CHRISTOPHER REGAN, DAVID BONDY, TODD CONWAY, FRED FARKOUH, CHARLES FABRIKANT, EDWARD MATTHEWS AND ROBERT BAILEY	:	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiffs,	:	**DOCKET NO: A-001962-22**
v.	:	**Civil Action**
BRAD CONWAY AND HAZIM AUDALLA	:	**On Appeal from: Chancery Division -Essex County ESX-C-123-11**
Defendants,	:	**Sat Below: Hon. Jodi Lee Alper, J.S.C. and Hon. Thomas Moore, J.S.C.**
CONTROL SCREENING LLC,	:	
Intervenor.	:	

DEFENDANT/APPELLANT, BRAD CONWAY'S, BRIEF ON APPEAL

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RELEVANT PROCEDURAL HISTORY

In May 2011 Todd Conway ("Todd") and several other members of Autoclear LLC ("Autoclear") sued his brother, Brad Conway ("Brad"), in Chancery. (Da1456; Pa226) On August 11, 2011, the Court referred the matter to binding arbitration based on the Autoclear operating agreement. (Da1456) The arbitration proceeded in two "Phases". The first phase pertained to injunctive relief for management control, and the second as to Brad's alleged breaches of duty and damages. (Da1905)

In October 2015, the appointed Arbitrator changed management control from Brad to Todd's group. (Ibid.) The Court confirmed on January 28, 2016. (Da1906-07) On February 23, 2016, the Court restrained Brad from interfering with the transition of control and from representing to anyone that a new operating agreement was valid. (Da120) On June 7, 2016, the Court made additional restraints. (Da7)

On June 15, 2016, Plaintiffs filed an amended complaint which sought more than $1,000,000 in money damages based on Brad's breaches of fiduciary duty, which the Arbitrator and the Court deemed "Phase II" of the dispute. (Da269)(Da308) In Phase II Plaintiffs sought and received several arbitration orders for monetary relief between 2016 and 2018, which the Court confirmed. For example, on May 23, 2018, the Court confirmed a January 5, 2018, award voiding a $970,000 loan that Autoclear made to Brad and Ordered Brad to repay it. (Da3153; Da999) On July 18, 2018, Plaintiffs obtained a "Partial final award" that stripped Brad of $1,000,019 in Autoclear interests (the "Partial Final Award"). (Da131)

On October 9, 2018, Plaintiffs moved to confirm the Partial Final Award. (Da127) Brad opposed and cross-moved to vacate. (Da183) On December 7, 2018,

the Court confirmed that award and denied Brad's cross-motion.[1] (3T80:15-93:13)(Da3157) On December 13, 2018, the Arbitrator issued his "Final Award" for money damages and disassociating Brad, which Plaintiffs moved to confirm on February 26, 2019. (Da2209-2223)(Da1377) Brad again cross-moved to vacate. (Da2224) On April 10, 2019, the Court denied Brad's motion to reconsider vacatur of the Partial Final Award. (4T18:14-25)(3159a) On June 3, 2019, the Court confirmed almost all of the Final Award. (Da3161-3184)

The Court then appointed an independent expert for Brad's interest and in April and May 2022 held a valuation hearing. (Da3255) On November 18, 2022, the Court valued Brad's interests. (Da3185-3208) On January 24, 2023, the Court denied reconsideration. (10T27:18-30:5)(11T:6) (Da3209) On March 7, 2023, Brad filed his Notice of Appeal. (Da3220)

STATEMENT OF FACTS

This 12-year-old action arises from a dispute among members of Autoclear, a family business in which Brad and Todd are the two largest interest holders (29.5% and 11.8%, respectively). In May 2011, several individual members of Autoclear, including Todd, (hereinafter "Plaintiffs"), sued Brad to change management control and install Todd. Because Autoclear's operating agreement required AAA arbitration of disputes arising "hereunder", the Court referred the matter. (Da648)

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[1] Transcript references are:
1T 5/23/18 motion hearing; 2T 7/13/18 decision; 3T 12/7/18 motion hearing; 4T 4/10/19 motion hearing; 5T 2/9/22 hearing Vol. I; 6T 2/9/2022 hearing Vol II 7T 4/6/22 Vol 1 hearing; 8T 4/6/22 Vol II hearing; 9T 4/7/22 hearing; 10T 5/9/22 hearing; 11T 1/20/23 motion; 12T 1/24/23 decision

The AAA opened the case as a non-monetary claim and, according to regular case rules, appointed a single arbitrator (the "Arbitrator"). (Da354)

From 2011 through 2015, Plaintiffs sought to oust Brad from management by confirming majority votes. On October 6, 2015, the Arbitrator confirmed a vote to remove Brad as managing member and substituting Plaintiffs' group. The Chancery Court confirmed on January 28, 2016. (Da1577)

On February 23, 2016, Plaintiffs sought and received a TRO enjoining Brad again certain actions related to company management. (Da120) On June 7, 2016, the Court made its injunction permanent. (Da13) The Court did not grant sanctions or award legal fees or costs, but reserved decision. (Ibid.)

On June 15, 2016, Plaintiffs commenced what they called "Phase II" of their action against Brad, filing an amended pleading in arbitration which sought more than $1,000,000 in damages for alleged acts of misconduct. (Da269)(Da308) On receipt of Plaintiffs' amended complaint Brad requested that AAA follow its "Complex Case Rules" and appoint 3 arbitrators, because Plaintiffs' new claims were monetary and now sought more than the $1 million threshold which a single arbitrator was not allowed to decide. (Da316-317) AAA initially granted Brad's request and advised it would appoint two more arbitrators. (Da316) However, AAA's administrator then decided Brad had "waived" his right to 3. (Da320)

Despite Brad's repeated requests that AAA follow its rules governing the parties' arbitration and show where a waiver had occurred, AAA refused to appoint 3 arbitrators to decide Plaintiffs' monetary claims. (Da320-357) Garafalo was thus the only arbitrator ever to decide any of the issues in this entire dispute. He then made several awards for Plaintiffs and against Brad that exceeded $2.5 million. For

example, on January 5, 2018, he voided a documented loan between Autoclear and Brad for $970,000, even though the loan documents did not provide for arbitration and the loan was not Part of the Autoclear Operating Agreement. (Da999) On July 18, 2018, he entered the Partial Final Award which stripped Brad of $1,000,019 of interests in Autoclear. (Da131) His Final Award would later award another $1.1 million against Brad. (Da2209-2223)

In November 2017 the Plaintiffs filed a motion in aid of litigant's rights contending that Brad had violated the Court's June 7, 2016, restraint by seeking to remove the case to the Federal District Court in a pro se application, and by filing a claim in the Southern District of New York. (Da1) On May 23, 2018, that motion was granted and a cross-motion by Brad seeking discovery was denied. (Da3150)(1T) Also on May 23, 2018, the Court confirmed the Arbitrator's January 5, 2018, ruling voiding the $970,000 loan between Brad and Autoclear. (Da3153) The Court rejected Brad's argument that the loan agreements were not arbitrable where only disputes arising "under" the operating agreement were. (1T54:11-15; 1T56:12-14; 1T72:12-14) It ordered Brad to repay $700,000 to Autoclear. (Pa3154)

On July 13, 2018, the Court also issued a sanction order against Brad for $503,571.88 of Plaintiffs' counsel's legal fees, costs and expert fees, mostly related to the 2016 injunction, for Brad filing the SDNY complaint and attempt to remove the case to federal court. (Da3155)(2T13:24-14:12)(2T15:18-16:19)(2T25:5-10)

In September 2018, Plaintiffs moved for final relief with the Arbitrator on all remaining monetary issues, and disassociating Brad. During the two-year time period between 2016 and September 2018 Brad was *pro se*. However, near in time to Plaintiffs' motion for judgment, Brad found an attorney who had agreed to

represent him, but that attorney quit on short notice. (Da2154-55) Brad requested an extension of time from the Arbitrator. (Da2156) He argued nothing was urgent in the Plaintiffs' request for final relief. (Ibid.) He was given only 12 days. (Da2095)

Brad's new counsel (the undersigned firm) then agreed to appear and oppose Plaintiffs' motion for final relief if more time was allowed. (Da2154) Brad's counsel asked the Arbitrator for a 45-day postponement. (Ibid.) He cited several legitimate reasons for it, including that: (a) Brad had earlier secured different counsel who agreed to accept his case but who then suddenly withdrew; (b) Brad's ex-wife had suffered a stroke requiring him to care for their kids; and (c) Brad's increased child care obligation also hindered his time and ability to continue to find counsel for him and the minor children. (Ibid.) Another reason for the request for a 45-day postponement was the obvious volume of the Plaintiffs' submissions and arguments, the 8-year history of the case and a need to 'get up to speed' with wide-ranging facts and legalities. Plaintiffs' motion to confirm the Final Award contained 75 exhibits and almost 1,000 Pages. (Da1380-2223) Their motion for final relief to the Arbitrator was just as voluminous. However, Brad's counsel confirmed that, if given the 45-day extension, he could prepare and file opposition. (Da2154)

The Arbitrator denied the postponement request immediately and did not even await Plaintiffs' response as to consent or not. (Da2508) He then considered Plaintiffs' motion for final relief as unopposed and did not consider Brad's *pro se,* "out of time" opposition, or Brad's September 8, 2018 "cross motion". (Da2160)(Da2210) He later based some of his rulings for Plaintiffs on being "uncontroverted", ignoring that his refusal was the reason. (Da2211)

While their final relief motion was pending, Plaintiffs moved to confirm the Partial Final Award that stripped Brad of $1,000,019 in Autoclear interests. (Da1299) Brad's new counsel opposed and cross-moved for vacatur on the basis that the parties' arbitration agreement, and the AAA rules, had required a panel of 3 arbitrators for all "Phase II" claims because more than $1,000,000 was at stake. (Da183)(3T27:13-61:16) However, on December 7, 2018, the Court confirmed the Partial Final Award and denied Brad's cross-motion. (3T80:9-92:15) The Court found that Brad, while *pro se*, failed to challenge the 2016 partial award related to the $970,000 loan, and therefore waived any right to challenge all single arbitrator rulings made in Phase II. (3T78:5-9) The Court ignored Brad's argument that his prior challenge to the Plaintiffs' loan voidance claims was that they were not arbitrable at all because they were separately documented and did not arise "under" the operating agreement. (4T9:1-25) The Court instead ruled that Brad, although *pro se*, was still required to simultaneously assert that, what he considered to be a non-arbitrable claim was arbitrable, but only by a panel of 3. (3T78:12-15) The Court also decided that it had to defer to AAA's decisions, whether or not those decisions violated the arbitration rules and the parties' "agreement to arbitrate" thereunder. (3T80-92)

On December 13, 2018, the Arbitrator entered his final award (the "Final Award"). (Da2209-2223) He granted approximately $1,100,000 in additional relief against Brad, in some parts on undocumented claims. (Ibid.) He ordered Brad to reimburse Autoclear for $504,058.35 "for its Payment of [Brad's] legal fees and arbitration charges in this arbitration" on his behalf. (Da2212; Da2220) He awarded Plaintiffs another legal fee reimbursement of $70,975.36 for fees Autoclear Paid for

Brad in a "Morris County Estate Litigation." (Da2213) He voided $95,000 of medical expense reimbursements Autoclear paid to Brad. (Da2214) He also shifted to Brad $314,730.10 of Plaintiffs' legal fees in this action, based on his belief and the Plaintiffs' argument that the third-party tort exception to the American Rule and R. 4:42-9 somehow applied, although this was a direct action. (Da2215-16)

The "Final Award" decided all of Plaintiffs' monetary claims, rejected all of Brad's claims and expelled Brad from Autoclear, subject to valuation of his interests. (Da2223) However, the Arbitrator directed that the Court should value Brad's interests and do so pursuant to N.J.S.A. 42:2C-47(c). (Da2220)

Plaintiffs moved to confirm the Final Award. Brad cross-moved to vacate it again on grounds that: (a) AAA rules and parties' arbitration agreement required 3 arbitrators for Plaintiffs' monetary claims; (b) the Arbitrator's postponement denial was "misconduct"; (c) the Arbitrator ignored his own standard being applied for summary relief; and (d) no statute, rule or agreement allowed the $314,000 fee award and the "third-party tort" exception did not apply. (Da2224-2548)

On April 10, 2019, the Court denied Brad's motion to reconsider its December 7, 2018, refusal to vacate the Partial Final Award. (4T18:15-25) It also heard oral argument on confirmation or vacatur of the Final Award. (4T18-84)

On June 3, 2019, the Court by written decision confirmed the Final Award in almost respects, and again rejected Brad's vacatur motion. (Da3161-3184) However, the Court did vacate the Arbitrator's $314,000 fee award, agreeing it was a violation of New Jersey's public policy where no statute, rule or agreement permitted fee-shifting in this case. (Da3178) The Court agreed the Arbitrator had misread case law considering exceptions to the American Rule for third-party tort

litigation in this direct action between the Plaintiffs and Brad. (Ibid.) However, the Court confirmed the Arbitrator's ruling that Brad had to repay Autoclear $504,000 for his "personal legal fees" which Autoclear had paid for him in Phase I of this case. (Da3162) The Court also refused to vacate based on the postponement denial, believing that Brad had an "opportunity" to present evidence and that the Arbitrator had discretion. (Da3170-3173)

The Court then appointed an independent accountant (ultimately Robert Bonavito CPA) to render a valuation opinion and assist the Court's N.J.S.A. 42:2C-47(c) determination how much Brad was owed for his interest. (Da3255) The Parties then each employed their own accountants to do so as well.

During Bonavito's investigation and analysis, he reviewed Autoclear's financial records and confirmed that, after Plaintiffs took over management, they had voted to require Autoclear to "reimburse" their individual legal fees in this action and converted their own fee obligations to a "long term liability" of the company. (Pa2869;Pa2942-2943) (5T187:2-188:1) (5T189:22-25) (6T244:12-23) (7T5:4-6:1) (7T125:8-10) Bonavito testified that, as of the 2018 valuation date, Autoclear's books showed a $2.8 million "long term liability" attributed mainly to Plaintiffs' legal fees in this action. (6T244:12-245:8)(5T189:22-25(7T32:6-13)(7T125:9-10)(7T22:4-25:22(7T28:6-23)

Autoclear's own expert, Hubert Klein, CPA ("Klein") also confirmed that, as of the 2018 valuation date, Autoclear's book value and net asset value were reduced by the $2.8 million obligation that Plaintiffs had created to reimburse their personal legal fees in this case. (8T216:19-20)(9T65:20-66:22)(9T37:24-38:15) He confirmed the Plaintiffs had voted to create that company-wide expense and

liability, and placed a $3,389,000 "long-term liability" on Autoclear's books all at once, and the "majority" was for Plaintiffs' legal fees. (8T58:14-60:18) (8T79:4-5) (8T217:1-218:3)(9T124:19-125:4)(9T126:7-10) He even admitted that the fees had not actually been reimbursed, just booked as a company obligation. (9T38:4-5)

Therefore, Bonavito and Klein both confirmed that the net equity of Autoclear as a whole had been reduced, "dollar for dollar", by Plaintiffs' individual legal fees, which Plaintiffs' new majority had voted to have Autoclear "reimburse". (Pa2869)(7T33:10-34:8)(6T209:12) (9T69:18-70:15) Both experts also confirmed that net value of Brad's interests, also had been reduced "dollar for dollar" by his adversaries' personal legal fees *pro rata* to his ownership interest. (7T39:12-15)(9T60:1-17(9T107:23-108:6)(8T217:13-15)(7T43:18-44:23) (Pa2840) (Pa2842)

Bonavito and Klein also agreed that if Plaintiffs' $2.8 million legal fees were not allowed to count as <u>Autoclear's</u> valid "long term liability", then the company's book value for 2018, increased from $4,068,000 to $6,897,000. (7T35:6-36:14(9T:154:20-155:7) (9T155:24-156:23) (Pa2840) (Pa2842) (9T58:14-60:18) Both experts also confirmed that, without Plaintiffs' legal fees counting as a valid 'company' liability, their opinions "Net Asset Value" opinion increased 'dollar for dollar'. Specifically, Klein confirmed his opinion of Autoclear's 2018 Net Asset Value would increase from $6,232,073 to $9,061,545. (9T:84:20-85:3)(Pa2849)(9T60:1-18)(9T70:9-15) Bonavito confirmed his opinion that Autoclear's Net Asset Value increased to $9,106,577 if the Court did not allow Plaintiffs to make their legal fees a company liability. (7T34:23-38:2)(Pa2840)

Since Brad is Autoclear's largest member, Bonavito and Klein both confirmed that Plaintiffs' vote to require Autoclear to "reimburse" their legal fees had shifted

29.5% of their $2.8 million in legal fees incurred in this action ($826,000) to Brad by devaluing his equity interest through the artificially increased "liability" on the company books.[2] (9T59:22-60:18)(9T68:16-69:25) Autoclear actually had zero "long term liabilities" on its books before the Plaintiffs' change of control. (9T123:15-18) (Pa2942-2943) The Plaintiffs therefore used their majority control to create a 'corporate' liability for their personal legal fees, and in doing so charged Brad 29.5% of those fees incurred in this action. (7T216:19-21) (9T124:9-125:6)

After the valuation hearing the Parties submitted written arguments and proposed findings of fact but no oral argument occurred. Brad argued to reject the "long-term liability" booked as a company expense as clear fee-shifting in violation of New Jersey law and public policy. He argued the Bonavito and Klein opinions of Autoclear's 'net asset value' should be increased by $2.8 million, as both had opined it would "dollar for dollar", if the Court rejected the liability as a legally improper management "vote". (11T5-9:1)

Brad also argued that the fair value of his interests should not be discounted where Plaintiffs had already been awarded damages for any and all claims of "oppression" or wrongful conduct <u>before</u> the Arbitrator directed the Court should decide valuation according to <u>N.J.S.A</u>. 42:2C-47c. (11T9:2-11:5) Brad requested that the Court use net asset value as the method of valuation, not book value. He requested that the Court use Klein's "net asset value" opinion, but as increased upon legal rejection of the $2.8 million imposed company "liability" to $9,061.545.

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[2] One of the issues in dispute for the valuation hearing was whether Brad's interest was 29.5% or 33% but the Court determined it to be the former. (Pa3185)

On November 18, 2022, the Court issued a written decision. (Da3186-3208) It did accept "net asset value" as the proper valuation method. It also accepted Klein's opinion of Autoclear's net asset value. (Da3199-3200) However, in a footnote the Court ruled that Plaintiffs' vote to have Autoclear reimburse their legal fees, thereby charging those fees in substantial part to Brad, was allowed by the "business judgment rule". (Da3196 n.2) Thus, the Court accepted Klein's reduced net asset value of $6,232,073 (which had allowed the legal fee reduction as a "long term liability" of Autoclear). The Court valued Brad's 29.5% equity interests at $1,838,461.54. (Da3185)(Da3196).

The Court also ruled that Brad's past actions, "qualify Brad as an oppressor shareholder and the Plaintiff as the oppressed." (Da3204) The Court recognized the past actions had been litigated. However, it still applied a 35% discount to fair value based on that same past conduct and despite the prior remedies for it. (Da3204) The $588,307.59 discount to fair value was thus made <u>in addition to</u> all of the damages and fee awards that the Arbitrator and Court previously imposed for the same misconduct. (Da3162)

Brad moved for reconsideration. He argued Plaintiffs' vote to reimburse their own legal fees was not a valid exercise of the business judgment rule because it was plainly self-dealing, benefiting the very managers who voted for it and only them. He also argued the business judgment rule does not protect unlawful actions. The vote to impose Plaintiffs' personal legal fees on Brad, through the company 'agreeing' to reimburse, violated New Jersey law and public policy against fee-shifting. <u>R</u>. 4:42-9. Brad argued the Court had actually created an enormous exception to the American Rule that now permits a majority in <u>every</u> shareholder

case, simply by majority vote, to charge part of their legal fees to the other litigants involved in the case, at the rate of their minority interests. (11T6:16-7:16) He argued the business judgment rule can now trump the American Rule and R. 4:42-9 even during court control of a shareholder action. Brad also argued that discounting doubly charged him for the same conduct already remedied. (11T9:2-19)

On January 24, 2023, the Court denied reconsideration. (12T4:15-9:17) As to fee-shifting it ruled there was no evidence to support self-dealing because Brad's expert had not confirmed what the Court's expert and Autoclear's expert had definitely confirmed: the Autoclear "long term liability" was mostly Plaintiffs' own legal fees. (12T6:12-7:21)(Pa3209) Autoclear's own expert confirmed that. (8T58:9-23) The Court also reiterated its original belief that discounts normally should apply under law, and that Brad's arguments of law were not correct. (12T7:22-8:11) This appeal followed. (Pa3220)

I. IT WAS A MISAPPLICATION OF LAW AND PUBLIC POLICY FOR THE CHANCERY COURT TO PERMIT A MAJORITY IN A SHAREHOLDER CASE TO VOTE THE MINORITY TO BE RESPONSIBLE FOR THEIR LEGAL FEES, OR THAT THE "BUSINESS JUDGMENT RULE" PERMITS CIRCUMVENTION OF R. 4:42-9'S LIMITATIONS (Da3196, n2)(11T6:22-7:21)

The 'American Rule' is well recognized in New Jersey, that:

> judicial administration is best advanced if litigants bear their own counsel fees. Right to Choose v. Byrne, 91 N.J. 287, 316 (1982). Consistent with this policy, legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract. R. 4:42-9."
>
> [State, Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 504 (1983)].

Thus, "New Jersey strictly adheres to the "American rule" in regard to attorney's fees." First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419, 425 (App. Div. 2007). There is a "strong public policy disfavoring shifting of attorneys' fees." North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569, 730 A.2d 843 (1999). "The Comment to Rule 4:42-9 emphasizes that the Rule's history, policy, and intent conjointly support the strict limitation of fee awards…." McGuire v. Jersey City, 125 N.J. 310, 326 (1991).

This Court has also recently reversed a Chancery Court award of legal fees that was based on "equitable principles" where no expressly recognized exception in the law permitted same. In Tarta Luna Properties, LLC v. Harvest Restaurants Group LLC, 466 N.J. Super. 137, 155 (App. Div. 2021), this Court reversed a Chancery Judge's attempt to enlarge the exceptions to the American Rule based on general "equitable principles":

> Although the Chancery judge also concluded there was no established basis to support a fee award, she nevertheless found that equitable principles demanded the remedy, because "the safety of the public had been compromised by the decision to open [the restaurant]." The general concept of public safety has not previously been recognized as an exception to the policy preventing fee-shifting, and although it might support an award under certain egregious circumstances, those circumstances were not present here. [Id. at 155].

It ruled, "the Chancery court's award of attorneys' and expert fees was a mistaken exercise of discretion as it departed from well-established precedent and was not founded on any statute, court rule, or contract provision." Id. at 158.

Finally, and relevant to this Chancery Court's justification for permitting Plaintiffs to vote to shift their legal fees to Brad by the 29.5% value of his interests:

> The business judgment rule has its roots in corporate law as a means of shielding internal business decisions from second-guessing by the courts. Under the rule, when business judgments are made in good faith based on reasonable business knowledge, the decision makers are immune from liability from actions brought by others who have an interest in the business entity. The business judgment rule generally asks (1) whether the actions were authorized by statute or by charter, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable.
>
> [Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 175 (2011)].

"The business judgment rule protects a board of directors from being questioned or second-guessed on conduct of corporate affairs except in instances of fraud, self-dealing, or unconscionable conduct. Maul v. Kirkman, 270 N.J.Super. 596, 614, 637 A.2d 928 (App.Div.1994)." In re PSE & G Shareholder Litigation, 173 N.J. 258, 276-277 (2002). "A court may intervene to prevent (or annul) conduct on the part of directors that is fraudulent or represents a breach of their fiduciary obligations, id., or violates the law." Goldstein v. Lincoln Nat'l Convertible Secs. Fund, Inc., 140 F. Supp. 2d 424, 437, (E.D. Pa. 2001) (emph. added). "It is axiomatic that a court's deference to a defendant's business judgment is limited to lawful business purposes, and that a defendant's business judgment will not insulate an employer from liability for unlawful discrimination." Keiser v. Borough of Carlisle, 2017 U.S. Dist. LEXIS 25777, *24, 2017 WL 736851 (M.D. Pa).

This Court has also confirmed that, "[i]nstances of directors' self-dealing are always subject to the closest scrutiny by the court.... The propriety of judicial supervision to prevent or redress fraudulent or inequitable conduct on the part of directors has never been questioned." Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 94, (App. Div. 1956). In Daloisio, a self-interested transaction was held to have violated the business judgment rule. There, two directors of an entity that

had a business opportunity to acquire land secretly negotiated to acquire that land for their own separate entity. Id. at 86-87. When sued by the other shareholders, the Court found their actions were a breach of fiduciary duty. In rejecting the directors' 'business judgment rule' defense, that they "acted within the proper limits of their managerial discretion in assigning the contract", this Court held:

> We recognize the basic principle laid down in Ellerman v. Chicago Junction Railways, etc., Co., 49 N.J. Eq. 217, 232 (Ch. 1891), and cited by defendant, that
>
> > "Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and, in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation."
>
> But plaintiffs are not questioning the directors' acts for the reason that they were impolitic or merely inexpedient. They charge that the directors acted in bad faith and failed to exercise honest judgment. Under such circumstances the court will interfere.
>
> The Ellerman rule, granting wide discretion to corporate directors, is sound, but it is obviously inapplicable to a situation involving fraud, self-dealing, or unconscionable conduct.... Instances of directors' self-dealing are always subject to the closest scrutiny by the court, particularly here where the votes of Gavlak and Capelli were necessary to constitute the majority which authorized the questioned action at the directors' meeting of March 31, 1953. The propriety of judicial supervision to prevent or redress fraudulent or inequitable conduct on the Part of directors has never been questioned.
>
> [Id. at 93-94 (emph. added)(citations omitted)].

Thus,

> If a challenger rebuts the business judgment rule by showing bad faith or another disabling factor [i.e. self-dealing] then, the presumption of good faith is reversed and the burden of proof shifts to the defendant to show that the transaction was, in fact, fair to the corporation. In re PSE&G Shareholder Litigation, supra, 173 N.J. at 277. The entire fairness standard must be proven by clear and convincing evidence, and that absent such proof the transaction under scrutiny cannot receive the commendation of a Court of Equity. Daloisio v. Peninsula Land Co., supra, 43 N.J. Super. at 94 (citing Robotham v. Prudential Insurance Co., 64 N.J. Eq. 673, 712, 53 A. 842 (Ch. 1903)).
>
> [Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, *37-38 (Ch. Div. 2016) (emph. added)].

Here, the Chancery Court had already found that no statute, rule or agreement permitted shifting of legal fees to Brad and that, based on New Jersey's public policy in adhering to the American Rule, Brad could not be required to "contribute" to the other parties' legal fees. (Pa3161)(Pa3178) However, the Court somehow then permitted Plaintiffs indirectly to shift far more of their fees to Brad by a management "vote" to obligate Autoclear to "reimburse" their fees in this action against Brad. "This Court views the litigation costs as an example of business judgment and those will not be second-guessing the decision of the company. The reasons articulated were sound." (Pa3196 n.2) However, both the Court's expert and Autoclear's expert testified that 'vote' directly charged Brad 29.5% of his adversaries' personal legal fees through the "dollar for dollar" 'reduction' of his net equity interests in the company. (*See*, discussion and citations *supra* pp. 9-11) They both testified the majority of a $3,389,000 long term liability booked for Autoclear in 2015 was the Plaintiffs' legal fee reimbursement. (5T187:22-188-1)(7T31:3-13)(8T58:9-23)

This decision was a complete misapplication of the "business judgment rule" for several reasons and actually created another exception to the American Rule that would apply in every shareholder case through majority votes to obligate all shareholders and minority parties to reimburse the majority's personal legal fees. Firstly, there were no 'reasons' articulated in the valuation hearing to justify making Plaintiff's personal expenses the obligation of the company. Bonavito simply testified that he was satisfied from an accounting perspective that the managers had voted to create the corporate obligation. (5T187:5-189-13) There was no testimony that established why that was a legitimate business decision for the good of the Company, versus the good of the few members who voted themselves to be reimbursed. Likewise, Autoclear's expert, Klein, testified that the decision was made, but not how there was any benefit to the company itself. (8T217:24-218:3)(9T124:19-125:4)(7T126:7-10)

In reality, there was no sound 'business judgment' reason that benefited Autoclear from assuming Plaintiffs' personal fee obligations, let alone for $2.8 million. How would that help the Company versus only the members who voted to relieve themselves of their personal obligation? In fact, the imposition of this reimbursement obligation reduced the value of Autoclear "dollar for dollar" by $2.8 million. (8T62:17-63:8) (6T33:4-34:8) Each member's equity interest dropped "dollar for dollar" proportionately to his ownership by this vote to impose a liability for the Plaintiffs' personal legal fees. (Ibid.)

Moreover, the Plaintiffs hold minor interests in Autoclear and, even combined, they held far less than Brad held alone. Todd held 11.8%. (Pa2578) Christopher Regan owns only 1.85% (Ibid.) Charles Fabrikant has only 1.81%

ownership. (Ibid) David Bondy has only 1.69% (Ibid.) Conversely, Brad held 29.5%. Thus, the Plaintiffs who "voted" to shift their personal legal fee obligations to all members of Autoclear own only 17.15% combined. At the same time that they escaped 81.5% of their fees by this "vote", they charged Brad, who was their direct litigation adversary, 29.5% of their fees. They also charged the rest to the 52% non-party members of Autoclear.

Clearly, there was no legitimate business reason from the company's perspective or a company benefit from this vote. It did nothing but devalue the company and all members' interests. Plaintiffs voting for that do not care because they hold minor interests and because the vote imposed their fees in part on their litigation adversary, Brad. Indeed, the only real reason for this 'vote' was so that these members could try to shift to Brad a large percentage of their fees, since he held 29.5% of the total interests in Autoclear. This vote was the plainest "self-dealing" there can be. It benefitted only those who voted for it, in addition to harming the largest member who was also a direct litigant in this action, and the other 52% of the members who were not parties in the case at all.

Where the "business judgment rule's" presumption of validity was clearly rebutted by proof of "self-dealing", the Court was not permitted to simply accept the fee-shifting vote as a valid or "sound" management decision, as it did. In re PSE&G, *supra*. To the contrary, the Court was required to find the vote to impose a personal debt on the company and thereby shift these litigants' legal fees to the company and all shareholders impermissible, unless it was "entirely fair" to the Company "by clear and convincing evidence". Daloiso, supra,

The Court did not do so. In fact, it could not do so. It could not be "entirely fair" to the company for it to pay all of these members' legal fees, particularly where those members held only 17.5% of the total interests. Whether or not Brad held 29.5% and therefore was impacted the most by this self-interested vote, the members holding 52% of Autoclear, who were even not parties in this action, also became liable for Plaintiffs' legal fees by this vote as well. Their equity dropped directly.

The Court instead made an effort to avoid the issue by finding that Brad's expert had not established that this was self-dealing because he did not independently confirm the long-term liability was for Plaintiffs' legal fees. (12T6:8-13) However, his analysis was not necessary at all. The Court ignored that both Bonavito and Autoclear's own expert, Klein, had testified throughout the valuation that the liability was mainly and mostly, and "majority", Plaintiffs' legal fees. They testified the liability was imposed by the vote for Plaintiffs to "reimburse" themselves for those fees. (See, discussion and citations supra at pp. 8-10) Brad's expert had also testified that he had based his opinion on the Court-appointed expert's confirmation, so it did not matter whether he had personally confirmed. (10T35:8-13) It was established separately from Brad's expert that the long-term liability imposed in 2015, when there was none beforehand, was $3.389 million most of which was Plaintiffs' own legal fees, and as of the 2018 valuation date $2.8 million remained. (See, discussion and citations supra at pp. 8-10)

Still further, this vote violated Brad's rights to the protection of the American Rule, as a direct litigant in this case. He cannot be required to Pay his adversaries' legal fees without a statute, a rule or an agreement, none of which existed here, as the Court had already ruled. (Da2810-12) This vote was therefore a vote that

violated the law and New Jersey's public policy. The vote was undertaken during an action while all parties were under judicial control. No unlawful act could ever be protected by the business judgment rule, or else every unlawful act would be. No Court should hold that it lacked control over litigants' decisions that violate New Jersey law or public policy. This Chancery Court ruled exactly that.

By all means, the Plaintiffs' decision to impose their personal fees on the company, and therefore Brad at the rate of his 29.5% interest, was a vote to circumvent the American Rule and the Court's power to enforce the law and public policy. By refusing to reject the effort and the fee-shifting effect of Plaintiffs' management vote, the Court here ceded all existing and required judicial control over fee-shifting in this case to one set of litigants in this shareholder action: those holding the majority of interests. That decision should be reversed just for the protection of the judicial system's right to control its litigants' actions, and for proper relegation of the business judgment rule to lawful decisions only. It should be rejected for violating R. 4:42-9.

It also cannot be overlooked that in the Final Award the Arbitrator ruled that $504,058.35 of Brad's "personal legal fees", which Autoclear Paid, needed to be repaid. The Court confirmed that decision, meaning that Autoclear's payment of Brad's "personal legal fees" from the time that Brad was in management were disallowed in this case. (Da3162) There is accordingly no way that the Plaintiffs should have recovered $504,000 that Autoclear paid for Brad's "personal legal fees", but then later be allowed to charge Brad more than $826,000 of their own personal legal fees through by their own 'vote' after they took over management. However, that is what the Chancery Court blessed.

Indeed, this decision has enormous implications to every shareholder dispute in New Jersey and now creates a complete exception to the American Rule in all shareholder cases. If a majority of members in a shareholder suit can simply vote to make 'the company' reimburse their legal fees during that action, and if the Court presiding over that action must defer to that decision as within the "business judgment rule", then in every shareholder action a majority can <u>and will</u> supersede the control of the Court, <u>R</u>. 4:42-9, and New Jersey law and public policy. No vote to impose fee-shifting of a majority's legal fees onto the minority parties involved in the action could be voided by the Court. *De facto* fee-shifting must now be allowed even among direct parties to an action, such as exist here, and despite New Jersey law's strict prohibitions against fee-shifting.

