FILED, Clerk of the Appellate Division, July 31, 2024, **A-000669-23**, **AMENDED**

Superior Court of New Jersey
APPELLATE DIVISION

AHMET DERYA,

vs.

SEDEF GULSAN,

DOCKET NO. A-000669-23

Civil Action

On Appeal From:
Superior Court of New Jersey
Law Division
Mercer County

Docket No. MER-L-1265-20

Sat Below:
Hon. R. Brian McLaughlin, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT

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[1] The following documents are located in Plaintiff's Appendixes.

Preliminary Statement

Plaintiff-Appellant, Ahmet Derya ("Plaintiff" or "Mr. Derya") appeals the October 6, 2023 Order ("October 6 Order"), which denied Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Plaintiff also appeals the March 11, 2024 Order ("March 11 Order") granting the fee application of defendant Sedef Gulsan ("Defendant" or "Ms. Gulsan") in the amount of $119,256.40.

The October 6 Order should be reversed, and Plaintiff should be granted JNOV pursuant to *R.* 4:40-2, or, in the alternative, a new trial, because the jury's verdict was against the weight of the evidence and reasonable minds could not differ as to Plaintiff's entitlement to judgment against Defendant. At a minimum, Plaintiff is entitled to a new trial pursuant to *R.* 4:49-1 to prevent a miscarriage of justice.

The March 11 Order, which granted Defendant's fee application in the amount of $119,256.40 ("Defendant's Fee Application"), should also be reversed for several reasons. First, Plaintiff is entitled to judgment as a matter of law pursuant to *R.* 4:40-2 and/or a new trial pursuant to *R.* 4:49-1 to prevent a miscarriage of justice. Second, Defendant never asserted any counterclaim against Plaintiff and Defendant, therefore, cannot be considered a prevailing party for purposes of a contractual fee shifting

provision simply because the jury found Plaintiff had no cause of action against Defendant. Third, Plaintiff brought this lawsuit in good faith and was successful in obtaining financial information from Defendant relating to SG Health LLC d/b/a Viva Pharmacy ("Viva Pharmacy" or the "LLC") to which Plaintiff was entitled pursuant to the parties' operating agreement (the "Operating Agreement") and the New Jersey Limited Liability Company Act (the "LLC Act"), and which Defendant had failed and refused to provide to Plaintiff prior to discovery in this litigation. And fourth, Defendant admitted her liability to Plaintiff for at least certain aspects of Plaintiff's claims, which should preclude a fee award to Defendant.

For example, without limitation, Defendant testified that Plaintiff was entitled to 49% of the profits generated by Viva Pharmacy in 2016, but that she never paid Plaintiff his share of these profits. 3T119:14:7-24. Defendant also admitted at trial that she improperly charged Plaintiff $6,273 for Defendant's own car payments to First Data-Santa (3T166:11-25) and $4,387.20 for her own insurance payments to Geico (3T162:11-19), as listed on page 103 of the Viva Pharmacy bank ledger. (Pa170), and she acknowledged that it was a mistake to charge Plaintiff for these amounts. *Id.*

Moreover, New Jersey's general policy disfavoring fee awards, and the limiting language contained in the Operating Agreement,

which provides the Court with discretion to determine ". . . who is the prevailing party and the amount of reasonable attorney fees to be paid to the prevailing party . . ." warrants the outright denial of Defendant's Fee Application.

In the alternative, Plaintiff respectfully submits the trial court should have reduced the fee award to the extent Defendant sought to recover fees and costs for *unsuccessfully* moving to dismiss Plaintiff's complaint, and for *unsuccessfully* opposing Plaintiff's discovery motions. Defendant is not entitled to fees for opposing Plaintiff's successful motions to amend his complaint and/or to compel discovery from Defendant, and to extend the discovery end date, along with other related relief necessitated by Defendant's failure to comply with discovery. Defendant should not be awarded fees and costs for raising arguments and objections that were rejected by the Court because Defendant was not the prevailing party at least as to those issues.

In addition, the amount of the fee award should have been further reduced because the amount Defendant sought was excessive and unreasonable based on the procedural history and the totality of the circumstances, including, without limitation, Defendant's counsel's block billing practices and failure to address pertinent factors set forth in *RPC* 1.5(a).

Procedural History[2]

Plaintiff initiated this action against Defendant on July 16, 2020. Pa670-81. On September 2, 2020, Defendant filed a motion to dismiss the complaint. Pa682-707. On September 25, 2020, the Court denied Defendant's motion to dismiss Count Three of Plaintiff's Complaint, alleging common law fraud. Pa722. On October 5, 2020, the Defendant filed an answer and counterclaim. Pa723-36. On October 26, 2020, Plaintiff filed an answer to the counterclaim. Pa748-51.

On November 10, 2021, Plaintiff filed a motion to amend his complaint and to extend discovery. Pa1589-633. On December 9, 2021, Defendant opposed Plaintiff's motion. Pa1634-646. On December 17, 2021, the Court granted Plaintiff's motion over Defendant's objections and entered an order permitting Plaintiff to file an amended complaint, extending the discovery deadline, and compelling discovery from Defendant, among other elements of relief. Pa1647-648.

On December 20, 2021, Plaintiff filed his Amended Complaint. Pa752-71. Defendant filed an Answer to the Amended Complaint on

[2] AT: MOTION FOR JNOV DECISION DATED OCTOBER 6, 2023
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1T: TRIAL TRANSCRIPT DATED JULY 25, 2023
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3T: TRIAL TRANSCRIPT DATED JULY 27, 2023
4T: TRIAL TRANSCRIPT DATED JULY 28, 2023

January 10, 2022. Pa772-85. Plaintiff's Amended Complaint asserted the following causes of action:

Count One – Breach of the Duty of Loyalty

Count Two – Breach of the Duty of Care

Count Three – Common Law Fraud

Count Four – Unjust Enrichment

Count Five – Breach of Contract.

Count Six - Dissolution Pursuant to N.J.S.A. 42:2C-48

Count Seven - Personal Liability Pursuant to N.J.S.A. 42:2C-39

Count Eight - Conversion

Count Nine - Breach of Good Faith and Fair Dealing

Count Ten - Promissory Estoppel

Count Eleven- Tortious Interference

Count Twelve - Negligence

Count Thirteen - Declaratory Judgment

Pa772-85.

On January 6, 2022, Defendant filed a motion to quash Plaintiff's subpoena to TD Bank.Pa1649-694. On February 2, 2022, Defendant withdrew her motion to quash and the Court entered a protective order that permitted Plaintiff to obtain from TD Bank financial information relevant to Viva Pharmacy, which Defendant had failed and refused to provide to Plaintiff despite Plaintiff's discovery demands and entitlement pursuant to the Operating Agreement and LLC Act. Pa1695-704.

The Honorable R. Brian McLaughlin, J.S.C., presided over a jury trial in this matter from July 24 to July 28, 2023. The jury returned a verdict in favor of Defendant on July 28, 2023. Pa1705. Plaintiff moved for judgment notwithstanding the verdict or for a new trial on August 14, 2023. Pa948-1524. On August 22, 2023, Defendant filed an application for an award of attorneys' fees and costs against Plaintiff. Pa804-81. On November 11, 2023, Plaintiff filed opposition to Defendant's fee application. Pa882-947.

The Court denied Plaintiff's post-judgment motion on October 6, 2023. Pa665-66. On November 1, 2023, Plaintiff filed a notice of appeal. Pa1706-710. On February 12, 2023, the Honorable Thomas W. Sumners, JR, C.J.A.D. issued a *sua sponte* order that temporarily remanded this matter to the trial court to issue an order deciding Defendant's Fee Application. Pa669. On March 11, 2024, Judge McLaughlin awarded Defendant attorneys' fees and costs in the amount of $119,256.40. Pa667-68. On the same day, Plaintiff filed an amended notice of appeal. Pa1711-715.

Statement of Facts

Plaintiff invested $100,000 into SG Health, LLC d/b/a Viva Pharmacy (defined above as "Viva Pharmacy" or the "LLC") in 2016, acquiring a 49% ownership stake in the LLC. The LLC operated a pharmacy store located at 503 S Olden Avenue, Trenton, NJ 08629. Pa1-22. Through an agreement with Plaintiff (the "Operating Agreement")[3], the defendant Sedef Gulsan (defined above as "Defendant" or "Ms. Gulsan"), assumed the role of pharmacist and sole manager of Viva Pharmacy and she was responsible for the LLC's day-to-day operations and all managerial decisions. 3T37:5-23.

Plaintiff brought this action alleging, among other related causes of action, that Defendant breached the Operating Agreement and violated the LLC Act by, among other misconduct, failing and refusing to provide Plaintiff with the LLC's financial information. Pa752-771. Plaintiff sought, among other elements of relief, an accounting and money damages. *Id.*

Plaintiff alleged that Defendant, in her capacity as the sole manager, failed to distribute to Mr. Derya his fair share of profits, withheld financial records, made excessive withdrawals from Viva Pharmacy for her personal use that were disguised by inflating company expenses, payroll, and other transactions, and releasing the LLC's valid claims against third parties without

[3] Pa1-22.

Plaintiff's knowledge and consent. *Id.* Additionally, Ms. Gulsan misappropriated Viva Pharmacy's funds and business opportunities by establishing Atmaca LLC in 2017. *Id.* Atmaca LLC was formed using Viva Pharmacy's funds and operated as a competing pharmacy, all without Plaintiff's knowledge or consent. 3T88:13-22.

Defendant's Fee Application

The fee shifting provision contained in the parties' Operating Agreement provides:

> In the event of any suit or action to enforce or interpret any provision of this Agreement (or that is based on this Agreement), the prevailing party is entitled to recover, in addition to other costs, reasonable attorney fees in connection with the suit, action, or arbitration, and in any appeals. *The determination of who is the prevailing party and the amount of reasonable attorney fees to be paid to the prevailing party will be decided by the court or courts, including any appellate courts, in which the matter is tried, heard, or decided*.

(Pa15, SG Health Operating Agreement at ¶ 10.5).

Defendant's fee application seeks **$6,897.00** for unsuccessfully moving to dismiss Plaintiff's complaint:

#	Date	Description	Time Billed	Amount Charged	Subtotal
1	8/27/20	Analyze Fraud and Punitive Damages claims for possible motion on the pleadings. Research partial Motion to Dismiss based upon . . . [redacted] . . . Review proofs with regard to . . . [redacted]	2.75 hrs.	$1,045.00	$1,045.00
2	8/31/20	Call with and email to Sedef. Draft notice of motion to dismiss count three (common	3.10 hrs.	$1,178.00	$2,223.00

		law fraud) of plaintiff's complaint; draft proposed order and certification of counsel. Draft memorandum of law.[4]			
3	9/1/20	Work on Memorandum of Law and pull case law supporting Plaintiff's lack of pleading fraud with specificity as required by the Rules of Court . . .[5]	2.8 hrs.	$1,064.00	$3,287.00
4	9/2/20	Finalize Motion to Dismiss Fraud Claim. Finalize Memorandum of Law supporting the same. Draft Order. Draft Certification of Service. Email counsel. File the same. Email counsel. Finalize draft Answer and defenses based on client meeting notes.[6]	4.60 hrs.	$1,748.00	$5,035.00
5	9/10/20	Receive, review, and analyze Opposition to Motion to Dismiss Fraud Claim.[7]	1 hrs.	$380.00	$5,415.00
6	9/21/20	Draft Reply Brief in Support of Motion to Dismiss. File the same and email the client and counsel[8]	3.40 hrs.	$1,292.00	$6,707.00
7	9/23/20	Call the client to inform her of the judge's preliminary/tentative decision. Email Judge Hurd about accepting his tentative findings relative to the Motion to dismiss the fraud claim. Pull docket to determine whether the motion was carried by the Court.[9]	.5 hrs.	$190.00	**$6,897.00**

[4] *Id.*
[5] Pa817.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

Defendant's Fee Application seeks **$33,291.22** in fees and costs for participating in discovery necessary for Plaintiff to obtain financial information relating to Viva Pharmacy, which Plaintiff was entitled to pursuant to the Operating Agreement and the LLC Act. Pa804-881.

#	Date	Description	Time Billed	Amount Charged	Subtotal
1	12/09/20	Redact SS no.'s from tax returns. Produce three years of LLC tax returns to Plaintiff's counsel.[10]	.5 hrs.	$190.00	$190.00
2	5/6/21	Call with Plaintiff's counsel to discuss the discovery and the case. Review . . . [redacted][11]	1.2 hrs.	$456.00	$646.00
3	6/21/21	Discern files/documents that were produced in discovery . . . [redacted] applicable to Sedef's action. Email to counsel for Ahmet. Email to Sedef.[12]	1 hrs.	$380.00	$1,026.00
4	7/14/21	Draft supplemental discovery responses based upon last week's meeting Sedef to review plaintiff's document production[13]	2.6 hrs.	$988.00	$2,014.00
5	7/26/23	Receive and review discovery notice from the Court. Work on supplemental discovery requests[14]	2.1 hrs.	$798.00	$2,812.00
6	8/10/21	Begin assessing documents for deposition exhibits of Plaintiff and create mark-up deposition binder of the same[15]	2.8 hrs.	$1,064.00	$3,876.00
7	9/8/21	Email counsel regarding the 9/22 deposition of Plaintiff. Email . . . [redacted] . . . client regarding . . . [redacted] . . . Draft and file Motion	2.1 hrs.	$798.00	$4,674.00

[10] Pa822.
[11] Pa826.
[12] Pa827.
[13] Pa828.
[14] *Id.*
[15] Pa829.

		to Extend discovery[16]			
8	9/28/21	Receive and review mailing from Plaintiff's counsel regarding discovery. Receive and review Order from Court.[17]	.25 hrs.	$95.00	$4,769.00
9	10/14/21	Pull documents review with Sedef and received from Ahmet and review for potential use at tomorrow's deposition. Emails with Plaintiff's counsel regarding depositions. Review translator protocols.[18]	2.2 hrs.	$836.00	$5,605.00
10	12/9/21	Email from/to counsel regarding Sedef's deposition and status of discovery. Email to the client regarding . . . [redacted]. File opposition to Motion to Amend.[19]	.5 hrs.	$190.00	$5,795.00
11	12/14/21	Work on Rogs. Objections and clients responses to 82 interrogatories[20]	5.00 hrs.	$1,900.00	$7,695.00
12	12/15/21	Continue working on responses and objections to discovery. Email from Judge Hurd regaining tentative decisions on motion to Amend. Call counsel Email counsel regarding same.[21]	1.8 hrs.	$684.00	$8,379.00
13	12/17/21	Receive and review subpoenas from Ahmet's attorney. Begin drafting responses to request for production of documents.[22]	2.5 hrs.	$950.00	$9,329.00
14	1/5/22	Draft Certificate of Service. Research law on Motion to Quash and begin brief. Finalize Sedef's certification with exhibits.[23]	4 hrs.	$1,520.00	$10,849.00
15	1/6/22	Finalize Brief. Draft Notice and Draft Order. File motions to Quash.	2.1 hrs.	$798.00	$11,647.00

[16] Pa830.
[17] *Id.*
[18] Pa832.
[19] Pa835.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Pa837.

