, Nasser carried his burden of proof.

The evidence at trial established that Nasser was shocked by Dweck's admission at the March 11 stockholder meeting that she was competing from Kids' premises and by her subsequent refusal to serve on Kids' board of directors. Nasser had not groomed a successor. Given Dweck's central role in the day-to-day affairs of the company, Nasser needed to fill her position immediately. With more than forty years experience in the apparel industry, Djemal was a qualified candidate. Under the circumstances, Nasser's appointment of Djemal as Kids' CEO was entirely fair to Kids and did not constitute a breach of fiduciary duty. For similar reasons, hiring Djemal was not an act of waste.

H. The Seabreeze Joint Venture

Dweck challenged Nasser and Djemal's decision to enter into the Seabreeze joint venture as a breach of fiduciary duty. Because Nasser controlled both Kids and Seabreeze, the joint venture is subject to entire fairness review. *Lynch*, 638 A.2d at 1115.

As controller of both entities, Nasser unilaterally set the terms of the joint venture. The venture nevertheless was profitable for Kids, netting $356,808 over two years. Although I initially was skeptical of the economic terms, Nasser and Djemal offered evidence at trial that the terms comported with industry standards. Dweck offered no evidence to the contrary. Based on the evidence presented, I find that Nasser carried his burden by demonstrating that the terms of the Seabreeze joint venture were entirely fair to Kids.

I. The $3,076,400 In Cash

Kids had $18,312,555 of cash or cash equivalents on its balance sheet as of March 31, 2005. By the time Nasser shut the company down, Kids only had $832,414 remaining. Much of the difference was accounted for at trial: $8,346,211 went to Woodsford; $3,830,537 went for legal fees; $1,258,718 went to RAJN for consulting fees; $968,275 went to Djemal for services rendered to Kids. The remainder, $3,076,400, has not been accounted for.

Dweck sought a full accounting. Such a remedy would be overbroad. Nevertheless, given Nasser's history of insider transactions and the gap in the evidentiary record, Nasser is ordered to account to Kids for the unidentified $3,076,400. Whether any further remedy is warranted must await the completion of the accounting.

J. Kids' Payments For Attorneys' Fees

At trial and in her post-trial briefs, Dweck belatedly challenged Kids' payment of Nasser's, Djemal's, and its own legal fees in this litigation. She cited the fact of payment and the amounts incurred, but did not articulate how the payments might be wrongful.

Dweck named Kids as a defendant, not simply a nominal defendant, forcing Kids to retain counsel. Nasser and Djemal possessed the right to mandatory advancements under Article Sixth of Kids' Certificate of Incorporation. *See* JX 932. Dweck did not offer any reason why their advancement rights would not have been triggered when she sued them in their covered capacities for breaches of fiduciary duty. On the current record, the payments for legal fees appear proper.

K. Fee Shifting

Each side asked me to shift fees under the bad faith exception to the American Rule. Each side litigated vigorously. Each side has been found to have engaged in conduct for which liability has been imposed. Although Dweck's striking breaches of the duty of loyalty and her frequently non-creditable testimony came closest to qualifying under the bad faith exception, the case as a whole does not warrant fee shifting.

III. CONCLUSION

Dweck, Taxin, Fine, and Nasser are liable to Kids as set forth herein. For purposes of the accountings ordered herein, profit shall be measured as gross profit less selling, general, and administrative expenses. *See* JX 179, Ex. J. Pre-judgment interest is due on all amounts at the legal rate, compounded quarterly. The parties will confer regarding the additional proceedings required by this opinion and submit an implementing order.