

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

DARWISH AUTO GROUP, LLC
& DARWISH GENERAL CORP.,

Plaintiffs,

-against-

TD BANK, N.A. &
WALID DARWISH,

Defendants.

**DECISION, ORDER &
JUDGMENT AFTER
TRIAL**

WALID DARWISH, individually and direct and
derivative action on behalf of Darwish Auto
Group, LLC, DP RE Holdings, LLC and
Darwish General Corp.,

Third-Party Plaintiff,

-against-

BARRY FRIEDER, MARK MANZO, DAVID YUSKO,
MELISSA LACARTER, JOHN DOES 1-10, and
JANE DOES 1-10,

Third-Party Defendants.

Index No. 905851-22

(Judge Richard Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiffs Darwish Auto Group, LLC (“Darwish Auto”) and Darwish General Corp. (“Darwish General”) (collectively, “Companies”) commenced this commercial action against defendant Walid Darwish on August 2, 2022 (*see* NYSCEF Doc No. 1).

On September 23, 2022, Darwish served an amended answer with counterclaims and commenced a third-party action against Barry Frieder, Mark Manzo, David Yusko and Melissa LaCarter (*see* NYSCEF Doc Nos. 46-47), individuals associated with non-party Potamkin Automotive Group (“PAG”) at all pertinent times.

The plenary trial of this action was held before the Court from October 6, 2025, through December 15, 2025. Post-trial briefing was completed on April 28, 2026 (*see* NYSCEF Doc No. 1229), and this Decision & Order After Trial follows.

I. BACKGROUND

A. The Parties and Their Transactions

The events giving rise to this litigation are detailed in the Court’s prior decisions (*see* NYSCEF Doc Nos. 34, 232, 500, 964, 965, 1069, 1140), particularly the Decision, Order & Interlocutory Judgment dated December 30, 2024, which awarded partial summary judgment to plaintiffs on key issues (*see* NYSCEF Doc No. 1069 [“SJ Decision”]). The SJ Decision was affirmed by the Appellate Division, Third Department, on February 26, 2026 (*see* 246 AD3d 1332 [3d Dept 2026]).

In brief, the Companies owned and operated ten automotive dealerships in upstate New York (“Dealerships”).¹ Walid Darwish (“Darwish”) is the sole member of Darwish Auto and the sole shareholder of Darwish General.

¹ “Dealerships” and other defined terms from the SJ Decision shall have the same meaning herein.

To finance his acquisition of the Dealerships and associated real estate, Darwish borrowed about \$62 million (“Loan”) from an affiliate of 2427 Investments, Inc. (“Lender”) and DP RE Holdings, LLC (“Secondary Lender”) (collectively, “Lenders”), which themselves are affiliates of PAG. About \$46.5 million of the Loan proceeds were used to purchase the real estate, with the balance used to capitalize the Dealerships.

The Loan was subject to an Agreement Regarding Borrowing dated April 18, 2022 (*see* Ex. P1 [“Borrowing Agreement”]), which required Darwish Auto to be “governed by an Operating Agreement dated April 18, 2022 entered into by Darwish, its sole member,” and Darwish General to be “governed by a Shareholders Agreement dated April 18, 2022 entered into by Darwish, its sole [shareholder]” (Borrowing Agreement, §§ 1-2).

The April 18, 2022 Operating Agreement for Darwish Auto declares that management is vested in a committee of three managers, of which no manager may act alone (*see* Ex. J1 [“Operating Agreement”], § 3.01). The April 18, 2022 Shareholder Agreement for Darwish General similarly provides that the corporation is managed by a three-member board of directors, of which no director may act alone (*see* Ex. J2 [“Shareholder Agreement”], § 3.01).²

Darwish gave his written consent to the formation of a management committee for Darwish Auto and a board of directors for Darwish General (collectively, “Governing Bodies”), consisting of himself and two designees of the Lenders: third-party defendants Barry Frieder and Mark Manzo (*see* Ex. P6; *see also* Ex. AX).

The Borrowing Agreement also addressed governance of the Dealerships (*see* Borrowing Agreement, 3rd Whereas & § 3), providing that each Dealership “is managed by its members, [Darwish Auto] and [Darwish General],” which have “the right to make all decisions on behalf

² The Operating Agreement and Shareholder Agreement are referred to collectively as the “Governance Agreements.”

of” the Dealerships, “including . . . decisions regarding the acquisition, management, . . . operations, financing, accounting and sale of any or substantially all of . . . their assets” (*id.*, § 3; *see also* Exs. L-V [operating agreements for Dealerships]).

Additionally, Darwish signed an agreement by which the Companies would contribute their membership interests in the Dealerships to DP Dealership Holdings, LLC in exchange for a 35% interest in the new company (*see* Ex. P5 [“Contribution Agreement”]). However, closings under the Contribution Agreement would not occur until the Manufacturers approved the ownership changes (*see* Contribution Agreement, § 5).³

Finally, Darwish entered into an employment agreement that became effective upon his purchase of the Dealerships (*see* Ex. J3 [“Employment Agreement”]). As “President” of the “New York Dealership Group,” Darwish reported to the Governing Bodies, which had the discretion to “extend[] or curtail[]” his “duties and responsibilities” (*id.*). Following an initial one-year term, Darwish was an at-will employee of the Companies, subject to “terminat[ion] at any time with or without cause” (*id.*).

B. This Litigation

In July 2022, a dispute arose regarding access to the Dealerships’ bank accounts. After learning that TD Bank had allowed Darwish to modify access rights to the accounts, the Governing Bodies issued a resolution placing the accounts under their control.

At around the same time, the Governing Bodies directed Darwish to contact the Manufacturers to obtain their approvals (“Manufacturer Approvals”) for the governance and ownership changes described in the April 18 Agreements.

³ The Borrowing Agreement and Contribution Agreement are referred to collectively as the “Financing Agreements,” and the Governance Agreements and Financing Agreements are referred to collectively as the “April 18 Agreements.”

Plaintiffs commenced this action on August 2, 2022, seeking a preliminary injunction directing TD Bank to comply with the resolution of the Governing Bodies. The Court granted the injunction over Darwish's objection, finding that the Companies were "likely to succeed in demonstrating that [the Governing Bodies] have the right to determine access to the bank accounts held in the name of [the Companies] or the Dealerships," and "Darwish does not have the unilateral authority to alter access to the accounts absent the approval of [the Governing Bodies]" (NYSCEF Doc No. 34 at 7).

On September 23, 2022, Darwish served an amended answer with counterclaims and commenced his third-party action (*see* NYSCEF Doc Nos. 46-47).

Plaintiffs filed an amended complaint on October 13, 2022 (*see* NYSCEF Doc No. 51 ["Complaint"]), and moved for a second preliminary injunction (*see* NYSCEF Doc Nos. 66-71), complaining that Darwish: (i) refused to request Manufacturer Approvals; (ii) modified access rights to the Manufacturers' digital portals ("Portals"); (iii) impeded the efforts of the Governing Bodies to oversee the Dealerships; and (iv) refused to cooperate in exploring sales of underperforming Dealerships.

For his part, Darwish moved to dismiss the Complaint on various CPLR 3211 grounds, including improper forum, lack of standing and failure to state a claim (*see* NYSCEF Doc No. 77).

Prior to oral argument on the motions, the parties agreed to a temporary stipulation governing access rights to the Portals and other books and records (*see* NYSCEF Doc No. 227), as well as expedited private mediation. The case did not resolve through early mediation, but plaintiffs withdrew their injunction application based on the temporary stipulation.

In a Decision & Order dated April 26, 2023, the Court denied Darwish's dismissal motion, concluding that New York was a proper forum for this litigation, the Companies had standing to sue Darwish to enforce the Governance Agreements, and the claims in the Complaint were sufficiently pleaded (*see* NYSCEF Doc No. 232 ["MTD Decision"]).⁴

In his Answer (*see* NYSCEF Doc No. 247 ["Answer"]), Darwish denied the pertinent allegations of the Complaint and alleged ten counterclaims/third-party claims.

Following joinder of issue, Darwish moved for a preliminary injunction granting him management authority over the Dealerships (*see* NYSCEF Doc Nos. 257-348). Darwish cited the Third-Party Defendants' "attempts to remove [him] as Dealer Principal and operator," arguing that such actions "change[d] the status quo" and "almost guarantee[d] that the manufacturers will terminate the Dealerships" (NYSCEF Doc No. 346 at 1-2).

The Court denied Darwish's injunction motion on November 2, 2023:

Darwish has not demonstrated a reasonable probability of success on his claims that the Governance Agreements were never effective or that he is an oppressed minority shareholder/member. Nor has Darwish shown that he is likely to succeed in establishing that he is the authorized manager of the Dealerships or that he is being denied management rights granted to him by the Governance Agreements.

Darwish has shown the prospect of irreparable harm through the potential loss of Dealership franchises, but that harm has not been shown to be imminent.

Further, the harm that Darwish seeks to avoid largely is self-created, and the requested injunction may itself cause irreparable harm to the Companies and Dealerships. As such, Darwish has not shown that the balance of equities tips in favor of . . . even an injunction limited to restoring the status quo (NYSCEF Doc No. 500 ["2023 PI Decision"] at 26-27).

⁴ The denial of Darwish's dismissal motion was affirmed on appeal, as was issuance of the TD Bank injunction (*see* 224 AD3d 1115 [3d Dept 2024]).

The parties then proceeded to expedited discovery under the able supervision of Hon. Thomas A. Stander (Ret.), who was appointed Special Referee upon the parties' stipulation.

On July 16, 2024, with discovery nearing a close, plaintiffs moved for partial summary judgment on their Complaint (*see* NYSCEF Doc No. 742).

At around the same time, Darwish moved again for a preliminary injunction, this time seeking to restrain the Companies and Third-Party Defendants from selling any of the Dealerships (*see* NYSCEF Doc No. 763). The Court granted Darwish's motion on September 12, 2024, relying chiefly on the irreparable harm that he may suffer "through the potential loss of the Dealerships and their associated real estate" prior to a full adjudication of the merits of his claims/defenses (NYSCEF Doc No. 965 ["Dealership PI"] at 5-6).