		Email to TD Bank. Letter to the same with a copy of the motion[24]			
16	1/7/22	Receive and review notice from Court of accepted filing. Send TD Bank a copy of the filed motion, copying Sedef. Email from Account, AMCB GSI Subpoena processor at TD.[25]	.3	$114.00	$11,761.00
17	1/20/22	Receive and review correspondence with supplemental documents requests from counsel[26]	.4	$152.00	$11,913.00
18	1/27/22	Receive and review notice from the Court regarding Plaintiff's opposition to the motion to Quash. Review counsel's certification relating to same.[27]	.25	$95.00	$12,008.00
19	1/28/22	Work on supplemental request from Docs. Email Sedef . . . [redacted] . . . Email from Counsel. Research case law for Reply Brief.[28]	4 hrs.	$1,520.00	$13,528.00
20	1/31/22	Receive and review email of a subpoena from Plaintiff's counsel to JCM Tax Service and upon Republic First Bank relative to husband's account. Draft Reply Certification in reply to Plaintiff's opposition and assemble exhibits. Draft Reply Brief on opposition. File the same with the Court. Email Plaintiff's counsel. Review court notices relating to the same.[29]	3.4 hrs.	$1,292.00	$14,820.00
21	2/1/22	Email from/to Judge Hurd regarding the Motion to Quash. Email counsel regarding phone calls to try to work out issues and discuss potential confidentiality order. Review of Republic First	2 hrs.	$760.00	$15,580.00

[24] Pa837.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Pa838.

		Bank and JCM subpoenas for objections if there is no confidentiality Order. Call with counsel. Review proposed confidentiality Order and make edits to the same.[30]			
22	2/2/22	Work on Draft Confidentiality Consent Order. Email counsel regarding the condition of the production of tax and financial information sought relative to SG Health from Republic First Bank and JCM in the respective subpoenas be deemed Confidential (not Attorney Eyes Only); and that the information sought relative to the Republic First Bank subpoena be designated confidential and Attorney's Eyes Only. Email to/from Judge Hurd regarding Friday's motion relative to the subpoenas[31]	2.25 hrs.	$855.00	$16,435.00
23	2/14/22	Voicemail from Josh Mellum, EA regaining SG Health subpoena. Email from the same. Email Sedef . . . [redacted] . . . [32]	.5 hrs.	$190.00	$16,625.00
24	2/25/22	Receive multiple emails with documents attached relative to Viva Pharmacy and its sale to CVS. Draft supplemental response to counsel regarding the same. Email from/to counsel regarding the deposition of Sedef and discovery.[33]	.75 hrs.	$285.00	$16,910.00
25	3/7/22	Email Sedef regarding . . . [redacted] Assemble docs. Draft a formal response to Jan. 20, 2022 request for documents. Review of J. Mellum's Merchant Data Release and CVS's Retail Acquisition Owner Guide.[34]	2.3 hrs.	$874.00	$17,784.00
26	3/14/22	Email counsel regarding the	.3 hrs.	$114.00	$17,898.00

[30] Pa839.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Pa841.

		status of Sedef's deposition. Call with the client regarding . . . [redacted] . . . email counsel the timing of subpoenaed documents and discovery end-date.[35]			
27	3/25/22	Motion to extend discovery[36]	2 hrs.	$760.00	$18,658.00
28	3/30/22	Emails with counsel regarding motion. Edit to motion and prepare the same for filing. File the motion to extend discovery.[37]	.3 hrs.	$114.00	$18,772.00
29	3/31/22	Review emails between Plaintiff's counsel and CVS counsel regarding protective order and subpoena.[38]	.3 hrs.	$114.00	$18,886.00
30	4/4/22	Email between counsel and CVS regarding the subpoena relative to CVS sale/purchase of Viva Pharmacy documents[39]	.2 hrs.	$76.00	$18,962.00
31	6/21/22	Cal, Sedef . . . [redacted]. Emails with counsel regarding the same and regarding the request for subpoenaed documents. Begin review of nearly 8.5k pages of additional/subpoenaed discovery documents from Block, Inc. (Square Cash); CVS; Kaplan v. SG Health; Affidavit of Kivanc Atmaca; Chase Bank, TD Bank; deposition exhibits Email to Sedef/text the same[40]	4.4 hrs.	$1,672.00	$20,634.00
32	6/23/22	Complete review of nearly 8.5k pages of additional/subpoenaed discovery documents from Block Inc. (Square Cash); CVS; Kaplan v. SG Health; Affidavit of Kivanc Atmac; Chase Bank; TD Bank; deposition exhibits Email to Sedef/text the same.[41]	3 hrs.	$1,140.00	$21,774.00

[35] Pa841.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Pa843.
[40] Pa844.
[41] *Id.*

33	7/5/22	Receive and review 100s of pages of DropBox files for tomorrow's Deposition Exhibits marked supplemental to prepare DropBox production. Emails from counsel with Zoom information for deposition[42]	.7 hrs.	$266.00	$22,040
34	7/6/22	Deposition (Day-1) of Sedef[43]	3.2 hrs.	$1,216.00	$23,256.00
35	7/11/22	Receive and review email and letter from Plaintiff's counsel with the plaintiff's supplemental discovery demand for items Ms. Gulsan testified about during her deposition. Review whether some of the requests have already been addressed and/or responded to.[44]	.5 hrs.	$190.00	$23,446.00
36	7/14/22	Review Supplemental RFP documents and draft email with comments to Sedef regarding . . . [redacted].[45]	1 hrs.	$380.00	$23,826.00
37	7/18/23	Review draft motion from Crew regarding discovery extension. Email same with edits.[46]	.3 hrs.	$114.00	$23,940.00
38	7/20/22	Review revised motion to extend discovery. Review court notice with regard to the filing of the same. Review, assemble, and Bates the supplemental production base upon Mr. Schielke's letter of July 11, 2022. (Bates "DEF-643 through DEF-674.") Email; to counsel. Email from counsel regarding. Receive review Day 1 transcript and send the same to Sedef. Receive and review First Republic productions (Bates 10235 – 11125).[47]	3.2 hrs.	$1,216.00	$25,156.00
39	7/21/22	Continuation of deposition	4.4 hrs.	$1,672.00	$26,828.00

[42] Pa845.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

		of Sedef[48]			
40	7/28/22	Review Plaintiff's supplemental document request to Sedef[49]	.3 hrs.	$114.00	$26,942.00
41	7/31/22	Photocopies[50]	n/a	$155.20	$27,097.22
42	8/2/22	Receive and review letter from Ahmet's counsel with a supplemental request for a copy of the QuickBooks (or comparable accounting software) date file for Viva Pharmacy with passwords, including separate files. Email to the client regarding the same.[51]	.2 hrs.	$76.00	$27,173.22
43	8/8/22	Receive and review letter from counsel and Republic First Bank Subpoena Response Additional Documents (DERYA 11126 – DERYA 11227)[52]	1 hrs.	$380.00	$27,553.22
44	8/30/22	Email from Crew S., Esq.'s office regarding supplemental discovery request status. Emails from Josh Mellum (CPA) and client regarding document production. Email [redacted] . . . Receive and review supplemental TD documents (over 1,000 pages).[53]	1.4 hrs.	$532.00	$28,085.22
45	9/1/22	Emails from/to Ahmet's counsel regarding supplemental document requests and ShareFile from the accountant, Josh Mellum. [Redacted] . . . Sedef [redacted] regarding [redacted] . . . Emails with Sedef regarding [redacted] . . . Call Sedef.[54]	.5 hrs.	$190.00	$28,275.22
46	9/7/22	Mark up counsel's 7.28.22 supplemental request for documents for client review	.6 hrs.	$228.00	$28,503.22

[48] *Id.*
[49] Pa846.
[50] Pa845.
[51] Pa847.
[52] *Id.*
[53] Pa848.
[54] Pa849.

		and comment. Email the same to Sedef. Email Erik Nunez regarding the status of the supplemental document production responses.[55]			
47	9/9/22	Receive documents from Sedef. Work on supplemental request responses and document assembly. Email Sedef regarding [redacted].[56]	1.5 hrs.	$570.00	$29,073.22
48	9/12/22	Finalize responses to July 28, 2022 demand for production of documents. Email Sedef with [redacted] . . . Email Sedef to [redacted].[57]	1.8 hrs.	$684.00	$29,757.22
49	9/21/22	Prepare file [redacted] shared and exchanged for review and [redacted].[58]	2 hrs.	760.00	$30,517.22
50	10/4/22	Assemble discovery documents into [redacted] . . . Call and email Josh Mellum for access to the ShareFile from a few months back that was shared with counsel so I may use [redacted].[59]	2.2 hrs.	$836.00	$31,353.22
51	10/7/22	Email [redacted] . . . by the client. Email counsel requesting additional time/extension to serve expert report.[60]	.3	114.00	$31,467.22
52	10/11/22	Email from Sedef regarding [redacted] . . . Draft Motion to Extend Discovery. Draft Notice of Motion. Draft Certification in support of the motion, Draft Cert. of Service. Draft Proposed Order.[61]	3.1 hrs.	$1,178.00	$32,645.22
53	10/12/22	Finalize motion. Add demand for Rog Answers. Assemble Exhibits. File the Motion on Short Notice to Extend Discovery. Serve Counsel.[62]	1.5 hrs.	$570.00	$33,215.22

[55] *Id.*
[56] Pa849.
[57] *Id.*
[58] *Id.*
[59] Pa851.
[60] *Id.*
[61] *Id.*
[62] *Id.*

54	10/13/22	Email from Court with notice of motion date. Email [redacted] . . . Sedef confirming [redacted].[63]	.2 hrs.	$76.00	**$33,291.22**

[63] *Id.*

Defendant's Fee Application seeks **$5,263.00** in fees and costs for unsuccessfully opposing Plaintiff's motion to amend his complaint. Pa804-881.

#	Date	Description	Time Billed	Amount Charged	Subtotal
1	11/10/21	Receive and review Plaintiff's Motion to Amended Complaint[64]	.75 hrs.	$285.00	$285.00
2	11/12/21	Draft and file adjournment request to carry plaintiff's motion.[65]	.4 hrs.	$152.00	$437.00
3	12/7/21	Research for opposition and begin draft brief in opposition to Plaintiff's Motion to Amend to Judge Hurd[66]	3.70 hrs.	$1,406.00	$1,843.00
4	12/8/21	Draft brief in opposition to Plaintiff's motion to amend. Review proposed discovery dates. Draft Order and Certificate of Service[67]	5.2 hrs.	$1,976.00	$3,819.00
5	12/9/21	Email from/to counsel regarding Sedef's deposition and status of discovery. Email to the client regarding . . . [redacted]. File opposition to Motion to Amend.[68]	.5 hrs.	$190.00	$4,009.00
6	12/13/21	Email from counsel with prospered discovery dates. Receive and review reply to my opposition as filed with the Court for Friday's motion. Review Plaintiff's proposed discovery dates.[69]	.8 hrs.	$304.00	$4,313.00
7	12/15/21	Continue working on responses and objections to discovery. Email from Judge Hurd regaining tentative decisions on motion to Amend. Call counsel Email counsel regarding same.[70]	1.8 hrs.	$684.00	$4,997.00
8	12/16/21	Receive and review revised	.7 hrs.	$266.00	**$5,263.00**

[64] Pa833.
[65] *Id.*
[66] Pa835.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

		proposed Order given judge's tentative decision on the motion to amend. Email counsel regarding Order. Review proposed amendment. Voicemail from counsel's office. Email to the same[71]			

[71] *Id.*

Defendant's Fee Application seeks **$7,181.00** in fees and costs for the following time entries that are too vague or indiscernible to be allowed. Pa804-881.

#	Date	Description	Time Billed	Amount Charged	Subtotal
1	10/2/20	…[redacted] . . . for review with client Monday. Consider possible . . . [redacted]. Review LLC as a party where named in the body of the Complaint, but not in the caption.[72]	3.7 hrs.	$1,406.00	$1,406.00
2	2/1/21	Call client regarding . . . [redacted] Also, touch base regarding . . . [redacted][73]	.3	$114.00	$1,520.00
3	3/8/21	Research . . . [redacted] . . . pharm license. Review . . . [redacted] for helpful information to the case.[74]	.4	$152.00	$1,672.00
4	6/25/21	Work on the . . . [redacted] applicable to Sedef's action. Email to counsel for Ahmet. Email to Sedef.[75]	1 hrs.	$380.00	$2,052.00
5	8/17/21	Research . . . [redacted][76]	.5 hrs.	$190.00	$2,242.00
6	10/1/21	Call Sedef regarding . . . [redacted][77]	.2 hrs.	$76.00	$2,318.00
7	12/6/21	Call Sedef re . . . [redacted][78]	.75 hrs.	$285.00	$2,603.00
8	1/10/22	Finalize New Matter to Amended Complaint. File the same. Draft and file Certification of Service[79]	1 hrs.	$380.00	$2,983.00
9	2/18/23	Call Sedef . . . [redacted].[80]	.25 hrs.	$95.00	$3,078.00
10	8/15/22	Review email from Sedef . . . [redacted].[81]	.2 hrs.	$76.00	$3,154.00
11	8/23/22	Conferred with PRS over . . . [redacted] issue in Sedef/Derya case; began summary of case law	2.6 hrs.	$510.00	$3,664.00

[72] Pa819.
[73] Pa821.
[74] Pa824.
[75] Pa827.
[76] Pa829.
[77] Pa831.
[78] Pa835.
[79] Pa837.
[80] Pa839.
[81] Pa847.

		regarding issue. [82]			
12	8/24/22	Continued research on enforceability of . . . [redacted]; began summary of case law regarding issue.[83]	2.6 hrs.	$780.00	$4,444.00
13	8/24/22	[Redacted] . . . the case more in-depth . . . [redacted].[84]	.6 hrs.	$228.00	$4,672.00
14	8/24/22	Email J. O'Donohue regarding . . . [redacted] . . .[85]	.8 hrs.	$304.00	$4,976.00
15	8/25/22	Continued research on . . . [redacted] . . . issue [redacted], particularly concerning . . . [redacted] . .; conferred with PRS about same.[86]	2.6 hrs.	$780.00	$5,756.00
16	8/29/22	Email . . . [redacted] . . . Also, review [redacted]. Email Sedef [redacted].[87]	.5 hrs.	$190.00	$5,946.00
17	10/3/22	Email from Sedef indicating she [redacted] . . . Email Sedef regarding the [redacted] . . . Reply to the questions about [redacted] . . . Email to/from the same following up . . . [redacted].[88]	1.25 hrs.	$475.00	$6,421.00
18	10/24/22	Email and call Sedef [redacted] . . . Indicates that she is considering [redacted].[89]	.4 hrs.	$152.00	$6,573.00
19	10/26/22	Advise to P. Sheehan re [redacted][90]	.2 hrs.	$76.00	$6,649.00
20	10/26/22	Memo on [redacted] . . . Conference with M. Shavel on [redacted] . . . Email M. Shavel.[91]	.4 hrs.	$152.00	$6,801.00
21	3/3/23	Call with Sedef regarding [redacted][92]	1 hrs.	$380.00	**$7,181.00**

[82] Pa847.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Pa848.
[88] Pa851.
[89] Pa852.
[90] *Id.*
[91] *Id.*
[92] Pa861.

ARGUMENT

POINT I

THE MOTION JUDGE COMMITTED REVERSIBLE ERROR BY DECLINING TO VACATE THE JUDGMENT PURSUANT TO R. 4:40-2 BECAUSE PLAINTIFF DEMONSTRATED THAT THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND REASONABLE MINDS COULD NOT DIFFER AS TO THE RESULT (Pa665-66).

The purpose of *Rule* 4:40-2 is to allow the court to correct "clear error or mistake" by the jury. *Dolson v. Anastasia*, 55 N.J. 2, 6 (1969). In considering a motion for JNOV under *Rule* 4:40-2(b), the standard is: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according [her] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . ." *Verdicchio v. Ricca*, 179 N.J. 1, 30 (2004) (quoting *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 612 (2000)).

Defendant's contention that Plaintiff's Motion for JNOV is time-barred is without merit. While Plaintiff did not orally move for a directed verdict at the close of evidence, or for JNOV on July 28, 2023, immediately after the jury returned its verdict, the requirement that a motion be made at the close of evidence is inapplicable, since the basis for Plaintiff's Motion in this case arose upon the return of the verdict, and not by reason of proofs

which reasonably may have required a motion for judgment pursuant to *R.* 4:40-2. *Dolson v. Anastasia*, 55 *N.J.* 2 (1969).

