**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Contract Packaging, Inc.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:08-cv-03492-JOF
Central Garden & Pet Co., et al.,	:	
	:	
Defendants.	:	

OPINION & ORDER

This matter is before the court on Defendants' Motion for Summary Judgment [97], Defendants' Motion to Exclude Opinions of Mark Zyla [98], Defendants' Motion to Strike [99], Plaintiff's Motion for Summary Judgment [100], and Defendants' Motion for Leave to File Proposed Submission of Supplemental Evidence In Support of Motion to Exclude Opinions of Mark Zyla and Motion for Summary Judgment [119].

I. Background

A. Procedural and Factual History

Plaintiff Contract Packaging, Inc. ("CPI") filed the present suit November 12, 2008. Plaintiff alleges several claims arising out of the parties' involvement in a joint venture[1]

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[1] Although Plaintiff objects to Defendants' use of the phrase "joint venture," Plaintiff itself refers to Tech Pac as a joint venture. *Compare* Plaintiff's response to Defendants'

through a company called Tech Pac, LLC. Tech Pac is a Delaware Limited Liability Company that is engaged in manufacturing and selling pesticide products.[2] D.E. [104], ¶ 1. Tech Pac has two members: Plaintiff and Defendant Gulfstream. *Id.* Defendant Gulfstream owns 80% of Tech Pac, while Plaintiff owns 20%. *See id.* at ¶ 10. *See also* D.E. [101], ¶ 2. Gulfstream is the wholly-owned subsidiary of Defendant Central Garden & Pet Co. ("Central"). It was acquired by Central after Tech Pac was formed. Neither parties' briefs nor motions give much information regarding Defendants Reed and Brown's positions with either Gulfstream or Central. However, Defendants Reed and Brown are or were at all relevant times "directors, officers and/or employees of Central and serve as members of the Tech Pac Board of Directors." D.E. [103], 2. According to the Amended Complaint, Brown is "the President and Chairman of the Board of Central," and Defendant Reed is "an officer of Central." Amended Compl., ¶¶ 103-04.

Pursuant to a manufacturing agreement (the "Manufacturing Agreement"), Plaintiff manufactures products for Tech Pac. *Id.* at ¶ 4. Gulfstream provides marketing services for Tech Pac pursuant to a marketing agreement (the "Marketing Agreement"). Both parties are compensated in several ways for their involvement with Tech Pac. On October 31 of each

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statement of undisputed fact, D.E. [104], ¶ 1 *with* Plaintiff's statement of undisputed fact, D.E. [100-2], ¶ 1.

[2] Plaintiff and Defendants' claims arise out of the following undisputed facts. The court will make it clear where any facts are disputed.

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year, according to the Tech Pac, LLC Limited Liability Agreement (the "LLC Agreement"), Tech Pac is to distribute to its members its "cash on hand as of the date of distribution after the payment of all then due liabilities and obligations of" Tech Pac. D.E. [97-13], Exhibit B, LLC Agreement, § 8.5. In addition to the aforementioned distribution of cash on hand, Tech Pac was also required to make a specific distribution to Plaintiff each year, and if Tech Pac did not have the ability to make that payment, Gulfstream was obliged to make up the short fall. This is referred to as the "Make Whole Payment." D.E. [104], ¶ 8. *See also* D.E. [97-13], Exhibit B, LLC Agreement, § 6.4. Additionally, it appears that both parties are also compensated pursuant to their individual agreements with Tech Pac — the Marketing and Manufacturing Agreements.