The preliminary injunction was conditioned upon Darwish posting an undertaking of \$3 million ("Undertaking"), an amount fixed by reference to the potential diminution in value of the Dealerships while the injunction remained in effect (*see id.* at 8-9). Darwish was required to post the Undertaking within thirty (30) days; otherwise, "plaintiffs may move on notice to vacate the preliminary injunction" (*id.* at 10).

Darwish did not post the Undertaking; instead, he moved on the thirtieth day for (i) renewal and reargument as to the amount of the Undertaking, and (ii) an additional thirty days from determination of that motion to post the Undertaking (*see* NYSCEF Doc No. 988). For their part, the Companies moved to dissolve the preliminary injunction based on the absence of an Undertaking (*see* NYSCEF Doc No. 1021).

C. Summary Judgment

Plaintiffs' Complaint alleges three causes of action: (i) a claim for a declaratory judgment concerning governance of the Companies and Dealerships (*see* Complaint, ¶ 72 [a]); (ii) breach

of fiduciary duty (*see id.*, ¶ 77); and (iii) breach of the Employment Agreement and Governance Agreements (*see id.*, ¶¶ 80-82). In their motion, plaintiffs sought summary judgment on the claim for declaratory relief and partial summary judgment as to Darwish's liability for certain breaches of contract and fiduciary duty.

Darwish opposed the motion and cross-moved for summary judgment on his claims alleging that the Third-Party Defendants (i) breached fiduciary duties by engaging in oppressive and self-dealing conduct intended to harm the Dealerships and force their sale, and (ii) misused Darwish's TD Bank token.

The primary relief sought by plaintiffs was a declaration that the Governing Bodies have the power to manage, direct and control the business, property and affairs of the Companies and Dealerships, including the right to sell the Dealerships. The Court issued that declaration, concluding that the Governance Agreements vested management of the Companies in their Governing Bodies and management of the Dealerships in the Companies.

In so doing, the Court rejected Darwish's arguments that: (i) the Governance Agreements were "never effective"; (ii) he was not given the opportunity to review the April 18 Agreements before signing them; (iii) the parties' post-closing conduct demonstrated that the Governance Agreements were not intended to become effective; (iv) the Governance Agreements cannot be given effect because they conflict with the Manufacturer Agreements; (v) the Governance Agreements were the product of fraudulent representations that Darwish would own and manage the Dealerships without interference from the Lenders; and (vi) granting the relief sought by the Companies would defeat Darwish's reasonable expectations as the sole shareholder of Darwish Auto, the sole member of Darwish General, and the Dealer Principal of each Dealership (*see* SJ Decision at 9-23). The Court therefore declared:

- i. A majority of the members of the Management Committee of Darwish Auto has the power to manage, direct and control the business, property and affairs of Darwish Auto, including the right to sell its interest in the Dealerships, without interference from Darwish.
- ii. A majority of the members of the Board of Directors of Darwish General has the power to manage, direct and control the business, property and affairs of Darwish General, including the right to sell its interest in the Dealerships, without interference from Darwish.
- iii. Darwish Auto and Darwish General, acting through their Management Committee and Board of Directors, respectively, have the power to manage, direct and control the business, property and affairs of the Dealerships, of which Darwish Auto and Darwish General each hold 50% membership interests.
- iv. Darwish has no right to take any action relative to potential Dealership sales, Dealership facilities, management, accounting and other systems and employees, except as authorized by a majority of the members of the Management Committee and the Board of Directors (*id.* at 23-24).

Next, the Court awarded partial summary judgment to the Companies as to Darwish's breach of the Employment Agreement (*see id.* at 24-25). Plaintiffs submitted overwhelming evidence that Darwish refused to report to the Governing Bodies, follow their policies and procedures, or even recognize the existence of the Governing Bodies. Darwish's recalcitrance was most pronounced relative to a potential sale of Dealerships (*see id.*).

The final branch of plaintiffs' motion sought partial summary judgment on the claim that Darwish breached fiduciary duties owed to the Companies by converting \$4.77 million in Manufacturer advances to his own personal benefit. The Court found Darwish liable, concluding that he owed fiduciary duties to the Companies by reason of his role as a member/manager and shareholder/director, and he breached those duties by converting \$4.77 million in Manufacturer advances (*see id.* at 25-30).

On Darwish's cross motion, the Court first determined that there were triable issues of fact as to whether Darwish authorized the Third-Party Defendants to use his banking token, thereby precluding summary judgment on the token-based claims (*see id.* at 30-32).

As to Darwish's allegation that the Third-Party Defendants breached fiduciary duties by intentionally seeking to harm the Dealerships, the Court concluded that even if Darwish had made a *prima facie* demonstration of fiduciary misconduct, "Darwish's own proof – and the important issues left unaddressed therein – gives rise to triable issues of fact . . ." (*id.* at 34).

The Court denied the remainder of the cross motion, concluding that certain of the declarations requested by Darwish had already been rejected by the Court, and others were redundant and/or gave rise to triable issues of fact (*see id.* at 35). And summary judgment on Darwish's equitable accounting claim was denied based on his failure to prove that he lacked an adequate remedy at law (*see id.*).

Finally, having declared that the Companies have the right to govern and manage the Dealerships, the Court concluded that the preliminary injunction restraining the Companies and Third-Party Defendants from exercising those bargained-for rights with respect to the sale of the Dealerships was erroneously granted and should be dissolved.

Prior to trial, the parties conformed their pleadings via stipulation. Plaintiffs filed a Conformed Verified Amended Complaint (*see* NYSCEF Doc No. 1159 [hereinafter "Complaint"]), and Darwish filed both a Conformed Amended Verified Answer with Amended Counterclaims (*see* NYSCEF Doc No. 1161 [hereinafter "Answer"]) and a Conformed Verified Amended Third-Party Complaint (*see* NYSCEF Doc No. 1163 ["Third-Party Complaint"]).

Based on the credible testimony and evidence adduced at trial, the Court finds and determines as follows.

II. BREACH OF FIDUCIARY DUTY CLAIMS

A. Introduction

Plaintiffs' second cause of action alleges that Darwish breached fiduciary duties owed to the Companies as a manager of Darwish Auto and director of Darwish General by, among other things:

- a. Converting the Advances to Darwish's own benefit and embezzling other funds belonging to the Plaintiffs and the Dealerships;
- b. Intentionally defalcating the finances of the Dealerships to his own use and to the detriment of the Plaintiffs while in a fiduciary capacity;
- c. Keeping the Advances and their use secret from the Management Committee and Board of Directors;
- d. Defying and interfering with the actions and directives of the Management Committee and Board of Directors;
- e. Unilaterally modifying user access to the TD Bank Accounts;
- f. Unilaterally modifying access to the Manufacturer Accounts;
- g. Refusing to cooperate in the process of submitting applications for change in control and obtaining Manufacturer Approvals;
- h. Refusing to cooperate with Potential Dealership Sales, including, without limitation, the sale of the Nelliston Dealerships;
- i. Transferring \$50,000 from one of the TD Bank Accounts to pay his personal legal bills; and
- j. Unilaterally tak[ing] draws in excess of the amounts he is entitled to receive under his Employment Agreement (Complaint, ¶ 111).

Darwish's fifth counterclaim/third-party claim alleges that the Third-Party Defendants breached fiduciary duties owed to him and the Companies (*see* Answer, ¶¶ 275-319; Third-Party Complaint, ¶¶ 275-319; *see also* Answer, n 4). The allegations of misconduct include:

- Failing to properly manage the process of acquiring Fuccillo’s used cars (*see* Third-Party Complaint, ¶¶ 277-280);
- Frustrating Darwish’s reasonable expectations as the only member of Darwish Auto and the sole shareholder of Darwish General (*see id.*, ¶¶ 280-281);
- Operating under a conflict of interest, due to divided loyalties to PAG and the Lenders (*see id.*, ¶ 304);
- Manufacturing a loan default (*see id.*, ¶ 305);
- Imposing excessive write-downs on used vehicles and selling them below replacement cost (*see id.*, ¶¶ 282 [a-c], 291-292);
- “Tank[ing] new car sales” (*id.*, ¶ 293);
- Removing Darwish from a managerial role in contravention of the Manufacturer Agreements (*see id.*, ¶¶ 282 [h], 284, 301);
- Failing to involve Darwish in meetings of the Governing Bodies and denying him access to corporate books and records (*see id.*, ¶ 282 [e-f]);
- Causing a mass exodus of important employees (*see id.*, ¶ 282 [i]);
- Intentionally rendering the Dealerships unprofitable to force a sale (*see id.*, ¶¶ 282 [d], 307); and
- Rushing to sell the Dealerships at below-market values (*see id.*, ¶ 282 [g]).

A claim for breach of fiduciary duty “requires the existence of a fiduciary relationship, misconduct by the defendant[] and damages directly caused by the misconduct” (*Matter of Testani v Russell & Russell, LLC*, 204 AD3d 1260, 1262 [3d Dept 2022]).

B. Witness Credibility

The Court begins with witness credibility, which plays a critical role in the determination of this action. “The credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of

the testimony, whether contradictory or not, are issues for the trier of the facts The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by a trial judge who sees and hears the witnesses” (*Healy v Williams*, 30 AD3d 466, 468 [2d Dept 2006] [quoted source omitted]; *see also Magie v Preferred Mut. Ins. Co.*, 91 AD3d 1232, 1235 [3d Dept 2012]).

Many of the fact witnesses who testified at trial, including Darwish, the Third-Party Defendants and Alan Potamkin, have substantial stakes in the outcome of this litigation. Thus, the Court must consider the extent to which their testimony has been influenced, whether intentionally or unintentionally, by these interests.

The doctrine of *falsus in uno* allows the trier of fact to completely disregard the testimony of a witness who has willfully testified falsely as to any material fact, on the principle that one who testifies falsely about one material fact may well have testified falsely about everything (*see* PJI 1:22; *see e.g. DiPalma v State of New York*, 90 AD3d 1659, 1660 [4th Dept 2011]).