Defendant failed to Pay Plaintiff's Share of Profits for 2016

Here, Defendant did not dispute that Plaintiff was a 49% member of SG Health LLC and that he was entitled to 49% of the profits. 3T119:14:24. Defendant also admitted that she did not pay Plaintiff what he is owed. 3T119:7.

Specifically, Defendant testified at trial as follows:

> Q: . . . [D]o you remember testifying at your deposition that you believed Mr. Derya was entitled to receive 49 percent of the profits of the company for 2016?
>
> A: Yeah, I do remember.
>
> Q: Do you still stand by that position, that Mr. Derya is entitled to 49 percent of the profits of the company for 2016?
>
> A: I'm not disputing what I said. I'm still saying the same thing. I believe Mr. Derya was the 49 percent of the company owner during the [sic] 2016.

See Id. at 3T119:14:24.

Defendant further testified:

> Q: I'm going to show you what has been premarked as P-23. I believe this is the 2019 amended tax return for SG Health, L.L.C. I'm going to show you on Page 46, Part 1, what is the -- you see that this is the K(1) for Mr. Derya. Do you see the date that he acquired his interest? What is the -- can

you read that date for the jury?

A: April 15, 2016.

Q: So is that the date that Mr. Derya acquired his interest in the company?

A: That's what it says.

Q: Okay. You don't dispute that, right? That's not a mistake too?

A: No, I don't.

Q: Okay. So if Mr. Derya had acquired his interest on April 15th, 2016, wouldn't he be entitled to the profits for the company?

A: Sure. If Mr. Derya wants to be partner beginning from April 15, 2016, then we have to go to the business register and we have to register him as a partner from that day. And we have to do all the calculations and do the amendment again. And I'm not disputing this.

See Id. at 3T121:22 to 122:18.

Despite acknowledging that Plaintiff was entitled to 49% of the profits for 2016, Defendant admits she kept all the 2016 profits for herself, and Mr. Derya got "*nothing.*" *Id.* at 3T119:7.

Defendant Admitted She Charged Mr. Derya For Her Personal Expenses

Despite acknowledging that thousands of dollars of Geico insurance payments, and her car payments, were her sole responsibility, Defendant admitted she charged these amounts to

Plaintiff by "mistake", which improperly reduced his share of the profits. 3T:162:11-19 and 3T166:11-25. The SG Health TD Bank Ledger was admitted into evidence as Plaintiff's trial *Exhibit P30*. Pa68-201. Page 103 of the ledger references a November 13, 2019 payment in the amount of $6,273 to First Data-Santa for Defendant's car, and a total of $4,387.20 in Geico insurance payments for Defendant's insurance. Pa170. Defendant admitted that both these items were her sole responsibility and that she improperly charged them to Plaintiff by mistake, which was never corrected. 3T:162:11-19 and 3T166:11-25.

Defendant Admitted that she Paid Herself an Unauthorized Salary

Likewise, despite the Operating Agreement prohibiting Defendant from paying herself a salary absent Plaintiff's consent, Defendant admitted she paid herself a salary without even telling Plaintiff about it, much less asking for his consent. 3T152:11-14 and 3T154:10 to 155:3.[93] The evidence was undisputed that the Operating Agreement[94] required the members to share in "all capital contributions, profits and surplus of the LLC according to the percentage of their ownership" and provided that "[n]o salary will be paid to a member for the performance of his or her duties under this Agreement unless the salary has been approved in writing by

[93] Defendant's contention that she was entitled to a salary as a pharmacist is not supported by any exception to the prohibition contained in the Operating Agreement against a member salary.
[94] Pa1-22.

the unanimous consent of the Members." Pa3. Therefore, Plaintiff is entitled to 49% of what Defendant paid herself as a salary because the parties' agreement did not permit Defendant to receive a salary.

Initially, Defendant said she paid herself $117,000 as salary (or guaranteed payments) for 2017 and $130,000 for 2018. 3T:151:1-4 and 3T153:4-21. She testified at trial she thought this was reasonable, despite the Operating Agreement's prohibition against members receiving salary. 3T148:24 to 149:1. But when Mr. Derya challenged her calculations and pointed out how she actually took more than she said, Defendant changed her story. 3T151:1-14. In response to Plaintiff's objections to Defendant's unauthorized salary and other fraudulent distributions to herself and her family and her friends, Defendant further cooked the books and increased her impermissible salary to $143,000 for 2017 (3T146:23) and $156,000 for 2018 (3T152:25 to 153:3) to try to justify after the fact all the excessive distributions she took from the pharmacy. 3T147:5 to 152:14. She made up these numbers years after she took the money without even keeping track of what she took, relying only on bank statements. 3T143:3-12 and 3T152:7-10.

Defendant's contention that she was entitled to a salary as a "pharmacist" is semantic and disingenuous because it contradicts the plain language in the Operating Agreement. Pa7. The parties' agreement always contemplated Defendant serving as both managing

member and pharmacist and her only compensation was supposed to be her 51% share of the profits. 3T112:12-14. The Operating Agreement contains no carve out or exception that would permit Defendant to pay herself a salary as a pharmacist. Pa1-17.

Defendant's Admitted Unauthorized Distributions to Herself

Defendant did not dispute the amounts that Plaintiff's expert identified as improper distributions that she took from Viva Pharmacy. In fact, Mr. Chait's calculations are based on the QuickBooks ledger, which Defendant's own accountant provided in discovery. (Pa68-201). Moreover, Defendant's trial testimony attempting to refute Exhibit E to Mr. Chait's report (Pa552), which listed all of Defendant's unauthorized distributions, was deemed inadmissible, and the Trial Court instructed the jury to disregard what she said about this. 3T97:16 to 106:12. Therefore, that exhibit with those calculations must be considered undisputed.

In fact, Defendant never disputed any of the unauthorized and impermissible personal charges that she made, and which are listed in Pa558 prior to trial and her efforts to do so at trial were barred and her testimony to the contrary was precluded. 3T142:3 and 3T58:9 to 106:12. Defendant does not dispute the accuracy and authenticity of these calculations, instead, she claims, without basis or any plausible explanation, that she was entitled to what she took. (3T129:19; 3T133:25 to 138:5). But her contentions fly in the face of the plain terms of the parties' Operating Agreement

and common sense and are refuted by Plaintiff's expert witness' uncontroverted reports and testimony. Mr. Chait's testimony and his written reports (Pa23-67 and Pa552-557) calculate Plaintiff's damages as totaling $420,888.[95] This calculation remains undisputed because Defendant never responded to Mr. Chait's report, and Defendant's testimony trying to challenge the amount and personal nature of these transactions listed on Exhibit E to Mr. Chait's report was deemed inadmissible and excluded. 3T97:16 to 3T106:12.

Despite admitting that her daughter never worked for the company, except briefly in 2016 (3T93:21-94:5), Defendant admitted to paying her daughter thousands of dollars from the Viva Pharmacy's checking account. 3T132:24-133:1 and 3T139:2-13.

Defendant also admitted to paying friends who immediately cashed checks from Viva Pharmacy and gave the cash back to her. (Pa246-47, 7/6/22 Gulsan Dep. 45:24 to 46:8) 3T133:7-13. Defendant admitted that all Western Union payments from SG Health's checking account were for her personal expenses. (Pa401, 3T125:1-9). Defendant admitted she paid her husband Galip Gulsan $37,100 as listed in Pa663. 3T141:22-3T142:14. Defendant admitted to paying more than $144,000 from Viva Pharmacy's business checking account for personal expenses, as listed in Pa558-663. 3T129:8-3T139:13.

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[95] As set forth above, this $420,888 figure represents Plaintiff's 49% interest in the unauthorized distributions Defendant made to herself, which were identified in Exhibit E to Chait's report.

Defendant also admitted to improperly charging Plaintiff $6,273 for her car payments to First Data-Santa (3T166:22) and $4,387.20 for her insurance payments to Geico (3T162:11-19), as listed on page 103 of the Viva Pharmacy bank ledger. (Pa170). Mr. Chait's March 16, 2023 Updated report calculates Plaintiff's damages resulting from Defendant's admitted, unauthorized, personal expenses paid from Viva Pharmacy's business checking account as totaling $160,881. (Pa552, 3-16-23 Updated Chait Report).

Defendant acknowledged that she never accounted for her personal expenses and unauthorized distributions from Viva Pharmacy. 3T122:19-3T127:5. She was the managing member, and it was her obligation to do this. (Pa1-22) She was required to maintain the books and records and to account to Plaintiff. *Id.* But she breached her duties under the Operating Agreement and the LLC Act by treating the company as her own personal piggy bank and not even bothering to keep track of what she took, let alone keeping Plaintiff informed.

While Defendant self-servingly dismissed Plaintiff's expert report and his efforts to reconstruct her misconduct, claiming she does not understand plaintiff's calculations, she also claims that *she did not even bother to look at Plaintiff's report and calculations until the trial*. 3T164:10. Plaintiff served his expert report in September 2022. Defendant had a deadline to

respond, but she blew it. She never hired an expert CPA to rebut it. Nor did she ever try to otherwise contradict Plaintiff's expert report until she was on the witness stand at trial and had her testimony excluded. 3T97:16 to 3T106:12. Therefore, the jury was not even permitted to consider her contentions that these unauthorized personal disbursements were legitimate business expenses.

Defendant Admitted She Violated the Non-Compete Provision

Despite acknowledging that the Operating Agreement contained a non-compete provision, Defendant admitted she used Plaintiff's money to form Atmaca LLC to operate another pharmacy, Our Pharmacy, a competing business. 3T88:15-20. The evidence was clear and uncontroverted that Defendant formed Atmaca LLC in December 2017 to operate another pharmacy. 3T111:2. She took Plaintiff's money to get back on her feet, and then wanted to get rid of him. She used SG Health's checking account to pay for Our Pharmacy's startup costs and then sold Viva Pharmacy once it was established to cut Plaintiff out and keep the business all for herself. 3T88:13-22. This is precisely the type of conduct that the non-compete provision in the Operating Agreement was designed to protect against.

Defendant's Admitted Use of Plaintiff's Credit Card

Defendant admitted she used Plaintiff's personal credit cards to make payments for her own personal expenses. (Pa321-324,

7/6/22 Gulsan Dep. 120:12; 123:16-19). She confirmed her deposition testimony at trial. 3T146:11. Defendant admitted that Viva Pharmacy paid for these charges she made for her personal expenses on Plaintiff's credit cards, and that she never reimbursed the company. (Pa325, 7/6/22 Gulsan Dep. 124:11-21). Defendant also confirmed this with her trial testimony and admitted to making payments to herself, her daughter (3T94:11-13), her husband (3T95:19 to 3T97:5), and friends from Viva Pharmacy's bank account that were not for legitimate business expenses. 3T133:7-13. (Pa442, 445, 462-63).

Defendant's Unauthorized Loans to Friends

Despite acknowledging that the Operating Agreement prohibited her from loaning money from Viva Pharmacy absent Plaintiff's consent, Defendant admitted that she loaned money to her friends without telling Plaintiff or asking for his consent. 3T133:21 to 3T134:20

Based on the forgoing admissions and uncontroverted evidence that proves Defendant breached the Operating Agreement and violated the LLC Act, the jury's verdict in favor of Defendant was clearly against the weight of the evidence, and reasonable minds cannot disagree that Plaintiff is entitled to judgment notwithstanding the verdict as a matter of law.

Therefore, the trial court has made an error when denying Plaintiff's Motion for JNOV, and this denial should be reversed.

POINT II

THE MOTION JUDGE COMMITTED REVERSIBLE ERROR BY DECLINING GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL TO PREVENT THE MISCARRIAGE OF JUSTICE(Pa665-66).

A trial judge shall grant a motion for a new trial if, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." *R.* 4:49-1(a); *Dolson v. Anastasia*, 55 N.J. 2, 5 (1969).

"A motion for a new trial may be grant, . . . [even though] the state of the evidence would not justify a [JNOV]." *Judge v. Blackfin Yacht Corp.*, 357 N.J. Super. 418, 424 (App. Div. 2003). "[T]he standard for authorizing a new trial [is] one that requires a determination that the jury's verdict [be] 'contrary to the weight of the evidence or clearly the product of mistake, passion, prejudice or partiality.'" *Crawn v. Campo*, 136 N.J. 494, 512 (1994) (quoting *Lanzet*, 126 N.J. at 175).

If an error is confined to certain issues, then a court should grant a partial new trial; if the error tainted the entire verdict, then a court should order a new trial on all the issues. *See Negron v. Melchiorre, Inc.*, 389 N.J. Super. 70, 84-85 (App. Div. 2006); *see also Bell Atl. Network Servs., Inc. v. P.M. Video Corp.*, 322 N.J. Super. 74, 111 (App. Div. 1999) (stating that a new trial on damages can be ordered if the issue is "distinct and separable

from the issue of liability") (quoting *Juliano v. Abeles*, 114 N.J.L. 510, 512 (1935)).

"'The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its "feel of the case" including credibility.'" *Caldwell v. Haynes*, 136 N.J. 422, 432 (1994) (quoting *Feldman v. Lederle Labs.*, 97 N.J. 429, 463 (1984)); *see also Johnson v. Scaccetti*, 192 N.J. 256, 282 (2007). Aside from a consideration of these "intangible[s]," a court must make its own independent determination of whether a miscarriage of justice has occurred. *Carrino v. Novotny*, 78 N.J. 355, 360-61 n.2 (1979).

Here, Defendant breached the Operating Agreement by:

- failing to obtain Plaintiff's consent before paying herself a salary (3T152:11-14 and 3T154:10 to 3T155:3),
- extending loans from the pharmacy to her friends (3T133:21 to 3T134:20),
- treating the company as her personal piggy bank (3T132:5-9), and
- not maintaining books and records(3T132:5-9).

She breached her duty of care by not observing corporate formalities, or even keeping track of what she took.

She breached her duty of loyalty by failing to provide Plaintiff with access to the books and records, and by paying Atmaca's LLC's

startup costs to form a competing pharmacy, which she paid for with Plaintiff money. 3T88:15-20.

Defendant breached the implied covenant of good faith and fair dealing by deliberately concealing the books and records of Viva Pharmacy from Plaintiff (3T125:12 - 3T127:5), transferring assets from the company's checking account to herself and to others for personal purposes unrelated to the business (3T138:12-14), withdrawing monies for her own personal benefit which she misidentified as company expenses, or Plaintiff's expenses (3T:162:11-19 and 3T166:11-25), failing to pay Plaintiff his fair share of profit distributions (3T119:14:7-24), failing to provide accurate financial books and records (3T132:5-9), and paying herself excessive and unjustified salaries without Plaintiff's knowledge or consent (3T152:11-14 and 3T154:10 to 155:3).

Defendant unlawfully interfered with Plaintiff's prospective economic advantage by forming Atmaca LLC to operate Our Pharmacy instead of Viva Pharmacy, then selling Viva Pharmacy and excluding Mr. Derya from participating in her new pharmacy, which she formed with Plaintiff's money while she was his partner (3T129:4).

Defendant committed fraud by lying to Plaintiff about what she paid herself, and about his partnership status in 2016. (3T152:11-14 and 3T154:10 to 155:3).

She inflated company expenses, payroll, and other transactions so that Plaintiff would not be aware of what she stole from the

company and paid to herself and/or members of her family. (Pa552-667).

Plaintiff relied upon her lies to his detriment and sustained damages in the amount set forth in Mr. Chait's report to the tune of $420,888.[96] (Pa552-667).

Defendant also violated the LLC Act by not accounting to Plaintiff, by forming a competing pharmacy with Viva Pharmacy's money, giving away the company vehicle as a gift, etc. (3T165:21).