Relevant to this suit, "[d]uring 2008, Gulfstream caused Tech Pac to borrow about $11 million. Using the loan proceeds and cash from earnings, Tech Pac had sufficient cash on hand at the end of 2008 to make its full guaranteed distribution to CPI." D.E. [104], ¶ 45. Meaning that Tech Pac used some of the loan proceeds to cover its obligation to make the 2008 Make Whole Payment to Plaintiff, and Gulfstream, therefore, did not have to make up any shortfall. The money was borrowed from Central through a line of credit that Tech Pac has with Central. Upon learning that the 2008 Make Whole Payment was made out of those loan proceeds, Plaintiff returned the Make Whole Payment. Defendants claim that Gulfstream has since reversed the 2008 loan, reimbursed Tech Pac for interest associated

with the loan, repaid Tech Pac the distribution to Gulfstream, and made the 2008 Make Whole Payment to Plaintiff. D.E. [104], ¶ 48.

Tech Pac's major brand is the brand SEVIN, which has been sold for more than forty years and is well-established in the pesticide marketplace. D.E. [104], ¶ 11. Tech Pac also owns the trademark and brand OVER-N-OUT ("ONO"), and ONO products are used to kill fire ants. *Id*. at ¶ 12. The original ONO product was "designed to be spread over a broad area," and it is referred to as a "broadcast" product. *Id*. Tech Pac has introduced other ONO products to the marketplace, such as a "mound" product, which was used to directly treat fire ant mounds. *Id*. at ¶ 19 (hereinafter referred to as the "Mound Treatment"). The launch of the Mound Treatment was not successful, and it was "phased out" in 2008. *Id*. at ¶ 24. Plaintiff contends that the failure of the Mound Treatment is Defendants' fault. At one point, Tech Pac also considered introducing under the ONO brand a "perimeter treatment product," which would be used to treat the "boundaries of an area, thereby preventing fire ants from crossing the treated perimeter." *Id*. at ¶ 25 (hereinafter referred to as the "Perimeter Treatment"). However, the Perimeter Treatment was never developed or introduced to the marketplace. *See id*. at ¶ 28. Plaintiff maintains that Defendants wrongfully blocked the development of the Perimeter Treatment.

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In what appears to be another attempt to expand the Tech Pac line of ONO products, Tech Pac entered into negotiations with a Third Party[3] because the Third Party "owned rights to certain active ingredients that it . . . historically [only] licensed for use in the non-consumer market. The Third Party hoped to broaden the use of these active ingredients into the consumer product market and explored doing so with various parties, including Tech Pac." D.E. [104], 21. Despite the negotiations, Tech Pac and the Third Party did not enter into an agreement at that time. *Id.* at ¶ 34. The reasoning behind this failure is highly disputed by the parties. However, it is undisputed that Gulfstream, on its own, did execute an advertising and profit and loss sharing agreement with the Third Party on February 21, 2009. *Id.* at ¶ 36 (hereinafter referred to as the "Third Party Opportunity"). Eventually, Plaintiff also entered into a manufacturing agreement with the Third Party. According to Defendants, this venture with the Third Party has not been successful thus far, and Plaintiffs agree that the Third Party venture has lost money in the first year. *Id.* at ¶ 57. The venture has also decided not to introduce the new products using the Third Party's active ingredient in the year 2010 or possibly ever. *Id.* at ¶ 43. In fact, according to a more recent filing by Defendants, Defendants contend that the venture between the Third Party and Gulfstream was terminated as of December 31, 2010. D.E. [119-2], 1.

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[3] The Third Party is not a party to this suit, and the parties have made it clear from the beginning of the litigation that they all prefer to keep the identity of the Third Party confidential. The identity of the Third Party is irrelevant to the merits of this suit.

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B. Contentions

Plaintiff's Amended Complaint asserts claims against Gulfstream for failure to make the 2008 Make Whole Payment and for breaching the Marketing Agreement by entering into the Third Party Opportunity. Plaintiff also alleges that both Gulfstream and Central breached certain fiduciary duties and the implied covenant of good faith and fair dealing found in several agreements between the parties. Additionally, Plaintiff brings claims against Defendants Brown and Reed for breach of fiduciary duty. Plaintiff further makes a demand for accounting against Central and Gulfstream, and finally, Plaintiff requests injunctive relief against Central, relating to the line of credit extended from Central to Tech Pac, and the 2008 loan. Defendant Gulfstream, in answering Plaintiff's Amended Complaint, asserted a counterclaim against Plaintiff relating to Gulfstream's right to inspect certain documents belonging to Plaintiff for breach of contract, and Defendant requests specific performance and damages arising out of that breach.