The proof at trial clearly and convincingly establishes that Darwish testified falsely about many highly-material facts, both at trial and in affidavits submitted on motions, to further his own personal and pecuniary interests. Notable examples include:

- Darwish claimed the April 18 Agreements were “never effective” because he was only given signature pages at the closing and never saw the full documents (*see* Transcript at 578, 730, 988-989). But the proof at trial shows that Darwish attended the closing with experienced transactional counsel, and, more fundamentally, he emailed signed, *complete* copies of the major agreements from his own computer and email account prior to the closing (*see* Ex. P170; Transcript at 991-999; Darwish EBT at 11-13). Darwish knew he signed the full agreements, and he knew what he signed.
- In his affidavit of August 28, 2023, Darwish attested that the Ford Advance funds “have not been misappropriated. They remain in a proper account to pay back the advance” (NYSCEF Doc No. 410,

¶ 57). By then, however, Darwish already had used more than \$1 million of advanced funds to retire personal loans (*see* Darwish EBT at 190-191) and purchase his parents a home (*see id.* at 189-190).

- Darwish insisted at trial that Dealership funds, including the Advances, were his to do as he wished, effectively contending that the Dealerships were a sole proprietorship: “All of the money that goes into the dealerships, through any which way, and come out of the dealership, all point to me as the owner the dealerships, so losses and profits all come to me. So, indirectly, I paid back the advances through sales in the dealerships. It’s my income and it’s my losses in the dealerships” (Transcript at 555). But Darwish knew that, following execution of the April 18 Agreements, the Companies owned and managed the Dealerships, and he possessed only a minority voice (*see e.g.* Contribution Agreement, 2nd Whereas clause).

In light of Darwish’s persistently false testimony at trial and in pretrial proceedings regarding highly consequential matters, the Court rejects his testimony entirely under the doctrine of *falsus in uno* (*see Galeano v Giambrone*, 218 AD3d 745, 747 [2d Dept 2023]).

C. Darwish’s Breaches of Fiduciary Duty

The Court previously determined that Darwish owed fiduciary duties to the Companies and that he breached those duties by converting \$3.75 million from the Ford Advance and \$1.02 million from the NESNA Advance to his personal benefit (*see* SJ Decision at 25-30). Thus, Darwish’s liability for defalcating the Advances already has been established, and the only issue that remains is the assessment of damages.

But Darwish’s defalcation of the Advances was not an isolated act of self-dealing; it was just one episode in a long course of disloyal conduct.

To his credit, Darwish had secured an extraordinary business opportunity: the chance to purchase ten operating automotive dealerships from Fuccillo for no “blue sky.” But Darwish’s time to close on the Fuccillo transaction was running short, and he had not yet secured the tens of millions of dollars in necessary capital (*see* Transcript at 593-594, 708-709).

With about \$62 million in financing from the Lenders, Darwish was able to acquire the Dealerships for essentially the cost of their real estate, without any substantial investment of his own capital. But the Potamkins and their lending affiliates struck a hard bargain, and the price of their \$62 million investment included: (i) a governance structure for the Companies that vested management in Governing Bodies in which Darwish possessed only a minority voice; (ii) an Employment Agreement that obliged Darwish to report to the Governing Bodies and serve at their pleasure after an initial one-year term (*see* Employment Agreement at 1-3); and (iii) a Contribution Agreement that contemplated the transfer of the Dealerships to a new entity in which Darwish would hold only a minority interest (*see* Contribution Agreement, §§ 2, 5).

As this Court concluded, and the Appellate Division affirmed, Darwish was a sophisticated party, represented by experienced transactional counsel throughout the acquisition process, who transmitted signed copies of key April 18 Agreements from his own email account prior to the closing (*see* 246 AD3d 1338; Transcript at 991-993; Ex. P170). And Darwish signed each of the April 18 Agreements again at the closing with counsel by his side (*see* SJ Decision at 15-16).

Darwish needed the \$62 million in financing, but he did not want the governance and ownership changes that came with it. From the outset, Darwish conducted himself as though the April 18 Agreements did not exist. He refused to recognize the authority of the Governing Bodies, declined to report to them, and disregarded their directives:

[P]laintiffs submit overwhelming evidence that Darwish refused to “report to the [Governing Bodies]” and “follow all policies and procedures adopted by the Governing Bod[ies].” Indeed, Darwish denies that the Governing Bodies ever came into existence, insisting that the parties “never came to an agreement” that was “finalized.”

Darwish’s recalcitrance was most pronounced in regard to a potential sale of [the] Dealerships. On July 22, 2022, the Governing

Bodies directed Frieder and Manzo “to explore a potential sale of one or more of the Dealerships.” A business broker responded to these efforts on August 8, 2022 by conveying an offer to purchase one of the Dealerships. Darwish’s counsel responded as follows: “The dealerships are not for sale. Please refrain from any marketing efforts . . .” (*id.* at 24-25 [citations and footnote omitted]).

When confronted at trial about the conversion of the Advances to his personal use, Darwish continued to insist that the Dealerships were his to do with as he pleased: “All of the money that goes into the dealerships, through any which way, and come out of the dealership, all point to me as the owner the dealerships, so losses and profits all come to me. . . . It’s my income and it’s my losses in the dealerships” (Transcript at 555). “I did not recognize a board and management committee . . .” (*id.* at 552; *see id.* at 577, 620).

Given his unwillingness to accept the governance and ownership structure that induced the Lenders to fund his \$62 million acquisition, Darwish quickly turned his attention to obtaining replacement financing, in the hopes of displacing the Lenders. The testimony of Trudy Austin,⁵ which the Court finds credible in all material respects, establishes that by July 2022 – a few months after the closing and just after receiving the Ford Advance – Darwish’s attention shifted away from the Dealerships to refinancing and a reinsurance venture, at which point he visited the Dealerships only occasionally (*see id.* at 1020-1021; *see also id.* at 585).

Darwish and Austin “met with lots and lots of different lenders to see if [Darwish] could get refinancing to buy the Potamkins out” (*id.* at 1021). Darwish “was trying to do whatever [he could] to refinance the dealerships” (*id.* at 614). But potential refinancers were concerned by the Dealerships’ poor fiscal performance, and Darwish believed that “[h]e needed to make the numbers look better” to obtain replacement financing (*id.* at 1021).

⁵ Trudy Austin was the director of recruitment and training for Fuccillo, and Darwish hired her to serve as his “[c]orporate director” after the closing (Transcript at 1008-1009). She primarily oversaw human resources, but did “[a] little bit of everything” (*id.* at 1008). Austin reported directly to Darwish (*see id.* at 1010).

To improve the appearance of the Dealerships' financial statements for prospective lenders, Darwish (i) imposed above-MSRP markups on specialty vehicles and added "packs" to new-vehicle sales, (ii) withheld and reduced employee compensation, (iii) conducted mass layoffs of experienced Fuccillo personnel, and (iv) directed to himself financial incentives intended for high-performing Dealership employees (*see id.* at 1022-1025; *see also* Exs. P167-168).

By February 2023, Darwish had laid off more than 100 Dealership employees and rarely visited the Dealerships. This was in stark contrast to his first few months, when he was "very active," "[v]ery involved" and present at the stores "a lot" (*id.* at 1020, 1025). By Thanksgiving 2022, Darwish visited the stores "once every six weeks, once every eight weeks," and after the February 2023 layoffs, he was only present "[o]nce every three or four months" (*id.* at 1025).

The pay cuts, withheld bonuses, layoffs and addition of "packs" devastated morale and left Dealership employees "extremely unhappy" (*id.* at 1026). Between the roughly 100 employees laid off by Darwish and those who left because of the poor working conditions and collapsing morale (*see id.* at 1025), the Dealerships experienced a turnover of about 400 employees, including many capable and experienced workers who could not easily be replaced in the small and rural markets served by the Dealerships (*see id.* at 1027; *see also* Ex. P8).

At the same time, Darwish paid himself \$1.2 million per year against a contractual base salary of \$500,000 (*see* Transcript at 583-584; *see also* Part III [A], *infra*). Darwish also installed family members in highly compensated positions: his brother, Liwaa Darwish, was made a vice president at a salary of \$4,000 per week, with a bonus of at least \$4,000 per month (*see* Transcript at 599, 1032); Darwish paid his son-in-law, Moe Shahin, \$4,000 a week and bonuses totaling \$115,000 to serve as his "right-hand man" and "enforce[r]" (Darwish EBT at

198-199; *see* Transcript at 1030 [Austin was not “really . . . sure of what (Moe) did”]); and Darwish’s son, Jalaa Darwish, was paid \$2,500 a week, with a bonus of \$2,000 to \$2,500 per month, ostensibly for “marketing,” although Austin had “no clue” what Jalaa actually did, and the Dealerships’ actual marketing employee “never heard from [him]” (Transcript at 1031-1032). Thus, Darwish’s economy measures did not extend to his own compensation or that of his family.

The July 19, 2023 termination of Darwish as the manager of the Dealerships did not end his course of disloyalty; it simply altered the form. Having lost operational control, Darwish acted to ensure that those in control could not succeed. He directed Dealership employees, including Trudy Austin and Aubrey Laquidari, the corporate controller, not to speak with Frieder or “listen to anything the Potamkins were saying” (*id.* at 619-620).

Darwish also worked in cahoots with his son Jalaa to disable the Dealerships’ websites and email domains, severing the customer traffic inherited from the legacy Fuccillo operations (*see id.* at 626, 1043-1045). Darwish denied any involvement in his son’s decision to shut down the domains in August 2023, immediately following the termination of their employment, but the Court finds that Darwish’s denial, as with virtually all of his testimony, lacks credibility and plausibility.

And throughout this entire period, Darwish blocked plaintiffs’ efforts to cut their losses by selling the Dealerships that he had damaged (*see id.* at 635-636).

D. Frieder and Manzo’s Role

Darwish argues that the Dealership operating losses that plaintiffs seek to hold him responsible for were caused by the mismanagement and misconduct of Frieder and Manzo: “Following Darwish’s termination in July 2023, Frieder and Manzo took full operational control

of the Dealerships,” and the Dealerships “‘hit a wall,’ stopped performing, and hemorrhaged money” (NYSCEF Doc No. 1220 [“Darwish Mem”] at 6-7 [internal citations omitted]). Frieder and Manzo’s mismanagement/misconduct is said to include:

- Failing to create or implement a new business plan or engage in a meaningful rebranding effort;
- Placing inexperienced individuals who lived out of state to handle and manage the Dealerships;
- Imposing excessive write-downs of used vehicles to below wholesale value;
- Advertising and selling used vehicles for below replacement cost;
- Failing to purchase and maintain used vehicle inventory;
- Knowingly ousting Darwish in violation of the Manufacturer Agreements;
- Intentionally causing and rendering the Dealerships unprofitable to force a sale; and
- Rushing to sell the Dealerships quickly and causing the Dealerships to be sold at below market value (*id.* at 6-12).