In a hypothetical 51% vs. 49% shareholder dispute, the majority will always charge 49% of their personal legal fees in the action to the minority parties by simply voting that <u>the company itself</u> will reimburse them, as was done here. That will reduce the net equity value of the 49% owner's shares and thereby charge that minority owner his or her adversaries' legal fees even where no statute, rule or agreement allowed. A Court will have no authority to disallow despite <u>R</u>. 4:42-9. The single largest exception to the American Rule is now found in the "business judgment rule" even though it heretofore did not insulate against unlawful and/or self-interested decisions.

This Court should reverse that part of the judgment of valuation (and the Order denying Brad's motion to reconsider), to the extent they allowed Plaintiffs' legal fees to be considered a <u>proper</u> "long term liability" of <u>Autoclear</u> for purposes of valuing Autoclear and Brad's 29.5% interests. It should remand with instructions

to disallow the $2.8 million of Plaintiffs' legal fees as a company-wide "long term liability" for 2018, and increase Autoclear's net asset value accordingly.

II. IT WAS UNFAIR AND VIOLATED RES JUDICATA FOR THE COURT TO IMPOSE A DISCOUNT TO FAIR VALUE BASED ON MISCONDUCT THAT HAD PREVIOUSLY BEEN THE SUBJECT OF FINAL MONEY PAMAGE AWARDS BY THE ARBITRATOR (Da3202-3204)(12T7:2-8:11)

Res judicata, or claim preclusion, insulates courts from the inefficiency of relitigating claims that have already been resolved, thereby protecting the integrity of judgments and preventing the harassment of parties. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 409, 591 A.2d 592 (1991). To apply the bar, three elements must be met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
> [Id. at 412.]
>
> In appropriate circumstances, arbitration awards may be given collateral estoppel effect in subsequent judicial proceedings. Nogue v. Estate of Santiago, 224 N.J. Super. 383, 385-86, 540 A.2d 889 (App.Div.1988); Chattin, supra, 216 N.J. Super. at 634-38, 524 A.2d 841.
> ....
> The determinations made by the arbitrator or agency are entitled to preclusive effect "if rendered in proceedings which merit such deference." Hernandez, supra, 146 N.J. at 660, 684 A.2d 1385.... The proceeding must entail the essential elements of adjudication....
>
> [Konieczny v. Micciche, 305 N.J. Super. 375, 384-385 (App. Div. 1997)].

This Court has ruled that claim preclusion extends to relabeling arbitrated claims under different theories but based on the same facts:

> A party whose claims have been decided in arbitration may not then bring the same claims under new labels. . . . The same is true of claims that should have been submitted to arbitration, even if they were not actually heard, for any other rule would allow parties to split their causes of action. [668 F.2d at 1368; citations omitted].

[Chattin v. Cape May Greene, 216 N.J. Super. 618, 637 (App. Div. 1987)]. In Chattin, plaintiffs in arbitration obtained a final decision on breach of warranty claims for defects in building products. They then sued on different causes of action, but still related to the same defective products that were the subject of the arbitrated claims. The Court ruled that res judicata precluded the "new" causes of action when based on the same underlying dispute. Id. at pp. 637-638.

Here, Autoclear had already pursued all potential damage claims that could relate to Brad's ownership of shares and management during the arbitration. Autoclear obtained financial relief voiding more than $1,000,019 in membership interests issued to Brad, received back $700,000 on a disputed loan, and more than $500,000 for legal fees and expenses as a sanction for misconduct in 2016. (Da131; Da1299) What remained of Autoclear's damage claims went to a final hearing by motion in 2018, which the Arbitrator decided as unopposed because he had refused Brad's new counsel's postponement request. (Da2209-2223) From that award, Autoclear received a $504,000 counsel fee reimbursement for Brad's "personal legal fees" that Autoclear paid in Phase I of this case. (Pa2220) The Arbitrator awarded another $70,975 in counsel fee reimbursements that Autoclear claimed it paid for Brad's personal legal fees in a separate action. (Ibid.) He also ordered repayment of $95,000 of medical expenses. (Pa2221)

The Arbitrator also disassociated Brad by reference to all of the history of the parties' relationship. "There is no need to restate Respondent's objectionable

actions. Incorporated herein by reference is Claimant's brief September 1, 2018, Pages 3-6 as to Phase 1 and 7.16, as to Phase II, and Judge Moore's Orders." (Pa2221) However, the Arbitrator did not Order that Brad's interest should later be valued by the Court based on a relitigation of any of those facts and claims. (Da2220. para.3) He ruled the opposite, that the Arbitration was finished. "The Award is in full determination of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied." (Da2223) Therefore, there can be no doubt that <u>whatever</u> monetary relief the Arbitrator found due to Autoclear, based on any and all of the past wrongful conduct asserted against Brad in Plaintiffs' complaint for breach of fiduciary duty, that was <u>all</u> the monetary relief to which Autoclear was entitled. Once that Final Award was entered and reduced to a judgment on December 7, 2018 in the amount of $774,638.15, there was no longer any <u>unremedied</u> misconduct or oppression that needed to be considered when valuing Brad's interest. (Pa3210)

However, over Brad's *res judicata* objections, the Court did impose a significant 35% discount based on that same past conduct. (Pa3202-3204) It agreed that "fairness and equity" must be considered in deciding whether to apply a discount to fair value and that the past conduct was already litigated. However, it nevertheless re-used that past conduct as the basis to discount. (Ibid.) The Court even included reference to Brad's conduct, "adding additional incurred legal expenses to the Autoclear balance sheet..." (Da3204) Yet, it knew that Brad had paid the $503,000 legal and expense reimbursement on the July 13, 2018, sanction order. (Da3155) The Court had also confirmed the Arbitrator's reimbursement Order for another $504,000 of Brad's "personal legal fees" that Autoclear paid while

Brad was in management control during Phase I of this case. (Pa3162) Thus, the Court admittedly discounted based on the same past conduct separately remedied.

This was a misapplication of law, violated principles of *res judicata* and also the "fairness and equity" that the Court recognized was required in valuations. The result of doing so was to grant Plaintiffs another monetary award for the same conduct, by paying Brad 35% less than his shares are worth. This Court should reverse the valuation decision's discount to fair value as a violation of *res judicata*.

III. THE CHANCERY COURT SHOULD NOT HAVE DISCOUNTED FAIR VALUE OF BRAD CONWAY'S INTERESTS AT ALL WHERE IT DID NOT FIND THIS CASE WAS "EXTRAORDINARY" AND WHERE THE PRIOR MONETARY DAMAGE AWARDS PRECLUDED SUCH A FINDING (Da3202-3204)(12T7:22-8:11)

New Jersey law prohibits discounts except in "extraordinary cases." Lawson Mardon, Wheaton v. Smith, 160 N.J. 383 (1999). In Lawson, there was a buyout offered to shareholders based on a restructuring of the company and the sole question was fair value. Lawson, 160 N.J. at 389. The selling shareholders did not ask to be bought out and objected to discounts. The Supreme Court held none should apply:

> We find most persuasive those cases holding that marketability discounts should not be applied in determining the "fair value" of a dissenting shareholder's share in an appraisal action.... A rule that imposes a discount on the exiting dissenting shareholder "fail[s] to accord to a minority shareholder the full proportionate value of his shares . . . [and] enriches the majority shareholder who may reap a windfall from the appraisal process by cashing out a dissenting shareholder. . . ." Cavalier, supra, 564 A.2d at 1145. Such a rule also penalizes the minority for taking advantage of the protection afforded by the appraisal statute.... "Any rule of law that [gives] the shareholders less than their proportionate share of the whole firm's fair value would produce a transfer of wealth from the minority shareholders to the

> shareholders in control. Such a rule [also] would inevitably encourage corporate squeeze-outs[,]".... Those results are clearly undesirable.
>
> The history and policies behind dissenters' rights and appraisal statutes lead us to conclude that marketability discounts generally should not be applied when determining the "fair value" of dissenters' shares in a statutory appraisal action. Of course, there may be situations where equity compels another result. Those situations are best resolved by resort to the "extraordinary circumstances" exception in 2 ALI Principles, P7.22(a).
> [Lawson Mardon Wheaton v. Smith, 160 N.J. at 402 (emph. added)].

It held 'extraordinary circumstances',

> require more than the absence of a trading market in the shares; rather, the court should apply this exception only when it finds that the dissenting shareholder has held out in order to exploit the transaction giving rise to appraisal so as to divert value to itself that could not be made available proportionately to other shareholders. . . .
> [Id. at 403].

On the same day, the Supreme Court decided Balsamides v. Protameen Chems., 160 N.J. 352 (1999) in which they did allow a discount based on the "equities" of that particular case. There, the trial court had granted a buyout as the only remedy for oppression it found. It denied the oppressed shareholder's compensatory damage claims and did not award its legal fees. Id. at 360. The trial court thus ordered the worse-acting shareholder (both were somewhat at fault) to sell at fair value, less a marketability discount based on the oppression. Id. at 357. The Appellate Division reversed, holding no discount should be permitted based on a hypothetical sale to the public where other members were the ones receiving the interest, and it had higher value to them. Balsamides v. Perle, 313 N.J. Super. 7, 27-28 (App. Div. 1998). The Appellate Division, also "thought it would be "neither 'fair' nor 'equitable' for the surviving shareholder to obtain the selling shareholder's interest at a discount." Id. at 377.

The Supreme Court reinstated the discounted value under the unique circumstances presented where it found, "the 'equities' of this case quite clearly lie with Balsamides, it would be unfair to allow Perle to receive Protameen's undiscounted value." Id. at 378-379. However, it also reiterated that each decision on fair value and the application of discounts, "depends not only on the specific facts of the case, but also 'should reflect the purpose served by the law in that context." Balsamides, supra, 160 N.J. at 381. It was only on those particular facts that the trial court could discount for all of its several stated reasons, which facts included that there was no damage or attorney fee award granted. Id. at 357-358.

In cases decided after Balsamides and Lawton, this Court has ruled marketability and minority discounts should not normally be used to offset fair value. In Casey v. Brennan, 344 N.J. Super. 83, 112, (App. Div. 2001), adopted what the Delaware Supreme Court had said:

> In refusing to apply marketability discounts or minority discounts, the Delaware Supreme Court has noted that the "objective of [the statutory] appraisal is 'to value the corporation itself, as distinguished from a specific fraction of its shares as they may exist in the hands of a Particular shareholder.'" Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del.1989). We agree. Thus, we conclude that the judge correctly declined to apply marketability discounts or minority discounts to the value of the shares. In addition, we perceive no reason to distinguish, for these purposes between marketability and minority discounts and, thus, also conclude that minority discounts likewise are not to be applied in a valuation proceeding.
>
> [Ibid., (emph. added)].

In Brown v. Brown, 348 N.J. Super. 466, 483 (App. Div. 2002), the Appellate Division recognized that Lawson, Balsamides, and Casey all stood against discounts to fair value in most cases and that "extraordinary circumstances" were required:

> The general rule we deduce from Lawson and Balsamides is that in a statutory appraisal for purposes of determining the fair value of shares owned by a dissenting shareholder, N.J.S.A. 14A:11-1 to -11 (as in Lawson), or for valuing shares in a court-ordered buy-out resulting from an oppressed shareholder situation, N.J.S.A. 14A:12-7(1)(c) (as in Balsamides), neither a marketability nor a minority discount should be applied absent extraordinary circumstances. [Emph. added].

Brown recognized that in Balsamides the,

> extraordinary circumstance that warranted use of a marketability discount was that it was the oppressing 50% shareholder who was to acquire the shares of the oppressed 50% shareholder, and equity demanded that the oppressor not be rewarded for his conduct by allowing buy-out at a discounted price," while he was also going to retain ownership of the company.
> [Id. at 484].

The Appellate Division continued that:

> The ALI's rationale for the fair value, no-discount rule, a rationale adopted in Lawson and Balsamides, is that neither the dissenting (minority) shareholder, nor the oppressive (majority) shareholder, nor a veto-wielding (50%) shareholder, can be allowed to exploit the very situation that triggered the right to an appraisal, thereby capturing more than a proportionate share of the corporation's value and depriving other shareholders of their fair share.
> [Id. at 484-485].

Thus, in Brown, the Appellate Division denied discounts to fair value of a husband's interest in a closely held business, and recognized Balsamides stood on its unique facts. Id. at 488-489. Brown adopted the decision in Casey, supra, that no discount is allowed absent "extraordinary circumstances". Id. at 486-487. It also recognized in its facts that:

> But liquidity is of little consequence here. As between James and his brothers, the only other shareholders, there is no evidence of a contemplated sale of all or Part of the business, forced or otherwise. All of the evidence supports the likelihood that the business will continue under the present ownership for the foreseeable future, with James and Richard each continuing to be the active owners and officers....

[Id. at 488].

As such, the only case on which the Court here relied, which did support a discount, Balsamides, had facts entirely dissimilar to this one and was "extraordinary" on its unique facts. Here, the Court was not ordering a buyout of Brad's interest as the sole remedy granted to Plaintiffs for acts of oppression found. The Court also did not deny Plaintiffs' compensatory damage claims, as occurred in Balsamides. To the contrary, in this case millions of dollars in monetary awards for oppression or breach of duty, and anything else that Plaintiffs could assert in the arbitration, were imposed against Brad, and all prior to the Court's valuation. This Court was thus deciding fair value only after that substantial and complete monetary relief had been afforded. This case is therefore the opposite of Balsamides in that regard. There were no unremedied "equities" weighing in favor of discounting fair value, and certainly none based on the past misconduct the Court cited. (Pa3204) While the Plaintiffs here perpetually argued that Brad's wrongful conduct justified a discount, they completely ignored, unlike Balsamides, they got separate monetary relief for any and all such conduct throughout the entire arbitration and including the Final Award. They also got a fee award for conduct that violated the Court's Order changing management control. (Da3150) Brad would not be "rewarded", as Balsamides sought to avoid, by obtaining fair value in this case precisely because of those separate and prior damage and fee awards not present in Balsamides. Under these facts, Balsamides would have followed the companion decision of Lawton and found no "extraordinary circumstances" warranted less than fair value to Brad. As well, like in Brown, "liquidity" of Brad's shares was irrelevant here, where Plaintiffs

have no interest in selling. They refused even to consider a competitor's solicitation for a sale, elicited during the valuation hearing. (9T74:20-22)

The Chancery Court here also did not even make the finding that the case was "extraordinary". (Da3202-05) It simply ruled that the discounts normally should be applied as a matter of law, and that "equity" warranted a discount here. (Pa3205) It did not say specifically what equity that was, other than Brad's past oppressive actions, which the Court even agreed had been already litigated and decided. (Pa3204) Both of these decisions were errors of law. Discounts should not normally apply. Casey, *supra*. This case also could not be deemed "extraordinary" given the prior, separate damage and fee awards made for misconduct. A proper valuation here should have been just a "fair value" appraisal process, without regard to the past oppression or misconduct separately remedied. To add an additional discount against Brad of $588,000 based on that same conduct granted a windfall to the Plaintiffs, which the law precludes. Casey, *supra*, 344 N.J. Super. at 112.

For these reasons, this Court should reverse and remand for entry of judgment for the fair value of Brad's interests, without Plaintiff's legal fees as a 'company' liability and without any discounts.

IV. THE ARBITRATOR'S 2018 PARTIAL AND FINAL AWARDS WERE INVALID WHERE THE PARTIES' ARBITRATION AGREEMENT AND AAA RULES REQUIRED 3 ARBITRATORS TO DECIDE MONETARY CLAIMS GREATER THAN $1,000,000 (3T80:12-92:5)

N.J.S.A. § 2A:24-8 provides: "the Court shall vacate the award in any of the following cases: … (d) an arbitrator exceeded or so imperfectly executed their

powers." This statute follows closely the language of the Federal Arbitration Act's ("FAA") vacatur provision of 9 U.S.C. § 10, which allows vacatur:

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

New Jersey courts confirm that, "in adopting the Act, the Legislature intended to follow the FAA...." Minkowitz v. Israeli, 433 N.J. Super. 111, 133, (App. Div. 2013). Thus, cases applying the FAA regarding an arbitrator's exceeding of powers are persuasive authority concerning N.J.S.A. 2A:24-8. Those cases hold that the power and authority of the arbitrators in an arbitration proceeding is "dependent on the provisions of the arbitration agreement under which the arbitrators were appointed." Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir, 1991). "Arbitration is fundamentally a creature of contract, ... and an arbitrator's authority is derived from an agreement to arbitrate." Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 169 (3rd Cir. 2009).

Numerous federal cases have vacated arbitration awards that were not rendered strictly in accordance with the parties' agreement. In Tamari v. Conrad, 552 F.2d 778, 781 (7th Cir. 1977), it was held, "an arbitrator's award is not self-executing. It must be enforced by a court, and it will not be enforced if the arbitrator was not chosen in conformance with the agreement of the Parties to arbitrate or is otherwise unqualified." In Szuts, *supra*, the Court vacated an arbitration award that was rendered by 2 arbitrators where the agreement required 3:

> A federal court can vacate an arbitration award in a case "where the arbitrators exceeded their powers." 9 U.S.C.A. § 10(d).... The power and authority of the arbitrators in an arbitration proceeding is dependent on the provisions of the arbitration agreement under which the arbitrators were appointed.

> We think the provision of the arbitration agreement that "any arbitration hereunder shall be before at least three arbitrators" means what it says: any contract-related controversy between Szuts and Dean Witter must be arbitrated by no less than three arbitrators.... The going forward of two arbitrators after a third arbitrator was removed from the Panel thus violated the provision of the arbitration agreement that "any arbitration . . . shall be before at least three arbitrators." [Szuts, supra, at 931].

In Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272, 791 F.2d 22, 25 (2d. Cir. 1986), the Second Circuit reversed confirmation of an award because the arbitrator had not been appointed according to the parties' agreement. It held:

> Under Article XX of the Avis Agreement, the Union and Avis agreed to binding arbitration only by a person selected under AAA rules. Courts generally enforce such clauses strictly, vacating awards entered by arbitrators whose qualifications or method of appointment fail to conform to arbitration clauses. *See Food Handlers Local 425 v. Pluss Poultry, Inc.*, 260 F.2d 835 (8th Cir. 1958) (arbitration Panel composed of one agency-appointed and one union-appointed member, when contract called for jointly-appointed Panel of three).
> [Emph. added].

In, Food Handlers Local v. Pluss Poultry, Inc., 260 F.2d 835, 836 (8th Cir. 1958), the parties' agreement required multiple arbitrators but, due to disagreement, only 1 heard their dispute. The Court found that arbitrator's ruling exceeded his powers because "the arbitrator, who made the award sued on, was without power to arbitrate or render award upon the disputes." Id. at 838-839. In, El Vocero de Puerto Rico v. Union de Periodistas, 532 F. Supp. 13, 16 (Dist. P. R. 1981), the Court voided an arbitration award entered because the parties' agreement required their arbitrator to be from the Department of Labor and was not at the time of his award.

> The arbitrator resigned from his position with the Department of Labor, but failed also to resign as such. This situation being contrary to the intention of the parties, we find that he lacked jurisdiction to issue his award, which is therefore invalid and cannot prevail. [Ibid.]

Here, the AAA rules became part of these parties' agreement to arbitrate in 2011. (Da222) R-1(a) of AAA Rules provides that, "the parties shall be deemed to have made these rules a part of their agreement whenever they have provided for arbitration by the [AAA] under its Commercial Arbitration Rules." (Da197) Under AAA Rule L-2, "if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrators shall hear and determine the case." (Da212)(emph. added)

The Plaintiffs' initial demand for arbitration was mostly for injunctive relief and control of Autoclear, which the Chancery Court had even recognized. (Da226) (1T, Vol 2 6:8-13) No damage claim specified any amount of money in the initial demand, let alone one exceeding $1,000,000. (Da226-268) The AAA even booked the Plaintiffs' initial claim as a "non-monetary" claim. (Da354) It then clearly proceeded under its regular Rule 15 and appointed 1 arbitrator. (Da202)

The AAA's initiating correspondence to the parties also did not state that the matter was proceeding under the Large Complex Case ("LCC") Rules, L1 to L4. (Da222) The AAA also did not convene an "Administrative Conference" as is required under L-1 for Large Complex Cases before an arbitrator or Panel of arbitrators is chosen. (Da354-355) AAA Rules require that in complex cases, "prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the Parties agree otherwise, [and] conduct an administrative conference...."). (Da212) From such administrative conference, which did not occur here, there would have needed to have been an express agreement to proceed with 1 arbitrator instead of 3, under L-2 of the LCC. (Da212)

It was not until Plaintiffs' June 2016 amended claim that they for the first time asserted that Brad's breach of fiduciary duty caused a $950,000 loan to be made and a $96,000 medical reimbursement. (Da308) On June 17, 2016, Brad advised AAA that the newly disclosed monetary claims triggered the LCC Rules and, from that point forward, required an administrative conference and 3 arbitrators. (Da317) In response, the AAA agreed that the large complex procedures "are in place for this matter". (Da316) The case manager further stated that, "if you are no longer agreeable to one arbitrator to hear this matter, please confirm and the AAA will proceed in accordance with the Rules." (Ibid.) Accordingly, in its June 17, 2016, response to Brad's request to apply the LCC Rules, the AAA agreed to do so unless he agreed to proceed with one arbitrator but told Brad that Mr. Garafalo would still be one of the arbitrators. AAA did not state that Brad had agreed prior to 2016 to proceed with one arbitrator. AAA stated Brad had the right to two additional arbitrators for the Phase II claims if there was "no longer agreement to one arbitrator". (Ibid.)

Plaintiffs' counsel then objected to the request to apply the LCC and stated that the same claims existed from the beginning of the case, just in then unknown amounts. (Da313) However, Plaintiffs' counsel admitted the opposite, that, "Phase One was about who were and who were not members of this LLC...." (Da314) He wrote that, "Phase II was supposed to be about our damages and Mr. Conway's breaches of fiduciary duties and disassociation from the Company, together with claims about striking down increased membership interests given to Mr. Conway and his immediate family." (Ibid.) Thus, Plaintiffs' counsel admitted that Phase I

was not a "Large Complex Case" but Plaintiffs expected Phase II would be, which was only in June 2016 when they filed the amended. (Da269-312)

On June 28, 2016, the AAA case manager advised that 1 arbitrator would remain based on the waiver provisions of the regular commercial arbitration rules; Rule 37, which provides:

> Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object. [Da319)(Da207)].

In response Brad asked AAA to show where an express waiver of rights had occurred. AAA's case manager simply reiterated that she had decided there was a waiver, giving no reasoning. (Da319)(Da322)

Brad requested reconsideration of the unreasoned waiver ruling. (Da324-331) He pointed out that the waiver provision on which the AAA case manager relied required "knowledge" of a requirement of the rules before it could be waived. (Pa325) He demonstrated to AAA that its rules would only trigger the LCC procedures where there was a, "disclosed claim or counterclaim of any party that is at least $500,000." (Pa326, *citing* R-1c Pa197-98)(emph. added)). He demonstrated that, before the June 2016 amendment, there was no "disclosed" claim for any dollar amount. (Ibid.)(Da269) Brad pointed out the Parties had been paying AAA's fees at lower, regular rates than were required for Large Complex Cases. (Da327)(Da336) Brad also pointed further that the new pleading named 11 new Parties, none of whom could be deemed to have waived rights to the LCC Rules back in 2011. (Da327) He advised that the AAA could not ignore its own rules

because of expediency, and that is why L-2 was mandatory and required an express agreement not to use 3 arbitrators. (Da327-328)

Significantly, AAA had even confirmed the timeline of events in the case from 2011 and that no monetary value was set to Plaintiffs' "Phase I" claim in 2011. (Da354-55) Its own summary confirmed it started the case with a "non-monetary filing fee", which meant the LCC Rules were never effectuated such that a knowing waiver under Rule 37 could not have been expressed in 2011. (Ibid.)

AAA refused to reconsider. (Da332)(Da356) The single Arbitrator when went on to decide far more than $1,000,000 of monetary claims against Brad. (Da131)(Da999)(Da3202) He had no power or Brad's agreement to do so. This case was no different than any of those cited above, where the Federal District and Appeals Courts all strictly and readily construed the "agreement to arbitrate" as whatever were the parties' governing rules. In all of those cases the awards were vacated, as statutorily required. Here, every decision by the single Arbitrator from and after June 2016, including the July 18, 2018, Partial Final Award and the Final Award, "exceeded the powers" of 1 Arbitrator to decide.

However, the Chancery Court refused Brad's motions to vacate. The Court somehow believed that, despite all of the law cited, it did not have jurisdiction to sit in review of the AAA's decision to proceed with one arbitrator. (3T86:7-22)(3T80:12-92:15) The Court relied on the case of US Steelworkers of America v. Warrior & Gulf Navigation, 363 U.S. 574 (1960) and Barcon v. Tricounty Asphalt, 86 N.J. 179 (1981), which the Court ruled require minimal interference by Courts in the arbitration process. The Court also cited Tretina Printing v. Fitzpatrick and Assocs., 135 N.J. 349 (1994) and Linden Bd. Of Educ. v. Linden Educ. Assn, 202

N.J. 268 (2010) for the proposition that the law limits a Court's ability to vacate an arbitration decision to certain delineated issues, ignoring that "exceeding powers" is one of those delineated. N.J.S.A. 2A:24-8d.

The Court also held that the case of Dockser v. Schwartzberg, 433 F.3d 421 (4th Cir. 2006) prevented Courts from deciding, even on a confirmation and vacatur motion, whether or not AAA had followed its rules when it found a waiver of the LCC rules had somehow occurred. The Court applied Dockser to mean that all procedural decisions of arbitration authorities are theirs to make without judicial review, ignoring all of the cases cited above that ruled oppositely. The Court also found that Brad had waived his right to claim 3 arbitrators were needed by failing to raise the issue whilst *pro se* in 2016 when opposing confirmation of the Partial award voiding the $970,000 loan. (3T86:23-88-12) Both reasons were incorrect.

First, the Court ignored that the prior award from 2016 was one that Brad challenged based it not being arbitrable at all, because the arbitration was limited expressly to claims arising out of Autoclear's operating agreement. In 2016 Brad had argued (although not as cogently as a practicing attorney might have) that:

> The Loan Contracts which are now nearly four years in performance, never contained an arbitral provision, but held instead a selection of court clause, which under federal and supreme court law is just as favored, as an obligation or not to submit to arbitration on a given issue, here the Loan, stems only from the contract that might contain it.
> [Pa1090-91].

He stated, "Here, in the 2014 Loan Contract there never was an arbitral agreement between the two parties." (Pa1100). He argued, "the absence of an arbitration claims means the arbitrator could not have any jurisdiction on the Loan Contracts." (Da1157) The only consent to arbitration that exists is for disputes arising out of

the 1995 Operating Agreement, which states, "13. Arbitration. Any material dispute hereunder shall be decided in accordance with the rules of the American Arbitration Association which award shall be final." [Pa648 (emph. added)].

Thus, the Court's ruling imposed on Brad a duty to make alternative arguments that were contrary to those that he did make. The Court ruled that, by failing to make that contrary argument, Brad knowingly waived his right to challenge the arbitrator exceeding his powers for the other $2 million of awards he made. That was unfair. (3T86-87) A waiver finding on those facts was a misapplication of law and an abuse of discretion.

Second, the Court incorrectly ruled that deference to AAA's procedural decisions precluded vacatur even if those procedures were violations of the parties' arbitration agreement. The Court thereby voided the statutory basis to vacate an award under N.J.S.A. 2A:24-8d. entirely. It ruled that an arbitrator can exceed his powers if the arbitration body allows that, and a Court will still enforce an award. The Court's reliance on U.S. Steelworkers, supra., was misplaced. That case was based on specific provisions of the Labor Relations Management Act, and in recognition that, "the present federal policy is to promote industrial stabilization through the collective bargaining agreement." Id. at 578. The U.S. Supreme Court recognized the difference in labor agreements from normal commercial arbitrations,

> in the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here.
> [Ibid.]

In addition, the main reason that the U.S. Steelworkers Court held the question of arbitrability of the particular dispute between labor and management should be decided by the arbitrator was because the CBA expressly said so. Id. at 576. "The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' [QUOTING THE CBA] which the parties had agreed would be determined by arbitration." Id. at 585 (emph. added). Accordingly, that case simply recognized that in the specialized context of CBA's and labor unions, and wherein the Particular CBA had specifically granted the arbitrator power to decide questions of arbitrability, the Courts would not interfere.

Likewise, Barcon v. TriCounty Asphalt Corp., 86 N.J. 179 (1981) did not support the Court's assertion that minimal interference with arbitration decisions voided the statutory grounds to vacate. Brad's argument was that the Court had the power and the duty to consider whether or not the arbitrator exceeded his powers by examining, as a threshold question, whether or not the ruling was made pursuant to the rules of the arbitration, and within the statutory vacatur grounds of N.J.S.A. 2A:24-8. Barcon supported Brad. Its trial court had vacated an award for arbitrator bias, one of the statutory grounds. Id. at 184-185. The Appellate Division affirmed. The Supreme Court granted *certiorari* and agreed vacatur was required. Id. at 189. Thus, none of the three reviewing Courts found that they lacked power to apply the statute, or that the arbitration body would decide the question of arbitrator bias.

In fact, in Barcon the Supreme Court recognized the power of judicial review of awards when the arbitrator exceeded his powers:

> Arbitrators are given these extensive powers subject to judicial review limited the narrow grounds of arbitrator Partiality or corruption, fraud, undue means, conduct prejudicial to the rights of a Party or failure to make a 'mutual, final and definite award,' N.J.S.A. 2A:24-8, or 'evident' mistakes by the arbitrators, N.J.S.A. 2A:24-9.
> [Id. at 187-188 (emph. added)].

N.J.S.A. 2A:24-8, of course, includes, "where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." Barcon, supra, at 187.

Next, the Court's reliance on the 4th Circuit case of Dockser v. Schwartzberg, was incorrect because that was not a case decided on the issue of whether or not an arbitrator had exceeded his powers, under 9 U.S.C. sec. 10. Dockser was interpreting 9 U.S.C. sec. 5, which allows declaratory judgment actions to compel appointment of an arbitrator when a party to an arbitration agreement "shall fail to avail himself of such method [of arbitration]". Id. at 424. In Dockser no award had been made and the parties had just started their arbitration. It was an action commenced specifically to ask the Court to choose an arbitrator. The court deferred the question of how many arbitrators the parties' agreement required because it was not within 9 U.S.C. sec. 5's allowed declaratory relief, under which the plaintiff had sued. Indeed, in Dockser, supra, 433 F. 3d at 425 the Court directly noted the difference. "The question of whether [the arbitration rules] have properly been applied falls outside of the ambit of sec. 5".

The 4th Circuit itself separately recognized the distinction that the Chancery Court here did not, and therefore that Dockser was inapplicable. In Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223, 224, (4th Cir. 1994), the parties' arbitration agreement required mutual selection of arbitrators.

Defendant demanded arbitration with the Rice Millers Association ("RMA"). However, under the RMA's rules the RMA selects arbitrators. Cargill objected to that on the basis that the parties' agreement controlled. Id. at 224. The RMA "rejected this contention and appointed itself as the three-member arbitration Panel for the dispute." Ibid. The disputed Panel then proceeded over Cargill's objection and made a final award. Id. at 224-225. The Fourth Circuit vacated:

> Because "arbitration is a matter of contract," ... parties may determine by contract the method under which arbitrators for their disputes will be appointed ... Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir. 1991); Avis Rent A Car System, Inc. v. Garage Employees Union, 791 F.2d 22, 24 (2d Cir. 1986).... In fact, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, expressly states in section 5 that if the parties have provided in their contract "a method of naming or appointing an arbitrator or arbitrators . . ., such method shall be followed." 9 U.S.C. § 5.
>
> ....
>
> Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated, Szuts, 931 F.2d at 832; Avis, 791 F.2d at 26; Bear Stearns, 728 F. Supp. at 501 ("Arbitrator[s] who [are] improperly elected have no power to resolve a dispute between the parties . . . .")....
>
> [Id. at 225-226] (citations omitted)].

In fact, in doing so the Court in Cargill rejected the argument which this Chancery Court accepted, that the Court had to, "defer to the determination by the RMA arbitration committee that the arbitration clause did not require arbitrators chosen by mutual agreement of the parties." The 4th Circuit stated to the contrary:

> We find this position untenable. While we do, of course, defer in some circumstances to contractual interpretations of arbitrators, we are aware neither of any authority nor any reason to defer to the contractual interpretation of the arbitration committee of an arbitral forum. That the members of this arbitration committee later appointed themselves as the

arbitrators does not alter our determination not to accord their interpretation deference. [Id. at 226].

Here, the Chancery Court applied Dockser contrary to what even the 4th Circuit would. The Court effectively overruled all of the cases which held that the Court has power and, is in fact required, to decide whether or not the arbitrator "exceeded powers", pursuant to 9 U.S.C. sec. 10 and N.J.S.A. 2A:24-8d. The Chancery Court here had no right to defer to AAA's refusal to grant 3 arbitrators to Brad where AAA rules did require 3 for monetary claims exceeding $1 million. Instead, the Court here was bound to vacate all Phase II awards because the parties' arbitration agreement (i.e., AAA rules) did not permit 1 arbitrator to act alone as he did for amounts that large. N.J.S.A. 2A:24-8d.

This Court should reverse the Orders confirming the 2018 Partial Final Award and the Final Award and grant the cross-motions to vacate. It should Order new hearings with 3 arbitrators.

V. THE ARBITRATOR'S UNREASONED DECISION TO DENY BRAD'S COUNSEL A POSTPONEMENT OF PLAINTIFFS' MOTION FOR FINAL RELIEF SO THAT HE COULD LEARN THE FACTS OF THE CASE AND PRESENT BRAD'S SIDE, CONSTITUTED MISCONDUCT REQUIRING VACATUR (Da3172-3173)

N.J.S.A. 2A:24-8c. also requires vacatur:

> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any Party;

"In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a 'fundamentally unfair' proceeding.'" Mandell v. Reeve, 2011 U.S.

Dist. LEXIS 114804, *12-13, 2011 WL 4585248 (S.D.N.Y.). "A failure to postpone a hearing can constitute misconduct warranting the vacation of the award only when, in the totality of the circumstances, the refusal to postpone impinges upon a party's fair and reasonable opportunity to be heard by the arbitrators." Johowern Corp. v. Affiliated Interior Designers, Inc., 187 N.J. Super. 195, 199-200 (App. Div. 1982).