She breached her duty of care by not maintaining a general ledger or comparable books and records (3T132:5-9), by allowing the $100,000 judgment against Kaplan, et al., in favor of Viva Pharmacy to be vacated with prejudice, and by not even knowing she had done so. (3T158:17 to 159:2).

Based on the forgoing, Plaintiff has established by clear and convincing evidence that there was a miscarriage of justice under the law, and the verdict in favor of Defendant was so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality. *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130, 134 (1990) (quoting *Wytupeck v. City of Camden*, 25 N.J. 450, 466 (1957)). In fact, the verdict was so distorted and wrong as to

[96] Chait calculated that, of the $1,336,374 that Defendant distributed to herself, $858,955 was improper, and that Plaintiff was entitled to 49% of these unauthorized and improper withdrawals, totaling $420,888. *Id.*

manifest with utmost certainty a plain miscarriage of justice. *Carrino v. Novotny*, 78 N.J. 355, 360 (1979).

Therefore, Plaintiff respectfully submits that, Plaintiff was, at minimum entitled to a new trial even if the trial court denied Plaintiff's motion for JNOV, and that the trial court erred in denying Plaintiff's alternative motion for a new trial.

POINT III

THE MOTION JUDGE COMMITTED REVERSIBLE ERROR BY GRANTING DEFENDANT'S FEE APPLICATION BECAUSE DEFENDANT NEVER ASSERTED ANY COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANT CANNOT BE DEEMED A PREVAILING PARTY (Pa667-68).

In general, New Jersey disfavors the shifting of attorneys' fees. *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999). However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." *Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427, 440 (2001). When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed in light of New Jersey's general policy disfavoring the award of attorneys' fees. *See N. Bergen, supra*, 158 N.J. at 570.

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), the United States Supreme Court denied a Defendant's fee application against a no-caused plaintiff, and protected that no-caused plaintiff from the penalizing consequences of fee shifting,

reasoning that:

> Federal rules are to be construed to "secure the just, speedy, and inexpensive determination of every action." If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered. But it is hardly fair or even-handed to make the plaintiff's rejection of an utterly frivolous settlement offer a watershed event that transforms a prevailing defendant's right to costs in the discretion of the trial judge into an absolute right to recover the costs incurred after the offer was made.

Id. 450 U.S. at 356.

New Jersey law has long recognized the catalyst theory. In 1984, the New Jersey Supreme Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 *U.S.C.A.* § 1988. *Singer v. State*, 95 N.J. 487, 495 , *cert. denied*, *New Jersey v. Singer*, 469 U.S. 832 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *id.* at

495. *See* also *North Bergen Rex Transport v. TLC*, 158 N.J. 561, 570-71 (1999) (applying *Singer* fee-shifting test to commercial contract).

A defendant cannot be deemed a prevailing party for purposes of fee shifting under a contractual provision simply by successfully defending against a plaintiff's claims. *Bogage v. Display Grp. 14, LLC*, 2018 N.J. Super. Unpub. LEXIS 465, at 39-40 (App. Div. 2018)

Here, the fee shifting provision contained in the parties' Operating Agreement provides the Court with discretion to determine who is the prevailing party and the amount, if any, fee award, that the prevailing party is entitled to receive from the non-prevailing party. *See* Pa15, SG Health Operating Agreement at ¶ 10.5.

Plaintiff brought this action in good faith and successfully used discovery in this litigation to obtain financial information relating to Viva Pharmacy to which he was entitled pursuant to the Operating Agreement and LLC Act. Defendant did not assert a counterclaim, nor did she obtain any affirmative relief against Plaintiff. Prior to discovery in this lawsuit, Defendant had failed and refused to provide this information to Plaintiff. Therefore, despite the jury verdict in favor of Defendant, Defendant should not be deemed the prevailing party for purposes of fee shifting under the Operating Agreement. To hold otherwise would unfairly

penalize Plaintiff for seeking to enforce his contractual and statutory rights, and reward Defendant for withholding this information from Plaintiff until he sued her.

Therefore, the trial court erred in granting Defendant's fee application because Defendant was not the prevailing party under the relevant *Singer* formula, and Plaintiff brought this action in good faith and discovery in this litigation was necessary for Plaintiff to obtain financial information relating to Viva Pharmacy to which he was entitled pursuant to the Operating Agreement and LLC Act.

POINT IV

THE MOTION JUDGE COMMITTED REVERSIBLE ERROR BY GRANTING DEFENDANT'S FEE ON ISSUES DEFENDANT DID NOT PREVAIL ON (Pa667-68).

A trial court should decrease a requested fee award if the prevailing party achieved limited success in comparison to the relief sought in the litigation. *Walker v. Giuffre*, 209 N.J. 124, 130-33 (2012). In determining the reasonableness of an attorneys' fee award, the threshold issue "is whether the party seeking the fee prevailed in the litigation." *N. Bergen, supra*, 158 N.J. at 570. In that regard, the party must establish that the "'lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important

factor in obtaining the relief.'" *Ibid.* (quoting *Singer v. State*, 95 N.J. 487, 494, *cert. denied*, 469 U.S. 832 (1984).

Here, Defendant's Fee Application sought an award of fees in the amount of: **$6,897.00** for unsuccessfully moving to dismiss Plaintiff's complaint (Pa887-88); **$33,291.22** for engaging in discovery and providing Plaintiff with financial information relating to Viva Pharmacy to which he was entitled pursuant to the Operating Agreement and LLC Act (Pa889-93); and **$5,263.00** in fees and costs for unsuccessfully opposing Plaintiff's motion to amend his complaint (Pa894).

If the trial court was inclined to grant Defendant's Fee Application, any award should be reduced by **$45,451.22** for fees and costs that Defendant purportedly incurred relating to issues she did not prevail on.

Therefore, the trial court's decision to grant Defendant's Fee Application in the amount of $119,256.40 should be reversed.

POINT V

THE MOTION JUDGE COMMITTED REVERSIBLE ERROR BY GRANTING DEFENDANT'S FEE ON TIME ENTRIES THAT ARE VAGUE AND/OR OR OTHERWISE INDISCERNABLE (Pa667-68).

The starting point in awarding attorneys' fees is the determination of the "lodestar," which equals the "number of hours reasonably expended multiplied by a reasonable hourly rate." *Rendine v. Pantzer, supra*, 141 N.J. 292, 335

(1995); *see R.* 4:42-9(b) (stating that application for counsel fees shall be supported by affidavit addressing pertinent factors, including those in *RPC* 1.5(a), and shall include amount of fees and disbursements sought). *Rule of Professional Conduct* 1.5(a) commands that "[a] lawyer's fee shall be reasonable" in all cases, not just fee-shifting cases. *RPC* 1.5(a) catalogues the "factors to be considered in determining the reasonableness of a fee," which include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

Those factors must inform the calculation of the reasonableness of a fee award in this and every case. *Furst v. Einstein Moomjy, Inc.* 182 N.J. 1, 36 (2004).

In setting the lodestar, a trial court must determine the

reasonableness of the rates proposed by prevailing counsel in support of the fee application. *Rendine, supra*, 141 N.J. at 335. In that regard, the court should evaluate the rate of the prevailing attorney in comparison to rates "'for similar services by lawyers of reasonably comparable skill, experience, and reputation'" in the community. *Id.* at 337 (quoting *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir.1990)).

In addition, the court must determine whether the time expended in pursuit of the "interests to be vindicated," the "underlying statutory objectives," and recoverable damages is equivalent to the time "competent counsel reasonably would have expended to achieve a comparable result. . . ." *Id.* at 336. The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar. *Id.* at 335-36 (noting that it is not "'time *actually* expended'" but time "'*reasonably* expended'" that matters and that "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary*'") (quoting *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880, 891 (D.C.Cir.1980). Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires consideration of what is reasonable under the circumstances.

Here, Defendant's Fee Application contains **$7,181.00** in fees and costs for time entries that are too vague or indiscernible to

be allowed. In addition, the time records Defendant's counsel submitted contain block billing entries which render it impossible to determine how much time was billed for any particular task contained in the block entries and preclude a meaningful assessment of the reasonableness of the time Defendant's counsel purportedly devoted to this matter.

Therefore, the trial court should have denied or at least reduced Defendant's Fee Application because the award sought is excessive and unsupported by a certification addressing the pertinent factors set forth in *R.P.C.* 1.5(a).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the October 6, 2023 Order, which denied Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. At a minimum, the March 11, 2024, Order granting Defendant's fee application in the amount of $119,256.40 should be reversed or modified to prevent a miscarriage of justice.

Respectfully submitted,

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AHMET DERYA, Plaintiff-Appellant, vs. SEDEF GULSAN, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-00669-23 CIVIL ACTION Appeal from the Law Division of the Superior Court of New Jersey, Mercer County Docket No. MER-L-1265-20 Sat Below: Hon. R. Brian McLaughlin, J.S.C.

BRIEF OF DEFENDANT-RESPONDENT, SEDEF GULSAN

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PRELIMINARY STATEMENT

This action involves a business dispute between members of a limited liability company and the operation of SG Health, LLC d/b/a as Viva Pharmacy ("SG Health") in Trenton, NJ from 2016 to May 2019. In December 2015, Sedef Gulsan ("Defendant") formed SG Health, LLC for the purpose of operating a pharmacy. In 2016, Ahmet Derya ("Plaintiff") paid Ms. Gulsan payments over time totaling $100,000 for forty-nine percent (49%) of her membership interest in SG Health. In January 2017, the parties entered into an operating agreement for SG Health. According to the operating agreement, Ms. Gulsan was the manager. She also worked as the pharmacist for SG Health LLC. In May 2019, CVS Pharmacy purchased the assets of SG Health, LLC d/b/a Viva Pharmacy pursuant to an Asset Sale and Purchase Agreement.

The Honorable R. Brian McLaughlin, J.S.C. presided over a jury trial in this matter from July 24 to July 28, 2023. After the close of all of the evidence and the Court's charge on the law, the jury was tasked with determining whether Defendant breached the operating agreement of SG Health; breached the implied covenant of good faith and fair dealing; acted grossly negligent or with willful misconduct in violation of the Limited Liability Company Act (*N.J.S.A.* 42:2C-39); tortiously interfered with Plaintiff's prospective economic advantage, committed fraud, and whether the assessment of punitive damages against Defendant were warranted. The

jury reached a verdict (7-0) on each count, with a verdict being entered for the defense. Because of its verdict, the jury did not reach an assessment of punitive damages.

A. <u>Plaintiff's Motion for Judgment Notwithstanding the Verdict (JNOV) or, in the Alternative, a New Trial.</u>

The trial court did not err in denying Plaintiff's Motion JNOV or, in the Alternative, a New Trial. First, the trial court found that the prerequisite for making a motion for judgment notwithstanding the verdict under *Rule* 4:40-2 had not been met. The rule contemplates a renewal of a motion, which was not present here—there was never a motion for judgment, or an equivalent, made before the verdict. Accordingly, the motion JNOV was denied.

The trial court also denied Plaintiff's Motion for a New Trial, brought under the high standard of *Rule* 4:49-1. The trial court correctly recognized that it could "not sit as the eighth juror" and that upon a motion for new trial, it is not a matter of what the court would decide, but rather whether there was *clear and convincing* evidence that that the jury's verdict was so against the weight of the evidence such that no reasonable jury could come to the conclusions it reached. As the trial court observed, "[i]t is not for the Court to substitute its assessment of the credibility of the witnesses, or the proofs adduced at the trial." Here, the jury had sufficient evidence to make a determination as to each of the questions on the verdict sheet. The trial court found the jury was attentive and, after being instructed on the law,

they considered the facts and made credibility determinations that resulted in a defense verdict on each. Plaintiff's Motion JNOV or for a New Trial was properly denied. Respectfully, the trial court's October 6, 2023 Order denying Plaintiff's Motion for JNOV or for a New Trial must be affirmed.

B. The Award of Attorney's Fees and Costs to Defendant.

The trial court did not err in awarding attorney's fees and costs to Defendant. Pursuant to the trial Court's Order of Disposition, Defendant's counsel made application for attorney's fees and costs. With that application, all monthly billing was submitted.

The trial court awarded Defendant counsel fees and costs. In placing its decision on the record, the trial court found Defendant to be the "prevailing party" as required under the terms of the Operating Agreement from which the fee entitlement flows. The trial court also found the fees and cost requested to be well-documented and reasonable based upon the nature of the work, the time span of the litigation (i.e., three years), and the experience of counsel practicing in Mercer County, New Jersey. Additionally, Defendant's counsel had entered time entries concurrently with work being done and in detail sufficient to inform Defendant of the tasks completed (i.e. there was no "block billing"). Respectfully, the trial court's March 11, 2024 Order granting Defendant attorney's fees and costs must be affirmed.

PROCEDURAL HISTORY

Defendant hereby adopts and incorporates by reference the procedural history set forth in the appellate papers of plaintiff/appellant, Ahmet Deyra. (**Plf. Brief at 4.**) The basis for the appeal filed by the plaintiff/appellant is (1) the trial court's October 6, 2023 Order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial (**Pa665-66**) and; (2) the trial court's March 11, 2024 Order granting defendant/respondent Sedef Gulsan attorney's fees and costs. (**Pa667-68**).

STATEMENT OF FACTS

This action involves a business dispute between members of a limited liability company and the operation of S.G. Health, LLC d/b/a as Viva Pharmacy ("S.G. Health") in Trenton, New Jersey from 2016 to May 2019. In December 2015, Sedef Gulsan ("Defendant") formed S.G. Health, LLC for the purpose of operating a pharmacy. In 2016, Mr. Derya paid Ms. Gulsan payments over time totaling $100,000 for forty-nine percent (49%) of her membership interest in S.G. Health. In January 2017, the parties entered into an operating agreement for S.G. Health. According to the operating agreement, Defendant was the manager. Unrelated to the operating agreement, she also worked as the pharmacist for S.G. Health LLC. In May 2019, CVS Pharmacy purchased the assets of S.G. Health, LLC d/b/a Viva Pharmacy pursuant to an Asset Sale and Purchase Agreement.

The Honorable E. Brian McLaughlin, J.S.C. presided over a jury trial in this matter from July 24 to July 28, 2023. After the close of all of the evidence and the Court's charge on the law, the jury was tasked with determining whether Defendant breached the operating agreement of S.G. Health; breached the implied covenant of good faith and fair dealing; acted grossly negligent or with willful misconduct in violation of the New Jersey Limited Liability Company Act (*N.J.S.A.* 42:2C-39); tortiously interfered with Plaintiff's prospective economic advantage, committed fraud, and whether the assessment of punitive damages against Defendant were

warranted. (**4T71:5-74:18**) (the trial court's review of the Verdict Sheet with the jury).

Plaintiff acquired 49% interest in S.G. Health, LLC from Defendant for $100,000, with that amount being paid by Plaintiff over time. (**1T31:25; 1T35:3-38:6**). Plaintiff was a licensed pharmacist in Turkey. (**1T39:10-12**). Plaintiff did not have a pharmacist license in the state of New Jersey. (**1T39:16-18**). Defendant had a pharmacist license in the state of New Jersey. (**1T39:19-21**). S.G. Health applied for a New Jesey pharmacy technician's license for Plaintiff. (**2T8:16-20**). Plaintiff went into business with Defendant because he wanted to be partners with someone who was licensed in New Jersey in order to further his experience with an understanding that Defendant would be the pharmacist for Viva Pharmacy and that with her experience, Defendant was going to show Plaintiff how to run a pharmacy in the United States. (**1T40:2-12; 2T10:11-13**).