In his post-trial briefing, Darwish invokes the business judgment rule both as a shield and a sword. He argues that the rule shields him from liability on plaintiffs’ claim for breach of fiduciary duty because “there is no indication that he did anything that is not protected by the business judgment rule” (*id.* at 3). At the same time, Darwish argues that the business judgment rule does not protect Frieder and Manzo’s alleged mismanagement because they acted in bad faith and were motivated by factors other than the interests of the Companies (*see id.* at 12-13).

The New York courts “have long adhered to the business judgment rule, which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation’s interests, courts will defer to those determinations if they

were made in good faith” (*Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 274 [2016]). “The doctrine is based, at least in part, on a recognition that: courts are ill equipped to evaluate what are essentially business judgments; there is no objective standard by which to measure the correctness of many corporate decisions . . . ; and corporate directors are charged with the authority to make those decisions” (*id.*).

However, the business judgment rule presupposes review of actions “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks and citation omitted]). “[T]he business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws, or where they make decisions affected by an inherent conflict of interest” (*Matter of People v Lutheran Care Network, Inc.*, 167 AD3d 1281, 1286 [3d Dept 2018] [internal citations omitted]).

Plaintiffs have proven, both at summary judgment and at trial, that Darwish acted in bad faith and for the purpose of enriching himself personally at the expense of the Companies and Dealerships. Darwish knowingly and voluntarily entered into agreements in which he accepted a minority voice in the governance of the Companies and, ultimately, a minority ownership interest in the Dealerships, to obtain the capital he desperately needed to take advantage of the Fuccillo “no blue sky” opportunity. But Darwish never intended to recognize the authority of the Governing Bodies or honor the April 18 Agreements, and he saw no distinction between the Companies and himself, treating the Companies and Dealerships as an extension of his own pocketbook.

Having chosen to deny the existence of the April 18 Agreements and conduct himself as if he were the sole proprietor of the Dealerships, Darwish made no attempt to discharge his fiduciary duties. At every turn, when faced with a choice between actions that would benefit the Dealerships/Companies, or one that would benefit himself personally at their expense, Darwish chose himself (*see* NYSCEF Doc No. 1219 [“Plaintiffs’ Mem”] at 22). The business judgment rule has no application to willful misconduct by a fiduciary who refuses to recognize or acknowledge his fiduciary duties (*see Lutheran Care*, 167 AD3d at 1286).

The Court finds, however, that the business judgment rule does apply to the conduct of Frieder and Manzo, and Darwish has not overcome the deference afforded to them under the rule. Following Darwish’s termination for cause in July 2023, Frieder and Manzo were left with a mess: a workforce gutted by layoffs and resignations, with many long-time Fuccillo employees replaced with underqualified Darwish loyalists; squandered goodwill in small community markets; and millions of dollars in needed capital diverted from the Dealerships into Darwish’s bank account.

In evaluating Darwish’s claim of mismanagement, it also bears emphasis that the Lenders and Third-Party Defendants did not go into this venture with the anticipation of assuming an operational role; they believed that Darwish would take on the role of operator and front-person in accordance with the April 18 Agreements.⁶ And Darwish only compounded the difficulty of a turnaround by deliberately disabling operational systems and instructing employees to disregard the Dealerships’ new managers. That Frieder and Manzo were unable to reverse the decline caused by Darwish’s misconduct, all while Darwish attempted to frustrate their efforts, does not establish that Frieder and Manzo played a substantial role in causing the decline.

⁶ The Court rejects Darwish’s attempt to portray this as Frieder and Manzo “never wanted to manage the Dealerships . . .” (NYSCEF Doc No. 1227 at 17-18).

This distinction is central to Darwish’s causation argument, which rests almost entirely on the observation that the Dealerships performed worse following his departure than before it. The deterioration that followed Darwish’s removal was a continuing consequence of a decline that Darwish himself set in motion: a workforce he had hollowed out and left stocked with under-qualified loyalists, goodwill squandered, operational infrastructure disabled, and sales obstructed (*see* Transcript at 1048 [Trudy Austin: Q: “Could the Potamkins have done anything differently to (make) the stores more profitable? A: Remove Wally’s name.”]).⁷

Nor has Darwish offered any plausible reason to believe that Frieder and Manzo intentionally rendered the Dealerships unprofitable to force a sale. The theory lacks evidentiary support and is economically incoherent. Darwish had not invested any capital of his own in the venture, whereas the Lenders had committed tens of millions of dollars, including personal investments from both Frieder and Manzo (*see id.* at 43, 279). The Potamkin entities also infused another \$4 million in working capital into the Dealerships in 2024 and 2025 (*see id.* at 284). A scheme to destroy the value of the Dealerships would have harmed the Potamkins, Frieder, Manzo and the Lenders far more than it harmed Darwish, and the Court declines to infer that Frieder and Manzo set out to sabotage their own investment (*see* Ex. P90).

Darwish’s remaining criticisms – that Frieder and Manzo wrote down the value of used vehicles excessively, declined to replenish used-car inventory, made incorrect advertising decisions, and elected to sell the Dealerships rather than continue operating them at a loss – all represent challenges to ordinary business judgments, not breaches of fiduciary duty. Even

⁷ For this reason, the Court does not find the expert testimony of Rebecca Fitzhugh helpful, as it simply compared the financial performance of the Dealerships under different management without consideration of the continuing effects of Darwish’s misconduct (*cf.* Ex. 0A, ¶ 86 [“Mr. Darwish had no influence over the decline in sales volume or revenues, or the expenses incurred by the Dealerships, during the twelve months ended June 30, 2024”]).

assuming Frieder and Manzo's personal involvement in each of these areas, the Court finds that their actions represented a good-faith response to the deteriorating condition in which Darwish left the Dealerships.

In particular, the Court finds that the decision to sell the Dealerships was a reasonable exercise of the Governing Bodies' discretion and business judgment. The Dealerships had no goodwill under the Darwish name, were operating at a loss and required ongoing infusions of capital. And the longer sales were delayed, the more value eroded. The fact that the Dealerships did not command the price Darwish's valuation expert ascribed to them, which was based on peak-of-market performance of 2021 (*see* Transcript at 1494; Exs. HB, HU-ID), is not persuasive evidence that the Dealerships were sold too quickly or that the Third-Party Defendants otherwise breached their fiduciary duties in relation to Dealership sales.

Moreover, the preliminary injunction that Darwish procured, and then failed to secure with the required undertaking, impeded the orderly marketing of the Dealerships and contributed to any resulting diminution in price (*see* Dealership PI at 8-10; Transcript at 72-73; *see also* P164 & Transcript at 629-634 [Darwish's rejection of potential Nelliston sale in 2022]; *cf.* Darwish Mem at 12 [accusing Frieder and Manzo of "rushing" to sell Dealerships]). And there is no reason to believe that Frieder and Manzo intentionally failed to obtain the best price possible for the Dealerships.

In sum, Darwish has not rebutted the presumption that Frieder and Manzo acted in good faith and in the legitimate furtherance of the Companies' interests, and he has not proven that Frieder or Manzo caused or contributed to the losses for which the Companies seek recovery. The business judgment rule shields Frieder and Manzo; it does not shield Darwish.

E. Darwish's Affirmative Claim

Darwish's fifth counterclaim/third-party claim alleges that the Third-Party Defendants breached fiduciary duties owed to him and the Companies.

As a threshold matter, Darwish improperly refers to the four Third-Party Defendants collectively throughout his pleadings and in his post-trial briefing (*see e.g.* Darwish Mem at 6-7; Transcript at 936-939). "A complaint that fails to differentiate between the defendants is an improper group pleading" (*Cedar Capital Mgt. Group Inc. v Lillie*, 79 Misc 3d 1238[A], 2023 NY Slip Op 50831[U], *13 [Sup Ct, NY County 2023] [citations omitted], *aff'd* 236 AD3d 508 [1st Dept 2025]; *see also Cohen Ritz Retail Co., LLC v Manhattan ASC, LLC*, 2015 WL 1850500, *5 [Sup Ct, NY County 2015, Bransten, J.]).

In particular, Darwish has not shown that Melissa LaCarter owed fiduciary duties to Darwish or the Companies. LaCarter was not a manager, director or officer of the Companies; she was employed by a Potamkin entity and assisted with the Dealerships' accounting systems (*see* Transcript at 574-576). Absent proof of a fiduciary relationship, the claim for breach of fiduciary duty must be dismissed as against LaCarter.

As an officer, David Yusko owed the Companies fiduciary duties. But Darwish has not attributed any conduct to Yusko evidencing a breach of such duties; the only conduct meaningfully attributed to Yusko concerns the banking token, addressed in Part IV (D), *infra*.

And as to Frieder and Manzo, the claim fails for essentially the reasons stated in Part II (D), *supra*. The business judgment rule protects their management decisions, which were made in good faith and with the best interests of the Companies and Dealerships in mind, and Darwish has not proven that their actions caused or contributed to the losses for which plaintiffs seek recovery.

In particular, the Court rejects Darwish's contention that Frieder and Manzo operated under a disabling conflict of interest, manufactured a loan default,⁸ and improperly terminated his employment. These contentions merely reflect Darwish's unwillingness to acknowledge that he granted the Lenders substantial bargained-for rights to participate in the governance and management of the Companies and Dealerships in exchange for supplying the capital needed to take advantage of the "no blue sky" opportunity offered by Fuccillo.

Finally, Darwish's allegation that the Third-Party Defendants mishandled the appraisal and acquisition of the Fuccillo used-car inventory fails for the additional reason that the conduct predated the closing that created the fiduciary roles on which the claim depends. And, in any event, the record establishes that the price of the used vehicles was fixed by Fuccillo at above-market values as a condition of the "no blue sky" sale (*see* Transcript at 106-107).

Accordingly, Darwish's counterclaim/third-party claim for breach of fiduciary duty is dismissed in all respects.

F. Damages

Having determined that Darwish is liable to plaintiffs for his persistent breaches of fiduciary duty, the Court turns to the assessment of damages.