In Mandell, the movant's attorney had requested an adjournment of a hearing date because he was "unavailable". Id. at p. 12. The Court found the movant's counsel's unavailability suspect since he had been retained a year earlier and stated solely for the purpose of obtaining a continuance. The vacatur was denied. The District Court distinguished that situation from the one at issue here.

> Notably, this was not a situation in which a pro se litigant recently retained counsel who needed time to be brought up to speed on the case. To the contrary, Mandell's attorneys — who were retained as early as July 2009 to represent Mandell in the related criminal action, United States v. Mandell, 09 Cr. 662 (PAC) (S.D.N.Y.) — explicitly stated that they represented Mandell "solely" for the limited purpose of obtaining a continuance of the hearing. [Id. at 14 (emph. added)].

Brad's case is precisely one as referenced in Mandell, where a *pro se* litigant recently retained counsel, and that new counsel had asked for a reasonable period of time to prepare and submit opposition and "get up to speed on the case". (Da2154) Brad had also submitted sufficient reasons for his delay in appearing with counsel, including that he had found one earlier who agreed to appear and sent retainers, but then declined. (Ibid.) His ex-wife had also had a stroke leaving him to care for their children, which inhibited his time available to search for counsel he ultimately did find. (Ibid.) Most importantly, the request to postpone was not by Brad seeking more time to find an attorney. It was made by the attorney he had found. That

attorney confirmed that, if given 45 days, he could appear and file opposition. In a case that was 7.5 years old, with no stated reason that a final hearing needed to occur sooner, the denial was misconduct. (Ibid.)

In fact, the Arbitrator did not specifically reject any of those reasons as invalid. (Da2508) He did not specify why a denial was appropriate. He also did not give any real reason that he needed to proceed to the final hearing sooner than 45 days. He simply denied the request without reason, and even before Plaintiffs stated their position. (Ibid.) He wrote in response to Brad's own request for extension only that he had "given leeway" in the past but did not want to do so this time. (Da2511) He gave no reason for not wanting to do so again. (Da2508)

His personal whims should not have been paramount to the several legitimate reasons Brad had given for a delay in finding counsel, or to reject Brad's right to have the new counsel that he did find appear to present his case. After all, this was not a trivial or procedural hearing. This was the final hearing in which more than $1,000,000 of additional relief and Brad's expulsion from Autoclear were at stake, and where Plaintiffs' submission was inches thick with more than 70 exhibits. (Da2209-2223) New counsel also was not requesting months to get up to speed. He confirmed he could be ready in 45 days in a case that had no urgent need to finish after 7.5 years. (Pa2154)

Amazingly, the Arbitrator denied the request for postponement at the same time that he actually had acknowledged he was "concerned" about who was representing Brad's minor children. (Da2093) If the Arbitrator was concerned about representation of Brad's children, then the postponement should have been granted just for that reason. The appearance that new counsel offered to make was

for the children's interests as well. (Da2155) Instead, the Arbitrator effectively denied Brad the right to counsel in the most critical stage of the proceeding for his own personal reasons and without finding Brad's reasons were insufficient.

His decision resulted in the Final Award that imposed more than $1,100,000 in monetary damages and expelled Brad from Autoclear. (Pa2209-2223) Parts of his decision were made based on the lack of opposition and facts being "uncontroverted", which his postponement denial had caused. (Da2211) The Arbitrator also misinterpreted New Jersey law against fee-shifting by considering the third-party tort exception as applicable in this direct action. That decision, although later vacated, cost Brad $314,000 and would not have resulted if Brad's new counsel was permitted time to appear. (Da2216)

The Arbitrator also awarded Plaintiffs $70,975 for a fee reimbursement in a separate matter although Plaintiffs failed to document that claim in any way. (Da2213) In fact, Plaintiffs did not even attach a single payment record that Autoclear's CFO claimed he "reviewed" when certifying that the company had Paid Brad's counsel on his behalf and that Brad later received payment from a different entity in reimbursement. (Pa2034) The Plaintiffs' CFO's certification was also suspect where he claimed an invoice from Brad's counsel was presented <u>after</u> the date a Consent Order actually had been entered in that separate case confirming a different entity was paying, not Autoclear. (Pa2544)(Pa2518) At minimum, Brad was entitled to cross-examine the CFO and to present as a witness the attorney the CFO claimed Autoclear paid.

However, the Court refused to deem the postponement denial to be arbitrator "misconduct". The Court found instead that the arbitrator was within his discretion

to deny the *pro se* litigant a chance to have counsel get up to speed. (Da3172-3173) The Court found that Brad did have an "opportunity" to present his arguments because of the deadline that the Arbitrator had imposed and the 12-day extension for a pro se submission. (Da3170-3172) Yet, Brad's *pro se* writing style would make that a false 'opportunity'. (*See*, e.g. Da359-412; 1061-1178;75-115; 359-421 & 2160-2208) While Plaintiffs continually stated in the case that Brad held a law degree, his inability to cogently express legal positions was obvious after 2 years of *pro se* status. (Ibid.) The need for an attorney here was actually heightened under the circumstances where Brad was shown incapable of briefing his position understandably or pointedly.

Thus, it was not so simple for the Court to find that Brad, as *pro se,* had a chance to oppose. He had to have the "fair and reasonable" opportunity to be heard. Johowern, supra, 187 N.J. Super. at 199. That inquiry should have considered as paramount that Brad needed counsel, and had found new counsel who could oppose with only a 45-day postponement in a 7.5 year old case. (Da2154) The Court should have considered the lack of any stated reason from the arbitrator why the final hearing needed to occur sooner than the requested 45 days. It should also have considered the breadth of the Plaintiffs' motion for final relief, which obtained $1.1 million in damages and expulsion of Brad from Autoclear. All of that juxtaposed against merely 45 days in a 7.5-year-old case, can lead to no other conclusion than the denial of the postponement "impinged on" Brad's rights to be heard, and was arbitrator "misconduct" that denied Brad the reasonable chance to participate, pursuant N.J.S.A. 2A:24-8c. Any decision otherwise was an error of law. (Da3172)

In fact, the Chancery Court's reliance on Manchester Township Bd. of Education v. Thomas P. Carney, Inc., 199 N.J. Super. 266, 274-275 (App. Div. 1985) should have actually led to a finding in favor of Brad that he had the right to the postponement. There, the Court vacated an award after the arbitrator denied a chance to present a rebuttal witness. Id. at 270-271. The Appellate Division affirmed. Id. at 272, "the AAA Rules requires a full and equal opportunity to the Parties for the presentation of any material or relevant proofs.... N.J.S.A. 2A:24-8c mandates that an award be vacated where the Parties are guilty of misconduct in "refusing to hear evidence, pertinent and material to the controversy . . ." Case law further holds that the Parties to arbitration are entitled to a full hearing. There was no discretion to be exercised by the arbitrators whether to permit rebuttal testimony." Id. at 274-275 (emph. added).

Where vacatur has been required for merely the denial of a rebuttal witness, it was also required for this Arbitrator's refusal to permit a short postponement in a case with no urgency so that new counsel could appear and defend a *pro se* party who clearly had trouble expressing his positions.

This Court should reverse the Orders refusing to vacate the Partial Final Award and the Final Award based on arbitrator "misconduct", and should return the matter for new arbitration hearings on all "Phase II" claims.

VI. THE $503,000 SANCTION AGAINST BRAD CONWAY WAS AN ABUSE OF DISCRETION AND MISAPPLICATION OF LAW (1T46:25-47:6) (3T13-24:14-12)(3T32:19-33:16)(Pa3155)

Relief under *Rule* 1:10-3, "is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of" the order a party has violated. Ridley v. Dennison, 298 N.J. Super. 373, 381, 689 A.2d 793 (App. Div.

1997). The scope of relief awarded must be "limited to remediation of the violation." Abbott v. Burke, 206 N.J. 332, 371, 20 A.3d 1018 (2011); Bd. of Educ. of the Twp. of Middletown v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501, 509 (Ch. Div. 2001). "It has been generally understood that the appropriate coercive method ought to be carefully tailored and sometimes issued in a particular sequence--from least to most drastic. In truth courts should hesitate before leaping to the most severe sanction." Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n, 352 N.J. Super. 501, 509 (App. Div. 2001).

> [B]efore ordering any sanction, [a Court] must determine that defendant has the ability to comply with the order [that] he has violated * * *." *Essex County Welfare Bd. v. Perkins,* 133 N.J. Super. 189, 195, 336 A.2d 16 (App.Div.1975).
>
> [Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 392 (1995)].

Here, the Court had enjoined Brad in June 2016 against interfering with the change of control. It did not grant the Plaintiff's fee application at that time. (Pa13-14) The Court instead indefinitely withheld that decision in order to hold the threat over Brad's head. (1T46:7-23) (1T11:14-12:6)

More than 1 full year then passed without an alleged violation of the change in control Order. The conduct which prompted a second motion in aid of litigant's rights in November 2017 related to Brad filing an action in the SDNY and a notice of removal of the case to federal court in October 2017. (Pa1) (1T20:8-13) The Court believed that Brad's pleading allegations challenged the legitimacy of its change in control order based on language asserted related to the Autoclear operating agreement. (1T15:5-16:4)(1T20:8-23:24) However, these were just allegations in a pleading, not actions that actually prevented management of Autoclear.

As part of its May 2018 Order in aid of litigant's rights the Court directed Brad to withdraw those claims, which he did. (Pa3151) Nevertheless, the Court then still found that the "only remedy" it had to avoid further violations was to award all of the fees and costs reasonably incurred from the 2016 temporary restraining orders, as well as the fees for defending the federal filings by Brad and fees for the second motion. (1T46:25-47:6) It thus granted a $503,000 fee application on July 13, 2018, most of which related to the Plaintiffs' 2016 legal fees and expert fees. (3T13-24:14-12)(3T32:19-33:16)(Pa3155)

The Court did not make a specific finding why anything less would be insufficient to be "coercive" going forward. The Court also ignored that its change of control Orders were 17 months old before Plaintiffs alleged a violation. That substantial gap in time actually showed that Brad had honored the change of management control Order, as the Court was hoping he would. The Court also failed to recognize that the challenged conduct was assertion of a claim in a court, not an actual interference with the company's operation. Therefore, the most drastic fee award was not needed as the "only remedy" that might deter in the future. The Court's ignorance of these mitigating factors and the enormity of the award show it was punishing Brad in this fee award. That was an abuse of discretion and misapplication of law under the circumstances.

Finally, the Court did not make any "ability to pay" determination before entering the Order for fee reimbursement. Manalapan Realty, L.P, supra, 140 N.J. at 392. It noted Brad's opposition that stated he was disabled and on Medicaid. (3T17) However, it did not make any findings that he was able to pay.

For these reasons, this Court should vacate the May 23, 2018, and July 13, 2018, Orders related to the fee award. It should remand for further consideration of whether any smaller award could have sufficiently deterred Brad from further violations and the financial impacts of any such award.

CONCLUSION

Brad respectfully requests: (a) reversal of the decisions and Orders that confirmed the July 18, 2018 and December 13, 2018 arbitration awards and denied Brad's motions to vacate (and to reconsider), remanding for new arbitration hearings on all monetary claims; (b) reversing the November 18, 2022 valuation (and order denying reconsideration), and remanding with instructions to disallow: (i) Plaintiffs' personal legal fees as a company-wide liability; and (ii) any discounts to fair value; and (c) vacating and remanding the 2018 fee award.

Respectfully submitted,
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Date submitted: October 20, 2023 *s/ Anthony Arturi, Esq.*

CHRISTOPHER REGAN, DAVID BONDY, TODD CONWAY, FRED FARKOUH, CHARLES FABRIKANT, EDWARD MATTHEWS and ROBERT BAILEY, Plaintiffs, v. BRAD CONWAY and HAZIM AUDALLA, Defendants, And CONTROL SCREENING, LLC, Intervenor.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001962-22 ON APPEAL FROM: CHANCERY DIVISION—ESSEX COUNTY ESX-C-123-11 SAT BELOW: HON. JODI LEE ALPER, J.S.C. AND THOMAS M. MOORE, J.S.C. CIVIL ACTION

INTERVENOR/CROSS-APPELLANT AUTOCLEAR, LLC f/k/a CONTROL SCREENING, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO APPEAL AND IN SUPPORT OF CROSS-APPEAL

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June 3, 2019 Order and Opinion of Honorable Jodi Lee Alper J.S.C., confirming in Part Final Arbitration Award Da3161a

November 18, 2022 Order of Honorable Jodi Lee Alper, P.J.Ch. and Opinion of Value of Brad Conway's Interests Da3185a

STATEMENT OF THE CASE

Plaintiffs Christopher Regan, David Bondy, Todd Conway, Fred Farkouh, Charles Fabrikant, Edward Matthews, and Robert Bailey (the "Individual Plaintiffs"), and Intervenor Autoclear, LLC f/k/a Control Screening, LLC ("Autoclear" or the "Company") (together with the Individual Plaintiffs, the "Plaintiffs"), submit this memorandum of law in opposition to defendant Brad Conway's appeal and in support of Plaintiffs' cross-appeal of orders (1) vacating the portion of the final arbitration award requiring Brad to reimburse the Company 40% of its legal fees incurred in arbitration Phase I; and (2) valuing Brad's interests in the Company using Fair Market Value rather than tax book value.

PROCEDURAL HISTORY/STATEMENT OF FACTS[1]

In May 2011, the individual Plaintiffs filed this action to enforce an election wherein they had voted, in October 2010, to remove Brad Conway ("Brad")[2] from his management role at the Company. (Pa1). In 2011, the Court compelled arbitration of these claims. (Pa5). Arbitrator Garofalo (the "Arbitrator") bifurcated the arbitration into Phase I, dealing with issues of control over the company, and Phase II, dealing with claims against Brad including breach of fiduciary duty, dissociation, and others.

[1] Transcript are identified as referenced in Brad's Brief, n.1

[2] Brad is referred to by his first name to avoid confusion with his brother, Plaintiff Todd Conway. No informality or disrespect is intended in doing so.

During Phase I, the Arbitrator issued a January 2, 2014 Order finding that Brad had exceeded his authority by unilaterally amending the Company's Operating Agreement. (Da967) The Arbitrator also issued a December 10, 2014 Order voiding Brad's attempt to redomicile the Company to Belize. (Da980) Among other things, the Arbitrator found that "Claimant's amendments to the Operating Agreement and Belize activities... are an attempt to change, to the substantial detriment and damage of [Plaintiffs] and other non-aligned Brad Conway Members, the landscape of the control and governance of the Company. These activities have been... determined to be *ultra vires* and illegal." Id. at page 10 (also quoting the trial court as finding the actions not "equitable... to move the Company... out of the country without notifying plaintiffs... and then to assert that Belize law must be controlling....").

During Phase I, Arbitrator Garofalo also issued a March 17, 2015 Order for contempt of a prior order prohibiting Brad from filing any action in Belize and issuing a sanction of over $84,000.00. (Da997) Phase I ended on October 6, 2015, when Arbitrator Garofalo (the "Arbitrator") entered a Partial Final Award on all Phase I issues and awarded control to the Individual Plaintiffs, removing Brad from management of the Company. (Da654).

The trial court confirmed the Phase I Partial Final Award via a January 28, 2016 Order, but stayed implementation until a subsequent February 8, 2016 Order,

when the confirmation was given full force and effect. (Da1577; Da1619). On February 8, 2016, immediately following the trial court's implementation of the January 28, 2016, Brad directed Company employee Josette Caruso to steal the Company's servers and have them loaded on a plane to the Philippines, where Brad intended to continue running the Company. (Da1621) Thus, on February 8, 2016, the trial court also entered an Order dictating that Brad (and others) return certain Company computers and other equipment, and that "[t]he Fairfield, New Jersey police department, or any other law enforcement agency, are hereby authorized to take all lawful measures necessary to enforce this Order and return the aforementioned property to the Company premises...." (Da1626)

On February 23, 2016, the trial court issued a temporary injunction, and on June 7, 2016, this Court issued a permanent injunction, preventing Brad from taking a list of actions that were contrary to prior Court Orders confirming and implementing the Phase I arbitration award. (Pa99-106) The injunctions prohibited Brad Conway from: (a) "interfering with the transition of control of Autoclear LLC," (Pa100); (b) "contacting... any employee... or other business partner of the Company for the purpose of interfering" with the change in control; (Ibid); (c) "representing... that Brad Conway remains in control of... the Company," (Pa101); (d) "representing to anyone that any Operating Agreement... has any legal effect...

other than the Operating Agreement dated April 1, 1995... ;" (Ibid); and (e) setting various other restrictions. (Pa99-101)

During Phase II, on October 25, 2017, Brad separately sued some of the Plaintiffs in this action, along with their attorneys and the American Arbitration Association ("AAA"), alleging a violation of the Racketeer Influenced Corrupt Organizations Act (*i.e.*, RICO), breaches of fiduciary duty, and other issues in the United States District Court for the Southern District of New York in an action bearing Docket Number 1:17-cv-08245 (RJS) (the "SDNY Action"). (Pa151) Brad complained, *inter alia*, about "the transfer or assignment of the Todd managers' debts and obligations incurred while mere activist investors in 7/13, to try to 'buy' an as yet unannounced 11/13 election, for well over $500,000, evidenced in a letter [and] at least one contract...," (Pa157), and that certain managers "wrongfully approved a $500,000 assignment of their personal obligations and debts contracted to Audalla... to the LLC in 2016 illegally and secretly..." (Pa166-167)

On January 5, 2018, the Arbitrator issued a Partial Final Award which voided the self-dealing $970,000 "loan" that, during Phase I, Brad caused the Company to provide to Brad and which he used, in part, to purportedly purchase $270,000 in additional membership interests in the Company. The January 5, 2018 Partial Final Award, among other things, also voided those additional interests. The trial court confirmed that Award on May 23, 2018. (Da1212)

Also during Phase II, the trial court found Brad to have violated the June 7, 2016 injunction, and issued May 23, 2018 and July 13, 2018 Orders resulting in a monetary sanction against Brad in the amount of $503,577.99. (Da3155)

On July 18, 2018, the Arbitrator issued a Partial Final Award, which voided Brad's self-dealing issuance to himself, during Phase I, of over $1,000,000 in Company membership interests that Brad called "acquisition management fees," or "AMF's." The trial court confirmed that award on December 7, 2018. (Pa245; Da3157)

Phase II ended on December 13, 2018 when the Arbitrator issued a Partial Final Award granting summary judgement on all remaining issues in the arbitration. (Da2209-2223) The Arbitrator determined (and the Court confirmed) that Brad's "wrongful conduct, during Phase I and through the change over to new management," constituted relevant "circumstances of the case." (Da2211) That Partial Final Award stated, among other things:

- That "Pursuant to N.J.S.A. 42:2C-46, Respondent, Brad Conway, is hereby dissociated from and expelled as a member of the Company, with the effect provided in N.J.S.A. 42:2C-47." (Da2220)

- That:

  > [Autoclear] asserts [Brad Conway's] conduct warrants expulsion under N.J.S.A. 42:2C-46 in that his wrongful conduct, during Phase I and through the change over to the new management, materially, adversely affected the Company and violated the Operating Agreement in many

> significant respects, all of which makes it unreasonable and impracticable to carry on the Company's activities with him as a member.
>
> There is no need to restate [Brad Conway's] objectionable actions.... The proofs leave no doubt. [Brad Conway's] activities warrant dissociation: He has engaged in wrongful conduct that has adversely and materially affected the Company. (Da2211-2212)

- That membership interests Brad caused the Company to issue to him in 2009 and 2010 in the amounts of $100,000 and $136,000 respectively were void and of no legal effect, (Da2221); and
- That "[i]n connection with Phase II, Respondent, *pro se*, filed an Answer and a seven count Counterclaim.... Counts I through VI were dismissed as being claims against non-party individuals and claims not within this Arbitration. These claims were dismissed." (Da2218)

On March 25, 2019, U.S. District Judge Richard J. Sullivan issued an order dismissing Brad's separate complaint against some of the Individual Plaintiffs, their lawyers, and the AAA, finding Brad failed to plead a valid RICO, breach of fiduciary duty, or any other claims. (Da3123-3149) Judge Sullivan also sanctioned Brad in the amount of $20,142.10 due to Brad's misrepresentations to that Court in his *in forma pauperis* application and in an adjournment request claiming Brad's medical conditions necessitated an adjournment. Among other things, Judge Sullivan noted:

- Brad had previously removed the New Jersey Superior Court action to the United States District Court for the District of New Jersey only days before a hearing scheduled by Judge Moore to determine if Brad Conway had violated the Courts' injunction, and

then tried *again* to remove the action, again *one day* before Judge Moore's rescheduled hearing, (Da3127)

- Brad's "central theory of wrongful conduct is that the members... combined to purchase Audalla's proxy in order to win control over Autoclear and ***later agreed to have Autoclear assume the debt*** they incurred in purchasing the proxy," (Da3135) (emphasis added);

- Brad's breach of fiduciary duty claim included that "various defendants engaged in self-dealing in violation of their fiduciary duties and New Jersey law," by, among other things, alleging that "transfer[ing]... their own individual debts for... debts to the LLC, in secret for personal tax and cash or debt benefits to... themselves as individuals," (Da3142);

- Finding that "[Brad's] suit was essentially an improper attempt to appeal judgements entered by the arbitrator and confirmed by the Superior Court [of New Jersey]," (Da3148)

On June 3, 2019, the New Jersey Court confirmed in part, and vacated in part, the December 13, 2018 Phase II Partial Final Award. (Da3161-3184)

The trial court vacated that portion of the December 13, 2018 Partial Final Award that required Brad to reimburse 40% of the legal fees Brad caused the Company—which he fully controlled throughout Phase I—to incur by litigating Brad's individual issues and claims. (Da3178-3182)

In confirming the portion of the award dissociating Brad, the trial court on August 9, 2019 sought clarification from the Arbitrator regarding the buyout process. (Pa252-254) On August 26, 2019, the Arbitrator clarified he intended the award to state "[t]he methodology, therefore, shall be determined by the Court,"

and that the valuation date should be the "date of the Final Award after adjusting the membership interests in accordance with the Final Award." (Pa255-256)

On January 21, 2020, the trial court appointed an independent valuation expert, affixing the valuation date as December 12, 2018, and instructing the expert to determine various values as of that date, as well as the historical methodology the Company used in similar transactions. A May 4, 2020 Order modified the January 21, 2020 Order to appoint Robert A. Bonavito, CPA, as the independent expert. (Pa275) On October 14, 2021, the trial court denied Plaintiffs' motion to fix the percentage of Brad's interests in the Company, and ordered that the experts also opine on the percentage interest to be purchased along with the value. (Pa309)

The trial court held a four-day hearing commencing on February 9, 2022 and continuing on April 6, April 7, and May 8 (the "Valuation Hearing") relating to (a) the value of Brad's membership interests in Autoclear, LLC, and (b) the amount of those interests. In addition to the court-appointed valuation expert ("Mr. Bonavito"), the Court heard Plaintiffs' expert, Hubert Klein, CPA ("Mr. Klein"), and Brad's expert, Gerard Giannetti, CPA ("Mr. Giannetti").

During the Valuation Hearing, Mr. Bonavito, Mr. Klein, and Mr. Giannetti (the "Experts") testified about their valuation reports, which were entered at the Valuation Hearing as Exhibit J-1 (for Mr. Bonavito) (Da2853), P-3 (for Mr. Klein) (Da2986) and D-2 (for Mr. Giannetti). (Da2579) Each testified to various

modifications to be made to their reports given the difference in what they believed to be Brad's percentage interests when they wrote their reports, and what they believed to be Brad's percentage interests after accounting for the aggregate $236,000 reduction required by the Court's confirmation of the Phase II Partial Final Award. Each expert testified to the accuracy of the recalculated numbers. (Da3045).[3]

The Court heard testimony relating to the fair value and fair market value of Brad's interests as of December 13, 2018, as well as the book value as of December 13, 2018 and December 31, 2017. The relevant determination on appeal is the undisputed Autoclear historical methodology of referencing the book value on the prior-year's tax returns (tax book value on December 31, 2017) (hereafter "Tax Book Value"). Brad's 29.5% interest in Autoclear as of December 13, 2018, is indisputably $745,244.93 if using the Tax Book Value.

Prior to the hearing, Autoclear's current Chief Financial Officer Kevin Lavan provided a certification analyzing the historic Tax Book Value method and providing over a decade's worth of transactions at Tax Book Value that occurred while Brad was CEO. During the hearing, Mr. Bonavito confirmed that Autoclear has a long history of using the prior year's book value—meaning the unadjusted

[3] The remaining testimony is not recited here, as the only aspect at issue is (a) the application of discounts, and (b) the use of book value as opposed to fair market value, both of which are legal issues not subject to expert testimony.

net equity value—from the prior year's tax returns in order to value the purchase and sale of member interests. (5T89:16-19) This methodology meant "if I sold my interest today [(a date in the year 2022)], I would get the value for December 31, 2021." (5T54:7-19) No matter what part of a year an interest was sold or purchased, Autoclear always used the previous year's Tax Book Value. (5T87:23-25: 88:1-2) Approximately 119 prior purchases and sales of equity interests were documented to have used this methodology without any adjustments to the value listed on the prior year's return. (9T50:6-51)(5T89:20-24) Mr. Bonavito specifically confirmed this practice by reviewing every single equity transaction from 2004 to 2018, which was over 100 prior transactions, in which "every single one was done at book value the prior year." (5T63:16-65:4; 52:15-18; 66:9)

Mr. Bonavito interviewed company employees who confirmed that book value was the historic methodology. (5T88:6-11) He even interviewed Brad himself, who confirmed not only that this had been Autoclear's historic practice, but that Brad was the one who performed the calculations. (5T88:12-89:7) **All** of the transactions Mr. Bonavito reviewed occurred while Brad was CEO of the Company, meaning they **all** occurred when Brad had significant control over how the transactions occurred. (5T91:6-14; 88:3-5)(9T105:5-8) Some of the transactions included Brad himself. (5T91:19-92:1)

Brad's expert (Mr. Giannetti) agreed that Autoclear's historic practice for equity transactions, including purchases and sales, was to use the prior year's tax number as it appeared on the tax return, without adjustment. (9T188:3-9)(10T25:8-19) Mr. Giannetti confirmed that Brad himself did not dispute this historic methodology. (9T189:9-11) Mr. Giannetti had no reason to disagree with the findings of the other two experts about the Company's historic practice of referring to the prior year's tax return to value every single prior equity transaction in the Company. (10T27:21-25)

Mr. Bonavito noted that for the history of the Company, all the members had access to the same information and "no one had ever questioned it in the past, so we used that number." (5T52:19-54:2) Mr. Bonavito acknowledged that Brad had explained that this method was chosen as a matter of convenience, (6T230:18-25), and Mr. Bonavito rejected the assertion that the prior transactions related to interests that were "too small" to justify the engagement of a valuation expert, stating:

> I mean, if I was a shareholder in this company in 2000, let's say '17 or '16, I would pay for a valuation expert to come in and value my shares.... [F]or example, if I was selling 1 percent interest of 40,000 and they said they want to give the book value and I would say no, why don't we hire, you know, Klein and Giannetti to come in and do a valuation for us and I want fair market value or fair value.... So they would come in and you know, instead of getting 40,000, maybe I can get 100 or— So I personally would tell anybody who is selling shares in this company prior to 2018 to hire a valuation expert to come in and

> value the shares because you would more than pay for the valuation expert, based on the increase in value of the sale.

(6T222:8-223:12) Mr. Bonavito also noted that Autoclear could have obtained an appraisal every year, which is something Mr. Bonavito has seen other small companies do. (7T120:6-8) Autoclear simply chose not to do so. (7T12-:9-11)

All experts agreed that if Brad's interests were purchased by Autoclear after the Valuation Hearing at some amount other than prior year's Tax Book Value, he would be the first person ever to receive that valuation. (5T92:16-21)(7T169:13-18) Mr. Bonavito agreed it would not make sense to allow someone to purchase shares at book value and sell them at some other value: it is "common sense" that "if you're buying shares at book, then you should sell them at book... it's commonsense... if that's what the company's done historically," regardless of the volume of shares being bought or sold. (7T118:16-119:11)

On November 18, 2022, the Court issued an Order declaring that Brad held a 29.5% interest in Autoclear after accounting for all the prior orders voiding certain actions Brad had taken to give himself more, and valuing that 29.5% interest at $1,250,153.95 using the Fair Market Valuation reached by Mr. Klein.

LEGAL ARGUMENT

I. The trial court did not abuse its discretion by sanctioning Brad $503,000

Brad's argument that the trial court abused its discretion by sanctioning him more than $500,000 (the "Sanction") is utterly meritless and should not be taken seriously in light Brad's egregious conduct throughout the record of this case.

A. The Court was within its authority to sanction Brad Conway.

R. 1:10-3 provides the Court with the ability to coerce compliance with its orders. See e.g., Thackray Crane Rental Inc., No. A-1940-11T4, 2013 WL 811301, at *3 (App. Div. Mar. 6, 2003) (quotation omitted). The nature of the sanction lies solely in the Court's discretion. Bd. of Ed., Twp. Of Middletown v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501, 509 (Ch. Div. 2001). A court's power under this rule includes the issuance of equitable relief, monetary relief, and even incarceration pending the party's compliance with the order. See Milne v. Goldberg, 428 N.J. Super. 184 (App. Div. 2012). ("Rule 1:10-3 allows a court to enter an order to enforce litigant's rights commanding a disobedient party to comply with a prior order or face incarceration.") (citing Saltzman v. Saltzman, 290 N.J. Super. 117, 125 (App. Div. 1996)); Bd. of Ed., Twp. Of Middletown, 352 N.J. Super. at 509 (incarceration available if less coercive measures would fail to prevent the irreparable injury being caused by the disobedient party).

B. Brad's conduct justified the sanction.

Brad makes the patently false and, frankly, shocking assertion that "Brad had honored the change of management control Order, as the Court was hoping he would." (Db49) (emphasis in original). Appellant is undoubtedly banking on this Court not reviewing the record itself, as he inexplicably fails to discuss how the myriad violations of the trial court's orders that led to the Sanction somehow comport with the claim that he "honored" the change in control. This Court need not, and should not, opine on the propriety of the Sanction in a factual void.

C. Brad's harmful (and illegal) efforts to loot the company and to avoid the arbitration altogether.

Although the bifurcation was intended to save time, Phase I lasted over five years. During that time, Brad remained in control of Autoclear. The lengths to which Brad went to retain control were innumerable. The most egregious were (a) issuing himself retroactive bonuses, a/k/a the "AMF," to increase his ownership in Autoclear by over 8%, (Pa246); (b) "loaning" himself nearly $1M, some of which he used to allegedly purchase additional shares, (Da999-1000); (c) redomiciling Autoclear to Belize without notice to the members and then suing some of them there, (Pa16)(Pa51); and (d) unilaterally amending the operating agreement to *remove the arbitration clause*—during the arbitration—and claiming it removed the Court and Arbitrator's jurisdiction to continue. (Pa61)

When Phase I ultimately ended on October 6, 2015, with Brad's removal from management of the Company, (Da672), Brad refused to relinquish control until the Court confirmed the award on January 28, 2016. (Da1577-1578) On January 28, 2016, counsel for Plaintiffs presciently voiced concern that "computer files and money, and inventory [might] suddenly [go] to the Philippines... " if the Court did not specifically order that Brad not do those things. To alleviate these concerns, the trial court ordered "that counsel... meet and discuss and attempt to jointly develop a plan." Ibid. The trial court "had tremendous concerns about the transition of control... and... wanted a plan....". (Da1996) The trial court intended for nothing to be done "outside the ordinary course of business... during this stay period" both as to the U.S. portion of Autoclear and its "overseas" subsidiaries. (Pa94) Critically, the trial court urged that "if anything happens that is contrary to what we're discussing on the record, there will be consequences." (Pa95)

Plaintiffs "actually submitted to the plan, Brad did not." (2T6:16-16) Because Brad refused to participate, on February 8, 2016, the trial court was forced to simply lift the stay and place the Individual Plaintiffs in control of the Company. (Da1619-1620) The trial court "retain[ed] jurisdiction for Phase II." (Da2014)

D. Even after confirmation of Phase I, Brad attempted to thwart new management's control, leading to a sweeping injunction.

As the trial court prudently observed, the events that unfolded on and after February 8, 2016 were "unacceptable" and "shocking." (2T33:20-25) "[T]he

company's suspicions about Mr. Conway's motives and plans turn[ed] out to be entirely justified."(2T34:6-8) Brad "and his agents... stole the company's computer servers critical to the functioning and operation of the company, made unauthorized financial transactions, and attempted to maintain and regain control of the company." (2T33:6-12) "Egregious actions have occurred here" which the trial court "just f[ou]nd outrageous," and which led it to be "surprised the company is still operating," because Brad's actions created "a very serious risk of going insolvent." (Da2012)(Da2015-2016) "The company's very survival was at stake, because of Mr. Conway's conduct during and after the transition of control," and "[i]t was remarkable in real time to be hearing what was going on." (2T26:21-24; 33:1-2)

First, within hours of lifting the stay on February 8, 2016, Brad "within hours" held a "purported members meeting", to "transfer control...away from plaintiffs." (Da1998) He had issued "sham membership interests in the [C]ompany," and asked the recipient employees "to endorse blank signature pages which they believe were [then] used as part of the February 8th election...." (Da2003) Thus, "[t]he moment the pen strikes the order the stay is removed," and "[w]e have an emergency meeting." (Da2001) But Brad "honored" the transition.

Second, the same day:

> Mr. Brad Conway and his associates, including Josette Caruso took the company's computer... servers critical to the operation of the...

> company, which forced the Court to enter another order on February 8th that required Brad and his associates to return the servers and any other company equipment to the... company's premises immediately. That also included a call to the Fairfield Police Department to get their assistance in doing so. It was a very unusual and in the Court's view grave situation that occurred.

(2T7:7-18) The entire theft was captured on video with Ms. Caruso asking another employee "whose side are you on," and the intent had been to send the servers to the Philippines. (Da1999-2000) Again, "[t]he moment the pen strikes the order the stay is removed," and "we have the life's blood of the company being transferred to Philippines." (Da2001) But Brad "honored" the order.