Pursuant to a scheduling order by this court, Plaintiff and Defendants filed their motions for summary judgment on July 1, 2010. Defendants appear to be seeking summary judgment on all of Plaintiff's claims, and Plaintiff seeks summary judgment on Defendant Gulfstream's counterclaim. Defendants also filed a motion to exclude Plaintiff's damages expert, a motion to strike some of Plaintiff's discovery responses, and a motion to supplement some of their previous filings.

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II. Discussion

A. Expert

Defendants have moved to strike both the reports and testimony of Plaintiff's damages expert, Mark Zyla, arguing that neither Zyla's testimony nor his opinion meet the rigorous standards set forth in *Daubert v. Merril Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[4] Zyla computed five components of damages arising out of "(1) the Defendants' decision to pursue an agreement with [the Third Party] outside of Tech Pac, (2) the Defendants' decision to reject the Mound treatment and Perimeter treatment opportunities, (3) the Defendants' direction of Tech Pac to draw an additional $10,878,500 in debt, and (4) the Defendants' failure to properly make payment under the Make Whole Agreement, for the fiscal year 2008." D.E. [98-4], Zyla Report, 5. According to Zyla, Plaintiff suffered damages with regard to the first two categories in the following amounts: "[1] Loss of Expected/Anticipated Profits from [Third Party] Agreement[:] $8,000,000 [,]"[5] [2] Loss of Expected/Anticipated Profits from Mount Treatment[:] $1,511,000[,] [3] Loss of

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[4] As Defendants have pointed out, Plaintiff's response brief is untimely. Defendants filed their motion to exclude on July 1, 2010, and Plaintiff did not respond until August 10, 2010. Although the court extended the parties' time to respond to motions for summary judgment, as far as the court is aware, there was no extension of time allowed to reply to any other motion the parties might file. See Minute Order on May 28, 2010. The court notes that it could, therefore, consider Defendants' motion unopposed.

[5] Zyla's Supplemental Report lowered this amount to $6,006,000. D.E. [98-6], Supplemental Zyla Report, 3.

Expected/Anticipated Profits from Perimeter Treatment[:] $3,254,000." *Id*. at 12. Zyla also calculated $2,175,700 in damages for Defendant Gulfstream's failure to pay the 2008 Make Whole Payment, and $2,297,426 in damages from the "Loss in Value and Loss in Profits from Additional Loan," arising out of Defendant Gulfstream's borrowing, on Tech Pac's behalf, of approximately $11,000,000 from Defendant Central. *See id*.

Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." In interpreting this Rule, the Supreme Court has imposed a special gatekeeping role on trial courts, charging them to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. While *Daubert* spoke in terms of scientific expert testimony, the Court has subsequently made clear that there exists "no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge," and the gatekeeping obligation therefore applies to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Under *Daubert* and its progeny, expert testimony may be admitted only if: "(1) the expert is qualified to testify competently regarding the matters he intends to discuss; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*;

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and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). Defendants' argument focuses on the reliability of Zyla's methodology. As such, the court will describe Zyla's method for calculating damages in some detail as to each of the aforementioned categories.