There was an operating agreement for S.G. Health, LLC dated January 26, 2017. (**Pa1; 1T40:13-15; 1T41:7-9**). When Defendant agreed to sell 49% of her own interest in S.G. Health to Plaintiff, Defendant had an expectation that he knew English and that he would work at Viva Pharmacy while he was going through the process of getting his pharmacist license. (**3T25:18-26:3; 26:6-15**). He never became a pharmacist on the United States. (**3T9:5-8**). Defendant expected Plaintiff would become a pharmacist. (**3T26:16-20**).

Defendant supported Plaintiff in his desire to become a pharmacist in the United States and to be actively involved in Viva Pharmacy. (**3T27:24-28:4**). Defendant assisted Plaintiff with trying to learn English (**2T101:14-21**).

Plaintiff told Defendant that he wanted to wait until he was divorced to officially become a partner in the business. (**3T33:24-34:1**). According to the January 2017 S.G. Health Operating Agreement, Defendant was the limited liability company's manager. (**Pa1; 1T41:24-42:2**). There is no requirement in the Operating Agreement that the managing member be a pharmacist. (**Pa1; 2T18:10-25**). There is no reference to pharmacist in any capacity in the Operating Agreement. (**Pa1**). Plaintiff's attorney prepared the Operating Agreement in January 2017. (**3T32:17-18**). Defendant was not represented by an attorney with regard to the Operating Agreement. (**3T33:2-4**).

When entering into the Operating Agreement in 2017, Defendant was not aware that Plaintiff did not want to pay Plaintiff a salary as a pharmacist (**3T35:1-4**) (even though she had been the pharmacist and receiving a salary since the pharmacy opened in March 2016). If Defendant knew Plaintiff did not expect her to take a salary for being the pharmacist, she would not have signed the Operating Agreement and would not have partnered with Plaintiff. (**3T35:4-6; 3T170:20-171:5**). At the time Defendant signed the Operating Agreement, she did not believe the agreement

prohibited her from receiving a salary as a pharmacist and she would not have signed it had she known of such prohibition. (**3T35:7-13**).

Plaintiff began receiving regular payments from Viva Pharmacy in July 2017, having received other amounts from Viva Pharmacy before that time, just not regularly. (**2T22:24-23:23:7**). Plaintiff had a verbal agreement with Defendant to take $1,000 a week from the pharmacy. (**2T24:3-6**). There were weeks, however, where plaintiff would take $1,500, $2,300, 5,000 a week from the pharmacy's bank account. (**2T25:1-18**) He wrote and signed a number of these checks to himself. (**2T26:10-27:11; 2T27:19-30:15**).

Defendant worked at the Pharmacy six days a week for about fifty-five hours a week. (**3T36:2-7**). As the pharmacist in charge of Viva Pharmacy, Defendant was responsible for seizing all controlled substances, receiving medications, dispensing medications and filling prescriptions and putting them into the system, reviewing drug interactions or potential adverse effects, doing inventory, and dealing with expired medications. (**3T37:12-19**). These responsibilities were only something a licensed pharmacist could do. (**3T37:20-23**).

The term "guaranteed payment" as used in the documents prepared by the accountant is the same as a salary. (**3T38:6-10**). Defendant based her salary on the hourly rate pharmacist typically are paid—based on her first-hand experience and knowledge of pharmacists' salaries (**3T39:4-22**)—and based upon the number of

prescriptions she was filling, with that number of daily prescriptions increasing by the hundreds between 2017 and 2019, which in turn had her hourly rate salary increase from $50 an hour in 2017 to $60 an hour in 2019. (**3T37:24-39:3**). Defendant never took a paycheck from Viva Pharmacy. (**3T:40:18-20**). Plaintiff offered no evidence whatsoever of what a market-rate or reasonable salary for a pharmacist in New Jersey was in those same years. Said another way, there was no evidence that the salary Defendant received as the pharmacist at Viva Pharmacy was unreasonable.

Plaintiff only worked at Viva Pharmacy a couple times a month in March, April, and May 2016. (**3T28:6-16**) Plaintiff worked full-time in Viva Pharmacy for only the first three months of 2017. (**2T40:1-4**). Plaintiff did not work in Viva Pharmacy in 2018. (**2T41:6-8**). In 2019, Plaintiff worked full-time in Viva Pharmacy only in April and May, leading up to the asset sale to CVS. (**2T50:4-7**). Plaintiff took eleven trips to Turkey between June 2016 and December 2018. (**2T53:9-54:5**). Between 2016 and May 2019, Plaintiff also took two trips to Europe. (**2T50:18-21; 54:15-55:12**).

Plaintiff had full access to the pharmacy's TD Bank business checking account; he could write checks, make deposits or withdrawal, use the debit card, and had full on-line access to the account, which was the only account the pharmacy had.

(**1T44:7-11; 2T27:11-15; 2T37:24-38:1; 3T42:21-43:11**). Plaintiff also had full access to the pharmacy's only email account. (**3T43:12-19**).

In addition to the one business account, the parties also used credit cards. On each credit card the parties used (AMEX, Chase, and Discover), Plaintiff and Defendant were charging personal expenses along with expenses for Viva Pharmacy. (**2T31:24-32:19; 3T50:24-51:5**). The credit card bills that contained the personal expense charges of each of the parties were paid by Plaintiff directly from the pharmacy's checking account. (**2T32:19-23; 3T51:6-9; 3T143:16-23; 3T144:6-10**).

The credit cards—AMEX, Chase, and Discover—that were paid by the pharmacy were all accounts of the Plaintiff, with Plaintiff having authorized cards for each card to also be issued in Defendant's name. (**2T33:21-34:23; 3T50:12-23**). Plaintiff even authorized Chase to issue a card in Defendant's daughter's name. (**2T34:17-20**).

There is no evidence showing Plaintiff requested copies of tax returns until 2018. There are no text messages or emails from 2016 or 2017 that show Plaintiff asking either Defendant or the pharmacy's accountant, Josh Mellum, any S.G. Health tax information. (**2T57:11-19**). The pharmacy's accountant, Josh Mellum, prepares all of the tax forms and financials for Viva Pharmacy and did so with information from the pharmacy's only bank account at TD Bank, which Mr. Mullem

had full online access to. (**3T44:8-25**). The pharmacy's financials prepared by Mr. Mullem identify personal expenses of Defendant *and* Plaintiff and categorize them under the term "Draw." (**Pa49-67; 2T63:18-64:12; 3T46:4-14**). The Viva Pharmacy balance sheets and profit and loss statement showed the term "Draw" under each of the parties' names, i.e., Ahmet Derya and Sedef Gulsan, with the term "Draw" identifying personal expenses. (**Pa49-67; 3T107:17-108:14**). This was also true for the general ledgers of Viva Pharmacy. (**Pa68-146**).

Plaintiff and Defendant each used the pharmacy account for personal expenses. (**3T124:13-19**). Each personal draw would go against each other's respective profits in business. (**3T107:15-18; 3T168:13-169:16**). Relating to each check drawn on the pharmacy's account that Defendant was asked about at trial, Defendant testified that those checks and expenses were "under her personal draw" or that she never claimed the check as a business expense, meaning it was personal expense to be applied as a draw against her share of profit in the company. (**3T129:14-139:13**). In June 2019, just after the sale of Viva Pharmacy to CVS, Defendant attempted to sit down with Plaintiff to reconcile all the credit card statements and expenses. (**3T51:14-52:4; 3T60:25-61:24**). At the last meeting Defendant had with Plaintiff that June, Plaintiff took all the documents into his possession, including all of the credit card statements, all of the papers from the

accountant, and the comments and notes they made on the papers; he took everything. (**3T60:19-24; 3T143:6-12).**

After the sale of the pharmacy to CVS, in June 2019, Plaintiff wrote $25,000 to himself from the pharmacy's account and sent a screenshot of the withdraw to Defendant saying he was buying a house. (**3T57:24-3**). On or about November 2019, Plaintiff paid off, without asking Defendant, the balance of a car loan from the pharmacy's account—a loan he was a co-signer on—in order to improve his own credit score. (**3T65:3-67:3**). Plaintiff did not inform Defendant that he was paying the loan off from the pharmacy account, but rather texted Defendant that he paid off the car loan. (**2T76:1-11**). This concerned Defendant because there were still debts of the pharmacy to be paid and she wanted to make sure there was money in the account to cover them. (**3T66:2-16**).

Plaintiff formed a company in the United States called the Poseidon Group in April 2016 (**2T83:18-24**), after he says he partnered with Defendant. Poseidon was intended to be an export/import wholesale medicine company. (**2T83:25-84:6**). Plaintiff testified that Poseidon was not something that involved Defendant, that Poseidon had nothing to do with her. (**2T83:18-24**). It was never Plaintiff's intent to have Defendant be a partner in Poseidon (**2T84:7-11**). Defendant was not invited to be a partner or otherwise to participate in Poseidon. (**3T114:1-3**).

Defendant formed Atmaca, LLC d/b/a Our Pharmacy on December 5, 2017 (**3T110:24-111:3**). Our Pharmacy did not open until 2019 in Burlington, New Jersey (18 miles from Viva Pharmacy (**3T111:23-25**)) *months after the sale* of Viva Pharmacy's assets to CVS. (**2T39:9:11; T3112:1-3**). The last time S.G. Health d/b/a Viva Pharmacy was an active business was the end of May 2019. (**1T31:4-6**). The pharmacy closed when it was sold to CVS in May 2019. (**1T31:4-6**). Plaintiff knew about Our Pharmacy around February of 2018, a few months after its formation date (**1T50:6-9**). Plaintiff was fully aware of Our Pharmacy. Before the CVS sale of VivaPharmacy and before Our Pharmacy was operating, Defendant had talked to Plaintiff about proposed work schedules as between the two. (**T3112:4-113:1; T3128:23-129:1**). Plaintiff did not object to Defendant's opening of Our Pharmacy. (**3T113:8-10**).

Plaintiff's forensic accounting expert, Mr. Chait, in review of Viva Pharmacy's records stated in his report that "there are numerous expenses which appear personal in nature" and agreed that these personal expenses were not only Defendant's, but *Plaintiff's as well*. (**2T129:1-8**). Mr. Chait, in review of credit card records and Viva Pharmacy's general ledger predominately replied upon Plaintiff's analysis of credit card details and took Plaintiff's word for what the information represented, including what Plaintiff alleged were personal expenses of Defendant. (**2T134:2-135:11**).

Mr. Chait only reviewed expenses Plaintiff challenged that Mr. Chait categorized as "major ones" and did not review the challenged "insignificant ones;" he did not review all the expenses Plaintiff alleged were Defendants, yet he still included those amounts in his total only by taking Plaintiff's word for it. (**2T135:12-136:11**). Even with the "major one" (i.e., the major expenses Plaintiff was challenging), Mr. Chait simply took Plaintiff's word for it, there was no independent evaluation or verification done to discern whether an expense was Defendant's or if it was a pharmacy expense. (**2T136:5-11**).

Plaintiff had full access to all of S.G. Health's financial accounts and record. SH Health's tax returns for 2017 and 2018 were not available, and had been on extension, until around the time of the pharmacy's May 2019 sale to CVS. (**3T43:13-19; 3T48:4-12; 3T50:2-4**). The 2019 return would not be due for another eleven months and the 2018 return was only approximately a month and a half late (but the accountant had requested an extension). (**3T48:13-19**). Defendant did not have any company tax returns to share with Plaintiff until just before the sale to CVS in May 2019, which she shared with him when the returns and schedules were completed. (**3T126:25-127:5**).

Pursuant to the trial Court's Order of Disposition (**Pa1705**), having found that the Operating Agreement provided for the award to the prevailing party of attorney's fees and costs, Defendant's counsel made application to the trial court for

such fees and costs. (**Pa1705; Pa804-812**). With that fee application, true and correct copies of all monthly billing from counsel relating to this matter were filed with the trial court for consideration and determination, some with redaction to protect attorney/client privilege. (**Pa804**). The Court, after considering the moving papers and opposition, and after oral argument, found Defendant to be the prevailing party and, for the reasons put on the record (**Pa1717**), granted Defendant's application for fees and costs by Order of March 11, 2024. (**Pa667**).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S OCTOBER 6, 2023 ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE AFFIRMED BECAUSE PLAINTIFF DID NOT MAKE A MOTION FOR JUDGMENT, OR THE EQUIVALENT, DURING TRIAL. (Pa665-666; Pa1716).

Rule 4:40-2 governs motions for judgment notwithstanding the verdict. The comments to that Rule and interpreting case law make clear that a judgment notwithstanding the verdict cannot be entered unless an appropriate motion has been made during the trial. *See e.g.*, *Surkis v. Strelecki*, 114 N.J. Super. 596 (App. Div. 1971).

In *Surkis*, the moving party never moved for judgment at the close of evidence or at any other point during the trial. The court found that "[o]rdinarily, absent a motion for dismissal at the close of a case, a party is presumed to have waived his

right to a judicial determination of the legal sufficiency of his adversary's claim." *Id*. at 600; *see also*, *Velazquez ex rel. Velazquez v. Jiminez*, 336 N.J. Super. 10, 33–34, 763 A.2d 753, 765–66 (App. Div. 2000), *aff'd,* 172 N.J. 240, 798 A.2d 51 (2002); *Sun Source, Inc. v. Kuczkir*, 260 N.J. Super. 256, 266, 615 A.2d 1280, 1284–85 (App. Div. 1992) (stating, "...we emphasize that a party who does not make a motion for judgment at the close of a case may not subsequently move for judgment notwithstanding the verdict." [citations omitted]).

A motion for judgment notwithstanding the verdict may still be maintainable where an 'adequate substitute for the requisite trial motion' was made. *Sun Source, Inc*. at 266. "[A] party is not procedurally barred from asserting a motion for judgment notwithstanding the verdict *if the substitute or equivalent motion* would have afforded the moving party the same relief the party seeks by way of the judgment notwithstanding the verdict. *Id*. (emphasis added).

In *Velazquez ex rel. Velazquez v. Jiminez*, cited above, the court reversed the trial court's entry of judgment notwithstanding the verdict in favor of the defendant finding it inappropriate because the moving party "did not move for judgment either at the close of plaintiffs' evidence or at the close of all the evidence, and the record did not support the grant of such a motion." *Id*. at 33-34.

While the exception to the rule that a motion for judgment at trial must first have been made can be relaxed where an equivalent trial motion, one where the

ultimate relief sought is the same, such exception is not applicable here. The record is clear that Plaintiff did not move for a directed verdict, nor the equivalent thereof, at any point during the trial. Plaintiff does not argue this because no motion (or equivalent trial motion seeking ultimate relief) was made.

Plaintiff's argument that "the requirement that a motion be made at the close of evidence is in applicable, since the basis for the Plaintiff's Motion in this case arose upon the return of the verdict..." (Plf.'s Brief at 23) is nonsensical since a judgment notwithstanding the verdict can only be brought after a jury verdict. It was what Plaintiff failed to do before the verdict that would have theoretically preserved the right to move for a JNOV. To preserve that right, Plaintiff was required to move for a directed verdict (or equivalent) during trial. As such, Plaintiff was barred from bringing such a motion following conclusion of trial and entry of a jury verdict. The trial court's October 6, 2023 order denying plaintiff's motion for judgment notwithstanding the verdict should be affirmed.

Even if the Court were to reach the merits of Plaintiff's Motion for Judgment Notwithstanding the Verdict, which, given the above, it should not, Plaintiff fails to present clear and convincing evidence that any trial decisions constituted a miscarriage of justice under the law. A jury verdict should not be undone merely because reasonable minds might have reached different conclusions based on the evidence. *See Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist.*, 201

N.J. 544, 572 (2010); *see also*, *Dolson v. Anastasia*, 55 N.J. 2, 5 (1969). A motion for judgment notwithstanding the verdict should be granted only:

> if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it *clearly and convincingly* appears that there was a miscarriage of justice under the law ....The purpose of [a motion for judgment notwithstanding the verdict] is to correct clear error or mistake by the jury, and not for the judge to substitute his judgment for that of the jury merely because he would have reached the opposite conclusion.