Third, Brad orchestrated a series of payments and other impediments to the Individual Plaintiff's control over Autoclear. (2T7:2-4) Brad was clearly "attempting to undermin[e] the effectiveness of the arbitration award to retain substantial control over the Company's operations abroad." (Da2001) Brad's actions included:

- "[E]ncrypting their e-mails as well as other files," keeping important information out of new management's control (Da2003).
- "[R]emoving papers, documents, computer files, [and] computers from the office and relocating them to Brad's house." (Da2003)
- Intending to, and taking steps toward, "set[ting] up a company out of his house in order to leave the Fairfield [New Jersey] facility without the capacity to make payroll," which deficiency he would then use "to take control of ACA," *i.e.,* Autoclear's largest overseas operation, Autoclear Asia.(Da2004)(Da2010) (Brad stated "any number of people can be in control" because "anyone who pays their salaries over there will have their allegiance.").

- Holding "meetings and conversations... wherein it was made clear... that Brad intended to ignore the arbitration award and this Court's order for the purpose of returning control over the company's operations," (Da2003)

- Talking about "fighting the duress of this [New Jersey] judge, particularly from places like Jordan and Belize." (Da2010)

- "[F]ully maintain[ing] the viability and validity and authority of the [non-existent] Belize company." (Da2009)

- Making "a number of... untypical transfers... in the waning days of his control when the Court had already ordered that nothing out of the ordinary course of business be undertaken," (Da2001-2002), including transfers of $95,000 to himself for alleged medical expense reimbursement that he could not later substantiate, (Da2002), $125,000 to a Canadian attorney as an advancement on hypothetical attorneys' fees, (Ibid); and $150,000 to Autoclear Asia (a subsidiary), as compared to the usual $40,000 to cover payroll (Ibid).

- Being caught in recorded "voicemail messages and lengthy phone conversations" about opening an Autoclear Jordanian bank account after control had been transferred,(Da2005-2006), with Brad having sent "a $59,500 check from the company" dated February 6, 2016—after the award had been confirmed and two days before the stay was lifted—as "an advance in salary" to the employee whom he planned to have set up the bank account (Ibid).

- Assigning a company-owned patent to an Irish corporation and/or himself. (Da2001)

But, Brad "honored" the transition of control of Autoclear.

E. Brad's conduct *during* the pendency of a motion for an injunction and, later, for sanctions, further justified the trial court's decision.

As injunction proceedings were ongoing, Brad filed an earlier appeal, which the Appellate Division dismissed on July 28, 2017 because Brad failed to file a

conforming brief. (Da1926) The Appellate Division denied Brad's motion to vacate the dismissal on September 29, 2017. (Ibid) In the trial court's "view it is not coincidental that Brad… filed the [Southern District of] New York action" on October 25, 2017, "less... than a month" after his appeal was dismissed. (Ibid)

Upon learning of the SDNY Action, Plaintiffs filed a motion in the New Jersey trial court to enforce the injunction on November 15, 2017. (Da1912) The complaint in the SDNY Action violated the injunction by repeatedly asserting that the Company was a Belizean entity, that the February 8, 2016 meeting was valid, that agreements other than the April 1995 operating agreement governed, and that the trial court's and/or the Arbitrators orders were invalid.

The Court was forced—through more of Brad's improper conduct—to adjourn the November 2017 motion to enforce the injunction several times.[4]

On February 13, 2018, Brad filed a notice of removal to the United States District Court for the District of New Jersey (the "First Removal") but did not notify the trial court of the removal until February 15, 2018, *i.e.,* the day before the then-scheduled return date for the pending motion. (Da1913-1914)(2T10:25-11:5) On April 3, 2018, District Court Judge Susan Wigenton found that the District Court lacked subject matter jurisdiction and remanded the matter to the trial court. (Pa194-195) The trial court again adjourned the motion so the parties could brief

[4] The first adjournment occurred so that the motion could coincide with a motion to confirm the Phase II Partial Final Award voiding Brad's self-dealing loan.

issues relating to the First Removal—which again violated the injunction by, *inter alia*, suggesting the Company was Belizean—and a new return date was ultimately scheduled for May 23, 2018. (Da1916)(2T11:24-12:4)

Late in the afternoon of May 22, "Brad Conway called the [New Jersey] Court... to inform the Court that he removed this action again to the District... of New Jersey... [and] emailed the petition for removal to the Court and [Plaintiffs' counsel] at 2:41 p.m." (Da1916) For a second time, Brad had removed the action *the day before* the return date of a motion seeking to sanction him for violating an injunction, and for a second time that removal violated the injunction in question (the "Second Removal"). (Ibid) Fortunately, Judge Wigenton quickly "dismissed the action again for lack of subject matter jurisdiction and noted that further filings by Brad Conway in the matter would be subjecting him to sanctions." (Pa196)

On May 23, 2018, the New Jersey court heard the oral argument as scheduled. (2T12:24-13-1) Once the trial court was finally able to hear the motion, it found that the SDNY Action was Brad's "attempt[] to re-litigate the [New Jersey] Court's order in other forums," which "effectively undermin[ed] the whole process of this [New Jersey Action] lawsuit." (2T25:8-26:8) Accordingly, the trial court ordered Brad to withdraw the SDNY FAC or replead it by June 5, 2018. (Da1929-1930)

F. Brad *continued* to claim that the February 8 meeting was valid and improperly sought to collaterally invalidate the Arbitration.

At the May 23, 2018 argument, Brad was defiant as ever, and his arguments *that day* continued to violate the trial court's injunction. For example, Brad continued to try to justify behavior that the trial court had already called "outrageous," saying that on February 8, 2016, "I [Brad] considered that I was still in control at that point.... and there was a possibility that **some other court** would say that the new election would supersede. **That still remains to be seen**." (Da1901) Brad continued to suggest that he was the proper manager of the Company, and that the SDNY Action would eventually overturn the arbitration and the instant action. Specifically, Brad argued (falsely) that:

> between the 8th and the 23rd, **we had a reasonable basis. It could have b[een] wrong as a matter of law. Southern District of New York will actually determine that someday**. That's how <u>we</u> were—in control and, yet, we still didn't go around and—and after the injunction say, well, we don't respect what Judge [Moore said].

(Da1899) Brad finally admitted the real reason he filed the complaint in the SDNY Action, saying that in "the Federal Court may rule that the elections at the February 8th meeting in fact superseded the 2013 meeting[5] under the [FAA] or the arbitra[l] convention." (Da1919) "**This is about getting into the right court.**" (Da1900)

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[5] The 2013 Meeting was ultimately found to have removed Brad from his position at the Company, per the Arbitrator's October, 2015 award; a new meeting had been held after the original 2010 meeting that originated this dispute.

It was evident Brad's reasoning was the SDNY needed to make "an arbitrability determination... over the operating agreement" under which he purported to hold the February 8, 2016 vote putting him back in control. (Da1897) Brad also argued that "five [other] amendments to the operating agreement that he drafted after the October 2015 award were valid, because the arbitrator did not rule on them." (Da1921-1922) Brad argued that "it will be **up to the Southern District of New York Judge** whether... that election... is invalid or that that operating agreement is invalid.... So they're not null and void... but they will be before Judge McMann [of the SDNY]." (Da1902-1903)

In other words, Brad argued that operating agreements and votes that he held *during* Phase I of the arbitration—trying to place himself back in control through the votes of persons to whom he had granted sham membership interests—would somehow supersede the votes that removed him from control, and that the SDNY would be the one to make that determination. (Da1893) Brad falsely represented to the trial court that those votes were held by legitimate members of the Company, (Ibid), and he repeated the same falsehood in the SDNY Action's pleadings, referring to these same sham amendments as those having been voted on by the "John and Jane Roes" referred to in Plaintiffs' complaint. (Da1410-1411)

But the validity of these "votes" and those "elections" ***was*** before the Arbitrator in Phase II of the Arbitration, because the validity of the membership

interests that were allegedly ***cast*** in those votes and elections was a question in Arbitration Phase II, as was Brad's inability to unilaterally amend the operating agreement.(Da2003)(Da2006) There is no doubt what Brad was trying to accomplish: regain control of the Company by challenging prior and ongoing arbitral proceedings. Fortunately, the SDNY Action resulted in dismissal on the pleadings, along with a significant sanction for Brad lying—twice—to that court.

G. The trial court's correctly ordered sanctions.

The trial court was not buying what Brad was selling. It found that:

> Through the New York action Brad Conway is trying desperately to change the results of the Court's June 7th order, so that he can regain control of the company. That is patently clear, and patently violative of the court's order.... What can be more violative of this court's order, than that [SDNY] filing.

(Da1927-1928) The trial court reiterated:

> Mr. Conway directed the theft of the company's computer serv[ers], and interfered with the new managements control of the company.... [T]hen we get the submissions in the New York action, the first removal, [and] the second removal which sought to reverse the October, 2015 award and the court's January 28th, February 8th... February 23rd, and June 7th orders by asking Federal Courts to rule that the February 8th meeting was a valid election which put Brads back in control of the company effectively undermining the whole process of this lawsuit.

(2T25:8-26:2) "Mr. Conway attempted to re-litigate the Court's order in other forums which, again, in the Court's view threatens the company's ability to function, because of these enormous attorneys' fees and other costs." (2T26:4-8) Thus, the trial court ordered Brad to withdraw or replead the SDNY Action, "by

June 5th or the Court will make him responsible for any attorneys' fees and costs… incur[ed] in the New York action." (Da1929-1930) The trial court also found that "financial sanctions are warranted to compel Brad Conway to comply with the Court's January 28th, June 7th orders," which "[h]e has continually violated." (Da1931-1932)

H. Brad did not "honor" the change in control; he tried to thwart it at every turn, and the trial court's sanction was entirely justified.

Brad would have this Court believe he "honored the change of management control." Db49. He did nothing of the sort. HONOR, Black's Law Dictionary (11th ed. 2019) ("honor vb. (13c) 1. To accept…"). The reality is Brad committed unconscionable acts of theft and other misdeeds between February 8, 2016 and June 7, 2016 to thwart transition of control, including an outrageous Federal lawsuit that claimed the Individual Plaintiffs, their attorneys, and the AAA were a racketeering enterprise with the sole purpose of removing Brad from management.

Brad necessarily ignores the facts and exceeds all bounds of rational thinking to argue that he "<u>had</u> <u>honored</u> the change of management control Order." Db49 (emphasis supplied). This sentence is a blatant, fact-free fabrication. And Brad's argument that he did not take action to prevent new management from controlling the Company plainly ignores reality, particularly while arguing that Brad's actions were "just allegations in a Complaint," (Db48).

First, it is simply untrue that Brad did not attempt to interfere with management of the Company. Brad did more than file allegations in the SDNY Action; he orchestrated a theft of company property, encrypted its emails, wired Company money out of the country, and was caught on a recorded line plotting to remove *even more* of the Company's assets from the United States.

Second, Brad's argument that these were "just allegations"—which is completely false—also completely misses the point of that part of the sanctions that are related to the SDNY Action. The sanction included Plaintiff's counsel fees to defend those allegations, the very assertion of which was a direct violation of multiple trial court orders including an injunction, *i.e.,* those counsel fees directly resulted from Brad's violation of the Court's injunction.

Brad also erroneously claims that the trial court "did not make a specific finding why anything less would be insufficient to be 'coercive' going forward." Db49. What Brad refuses to understand, however, is the sanctions could not have been "anything less," as it exclusively represented the costs incurred by Plaintiffs to address Brad's conduct, which the court carefully and deliberately considered.

Indeed, the sanctions were actually less than what Plaintiffs requested or what could have been justified by the law as applied to these egregious facts. The Company submitted a certification of services, including costs, totaling

$554,157.82, which included $293,117.381[6] for a computer forensic expert that the Company had to hire to (a) fix the servers that Brad stole and returned damaged, and (b) examine all of the computers to determine what else Brad had done to damage the Company. (2T4:18-20; 16:17-19) The trial court correctly found that the Company was justified in hiring the expert, and that the cost was reasonably incurred, (2T33:17-22), in light of the court's specific finding that Brad "directed the theft" of the servers. (2T25:9-10) Furthermore, of Plaintiffs' total attorneys' fees requested of $254,201.00, the trial court awarded $206,718.70, and noted that the delta was not awarded only because some of the work would have been needed in the arbitration even absent Brad's bad acts. (2T34:23-35:8)

Brad's intentional exclusion of these facts from his brief while arguing that the Sanction was an abuse of the trial Court's discretion is remarkably disingenuous. The Court did assess, and even grant, a less coercive sanction than had been requested. And of course, once the sanction was imposed, Brad stopped asserting his control over Autoclear. So they worked.

Brad's "ability to pay" argument is just as meritless. At no point did Brad oppose the motion by stating he could not afford to make the payment, thereby waiving the argument. Moreover, any failure of the trial court to make an "ability

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[6] The remaining requested amounts included a request for Norris McLaughlin fees totaling $254,201.00 and fees for a Canadian law firm in the amount of $3,103.64 and miscellaneous costs in the amount of $3,735.80.

to pay" determination was—at worst—harmless error, as Brad actually paid the Sanction, in full, almost immediately upon being forced to do so. (Pa247) Nobody who is unable to pay a $500,000+ sanction can nonetheless suddenly cut a check for that exact amount so quickly (or at all). Indeed, Brad's payment of the $500,000+ sanctions came very soon after Brad had already repaid the cash portion of the sham $700,000 loan in full.[7] (Pa248) Thus, Brad's ability to pay was never an actual issue.

For all these reasons, the $503,000 Sanction should be affirmed.

II. <u>The Arbitrator properly excluded Brad's summary judgment opposition brief.</u>

Brad argues that the Arbitrator improperly denied an extension of Brad's deadline to oppose Plaintiffs' summary judgment motion in arbitration Phase II. But Brad had a history of manipulating deadlines solely for the sake of delay, including being caught lying about a medical condition in the SDNY Action resulting in an over-$20,000 sanction there. The Arbitrator was within his rights to deny Brad even more delay after many years of dilatory litigation tactics, and the confirmation of the Arbitrator's summary judgment award should be affirmed.

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[7] The other $270,000 were in membership interests that were voided, and thus that portion of the "loan" was not repaid in cash.

A. Arbitrators have authority to reject untimely submissions to achieve a fair and expeditious disposition of the proceeding.

"While vacatur may be appropriate if the arbitrator refused to consider evidence material to the controversy... that provision is narrowly applied." Risco. Inc. v. New Jersey Nat. Gas Co., No. A-4365-13T2, 2015 WL 4487739, at *6 (App. Div. July 24, 2015) (citations and quotations omitted); see also Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 519 (1992) (Wilentz, C.J., concurring) (stating that the evidentiary error must rise to the level of misconduct, and be so obvious that resort to the record, which often does not exist in arbitration, is unnecessary); Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 351 (1994) ("the Court adopts as a rule… the standards set forth in the chief Justice's concurring opinion in Perini….").

Risco and subsequent cases demonstrate that a party may ***not*** vacate an arbitration award under N.J.S.A. 2A:23B-23(a)(3) if they were presented with, at a minimum, the opportunity to present evidence. See Voorhees Office Cm. LIX v. Target Bldg. Const., Inc., No. A-6337-08T3, 2010 WL 3933238, at *4 (App. Div. Oct. 4, 2010) (denying a party's request to vacate an award due to the arbitrator's alleged refusal to hear evidence because "[t]here was abundant opportunity for [the party] to submit its opposition."); Rock Work. Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 355 (App. Div. 2007) (refusing to vacate an award where there was no prejudice when arbitrator refused to accept rebuttal evidence after deadline for

submissions); Manger v. Manger, 417 N.J. Super. 370, 367¬77 (App. Div. 2010) (stating that a party's "right to be heard" and "to present evidence material to the controversy" was not violated when the arbitrator declined to accept evidence after the parties failed to submit any ***by a pre-determined deadline***).

In Rock Work, the arbitrators set a deadline for submissions of proposed awards. Brad Pulaski timely submitted their proposed award, but interpleader Brad Norwood argued that this submission contained impermissible legal arguments. Norwood attempted to respond to Pulaski's submission with an untimely letter, which the arbitrators refused to consider. Rock Work, 396 N.J. Super. at 350. The Appellate Division characterized the arbitrator's decision to set a deadline as "procedural" and found that vacatur under this circumstance would be inconsistent with a court's limited standard of review over an arbitration award. Id. at 355.

In Manger, the parties attempted to introduce bank statements regarding the valuation of marital property. The Appellate Division found the "arbitrator provided an opportunity for each party to identify... documents on which they intended to rely at the hearing," but the parties failed to do so. 417 N.J. Super. at 376. "[T]he arbitrator had the authority to exclude" that evidence "and any other documents not produced in accordance with the case management order." Id. at 376-377. The Appellate Division viewed such an exclusion as "[c]onsistent with [the arbitrator's] authority to conduct an arbitration in such manner as the arbitrator

considers appropriate for a fair and expeditious disposition of the proceeding" pursuant to N.J.S.A. 2A:23B-15(a). Id. at 376 (quotation omitted).

New Jersey courts have consistently held that the arbitrator's authority over setting briefing schedules and deadlines is a matter of procedure with which the courts will not interfere. Minkowitz v. Israeli, 433 N.J. Super. 111, 144 (App. Div. 2013); Risco, 2015 WL 4487739, at *7. The New Jersey Arbitration Act affords the arbitrator "broad authority" over matters of procedure. Risco. Inc., 2015 WL 4487739, at *7 (citing N.J.S.A. 2A:23B-15(a)). Given the arbitrator's broad authority over matters of procedure, id., and a court's restricted scope of judicial review of an arbitration award, Rock Work, 396 N.J. Super at 355, the trial court was correct to confirm the Arbitrator's decision to deny Brad's untimely submission after establishing, and twice extending, briefing timelines.

B. Brad's decision not to take advantage of multiple *opportunities* the Arbitrator provided for his submission of a summary judgment opposition is nobody's fault but Brad's, and does not require reversal.

A litigant is not entitled to have every conceivable argument or every conceivable piece of evidence considered in an arbitration. As the trial court correctly observed, "a party may not... successfully vacate an arbitration award... if they were presented with... the opportunity to present evidence." Rock Work, 396 N.J. Super. at 255; see also (Da3171) Brad did not merely have ***an opportunity*** to file his opposition; he had ***three opportunities***. The trial court correctly found that

the Arbitrator "acted within his discretion to determine at what point [Brad] had gone beyond the bounds of his rules." (Da3173) The trial Court elaborated that the Arbitrator was "well within his authority to preclude submissions from [Brad] after he blatantly disregarded the prior extensions," and that "[i]t would be folly for this court to second guess the Arbitrator on a procedural question where [the Abitrator's] involvement in the case went on for years." (Da3173)

Brad argues the trial court's reliance on Manchester Township Bd. of Educ. V. Thomas P. Carney, Inc., 199 N.J. Super. 266, 275-75 (App. Div. 1985) "should have actually led to a finding in favor of Brad that he had to the right to the postponement." App. Brf. at 47. Brad's reliance on that case is entirely misplaced. Manchester addressed whether an arbitration award may be vacated due to the arbitrator refusing to consider or receive evidence from a party ***at all***. That court held that an arbitrator improperly refused to consider evidence when he arbitrarily ended an arbitration with one side not being afforded an opportunity to respond to evidence. Id. at 270-71. Critically, the affected party in that case was denied the opportunity to present "pertinent and material evidence." Id. at 272.

This case is completely different. The record establishes that Brad had ***three opportunities*** to oppose the summary judgment motion: first, by October 3, 2018 (Da2095), then, by October 15, 2018, (Ibid) and finally, an ***unrequested*** final adjournment to October 18, 2018, at 5:00 pm. (Da2096) Brad choosing to *ignore*

these opportunities does not mean he was *denied* any opportunity. Manchester has nothing to do with a party who was given the opportunity to present evidence, but *chose* to disobey multiple deadlines. The trial court correctly recognized the distinction and found that "[u]nlike the instant matter, the party in Manchester did not fail to comply with deadlines or fail to respond in a timely matter." (Da3170)

The reasons Brad now provides for his delay do not compel a finding that the Arbitrator erred in refusing to grant a third adjournment. Db43. Brad failed to raise these purported issues in his September 27, 2018 adjournment request (Da2156), or at any other time prior to counsel's untimely October 22, 2018 letter. There is nothing in the record to support Brad's counsel's claim that other counsel backed out of representing Brad or that Brad's ex-wife purportedly had a stroke. Matter of Proc. by Comm'r of Banking & Ins., No. A-0119-19T3, 2020 WL 7489010, at *3 (App. Div. Dec. 21, 2020) ("the attorney's letter is not evidence")(citing Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:6–6 (2020) ("Affidavits by attorneys of facts not based on their personal knowledge... constitute objectionable hearsay.")

Arbitrators are trained to handle matters as expeditiously as possible. This arbitration had already dragged on for ***seven-and-a-half years***. It was perfectly reasonable for the Arbitrator to conclude that seven-and-a-half years was long enough, and that no more Brad-created delay would be tolerated. As aptly noted by

the Arbitrator, "[a]t some point it must stop." Da2511a. For Brad to argue there was "no urgent need to finish after 7.5 years" (App. Brf. at 44) is completely misguided. The future of the company was at stake, and Brad was actively interfering with new management's control. Brad owed the company a significant amount of money and had been adjudicated to have harmed his own company. The Company, for the sake of its own survival, needed him out.

Brad asks this Court to depart from Rock Work, Manger, and other cases to remove the Arbitrator's settled authority over procedural matters to substitute its own judgment instead as to how many delays to tolerate from uncooperative parties. Requiring an arbitrator to give a recalcitrant litigant countless opportunities would cause litigants to significantly disfavor arbitration, contrary to public policy. Brad's disagreement with the Arbitrator's reasoning does not mean that the Arbitrator "did not give any real reason" for denying Appellant's untimely third adjournment request. Appellant provides no compelling authority for his position. The trial court's confirmation of that decision must be affirmed.

C. Brad is a Columbia-trained, licensed attorney, and his *pro se* status does not require vacatur of the Arbitrator's decision.

Brad relies on Mandell v. Reeve, 2011 WL 4585248 (S.D.N.Y. October 4, 2011) for the proposition that the Arbitrator committed misconduct by failing to afford Brad's newly-retained counsel an additional extension. Not only is Mandell

an unpublished S.D.N.Y. case with no precedential value to this Court, but Brad grossly mischaracterizes his role in the Arbitrator's denial of a ***fourth*** adjournment.

In Mandell, the Court observed in dicta that the case "was not a situation in which a *pro se* litigant recently retained counsel who needed time to be brought up to speed on the case." Id. at *5. Brad relies on this language for the proposition that *any* pro se litigant who recently retained counsel *at any time* should be afforded a "reasonable period of time to prepare and submit opposition and get up to speed on the case." Db43. That is simply not the law, which is why all Brad came up with is a cherry-picked quote from an unpublished, out-of-state federal trial court opinion.

First, Brad is a Columbia Law School-educated attorney who maintains an active license to practice law in New York State. (Pa353)[8] Brad decided to appear in this matter *pro se* for about two of the case's now-14 years after his prior counsel ceased their representation after Phase I. This is not a case where a *pro se* could not afford counsel only to scratch together the funds to pay an attorney at the last minute. Brad ***had*** an attorney, Brad ***always*** had the money to hire counsel, and Brad ***himself*** is a licensed attorney. Brad's payment to the Company of over $1.2 million in one month (for both the $700,000 judgment and the $503,000 Sanction),

[8] Brad's current registration to practice law is susceptible to judicial notice, and therefore the current (November 2023) information from New York State's website is acceptable to be included here. Stephens v. Civ. Serv. Comm'n of New Jersey, 101 N.J.L. 192, 194 (1925) ("we are permitted to consult. . . such records of the government. . . as are properly matters of judicial notice.").

(Pa247-248), demonstrates conclusively that he always could have hired counsel. For whatever reason, though, ***he strategically chose not to hire an attorney***.

Second, Brad's argument that this was a case "where a *pro se* litigant recently retained counsel" is untrue. Db43. Brad had already retained counsel to oppose a motion filed by Plaintiffs in the trial court seeking additional sanctions against Brad. (Pa249) That lawyer was the very same counsel who wrote to the Arbitrator nearly two months later to request a 45-day third adjournment of Brad's opposition deadline. The timeline is critical. Brad's current counsel appeared in the trial court on September 7, 2018, three days before Plaintiffs had even filed their arbitration summary judgment brief. (Da2209)(Pa249) Yet, Brad did not reveal the existence of counsel to the Arbitrator for 20 days (until a September 27, 2018 letter). And Brad's current counsel did not write to the Arbitrator seeking additional time to oppose the summary judgment motion—the one filed ***after*** Brad's current counsel appeared in the trial court—until October 22, 2018, ***45 days later***, *i.e.,* the exact amount of time he sought to adjourn the Arbitration summary judgment motion.

This was solely the latest Brad-manufactured delay tactic, and nothing more. Brad is a lawyer, and was represented by new counsel ***at the time he received the arbitration summary judgment motion***. Brad chose to hide the existence of his new counsel solely so he could request an eleventh-hour adjournment on Brad's

behalf weeks later. Brad's appeal is tantamount to complaining that the Arbitrator saw straight through his tactics.[9] Brad then had his existing lawyer write a letter asking for more time *a full week after his brief was due* on extension. Then, Brad simply submitted a 49-page brief on his own, on October 26, 2018, proving that he could have submitted this brief at any point. (Da2160-2208)

Third, Brad absurdly argues that the Arbitrator should have granted the third adjournment because Brad, though a lawyer, is a bad writer. This nonsensical argument overlooks the fact that Brad made the strategic decision to remain *pro se* even when he had the means to retain counsel. At no point in the then-six-year history of this case, did Brad claim that his "writing style" deprived him of a meaningful opportunity to present his case. Brad cannot voluntarily proceed *pro se* for two years, and argue *for the first time on appeal* that his "writing style" prevented him from having a meaningful opportunity to present arguments.

Moreover, to argue that Brad doesn't write well enough to represent himself *pro se* is preposterous. He wrote well enough to get into, and graduate from, Columbia Law School, to pass the bar exam, and to function as Autoclear's CEO and General Counsel for decades. If Brad was incapable of representing himself, he could have retained counsel at any time. He chose not to.

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[9] Whether Brad had yet decided whether counsel would handle the motion is beside the point. Brad could have informed the Arbitrator about his pending determination whether that counsel would handle the arbitration. Instead, Brad remained silent for completely transparent tactical reasons.

The confirmation of the Phase II Partial Final Award should be affirmed.

III. The trial court properly applied discounts to the valuation of Brad's interest in the company.

In dissociating Brad, Tax Book Value, as defined *infra* at § VII, is the proper methodology for valuing Brad's shares. If this Court does not to overturn the trial court's decision to reject a Tax Book Value valuation, the trial court's decision to apply fair market value, including discounts, was the only appropriate alternative.

A. Discounts reflect the economic reality of selling interests in a closely held business on the open market, and are not a punishment to Brad.

New Jersey law is clear that discounts reflect economic reality, and their *absence* would punish the payor and reward the payee. Whether or not fair value (undiscounted) or fair market value (discounted) is to be awarded is a question of law for the Court. See Sipko v. Koger, Inc., 251 N.J. 162, 180 (2022) ("determinations of what discounts or premiums the determination of fair value may include, or must exclude" are "questions of law"). Experts cannot opine on what they believe is fair. State v. Kelly, 97 N.J. 178, 208 (1984) (noting expert testimony is inadmissible unless it is "beyond the ken of the average layman.").

There are two types of discounts at issue. A minority discount "adjusts for lack of control over a business entity..." Brown v. Brown, 348 N.J. Super. 466, 473

(App. Div. 2001).[10] For example, if a Company were worth $1,000,000, a 51% stake is *not* worth $510,000 and a 49% stake is *not* worth $490,000. The difference between 51% and 49% is the control of the business, which is obviously quite valuable in the context of small, closely-held companies. Therefore, a 51% interest would be worth *more* than the aforementioned math would suggest (*i.e.,* would receive a premium), while a 49% interest would be worth *less* (*i.e.,* would receive a discount) to account for the value of control (or lack thereof). Thus, the value of a 49% interest is derived by applying a control discount to the undiscounted value of the 49% of a given company, resulting something less than, for example, the $490,000 valuation in the foregoing hypothetical.

A marketability discount, on the other hand, "adjusts for a lack of liquidity in one's interest in an entity." Brown, 348 N.J. Super. at 474. The marketability discount is applied even to a controlling interest[11] in closely-held businesses, as the field of potential buyers is small because there "is no readily available market." Balsimides v. Protameen Chemicals, Inc., 160 N.J. 352, 375 (1999). The marketability discount reflects the economic reality of a potential sale in a closely

[10] Sipko involved only the discussion of the marketability discount, and not the control discount, because the blocks of shares at issue were 50%, *i.e.* did not reflect a minority stake which lacked control.

[11] The valuation of majority interests in closely held companies would *not* carry a control discount, but would *still* carry a marketability discount. By contrast, publicly traded stock may carry control discounts, but not marketability discounts, since they can be sold instantaneously during times the securities markets are open.

held business, which would certainly involve a large amount of difficulty in locating and negotiating a sale in the open market. Unlike publicly traded securities (Google, Amazon, Exxon, etc.) that could be sold in a matter of minutes, or even seconds, the sale of a closely held business could take years, or never materialize at all. Thus the marketability discount reflects the reality that interests in closely held businesses are the opposite of publicly traded stocks. The value of any interest (51%, 49%, or any other percent) is derived by applying a marketability discount to the undiscounted value of those interests.

Both types of discounts reflect the "decreased worth of shares of stock in a closely-held business." Id. at 375. When a willing buyer voluntarily chooses to sell a minority interest in a closely-held business, these *two* discounts would *separately* be reflected in whatever price that buyer could even *possibly* obtain from a willing seller. In other words, discounts reflect economic reality of a hypothetical out-of-court, arms-length transaction. Put differently, ***no*** person owning a minority share in a closely held corporation could ***ever*** sell their interests on the open market and receive an ***undiscounted*** fair value price from a willing seller.

Thus, a valuation, with discounts, should thus be viewed as the "default" or "starting point" of valuation, with a *lack* of discounts being an unusual, law-created fictional price designed to punish the payor. Sipko, 251 N.J. at 182-83 ("'some commentators observe that a marketability discount is not a discount at

all,' but rather 'a price adjustment reflecting factors typical of close corporations.'") (quoting Balsamides, 160 N.J. 352, 379 (1999)).

B. The application of discounts turns on whether their presence or absence would incentivize or deter the conduct causing the buyout.

The current law regarding the application of discounts begins with two New Jersey Supreme Court matters issued at the same time. See Balsimides, 160 N.J. at 375; Lawson Mardon Wheaton, Inc. v. Smith, 160 N.J. 383 (1999). The New Jersey Supreme Court also summarized these prior holdings mere months ago in Sipko. 252 N.J. at 162. The analysis required by these three cases is clear: the person whose conduct *caused* the need for a buyout cannot *benefit* from the presence or absence of discounts, which will turn on whether that bad actor is the payor or payee. Where the bad actor is *receiving* payment, discounts should apply; where the bad actor is *making* payment, discounts should not apply.

Lawson assessed the application of discounts in the context of dissenters' rights.[12] 160 N.J. at 395-96. The dissenters' rights statute permitted dissenting shareholders to be bought out at "fair value" rather than participate in a merger with which they disagreed. Id. at 396. The Court described fair value as "an art rather than a science," id. at 397, and elaborated that in determining fair value

[12] When rendering its analysis, the court in Lawson analogized to the shareholder oppression statute, N.J.S.A. 14A:7(8)(a). In doing so, the court noted that the oppression statute authorizes the court to adjust value equitably "in cases of oppression—fraud, illegality, mismanagement." Lawson, 160 N.J. at 400.

courts must consider "fairness and equity in deciding whether to apply a discount to the value of a dissenting shareholder's stock." Id. at 400.

In deciding ***not*** to apply discounts in dissenters' rights cases, the Lawson court noted that the "standard of valuation employed in any given context should reflect the purpose served by the law in that context." Id. at 399-400. The entire purpose of the dissenters' rights statute was to "afford a simple and expeditious ***remedy*** to the dissenting shareholder." Id. at 400 (emphasis added). This "remedy... deters insiders from engaging in wrongful transactions... providing a remedy to minority shareholders who are subjected to such transactions." Ibid. Discounting share value in a dissenters' rights case would "encourage[] corporate squeeze outs" and would "penalize[] the minority for taking advantage of the protection afforded by the appraisal statute." Id. at 402. The court then stated the obvious, that such results "clearly are undesirable." Ibid.

The Brown court reached a similar conclusion in valuing a closely-held business for equitable distribution: "the very purpose of the appraisal remedy... would be undermined by application of a minority discount to the value of their shares." Brown, 348 N.J. Super. at 475. Ordinarily, the court said, "neither a marketability nor a minority discount should be applied absent extraordinary circumstances." Id. at 483. However—like Lawson—the court assessed a case

involving "court-ordered buyout[s] resulting from an ***oppressed*** shareholder." Ibid. (emphasis added). Brown did not address an *oppressor* shareholder like Brad.

It is ***not*** the case that a shareholder who has ***not*** been oppressed (like Brad) would receive an ***undiscounted*** share price for his stock. Doing so would be tantamount to overpaying Brad above and beyond anything he could hope to achieve if he sold his shares on the open market. See § III(A), *supra*. In fact, just the opposite must be true according to Lawson's companion case. Balsimides, 160 N.J. at 374 (beginning its analysis by saying there is "no reason to believe that 'fair value' means something different when addressed to dissenting shareholders... than it does in the context of oppressed shareholders.").

Balsimides involved a shareholder oppression action pursuant to N.J.S.A.14A:12-7 where a 50% shareholder prevailed and his business partner, the owner of the other 50%, was found to be the oppressor. The *oppressor* shareholder was ordered to sell his shares to the *oppressed* victim shareholder. If the shares were not discounted, the oppressor who caused the corporate breakup in the first place would be selling his shares to the faultless buyer at the highest price possible—a price that would never occur in an arms-length transaction. The case presented the mirror-image of Lawson: the *absence* of discounts would perversely reward the oppressive conduct that led to the sale in the first place.

The Balsimides Court held that, since the oppressed shareholder was buying out the oppressor, discounts apply, because "[t]o do otherwise would be unfair... since [the seller] was the oppressor and [the buyer] was the oppressed shareholder." Id. at 378. The "equities of this case quite clearly lie with [the buyer]" and "it would be unfair" to compel the an "undiscounted value." Id. at 379-80. Highlighting the importance of having the economic reality of a sale reflected in a valuation, the Court noted that the buyer would own a company:

> that will remain illiquid because it is not publicly traded and public information about it is not widely disseminated. [The company] will continue to have a small base of available purchasers. If it is resold in the future, [the buyer] will receive a lower purchase price because of the company's closely-held nature.