1. Third Party Opportunity Damages

One of the sets of damages Zyla calculates are those damages that arise out of "Defendants' decision to pursue an agreement with [the Third Party] outside of Tech Pac." D.E. [98-4], Zyla Report, 5.[6] Zyla begins his analysis "with the projected revenues [of the Third Party venture] and earnings before taxes (EBT) of ONO's extended product line, beginning in 2009 and ending in 2018, as if the agreement had been made between Tech Pac and [the Third Party]." *Id.* at 6. Zyla utilized projected revenues developed by Gulfstream and found in Gulfstream and the Third Party's "FY09-13 Long Range New Product Plan." *Id.* He claims that use of the projected revenues from the Long Range New Product Plan is reasonable because the parties are the same in both formulation and marketing of the products as they would have been pursuant to a Tech Pac/Third Party agreement. *Id.* Zyla calculated the EBT "using a five-year average historical EBT margin of Tech Pac of 8.9%"

[6] Zyla produced both an original report and a supplemental report, which only supplements Zyla's conclusion regarding the Third Party Opportunity damages.

because he considered "five years to be representative of a normal business cycle." *Id*. Zyla then divided that number in half to arrive at Tech Pac's percentage, because under the Gulfstream/Third Party venture, the Third Party gets 50% of the EBT. *Id*. at 6-7. He then multiplied Tech Pac's 50% of the EBT by 20% to arrive at Plaintiff's share, based on Plaintiff's percentage of ownership in Tech Pac. *Id*. at 7. Zyla then added a 3% commission, which Plaintiff would allegedly receive under its Manufacturing Agreement with Tech Pac. *Id*. Zyla next "adjusted Tech Pac's marketing overhead expense to [Gulfstream] by 50 percent since a portion of this expense would have been paid by [the Third Party] as well." *Id*.

After that, Zyla calculated and subtracted the net profits that Plaintiff would receive from its own personal agreement with the Third Party. D.E. [98-4], Zyla Report, 7. Zyla then "determined annual net profits for the ten-year period which were lost by [Plaintiff] but for the actions of the defendant. [Zyla] considered a ten year period reasonable based upon the life cycle of similar types of products." *Id*. Zyla's final step was to discount the entire amount by 20%, "which is the return an investor would require for this type of investment. The discount rate is based upon [his] calculation of a return on equity appropriate for [Plaintiff] under commonly used methodologies." *Id*. at 7-8. In his original report, Zyla concluded that the net present value of lost damages to Plaintiff for Tech Pac having been cut out of the Third Party Opportunity was approximately $8,000,000. *Id*. at 8. Zyla's

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supplemental report appears to use the same methodology, but he states that he received new projections for the Third Party venture, and he also received a revised forecast regarding the profits Plaintiff would make from its manufacturing agreement with the Third Party. D.E. [98-6], Supplemental Zyla Report, 2-3. Zyla revised his damages calculation downward to approximately $6,006,000 based on the updated data. *Id.* at 3.

2. Mound Treatment Damages

Zyla also calculated the amount of damages arising out of "Defendants' decision to reject the Mound treatment . . . opportunit[y]." D.E. [98-4], Zyla Report, 5. Zyla began with forecasted revenues from a Tech Pac Board of Directors meeting presentation that occurred in 2006, which projected revenue through 2012. *Id.* at 8. Zyla contends he used these because "they were prepared by Gulfstream[,] recommended to the Tech Pac Board by Gulfstream, and approved by the Tech Pac Board." *Id.* He "then grew revenues at 3% which is representative of the long-term inflation rate as determined by the ten-year historical average of the Consumer Price Index." *Id.* He again forecasted revenues for a period of ten years, "which represents the life cycle of similar products." *Id.* Zyla deducted Tech Pac's actual revenue from the Mound Treatment for the 2007 and 2008 fiscal years.[7] *Id.* Zyla also multiplied the revenue figure for each year by Tech Pac's five-year historical EBT margin of 8.9% to determine EBT. D.E. [105], 5. Zyla then calculated 20% of the remaining

[7] The Mound Treatment was phased out of the market in 2008.

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revenue in conjunction with Plaintiff's ownership interest in Tech Pac and added the same 3% commission previously discussed. D.E. [98-4], Zyla Report, 8. Finally, Zyla again discounted the amount by 20%, his calculation of the rate of return that an investor would require. *Id*. at 8-9. His final calculation was a loss to Plaintiff of $1,511,000. *Id*. at 9.