Barber v. ShopRite of Englewood & Associates, Inc., 406 N.J. Super. 32, 51-52 (App. Div. 2009) (emphasis added, internal citations and quotations omitted).

The test to be applied by the trial court on a judgment notwithstanding the verdict is whether the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of the party opposing the motion. *Finnegan v. Havir Mfg. Corp.*, 60 N.J. 413 (1972). The trial court is not concerned with the worth, nature, or extent of the evidence, but only with its existence. *Dolson* at 6 (1969).

On a motion for judgment notwithstanding the verdict, it is not within the province of the court to speculate upon the course of deliberations of a jury but merely to determine whether, as matter of law, any one possible theory of liability is substantiated by evidence taken as a whole in order to support verdict. *Lamendola v. Mizell*, 115 N.J. Super. 514, 527 (Law Div. 1971). A court "must accept as true all evidence supporting the position of the party defending against the motion and

must accord that party the benefit of all legitimate inferences which can be deduced from the evidence." *Besler*, 201 N.J. at 572 (citing *Lewis v. Am. Cyanamid Co.*, 155 N.J. 544, 567, 715 A.2d 967 (1998)) This approach respects the jury's singular role in resolving "disputed factual matters." *Id.*

Here, and as described in depth under Point II below as relating to Plaintiff's Motion for a New Trial, there is no clear and convincing evidence of a miscarriage of justice under the law. The jury had the opportunity to assess the credibility of the witnesses, including Plaintiff's expert, to consider the extensive evidence before it, and render a verdict accordingly. Giving all favorable inferences to the Defendant in this matter, the trial court's October 6, 2023 order denying Plaintiff's Motion for Judgment Notwithstanding the Verdict must be affirmed.

POINT II

THE TRIAL COURT'S OCTOBER 6, 2023 ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE AFFIRMED BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE THAT THERE WAS A MISCARRIAGE OF JUSTICE UNDER THE LAW. (Pa665-666; Pa1716).

The standards for granting a motion for judgment notwithstanding the verdict and a motion for a new trial are similar. Such motions should be granted only when it clearly and convincingly appears that there was a plain miscarriage of justice under the law. "The fact finder's determination is entitled to very considerable respect [and] .... should not be overthrown except upon the basis of a carefully reasoned and

factually supported (and articulated) determination." *Barber*, 406 N.J. Super. at 51-52.

In reviewing a jury's verdict on a motion for new trial, "a judge must view the evidence in the light most favorable to the party opposing the motion for relief." *Kozma v. Starbucks Coffee Co.,* 412 N.J. Super. 319, 325 (App. Div. 2010) (citing *Caldwell v. Haynes*, 136 N.J. 422, 432 (1994)). "[A] jury verdict, from the weight of the evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, *as to manifest with the utmost certainty a plain miscarriage of justice*." *Kozma* at 324 (quoting *Carrino v. Novotny*, 78 N.J. 355, 360 (1979)(emphasis added)); *see also*, *Doe v. Arts*, 360 N.J. Super. 492, 502-03 (App. Div. 2003). Moreover, jury verdicts should be set aside "only with reluctance and then only in the cases of clear injustice." *Crego v. Carp*, 295 N.J. Super. 565, 577 (App. Div. 1996), cert. denied, 149 N.J. 34 (1997) (citing *Goss v. Am. Cyanamid Co*., 278 N.J. Super. 227, 239 (App. Div. 1994)).

Plaintiff cites *Dolson v. Anastasia*, 55 N.J. 2, 6, 258 A.2d 706, 708 (1969) implying that the "feel of the case" may supplant that of the trial judge. This is not the case. *Dolson*'s "feel of the case" is applicable when the *trial judge* rules on a motion for a new trial, where he or she takes into account, not only tangible factors relative to the proofs as shown by the record, but also considers appropriate matters of credibility (generally within the jury's domain)—so-called 'demeanor evidence,'

and the intangible 'feel of the case' which he or she has gained *by presiding over the trial*. *Dolson* at 6 (emphasis added). The trial judge here made that determination and, having the benefit of "the feel of the case," denied Plaintiff's motion for a new trial.

Defendant will address the alleged facts that Plaintiff argues belie the jury's findings to the point that its verdict constituted a miscarriage of justice. By way of background, it is uncontested that, in December 2015, Defendant formed S.G. Health, LLC for the purpose of operating a pharmacy and that S.G. Health, LLC d/b/a as Viva Pharmacy operated in Trenton, New Jersey from about March 2016 to May 2019, when the assets of the pharmacy were sold to CVS. It is also uncontested that Plaintiff became a 49% membership interest holder in S.G. Health, with the other 51% membership being that of Defendant's.

a. **Defendant's alleged failure to garner Plaintiff's consent to receive a salary as a pharmacist. (3T152:11-14; 3T154:10–3T155:3** (Plf.'s brief at 35).

The jury heard testimony and was presented with the plain language of the S.G.'s Health's Operating Agreement whose terms indicated, "[n]o salary will be paid to a member for the performance of his or her duties *under this agreement* [the Operation Agreement of S.G. Health, LLC] unless the salary has been approved in writing by the unanimous consent of the members." (**Pa1, §6.2**) (emphasis added). There was testimony from Defendant as to her understanding and interpretation of

this language from the document drafted by Plaintiff's counsel. There was testimony that showed a distinction between duties of an LLC's manager and that of a pharmacist working for that LLC. Simply put, the duties under the operating agreement were not the same as the duties of a pharmacist.

According to the January 2017 S.G. Health Operating Agreement, Defendant was the limited liability company's manager. (**Pa1; 1T41:24-42:2**). There is no requirement in the Operating Agreement that the managing member be a pharmacist. (**Pa1; 2T18:10-25**). Defendant worked at the pharmacy six days a week for about fifty-five hours a week. (**3T36:2-7**). As the pharmacist in charge of Viva Pharmacy, Defendant was responsible for seizing all controlled substances, receiving medications, dispensing medications and filling prescriptions and putting them into the system, for reviewing drug interactions or any adverse effects, doing inventory, and dealing with expired medications. (**3T37:12-19**). These responsibilities were only something a licensed pharmacist could do. (**3T37:20-23**).

There is no reference to pharmacist in any capacity in the Operating Agreement. (**Pa1**). Plaintiff's attorney prepared the Operating Agreement in January 2017. (**3T32:17-18**). Defendant was not represented by an attorney with regard to the Operating Agreement. (**3T33:2-4**).

When entering into the Operating Agreement in January 2017, Defendant was not aware that Plaintiff did not want to pay her a salary as a pharmacist (**3T35:1-4**)

(even though she had been the pharmacist and receiving a salary since the pharmacy opened in March 2016 and even though the LLC would have had to pay a pharmacist if she did not work in that role). If Defendant knew Plaintiff did not expect her to take a salary for being the pharmacist, she would not have signed the Operating Agreement and would not have partnered with Plaintiff. (**3T35:4-6; 3T170:20-171:5**). At the time Defendant signed the Operating Agreement, she did not believe the agreement prohibited her from receiving a salary as a pharmacist and she would not have signed it had she known of such prohibition. (**3T35:7-13**).

In 2016, Plaintiff only worked at Viva Pharmacy a couple times a month in March, April, and May. (**3T28:6-16**) Plaintiff worked full-time in Viva Pharmacy for the only first three month of 2017. (**2T40:1-4**). Plaintiff did not work in Viva Pharmacy in 2018. (**2T41:6-8**). In 2019, Plaintiff worked full-time in Viva Pharmacy only in April and May, leading up to the asset sale to CVS. (**2T50:4-7**). Plaintiff took eleven trips to Turkey between June 2016 and December 2018. (**2T53:9-54:5**). Between 2016 and May 2019, Plaintiff also took two trips to Europe. (**2T50:18-21; 54:15-55:12**).

Although he did not work in the pharmacy on any regular basis, Plaintiff began receiving regular payments from Viva Pharmacy in July 2017, having received other amounts from Viva Pharmacy before that time, just not regularly. (**2T22:24-23:23:7**). Plaintiff had a verbal agreement with Defendant to take only

$1,000 a week from the pharmacy. (**2T24:3-6**). There were weeks, however, where plaintiff would take $1,500, $2,300, 5,000 a week from the pharmacy's bank account without Defendant's consent. (**2T25:1-18**) He wrote and signed a number of these checks to himself (**2T26:10-27:11; 2T27:19-30:15**).

b. Defendant's alleged loans from the pharmacy to her friends. (3T133:21 to 3T134:20) (Plf.'s brief at 35).

When you read the portion of the testimony that Plaintiff cites relating to a loan to her friend, Defendant's testimony is clear, she denies making loans from the business. Rather, as the jury heard, with regard to the referenced loan in this portion of the testimony, that it was made from Defendant's "personal draw" and that she "never claimed it as a business expenses [sic]." (**3T134:1-3; 3T134:15-22**).

This is in line with testimony of Defendant relating to numerous checks drawn on the pharmacy's account that Defendant was asked about at trial, Defendant testified that those checks and expenses were "under her personal draw" or never claimed it as a business expense, meaning it was personal expense to be applied against her share of profit in the company. (**3T129:14-139:13**).

Plaintiff and Defendant each used the pharmacy account for personal expenses. (**3T124:13-19**). Each personal draw would go against each other's respective profits in business. (**3T107:15-18; 3T168:13-169:16**).

The pharmacy's financials prepared by the accountant would identify personal expenses of Defendant *and* Plaintiff by categorizing them under "Draw." (**Pa49-67;**

2T63:18-64:12; 3T46:4-14). The Viva Pharmacy balance sheets and profit and loss statement showed the term "Draw" under each of the parties' names—i.e., under Ahmet Derya and Sedef Gulsan—and under "Draw" personal expenses are identified. (**Pa49-67; 3T107:17-108:14**). This was also true for the general ledgers of Viva Pharmacy. (**Pa68-146**).

c. Defendant's alleged treatment of the company as her personal piggy bank. (3T132:5-9) (Plf.'s brief at 35).

As stated above, Plaintiff *and* Defendant each used the pharmacy account for personal expenses. (**3T124:13-19**). Each personal draw would go against each other's respective profits in business. (**3T107:15-18; 3T168:13-169:16**).

In addition to the single business checking account, the parties also each used credit cards. Plaintiff and Defendant charged personal expenses along with expenses for Viva Pharmacy on each credit card they used (AMEX, Chase, and Discover). (**2T31:24-32:19; 3T50:24-51:5**). The resulting credit card bills having personal expenses of each of the parties were paid by Plaintiff directly from the pharmacy's checking account. (**2T32:19-23; 3T51:6-9; 3T143:16-23; 3T144:6-10**). These credit cards were all accounts of the Plaintiff, with Plaintiff having authorized cards for each account being also issued in Defendant's name. (**2T33:21-34:23; 3T50:12-23**). Plaintiff even authorized Chase to issue a card in Defendant's daughter's name. (**2T34:17-20**).

Plaintiff had full access to the pharmacy's TD Bank business checking account. He could write checks, make deposits or withdrawal, use the debit card, and had full on-line access to the account, which was the only account the pharmacy had. (**1T44:7-11; 2T27:11-15; 2T37:24-38:1; 3T42:21-43:11**).

As sate above, the financials prepared by the pharmacy's accountant would identify personal expenses of Defendant *and* Plaintiff in Viva Pharmacy's financials by categorizing them under "Draw." (**Pa49-67; 2T63:18-64:12; 3T46:4-14**). The Viva Pharmacy balance sheets and profit and loss statement showed the term "Draw" under each of the parties' names and show the personal expenses of each. (**Pa49-67; 3T107:17-108:14**). This was also true for the general ledgers of Viva Pharmacy. (**Pa68-146**).

d. Defendant's alleged failure to maintain books and records (3T132:5-9) (Plf.'s brief at 35).

The citation to the record by Plaintiff here does not support this contention. In fact, it's the same as the previous allegation in subsection "c" above. Notwithstanding, there is evidence and testimony from the parties that Defendant maintained the sole bank account and its records—one that Plaintiff had full access to—and that she gave the pharmacy's accountant full access to the bank account and credit card statements in order to create the general ledger and tax returns that were put into evidence in this case.

Additionally, the Operating Agreement (**Pa1**) created by Plaintiff's counsel gave, at Section 5.3, Plaintiff "...authority *along with the manager* to open accounts, deposit, withdraw and maintain funds in the name of the company, in banks, savings and loans associations, money market funds and such financial instruments." (emphasis added). Plaintiff had the same authority—a shared control—over the pharmacy's financial accounts and instrument that Defendant had.

e. Defendant's alleged failure to provide Plaintiff access to the books and records. (3T88:15-20) (Plf.'s brief at 35-36).

The citation to the record by Plaintiff here does not support this contention. The jury heard ample evidence that Plaintiff had full access to the account of the Pharmacy. Plaintiff had full access to the pharmacy's TD Bank business checking account, could write checks, make deposits or withdrawal, use the debit card attached to that account, and had full on-line access to the account, which was the only account the pharmacy had. (**1T44:7-11; 2T27:11-15; 2T37:24-38:1; 3T42:21-43:11**). The credit cards—AMEX, Chase, and Discover—that were paid by the pharmacy were all accounts of the Plaintiff, with Plaintiff having authorized cards for each account being also issued in Defendant's name. (**2T33:21-34:23; 3T50:12-23**). Plaintiff had unbridled access to the financial records of Viva Pharmacy.

Additionally, Defendant testified that, in June 2019, just after the sale of Viva Pharmacy to CVS, Defendant attempted to sit down with Plaintiff to reconcile all the credit card statements and expenses. (**3T51:14-52:4; 3T60:25-61:24**). At the last

meeting between the parties, Plaintiff took all the documents into his possession, including all of the credit card statements, all the papers from the accountant, and the notes they put on the papers—he [Plaintiff] took everything. (**3T60:19-24; 3T143:6-12).**

f. Defendant's alleged failure payment from Viva Pharmacy of Start-up costs to form a Competing Pharmacy. (3T88:15-20) (Plf.'s brief at 36).

First, as stated above, the cited portion of the record shows Defendant testified that monies were not paid from the business, but rather from her [Defendant's] "personal draw." (**3T88:13-19**). Additionally, with regard to the alleged competing pharmacy, it was not in competition with Viva Pharmacy.

Defendant formed Atmaca, LLC d/b/a Our Pharmacy on December 5, 2017 (**3T110:24-111:3**). Our Pharmacy did not open until 2019 in Burlington, New Jersey (18 miles from VivaPharmacy (**T3111:23-25**)) *months after the sale of Viva Pharmacy's assets to CVS*. (**2T39:9:11; T3112:1-3**). The last time S.G. Health d/b/a Viva Pharmacy was an active business was the end of May 2019. (**1T31:4-6**). The pharmacy closed when it was sold to CVS in May 2019. (**1T31:4-6**).

Plaintiff knew about Our Pharmacy around February of 2018, a few months after its formation date (**1T50:6-9**). Before the CVS sale of Viva Pharmacy, and before Our Pharmacy was operating, Defendant had talked to Plaintiff about the

potential work schedules as between the two. (**T3112:4-113:1; T3128:23-129:1**). Plaintiff did not object to Defendant's opening of Our Pharmacy. (**3T113:8-10**).

Plaintiff repeats, at page 36 of his brief, alleged acts of Defendant in that he alleges she deliberately concealed books and records, transferred assets from the company's checking account unrelated to business, withdraw monies for her personal use, failed to pay Plaintiff his fair share of profits, failed to keep accurate records, paid herself an excessive[1] and unjustified salary, and that she unlawfully interfered with Plaintiff's prospective economic advantages by forming Atmaca LLC to operate Our Pharmacy. Plaintiff further alleges that Defendnat lied about what she paid herself and inflated financials to hide what she "stole" from the Plaintiff. The jury did not agree.