1. Compensatory Damages

Compensatory damages "measure fair and just compensation, commensurate with the loss or injury sustained from the wrongful act" (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 448 [2018] [internal quotation marks and citation omitted]). "Although the damages cannot be remote, contingent, or speculative, '[t]he standard is not one of mathematical certainty but only reasonable certainty'" (*Ng v Asquared Group, Inc.*, 219 AD3d 1341, 1343 [2d Dept

⁸ There was no credible evidence that the Companies were not in default of their obligations or that Frieder and Manzo caused the Lenders to be paid more than they were entitled to under the Loans.

2023], quoting *E.J. Brooks*, 31 NY3d at 449). And “[w]hen a difficulty faced in calculating damages is attributable to the defendant’s misconduct, some uncertainty may be tolerated” (*id.*, quoting *Wolf v Rand*, 258 AD2d 401, 402-403 [1st Dept 1999]).

a. Defalcation of Advances

Darwish is liable to plaintiffs in the principal sum of **\$4,770,000** for the defalcation of the Ford and NESNA Advances, which Darwish was obliged to hold in a fiduciary capacity as a trustee for the Dealerships (*see* SJ Decision at 26-30). Plaintiffs shall be entitled to pre-judgment interest on such sum at the statutory rate of 9% from August 1, 2023, which the Court finds to be a reasonable intermediate date (*see* CPLR 5001 [b]; *Huang v Sy*, 62 AD3d 660, 661 [2d Dept 2009]; *see also* Darwish EBT at 190-192).⁹

b. Lost Profits

Plaintiffs seek to recover lost profits, which are an available measure of damages for breaches of fiduciary duty (*see Ng*, 219 AD3d at 1343; *Wolf*, 258 AD2d at 402-403). “Since the breach of fiduciary duty was proved, the court may be accorded significant leeway in ascertaining a fair approximation of the loss, as contrasted with the more precise, compensatory, standard of a contract or tort case, so long as the court’s methodology and findings are supported by inferences within the range of permissibility” (*Wolf*, 258 AD2d at 402 [citations omitted]).

Plaintiffs’ damages expert, Kimberly Linebarger, testified that Darwish’s misconduct resulted in operating losses to the Dealerships totaling between \$16,294,000 and \$19,781,000 (*see* Transcript at 414-416). As detailed in her report, Linebarger presented two analyses for each Dealership: (i) a quantification of the difference between actual quarterly pretax profits and

⁹ The Court rejects Darwish’s assertion that he is owed a “set-off” for his work as Dealer Principal and in locating the Fuccillo deal (*see* Darwish Mem at 3). The April 18 Agreements fully delineate the compensation to which Darwish was entitled.

the pretax profits if the dealership had achieved a profit margin of 1%, and (ii) the same analysis assuming the dealership merely broke even (0% profit margin) (*see* Ex. P44 [“Linebarger Report”] at 5-6).

Darwish maintains that plaintiffs’ request for an award of lost profits is “speculative and too far removed from Darwish’s . . . breaches” (Darwish Mem at 42). “Plaintiffs seek to hold Darwish responsible for any losses the Dealerships incurred, even from the first quarter of their operations and even after Manzo and Frieder took over operations. They even seek amounts even if those losses occurred early in the relationship as a normal part of a transition between Fuccillo and Darwish” (*id.* at 42-43).

At the same time, however, Darwish insists that he should be awarded lost profits from the Third-Party Defendants based on his now-dismissed claim for breach of fiduciary duty (*see* Darwish Mem at 24-29). In the context of his own damages claim, Darwish asserts that the “Third-Party Defendants’ breaches caused [Dealership] sales to collapse, profitability to erode, manufacturer terminations, and, ultimately, under-market sales of the Dealerships. The record shows precipitous decline of the Dealerships’ financial condition under their (mis)management and control” (*id.* at 24).

Darwish sought lost-profit damages of between \$16.3 million and \$23.5 million from the Third-Party Defendants based on this theory (*see id.* at 29 [citing Linebarger Report]). In this connection, Darwish’s own damages experts criticized Linebarger’s expectation of a 1% profit benchmark as inadequate, “conclud[ing] that at least 2% pre-tax profitability would have been the expectation for these Dealerships” (Ex. HB at 18; *see* Transcript at 1470-1473).

For essentially the reasons stated above, the Court finds that Darwish’s persistent breaches of fiduciary duty were a substantial factor in causing the Dealerships to sustain

operating losses throughout the period that they were owned by the Companies. Although low profits would be expected for most of the Dealerships, sustained negative profits would not.

The proof at trial clearly and convincingly demonstrated that Darwish's defalcation of Dealership funds, his defiance and interference with directives of the Governing Bodies, his refusal to cooperate in the process of obtaining Manufacturer Approvals, his refusal to cooperate in selling underperforming Dealerships, his failure to actively participate in the management of the Dealerships after just a few months to focus on replacement financing and a secret off-shore reinsurance business,¹⁰ the short-sighted measures Darwish ordered to improve the veneer of the Dealerships' financial statements for prospective new lenders,¹¹ the payment of excessive compensation to himself and his family, his post-termination efforts to prevent employees from cooperating with Frieder and Manzo, and his solicitation, encouragement and/or condoning of his son's disablement of critical Dealership IT infrastructure were substantial factors in the Dealerships' dismal financial performance under both Darwish and Frieder/Manzo's management (*see* PJI 3:59; *Ali v Chaudhry*, 197 AD3d 1084, 1085 [2d Dept 2021], *lv denied* 38 NY3d 904 [2022]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]).

The Court further finds that Linebarger's use of the difference between actual quarterly net profits for the Dealerships and a breakeven expectation (*i.e.* 0% profit) is a reasonable approach to assessing lost-profit damages under the difficult circumstances created by Darwish.

¹⁰ As stated by Trudy Austin: "[Darwish] started out being a rock star, and his focus[] changed. He lost sight of trying to make the dealerships great. His focus turned to refinancing and a reinsurance company instead of working as partnership with the Potamkins, growing the dealerships for a year, and then trying to refinance. His focus was not in the right place" (Transcript at 1048).

¹¹ This includes: (i) adding above-MSRP markups on specialty vehicles and "packs" to new-vehicle sales, (ii) withholding and reducing employee compensation, (iii) conducting mass layoffs of experienced employees, and (iv) diverting to himself financial incentives intended for high-performing Dealership employees.

An award of lost profits “may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes” (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). Nonetheless, “[t]he law does not require that [lost profit damages] be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation” (*Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]).

The Court is satisfied that Linebarger’s analysis of lost profits using the assumption of break-even performance is based on reliable facts. As plaintiffs observe, Linebarger is not speculating about the loss of future profits; she examined the Dealerships’ actual performance for more than three years and compared it to what she believed to be reasonable profit expectations for the Dealerships based on a comprehensive review of industry data and the particular circumstances of the ten Dealerships, including their sale by Fuccillo for no blue sky (*see Matter of Ga Young Lee v Charl-Ho Park*, 16 AD3d 986, 988 [3d Dept 2005]).

Although Linebarger found that most of the Dealerships would be expected to earn only modest profits due to their brand and local market conditions, in line with her 1% scenario, Linebarger credibly testified that sustained negative profits would not be expected. And Darwish’s own automotive expert adopted essentially the same approach as Linebarger but used an even-higher 2% profit assumption (*see Transcript at 1470-1473*).

In choosing to apply Linebarger’s break-even scenario, rather than the assumed 1% profit, the Court partially accepts Darwish’s complaint that some disruption would have been expected in the first few months as part of the Fuccillo/Darwish transition. The Court further credits Trudy Austin’s testimony that Darwish was a responsible steward for his first few months (*see id.* at 1048). At the same time, the Court is mindful that the profits of automotive dealers

increased substantially due to the COVID-19 pandemic (*see id.* at 435-436, 1503), but not at the Dealerships. Under the circumstances, the Court will rely on the more conservative, break-even expectation offered by Linebarger as a reasonable approximation of the losses proximately caused by Darwish's fiduciary misconduct.

In sum, the Court finds Linebarger's break-even calculation to represent a reasonable estimate, based on professionally reliable data, of the operating losses caused by Darwish's fiduciary misconduct during plaintiffs' ownership of the Dealerships. The Court further finds that any uncertainties associated with the calculation of such damages are directly attributable to Darwish's persistent course of misconduct committed over a multi-year period, thereby allowing any such uncertainties "[to] be tolerated" (*Wolf*, 258 AD2d at 402-403 [internal quotation marks and citations omitted]).

Accordingly, plaintiffs are awarded **\$16,294,000** in lost profits. Given the uncertainties inherent in that computation, however, the Court declines to award pre-judgment interest.

2. Punitive Damages

Plaintiffs seek an award of punitive damages, arguing that Darwish's breaches of fiduciary duty were morally reprehensible:

Darwish stole millions from the Dealerships he was entrusted to run. He stole money from his business partners and lenders. He steadfastly refused to recognize the validity of agreements he voluntarily signed, which agreements were sent in full, with his signatures, from his email, after negotiation and review by his competent counsel. He has maliciously prolonged this litigation at every turn, deliberately depleting value from Plaintiffs and their lenders while spending stolen money to fund his defense. He lied to this Court under oath, assuring the Court that the Advance money was safely accounted for – then spent the money the very next day, in a spending spree that would make *Brewster's Millions* look restrained. His feeble excuse – “Expenses came up” – cannot justify a \$2 million “gift” to his brother in direct contradiction of his sworn representations to this Court. Darwish has treated this proceeding

as a joke, winking at the camera while pocketing stolen funds (Plaintiffs' Mem at 25-26).

For punitive damages to be awarded, plaintiffs must show “such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton” (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012] [internal quotation marks and citations omitted]; see *O'Mahony v Whiston*, 224 AD3d 609, 610 [1st Dept 2024] [“egregious breaches of fiduciary duty”]; *Don Buchwald & Assocs. v Rich*, 281 AD2d 329, 330 [1st Dept 2001] [“To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another” (citation omitted)]).

The Court finds that Darwish's conduct in relation to the Advances manifests precisely the type of willful and wanton misconduct warranting the assessment of punitive damages.