Id. If the oppressed shareholder paid a discounted price, the seller "would suffer half the lack of marketability discount now" while the buyer "suffers the other half when he eventually sells his closely held business." Id. By contrast, "if [the seller] is not required to sell his shares at a price that reflects [the company's] lack of marketability, [the buyer] will suffer the full effect of [the company's] lack of marketability at the time he sells" the full company in the future. Id. This would perversely reward the seller, whose bad conduct caused the split in the first place.

Thus, in Balsamides and Lawson, the Supreme Court found ***twenty-three years ago*** that the application of discounts fell to a determination of whether they would benefit or harm the faultless party or the person who caused the corporate

breakup in the first instance. Balsamides, 160 N.J. at 382 ("fairness dictates that the oppressing shareholder should not benefit at the expense of the oppressed."). The entire analysis is all about ensuring that the court does not "afford a shareholder any incentive to oppress other shareholders." Id.

The Supreme Court recently reiterated these same principles in Sipko, analyzing a buyout remedy which "would be fair and equitable to all parties under all of the circumstances of the case," identical to the issue before this Court now. , 251 N.J. at 184. "Depending on the facts, we have held that fairness and equity can compel the decision to apply such a discount, or not. Stated differently, 'application of the equities... [can] dictate[] opposite results.'" Ibid. (quoting Balsamides, 160 N.J. at 382). Assessing Balsamides and Lawson, the Sipko Court reiterated: "[W]e did not want to afford a shareholder"—any shareholder—"any incentive to oppress the other shareholders for personal gain." Id. (citing Balsamides, 160 N.J. at 382-83). The Court continued its analysis, explaining:

> Balsamides and Lawson underscore the importance of determining the "fair value" of a corporation on a case-by-case basis... [T]he guiding principle in such cases is that a marketability discount[13] cannot be used unfairly by the parties whose misconduct and bad faith caused the corporate split to benefit themselves to the detriment of the injured parties.

Id. at 184-85.

[13] Sipko discussed only the marketability discount, and not the control discount, because the case involved a 50% stake, not a minority stake like Brad's 29.5%.

As to the particular facts of the case before the Sipko Court, it noted that "[w]ith fairness and equity in mind, we certainly cannot ignore the many instances in which defendants took deliberate steps to prevent [plaintiff] from recovering any value he might achieve throughout the course of litigation." Id. at 185.

> Defendants assert that post-judgment and post-remand conduct should not be considered in determining whether equity requires the application of a marketability discount. Even without defendants' misfeasance, blatant misrepresentations to the trial court, lack of transparency regarding their financials and financial transactions, and, in [one defendant's] case, fleeing the country to escape enforcement of the court's order, actions which are all contemptible, defendants engaged in enough pre-judgment misconduct between the filing of the complaint and this Court's 2013 opinion to justify not applying the discount when considering the equities.

Id. at 185-186. "[W]e cannot ignore the reality that steps were knowingly taken to deplete the value of assets [the plaintiff] was asserting [an] interest in." Id. at 187 (quotations to lower court omitted). Thus, the circumstances of a case must start with a discounted value reflecting economic reality, followed by a determination as to whether the discounts would encourage oppressive behavior, with an undiscounted value only enforced when the *payor* is the oppressor.

C. The trial court properly applied discounts to the valuation of Brad's shares to reflect the reality of what Brad would receive on the market.

The trial court properly applied Balsamides, Lawson, and Sipko in finding that "shareholder discounts are appropriately applied when representative of the reality of the transaction, the nature of the interest being transacted, and the bearing

of equity upon the parties." (Da3204-3205) On appeal, Brad proposes the novel theory that the trial court erred in applying discounts because significant monetary awards for Appellant's oppression and/or breaches of fiduciary obligation were imposed against him prior to the trial court's valuation. Db29. In other words, Brad suggests he is entitled to the law-created, fictional undiscounted value that the Balsamides, Lawson, and Sipko courts reserved as a punishment to the payor simply because he had already paid *other* forms of damages for his bad behavior.

Brad's theory is simply not the law, and not serious in light of Lawson, Balsamides, and Sipko. None of these cases support the nonsensical theory that a member, dissociated for *harming* the Company, could receive an undiscounted value for that member's forced buy out simply because that member's conduct was *so* egregious that the member had *also* been sanctioned throughout the litigation leading up to the dissociation and *also* made to pay damages for that conduct.

First and foremost, Brad's conduct caused the buyout, and his bad behavior is judicially established. Not only is Brad not a victim, he is not even neutral. ***He is the oppressor***. Paying Brad an undiscounted value would punish the Company, which did no wrong, contrary to every single word expressed by every single court in every single one of the above-cited cases.

Second, Brad's argument that he somehow wiped the slate clean by paying damages and sanctions misconstrues the nature of discounts. Brad's argument

rests on the unspoken and incorrect assumption that discounts are meant to punish Brad. But that is not the economic reality reflected in the purpose for applying discounts. Brad is not being further punished by receiving a discounted value that represents the economic reality that he would obtain at an arms-length sale. A discounted fair market value represents what ***any buyer*** would have received for a 29.5% interest if selling to ***any willing seller***. Brad is asking for fair value, a fiction meant to punish the payor (the Company) and ***reward*** the payee (Brad). There can be no serious argument that Brad deserves a reward, and the Company a punishment, because Brad already paid damages for his conduct. The standard to be applied to Brad is, quite obviously, that which reflects economic reality.

D. Res Judicata does not prohibit the application of discounts.

Brad cites boilerplate law defining res judicata, but zero case law supporting his absurd proposition that when improper actions are voided, and ill-gotten gains returned, any additional remedies (like a discounted buyout) are barred by *res judicata*. According to Brad, paying sanctions and damages magically makes a shareholder no longer the oppressor for a valuation analysis, with the slate somehow wiped clean. Of course, this is just as absurd as it sounds. Under Brad's theory, if an art thief is eventually caught with the art, and made to return it, they are no longer subject to incarceration for their thievery. If an assaulter reimburses his victim's medical expenses, they are no longer a violent felon. This, of course,

is not the law: Brad's payment of damages for wrongful conduct against the Company did not magically dissipate Brad's status as the oppressor whose conduct caused his dissociation along with other remedies like damages.

The very fact that Brad was deemed to have effectively stolen, first, $700,000 from his company, and then over $1M in interests, and then the Company's computers, and then was forced by court order to return the money and computers, is precisely what makes him the oppressor (among many other things). The trial court did not fall for Brad's nonsensical argument to the contrary.

Brad argues that "Autoclear obtained financial relief voiding more than $1,000,019 in membership interests issued to Brad, received back $700,000 on a disputed loan, and more than $500,000 for legal fees and expenses as a sanction for misconduct in 2016." Db23. There is simply no law stating that payment of such damages "cleanses" Brad's conduct and renders him no longer an oppressor. Rather, discounts were properly applied to represent the financial reality of Appellant's ***legitimate*** interest in the Company.

IV. <u>The trial court properly declined to exclude the members' vote to assume long-term liabilities from the valuation of Brad's interests.</u>

Brad argues the trial court erred in failing to exclude the Company's assumption of certain long-term liabilities from valuing Brad's interests, because some of these long-term liabilities (he argues) are comprised of the individual members' legal fees. Brad relies heavily on pontification regarding the "American

Rule" and the exceptions to the business judgment rule, and takes the position that the individual members' actions are not protected by the latter, and are prohibited by the former, in that they impermissibly shift their legal fees to Brad.

The trial court declined to allow Brad to slide this argument through the proverbial valuation "back door" well after he was denied by both the Arbitrator and the SDNY Action his ability to bring these claims directly through the front door. He should not be allowed to revive these claims here.

As argued below, Brad did not attempt to comply with ***any*** of the requirements of a proper challenge by an LLC Member to allegedly improper actions by the management of that LLC. Brad's claim seeks to invalidate management action and, if they exist at all, are derivative in nature because the purported harm was suffered equally among the members of the Company. Compare N.J.S.A. 42:2C-67(b) ("A member maintaining a direct action under this section shall plead and prove an actual or threatened injury that is not solely the result of an injury suffered... by the limited liability company") with Brad Br., p. 4 (arguing the long term liabilities resulted in a "dollar for dollar" reduction of the Company's value and harmed Brad based on his *pro rata* ownership). But Brad never attempted to comply with the requirements for a derivative action. See, e.g., N.J.S.A. 42:2C-68 (requiring demand on the LLC to take action, or proof that such a demand would be futile). His challenge, even if properly placed into a pleading

rather than a collateral attack via the valuation, would have been denied for failing to comply with this statute alone.

Critically, this is an issue that Brad already raised and lost in the arbitration. (Pa349-352) During Phase II, Brad attempted to plead counterclaims for breach of fiduciary duty regarding the Company's assumption of this very debt, and then did so ***again*** in the SDNY Action; both forums dismissed his pleading. (Da3123-3149) The trial court properly declined to allow Brad to disguise an already-twice-lost argument as part of the valuation hearing to get a third bite at the apple.

Moreover, the trial court's alternate ruling was also correct, *i.e.* that the business judgment rule protected the manager's decision to assume the debt. Either argument leads to the same result: disregard Mr. Giannetti's exclusion of the long-term liabilities in favor of an analysis of the Company's value that included those liabilities on the books, as did the other two experts, Mr. Bonavito and Mr. Klein. Of course, once again, Mr. Giannetti (and Brad) concocted this argument to artificially increase Brad's buyout amount, with no real basis in law.

Accordingly, the trial court's confirmation of the arbitrator's decision allowing the Company to assume long-term liabilities should be affirmed.

V. The trial court properly confirmed the 2018 awards issued by a single arbitrator.

Brad argues to vacate all Phase II awards because, he claims, the AAA should have "switched" to a 3-arbitrator panel following pleading amendments at

the start of Phase II. This is Brad's second failed attempt to forum shop his way out of the Arbitrator's decisions (after the SDNY Action). Brad cites cases where the wrong number of arbitrators entered the award, but in each case, the contractual arbitration clause expressly provided for a specific number of arbitrators. The Operating Agreement here does not. Brad's entire argument also assumes a false premise not raised during Phase I: that Phase I and Phase II were two different arbitrations merely because the parties amended a pleading. Db34-35.

A. Brad cites no authority for his argument in favor of a three-arbitrator panel, because none exists.

Brad cites to no authority whatsoever for the proposition that an amended pleading in an arbitration requires the empaneling of entirely new arbitrators, because that is not the law. As with litigation, parties regularly file amended pleadings in arbitration, just as in litigation, yet Brad did not present a single example of empaneling new arbitrators as a result. Because that never happens.

An understanding of Brad's proposal is crucial. If an amendment results in a "new arbitration" just because a party amends a pleading to clarify its claims and the specific damages sought, the question arises whether the existing arbitrator is to be included in the new, amended phase. Indeed, if the arbitrator is not included in the new panel automatically, no party who received an adverse ruling would select that arbitrator for the "new arbitration." And, if the arbitrator is not part of the new panel, the question becomes whether everything the existing arbitrator did applies

to the amended phase, or whether his prior ruling is wiped out. Were evidentiary decisions binding, or merely interim decisions to be revisited by the new, three-arbitrator panel? It is difficult to envision a rule that would be more likely to lead to forum shopping. If you don't like your arbitrator, amend your pleading and commence a new phase to "knock him out."

Given the vast number of uncertainties as to how such an amended phase would be administered, the AAA would clearly have put in place specific rules for how to switch from a one arbitrator panel to a newly-mandated three arbitrator panel were such a change required. Since there are no such rules in place, the AAA either does not have such a rule, or it has a secret, unpublished rule. Either way, such a rule would cause havoc, uncertainty, and an incentive to amend to add dubious new claims so that one could "arbitrator shop." Brad has cited no such secret rule, even when specifically asked, and it has never been articulated anywhere by even a single court. That is because it does not exist.

B. The existing case law grants exclusive, unreviewable power to the AAA to determine the number of arbitrators.

When the parties agree to follow the AAA rules for the purpose of selecting an arbitrator, the issue is a procedural question to be determined in the arbitration forum. While there is no New Jersey case specifically addressing the issue raised by Brad, the Fourth Circuit Court of Appeals has addressed the issue definitively:

> 3S finally asserts that the arbitrator exceeded his power because the arbitration proceedings should have been heard by a panel of three arbitrators instead of by only one. 3S contends that because DataQuick's actual claim was in the millions of dollars, it had the right to insist that three arbitrators hear the case, pursuant to the AAA's Complex Case Procedures. We have heretofore recognized that, in such a circumstance, **a court generally lacks jurisdiction to determine the number of arbitrators needed to hear and resolve an arbitration**. See Dockser v. Schwartzberg, 433 F.3d 421, 423 (4th Cir.2006) (concluding that when "[t]he parties have agreed that arbitrator selection should follow the rules and procedures of the" AAA, "the number of the arbitrators is a procedural question to be answered exclusively in that forum"). Thus, 3S has failed to satisfy its burden of showing that the arbitrator exceeded his power, and the Award cannot be vacated on that basis.

3 S Del., Inc. v. DataQuick Info. Svs., Inc., 492 F.3d 520, 532 (4th Cir. 2007).

Closer to home, the Third Circuit has also cited Dockser (the same case cited by the Three S court) for the proposition that when a contract is silent on issues of procedure, the default rule is the issue will be decided in the arbitration forum:

> Such disputes on arbitral procedure are [i]ncluded within the scope of [the] default rule' in favor of arbitral resolution, along with "the merits of the underlying dispute." Dockser, 433 F.3d at 425, 427 (noting that, in the face of contractual silence, arbitral resolution of procedural issues is presumed, and "the onus is on the party seeking litigation on a procedural issue to show that the agreement somehow excludes that issue from arbitration").

See Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580, 588 (3d Cir. 2007).

Critically, the relevant AAA rule related to changing one's claim specifically addresses the fact that a new fee may be owed for an enlarged claim, but mentions ***nothing*** about adding arbitrators or altering the arbitral panel:

> **R-6. Changes of Claim**
>
> (a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.
>
> (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

The AAA rules tell the parties exactly what is to happen when a claim is amended: a new fee may be due, and that's it.[14] This fact alone is fatal to Brad's argument.

Here, the trial court, relying on Dockser, correctly found that "[a] Court generally lacks jurisdiction to determine the number of arbitrators," and "the number of the arbitrators is a procedural question to be answered exclusively in that forum," *i.e.* the AAA. (3T90:18-91:1) Brad solely cites to cases where a court

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[14] In re Vince, 2 N.J. 443, 456 (1949) (when a statute "reasonably appears to be exclusive, the maxim *expressio unius est exclusio alterius* may be… applicable," meaning the express mention of one thing implies the exclusion of another).

enforced an explicit arbitration agreement that the arbitrator be of a certain nature, ***not*** of a court second-guessing the AAA's application of its own rules when an arbitration clause that is silent on the issue. Brad fails to appreciate the difference, as the Company's Operating Agreement contains no specificity with respect to the number of arbitrator(s). (Da648) And, under the foregoing authorities, when the agreement to arbitrate states only that the AAA rules will apply, that includes the AAA's power to interpret and apply its own rules.

Moreover, Brad argues that the trial court ruled that an arbitrator can exceed his powers if the arbitration body allows it. Db38. Not so. The trial court actually ruled that, because the arbitration body is permitted to interpret its own rules, the issue of whether the arbitrator exceeded his powers is up to the entity that defines what those powers are—in this case, the AAA. (3T87:20-88:5).

C. Brad waived any argument that a three-arbitrator panel is required.

i. Well-settled case law indicates Brad waived his right to object to the number of arbitrators.

Brad waived the right on multiple occasions to make the argument that a three-arbitrator panel was required. While there is no case in New Jersey discussing waiver in the context of the number of arbitrators, there are numerous cases involving waiver of objections to an arbitrator's jurisdiction, and both concepts contemplate an arbitrator acting without authority. In <u>Highgate</u>, the court expanded on the usual definition of waiver, stating:

> N.J. Manufacturers suggests that waiver requires a showing of an intentional relinquishment of the right to challenge the arbitrator's jurisdiction. 160 N.J. Super. at 301. We find that definition too limited. As Chief Justice Weintraub noted in an analogous setting, "waiver" is a term "used loosely to embrace a number of concepts it would be a mistake to apply a definition, useful for one purpose, to a situation for which it was not intended." Merchants Ind. Corp. v. Eggleston. 37 N.J. 114, 130 (1962). The relevant question here is not only whether the objecting party intentionally relinquished his objection to the arbitration, but whether he so conducted himself that he should be held to have made a binding election. Employing the language of *Merchants*, "waiver" really means that the objecting party has made an election which is binding "not because he wants it to be, but because the law makes it so,"

Highgate Dev. Corp. v. Kirsh, 224 N.J. Super. 328, 131 (App. Div. 1988). Two decades later, the New Jersey Supreme Court also discussed a party's failure to object to an Arbitrator's jurisdiction during the arbitration proceeding:

> [A] court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.

Wein v. Morris, 194 N.J. 364, 383-84 (2008).

The party challenging the arbitration award in Wein was ordered to arbitrate and then participated in the proceedings without objecting to the arbitrator's authority. The winning party moved to confirm, and the challenging party failed to raise the issue of the arbitrator's authority during this hearing, only raising the

issue at the appellate level. The court held, under the totality of the circumstances, this constituted waiver. Id. at 383-85. The Court should find the same waiver here.

ii. Brad waived the three-arbitrator panel argument.

Brad waived any right to argue for a three-arbitrator panel in several ways. First, Brad was on notice in Phase I that the claims exceeded $1 million, despite the fact that they did not explicitly state the amount. The Third-Party Demand for Arbitration asserted in Phase I (but stayed until Phase II) included a count to dissociate Brad and force him to sell his shares. (Da264-266) Brad cannot possibly claim he believed then that his shares were worth less than $1 million, when his expert below argued they were worth $3,331,000. (Da2585). Brad knew in Phase I that his shares, worth over a million dollars, were at issue, but failed to argue for a three-arbitrator panel. He thus waived the argument.

Second, Brad consciously sought to remove the arbitrator's jurisdiction during Phase I *for a different reason*, yet utterly failed to raise the three-arbitrator argument, further demonstrating that Brad waived the argument. Following Brad's ploy in the middle of Phase I to defeat jurisdiction by transferring the Company's domicile to Belize (later voided), (Da980) Brad was not content to merely write a letter to AAA saying he thinks the arbitrator lacked jurisdiction. No, he went out and hired the largest law firm in New Jersey to move the trial court to enjoin the arbitration for lack of jurisdiction. When Brad lost that, he sought an interlocutory

appeal of that decision (Da452-453). When he lost that, he filed a Petition for Certification before the New Jersey Supreme Court (which was denied). (Da460) Significantly, all of these judicial applications were on notice to the Arbitrator.

Clearly, then, in Phase II, even though Brad (a licensed attorney) acted *pro se*, he knew exactly what to do if there was a fundamental problem with the powers of the Arbitrator. And the analogy is apt—in Phase I he argued that the single arbitrator had no authority to act because of an Operating Agreement amendment that deprived him of authority to act at all, and only after receiving an adverse ruling in Phase I did Brad argue the single arbitrator had no authority. Yet despite the similarities of Brad's arguments, his actions could not have been any more different. Brad obsessively told the Arbitrator and AAA that he believed the Arbitrator lacked authority under the AAA rules, but made no motion to enjoin the arbitration in Phase II, despite employing this very strategy in Phase I.

Moreover, Brad failed to make the three-arbitrator argument in an earlier motion to confirm an earlier Phase II Partial Final Award, which alone should be fatal to his arguments. On January 5, 2018, the Arbitrator voided a $970,000 self-dealing "loan," awarding the Company a $700,000 judgment and reversal of $270,000 in interests issued to Brad. (Da999-1000). On January 17, 2018, the Company moved to confirm that award, and Brad opposed. Brad did not raise the three-arbitrator, even though Brad was already aware of it, since his

correspondence with the AAA about three arbitrators all predated that confirmation motion. Brad did not temporarily forget, since he said twice in his brief that the Company's amended pleading resulted in a "large complex case by the AAA."

Brad took the issue of the arbitrator's authority to act all the way to the New Jersey Supreme Court in Phase I (Da460) yet in Phase II decided to take a nearly identical, jurisdictional issue all the way... to a sternly worded letter to the AAA. (Da325) There is simply no reason why a litigious, wealthy, licensed attorney like Brad would not raise these arguments to the trial court during Phase II, when he plainly knew the exact course of action to take if he thought he had a valid argument. In failing to do so, he waived raising the argument now.

iii. Plaintiffs did not add new claims requiring a three-arbitrator panel.

Brad argues that new claims in Phase II triggered the requirement for a three-arbitrator panel. This argument is meritless. No claims were added for the first time in Phase II. The Company amended its pleading in Phase II to specify facts that occurred *during* Phase I that further supported Plaintiffs' existing breach of fiduciary duty claims. (Pa107-150) Brad's assertion that the *claims* were "newly disclosed," Db34, is patently false. The Company supported existing claims with newly *described* facts, of which all parties became aware during Phase I. (Da226) Brad knew about the factual allegations concerning both of Brad's self-dealing transactions during Phase I (the AMF, and the $970,000 loan), but the Arbitrator

did not allow Plaintiffs to formally challenge those acts in Phase I. (Pa398-400) All parties knew the value of the fiduciary duty claims exceeded the $1,000,000 during Phase I, even though the initial pleading did not specify a dollar amount. (Da226).

Brad mischaracterizes Phases I and II by claiming Phase I was about the identity of the members of the LLC, and Phase II was about damages. Db34. All claims preexisted the Arbitration—which Brad asked the trial court to compel—but the substantive claims were stayed until Phase II pending the determination of control in Phase I. Brad treats Phases I and II as separate arbitrations, when they were not; the phases were a procedural mechanism consented to by all parties regarding the order in which issues would be adjudicated. Ibid.

Thus, Brad waived any argument that three arbitrators were required through his inaction during Phase I, and this Court should affirm.

VI. The trial court erred in vacating the portion of the final arbitration award requiring Brad to reimburse the Company 40% of the Company's legal fees incurred in connection with Phase I. (Da3178-3182)

A. The entire purpose of Arbitration is to render final awards subject to vacatur only for specific, narrowly defined reasons.

An arbitration award is usually unassailable, final, conclusive and binding. Public policy favors arbitration, and awards are subject to vacatur only under narrowly defined circumstances. Borough of E. Rutherford v. PBA Local 275, 213 N.J. 190, 201(2013) (stating “courts give arbitration awards “wide berth, with

limited bases for a court's interference."). "[T]o ensure finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards." Id. "Arbitration should spell litigation's conclusion, rather than its beginning... and arbitration... should be a fast and inexpensive way to achieve final resolution of such disputes and not merely a way-station on route to the courthouse." Id.

A party challenging the Award must demonstrate statutory grounds to vacate. The New Jersey Arbitration Act, N.J.S.A. 2A: 23B-1 *et seq.* (effective January 1, 2003) (the "NJAA"), which this Court already determined applies here, provides that an arbitration award may only be vacated if:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

N.J.S.A. 2A:23B-23(a).

In reviewing private commercial arbitrations, courts apply this statute stringently, and the standard for vacatur will be met only in "rare circumstances." Tretina, 135 N.J. at 364. Arbitration awards are final and not subject to judicial review absent fraud, corruption or similar wrongdoing, and an award may not be vacated merely to correct alleged errors of law or fact. Tretina at 357. The party challenging the arbitration award (Brad), and not the successful party, bears the

burden of demonstrating sufficient grounds for vacatur. Del Piano v. Merrill Lynch, 372 N.J. Super. 503, 510 (App. Div. 2004). Of course, there is no "*de novo*" review or appeal, and the statutory grounds for vacatur do not authorize an independent review of the merits. Shahmoon Indus., Inc. v. Steelworker, 263 F.Supp. 10, 14 (D.N.J. 1966) ("courts... have no business weighing the merits"); Tretina, 262 N.J. Super. at 49, rev'd on other grnds., 135 N.J. 349 (1994) (a court reviewing an arbitration award does not sit as an appellate court).

Importantly for this matter, it is also well-settled under New Jersey law that an arbitration award generally cannot be vacated for legal error.[15] The only times mistakes of law or fact may constitute "undue means" occur in the rare situations where such mistakes violate public policy, which is not the case here. The New Jersey Supreme Court, in Tretina, expressly ruled that arbitration awards cannot be vacated based solely on errors of law. Tretina, 135 N.J. at 358. The Tretina standard of review, which is now the governing standard, provides:

> [A]rbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial

15 Indeed, had the New Jersey legislature wanted mistakes of law or fact to be grounds to vacate an arbitration award, it would have expressly included it in N.J.S.A. 2A: 23B-23(a).

> review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.

Tretina, 135 N.J. at 358 (citing Perini v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548-49 (1992)). Courts simply may not intervene even when an arbitrator has made a good faith legal error because, absent fraud or corruption, vacatur based on good faith legal error would be inconsistent with the law post-Tretina. See Tretina, 135 N.J. at 358; Associated Humane Societies, Inc. v. Lynch, No. A-0210-13T4, 2014 WL 5460721, at *4 (App. Div. Oct. 29, 2014).

Here, the trial court erred in vacating the Arbitrator's award of 40% of the Company's legal fees incurred in connection with Phase I of the Arbitration given the absence of statutory grounds to do so under the NJAA.

B. The trial court exceeded its authority in vacating the arbitration award due to a perceived mistake of law.

The trial court exceeded its authority in vacating the attorneys' fees award. The trial court's reliance on In re Estate of Lash, and indeed, its analysis as a whole, was in error. Lash involved a claim for attorneys' fees brought *in court*, not arbitration. Here, the trial court decided the issue as if it too were raised in court—not before an arbitrator—and applied the standard a court is required apply in deciding whether a party is entitled to attorneys' fees. But See Tretina, 396 N.J.

Super. at 353 ("arbitrators have no obligation to follow principles of law which would govern an action in a court of law.") (internal citation omitted). The trial court exceeded its role, which should have been to analyze the Arbitrator's decision against the grounds for vacatur set forth in the NJAA, and vacate the award *only if* the enumerated statutory grounds permitted it to do so.

Although the trial court couched its decision in a finding that the Arbitrator exceeded his powers—the only potentially applicable grounds for vacatur—the substance of the trial court's holding effectively ruled that the Arbitrator made a mistake of law. This is reflected in several statements in the trial court's June 3, 2019 Opinion. The trial court stated, "[t]his court takes no issue with the findings of the arbitrator and Judge Moore that the actions and breaches of fiduciary duty by [Brad] were, indeed, egregious. However, the court finds that more is required to establish an exception to the 'American Rule.'" (Da3180) Then the trial court observed that the Arbitrator "clearly intended to decide this matter according to the holding of" In re Niles, 176 N.J. 282, 294 (2003), (Da3181) but believed "no exception to the American Rule was established under Niles…." (Ibid)

Thus, the trial court recognized that the Arbitrator's decision to award attorneys' fees was based on his interpretation of New Jersey law, but nevertheless substituted its own legal judgment in finding the Arbitrator to have misapplied Niles. The trial court found that the Arbitrator made a mistake of law, but legal

error is not grounds for vacating an arbitration award. The trial court improperly substituted its own judgment for that of the Arbitrator.

The trial court also erroneously based its ruling on public policy grounds, stating "[i]f an arbitrator's decision on a question of public policy… plainly would violate a clear mandate of public policy, it is the duty of the Court to prevent the enforcement of the arbitration award." (citing Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 443 (1996); Heher v. Smith, Stratton, Wise, Heher and Brennan, 143 N.J. 448 (1996)). (Da3182)

Neither case supports vacatur of the awarded legal fees in this matter. Neither Weiss nor Heher involved an award of attorney's fees. Both cases involved the enforceability of certain provisions in law firms' partnership agreements and, more specifically, public-policy considerations implicated *by the conduct of the litigants*. Indeed, the trial court here observed the holding in Weiss that "arbitrators cannot be permitted to authorize litigants to violate either the law or… public policy...."(Da3182) Here, the dispute itself did not implicate public policy. Nor did the arbitration award authorize the conduct of any litigant. Instead, the Arbitrator awarded the Company the fees Brad caused it to expend while he was in control as damages flowing from Brad's breaches of his fiduciary duties, which breaches the Arbitrator, Judge Moore, and the trial court agreed were egregious.

The Weiss Court further held:

> We are persuaded that the standard advocated by the Chief Justice in his *Perini* concurrence and ultimately adopted by the Court in *Tretina, supra,* 135 *N.J.* at 358, 640 *A.*2d 788, ordinarily will govern ***<u>even if the arbitration award implicates a clear mandate of public policy</u>***. Assuming that the arbitrator's award accurately has identified, defined, and attempted to vindicate the pertinent public policy, courts should not disturb the award merely because of disagreements with arbitral fact findings or because the arbitrator's application of the public-policy principles to the underlying facts is imperfect. If the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted.

<u>Id</u>. at 442-43 (emphasis added).

Here, the trial court's decision implies that it found the correctness of the Arbitrator's award was not "reasonably debatable." This decision was in error. The award was undoubtedly "reasonably debatable" given the Arbitrator's basis for the award was the result of significant unjustifiable fees Brad caused the Company to incur for his own personal benefit. More importantly, neither <u>Weiss</u> nor <u>Heher</u> stands for the proposition that an arbitrator's award must be vacated when it would violate public policy if awarded by the Court.

Accordingly, Plaintiffs respectfully submit that the trial court erred in vacating the award of 40% of the Company's legal fees incurred in Phase I, and that portion of the June 3, 2019 Order should be reversed.

C. The Arbitrator's award of 40% of the Company's legal fees was not attorney-fee shifting and did not implicate the "American rule."

The error in the trial court's refusal to confirm the 40% legal fee award also results from Brad's mischaracterization of the award—which the court adopted—

as impermissible attorney fee shifting between litigants implicating the "American rule." But the award was nothing of the sort. The Individual Plaintiffs were adverse to Brad ***and the Company*** during Phase I, and the award involved Brad reimbursing ***the Company*** for legal fees he caused it to expend fighting the Individual Plaintiffs for his own personal benefit, against the Company's interests. No fees were shifted from one side of the "v." to another, and the decision has nothing to do with the "American rule" that litigants bear their own attorneys' fees.

Of course, in a typical case, one party expends fees litigating against an adversary, and the American Rule would serve to prohibit—absent specific exceptions—the prevailing party from seeking to shift the burden of its legal fees to the losing party. By way of example, the Individual Plaintiffs incurred legal fees in Phase I litigating to remove Brad as CEO, and the American Rule prevented them from seeking reimbursement from Brad after prevailing in Phase I. That is not what happened here. The Arbitrator awarded legal fees as consequential damages Brad improperly caused *the Company*—not the Individual Plaintiffs—to incur *against a third party* (*i.e.*, the Individual Plaintiffs).

Attorneys' fees incurred litigating against a third party can be included as incidental and consequential damages of a fiduciary breach, because they flow directly from Brad's breach. Niles, 176 N.J. at 294; see also Lash, 169 N.J. at 31 ("'[a] plaintiff has the right to recover attorney's fees incurred in other litigation

with a third person, if he became involved in that litigation as a result of a... tortious act by the present defendant.'") (quoting 22 Am.Jur.2d Damages § 618 (1988)). Although the "American Rule" disfavors fee shifting, New Jersey and other courts have long recognized that attorneys' fees may be awarded where "they are a 'traditional element of damages in a particular cause of action.'" Id., at 294 (quoting In re Estate of Lash, 169 N.J. 20, 31 (2001)). In Niles, the Court held that attorneys' fees resulting from litigations with third parties, which would not have been incurred but for a former executor/trustee's breach of fiduciary duty, were recoverable as damages from the former trustee. See Niles, 176 N.J. at 295-96.

Here, the numerous and significant breaches of fiduciary duties (torts) committed by Brad caused *the Company* to become involved in litigation *with the Individual Plaintiffs*. It is critical to consider the procedural posture. The Individual Plaintiffs initially brought this suit derivatively against Brad and the Company to recover for Brad's (other) fiduciary breaches and enforce a vote removing him as CEO. ***Brad controlled the Company throughout Phase I***. Brad caused the Company to defend Brad, against its own interests, as clearly articulated in the Arbitrator's Final Award: "[T]he litigation activities and efforts of the Company in Phase 1 were under Respondent's [Brad's] control and direction." (Da2215)

The Company has no interest in protecting Brad personally, and would be expected to have taken a neutral stance on many issues relating to Brad's

wrongdoing. Yet, the Company expended attorneys' fees, for example, arguing that it was totally appropriate for Brad to cause the Company to loan Brad $970,000, or that it was completely proper for Brad to cause the Company to issue Brad a $1M AMF bonus at Brad's direction. The Company's arguments were entirely against the Company's interests, but the Company expended legal fees fighting the Individual Plaintiffs (a third party at the time) as a result of Brad's breaches of his fiduciary duties to the Company.

The Arbitrator reasoned "this may be tiresome, but the prior Orders entered in this Arbitration, the violation of the Orders, the ancillary litigation in the Chancery Division, the Belize saga, dismissing and retaining counsel, ultra vires activities and Claimant's companion claims, herein, were initiated by [Brad]." (Da2215) The Arbitrator awarded counsel fees solely for litigation arising from Brad's tortious conduct, despite Plaintiffs arguing for all legal fees incurred in Phase I.(Da2215-2216) The Arbitrator awarded only 40% of the fees incurred because these were the only fees the arbitrator could directly associate with Brad's wrongful conduct (as opposed to good faith arguments). (Ibid)

The trial court failed to recognize these fees for what they actually were: damages Brad caused the Company to incur—litigation costs against third parties—as a result of Brad's improper, self-dealing, and often unhinged conduct. The Arbitrator did not shift fees incurred by the Plaintiffs to prosecute the

arbitration. Brad cost the Company countless legal fees defending his improper behavior, and but for Brad's conduct, the Company would not have incurred those fees. Thus, the fees constitute "incidental and consequential damages" flowing directly from Brad's myriad fiduciary breaches, which the Arbitrator and both trial court judges agreed were egregious. Niles, 176 N.J. at 294.