The jurors heard that Plaintiff used the Pharmacy bank account as his own, paying personal expenses and cutting checks to himself. The jury heard Plaintiff had a verbal agreement to take $1,000 a week from the pharmacy. (**2T24:3-6**). Despite this, there were weeks where plaintiff would take $1,500, $2,300, and even $5,000 a week from the pharmacy's bank account (**2T25:1-18**) and that the Plaintiff wrote and signed a number of these checks to himself. (**2T26:10-27:11; 2T27:19-30:15**).

[1] Despite the allegation, Plaintiff offered no evidence that Defendant's salary as a pharmacist in charge was unreasonable or excessive.

The jury heard that, after the sale of Viva Pharmacy to CVS in June 2019, Plaintiff wrote $25,000 to himself from the pharmacy's account and sent a picture of it to Defendant saying he was buying a house. (**3T57:24-3**). They further heard that Plaintiff paid off, without asking Defendant, the balance of a car loan from the pharmacy's account—a loan he was a co-signer on—in order to improve his own credit score. (**3T65:3-67:3**). Plaintiff did not inform Defendant that he was paying the loan off from the pharmacy account, but rather texted Defendant that he paid off the car loan. (**2T76:1-11**). The jury heard how this loan payoff concerned Defendant because there were still debts of the pharmacy to be paid. (**3T66:2-16**).

As discussed above, Plaintiff had full access to all of S.G. Health's financial accounts and records. S.G. Health's tax returns for 2017 and 2018 were not available, and had been on extension, until around the time of the pharmacy's May 2019 sale to CVS. (**3T43:13-19; 3T48:4-12; 3T50:2-4**). There is no evidence showing Plaintiff requesting copies of tax returns until 2018. There are no text messages or emails from 2016 or 2017 that Plaintiff has with either Defendant or the pharmacy's accountant, Josh Mellum, asking for any S.G. Health tax information. (**2T57:11-19**). The 2019 return would not be due for another eleven months and the 2018 return was only approximately a month and a half late (but the accountant had requested an extension). (**3T48:13-19**). Defendant did not have any company tax returns to

share with Plaintiff until just before the same to CVS in May 2019, which she shared with him when they were completed. (**3T126:25-127:5**).

As discussed above, Plaintiff knew about the plans Atmaca, LLC (Our Pharmacy) and Defendant spoke with him about work schedule logistics. Our Pharmacy was 18 miles away and did not operate for months after Viva Pharmacy was sold. On the other hand, there was testimony that Plaintiff formed an import/export medicine company after he says he became a partner with Defendant. Plaintiff formed a company in the United States called the Poseidon Group in April 2016 (**2T83:18-24**). Poseidon was intended to be an export/import wholesale medicine company. (**2T83:25-84:6**). Plaintiff testified that Poseidon was not something that involved Defendant, that Poseidon had nothing to do with her. (**2T83:18-24**). It was never Plaintiff's intent to have Defendant be a partner in Poseidon (**2T84:7-11**). Defendant was not invited to be a partner in Poseidon. (**3T114:1-3**). The jury heard that Plaintiff created Poseidon without allowing or inviting Defendant to participate in that business venture.

In terms of Defendant's work at, and her salary from, the pharmacy, the jury heard that Defendant worked at the Pharmacy six days a week for about fifty-five hours a week. (**3T36:2-7**). As the pharmacist in charge of Viva Pharmacy, Defendant was responsible for seizing all controlled substances, receiving medications, dispensing medications and filling prescriptions and putting them into the system,

for reviewing drug interactions or any adverse effects, doing inventory, and dealing with expired medications. (**3T37:12-19**). These responsibilities were only something a licensed pharmacist could do. (**3T37:20-23**).

The jury further heard that Defendant based her salary on the hourly rate pharmacist typically are paid—based on her first-hand experience and knowledge of pharmacists' salaries (**3T39:4-22**)—and based upon the number of prescriptions she was filling, with that number of daily prescriptions increasing by the hundreds between 2017 and 2019, which in turn had her hourly rate salary increase from $50 an hour in 2017 to $60 an hour in 2019. (**3T37:24-39:3**). Defendant never took a paycheck from Viva Pharmacy. (**3T:40:18-20**).

The jury heard that Plaintiff was not around the pharmacy for much of the time. Plaintiff only worked at Viva Pharmacy a couple times a month in March, April, and May of 2016. (**3T28:6-16**) Plaintiff worked full-time in Viva Pharmacy only for the first three months of 2017. (**2T40:1-4**). Plaintiff did not work in Viva Pharmacy at all in 2018. (**2T41:6-8**). In 2019, Plaintiff worked full-time in Viva Pharmacy in April and May, leading up to the asset sale to CVS. (**2T50:4-7**). The jury heard that Plaintiff took eleven trips to Turkey between June 2016 and December 2018. (**2T53:9-54:5**) and, between 2016 and May 2019, he took two trips to Europe. (**2T50:18-21; 54:15-55:12**).

In terms of the damages Plaintiff allegedly suffered, the jury heard Plaintiff's forensic accounting expert, Mr. Chait, in review of Viva Pharmacy's records, stated that there are numerous expenses which appear personal in nature and that these personal expenses were not only Defendant's, but Plaintiff's as well. (**2T129:1-8**). The jury also hear that Mr. Chait, in review of credit card records and Viva Pharmacy's general ledger, predominately relied upon Plaintiff's analysis of the details and took Plaintiff's word for what the information Plaintiff provided to him was in terms of the alleged personal expenses of Defendant. (**2T134:2-135:11**).

The jury also herd that Mr. Chait only reviewed expenses that he considered "major ones" and did not review the challenged "insignificant ones." Although he did not review all the expenses Plaintiff alleged were Defendants, Mr.Chait still included those amounts in his total only by taking Plaintiff's word for it. (**2T135:12-136:11**). Even with the "major one" (i.e., the major expenses Plaintiff was challenging), the jury heard that Mr. Chait simply took Plaintiff's word for what they allegedly were; there was no independent evaluation or verification done to discern if the expenses were Defendant's or if it was a pharmacy expense. (**2T136:5-11**).

Contrary to Plaintiff's contentions that the verdict in this case is against the weight of the evidence, there was more than ample evidence adduced at trial for the jury to return the verdict it did. Here, there was no clear injustice such that the Court could, when viewing the evidence in the light most favorable to the

Defendant, find objectively, and with the utmost certainty, a plain miscarriage of justice. As such, the trial court's October 6, 2023 order denying plaintiff's motion for a new trial must be affirmed.

POINT III

THE TRIAL COURT PROPERLY FOUND DEFENDANT TO BE THE PREVAILING PARTY AS SET FORTH IN ITS MARCH 11, 2024 ORDER. (Pa665-666; Pa1717).

Defendant prevailed on all counts brought against her. Initially, Defendant faced thirteen counts against her (Plf.'s Amended Complaint (**Pa752**)) During trial, after Defendant's motion for directed verdict made upon Plaintiff resting his case-in-chief, the parties stipulated to dismiss seven of Plaintiff's causes of action (**3T5:20-19:11**), with the total number of causes of actions being then whittled down six counts, those being whether Defendant breached the operating agreement of S.G. Health; breached the implied covenant of good faith and fair dealing; acted grossly negligent or with willful misconduct in violation of the New Jersey Limited Liability Company Act (*N.J.S.A.* 42:2C-39); tortiously interfered with Plaintiff's prospective economic advantage, committed fraud, and whether the assessment of punitive damages against Defendant were warranted. (**4T71:5-74:18**) (the trial Court's review of the Verdict Sheet with the jury).

Although New Jersey generally disfavors the shifting of attorneys' fees, *North Bergen Rex Transp., Inc. v. Trailer Leasing Co.,* 158 *N.J.* 561, 569, 730 A.2d 843

4885-2945-2259, v. 1

(1999), a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract. *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 440 (2001)(emphasis added). Here, as stated in the trial court's Order of Disposition (**Pa1705**), Section 10.5 of the Operating Agreement (**Pa1**) provides:

> In the event of any suit or action to enforce or interpret any provision of this Agreement (or that is based on this Agreement), the prevailing party is entitled to recover, in addition to other costs, reasonable attorney fees in connection with the suit, action, or arbitration, and in any appeals. The determination of who is the prevailing party and the amount of reasonable attorney fees to be paid to the prevailing party will be decided by the court or courts, including any appellate courts, in which the matter is tried, heard, or decided.

When the fee-shifting is controlled by a contractual provision (as here), the provision should be strictly construed in light of our general policy disfavoring the award of attorneys' fees. *See North Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 570, 730 A.2d 843 (1999). Conversely then, a court should not give a contractual fee provision an unreasonable or hyper-technical construction in order to limit its scope to avoid an award of fees.

A party may agree by contract (as here) to pay attorneys' fees, including "those instances where, as here, the parties have bargained for an aggrieved party to recover its counsel fees and costs as part of its contract damages or 'losses.' " *Litton Indus., Inc. v. IMO Indus., Inc.,* 200 N.J. 372, 406, 982 A.2d 420, 440 (2009) (*quoting N. Bergen Rex Transp.* at 570).

"In determining the reasonableness of an attorneys' fee award, the threshold issue 'is whether the party seeking the fee prevailed in the litigation.' *Id*. In that regard, the party must establish that the 'lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important factor in obtaining the relief.'" *Id* at 386 (quoting *Singer v. State*, 95 N.J. 487, 494, 472 A.2d 138, *cert. denied*, 469 U.S. 832, 105 S.Ct. 121, 83 L.Ed.2d 64 (1984)).

Here the Plaintiff lost on its breach of contract claim, which was central to the fee-shifting provision of the Operating Agreement. Defendant also prevailed by successfully defending against the twelve (12) other substantial claims raised by the Plaintiff. This should be construed as a sufficient degree of success on the merits.

The first inquiry in determining prevailing party status should be whether the verdict or judgment provided the movant with a sufficient degree of success on the merits of its claim. Here, Defendant, in her Answer to Plaintiff's Amended Complaint, sought dismissal of Plaintiff's Complaint, which, after jury trial has happened. [2]

Additionally, Plaintiff argues that it took the litigation to obtain information relative to Viva Pharmacy to which he was entitled pursuant to the Operating Agreement and the LLC Act. The argument Defendant kept information from him

[2] Defendant also sought the cost of suit in each of her prayers for relief.

(keeping in mind the testimony showed Plaintiff had full access to the financial records at all times; that the various tax filings had been extended, deadline -wise, and which were not available until around the time of the Viva Pharmacy's sale to CVS; and that there was no evidence that Plaintiff was in fact barred by Defendant from communicating with the accountant) fails; the jury decided, based on the evidence, otherwise. Plaintiff cannot now attempt to support his argument on allegations the jury flat-out rejected. Furthermore, Plaintiff asserts,

> "...Defendant should not be deemed the prevailing party for the purpose of fee shifting under the Operating Agreement. To hold otherwise would unfairly penalize Plaintiff for seeking to enforce his contractual and statutory rights, and reward Defendant for withholding this information from Plaintiff until he sued her."

(Plf.'s Brief at 40-41). This statement is contrary to the verdict and completely ignores the fact that Defendant had been dragged through three years of litigation and the expenses associated with the same. It also ignores the expectations set by theplain language of the contractual fee-shifting provision of the Operating Agreement that is quoted above. (Section 10.5 of the Operating Agreement (**Pa1**).

To find Defendant was not a prevailing party here is contrary to the language of the parties' agreement that contemplate an action to enforce, just as Plaintiff had brought, all the while contemplating that such an action may not be successful and thus either party could prevail. To find otherwise would abrogate the purpose of the clause and its impact on decisions to either bring or defend such actions.

POINT IV

THE TRIAL COURT PROPERLY GRANTED ATTORNEY'S FEES AND COSTS TO DEFENDANT BY ITS MARCH 11, 2024 ORDER, INCLUDING THOSE FEES AND COST ASSOCIATED WITH CERTAIN LIMITED PRE-TRIAL MOTIONS UPON WHICH DEFENDANT DID NOT SUCCEED. (Pa665-666; Pa1717).

As for calculating an attorney fee award, Defendant does not agree with the argument that Defendant was not entitled to fees relating to the limited issues she did not prevail upon (Plf.'s Brief at 42). When taken as a whole, Defendants was not partially successful; she was ultimately and fully successful in the defense of this case. The proof of this is in the dismissal, after jury trial, of the Complaint on all remaining Counts (having, as discussed above, stipulated a number of causes of action out of the case upon Defendant's Motion for Directed Verdict). In light of *Walker v. Giuffre,* 209 N.J. 124, 130-33 (2012) cited by Plaintiff, Defendant achieved more than limited success in comparison to the relief (i.e., the dismissal of the Complaint) in the litigation.

In calculating the amount of reasonable attorney's fees, courts determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate." *Furst v. Einstein Moomjy, Inc*., 182 N.J. 1, 21, 860 A.2d 435 (2004). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, supra, 182 N.J. at 22, 860 A.2d 435. The court is required to make findings on each element of the lodestar fee.

Id.; *see also*, *Feliciano v. Faldetta*, 434 N.J. Super. 543, 549, 85 A.3d 1006, 1009 (App. Div. 2014).

Defendant does not view the unsuccessful motion to dismiss the initial Fraud cause of action as baseless. Defendant's September 2, 2020 motion selectively sought to dismiss only one (1) of the then six (6) causes of action (as the Complaint was later amended to include thirteen (13) causes of action), which was fraud. There, Defendant asserted fraud had not been plead with specificity required of *Rule* 4:5–8(a). Said motion was not successful, but it was also not frivolous and made in good faith believing Count Three (fraud) of Plaintiff's initial Complaint was insufficiently pled as a matter of law.

The fees relating to discovery should also be deemed recoverable. Plaintiff engaged in *extensive* discovery, deposing Ms. Gulsan for approximately 7.5 hours, producing thousands of documents, propounding eighty-five (85) (plus the sub-parts) interrogatories in his first set of interrogatories, followed by supplemental requests and numerous requests for documents and multiple subpoenas to third-parties, including to numerous banks (even those relative to Defendant's husband and an account for an unrelated business formed during the pendency of the litigation), to a credit card processing company, to CVS, to the accountant for the LLC, all producing an additional and substantial amount of documentation as well

as the creation of a consent protective order after Defendant sought to quash certain (not all) of the numerous third-party subpoenas.

As such, the Court should not reduce the fee award by the amounts suggested (for Defendant's Motion to Dismiss the Fraud Count, for discovery efforts, and for the motion opposing Plaintiff's Motion to Amend the Complaint).

POINT V

THE TRIAL COURT PROPERLY GRANTED ATTORNEY'S FEES AND COSTS TO DEFENDANT BY ITS MARCH 11, 2024 ORDER AND PROPERLY FOUND DEFENDANT'S COUNSELS FEES TO BE REASONABLE AND THAT THE APPLICATION CONTAINING COUNSEL'S SUPPORTING CERTIFICATION THAT SETS FORTH THE FACTORS FOR CONSIDERATION UNDER *RPC* 1.5(a). (Pa665-666; Pa1717).

As for any alleged "vague" entries, the undersigned takes issues with such characterization and, as the Certification of Counsel and its attachments (i.e., the legal billing) (**Pa804**) shows and certifies, Defendant's counsel has entered time entries concurrently with work being done and in detail sufficient to inform the client of the tasks completed. Many entries as submitted upon this instant motion were redacted to protect the attorney/client privilege and/or the work product doctrine, but counsel attempted to leave-in enough unredacted information, where possible, to inform its viewer as to the task at hand. Unredacted versions can be made available for *in camera* review if the Court desired to entertain such an exercise.