Plaintiffs raised the issue of the Advances in opposition to Darwish's application for a preliminary injunction restoring him to operational control over the Dealerships. In opposition papers filed on August 14, 2023, plaintiffs revealed their discovery of the \$3.75 million Ford Advance sent to Darwish personally (NYSCEF Doc No. 351, ¶¶ 29-32), as well as Darwish's attempt to obtain another \$900,000 advance from FCA (*see id.*, ¶ 38).

In his reply affirmation dated August 28, 2023, Darwish attested as follows regarding “the \$3,750,000.00 five-year advance by Ford”: “[I]t was an advance against future packs. For the repayment, the Ford Dealerships were required to pay back Ford \$375,000.00 each six months through the sale of vehicle service contracts and ancillary products. These funds have not been misappropriated. They remain in a proper account to pay back the advance” (NYSCEF Doc No. 410 [“Darwish Aff.”], ¶ 57).

Oral argument on Darwish's injunction application was held on October 4, 2023 (*see* NYSCEF Doc No. 498 ["Dealerships Tr."]), and the Advances were the first topic of discussion. At that time, Darwish's counsel repeatedly assured the Court (and plaintiffs) that Darwish "didn't take the money"; rather, "the [Advance] money is sitting in the accounts that Mr. Darwish has" (*id.* at 11-12). Later in the argument, when asked why Darwish believed that he could keep funds advanced by Ford, Darwish's counsel responded: "Ford wrote [the check] to the Dealer Principal . . . , and he just put it in an account because it was written to him. . . . [H]e hasn't taken the money and gone to Barbados and spent it all. This money exists" (*id.* at 19-20).

Despite these assurances, the record shows that Darwish defalcated a substantial portion of the Ford Advance after his sworn attestation that the funds were being held in a "proper account to pay back the advance" (Darwish Aff., ¶ 57) and after counsel's representations to the Court and plaintiffs that Darwish had not spent the Advances (*see* Dealerships Tr. at 11-12, 19-20).

In fact, Darwish had converted Manufacturer Advances to his personal use both before and after his sworn representations to the Court. By early 2023, Darwish had used the Advances to retire personal loans totaling around \$360,000 (*see* Darwish EBT at 190-191) and to buy his parents a home for \$700,000 (*see id.* at 189-190).

On August 29, 2023, just one day after assuring the Court that the funds had "not been misappropriated" (Darwish Aff., ¶ 57), Darwish wired \$65,000 to his brother Liwaa (*see* Transcript at 564-565; *see also* P64). Then, on January 17, 2024, Darwish gave his brother Hani a \$2 million gift to start a mixed martial arts league (*see* Ex. P67; Transcript at 557-558). On February 5, 2024, Darwish paid off \$1.6 million in indebtedness on his own home (*see* Darwish EBT at 190; Transcript at 556-557). And Darwish used another \$181,628 in Advances to pay

legal fees (*see* Transcript at 566-567).¹²

The Court finds that Darwish's defalcation of the Advances was intentional and knowing; the misconduct was committed while Darwish was acting in a fiduciary capacity, as a trustee of funds received for the benefit of the Dealerships (*see* SJ Decision at 26, 29-30); and Darwish acted with full knowledge of the improper nature of his conduct, rather than out of inadvertence, negligence or mistake (*see Bullock v BankChampaign, N.A.*, 569 US 267, 273-274 [2013]).¹³ The conversion of the Dealership Advances to Darwish's personal use was done without disclosure to or authorization from the Governing Bodies,¹⁴ and in derogation of Darwish's fiduciary and contractual obligations to hold the advances in trust for the Dealerships.

In fact, the Court finds Darwish's entire course of conduct in relation to the Companies and Dealerships – from his repudiation of the governance and ownership structure he assented to in the April 18 Agreements, through his diversion of almost \$5 million in Dealership Advances, to his post-termination efforts to sabotage the Dealerships – was willful and egregious (*see O'Mahoney*, 224 AD3d at 610). Darwish did not have the best interests of the Companies or Dealerships at heart, only his own personal and pecuniary interests. Darwish refused to recognize the authority of the Governing Bodies and saw no distinction between the Companies and himself. He viewed the Companies and Dealerships as mere extensions of his own

¹² Darwish admitted that the major expenses were paid using the Advances, but he claimed that a portion of his home-loan payoff, the legal expenses and \$65,000 gift to Liwaa were paid with other, non-defalcated funds in the same account. Even if that were the case, and the Court declines to accept Darwish's mere say-so, that was a risk that Darwish assumed by commingling the defalcated Advances with his personal funds. And Darwish admits that the entire \$4.77 million has been spent and has not identified any other recipients or spending (*see* Transcript at 558 ["Q. All of the advance money is gone now, right Mr. Darwish? A. Yes. Q. You spent it all? A. Yes."]).

¹³ The Court rejects Darwish's contention that he acted with good-faith belief that the Advances were his personal funds. Darwish knew the funds were advances of future Dealership earnings and that the April 18 Agreements did not allow him to treat the Dealerships as sole proprietorships.

¹⁴ Although Darwish may have disclosed his intention to obtain Manufacturer Advances, he certainly did not disclose his intention to convert these Dealership funds to his personal benefit.

pocketbook and essentially admitted to ignoring the April 18 Agreements based on fanciful arguments that the agreements were never effective. The evidence at trial clearly and convincingly establishes that Darwish acted in bad faith and with conscious and deliberate disregard for the rights of the Companies, the Dealerships and their employees.

Nonetheless, the Court finds that the defalcations of Advances committed in and after August 2023 stand on a different footing from all of the other breaches of duty. When plaintiffs first raised the issue, a considerable portion of the advanced funds remained in Darwish's bank account. Had Darwish preserved the funds pending adjudication of the parties' competing claims, the Court would have been presented with a fiduciary who had mishandled funds but had done nothing to put them beyond recovery. Whatever the ultimate legal consequence, Darwish's conduct would not have evinced the high degree of moral culpability required for an award of punitive damages. Darwish did the opposite, and he did so deliberately.

After the ownership and disposition of the Advances had been placed squarely before the Court, after Darwish swore that the funds "remain[ed] in a proper account to pay back the advance" (NYSCEF Doc No. 410, ¶ 57) and after Darwish's counsel represented to the Court that the funds were sitting in Darwish's bank account and he hadn't "gone to Barbados" with them (Dealerships Tr. at 19-20), every further defalcation was made in knowing defiance of a pending judicial proceeding and in contradiction of Darwish's assurances.

It is this conduct, beyond the initial diversions and the defalcations, that supplies the "aggravating or outrageous circumstances" and the "conscious act[s] that willfully and wantonly disregard[] the rights of another" upon which an award of punitive damages must be based (*Don Buchwald & Assocs.*, 281 AD2d at 330). Darwish did not merely breach his duty to plaintiffs; he deceived plaintiffs and the Court as to his actions, and he used that deception to buy the time and

cover he needed to place the balance of the Advances beyond ready recovery.¹⁵ And the injury to the Companies was the intended object of Darwish's deception, and he accomplished it willfully, maliciously, and without just cause or excuse.

Darwish argues in reply that punitive damages are unavailable because his conduct was not aimed at the public at large, but plaintiffs properly are pursuing a remedy for the defalcation of Advances as a breach of fiduciary duty. There is no requirement to demonstrate a public wrong to obtain punitive damages on a claim for breach of fiduciary duty (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]; *Vandashield Ltd. v Isacson*, 146 AD3d 552, 555 [1st Dept 2017]).¹⁶

"Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the . . . trier of facts" (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]). In the exercise of that broad discretion, the Court will confine its award of punitive damages to the breaches of fiduciary duty arising from Darwish's defalcation of the Advances in and after August 2023. The earlier defalcations, although willful, preceded the issue having been raised in Court and Darwish's false assurances.

Nor will the Court award punitive damages on the broader course of sustained fiduciary misconduct underlying the lost-profits award. Although Darwish's fiduciary misconduct was a substantial factor in the Dealerships' persistent operating losses, the proof of aggravating circumstances beyond the breaches themselves was limited. Punitive damages are reserved for the most egregious conduct, and the Court exercises its discretion accordingly.

¹⁵ The forms in which Darwish transferred the funds, a "gift" to a close relative and equity in his own home, may be beyond plaintiffs' reach as putative judgment creditors, but still within Darwish's own reach, whether by calling for the return of familial gifts or by re-mortgaging his residence.

¹⁶ In any event, the Court is satisfied that Darwish's use of false affidavit testimony filed with a tribunal to create the opportunity for further defalcations represents both a public and private wrong.

Having determined that punitive damages are warranted for the defalcation of Advances in August 2023 and beyond, the Court must fix an amount. “In contrast to compensatory damages, which are intended to redress the concrete loss that a plaintiff has suffered by reason of the defendant’s wrongful conduct, punitive damages are essentially private fines levied by civil juries to punish reprehensible conduct, and deter its future occurrence” (*Storms v Geraghty*, 249 AD3d 1351, 1355 [3d Dept 2026] [internal quotation marks and citation omitted]).

The Court is guided in its assessment by the considerations New York has adopted from federal due-process review: the degree of reprehensibility of the conduct; the relationship between the punitive award and the actual and potential harm; and the disparity, if any, between the award and the penalties imposed in comparable cases (*see id.* at 1353; *see also BMW of North America, Inc. v Gore*, 517 US 559, 575 [1996]).

The reprehensibility of Darwish’s conduct is high. The harm was inflicted through repeated acts of intentional misconduct by a fiduciary who not only concealed his wrongdoing but affirmatively deceived the tribunal and his principals about it to create the opportunity for additional misconduct. And the consequences of Darwish’s diversion of capital from the struggling Dealerships fell not only on the Companies, but also on the Dealerships and their employees.

The relationship between a punitive award and the harm must also be reasonable. Where, as here, the compensatory damages are themselves substantial, due process counsels a correspondingly modest ratio (*see State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 425 [2003] [referencing “a long legislative history . . . providing for sanctions of double, treble, or quadruple damages to deter and punish,” noting that “(s)ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution”]).