The trial court erroneously vacated this award, finding that because there was no agreement in this case that attorneys' fees would be awarded to the prevailing party, the Arbitrator exceeded his powers, entering an award which would "clearly violate New Jersey's long-standing public policy of disfavoring the shifting of attorney fees." (Da3182) Relying on In re Estate of Lash, 169 N.J. 20, 30-32 (2001), the trial court further ruled that an award of attorneys' fees were not warranted, because—the trial court reasoned—there was no third party with whom the Company was forced to litigate. (Da3180) This was simply wrong; Brad controlled the Company during Phase I, and during Phase I, the Individual Defendants were that third party that the trial court believed did not exist.

This ruling was both legally and factually incorrect and must be reversed.

VII. The trial court erred in declining to set Tax Book Value as the appropriate valuation methodology (Da3185-3208).

A. The Company's history relating to buyouts created an implied contract requiring Brad's shares be valued using tax book value.

The Autoclear operating agreement contains no explicit provision on how to value equity transactions, and no integration clause. (Da645-653) However, the members for decades conducted over 100 transactions the exact same way, every time. (Pa258) Brad presided over the Company as CEO for 14 of the years during which 119 such transactions occurred, and he himself did the calculations, a fact which the trial court failed to acknowledge. (5T88:12-89:7) This course of conduct resulted in an unwritten but wholly unambiguous contract that all purchase and sales of interests in Autoclear be transacted at the prior year's Tax Book Value. Brad's conduct goes far beyond implied consent, because he dictated, implemented, and uniformly applied this valuation to his and others' transactions.

The revised NJ LLC Act—which the Arbitrator found applies to this case (Da958) (a ruling the trial court correctly confirmed)—disposed of the requirement that an operating agreement be in writing. See N.J.S.A. 42:2C-2 ("'Operating agreement' means the agreement, ***whether or not... oral, in a record, implied, or in any combination thereof****....*") (emphasis added). The act renders operating agreements like any other contract, which can be wholly oral, wholly written, or partially written and partially oral. See, e.g., Restatement (Second) of Contracts §

210 (1981). Where there is an agreement among members of a company as to equity transaction valuations, the Court must abide by that agreement.

Here, the 119 instances of equity transactions for which data is available (and all the decades' worth of transactions before that) created an implied agreement between Brad and Autoclear to conduct buyouts at the prior year's book value. No other method of valuation has been used, ever. Yet, the trial court disregarded the Company's long-standing practice—***which*** Brad himself acknowledged and ***required***—of using Tax Book Value for all equity transactions.

Citing Cohen, the trial court held that "where the partnership agreement fails to set a fair value buyout formula, the Uniform Partnership Act will 'fill the gap' by requiring that the buyout price be fair value." (Da3192) (discussing Cohen ex rel. Perelman v. Booth Computers, 421 N.J. Super. 134 (App. Div. 2011)). In doing so the trial court effectively determined that "fair value" could not, under the UPA and Cohen, be Tax Book Value. The trial court thus overlooked Cohen's holding that "[b]oth net book value and fair market value, as generally accepted techniques of valuation, can constitute fair value." 421 N.J. Super. at 156.

The court reasoned that the historical Tax Book Value method involved "very minor interests," thus failing to take into account the circumstances of this case. Brad imposed book value valuation on at least 119 people throughout the history of the Company, including in Brad's equity purchases. (5T88:12-89:7) Yet

now, finding himself on the seller-side of the transaction, Brad suddenly took the position that the rules apply differently to him, the very definition of inequitable.

There can be no method "fairer" when determining how Brad is to be bought out than to follow decades-long established precedent for how these transactions were ***always*** handled. Tax Book Value is the only logical valuation to be "fair and equitable to all parties under the circumstances of the case." N.J.S.A. 42:2C-47. Brad conceded book value had been the historical method of transacting equity even before data was available, and that of the 119 analyzed, multiple involved purchases by Brad *himself*. (5T88:12-89:7). It would be the definition of inequitable to permit Brad to *purchase* at Tax Book Value (a lower valuation) and then, because of his bad conduct, be ordered to *sell* at a *higher* valuation. The trial court's January 24, 2023 Order creates a windfall that gives new meaning to the phrase "buy low, sell high." The circumstances dictated that Brad *not* receive the best valuation in the history of the Company, when *every other member* who sold their shares—and were not dissociated for harming the Company—received prior year's Tax Book Value after having done *nothing* wrong.

"Fair and equitable to all parties" does not mean what is the "best" or "highest" value for Brad. Using Tax Book Value is the only fair result to everyone *even without* taking account of the "circumstances of the case." However, when the circumstances of the 12-year-long litigation are taken into account, which involve,

inter alia, Brad trying to literally move the Company out of the court's jurisdiction, artificially inflating his interests, looting the Company on the way out the door, receiving multiple sanctions in a variety of jurisdictions, and a host of other wrongful conduct, there can be no other choice.

Even if Tax Book Value *happens*, coincidentally, to be the valuation which results in the lowest payment to Brad, under *these* circumstances of *this* case, it is not at all unfair to Brad. Receiving the historic valuation cannot be considered unfair for a member who has been involuntarily dissociated for harming the very Company from which he seeks payment. On the contrary, the only thing that could possibly be considered "fair and equitable to all parties" is that Brad get the same valuation that literally *everyone else* got historically: Tax Book Value.

Brad's entire argument is, in essence, that Tax Book Value is not fair because those other 119 (and prior) transactions are "too small" and his dissociation is nebulously "bigger," and Brad unilaterally decided that others' transactions did not warrant an appraisal. But the trial court's neutral expert ***explicitly*** rejected this argument, finding no reason to distinguish Brad's (and others') "smaller" equity transactions from the current 29.5% dissociation buyout of Brad. (6T222:8-223:12) He opined those transactions were ***not*** insignificant, and ***did*** involve enough money that they ***could have*** involved a valuation, or that Autoclear could simply have obtained a valuation every year for everyone. Id.

They just chose not to. Or, more likely, Brad prevented anyone from even trying. Either way, only one member ever was dissociated from the Company for harming it, and no members have ever received a valuation other than Tax Book Value (*including* when Brad *bought* his interests). That member cannot be heard to claim it would be unfair to subject him to the same valuation as everyone else.

Accordingly, this Court should reverse the November 14, 2022 Order valuing Brad's shares using Fair Market Value, and remand with instructions to Order Brad's shares be valued using Tax Book Value as of 2017.

CONCLUSION

Accordingly, Plaintiffs respectfully request: (a) the Orders appealed by Brad Conway be affirmed in their entirety; (b) reversal of the portion of the June 3, 2019 Order vacating the arbitration award of 40% of the Company's legal fees incurred in Phase I of the arbitration; and (c) reversal of the November 14, 2022 Decision and Order valuing Brad's interests in the Company using Fair Market Value, and remanding for instructions to value Brad's interests using Tax Book Value as of 2017.

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Dated: November 30, 2023

/s/David C. Roberts
David C. Roberts

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CHRISTOPHER REGAN, DAVID BONDY, TODD CONWAY, FRED FARKOUH, CHARLES FABRIKANT, EDWARD MATTHEWS AND ROBERT BAILEY	:	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiffs,	:	**DOCKET NO: A-001962-22**
v.	:	**Civil Action**
BRAD CONWAY AND HAZIM AUDALLA	:	**On Appeal from: Chancery Division -Essex County ESX-C-123-11**
Defendants,	:	**Sat Below: Hon. Jodi Lee Alper, J.S.C. and Hon. Thomas Moore, J.S.C.**
CONTROL SCREENING LLC,	:	
Intervenor.	:	

APPELLANT/CROSS-RESPONDENT, BRAD CONWAY'S, BRIEF IN OPPOSITION TO RESPONDENTS' CROSS-APPEAL AND IN REPLY ON APPELLANT'S APPEAL

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I. THE COURT'S ALLOWANCE OF THE MANAGEMENT VOTE TO SHIFT LEGAL FEES TO BRAD WAS CLEARLY UNLAWFUL, AND THE COURT WAS NOT BOUND TO ACCEPT ANY VALUATION LIABILITY THAT RESULTED IN AN UNLAWFUL DISCOUNT TO EQUITY

There was no reason for Brad Conway to have to sue Autoclear in a derivative shareholder action in order to challenge the new management's decision to place their personal legal fees on the books as a company liability for valuation purposes. This argument is made because there is no counter to the impropriety of having argued to the Chancery Court that the 'business judgment rule' allowed a self-interested management vote that violated New Jersey's public policy and shifted Plaintiffs' legal fees by an $800,000 discount to equity. (11T15:17-16:16)(Da3196) It was error for the Court to allow Plaintiffs to usurp judicial control over fee awards in that way. Autoclear apparently concedes the limits of the business judgment rule against self-dealing and unlawful actions, and makes this new argument.

However, Brad was not just a shareholder who was the subject of a company-wide management decision. He was directly already a litigant in this action who had the right to fair value of his shares as ordered by the Arbitrator in his Final Award. (Da3095) The Arbitrator did not order a valuation hearing subject to any limitations, but that the Court would decide pursuant to N.J.S.A. 42:2c-47(c). (Ibid.)(Da3255)

The Court decides fair value case-by case and is fact sensitive. Sipko v. Rogers, 251 N.J. 162, 182 (2022). In addition, "[w]hether the corporation's fair value should be reduced by a marketability discount or any other discount is part and parcel of the fair value determination." Ibid. (emph. added). Moreover, a discount is reviewed *de novo*. "We need not give deference to the trial judge's determinations of what discounts

or premiums the determination of fair value may include, or must exclude, since they are questions of law." Id. at 179.

In determining fair value here, a Court clearly has full power to make an adjustment for whatever Plaintiffs had put on Autoclear's books as liabilities that resulted a discount to equity. That is part and parcel of the valuation process. The Court certainly had the power to disregard a 'liability' imposed by Plaintiffs for their personal legal fees where discounted Brad's equity value, in a valuation hearing. Sipko, *supra*. It was not necessary that Brad, or any other member of Autoclear, first sue in a separate, derivative action to challenge the Plaintiffs' vote that their personal legal fee debts should be made reimbursable and transformed into 'company' debt. If that were the law then all booked liabilities must be accepted verbatim by all Courts conducting fair value hearings, even those booked but unpaid as Autoclear's expert had admitted Plaintiffs legal fees were. (9T38:4-5) Neither a member of a company nor a Court is bound to accept what management deems a liability or discount to equity in a judicial determination of fair value. If that were the case Courts would be irretrievably hamstrung in deciding what fair value even is with adjustments not permitted.

Indeed, for Plaintiffs to contend that Brad had no basis in the valuation hearing to argue that he should not have to pay his adversaries' legal fees, which they had disguised as a company obligation or liability, would mean that a Court could not make adjustments to any part of a company's assets or liabilities in making a fair value determination. Was Brad required to sue Autoclear to challenge the depreciation of $2.2 million of actual value of their two real properties in order for those to be "adjusted" upward in a valuation hearing? Of course not. In fact, Autoclear's own

expert made that adjustment in determining what he believed "net asset value" was. The Court's expert did the same. (Da2193) Was the Court prohibited from making that upward adjustment to decide a fair 'net asset value' because Brad didn't first sue to oppose the company-wide bookkeeping decision? Of course not.

Plaintiffs' argument here is more dangerous to the law of judicial valuation than the business judgment rule argument on which Plaintiffs relied with the Chancery Court. Both arguments seek to wrest control from a Court in freely determining fair value and bind it to management's bookkeeping decisions. This Court should reject both that the business judgment rule would allow self-dealing and unlawful fee-shifting by majorities in shareholder cases. It should reject the idea that a Court must accept every 'liability' placed on a company's books prior to a valuation as a valid discount to equity unless a derivative action is first successfully brought to challenge it.

Finally, Plaintiffs ignore the entirely separate reason to disallow that particular discount to equity, which is that Plaintiffs in this case sought and received a $504,000 award from the arbitrator reimbursing Brad's "personal legal fees" paid by the Company. (Da2220) How can the Plaintiffs succeed in disallowing the Company's payment of Brad's personal legal fees, and then argue later the opposite; that their own personal legal fees are a valid Company debt that should reduce Brad's equity dollar for dollar? Indeed, Plaintiffs' opposition concedes the obvious reality. They intentionally created this 'company liability' in order to reduce Brad's net equity value in the anticipated buyout, which they were prosecuting from the moment they took over management control in 2016. That is when they suddenly placed a $3.3 million "long term liability" on Autoclear's books when there was none beforehand. (6T251:11-25)

That self-interested vote discounted Brad's net equity, on paper, by $826,000, although fee-shifting directly was not allowed in this case.

The law does not limit a Court in rejecting this liability as unlawful and improper fee-shifting because there was not a prior successful derivative action by Brad. Fair value encompasses judicial analysis of all assets and liabilities and adjustments in whatever regard are part of that process. This Court should exercise *de novo* review and reverse the discount to equity that was clearly fee-shifting of $826,000 of Plaintiffs' legal fees in this action, in violation of R. 4:42-9 and N.J.S.A. 2A:23B-21(b), and *see also*, Rock Work Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 355 (App. Div. 2007).

II. THE ARBITRATOR'S REFUSAL TO POSTPONE FOR 45 DAYS DENIED BRAD COUNSEL AND RESULTED IN AN UNFAIR AND IMPROPER FINAL AWARD WITHOUT A HEARING AT ALL

Plaintiffs conflate the law regarding the refusal to grant a postponement with the Arbitrator's right to refuse to consider evidence. The Arbitration Act expressly permits vacatur for the failure to grant a postponement, "upon showing of sufficient cause for postponement". N.J.S.A. 2A:23B-23(a). This was not a case where Brad requested to submit evidence that the Arbitrator refused to consider. This was not even a case where Brad was asking for a postponement so that he had time to find an attorney. This was a case where Brad had found an attorney and that attorney wrote the Arbitrator stating reasonable grounds for the postponement. (Da2154-2155) The case was 7.5 years old and the motion for judgment was inches thick. Brad's counsel needed a chance to review and stated that with 45 days he could file opposition. (Ibid.) Brad had not wasted time after receipt of the Plaintiff's motion and believed he had an attorney prior to this firm. (Da2154) He had childcare concerns because his ex-wife had a stroke.

(Da2154) The minor children themselves needed counsel, and the Arbitrator was admittedly concerned by that. (Da2064)(Da2093) Brad's current counsel stated he would be appearing for both Brad and those minors, if he could get 45 days postponement. (Da2154-2155) Despite all of those reasons, and that counsel was confirming he could file opposition with an extension, the Arbitrator denied the request and without reason. (Da2508; 2510-2512) Therefore, the statute compels vacatur if Brad was denied a fundamentally fair hearing.

Brad also had shown the Chancery Court that the Arbitrator's proceeding unopposed led to prejudice of Brad's chance to dispute that summary judgment was even warranted on the facts that Plaintiffs presented. In fact, N.J.S.A. 2A:23B-15 only permits an arbitrator to decide a case summarily by consent, or "(2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond." Brad had shown the Chancery Court several grounds for the Final Award being a violation of the Arbitrator's own summary judgment standard. For example, Brad filed a certification but the Arbitrator failed to grant any favorable inferences from Brad's denials, when summary judgment's standard required all of those statements to be accepted as true. (Da2548) (4T53:12-20) In that certification Brad had disputed that he owed medical bills. (Da2550-51) However, the Arbitrator gave no benefit of any favorable inferences and did not accept the denial as true or creating a genuine issue for dispute. Instead, he awarded $95,000 for medical reimbursement. (Da2794)

Brad had also shown that the Arbitrator's $70,000 fee reimbursement award for a prior litigation where Plaintiffs claimed Autoclear had paid Brad's personal legal fees

actually was not owed. Plaintiffs had certified in their motion for summary judgment that Autoclear paid a September 30, 2013 invoice for that separate matter. (Da2034) They didn't produce the invoice or the company's check, just the affidavit saying that "the company's books and records" showed the payment. (Da2034) However, Brad showed a consent order entered in that estate case where his counsel's fees would be paid by the estate. (4T53:19-54:16)(Da2043-2044 para. 11) Where Autoclear had failed to document the payment that its CFO, Kevin Lavan, said they could document, but did not, Brad was entitled to favorable inferences that the conflicting Consent Order presented. He was also entitled to cross-examine the Autoclear witness about where the documents he reviewed were. Instead, the Arbitrator ruled Brad owed the $70,975 and the Court confirmed because there was no evidence to refute. (Da2798)(Da2808)

In addition, while Plaintiffs argue here that Brad did not need counsel and submitted his own opposition brief, they somehow also contend that "the arbitrator properly excluded Brad's summary judgment brief". (Pb27) Thus, they contend that Brad's *pro se* brief was good enough, but that the Arbitrator was right not to consider it. They contend that was fair because the Arbitrator gave Brad a 12-day extension before denying his new counsel a chance to meaningfully appear.

As well, in their arguments that Brad's counsel was available to oppose the summary judgment motion because he had recently appeared to oppose a motion in the Chancery Court Plaintiffs assume that Brad was deciding whether or not to retain counsel for the motion for judgment. They contend that Brad did not reveal the existence of his new counsel to the Arbitrator as if new counsel had agreed to appear in the arbitration. (Pb35) They ignore that it was not Brad who decided to have his

new counsel appear in the Arbitration. It was new counsel's decision who told the Arbitrator he could not get in without more time. (Da2154-2155) Thus, Brad had no right to tell the arbitrator of even the possibility that counsel would appear just because that counsel agreed to oppose a motion in Court. It was not some strategy by Brad to conceal an attorney. Besides, what would that gain? Time for the new attorney to file opposition? That is what we were asking to obtain.

The Chancery Court was incorrect to deem the refusal to allow new counsel a short postponement as some form of procedural decision on what evidence to consider or reject. This was not merely a "procedural" issue. It was the denial of a right to counsel in a final hearing. It required a reason in order to be justified. *See,* Bisnoff v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y 2001), "In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a "fundamentally unfair" proceeding." None was given at the time of denial. (Da2508)

Plaintiff's contention that Brad had "three opportunities" to oppose their motion is yet another example of the massaging of facts throughout their briefing. Those "three opportunities" spanned 12 days in total from October 3, 2018 to October 15, 2018. (Da2510) They are the 12 days that the Arbitrator gave Brad in response to his request for 45 days. (Da 2156) They were in reality one opportunity and for less than two weeks in total. However, those 12 days were never going to be enough for a motion for final relief that voluminous and far-reaching. (Da2156) The "opportunity" to have 12 more days was illusory, and it was intentionally so for an arbitrator whose own agenda was to end his involvement in the case quickly. Indeed, that the Arbitrator's

final award directed that the Court was to handle the valuation after expulsion and not him shows he had no further interest in continuing after 7.5 years. He did not want to have to entertain arguments of counsel for Brad who would show that a full hearing was necessary and no final decision could be made on the papers. (Da2210)

If the Arbitrator had allowed Brad's counsel to appear and oppose he could not have granted summary judgment at all because there were substantial disputes of fact that would have required testimony. (4T55-59) Brad was entitled to a full hearing in this arbitration and failing to give him one was itself a basis to vacate. The Arbitrator appears to have denied the chance for Brad to have counsel in order to effectuate his plan to grant judgment on the papers submitted and to avoid the hearing he knew he would have to hold. (Da2510-2512)

Plaintiffs' citations to cases in which the Arbitrator refused to admit evidence is a deflection from the real issue. The unpublished decision of Risco v. NJ Natural Gas, 2015 Unpub. LEXIS 1785, is improper to cite and the case irrelevant. It was not decided on whether a refusal to grant a postponement required vacatur. The question was only whether the arbitrator had the right to expand the agreed upon record and to request and consider additional submissions. The Appellate Court questioned whether doing so constituted exceeding the arbitrator's powers. Id. at *13 and *15. However, it declined to vacate because the plaintiff did not object to additional submissions and it benefited in the award from that decision. Id. at *17-18.

Manger v. Manger, 417 N.J. Super. 370 (App. Div. 2010) is also not a case about the denial of a postponement on sufficient cause. That case was a divorce arbitration agreed upon by the parties as to all financial issues. Id. at 374. Both parties participated

and a full hearing was held. The objection was as to the arbitrator's refusal to allow expert testimony and other evidence. Ibid. The Court affirmed the award on the basis that the arbitrator had heard the case exactly as it would have been heard by the Court. Id. at 377. Most importantly, in Manger both parties were able to participate in a full hearing. That did not occur here because of the postponement denial. He proceeded as if the motion was unopposed, when opposition would have precluded summary judgment under the R. 4:46 standard he said applied. (Da2210)

Rock Work v. Pulaski Const. Co., 396 N.J. Super. 344 (App. Div. 2007), also was not a postponement case. Other than its primary issue which led to the ruling that the Arbitration Act precludes fee-shifting absent express agreement, the objection to the award was based on a limitation of a rebuttal argument. Id. at 350. Again, both parties in that case participated in a full hearing so the Court was not reviewing a confirmation request as one that had proceeded the way this case did.

Plaintiffs have actually argued the wrong point here. They ignore that no reason to deny the appearance of counsel or time to present opposition was even given. (Da2508) They ignore that the refusal to do so then resulted in a one-sided motion for final judgment and the dispensation with a hearing that Brad's counsel's opposition would have required.

Likewise, the Court's belief that the denial of the postponement was within the Arbitrator's discretion regarding evidentiary or procedural decisions was a misapplication of the law. This case was about the denial of counsel and therefore participation in a final hearing with no legitimate reason given, other than the Arbitrator did not want counsel to appear and thereby require a full hearing with testimony and

witnesses and cross-examination. The refusal to allow counsel a short postponement to learn a 7.5-year-old case with more than $1,000,000 at stake, without even giving a reason, is expressly a ground to vacate, and that should have been done.

III. PLAINTIFFS REFUSE TO RECOGNIZE THAT DISCOUNTS ARE ONLY ALLOWED IN EXTRAORDINARY CASES, AND THIS CASE WAS NOT SO BECAUSE OF THE COMPLETE, PRIOR MONETARY DAMAGE AWARDS

For this point as well, Plaintiffs fail to counter Brad's arguments. A minority or marketability discount was precluded here because the Plaintiffs had already recovered all of the damages that the Arbitrator said they could prove before the Court determined fair value. Therefore, this case could not present "extraordinary circumstances" as were found in Balsamides v. Protameen 160 N.J. 352 (1999). Instead, Lawson Mardon Wheaton v. Smith, 160 N.J. 383, 403 (1999) controlled.

In fact, Plaintiffs merely recite at length what marketability and minority discounts generally are, but ignore that our law, since Lawson, is that a case must be "extraordinary" for those to be justified. Id. at 160 N.J. at 403.

Plaintiffs also misstate that Sipko v. Rogers, 251 N.J. 162 (2022) held that discounts should be used as a "default" starting point and that a lack of discounts should be the unusual case. (*See, Pb39*, *citing* Sipko, supra at 182-183). Sipko stated instead that, "[d]epending on the facts, we have held that fairness and equity can compel the decision to apply such a discount, or not. Stated differently, "[a]pplication of the equities . . . [can] dictate[ ] opposite results." *Balsamides*, 160 N.J. at 382, 734 A.2d 721." Sipko v. Koger, Inc., 251 N.J. 162, 183 (2022). Far from Plaintiffs' contentions here, after reviewing Balsamides and Lawson, Sipko said those two cases, "underscore

the importance of determining the "fair value" of a corporation on a case-by-case basis." Sipko v. Koger, Inc., *supra*, 251 N.J. at 184. Thus, the application of a discount to fair value is in no way the "default", as Plaintiffs wish it was. The opposite is true.

Plaintiffs ignore the change in the valuation law from and after Lawson and Balsamides. They are hoping to argue back into existence that discounts apply in even "ordinary" cases, because they convinced the Chancery Court to grant a 35% discount without showing "extraordinary circumstances" and ignoring their enormous damage awards for the same conduct as they contended was oppression. This case was far different than Balsamides.

Plaintiffs also ignore that Casey v. Brennan, 344 N. J. Super. 83, 112 (App. Div. 2001) later relied on Lawson and again stated the opposite of Plaintiffs' contention. Casey affirmed a judge who refused to apply either marketability or minority discounts. "Our Supreme Court has held "that marketability discounts generally should not be applied when determining the 'fair value' of dissenters' shares in a statutory appraisal action," in the absence of "extraordinary circumstances." Id. at 112. Casey confirmed that Lawson requires, "[o]rdinarily, all shareholders are entitled to be paid fair value for their shares, because of the fiduciary duty majority shareholders and directors have to treat minority shareholders fairly." Id. at107-108 (emph. added).

Plaintiffs likewise ignore that Brown v. Brown, 348 N.J. Super. 466, 483 (App. Div. 2002) also confirmed the same change in our valuation law a year later, including cases, "valuing shares in a court-ordered buy-out resulting from an oppressed shareholder situation". Therefore, Brown recognized that, even in oppression cases,

"neither marketability nor a minority discount should be applied absent extraordinary circumstances." Ibid.

Contrary to Plaintiffs' argument here, it is the law that "ordinary" cases no longer allow discounts to fair value. "Extraordinary circumstances" are required and those circumstances, "require more than the absence of a trading market in the shares…." Lawson, *supra*, 160 N.J. at 403. Balsamides was only extraordinary because there was unremedied oppression and one overall equitable buyout order. The opposite occurred here. Plaintiffs were not entitled to anything more from Brad at the time of valuation because of their damage awards. They continued to play victim during the valuation process on the improper contention that Balsamides requires a discount if oppression occurred, whether or not a separate remedy was previously awarded for it.

Plaintiffs even show their misconception by contending the "purpose" of a discount here was not to punish but to reflect economic reality of the lack of marketability. (Pb47) Lawson held directly that "the absence of a trading market in the shares" is not enough. Lawson, *supra*, 160 N.J. at 403. In addition, Plaintiffs clearly argued for their discounts based on Brad being an oppressor and the Chancery Court did base its discounts on that 'oppression'. (11T20:13-21:3)(Da3203-04) However, that argument and its resultant finding both rested on the incorrect basis that the law does stand for discounting in most cases and whenever oppression existed.

The Chancery Court was therefore wrong about discounts being ordinarily available, and also made no finding of "extraordinary circumstances". The Court clearly also recognized the past but remedied oppression as justification for a discount. (Da3203-3204) Brad lost $588,000 of the fair value of his equity in Autoclear on those

rulings which violated Lawson, Casey, Brown and even Balsamides. That decision to discount requires this Court's *de novo* review and reversal for an Order that the Chancery Court must award fair value without discount. Sipko, *supra* 251 N.J. at 179.

IV. THE PLAINTIFFS DO NOT REFUTE THAT THEY RECEIVED A 35% DISCOUNT BASED ON THE SAME FACTS THAT JUSTIFIED MILLIONS OF DOLLARS IN MONETARY DAMAGES IN VIOLATION OF PRINCIPLES OF RES JUDICATA

Plaintiffs next incorrectly contend that Brad cites only "boilerplate" law for his *res judicata* argument that the Chancery Court double-counted relief for the same claims here. (Pb47) To the contrary, Brad cited to Chattin v. Cape May Greene, 216 N.J. Super. 618, 637 (App. Div. 1987) in which this Court agreed that arbitrated claims on the same facts could not be relitigated in Court under different theories. Plaintiffs have chosen not to address or distinguish Chattin. That is because they know that the same conduct for which they received prior monetary relief is exactly what they argued to the Chancery Court to be oppression justifying a discount.

Plaintiffs are also wrong that Brad is arguing that prior payment on the Plaintiffs' monetary claims 'absolves' Brad. He argues merely that Plaintiffs were already compensated for oppressive acts before the Court's determination of fair value, which prevents this case from being found similar to Balsamides. He argues that Lawson is the general rule, as confirmed by Casey and Brown. No discount is to be applied without "extraordinary circumstances". He argues this case could not be "extraordinary" to equitably justify a departure from Lawson based on oppression where doing so would be in addition to the millions of dollars Plaintiffs already

recovered from Brad in damages for that same conduct. He correctly argues that was relitigation of the same facts under a different theory for relief, prohibited by Chattin.

While Plaintiffs contend "there is no law" that payment of damages "cleanses" Brad's conduct in the context of paying him fair value without discounts, in reality all of the law requires that after Lawson, Brown, Casey and even Balsamides were decided. Chattin, *supra*, also precludes a recovery on the same facts but a different legal theory (here discount in valuation), and Plaintiffs do not refute the law.

It remains the proper analysis of law here that the Chancery Court should not have imposed any discount to fair value, particularly not for oppression, where any and all damages for that same conduct had previously been remedied. (Da3204) The Court's 35% discount to fair value here doubly punished Brad for the same conduct and should be reversed on this Court's *de novo* review. Sipko, *supra*.

V. PLAINTIFFS' ARGUMENTS REGARDING THE $503,000 SANCTION CONFLATE FACTS AND TIMELINES AND IGNORE THE POINTS BRAD CONWAY RAISES AS TO THE COURT'S FAILURE TO ACT WITHIN THE LIMITS OF R. 1:10-3.

Plaintiffs apparently agree that the, "scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011). However, Plaintiffs recount in their opposition all of the conduct that predated the June 7, 2016 restraining Order, which were not the violations raised in their November 2017 Motion in Aid of Litigants' Rights. (Pb25) Those other actions which led to the June 7, 2016 restraints are not relevant to the November 2017 R. 1:10-3 motion, because those violations were remedied by the June 7, 2016 Order of restraint. None were alleged to have been repeated as part of Plaintiffs' November

2017 R. 1:10-3 motion; only that Brad filed a pleading that alleged facts that were opposite of the Court and arbitrator findings in this case for the change in management control. (1T20:24-21:3(1T35:8-18) Thus, Plaintiffs cannot dispute that, despite almost 1.5 years passing after the June 2016 restraining order, Plaintiffs did not allege any actual interference with the management or operation of the Company in November 2017. Plaintiffs alleged only that the federal pleadings violated the June 2016 Order and that the cost to defend the federal filings was hurting the Company's finances. (1T24:11-21) However, in November 2017 the Arbitration proceedings were still ongoing and Plaintiffs were still pursuing Brad's expulsion from the Company. They were voluntarily incurring legal fees anyway and could not fairly argue that any fees were destroying the Company's ability to operate.

The Chancery Court also did not find any actual interference with operation or management of the Company. The Court stated that the Plaintiffs' 2017 motion in aid of litigant's rights was based on the SDNY complaint violating the June 7th restraint, and that Plaintiffs sought attorneys' fees and an Order requiring withdrawal of that pleading. (1T20:24-21-3) (1T35:8-18) (1T32:16-24) (Da1899) The Court stated that Plaintiffs objected to needing to pay to defend the SDNY action. (1T24:11-21) The Court found that Brad's SDNY filing violated the June 7th Order because he was prohibited from "representing to anyone" that any company operating agreement other than the one from April 1, 1995 was valid, and from "representing to anyone" that the February 8th meeting (where Brad purported to vote to retake control of the company) has any legal effect whatsoever." (1T39:10-25) (1T22:22-23:6) (1T39:22-40:4)

Therefore, the only "remediation" needed for the Plaintiffs' November 2017 R. 1:10-3 motion was an Order to withdraw the SDNY and DNJ pleadings and an Order against further efforts to remove this case to Federal Court. The Court could have also ordered reimbursement of Plaintiffs' defense costs for opposing the improper federal filings and legal fees incurred in making the November 2017 R. 1:10-3 motion. The Court did those things but then went much, much further, resulting in a $503,000 sanction despite 1.5 years passing after the June 7, 2016 restraining order and no physical interference with any management or actual operation of the Company. The Court did not explain why it needed, as remediation, to make such an enormous award in addition to the remedial Orders to withdraw the pleadings. Instead, it stated its award was consequence for the violation: punishment.

> The Court must sanction Brad, because he has not faced any consequence… In the rule of law behavior must have consequences and we've had behavior subsequent to the entry of that order, according to the plaintiff's argument, which are frivolous and have cost the company enormous sums of money to address. [1T36:8-16]

Thus, the Chancery Court relied on R. 1:10-3 for its fee award but went far beyond awarding only the fees that were part of the 2017 R. 1:10-3 motion at hand. Yet, it acknowledged that, "relief available" under that rule "is limited to remediation of the violation of a court order, thus sanctions available are intended to be coercive not punitive." (1T3718-25) It ruled that monetary sanctions unrelated to an applicant's damages are only permitted, "if they are intended to compel compliance with the court's order," citing Franklin Twp v. Quakertown Ed. Assn. 274 N.J. Super, 47, 55 (App. Div,. 1994). (1T382-8) However, the Court then awarded almost all of the fees going back to before the June 7, 2016 Order without explaining why or how doing so

was necessary to "compel compliance with the Court's Order" as it said Franklin would justify. Such an enormous award was in no way necessary, and the Court's statement that the award was a "consequence" shows the intent was in fact to punish in addition to remediation of the violation.

R. 1:10-3 did not permit this enormous and punitive award. Only R. 1:10-2 could have, as a contempt of court decision. Under R. 1:10-3, monetary awards are only allowed if, "fashioned in an amount sufficient to sting and force compliance, but must not be so excessive as to constitute ruinous punishment. East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 235 N.J. Super. 417, 422 (App. Div. 1989). In fact, the Chancery Court's reliance on Franklin Tp. Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super. 47, 54 (App. Div. 1994), for its enormous and punitive sanction is ironic. That case actually prohibited what the Court did here. It first ruled that a fee award on a R. 1:10-3 motion is limited to, "only legal expenses incurred in securing the order enforcing a litigants' previously-existing rights.... Plaintiff is not entitled to all attorney's expenses incurred during the strike, only those resulting from obtaining the order to show cause of May 18, 1992, seeking, in aid of litigants' rights, to enforce the return-to-work provisions of the May 15, 1992 order." Id. at 54 (emph. added).

Moreover, while the Chancery Court here believed that Franklin allowed it to impose a sanction unrelated to a litigant's damages, "to compel compliance with a court order," the Judge failed to recognize that the Franklin only allowed, "the trial judge may impose additional monetary sanctions against striking public employees and their representatives, to continue in effect until there is compliance with the court order which is being violated." Id. at 51 (emph. added) The Court did not hold that a

sanction could be a penalty, payable as a "consequence" for a violation, which is what the Court did here. To the contrary, it ruled:

> We find no authority which permits the imposition of nonlegal strike-related costs pursuant to *R.* 1:10-5. As we pointed out in *East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n,* 235 N.J.Super. 417, 563 A.2d 55 (App.Div.1989):
>
> The object of a civil proceeding to afford supplemental relief to a litigant, *R.* 1:10-5, is to enforce a court's order. Unlike a contempt proceeding, *R.* 1:10-1 through 4, punishment is not the objective, though a sanction imposed by the court to compel compliance may inflict punishment's sting. [Id. at 54].