For the foregoing reasons, Defendant respectfully requests that the Court should affirm the trial court's March 11, 2024 identifying Defendant as the prevailing party in the action below and awarding Defendant attorney's fees and costs.

CONCLUSION

For the aforementioned reasons, this Court should affirm the trial court's October 6, 2023 Order denying Plaintiff's Motion for Judgment Notwithstanding the Verdict and for a New Trial must be affirmed. Additionally for the reasons set forth above, the Court must affirm the trial court's March 11, 2024 Order identifying Defendant as the prevailing party in the action below and awarding Defendant attorney's fees and costs.

Respectfully submitted,

HILL WALLACK LLP

By: */s/ Paul R. Sheehan*
Paul R. Sheehan
Attorneys for Defendant-Respondent

Dated: September 9, 2024

FILED, Clerk of the Appellate Division, October 10, 2024, **A-000669-23**

Superior Court of New Jersey
APPELLATE DIVISION

AHMET DERYA, vs. SEDEF GULSAN,	**DOCKET NO.** A-000669-23 *Civil Action* On Appeal From: Superior Court of New Jersey Law Division Mercer County Docket No. MER-L-1265-20 *Sat Below:* *Hon. R. Brian McLaughlin, J.S.C.*

REPLY BRIEF OF PLAINTIFF-APPELLANT

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BT	MOTION FOR FEE APPLICATION DECISION DATED MARCH 11, 2024
CT	JURY TRANSCRIPT DATED JULY 24, 2023
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[1] The following documents are located in Plaintiff's Appendixes.

PRELIMINARY STATEMENT

Plaintiff-Appellant Ahmet Derya ("Plaintiff" or "Mr. Derya") respectfully submits this reply brief in response to the brief of Defendant-Respondent Sedef Gulsan ("Defendant" or "Ms. Gulsan") and in further support of Plaintiff's appeal of the October 6, 2023 Order ("October 6 Order"), which denied Plaintiff's motion for judgment notwithstanding the verdict ("JNOV"), or in the alternative, for a new trial. Plaintiff also submits this reply brief in further support of Plaintiff's appeal of the March 11, 2024 Order ("March 11 Order"), which granted Defendant's fee application in the amount of $119,256.40.

Plaintiff is entitled to JNOV, or, at a minimum, to a new trial, and the reversal of the March 11 Order granting Defendant's fee application, to prevent a miscarriage of justice because the jury's verdict was against the weight of the evidence and reasonable minds could not differ as to Plaintiff's entitlement to judgment against Defendant.

Specifically, and without limitation, the verdict should be reversed, and the fee award should be vacated in its entirety, because, among other reasons, Defendant admitted at trial that she improperly charged Plaintiff more than ten thousand dollars ($10,000.00) for her personal expenses. For example, Defendant unequivocally admitted at trial that she improperly charged

Plaintiff $6,273 for Defendant's own car payments to First Data-Santa (3T166:11-25) and $4,387.20 for her own insurance payments to Geico (3T162:11-19), as listed on page 103 of the Viva Pharmacy bank ledger (Pa170). Defendant also acknowledged that it was her mistake to charge Plaintiff these amounts. (3T162:15) This constitutes grounds to grant Plaintiff JNOV in the amount of $10,660 based on Defendant's undisputed and undisputable admission that Plaintiff is entitled to the correction of this $10,660 "mistake". (3T166:11-25)

Moreover, Plaintiff's undisputed entitlement to reimbursement of this $10,660 "mistake" also precludes the $119,256.40 fee award in Defendant's favor. As such, the trial court should not have found Defendant the prevailing party nor should it have held Plaintiff liable to reimburse Defendant's fees and costs as this improperly penalized Plaintiff for pursuing meritorious claims.

In addition, Defendant's acknowledgement that Plaintiff was a member of Viva Pharmacy starting in 2016 (3T114:10-115:14; 3T119:14-24; 3T122:1-10), and that he was entitled to 49% of the profits the company earned that year (3T:122:11-18), but that he received none of these 2016 profits (3T119:7) should be deemed dispositive on this issue. Defendant further acknowledged the Viva Pharmacy earned $67,791 in profits in 2016 and that she kept all these profits to herself, without sharing any

percentage of these profits with Plaintiff. (3T118:6-119:24) Therefore, Plaintiff is entitled to judgment in an amount equal to his 49% interest in Viva Pharmacy's 2016 profits, and to the vacation of the $119,256.40 fee award in Defendant's favor.

It is also undisputed that Defendant never provided Plaintiff with QuickBooks data relating to Viva Pharmacy's business account until her accountant produced this critical financial information on or about September 1, 2022, in response to Plaintiff's subpoena. (Pa892)[2] The fact that Plaintiff had to file this lawsuit and subpoena this information from Viva Pharmacy's accountant should preclude the $119,256.40 fee award in Defendant's favor because Plaintiff should not be penalized for enforcing his rights and seeking information to which he was entitled, and which ultimately proved that Defendant improperly overcharged Plaintiff for Defendant's own personal expenses. (3T162:15) Defendant's contention that Plaintiff had access to Viva Pharmacy's bank records, and that this obviated her duty to provide an accounting and/or access to the company's QuickBooks financial records was repudiated by her own trial testimony, when she testified that Plaintiff could not possibly distinguish Defendant's personal expenses from business expenses by

[2] Defendant's counsel's billing records confirm the date that Josh Mellum, CPA, first produced the relevant QuickBooks data and that this information, to which Plaintiff was entitled, was obtained through discovery in this lawsuit, in or about September 2022. (Pa892)

reviewing Viva Pharmacy's bank records. (3T131:9-20)

Still further, Defendant admitted at trial that she consented to vacate a $100,000 judgment in favor of Viva Pharmacy, and to the dismissal of Viva Pharmacy's claims underlying that judgment with prejudice, without ever consulting Plaintiff about this. (3T158:14-160:16) Likewise, Defendant also acknowledged that she opened another pharmacy called Atmaca LLC in December 2017, while she was still a member of Viva Pharmacy, and used Viva Pharmacy's funds to pay the startup costs for Atmaca LLC, in violation of the parties' operating agreement. (3T12710-131:1) Defendant's foregoing testimony confirms that she breached the parties' operating agreement and that the jury's verdict was against the weight of the evidence.

Therefore, Plaintiff is entitled to JNOV in the amount of $10,660, plus his 49% share of the 2016 profits,[3] reversal of the of the $119,256.40 fee award in Defendant's favor, and an award of fees and costs in Plaintiff's favor pursuant to the fee shifting provision in the parties' operating agreement.

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[3] 49% of $67,791 equals $33,217.59.

LEGAL ARGUMENT

POINT I

THE OCTOBER 6 ORDER DENYING PLAINTIFF'S MOTION FOR JNOV AND/OR FOR A NEW TRIAL WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED TO PREVENT A MISCARRIAGE OF JUSTICE BECAUSE DEFENDANT ADMITTED THAT SHE IMPROPERLY CHARGED PLAINTIFF FOR DEFENDANT'S OWN PERSONAL EXPENSES

The purpose of *Rule* 4:40-2 is to allow the court to grant JNOV to correct "clear error or mistake" by the jury. *Dolson v. Anastasia*, 55 N.J. 2, 6 (1969). Alternatively, a trial judge shall grant a motion for a new trial if, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." *R.* 4:49-1(a); *Dolson v. Anastasia*, 55 N.J. 2, 5 (1969).

Here, the jury's verdict was a clear error and resulted in a miscarriage of justice because Defendant admitted that she made a "mistake" by overcharging Plaintiff $6,273 for Defendant's own car payments to First Data-Santa (3T166:11-25) and $4,387.20 for her own insurance payments to Geico (3T162:11-19), as listed on page 103 of the Viva Pharmacy bank ledger (Pa170).

Defendant's acknowledgement that she improperly charged Plaintiff these amounts (3T162:15) constitutes standalone grounds to grant Plaintiff JNOV in the amount of $10,660. At a

minimum, Plaintiff is entitled to a new trial to determine the amount of the judgment that should be entered in Plaintiff's favor to correct Defendant's acknowledged mistake.

Therefore, the October 6 Order denying Plaintiff's motion for JNOV and/or for a new trial was against the weight of the evidence and should be reversed to prevent a miscarriage of justice.

POINT II

DEFENDANT'S TRIAL TESTIMONY CONFIRMED THAT PLAINTIFF WAS ENTITLED TO RECEIVE 49% OF THE COMPANY'S PROFITS FOR 2016, BUT THAT DEFENDANT KEPT ALL THE 2016 COMPANY PROFITS FOR HERSELF

Defendant's trial testimony acknowledged that Plaintiff was a member of Viva Pharmacy starting in 2016 (3T114:10-115:14; 3T119:14-24; 3T122:1-10). Defendant further testified that she does not dispute that Plaintiff was entitled to 49% of the profits the company earned in 2016. (3T122:11-18). She also testified that Viva Pharmacy earned $67,791 in profits in 2016 (3T:119:4) but that Plaintiff received none of these profits (3T119:7). Instead, she kept all these profits for herself.

Therefore, Defendant's testimony should be deemed dispositive on this issue of Plaintiff's entitlement to a judgment in the amount of $33,217.59, constituting his 49% share of Viva Pharmacy's 2016 profits..

POINT III

DEFENDANT'S ACKNOWLEDGED VIOLATIONS OF THE PARTIES' OPERATING AGREEMENT ENTITLE PLAINTIFF TO JNOV AND/OR TO A NEW TRIAL

The parties' operating agreement required Defendant to obtain Plaintiff's consent to enter into a fundamental business transaction. *See* Pa6, SG Health Operating Agreement at ¶ 5.4(e). Defendant violated this provision when she consented to vacating the $100,000 judgment that Viva Pharmacy obtained in its favor against Kaplan Group, LLC, et al, in a lawsuit bearing the caption MER-L-584-17. Defendant's trial testimony confirmed that she never consulted with Plaintiff before consenting to vacate the $100,000 judgment and the dismissal (with prejudice) of Viva Pharmacy's lawsuit against Kaplan Group, LLC, et al. (3T158:14-160:16)

Similarly, Defendant's acknowledgement that she opened another pharmacy called Atmaca LLC in December 2017, while she was still a member of Viva Pharmacy, and that she used Viva Pharmacy's funds to pay for the startup costs for Atmaca LLC, (3T12710-131:1) constitutes a violation of the non-competition provision contain in the parties' operating agreement. *See* Pa14, SG Health Operating Agreement at ¶ 10.3.

Defendant's foregoing testimony confirms that she breached the parties' operating agreement and that the jury's verdict was against the weight of the evidence.

POINT IV

DEFENDANT'S ACKNOWLEDGED ACCOUNTING MISTAKES AND BREACHES OF THE PARTIES' OPERATING AGREEMENT ENTITLE PLAINTIFF TO REVERSAL OF THE $119,256.40 FEE AWARD IN DEFENDANT'S FAVOR AND TO A FEE AWARD IN PLAINTIFF'S FAVOR AS THE PREVAILING PARTY

In general, New Jersey disfavors the shifting of attorneys' fees. *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999). Here, the fee shifting provision contained in the parties' Operating Agreement provides the Court with discretion to determine who is the prevailing party and the amount of any fee award that the prevailing party is entitled to receive from the non-prevailing party. *See* Pa15, SG Health Operating Agreement at ¶ 10.5.

Plaintiff brought this lawsuit in good faith and was successful in establishing his entitlement to reimbursement of the $10,660 accounting mistake that Defendant acknowledged that she made in her own favor. (3T162:15)

Plaintiff also established his entitlement to 49% of the profits that Viva Pharmacy earned in 2016, which Defendant improperly kept all to herself. (3T122:11-18)

Plaintiff further established that Defendant breached the parties' operating agreement by (1) vacating the $100,000 Kaplan judgment and dismissing Viva Pharmacy's lawsuit with prejudice without consulting Plaintiff, and by (2) using Viva Pharmacy's funds to establish Atmaca LLC as a competing Pharmacy.

As such, Plaintiff should be deemed the prevailing party as to these issues and he is entitled to an order reversing the $119,256.40 fee award in Defendant's favor, and entry of a fee award in Plaintiff's favor as the prevailing party.

POINT V

THE MARCH 11 ORDER GRANTING DEFENDANT'S FEE APPLICATION SHOULD BE REVERSED BECAUSE PLAINTIFF HAD TO BRING THIS LAWSUIT TO OBTAIN VIVA PHARMACY'S QUICKBOOKS DATA

Plaintiff brought this lawsuit in good faith and was successful in obtaining financial information from Defendant relating to Viva Pharmacy. Defendant's counsel's own billing records establish the date that Josh Mellum, CPA, first produced the relevant QuickBooks data:

		DERYA 11227)			
44	8/30/22	Email from Crew S., Esq.'s office regarding supplemental discovery request status. Emails from Josh Mellum (CPA) and client regarding document production. Email [redacted] . . . Receive and review supplemental TD documents (over 1,000 pages).	1.4 hrs.	$532.00	$28,085.22
45	9/1/22	Emails from/to Ahmet's counsel regarding supplemental document requests and ShareFile from the accountant, Josh Mellum. [Redacted] . . . Sedef [redacted] regarding [redacted] . . . Emails with Sedef regarding [redacted] . . . Call Sedef.	.5 hrs.	$190.00	$28,275.22

(Pa892)

This demonstrates that Plaintiff never received the QuickBooks data relating to Viva Pharmacy's financial records until approximately September 1, 2022, in response to a subpoena that Plaintiff served on Josh Mellum, CPA. *Id.*

Moreover, and significantly, Defendant's self-serving and implausible contention that Plaintiff's access to the company's

bank statements was sufficient to satisfy her accounting obligations, and Plaintiff's entitlement to access to the company records, was refuted by her own testimony, when Defendant testified that it was impossible for Plaintiff to identify Defendants' improper personal expenses by reviewing only Viva Pharmacy's bank records. (3T:131:9-20)

Specifically, Defendant's trial testimony confirmed the obvious and indisputable need for more than just bank records to distinguish Defendant's personal expenses from business expenses, as well as Plaintiff's entitlement to access to the company's financial records beyond mere bank statements. *Id.*

Plaintiff was entitled to this critical financial information pursuant to the parties' operating agreement and the New Jersey Limited Liability Company Act. Defendant failed and refused to provide this financial information to Plaintiff prior to discovery in this litigation. Significantly, Plaintiff had to bring this action to enforce his rights pursuant to the Operating Agreement and the LLC Act.

Moreover, the QuickBooks data that Plaintiff obtained by subpoenaing Viva Pharmacy's accountant ultimately confirmed that Defendant improperly overcharged Plaintiff for Defendant's own personal expenses.

Defendant should not be deemed the prevailing party for purposes of fee shifting under the Operating Agreement in these

circumstances. Otherwise, Plaintiff would be unfairly penalized for seeking to enforce his contractual and statutory rights, and Defendant would be rewarded for withholding this information.

As such, the trial court erred in granting Defendant's fee application because discovery in this litigation was necessary for Plaintiff to obtain Viva Pharmacy's financial information to which he was indisputably entitled to receive pursuant to the Operating Agreement and the LLC Act.

Therefore, Plaintiff should be deemed the prevailing party and he is entitled to an order reversing the $119,256.40 fee award in Defendant's favor, and entry of a fee award in Plaintiff's favor as the prevailing party.

CONCLUSION

For these reasons, Plaintiff respectfully submits that the Court should reverse the October 6 Order, which denied Plaintiff's motion for JNOV, or in the alternative, for a new trial. Plaintiff also submits that the March 11 Order, which granted Defendant's fee application in the amount of $119,256.40, should be vacated and that Plaintiff is entitled to entry of a fee award in his favor as the prevailing party.

Crew Schielke

CREW SCHIELKE, ESQ.
Attorney for Plaintiff

Dated: October 10, 2024