Applying these principles to the \$3,846,628 in Advances that Darwish converted to his personal use following the signing of his August 28, 2023 affirmation, the Court determines that plaintiffs should be awarded punitive damages in the sum of \$7,693,256, which represents a doubling of the associated compensatory award. The Court finds a 2:1 ratio to be warranted, as it is being applied only to a portion of the defalcated Advances and not at all to the \$16,294,000 in lost profits. Thus, an award of \$7,693,256 in punitive damages constitutes a little more than one-third of the \$21,064,000 in compensatory damages awarded to plaintiffs on their breach of fiduciary duty claim.

Darwish's claimed inability to satisfy such an award does not alter this conclusion. A defendant's financial condition is one consideration bearing on the amount of punitive damages, but Darwish's inability to return the Advances is the direct and intended result of the egregious misconduct for which he is being punished (*see also* n 15, *supra*).

Accordingly, the Court awards punitive damages in the amount of **\$7,693,256**.

III. CONTRACTUAL AND QUASI-CONTRACTUAL CLAIMS

A. Darwish's Breach of Employment Agreement

Plaintiffs were awarded partial summary judgment as to Darwish's liability for breach of the Employment Agreement, with damages to be determined at trial (*see* SJ Decision at 24-25).

The Employment Agreement prescribed the compensation to which Darwish was entitled for managing the Dealerships, including salary, bonus and draws. Darwish's salary was fixed at \$500,000 per year, payable twice per month; his bonus was 10% of combined net income in excess of \$5 million per year; and Darwish was to receive a monthly draw against the bonus in the sum of \$58,333.33 (which annualizes to \$700,000 per year) (*see* Ex. P4 ["Employment Agreement"] at 1).

However, at the end of each calendar quarter, Darwish's base salary and draws were to be reconciled against the bonus target, 10% of net income, and if his salary and draws during the quarter exceeded that amount, the difference was to be deducted "from [his] ownership distributions or future [d]raws" (*id.* at 2). If Darwish's salary and draws were less than the target, the Companies would pay Darwish the difference (*see id.*).

The proof at trial showed that Darwish took draws totaling \$686,530 (*see* Transcript at 244-246; *see also* Ex. P43 ["Moss Adams Report"] at 13), but the Dealerships never met the annual or quarterly bonus targets (*see* Transcript at 246-247; *see also* Moss Adams Report 14-19). Accordingly, Darwish was not entitled to receive any draws, and application of the contractual reconciliation process shows that Darwish was overpaid by \$560,962 (*see* Transcript at 249-250; *see also* Moss Adams Report 21-23).

In opposition, Darwish argues that the compensation he took from the Dealerships reflected work beyond that outlined in the Employment Agreement, including his responsibilities as Dealer Principal. Darwish further argues that plaintiffs' claim is barred by the Employment Agreement's reconciliation process, which provides that overpayments would be deducted from future distributions or draws. Finally, Darwish argues that plaintiffs waived any claim of overpayment (*see* Darwish Mem at 1220).

Darwish's objections lack merit. The Employment Agreement is a binding and enforceable contract intended to comprehensively govern the compensation paid to Darwish for managing the Dealerships, including his activities as Dealer Principal, which generally pertain to management of the Dealerships (*see e.g.* Ex. AA). And there is no proof of an intentional and knowing waiver by plaintiffs; Darwish was instructed to stop taking draws several times, first in September 2022 and again in March 2023 (*see* Transcript at 247-248).

Accordingly, plaintiffs are awarded \$686,530 on their claim for breach of contract for the unwarranted draws, with statutory interest from January 1, 2023, which the Court finds to be a reasonable intermediate date. Plaintiffs also are entitled to a declaration of their entitlement to set-off of \$560,962, with statutory interest from July 19, 2023 (the date of the termination of Darwish's employment), against any future distributions from the Companies.

B. Darwish's Quasi-Contractual Claims

Darwish's seventh and eighth counterclaims/third-party claims allege unjust enrichment and promissory estoppel, respectively. Darwish alleges that the Companies and Third-Party Defendants were unjustly enriched by: inducing him to enter into the April 18 Agreements through false promises that PAG would merely serve as a lender; removing Darwish from his own companies; engaging in misconduct in connection with payments to the Lenders; and forcing him to work without proper compensation (*see* Answer, ¶¶ 333-340; Third-Party Complaint, ¶¶ 333-340). The promissory estoppel claim similarly alleges a promise that PAG would merely serve as a lender (*see* Answer, ¶¶ 343-348; Third-Party Complaint, ¶¶ 343-348).

"Unjust enrichment occurs when in equity and good conscience, a party obtains or possesses value that rightfully belongs to another party" (*Henning v Henning*, 103 AD3d 778, 780-781 [2d Dept 2013] [internal quotation marks, brackets and citations omitted]). It is a quasi-contractual "obligation which the law creates, in the absence of any agreement" (*State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540 [1990], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). Thus, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

The proponent of a promissory estoppel claim “must show (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise” (*Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 797 [3d Dept 2002] [internal quotation marks and citation omitted]). And, as with unjust enrichment, “[t]he existence of a valid and enforceable contract governing a particular subject matter precludes recovery under a promissory estoppel cause of action arising out of the same subject matter” (*Bennett v State Farm Fire & Cas. Co.*, 181 AD3d 777, 778 [2d Dept 2020]).

Here, the Governance Agreements, Financing Agreements and Employment Agreement are binding and enforceable contracts that comprehensively govern the subject matter of Darwish’s quasi-contractual claims, including the Lenders’ involvement in managing the Companies and the compensation that Darwish was to receive for his labors. As such, Darwish’s seventh and eighth counterclaims/third-party claims must be dismissed.¹⁷

IV. REMAINING CLAIMS

A. Fraud

Darwish’s first counterclaim/third-party claim principally alleges that he was fraudulently induced to enter into the April 18 Agreements through the Lenders’ concealment of their intention to take control of the Dealerships and sell them (*see* Answer, ¶¶ 201-223; Third-Party Complaint, ¶¶ 201-223).¹⁸

“[A] cause of action for fraud require[s] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages”

¹⁷ In any event, the Third-Party Defendants’ alleged enrichment was not shown to be unjust, and Darwish’s claim of a clear and unambiguous promise is unsupported by credible evidence.

¹⁸ Darwish also complains about the misuse of his banking token (*see* Answer, ¶¶ 209-211; Third-Party Complaint, ¶¶ 209-211), but that issue is addressed under the rubric of conversion (*see* Part IV [D], *infra*). And Darwish lacks standing to allege claims of fraud on behalf of third parties (*e.g.* the Manufacturers).

(*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Darwish's fraud claim fails for numerous reasons.

First and foremost, Darwish has failed to establish an actionable misrepresentation or concealment. Proof of the alleged misrepresentations and concealments rests solely on Darwish's testimony, which the Court finds to be lacking in credibility.

Second, the April 18 Agreements include broad merger clauses, and Darwish could not have reasonably relied on any affirmative representations or concealments inconsistent with the clear and express terms of those agreements, particularly considering his representation by sophisticated transactional counsel.

Finally, the proof at trial shows that Darwish was not deceived; the Court finds that Darwish entered into the April 18 Agreements knowingly and voluntarily, with a full understanding of the resulting governance and ownership structure.

B. Declaratory Judgment

For his second counterclaim/third-party claim, Darwish seeks a declaration "that Third-Party Defendants, Alan Potamkin and PAG cannot act in a manner with the sole purpose of harming Darwish," they "cannot misuse Darwish Auto . . . and Darwish General" or "Darwish's log in or personal information and token," they "must provide Darwish with full access to the books and records of Darwish's Dealerships," they must restore "Darwish's title and find[] that the Board of Directors and Management Committee recognized in the SJ [Decision] cannot act without providing Darwish an opportunity to attend meetings and vote," and they may not "wrongfully oppress Darwish" or wrongfully "obstruct[] the normal business operations of [the Companies]" (Answer, ¶¶ 239-240; Third-Party Complaint, ¶¶ 239-240).

As observed on summary judgment, “[c]ertain of the declarations requested by Darwish already have been rejected by the Court . . . , and others are redundant of Darwish’s claims at law and/or give rise to triable issues of fact” (SJ Decision at 35).

Insofar as Darwish presses any remaining claims for declaratory relief that are not foreclosed by the SJ Decision, the Court finds that the credible proof adduced at trial fails to support the requested relief. There was no credible evidence that the Third-Party Defendants acted with the sole purpose of harming Darwish, misused the Companies, improperly terminated Darwish’s employment or wrongfully obstructed the business of the Companies and Dealerships. It was Darwish who acted to harm and misuse the Companies and Dealerships and obstruct their business.

C. Accounting

“Plaintiffs concede that Darwish is entitled to an Accounting pursuant to NY BCL § 624 (b). Neither Plaintiffs nor Third Party-Defendants have prevented such an accounting” (Plaintiffs’ Mem at 32).

Darwish maintains, however, that he also is entitled an equitable accounting, which is “a remedy ‘designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession’” (*Hall v Louis*, 184 AD3d 437, 438-439 [1st Dept 2020], quoting *Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]).

“The right to an [equitable] accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Jacobs v Cartalemi*, 156 AD3d 605, 608 [2d Dept 2017] [internal quotation marks and citation omitted]). Although Frieder, Manzo

and Yusko owed fiduciary duties to the Companies, Darwish has not proven any breach of those duties.¹⁹

Accordingly, Darwish is entitled to a judgment on his third counterclaim granting him the right to an accounting under Business Corporation Law § 624 (b) and Limited Liability Company Law § 1102, and his corresponding third-party claim is dismissed. However, Darwish's prayer for an equitable accounting is denied.

D. Conversion

The fourth counterclaim/third-party claim alleges conversion, citing the Third-Party Defendants' use of "self-help" to usurp control of the Dealerships, the misuse of Darwish's banking token and the reduction of his compensation (*see* Answer, ¶¶ 261-269; Third-Party Complaint, ¶¶ 261-269).

The tort of "conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. The two essential elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [citations omitted]). Although conversion claims ordinarily involve tangible property, the tort may extend to electronic records and other types of intangibles (*see Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292-293 [2007]).

Insofar as the conversion claim is predicated on control over the Dealerships and states a claim for relief in that regard, the Court declared on summary judgment that the Companies, acting through their Governing Bodies, are entitled to manage the Dealerships pursuant to the

¹⁹ Nor has Darwish shown he lacks an adequate remedy at law (*see Atlantis Mgt. Group II LLC v Nabe*, 177 AD3d 542, 543 [1st Dept 2019]).