Therefore, Franklin would only have allowed a monetary penalty in addition to the legal fees connected to the November 2017 motion, if that penalty was intended to run only "until" there was compliance with the June 7th Order. An example might have been to sanction Brad daily until he withdrew the SDNY pleading.

In reality, the limits to R. 1:10-3, as stated in Franklin, precluded both aspects of the Chancery Judge's sanctions here. He was not permitted to award legal fees beyond those connected to the November 2017 R. 1:10-3 motion and reimbursement of costs for Plaintiffs to defend the SDNY and DNJ filings that the Court found improper. He was not permitted to sanction as a consequence but only to compel. However, the vast majority of his $503,000 award was related to a motion 17 months earlier and was held to be an award as 'consequence'. (Da3155-3156)(2T4:18-20)(2T13:7-19:14)

What the Chancery Court did here was exceed the bounds of R. 1:10-3 and convert Plaintiff's motion to a *de facto* contempt proceeding under R. 1:10-2 wherein the Court punished Brad for violating the June 7, 2016 restraint, in addition to ordering remediation. Had the Court actually notified Brad that it was proceeding under R. 1:10-2, which the June 7, 2016 Order contemplated for violations (Da13-14), Brad was

entitled to its safeguards before such a penalty were imposed. Those safeguards included that a summary proceeding must be held instead of merely oral argument on a motion. R. 1:10-2(a). Brad also could have sought decision by another judge. R. 1:10-2(c). In fact, Plaintiffs had accused Brad of insulting and disrespecting the Judge, which would have mandated a different judge consider a contempt violation to be fair. (1T16:16-17:1(1T33:11-23) However, Brad was denied R. 1:10-2 safeguards while a contempt-like penalty was nevertheless imposed on him by a R. 1:10-3 motion. That decision violated Brad's rights under both R. 1:10-3 and R. 1:10-2.

Plaintiffs also misconstrue Brad's assertion that he had complied with the June 7, 2016 restraining Order to be an argument that he complied with the February 8, 2016 "change in control" Order. Brad only argued, and it is not refuted, that 1.5 years passed after the Court's June 7, 2016 restraints without any interference with operation or management of the Company. Brad himself made that argument at the R. 1:10-3 hearing. (1T33:12-23) The Plaintiffs' November 2017 R. 1:10-3 Motion was based on allegations in pleadings only and Brad's effort to remove this action to federal court, which are far less than the actions that led to the June 7, 2016 restraint. (1T20:24021:3)(1T35:8-18) The only perceived threat to Company operation from Brad's SDNY action was alleged to be defense costs for them. (1T24:11-21)

Thus, Brad rightly argues that the Court was required to consider the level of conduct that violated the June 7, 2016 Order as to what sanction was the least that was necessary to ensure future compliance, but did not do that. Bd. of Educ. of Middletown v. Middletown Tp Educ. Assn., 352 N.J. Super. 501, 509 (App. Div. 2001). He rightly argues that allegations in a federal pleading were not similar to physical efforts to

interfere with operation of the Company that led to the June 2016 restraint. He rightly argues the Court should have recognized, in mitigation, that its June 2016 Order was followed for 17 months before Plaintiff's R. 1:10-3 motion, and that the violations at issue in November 2017 were merely allegations in a pleading. Brad did not physically impede management of the Company from and after the June 7, 2016 Order, or as part of the November 2017 R. 1:10-3 motion. The Court should have also recognized that the defense costs for the SDNY and DNJ filings could not have threatened the existence of the Company where the Plaintiffs were voluntarily incurring legal fees suing Brad at the same time in the arbitration, seeking his expulsion and damages.

Similarly, Plaintiff's argument that the Court awarded less than they requested also is not relevant to whether the bounds of R. 1:10-3 were exceeded. (Pb26) Simply reducing a requested fee award does not mean the reduced award is automatically appropriate or allowed by the limits of R. 1:10-3 for "remediation". Under Franklin, the Court was only permitted to reimburse fees associated with the November 2017 motion in a R. 1:10-3 motion. "The goal is compliance and nothing but compliance." Bd of Ed., Tp. of Middletown, supra, 352 N.J. Super. at 510. The Court could not punish in any amount under R. 1:10-3 and this particular sanction was not imposed only "until" compliance occurred, as Franklin so limited it. Merely that the Chancery Court reduced what Plaintiffs had requested does not mean R. 1:10-3 was followed.

This Court reviews, "an order to enforce litigant's rights under *Rule* 1:10-3 for an abuse of discretion." Savage v. Tp. of Neptune, 472 N.J. Super. 291, 313 (App. Div. 2022); Wear v. Selective Ins. Co., 455 N.J. Super. 440, 458 (App. Div. 2018). This Court considers whether a lower court's order was, "'made without a rational

explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Wear, 455 N.J. Super. at 459. Here, the $503,000 sanction went far beyond the remediation allowed by R. 1:10-3 and was far more than "coercive" or the least sanction necessary to gain compliance. The Court also awarded far more than legal fees related to the November 2017 motion, which Franklin prohibits. The Court imposed a penalty as a "consequence" for a violation that occurred 17 months after the restraining Order at issue, and where the later actions did not interfere with management or operation of Autoclear. The Court's decision was punitive and intended to be so by reference to the Court's statement of a need for "consequences". The Court's sanction was a *de facto* contempt ruling, which R. 1:10-2 would have prohibited in the way it was decided; i.e. by the same judge on a motion and without a summary proceeding prosecuted by the State. Therefore, Brad submits that the Court's $503,000 sanction order was made on a legally impermissible basis and constituted an abuse of discretion requiring reversal.

VI. THE SINGLE ARBITRATOR HAD NO AUTHORITY OVER PLAINTIFFS' LARGE MONETARY CLAIMS AND THE CHANCERY COURT WAS REQUIRED TO DECIDE THE ISSUE, NOT DEFER

Plaintiffs apparently concede the facts related to their amendment of pleadings and that, prior thereto, AAA had opened the case as a "non-monetary" claim. (Da354)(Da357)(Da1319-1320) While Plaintiffs contend that Brad always knew the case was worth more than $1,000,000 because they sought to expel him from Autoclear, AAA is who needed to know an ascribed value so that its rules and fees could be applied. (Da212-214)(Da219) That is why AAA's rules require the delineation

between monetary and non-monetary claims, and that is why they require evaluation of "disclosed" claims. (Da198-199 at R-4)

Plaintiffs' claims contained no 'disclosed' large monetary claims when filed and their claims were recorded as "undetermined amount", which is why the AAA's Large Complex Claims were not triggered initially. (Da226-268)(Da354) That is also why AAA agreed with Brad that the amended filing did trigger the Large Complex Case rules. (Da316) AAA did not agree with Plaintiffs' argument here, that the amendment changed nothing. It recognized the opposite. (Ibid.) The only reason that AAA reversed its initial confirmation to add 2 more arbitrators to Garafalo was based on an unspecified "waiver" under AAA Rule 37, which AAA said only <u>after</u> it had recognized Brad did have the right to add two more arbitrators in 2016. (Da319-320)(da322) Of course, waiver even under the AAA rules required "knowledge" and therefore intentional acquiescence. (Da207)

As Brad had shown the Chancery Court, and as it appeared the Court may have agreed during oral argument, there could be no sustainable finding of a waiver that met the requirements of AAA Rule 37 here. (Da324-331)(3T55-60)(3T62:11-68-23) In fact, AAA tried to contend the case was always under the Large Complex Case rules, despite never having held the required initial conferences that L1-L4 would have required, and never having provided for choice of 3 arbitrators. (Da332) (Da335-340) There was nowhere in the record a written waiver from Brad's counsel when this arbitration started the Large Complex Case rules would be in effect but the parties would use only 1 arbitrator. The case simply was not started under those rules and they were triggered by the monetary amendment made in 2016.

Plaintiffs are also wrong that Brad was arguing for an entirely new panel once they amended to add their large monetary claims. He simply requested a panel of 3 and AAA agreed it would add 2. AAA said that Mr. Garafalo would stay on. (Da315-316) Therefore, had AAA not later changed its position and declared a waiver, Mr. Garafalo would have remained and 2 additional arbitrators would have also presided over the Plaintiffs' new monetary claims under the Large Complex Case rules. That would not be an 'entirely new panel' or an 'entirely new arbitration', as claimed.

Thus, Plaintiffs incorrectly contend that Brad tried to use their amendments to pleadings strategically because he did not like the arbitrator. Brad was not asking AAA to disqualify Garafalo. He was also not asking that Garafalo's prior "Phase I" rulings be vacated upon the amended pleadings Plaintiffs filed. He was simply asking that 3 arbitrators decide the large monetary claims that Plaintiffs' amendment had for the first time presented in 2016, which AAA rules required at the time those monetary claims were "disclosed". In fact, AAA rules provide that if the parties could not agree on 3 then AAA chooses, so it could have kept Garafalo on. (Da212) That is apparently what it indicated it would do in response to Brad's request. (Da316)

In fact, while Plaintiffs argue that, if amended pleadings automatically triggered changes to arbitration rules then a party could use that strategically to change arbitrators, AAA large complex rules would hold otherwise since AAA ultimately chooses the 3 arbitrators if there is no agreement. (Da212) In fact, the opposite strategy is more accurate here. Plaintiffs here could be argued to have 'strategically' presented their claims as "non-monetary" to avoid the AAA's Large Complex Case rules and have only 1 arbitrator presiding. (3T67:8-10)(3T10:5-10) Once they

obtained the injunctive relief they wanted, they "disclosed" large monetary damage claims which a single arbitrator could not have heard if disclosed initially. Arguably, it was as a result of the Plaintiffs' strategic phasing of their claims that they had 1 arbitrator decide millions of dollars of damages, which was against AAA rules.

Plaintiffs also apparently concede that the line of cases Brad cited for vacating awards made contrary to the parties' arbitration agreement do require vacatur. Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir, 1991); Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272, 791 F.2d 22, 25 (2d. Cir. 1986); Food Handlers Local v. Pluss Poultry, Inc., 260 F.2d 835, 836 (8th Cir. 1958); El Vocero de Puerto Rico v. Union de Periodistas, 532 F. Supp. 13, 16 (Dist. P. R. 1981). (Db30-32) Plaintiffs have not rebutted any of those cases and all of them were cases exactly like this one. An award was made. One party sought confirmation and the other sought vacatur based on a violation of the arbitration rules. In all of those cases the Courts, post-award, recognized that either the wrong number or type of arbitrator decided the case and the decision could not stand. This case was no different for the failure to have 3 arbitrators decide Plaintiffs' large monetary claims, as AAA Large Complex Case rules required. Just like all of the foregoing cases the Court here was required to decide if the single arbitrator was agreed as eligible to decide the Plaintiffs' monetary claims. It was not permitted to defer and let AAA decide what the agreement to arbitrate required. Judicial deference is only the standard in pre-award cases, which Plaintiffs incorrectly cited and the Court misinterpreted. Its decision in this respect was incorrectly based on a pre-award standard of law. (3T87:20-88:25)

For example, Plaintiffs' cited case of Dockser v. Schwartzberg, 433 F. 2d 421 (4th Cir. 2006) was not a post-award case. There, a demand for AAA arbitration was made and requested 3 arbitrators. Id. at 423. In order to try to get only a single arbitrator that plaintiff sought declaratory judgment under 9 U.S.C. sec. 5, which permits a court to choose an arbitrator if one party refuses to participate. Id. at 424. The district court there compelled the arbitration but refused to decide how many arbitrators the parties' agreement required in a pre-award setting. "The question of whether [the arbitration rules] have properly been applied falls outside of the ambit of sec. 5". Dockser, *supra*, 433 F. 3d at 425. Thus, Dockser's pre-award ruling on an entirely different statute made it inapplicable here. If the holding of Dockser were as the Plaintiffs argued, and as the Chancery Court applied it, then none of the cases that Brad submitted and wherein arbitration awards were vacated for exceeding powers, could have so held. Yet, they all did vacate the award, because they applied the post-award standard that was at issue here, not the pre-award standard.

In Avis Rent A Car System, supra, 791 F.2d 22, the parties disputed who had power to arbitrate. The arbitration authority appointed someone over one party's objection. Id. at 25. Upon application to vacate that final award, the 2nd Circuit did not hold that the procedural question of who could arbitrate was solely for the arbitration authority to decide. Id. at 25-26. Instead, it agreed that, "an arbitrator may have the final say on certain issues that affect the power to enter an award, but an award will not be enforced if the arbitrator is not chosen in accordance with the method agreed to by the parties." Id. at 25, *citing* Tamari v. Conrad, 552 F.2d 778, 781 (7th Cir. 1977) (emph. added).

Likewise, in Food Handlers Local v. Pluss Poultry, Inc., 260 F 2d. 835 (8th Cir. 1958) the parties agreed 3 arbitrators would make decisions, with each side choosing one and if the two chosen arbitrators could not pick a third then the 'Board of Arbitration' would. The union instituted arbitration. The company did not name anyone and asserted the union's claims were not arbitrable. Id. at 837. The union made its selection and then asked the "Federal Mediation and Conciliation Service" to submit a list of names, which it did. Ibid. On the motion to vacate that appointed arbitrator's decision the 8th Circuit did not rule that the arbitration authority had the sole decision procedurally to decide who was appointed. To the contrary, the Court vacated the award because it found that one arbitrator was not authorized by the parties' agreement to render the awards, and the appointment exceeded the arbitrator's powers. Id. at 839.

In Szuts v. Dean Witter, 931 F. 2d 830 (11th Cir. 1991) the Court had the same issue as is presented here: can an award by less than 3 arbitrators stand when the parties' agreement called for 3 and one party objected? Id. at p. 830. The Court held, "because arbitration is a creature of contract, the answer is no." Ibid. In that case the arbitration was pursuant to AAA rules. The AAA apparently considered the objection of one party to proceeding with only 2 arbitrators and ruled that it felt the matter should continue to final award. In Szuts the Court also did not defer to the AAA on its procedural election to proceed with only 2 arbitrators. It vacated, "[b]ecause the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their authority under the arbitration agreement." Id. at 224.

Still further, Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223, 224, (4th Cir. 1994), a Fourth Circuit case just as Dockser was, illustrates

the difference in pre-award judicial abstention versus post-award judicial analysis for confirmation/vacatur. There, the parties had an arbitration agreement requiring mutual selection of the arbitrators. Id. at 224. The arbitral body, the RMA, "appointed itself as the three-member arbitration panel for the dispute and made a final award over one party's objection. Id. at 224-225. The Fourth Circuit vacated because "arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated, Szuts, 931 F.2d at 832; Avis, 791 F.2d at 26." Id. at 226. In fact, in doing so the Cargill Court rejected the same argument that Plaintiffs made here, that the Court had to, "defer to the determination by the RMA arbitration committee that the arbitration clause does not require arbitrators chosen by mutual agreement of the parties." The 4th Circuit stated, "[w]e find this position untenable. While we do, of course, defer in some circumstances to contractual interpretations of arbitrators, we are aware neither of any authority nor any reason to defer to the contractual interpretation of the arbitration committee of an arbitral forum." Ibid.

Finally, Dockser cited Cargill and recognized its situation to be distinguishable from that Court's analysis of a pre-award 9 U.S.C. sec. 5 action. Dockser, *supra*, 433 F. 3d at 425. That means that Dockser cannot have been interpreted to stand for the proposition that the Chancery Court adopted here; that the Court had to defer to procedural decisions of the AAA in a post-award confirmation decision. The opposite is plainly true. On the motion to confirm the partial and final awards of 2018, the Court was required to decide whether 1 arbitrator was "agreed" by the parties to be eligible to decide Plaintiffs' large monetary claims. The Chancery Court would not reach the issue believing it had no authority. (3T87:20-88:25) The Court even refused

to reconsider when shown that Dockser was not applicable to a post-award confirmation as this was. (4T11:7-14:23) This was a misapplication of law requiring reversal and remand for that determination to be made on its merits.

The two cases Plaintiffs cite here do not change that analysis. They are not applicable either for their reliance on Dockser or for being pre-award decisions. In 3S Del Inc. v. DataQuick Info Svs, Inc., 492 F.3d 520 (4th Cir. 2007), the 4th Circuit misapplied Dockser in the final issue of a multi-issue rejected appeal. In that case, 3S had withdrawn from arbitration and, after suffering an unexpectedly large award against it, went to Court to try to vacate. 3S raised every post-award ground it could under 9 U.S.C. sec. 10, the last of which was that the other party's claim was in the millions of dollars so 3S could have asked for 3 arbitrators. Id. at 531. However, 3S did not ask for 3 arbitrators and get rejected, as Brad did here. It instead withdrew from the arbitration and let it proceed without its participation, not understanding what was at stake. Id. at 525. In rejecting that final issue, the Court generally referenced Dockser for the proposition that, a court "generally" lacks jurisdiction to determine the number of arbitrators. Id. at 532. It is doubtful that the Court in 3S Del even knew that Dockser was a pre-award case. Nevertheless, when a full analysis is done Dockser did not stand for what the 3S Court only generally stated.

Certain Underwriters at Lloyds London v. Westchester Firs Ins. Co., 489 F. 3d 580 (3d Cir. 2007), like Dockser, was plainly a pre-award case and therefore not applicable here on its face to the post-award judicial analysis that was required. That case was no more than a pre-hearing dispute between the parties as to whether the arbitrator or the Court could decide if two simultaneously filed arbitrations should be

decided together or separately. The District Court said that this pre-hearing dispute was not for the Court but for the arbitrator. Id. at 582. The Court held it was not a "question of arbitrability", which is all that a Court would decide in a pre-award setting. Id. at 585. Moreover, the Court in Certain Underwriters analyzed and recognized Dockser for what it was, a pre-award decision of simply whether a matter was arbitrable or not. Id. at 588-589. Certain Underwriters therefore does not stand to overrule any of the post-award cases Brad has cited that require clearly judicial review of whether an award was made within the rules of the parties' arbitration agreement or not. Szuts, *supra*, Food Handlers, *supra*, El Vocero, *supra*.

Likewise, the Chancery Court's reliance on Barcon v. TriCounty Asphalt Corp., 86 N.J. 179 (1981) for the proposition that Courts should minimally interfere with arbitration decisions was incorrectly analyzed. (3T88:18-25) In Barcon the Supreme Court recognized both the power of judicial review of awards on statutory grounds and to ensure the fairness of the process. In that case the ground raised for vacatur was the bias of the arbitrator, who had not disclosed business dealings with one of the parties. Id. at 184-185. The trial court vacated the arbitration award on that statutory ground. The Appellate Division affirmed and the Supreme Court agreed vacatur was required.

> Although arbitration originates in the contract of the parties and is a process which may operate without any court involvement, we reject the notion, repeatedly asserted by the dissent, that the parties' contract should prevail over all other considerations. In particular, we give priority to the need to maintain the integrity of arbitration and public faith in the process. The dissent objects that our holding today disregards "the paramount public policy consideration" of encouraging "voluntary arbitration as a means of resolving commercial disputes informally, expeditiously, relatively inexpensively, and in a manner that relieves our overburdened judicial resources," post at 210. However, it is our strongly held view that honest, fair and impartial arbitration is as important as the finality of arbitration. [Id. at 189].

At minimum, Barcon showed the Chancery Court did have the power to review the statutory ground for vacatur Brad cited; i.e. that the arbitrator exceeded his powers because the rules of the parties' arbitration agreement were not followed. Barcon also supported the Chancery Court's general right of review in order to ensure that the arbitration process was "fair" to Brad. Id. at p. 187.

It appeared that the Chancery Court well understood the validity of Brad's argument concerning the AAA's reliance on an implied waiver. (3T62:11-68-23) However, the Court incorrectly felt powerless to decide the issue because of a misapplication of the law, which should be reversed and remanded.

VIII. THE COURT WAS WRONG TO RULE THAT BRAD'S FAILURE TO CHALLENGE CONFIRMATION OF A PRIOR PARTIAL ARBITRATION AWARD WAIVED HIS RIGHTS

It was also unfair for the Chancery Court to rule that, when opposing the Arbitrator's prior partial award, which voided a $970,000 loan from Autoclear to Brad, he was at that time required to seek vacatur on grounds that 3 arbitrators were required, or be deemed to have waived that right forever. First, the Court incorrectly believed Brad did not make that argument. In several places of his *pro se* brief opposing, Brad did state his dispute with one arbitrator handling the Phase II part of the claims. For example, he argued that, "The AAA rules are also being reviewed for improperly empaneling arbitrators here under the Large Complex Rules L1-14." (Da1152) He argued that he was entitled to "a panel of three from the LCC roster". (Da1154). These statements raised the issue but were not the thrust of Brad's opposition at that time.

Instead, Brad's challenge to that particular partial arbitration award was based on the complete lack of arbitrability of that claim. He argued the only compulsion to

arbitration was in Autoclear's operating agreement which only required that for "any material dispute hereunder". (Da648) The loan at issue for that award was separately documented in 2 notes and did not arise under the operating agreement. (Da999) Brad further stated, "[t]he Loan Contracts which are now nearly four years in performance, never contained an arbitral provision, but held instead a selection of court clause...." (Da1090-91) . He stated, "in the 2014 Loan Contract there never was an arbitral agreement between the two parties." (Da1100) He argued, "the absence of an arbitration claims means the arbitrator could not have any jurisdiction on the Loan Contracts." (Da1157) He thus argued there was no arbitral contract at all which could have allowed any arbitrator to decide the validity of the $970,000 loan. (Da1093-98(Da1125-1126)(Da1135)(Da1157) When challenging the very arbitrability of the prior award on that loan transaction it was extremely unfair for the Chancery Court to have deemed Brad bound to also argue that 3 arbitrators were required. Those two arguments conflicted with each other. There should not have been any waiver finding on those facts related to that prior partial award.

Finally, the Plaintiffs in this case intentionally presented their claims piecemeal. They intentionally then presented motions for partial awards and sought confirmation separately of their partial awards. They did not need to confirm any partial awards until the entire arbitration was over. That they did so made it very unfair for Brad to have been deemed required to raise any and all objections that he might ever have to Phase II of the Arbitration in opposing each portion, or be foreclosed later.

This Court should reverse the Chancery Court on the decision to defer whether the parties' arbitration agreement required 3 arbitrators to decide Plaintiff's significant

monetary claims, and on remand direct the Court to decide the issue presented on Brad's cross-motion to vacate the 2018 partial and final awards.

Brad Conway's Arguments in Opposition to Cross-Appeal

IX. THE CHANCERY COURT WAS CORRECT TO VACATE THE ARBITRATOR'S $314,000 FEE AWARD AS A VIOLATION OF PUBLIC POLICY

A. Public Policy Violations By Arbitrators Must be Vacated

Plaintiffs' recitation of the applicable law for when an arbitration award may be vacated is misleading and intentionally incomplete. For example, Autoclear cites Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 202 (2013), for the general proposition that, "awards are subject to vacatur only under narrowly defined circumstances." (Pb60) Plaintiffs then cite only 2 sections of the New Jersey Arbitration Act's vacatur rules, when there are 6, including that, "(4) an arbitrator exceeded the arbitrator's powers". N.J.S.A. 2A:23B-23. Plaintiffs also omit the Supreme Court's confirmation directly in East Rutherford that, "additionally, a court 'may vacate an award if it is contrary to existing law or public policy,'" which is precisely the issue with this fee-shifting. Id. at 202. It violated public policy.

Plaintiffs also contend that Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 364 (1994) held that vacatur is limited to "rare circumstances", but again ignores that one such circumstance is expressly stated to be, "for public-policy reasons". Ibid. In fact, Plaintiffs admit that, "mistakes of law or fact may constitute undue means" to vacate "where such mistakes violate public policy...." (Pb62) However, Plaintiffs then inexplicably contend that fee-shifting in violation of the American Rule is not a matter of public policy. They even ignore that the very case they cited to the Arbitrator to

justify fee-shifting here, In re Niles Trust, 176 N.J. 282, 293 (2003) ruled to the contrary that, "[t]he history of [R. 4:42-9] demonstrates that New Jersey has a strong policy against the shifting of counsel fees." The Court in Niles even cited to the Supreme Court in N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569, (1999), which held that, "New Jersey has a strong policy disfavoring shifting of attorneys' fees." Plaintiffs also ignore that the Supreme Court in re Estate of Vayda, 184 N.J. 115, 120, (2005), reiterated that, "New Jersey has a strong public policy against the shifting of costs" and that "[t]his Court has embraced that policy by adopting the 'American Rule,' which prohibits recovery of counsel fees by the prevailing party against the losing party." Thus, there is no question that, according to the Supreme Court: (1) improper fee-shifting violates New Jersey's public policy; and (2) an arbitrator's decision doing so is one of the expressly allowed grounds for vacating an award.

B. Any legal fee award was barred by both the law and the public policy of this State and In re Niles Trust, did not create any applicable exception here

The New Jersey Arbitration Act, N.J.S.A. 2A:23B-21b., only allows attorney fee shifting, "if such award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." It is clear in New Jersey that the, "Arbitration Act adopts the American Rule except when fee shifting occurs 'by the agreement of the parties to the arbitration proceeding." Rock Work Inc. v. Pulaski Const. Co., Inc., supra, 396 N.J. Super. at 355. In Rock Work, it was held that a prevailing party could not obtain a legal fee award from an arbitration without an express agreement for fee shifting in the parties' agreement to arbitrate.

Since this case did not include any fee shifting agreement in the parties' agreement to arbitrate, the only way for the American Rule to be disregarded was if fees could be awarded, "in a civil action involving the Plaintiff's claims". N.J.S.A. 2A:23B-21b. However, the Arbitrator's fee award was only based on Brad's "breach of fiduciary duty to the Company" and he awarded part of what he found the Plaintiffs spent to "oust" Brad, i.e. what they claimed to have spent directly litigating with Brad. (Da2215) New Jersey law and public policy forbid the disregard of the American Rule for a breach of fiduciary duty in a direct action, which this is. Legal fees can only be awarded if a tortfeasor's breach of fiduciary duty compelled a victim to institute litigation with a third party, because those fees are only then the consequential damages of the separate action. *See,* In re Estate of Lash, 169 N.J. 20, 30-32 (2001): "A plaintiff has the right to recover attorney's fees incurred in other litigation with a third person, if he became involved in that litigation as a result of a breach of contract or tortious act by the present defendant." 22 Am.Jur.2d Damages § 618 (1988); accord Restatement (Second) of Torts § 914(2)." Id. at 31.

> [I]f the commission of a tort proximately causes litigation with parties other than the tortfeasor, the plaintiff is entitled to recover damages measured by the expense of that litigation with third parties.") (citations omitted); accord Restatement (Second) of Torts § 914(2) (1979) ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.").
>
> [In re Niles Trust, 176 N.J. 282, 295, 823 A.2d 1, 8, (2003)(emph. added)].

In Lash, the Supreme Court made clear that there is no right to fee shifting in a direct action for breach of fiduciary duty, and even confirmed that the exception to the

American Rule created by Packard- Bamberger v. Collier, 167 N.J. 427 (1999) for an attorney's breach of fiduciary duty to his client was only created because of the attorney-client relationship. "Packard-Bamberger makes clear that the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship." In re Estate of Lash, *supra*, 169 N.J. at 34. The Supreme Court in Lash also continued to hold that, "Such an award is directly contrary to the American Rule's prohibition, but was authorized in [Packard and Saffer v. Willoughby] due to the significance of the attorney-client relationship." Id. at 33.

In re Estate of Vayda, 184 N.J. 115, 122 (2005) also reaffirmed that when it held, "we specifically limited the reach of In re Estate of Lash to attorney breach of fiduciary duty malfeasance only", and explained that, "the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship." The Vayda Court also recognized that it "has described the policies undergirding the American Rule as 'strong'" and refused to create another fee-shifting exception. Id. at 122-123.

In addition, the Supreme Court in DiMisa v. Acquaviva, 198 N.J. 547, 554 (2009), held that the third-party litigation has to be "against a stranger" for this exception to apply. Accordingly, there was no right of the Plaintiffs to recover legal fees against Brad for their direct breach of fiduciary duty claims against him, or for litigating to "oust him", as the Arbitrator awarded, or involving their mutually owned company, Autoclear. (Da2215)

However, here the Arbitrator intentionally ignored all three of: the American Rule, the applicable arbitration statute and New Jersey's well-established public policy prohibiting fee shifting in direct actions for breach of fiduciary duty. In fact, the Arbitrator misconstrued In Re Niles, 176 N.J. 294 (2003) to allow a fee award in a direct breach of fiduciary duty claim. He opined that Plaintiffs had claimed Niles created an applicable exception to the American Rule. "Claimant contends that In Re Niles, 176 N.J. 294 (2003) supports its claim as being within the exception to the American Rule which disfavors the concept." (Da2215-16) The Arbitrator made no finding that there was any third-party litigation here. (Ibid.) To the contrary, he considered the Company the "Claimant" and Brad the "Respondent". (Da2215) He said the fees were incurred by the Plaintiffs "to oust" Brad, which is first-party, direct litigation expense. (Da2215) He stated that Brad's, "conduct and the breach of fiduciary duty to the Company warrants some consideration of [Plaintiffs'] claim for reimbursement". (Ibid.)

There was no separate litigation between the Plaintiffs and any third party, or "stranger" that Brad caused by any tortious conduct. DiMisa, *supra*. There was only litigation between Plaintiffs, individually, Brad individually and their mutually owned company (controlled by one side or the other) at different times in this action. The Arbitrator awarded fees for Plaintiffs litigating with Brad, based on his misconception that Niles allowed a direct fee award in breach of fiduciary duty cases. (Da3181)

It is actually in bad faith for the Plaintiffs to argue here that they contended to the Arbitrator that there was third party litigation. Their quotation of law to him in their motion for judgment, omitted reference to the "third party" element of the fee-shifting

exception stated In re Niles. (4T57:9-16) The parties argued before Judge Alper at length about the Plaintiffs' misleading the Arbitrator in failing to recite the need for "third party litigation" in their brief on motion for final judgment. (4T55-60) The Arbitrator's decision was clearly not making a fee award on any finding that there was third-party litigation, as Judge Alper properly recognized. (Da3181) This Court should not accept this new argument. Instead, as is more particularly shown below, the Chancery Court was not only permitted to vacate that part of the award for violation of public policy under Tretina, *supra*, it was required to do so, pursuant to Weiss v. Carpenter Bennet and Morrissey, 143 N.J. 420, 442-443 (1995).

C. Judge Alper Had a Special Duty to Review and Vacate Any Arbitration Award that Violated Public Policy

Even after the limited arbitration review standard was adopted in Tretina the Supreme Court in Weiss, *supra*, vacated an arbitrator's award based on the judicial duty to enforce public policy. Id. at 447-448. In doing so, the Court affirmed the "public policy" exception to the standard of review limitation in Tretina, and it definitively required judicial intervention whenever an arbitrator's decision implicates public policy of the State as follows:

> [O]our task is to determine the circumstances under which an arbitration award that implicates a clear mandate of public policy should be subjected to judicial intervention to safeguard the public interest.
>
> ....
>
> Assuming that the arbitrator's award accurately has identified, defined, and attempted to vindicate the pertinent public policy, courts should not disturb the award merely because of disagreements with arbitral fact findings or because the arbitrator's application of the public-policy principles to the underlying facts is imperfect. If the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted.

> The judiciary's duty to provide an enhanced level of review of such arbitration awards is discharged by a careful scrutiny of the award, in the context of the underlying public policy, to verify that the interests and objectives to be served by the public policy are not frustrated and thwarted by the arbitral award.
>
> However, if the arbitrator's resolution of the public-policy question is not reasonably debatable, and plainly would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award. In such circumstances, judicial intervention is necessary because arbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public.
>
> [Weiss v. Carpenter, *supra*, 143 N.J. at 442-443 (emph. added)].

In Heher v. Smith Stratton, 143 N.J. 448 (1996), decided the same day as Weiss, the Supreme Court ruled that a law firm's partnership agreement could compel arbitration even if the arbitrator was required, "to address and resolve issues that affect public policy…." Id. at 459. However, the Supreme Court in Heher allowed that only on condition that there would be an "enhanced level of judicial review" of an arbitrator in those cases. "Moreover, the arbitrator's disposition will be subjected to an enhanced level of judicial review in order to afford appropriate relief from an arbitration award that obviously would frustrate a clear mandate of public policy. Weiss, *supra*, 143 N.J. at 443." Id. at 459-460.

Plaintiffs incorrectly attempt to distinguish these cases because they were not cases involving fee-shifting decisions by arbitrators. That is not why they control this arbitrator's violation of public policy. They control because in each case an arbitrator made a ruling that violated New Jersey public policy and in each case the Supreme Court recognized that Courts must vacate such a violation. This case simply involved a different kind of public policy violation by an arbitrator, legal fee shifting without

statute, Court Rule or agreement. What is controlling from Weiss and Heher is that the Arbitrator's decision required an "enhanced level of judicial scrutiny," Heher, *supra*, 143 N.J. at 459, and where that arbitrator's decision, "would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award." Weiss, *supra*, 143 N.J. at 442-443.

Clearly, using the analysis the Supreme Court stated in Weiss and the enhanced level of review required by Heher, the fee award against Brad needed to be vacated completely. The fee shifting that this Arbitrator allowed was not a "reasonably debatable" effort to vindicate public policy. It was instead based on the complete misreading of what exception was permitted to the American Rule by the limited holding of In Re Niles. That misunderstanding resulted in a direct violation of a clear mandate of public policy against fee-shifting absent statute, rule or agreement which did not exist here. As Weiss states, this "arbitrator's resolution of the public-policy question is not reasonably debatable, and plainly would violate a clear mandate of public policy" in this case fee-shifting without statute, rule or agreement. Weiss v. Carpenter, supra, 143 N.J. at 442-443. Accordingly, Judge Alper, as the reviewing court, was required to, "intervene to prevent enforcement of the award … because arbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public." Ibid.

Indeed, Judge Alper's decision to vacate the fee-shifting in this case was exactly what the Supreme Court in Weiss v. Carpenter required. (Da3178-82) The fee award was not remotely a "debatable" effort to uphold or "vindicate" public policy for which

a Court might grant deference under Weiss. This fee award was wildly inaccurate in its reliance on a third-party tort litigation exception for estate fiduciary liability which in no way existed here, and where no separate litigation with a stranger existed.