Governance Agreements and Dealership Operating Agreements. If the unauthorized usurpation of management prerogatives implicates the tort of conversion, Darwish is the tortfeasor.

As to the banking token, Darwish argues that third-party defendant David Yusko used his personal token to initiate \$219,000 in wire transfers to the Lenders that were approved by third-party defendant Melissa LaCarter.²⁰ Darwish supports these assertions by reference to Suzy Kolb's trial testimony (*see* Transcript at 1172), Yusko and LaCarter's deposition testimony (*see* Yusko EBT at 102-110, 174-179; LaCarter EBT at 72-76), as well as his own trial testimony (*see* Transcript at 761-765). Darwish admitted that he had given Yusko permission to use his banking token at the closing, but Yusko "was supposed to give [him his] token back" (*id.* at 765). However, Darwish claims that he inadvertently left the closing without his token.

Yusko does not deny initiating the transfers with Darwish's banking token, but he claims that Darwish gave him an open-ended authorization to use the token without any specific direction regarding its return. Yusko understood that he was permitted to use Darwish's token until he received his own token from TD Bank (*see id.* at 1209-1210). Suzy Kolb was present at the closing and confirmed that "Mr. Darwish and Derrick Powers gave Mr. Yusko the token and told him to use it" (*id.* at 1172).

The Court finds that the token conversion claim fails for several reasons. First, the claim hinges on Darwish's vague testimony, which lacks credibility (*see supra*). The Court instead credits Yusko's more specific and detailed testimony that Darwish gave him the banking token at the closing to use on behalf of the Companies until TD Bank provided him with his own token, which Yusko attempted to obtain on several occasions (*see* Transcript at 1210).

²⁰ There is no credible evidence that Frieder or Manzo were personally involved in this.

And while Darwish claims a personal, possessory interest in the banking token, the record shows that the token granted access to the Companies' bank account, which falls under the control of the Governing Bodies.²¹ And Yusko, as the chief financial officer of the Companies, had the authority to pay debts of the Companies, including interest owed to the Lenders, using funds of the Companies.

Finally, Darwish has failed to demonstrate that the disputed wire transfers were used for anything other than legitimate debts of the Companies. Darwish suffered no damages from funds of the Companies being transferred to pay interest owed to the Lenders.

Accordingly, the fourth counterclaim and third-party claim are dismissed.

E. Tortious Interference

Darwish's ninth counterclaim/third-party claim alleges that the Third-Party Defendants tortiously interfered with his "interest in the [C]ompanies" by (i) contacting the Manufacturers and interfering with the Manufacturer Agreements, and (ii) preventing him from refinancing the loans by harming and undermining the Companies (Answer, ¶¶ 353-360; Third-Party Complaint, ¶¶ 353-360).

"Tortious interference with contract requires: the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*EXRP 14 Holdings LLC v LS-14 Ave LLC*, 239 AD3d 407, 407 [1st Dept 2025] [internal quotation marks and citation omitted]).

Darwish has failed to establish a specific contract that was tortiously interfered with by a specific third-party defendant. In his post-trial briefing, Darwish focuses on the Manufacturer

²¹ The same is true of Darwish's business email account.

Agreements (*see* Darwish Mem at 23), but the Court finds that the interference he alleges was not unjustified.

As the Court stated on November 2, 2023, in denying Darwish's application for an injunction restoring him as the manager of the Dealerships:

[B]oth sides bear some measure of responsibility for the prospect that the Manufacturers may terminate their franchise agreements for material breach or fraudulent inducement. Although the financing and ownership structure objected to by the Manufacturers undoubtedly originated with the Third Party Defendants and their lawyers, Darwish was a willing, and apparently knowing, participant.

On April 18, 2022, Darwish signed the Governance Agreements, which vested management of his Companies and the Dealerships in the Governing Bodies, of which he possesses only a minority voice. On the same date, Darwish signed the Contribution Agreement, which is intended to leave Darwish with only an indirect, minority interest in the Dealerships once fully effective. And just 11 days after agreeing to these ownership and governance agreements, Darwish executed the VW Agreement on behalf of the VW Dealership.

But while both sides bear some responsibility for the prospect of irreparable harm, Darwish is the only party who can initiate the process of repairing relationships with the Manufacturers by formally requesting their consent to the governance and ownership changes worked by the Governance and Financing Agreements.

And if Darwish applies for the Manufacturer Approvals – as the Governing Bodies directed him to do back in July 2022, more than 15 months ago, and as expressly contemplated by the Contribution Agreement – the Manufacturers will be bound by VTL § 463 (2) (k), which prohibits them from unreasonably withholding consent. This does not guarantee that efforts at a cure would be successful, but Darwish is the only one who can begin that dialogue with the Manufacturers.

The Court therefore finds that the irreparable harm that Darwish seeks to avoid largely is self-created, which does not tip the balance of equities in his favor.

The Court recognizes that plaintiffs' decision to remove Darwish from the day-to-day affairs of the Dealerships has exacerbated problems with the Manufacturers, particularly Volkswagen. . . . Nonetheless, this is an unusual case, because . . . restoring Darwish to a managerial role may itself cause irreparable harm.

Plaintiffs have tendered credible evidence showing that Darwish may have used his role as Dealer Principal to direct to himself millions of dollars in Manufacturer funds intended for the Dealerships and Dealership personnel. Notably, Darwish does not deny having directed such funds to himself or being in possession of such funds. Darwish merely claims that such transactions were "normal for Dealer Principals," and he expresses some willingness and ability to return certain of the funds.

Darwish's track record of refusing to follow the directives of the Governing Bodies further counsels against an injunction restoring him to a managerial role. The Court has no confidence that Darwish would operate the Dealerships in accordance with the duly-adopted directives of the Governing Bodies (PI Decision at 24-26 [footnote and citations omitted]).

In light of the foregoing, any interference by the Third-Party Defendants with the Manufacturer Agreements has not been proven to be unjustified, and the tortious interference claims are therefore dismissed.

F. Civil Conspiracy

The sixth counterclaim/third-party claim is for civil conspiracy. But "New York does not recognize an independent cause of action for conspiracy to commit a civil tort. In fact, allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [internal quotation marks, citations and brackets omitted]).

Thus, "to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the

furtherance of a plan or purpose; and (4) resulting damage or injury” (*id.* [internal quotation marks and citation omitted]).

Given the dismissal of Darwish’s underlying tort claims – the claims for breach of fiduciary duty, fraud and tortious interference – the civil conspiracy claim must also be dismissed (*see FPG Maiden Lane, LLC v Bank Leumi USA*, 211 AD3d 528, 529 [1st Dept 2022]).

G. Indemnification

Darwish argues in his post-trial submissions that plaintiffs are obliged to indemnify him under Section 7.02 of Darwish General’s operating agreement (*see* Darwish Mem at 37-39).

However, the indemnification language he relies upon does not apply where the “acts were committed in bad faith or the result of active and deliberate dishonesty and material to the cause of action adjudicated” or where the party seeking indemnity “personally gained a financial profit or other advantage to which such Covered Person was not legally entitled” (Operating Agreement, § 7.02 [a]).

The Court has determined that Darwish breached his fiduciary duties by defalcating the Advances to his personal benefit, a determination that was affirmed on appeal. Moreover, the trial record is replete with numerous instances of Darwish’s active and deliberate dishonesty, as well as his bad faith. Darwish is not entitled to recovery on his unpleaded claim for indemnification.²²

H. Attorney’s Fees

Plaintiffs claim an entitlement to an award of attorney’s fees under (i) the Employment Agreement, which provides that the employer can recover counsel fees in connection with the enforcement of any provision of that agreement, and (ii) the Borrowing Agreement, which

²² To be sure, the claim for indemnification was pleaded in Darwish’s Amended Answer of May 26, 2023, but was omitted from the conformed Answer (*compare* NYSCEF Doc No. 247, *with* NYSCEF Doc No. 1161).

provides that a prevailing party shall be entitled to recover fees and costs.

Plaintiffs cannot recover an award of attorney's fees under the Borrowing Agreement. At the outset of the case, plaintiffs took the position that their claims arose principally under the Governance Agreements, not the Borrowing or Contribution Agreements (*see* NYSCEF Doc No. 210 at 8-10), and the Court accepted that position (*see* MTD Decision at 8). The Borrowing and Contribution Agreements "largely serve as a source of context for the parties' disputes under the Governance Agreements" (*id.* at 9; *see also* 224 AD3d at 1121).

Finally, the Employment Agreement does provide for an award of counsel fees, but only in the portion of the agreement concerning the enforcement of post-employment covenants:

The [Companies] will be entitled to equitable and injunctive relief without the necessity of posting a bond in the event that you violate any of the foregoing restrictive covenants. The [Companies] will also be entitled to recover reasonable attorneys' fees and costs incurred in connection with the enforcement of any provision of this Agreement.

Given the lack of clarity of the intended scope of this language and the very modest role that the Employment Agreement played in this litigation and the relief granted, the Court declines to award fees thereunder.

CONCLUSION

Based on the foregoing, it is

ORDERED and **ADJUDGED** that plaintiffs are entitled to the following damages on their second cause of action for breach of fiduciary duty: (i) compensatory damages of \$4,770,000, with pre-judgment interest at the statutory rate of 9% from August 1, 2023; (ii) compensatory damages of \$16,294,000, with no pre-award interest; and (iii) punitive damages of \$7,693,256, with no pre-award interest; and it is further

ORDERED and **ADJUDGED** that plaintiffs are entitled to damages of \$686,530 on their third cause of action, with interest at the statutory rate of 9% from January 1, 2023; and it is further

ORDERED, ADJUDGED and **DECLARED** that plaintiffs are entitled to a set-off of \$560,962, with statutory interest from July 19, 2023, against future distributions to Darwish from the Companies; and it is further

ORDERED and **ADJUDGED** that Darwish is entitled to an accounting under Business Corporation Law § 624 (b) and Limited Liability Company Law § 1102, and plaintiffs shall cooperate with any such request; and finally it is

ORDERED that any remaining requests for relief are denied.

This constitutes the Decision, Order & Judgment After Trial, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for plaintiffs shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
July 10, 2026



RICHARD M. PLATKIN
A.J.S.C.



07/10/2026