Plaintiffs' argument that the fee award was "reasonably debatable" simply because the Arbitrator found Brad caused "significant unjustifiable fees" again misstates the standard. (Pb66) The factual justification for the fee award was irrelevant. A so-called "equitable" fee award, not within any exception, was recently reversed. In Tarta Luna Properties, LLC v. Harvest Restaurants Group LLC, 466 N.J. Super. 137, 155 (App. Div. 2021), the Chancery Court shifted legal fees in a complex and lengthy lease dispute litigation where it had agreed that no statute, rule or agreement existed to permit doing so. The Court utilized "equitable principles" to support the award:

> Although the Chancery judge also concluded there was no established basis to support a fee award, she nevertheless found that equitable principles demanded the remedy, because "the safety of the public had been compromised by the decision to open [the restaurant]." The general concept of public safety has not previously been recognized as an exception to the policy preventing fee-shifting, and although it might support an award under certain egregious circumstances, those circumstances were not present here. [Id. at 155].

The Appellate Division vacated that ruling because it was not strictly within an exception recognized by the law and R. 4:42-9. "The Chancery court's award of attorneys' and expert fees was a mistaken exercise of discretion as it departed from well-established precedent and was not founded on any statute, court rule, or contract provision." Id. at 158.

In all, to reverse Judge Alper in this regard and as Plaintiffs have requested is to overrule the Supreme Court's instructions in Weiss that arbitrator's violations of public

policy must be prevented through judicial intervention. It is to overrule the holding in Heher that such awards must be subjected to an enhanced level of judicial review.

D. There was no third-party litigation that justified the arbitrator's fee-shifting

Plaintiffs' final argument, that the fee-shifting awarded was not that, but an award of damages because there was a third party involved, ignores the Arbitrator's own words. The Arbitrator cited the "American Rule" for his award, which is the "fee shifting" rule. R. 4:42-9. Indeed, he stated directly in his opinion, "Claimant contends that In re Niles 176 N.J. 294 (2003) supports its claim as being within the exception to the American Rule which disfavors the concept." (Da2215). The Arbitrator was not awarding legal fees as monetary damages. He was requested by Autoclear to award legal fees as if there was an applicable exception to the American Rule for direct breaches of fiduciary duty, when there wasn't. He made no finding that the fees he awarded were considered damages incurred by Plaintiffs in other litigation with a separate third party. He did not identify any third party or other litigation. (Da2215) He did not consider the Company to be a third-party, but referred to it as the "Claimant" and referred to Brad as the "Respondent". (Ibid.) He also ruled that the legal fees he considered reimbursing were expended "to oust" Brad, which proves the fees were considered to be directly against Brad and not incurred in a separate, third-party litigation. (Ibid.)

In order to create a "third party" here, Plaintiffs contend that Brad, "caused the Company to become involved in litigation with the Individual Plaintiffs." (Pb68) They say that "Plaintiffs were adverse to Brad and the Company during Phase I". They claim the award was to reimburse the Company for legal fees that Brad caused it to

spend against the Plaintiffs when he was in control. Thus, they really contend that Brad was fighting them and using the company as the instrument to do so when he had management authority. That is no different than direct litigation between Brad and the Plaintiffs, involving their commonly owned entity. Autoclear is not a 'third party' to any of them. They all hold interests in that entity. The Arbitrator certainly didn't make any findings that showed he was reasoning his award that way.

In fact, the Supreme Court in DiMisa v. Acquaviva *supra*, recognized the fallacy in Plaintiffs' argument in a similar factual setting. It ruled that for third-party liability to apply there needed to be a real and separate third-party litigation. In that case, several partners sued one who had secretly purchased their common entity's mortgage debt through a company he had formed, called REI. The defendant partner was using REI to declare a default in the common entity's debt, when in reality he was on both sides. When defendant's partners found out what he was doing they charged him with breach of fiduciary duty among other things. After the Chancery Court voided the REI mortgage the plaintiffs sought their legal fees as damages and claimed that they had to sue REI and the defendant because of the defendant's breach of fiduciary duty. Id. at 552. The Supreme Court held that there was no third-party tort litigation within the exception to the American Rule for a partner who controls an entity.

> As is evident from those holdings, a prerequisite to an award of counsel fees under the exception to the American Rule is litigation with a third party precipitated by another party's wrongful act. No matter how egregious that wrongful act, in the direct action between a plaintiff and a defendant, each party bears his or her own fees under the American Rule. It is only the requirement of litigation against a stranger that calls the exception into play.
>
> [DiMisa v. Acquaviva, supra, 198 N.J. at 554 (emph. added)].

The Court found no stranger to the parties existed:

> To be sure, Christopher left much to be desired as a partner and no one could approve of his chicanery. However, what he did, as Judge Fisher found, was to act wrongfully through REI. That makes REI the instrument of Christopher's deceit, not a separate and distinct third party. Thus, we disagree with the Appellate Division's conclusion that plaintiffs were entitled to an award of counsel fees for suing REI, an alter-ego of Christopher, in a single litigation. Whatever REI was, it was not a third party under Ventron or its progeny, and we reverse the Appellate Division's contrary conclusion. [Id. at 555-556]

This case would abide the same analysis under Plaintiffs' arguments and even more so for the lack of any separate, third party. Here, the parties are all members of Autoclear. It is not a "stranger" to any of them. At least in DiMisa those plaintiffs could contend that they had no ownership in REI. Even still, the Supreme Court ruled the limited third-party tort exception could not apply. Here, Plaintiffs simply contend that Brad controlled Autoclear, their commonly owned entity, when they were seeking to oust him and that he thereby caused Autoclear to take actions that required Autoclear to spend legal fees. As in DiMisa, this argument is no more than that the entity (Autoclear) was being used as the "instrument of deceit" when Brad controlled it, and therefore was not a separate or distinct third party, or "stranger". Indeed, in DiMisa at least the Plaintiffs were not members of REI and could debatably claim it was distinct from them. In this case, the Plaintiffs are members of Autoclear. It is a commonly owned entity among all individual parties. The only difference alleged is who was controlling the parties' commonly owned entity during this direct, member vs. member litigation. This is not third-party "stranger" litigation that falls within the exception against fee-shifting. DiMisa, *supra.*

In fact, Plaintiffs also inconsistently contend that "the Individual Plaintiffs initially brought this suit derivatively against Brad and the Company…". So, again

this was direct litigation by Plaintiffs against Brad and the Company. (Ibid.) (4T58) There is no way that the Plaintiffs can claim they were strangers to the Company when suing it 'derivatively' as its members, even if they had argued third-party tort liability to the Arbitrator. They instead omitted In re Niles' reference to the need for third party litigation in their argument to the Arbitrator asking for fees. (4T57:9-16)

The Chancery Court's rejection of the Arbitrator's direct fee-shifting analysis and award was exactly what Weiss and Heher required and should be affirmed.

X. NO "IMPLIED" AGREEMENT TO USE TAX BOOK VALUE FOR BRAD CONWAY'S INTERESTS WAS BINDING ON THE COURT BECAUSE THERE IS NO PROVISION IN THE AUTOCLEAR OPERATING AGREEMENT THAT REQUIRED IT

The case of Estate of Cohen ex rel Pereleman v. Booth Computers, 421 N.J. Super. 134 (App. Div. 2011) negates any arguments that Judge Alper was required to select Plaintiffs' requested 'Tax Book Value' as the buyout methodology. In that case, there was a detailed agreement among the partners that any transfer would be at the "book value". Id. at 141. In response to a minority shareholder's effort to avoid that written agreement and obtain "fair value", the Court first recognized that where there is no express agreement in an operating agreement, "fair value" is statutorily required. "Where the partnership agreement fails to set a fair value buyout formula, the UPA will "fill the gap" by requiring that the buyout price be fair value." Id. at p. 156.

The relevant UPA provision, N.J.S.A. 42:1A-34, does require an express agreement to avoid fair value:

> a. If a partner is disassociated from a partnership without resulting in a dissolution and winding up of the partnership business . . . except as otherwise provided in the partnership agreement, the partnership shall cause the

> disassociated partner's interest in the partnership to be purchased for a buyout price as determined pursuant to subsection b. of this section.
>
> b. As used in subsection a. of this section, "buyout price" means the fair value as of the date of withdrawal based upon the right to share in distributions from the partnership unless the partnership agreement provides for another fair value formula. (Emphasis added).

Cohen therefore confirms that the UPA requires "fair value" absent express agreement, holding,

> where the partnership agreement fails to set a fair value buyout formula, the UPA will "fill the gap" by requiring that the buyout price be fair value. To the extent the partnership agreement does not otherwise provide, this act governs relations among the partners and between the partners and the partnership."
>
> [Cohen, *supra* at 156, citing N.J.S.A. 42:1A-4(a) (emph. added)].

Clearly, in Cohen had there been no express statement in the partnership agreement itself, the Court would not have upheld the use of "book value" as the buyout methodology. The buyout would have required "fair value" under the UPA.

Cohen's holding thereby prohibits mandatory use of 'Tax Book Value' in this case as a methodology since there was no written agreement requiring it. (9T32:18-33:14) It simply does not matter if prior buyouts were voluntarily done that way, because in each prior case there could have been a legal challenge to using that method in which event the law required fair value. The Chancery Court was instead free to use whatever methodology it believed to be fair value. *See,* Lawson Mardon Wheaton v. Smith, *supra*, 160 N.J. at 393, recognizing, "'fair value' is a flexible standard dependent on the circumstances and context of a transaction. 2 ALI Principles, supra, comment d to P7.22, at 306. There is no single or universal method to determine 'fair value'". Here, the Chancery Court chose Autoclear's 2018 'net asset value', to constitute "fair

value" in the amount opined by Plaintiff's expert, Hubert Klein,. (Da3208) It was not required to choose Autoclear's book value to constitute its opinion of fair value.

Plaintiffs' next argument, that 'tax book value' could be considered 'fair value' in certain cases, also does not mean Judge Alper was bound to their methodology. (Pb72) Plaintiffs again misconstrue the law and Cohen's holding. The Court in Cohen said that book value was only one possible methodology for a court to use in whatever case factually came before it:

> "Fair value" has been defined as requiring consideration of proof of value "'by any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court.'" Dermody v. Sticco, 191 N.J.Super. 192, 196, 465 A.2d 948 (Ch.Div.1983) (quoting Weinberger v. UOP, Inc., 457 A.2d 701 (Del.1983)). Both net book value and fair market value, as generally accepted techniques of valuation, can constitute fair value.
>
> [Id. at 156-157 (emph. added)].

Because in Cohen that particular company's operating agreement did expressly provide for book value as the fair and agreed valuation methodology, the Court simply commented that 'book value' was a "generally accepted" method for a court to choose in particular circumstances. Id. at 157. Thus, the Court in Cohen did not hold that "tax book value" is always "fair value", as Plaintiffs misstate here. It was fair value there because the parties had expressly agreed in their partnership documents that it was, and because book value is a recognized methodology.

This case is the opposite of Cohen. Plaintiffs concede that Autoclear's operating agreement does not contain an agreement to use the 'tax book value' for any buyouts. Merely that Judge Alper could have accepted Plaintiff's recitation of a history of minor, voluntary transactions as "fair" in this case, did not require that she do so. She did not

deem "book value" to be a proper "fair value" under these circumstances. (Da3191-3193) The Court instead believed that "net asset value", as calculated by Plaintiffs' own expert, was the best methodology. (Da3196-3197) Without a written agreement signed by Brad Conway to accept book value, the Court had the right to so rule.

XI. THERE WAS SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD AND THE JUDGE HAD DISCRETION TO DEEM TAX BOOK VALUE UNFAIR AS A BUYOUT METHODOLOGY IN THIS CASE

> "The trier of fact has considerable freedom . . . to select the method or methods of valuation appropriate in the particular case." (Footnote omitted). We also subscribe to the general principle that a trial court's determination of value will be reviewed under an abuse of discretion standard.
> [Balsamides v. Perle, 313 N.J. Super. 7, 19 (1998)].

In fact, Balsamides suggests that book value is not a favored methodology:

> "Valuation of stock in a close corporation cannot realistically be limited to its book value, but must deal with the realities of good will, actual profit, and, if necessary, the discounting of the value of a minority interest."
> [Id. at 20]

Here, after hearing the evidence and comparing the history of minor and voluntary transactions to this forced buyout of the single largest member of Autoclear, holding 29.5%, Judge Alper did not believe that using Autoclear's tax book value was "fair and equitable under all of the circumstances". N.J.S.A. 42:2C-47(c). The Court's own expert, Robert Bonavito, also did not believe that methodology was fair based on his analysis. (5T64:8-65:9) There was substantial, credible evidence in the record for the Court to believe that 'tax book value' was not a fair methodology here.

First, the valuation testimony demonstrated that none of the prior transactions Autoclear cited as history were even analogous to this one. None of them were

involuntary buyouts or Court Ordered. None had valuation experts or appraisals of company value associated with them. None were for anywhere near what could be considered significant membership interests, with all of those reviewed by Mr. Bonavito being between 1-2%. (6T229:18-23)(6T54:20-55:17)(Da2576) Conversely, Brad Conway held almost 30% of the company's interests. He was not asking to be bought out but was expelled, and there was a Court-Ordered valuation appraisal at the Court's disposal. There were 3. Just because 1-2% shareholders did not expend the cost to value their interests in the past did not mean that they were prohibited from doing so, or that Brad was not entitled to fair value.

In fact, Mr. Bonavito also recognized that Autoclear's Tax Book Value sales of the past were not similar to this case because those were minor shareholders who needed money and needed it quickly. (6T220:14-25) He said it was not "practical" for those 1-2% transfers to be actually valued using accountants, but they could have if they wanted to. Bonavito further testified that if *he* was an Autoclear shareholder he would want a valuation appraisal here because of the substantial difference from Autoclear's actual value to the reported Tax Book Value. (6T222:1-25)(5T54:20-55:17) Bonavito also did not confirm that every prior buyout transaction was at book value, as Plaintiffs argue. He admitted that he did not even review all of the prior transactions. (6T214:20-23) He therefore did not review at least 19 of the prior transactions. (6T214:20-23) He also admitted that he did not "do a study of" the prior transactions and that it was not a "big focus" for him. (6T232:14-18)

Moreover, the testimony and reports of Mr. Bonavito and Plaintiff's expert, Mr. Klein, confirmed that there was a very substantial difference in the reported Tax Book

Values and the actual Net Asset Value of Brad's interests. That was even without their allowance of the Plaintiffs' $2.8 million legal fee "liability" they imposed on Autoclear's books in 2015 as reimbursement of their legal fees here. Even aside from that issue, Bonavito and Klein both had confirmed that Autoclear's 2018 'tax book value' excluded $2.2 million of actual real property value because the company's properties were fully depreciated on its books at that time and would be almost zero in a calculation of 'tax book value'. (Da2914-2915(Da3042)(7T11:14-17)(7T12:12-23)(7T14:3-12)(8T208:18-209:15) Bonavito further testified that the Tax Book Value was not at all an accurate value of Autoclear's assets. (6T223:6-12)

Clearly, the Plaintiffs here were asking the Court to value Brad's interests without the actual value of two real properties that the company owned in 2018, so that Brad would be deprived his 29.5% share of the $2.2 million in actual real property value that both Mr. Bonavito and Mr. Klein adjusted upward to reach their net asset value calculations. The Court simply did not think that was appropriate here. Its rejection of Plaintiffs' methodology was based on sufficient facts showing book value was significantly disparate to the actual value of Autoclear's net assets. (Da3191-3193)

Accordingly, there is no basis in fact or law for this Court to reverse Judge Alper's decision to use Autoclear's 2018 'net asset value', determined by Hubert Klein, as the fair buyout methodology in this case, but instead to impose "book value" as Plaintiffs sought. (Da3196-3197) The only basis for a dispute as to the proper 'net asset value' calculation was the Court's allowance of the Plaintiffs' embedded discount to Brad's equity for their personal legal fees in this case which they had converted into

in Autoclear "liability" on paper. Brad lost 29.5% of his net equity by pro rata payment of his adversaries' personal legal fees through this accounting trick.

The Court should affirm the use of 2018 'net asset value' as Autoclear's fair value. However, it should require that the Court use Mr. Klein's 'net asset value' undiscounted by the Plaintiffs' legal fee reimbursement booked but unpaid 'liability'. That net asset value according to Klein would be $9,061,545. (Da2849)(9T70:6-15)

CONCLUSION

For all of the foregoing reasons of fact and law, the Court should reject Plaintiffs' and Autoclear's cross-appeal in its entirety. It should affirm the Chancery Court's vacatur of the arbitrator's fee-award and its rejection of Plaintiffs' request for mandatory book value for Brad's shares. The Court should grant Brad's appeal and reverse the rulings of the trial court, as originally argued in Appellant's Brief.

January 30, 2024

Respectfully submitted,
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FILED, Clerk of the Appellate Division, February 27, 2024, **A-001962-22**

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<td>CHRISTOPHER REGAN, DAVID BONDY, TODD CONWAY, FRED FARKOUH, CHARLES FABRIKANT, EDWARD MATTHEWS and ROBERT BAILEY,

Plaintiffs,

v.

BRAD CONWAY and HAZIM AUDALLA,

Defendants,

and

CONTROL SCREENING, LLC,

Intervenor.</td>
<td>SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001962-22

ON APPEAL FROM: CHANCERY DIVISION—ESSEX COUNTY
ESX-C-123-11

SAT BELOW: HON. JODI LEE ALPER, J.S.C. AND THOMAS M. MOORE, J.S.C.

CIVIL ACTION</td>
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INTERVENOR/CROSS-APPELLANT AUTOCLEAR, LLC f/k/a CONTROL SCREENING, LLC'S REPLY BRIEF IN FURTHER SUPPORT OF CROSS-APPEAL

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LEGAL ARGUMENT

I. Brad was not adverse to the Company during Phase One, and Brad improperly conflates the Arbitrator's award of consequential damages for Brad's fiduciary breaches as improper "fee shifting."

Brad's only hope in preventing reversal of the trial courts' vacatur of that portion of the Arbitrator's award requiring him to reimburse Autoclear for the fees he caused it to expend during Phase I is to continue to outright misrepresent the record and procedural history of this litigation. During Phase I of the Arbitration, the Individual Plaintiffs were adverse to Brad, who continued to control Autoclear. Brad then caused Autoclear to intervene and litigate *against* the Individual Plaintiffs, and *for* Brad's own personal interests. This portion of the award did not "shift" fees from Brad to an adverse litigant (the Individual Plaintiffs); it required Brad to reimburse Autoclear for those fees that he caused it to expend advocating for his own personal interests; *i.e.* this part of the award is merely an award of consequential damages for Brad's breach of fiduciary duty, which happens to have been Brad improperly causing Autoclear to litigate against some other third party (who just happen to be the Individual Plaintiffs).

Moreover, even setting aside Brad's continuous misrepresentation of the record, it was improper for the trial court to overturn that portion of the award merely because the trial court disagreed with the Arbitrator's application of law. For this reason alone, the trial courts' decision should be overturned.

A. The 40% of the Company's legal fees awarded by the Arbitrator was not a "fee-shift," but a simple award of consequential damages associated with Brad's fiduciary breaches.

In opposition, Brad tries desperately to confuse the issue and mislead this Court into believing the Arbitrator's award was an improper "fee-shift" of one adverse litigant's attorneys' fees to another. In fact, this is the entirety of his argument. To the contrary, though, the legal fees incurred by and awarded to Autoclear—and improperly stricken by the trial court—were an award of consequential damages for corporate waste resulting from Brad's fiduciary duty breach, ***not a shifting of legal fees***. Despite this unmistakable fact, which is clear from any honest reading of the record, Brad persists in referring to this portion of the Arbitrator's ruling as a "fee shift" an astonishing *twenty-eight times*. Repeating something that is false, over and over, in a blatant attempt to confuse the issues, does not, and cannot, make the false thing true. Repetition of falsehoods is not an appropriate strategy.

Yet, Brad does just that with respect to his argument that the Arbitrator awarded, and the trial court struck down, "fee shifting" that "violates public policy." Twenty-eight times. It is axiomatic that the "American rule" disfavoring attorney fee shifting implicates one adverse litigant reimbursing the ***other adverse litigant*** for legal fees paid ***by that adversary***. Had the Arbitrator ordered Brad to reimburse the Individual Plaintiffs for any portion of the legal fees they personally incurred

fighting Brad, then Brad might have a point. But that is unquestionably not what happened, and Brad knows it. Brad caused Autoclear to enter the litigation and fight ***on his personal behalf***, and against the Individual Plaintiffs; he was ordered to reimburse Autoclear, ***to which he was not adverse*** during Phase I.

Brad was found to have breached his fiduciary duty by causing Autoclear to engage in litigation that benefitted Brad personally rather than Autoclear. Thus, the award had nothing—zero—to do with "fee shifting." It was simply an award of consequential damages for Brad committing corporate waste. It does not matter what he wasted corporate money doing; it only matters that he breached his fiduciary duty and was ordered to answer for the monetary consequences. Such damages are clearly compensable under well settled law. Pb69-70. Moreover, it is crystal clear that monies a victim is caused to spend on legal fees for litigation with a third party are compensable. Pb67-68.

Here, of course, the facts are admittedly complicated, and Brad is hoping to render them confusing. Before the arbitration, and during Phase I, Brad was in charge of Autoclear as its CEO. He was removed as CEO at the end of Phase I, when the Individual Plaintiffs became the managers of Autoclear. As a consequence, Autoclear—a litigant in both phases—essentially "switched sides." It was adverse to the Individual Plaintiffs, and aligned with Brad, in Phase I, and became aligned with the Individual Plaintiffs, and adverse to Brad, in Phase II. The

Arbitrator found that Brad breached his fiduciary duty to Autoclear *during Phase I* by improperly using his position as CEO to cause Autoclear to engage in wasteful litigation against the Individual Plaintiffs to achieve Brad's own personal objectives. He used company monies to pay (1) Brad's own personal attorney, and (2) Autoclear's corporate counsel to do Brad's bidding. He could have caused Autoclear to engage in wasteful, self-serving litigation against the Individual Plaintiffs, against a contractor working on Brad's house, or against the man on the moon. It does not matter against whom the litigation was instituted. Brad was found to have wasted corporate assets in violation of his fiduciary duty by spending Autoclear money on legal fees that benefitted Brad personally, against Autoclear's interests. Reimbursing these monies is not a shift of legal fees from one litigant to another in violation of the American Rule.

This is not an instance in which Autoclear had to defend a suit brought by Brad, the suit was deemed frivolous, and Autoclear got a reimbursement of its legal fees paid. Autoclear got its own legal fees paid back by the person who – from the inside - improperly authorized the expenditure because it was a personal, not corporate, benefit.

This is no different than if Brad had used company monies to pay his personal mortgage. Or if he used company monies to rent a vacation home on Cape Cod. Or if he used company monies to purchase a Rembrandt for his personal art collection.

Or if he used company money for his children's private school tuition. Brad wasted company money. He had to pay it back. The fact that the wasted corporate money happened to be used to pay attorneys ostensibly representing Autoclear but pursuing Brad's personal interests does not turn the reimbursement into improper "fee shifting."

Assessing what *actually* happened, as opposed to the falsehoods that Brad hopes this Court may believe, all of Brad's arguments fail. His entire argument relating to "public policy," and a court's obligation to strike down something that violates public policy, is wholly dependent on Brad's argument that the Arbitrator improperly "shifted legal fees." Since he plainly did not, and no attorneys' fees were shifted between adverse litigants at all, no public policy was violated (or even implicated).

Moreover, Brad continues to mischaracterize Weiss and Heher. Brad argues that the Arbitrator's award was not reasonably debatable, as contemplated by Wiess. But in order to make this argument, Brad necessarily overlooks (or deliberately ignores) the fact that *this was not an improper attorney fee shift in the first place.*

The Arbitrator properly recognized that Brad improperly caused Autoclear to expend significant monies for Brad's own personal benefit, and made a reasoned decision that the Company was entitled to reimbursement. Thus, even if public policy concerns were implicated (and they are not), Weiss directs that "assuming

that the arbitrator's award accurately has identified, defined, and attempted to vindicate the pertinent public policy, courts should not disturb the award merely because of disagreements with arbitral fact findings or because the arbitrator's application of the public-policy principles to the underlying facts is imperfect." 143 N.J. 420, 443 (1996).

Thus, the trial court had no basis whatsoever to vacate this portion of the Arbitrator's Award, and this Court should reverse that decision.

B. It is well-settled that an arbitration award cannot be vacated solely for an alleged mistake of law.

Courts simply may not intervene to vacate an arbitration award, even when an arbitrator has made a good faith legal error. Absent fraud or corruption, vacatur based on good faith legal error would be inconsistent with the law. See Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc. 135 N.J. 349, 358 (1994); Associated Humane Societies, Inc. v. Lynch, No. A-0210-13T4, 2014 WL 5460721, at *4 (App. Div. Oct. 29, 2014). Brad entirely ignores this fact, placing all of his eggs in one basket, hoping this Court will view the Arbitrator's award as a fee shift in violation of public policy, when Brad is really arguing that the Arbitrator was merely wrong on the law (which is also not correct).

Brad relies on Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013) for the proposition that a court may vacate an award if it is contrary to existing law. See Brad's Opposition Brief at 32. However, the Court in

State, Office of Employee Relations v. Communications Workers of America, AFL-CIO, 154 N.J. 98, 112 (1998), an earlier case to which the line of decisions leading to East Rutherford cites (all of which involve public sector arbitrations), held that "[a] distinction exists… between public and private sector employment disputes." "When reviewing an arbitrator's interpretation of a **public sector** contract... a court must also ascertain whether the award violates law...." Id; see also Tretina, 135 N.J. at 36-65 (explicitly recognizing an exception in **public-sector** arbitration, because "public policy demands that a public-sector arbitrator, who must consider the effect of a decision on the public interest and welfare, issue a decision in accordance with the law.") Brad cannot rely on a decision about public arbitrations to overturn a private one, where the Court has expressly distinguished between the two as to the appropriate ground for vacatur.

Thus, Brad has offered no authority—as no authority exists—to refute the clear holding in Tretina. that private arbitration awards cannot be vacated based solely on errors of law. 135 N.J. at 358. Here, the trial court *expressly* recognized that the Arbitrator's decision to order reimbursement of Autoclear's attorneys' fees was based on his interpretation of New Jersey law, and nonetheless the trial court improperly vacated the award because it disagreed with the Arbitrator's interpretation of that law. Because the award was not an improper attorney fee-shift, public policy considerations are inapplicable, and the trial court had no other

legitimate basis to disagree with the Arbitrator's interpretation and application of New Jersey law. Therefore, even if the Arbitrator's *legal determination* that Autoclear was entitled to have Brad reimburse its Phase I legal fees incurred as a result of Brad's self-serving conduct was somehow incorrect, that is not a valid basis for the trial court to vacate that award. As the Supreme Court in Weiss held, "the Court is not attempting to second-guess the arbitrator. It is actually concerned with the *lawfulness of its enforcing* the award and not with the *correctness of the arbitrator's* decision." 143 N.J. at 443 (internal citation omitted). Because the award was not an improper attorney fee-shift, there was nothing unlawful about it, and whether the Arbitrator's award was "correct" is not a proper concern of the Court.

Accordingly, this portion of the trial court's June 3, 2019 Order must be reversed.

II. The Parties' Undisputed History of Conduct Created an Enforceable Implied Agreement Requiring a Valuation of Brad's Shares Using Tax Book Value.

In addressing whether or not book value should be applied to Brad's shares, the trial court wholly ignored the implied agreement created by a completely undisputed and continuous course of conduct, namely 119 prior transactions presided over by Brad himself.

The trial court expressly stated that, when the Operating Agreement does not set forth a buyout formula, the law requires defaulting to the statutory buyout

formula. The import of this ruling is that when the parties agree on a buyout formula, the trial court should enforce that agreement. The trial court essentially acknowledged that, had the trial court found that the parties had agreed to a buyout formula in writing, in the Operating Agreement, the trial court would have enforced that agreement, and would *not* have defaulted to the statute. But, in conceding that an agreement by the parties would govern, the trial court erred in refusing to even consider that the very same agreement can be unwritten and evidenced by the conduct of the parties. The trial court thus ignored that a contract by conduct has just as much force of law as a written agreement. Troy v. Rutgers, 168 N.J. 354, 365 (2001) (citing Wanaque Borough Sewerage Auth. v. Township of West Milford, 144 N.J. 564, 574 (1996) ("[C]ontracts implied in fact are no different than express contracts.")); see also Restatement (Second) of Contracts § 19 cmt. a (1981) ("[T]here is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others.").

The trial court did not affirmatively find any reason why the parties' implied agreement did not exist, nor any particular reason why it should not be enforced. The trial court simply never even considered this issue at all. There were an undisputed 119 prior equity transactions presided over by Brad himself, with no deviation from this pattern, and no factual dispute that it existed. Brad also agreed that all equity transactions *before* those 119 were *also* conducted in the same way,

but that there simply were not records of those transactions. The court-appointed expert *also* testified that there was no reason to distinguish any of those 119 transactions from the one at issue in this litigation. (6T222:8-223:12).

On this record, this Court can determine for itself that there was an implied agreement as a matter of law, and that it must be applied. At the very least, the matter should be remanded to the trial court to consider the issue of whether there was an implied agreement, with instructions to apply it when one is correctly found to exist.

Brad cites Cohen ex rel. Perelman v. Booth Computers, 421 N.J. Super. 134 (App. Div. 2011) in support of his arguments when that case actually supports Plaintiffs' position. In Cohen, when the operating agreement expressly provided for book value, book value was applied. However, there is no basis whatsoever to conclude that both the holding and logic of that opinion are limited to a *written* agreement among the members that is set forth within an operating agreement. When an agreement among the members is created elsewhere, why would it not apply? Cohen says it must be applied, in a case that *happens* to have involved a written agreement to apply book value. If the parties had reached a separate written agreement to apply book value, and simply called it "Book Value Agreement" without mentioning the separate Operating Agreement, does Brad seriously suggest that Cohen would require ignoring that "Book Value Agreement" because it was not

made a part of the Operating Agreement? Of course not. Nor can he seriously argue that an agreement implied by an undisputed, decades-long course of conduct should be ignored merely because it is not contained in Autoclear's Operating Agreement.

Cohen plainly supports a finding that, if the parties agreed to a particular value, that value should, and must, be applied. There is no integration clause in Autoclear's Operating Agreement (Da645), and no legal requirement that all matters pertaining to the operation of Autoclear be in writing. There was thus no excuse whatsoever for the trial court to wholly overlook not only the existence of this patently obvious and completely undisputed agreement, but also to ignore the fact that "[i]mplied contract terms are considered as binding as express contract terms." Troy, *supra*, 168 N.J. at 365. Further, Brad and the trial court wholly ignore that the revised NJ LLC Act, N.J.S.A. 42:2C-2, contemplates exactly such a situation, given that it specifically defines an operating agreement as "...the agreement, whether or not referred to as an operating agreement and *whether oral, in a record, implied, or in any combination thereof*...." (Emphasis added). Thus, it is flatly incorrect to argue that there was no agreement requiring valuation of Brad's shares using tax book value, as Autoclear had previously done at least 119 times (for which documents exist) and many times before that (for which there are no documents, but also no dispute).

On the issue of the nebulous "fairness" concept pushed by Brad as to the issue of applying book value, Brad's actual, straight-faced argument is that book value would have been unfair and inequitable and so should not be applied to his special situation, because his sale of shares to Autoclear was "big" and the others were "small." No law supports this argument. No testimony from any expert at the hearing supports this argument. And the argument is patently wrong as to anything being "unfair" to Brad on the facts of this case.

Plaintiffs submitted evidence below that there were 119 prior equity transactions where those members selling sold their interests at book value, and those buying bought at book value. 119. (5T88:12-89:7)(9T50:6-51)(5T89:20-24)(7T118:16-119:11) Every one of those transactions was presided over by Brad himself (a fact which the trial court failed to acknowledge). (5T88:12-89:7) Despite this, Brad did not dispute that all 119 for which records existed were conducted at book value. Of those that the court-appointed expert reviewed, all were conducted at book value. Some of these transactions were Brad's own transactions, where Brad himself purchased additional interests for book value. (5T91:24-92:1). Brad further disregards the fact that **all** of these transactions occurred while Brad was CEO of the Company, meaning they **all** occurred at a time when Brad had significant (if not exclusive) control over how the transactions occurred. (5T91:6-14; 88:3-5; 91:19-92:1) (9T105:5-8). And Brad ignores that Brad himself admitted tax book value had

essentially always been the method for transacting equity in the Company, even in the years before the 119 for which there were records. (5T88:12-89:7).

Not one of the parties involved in these prior transactions who sold at book value had ever been adjudicated to have harmed his own company and forced to dissociate from it. Brad, of course, is the only member of Autoclear ever to have been forced to dissociate because he harmed his own company. It is clearly inequitable to ignore (1) an implied agreement, and (2) these prior transactions, and award the only member ever to be dissociated the highest standard of value ever applied to this company. How is this not especially so when one considers that, under the Court's ruling, Brad himself is being permitted to buy in at book value, damage his company so much that he is dissociated therefrom, and then sell at a value higher than book value?

There are no extenuating circumstances in Brad's favor; in fact, aggravating circumstances abound to suggest that Brad should be paid *at most* what others would be, if not *less*. It would be impossible for almost *anything* to be inequitable to Brad under the entire circumstances of this particular case. Buy low, sell high, is an investment strategy; it should not be a court-imposed remedy for a dissociated member who almost destroyed his own company, redomiciled it to Belize, got sanctioned half a million dollars, stole Autoclear's servers, and engaged in all the myriad other shenanigans replete in this extensive record. The trial court did not

find that it would somehow be inequitable to apply the implied agreement to use book value in the particular circumstances of this case. It simply ignored the issue.

Accordingly, this Court should reverse the November 14, 2022 Order valuing Brad's shares using Fair Market Value, and remand with instructions to Order Brad's shares be valued using Tax Book Value as of 2017.

CONCLUSION

Accordingly, for all of the foregoing reasons, and those set forth in Plaintiff's opening brief, the Court should reverse the portion of the June 3, 2019 Order vacating the arbitration award of 40% of the Company's legal fees incurred in Phase I of the arbitration and reverse the November 14, 2022 Decision and Order valuing Brad's interests in the Company using Fair Market Value, and remanding for instructions to value Brad's interests using Tax Book Value as of 2017.

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Attorneys for Plaintiffs

Dated: February 27, 2024

/s/David C. Roberts
David C. Roberts