3. Perimeter Treatment Damages

Zyla also calculated the amount of damages arising out of "Defendants' decision to reject the Perimeter treatment . . . opportunit[y]," and in doing so, Zyla conducted essentially the same analysis as he did for the Mound Treatment. D.E. [98-4], Zyla Report, 5. Zyla began with the forecasted revenues from the presentation made to the Tech Pac Board in 2006, which forecasted revenues through 2012. *Id*. at 9. Zyla then grew the revenues at the 3% rate based on the Consumer Price Index for a period of ten years, based on what he considered the life cycle of similar products. *Id*. According to Plaintiff, he also multiplied the revenue figure for each year by Tech Pac's five-year historical EBT margin of 8.9% to determine EBT. D.E. [105], 6. He then determined the 20% of those revenues that would have flowed to Plaintiff based on their 20% ownership interest in Tech Pac, as well as the 3% commission on gross sales allegedly due to Plaintiff pursuant to the Manufacturing Agreement. D.E. [98-4], Zyla Report, 9. Unlike the Mound Treatment analysis, Zyla also calculated "a net cost savings to Tech Pac due to an agreement with BASF [an outside party, that] would have resulted in substantial price reductions of

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Fipronil." *Id*. Fipronil is a product that could have been used in the Perimeter Treatment. *Id*. at 4. According to Plaintiff, Zyla "added in an amount for each year to reflect a discount on active ingredients through an agreement with BASF that Tech Pac would have realized if the perimeter treatment had been pursued." D.E. [105], 6. Zyla then discounted the resulting figures by the 20% discount rate he applied to both the Mound Treatment calculation and the Third Party Opportunity calculation, for a total loss of $3,254,000. D.E. [98-4], Zyla Report, 9-10.

4. Make Whole Payment and Loan

"During 2008, Gulfstream caused Tech Pac to borrow about $11 million. Using the loan proceeds and cash from earnings, Tech Pac had sufficient cash on hand at the end of 2008 to make its full guaranteed distribution to CPI." D.E. [104], ¶ 45. Tech Pac used some of the loan proceeds to cover its obligation to make the 2008 Make Whole Payment to Plaintiff, in the amount of $2,175,700, and Gulfstream, therefore, did not have to make up any shortfall. Plaintiff later returned the Make Whole Payment. Zyla calculated damages he believes are owed to Plaintiff based on the failure to make the Make Whole Payment and the wrongful taking out of the loan. D.E. [98-4], Zyla Report, 10-11.

For the loan transaction, Zyla took the actual amount borrowed, $10,878,500, and he calculated 20% of the principal, based on Plaintiff's 20% interest in Tech Pac for a total of $2,175,700. D.E. [98-4], Zyla Report, 11. Zyla determined that the loan carried an interest

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rate of "LIBOR plus 1.5%," so he "calculate[d] the amortization schedule of the loan and interest," over a "one year term for the loan based on historical payoffs" of Tech Pac. *Id*. According to Zyla, "The impact of the additional debt also includes the interest payments of $608,629 which would result in a reduction of future net income which could be distributed to the members." *Id*. Therefore, "[t]he indicated amount of total damage of the additional $10,878,500 draw down to [Plaintiff] is $2,297,426 which is composed of $2,175,700 principal balance and interest of $121,726." *Id*. As for the Make Whole Payment, because Plaintiff returned the loan money it received, Zyla contends that the Make Whole Payment from 2008 is still owed to Plaintiff, in the amount of $2,175,700. It appears that Zyla asserts that this is in addition to the $2,175,700 (plus interest) already owed to Plaintiff due to the improper loan draw down. Zyla testified that the related damages calculations would be moot if the loan was reversed, the Make Whole Payment made to Plaintiff, and interest paid back. D.E. [98-5], Zyla Depo., pp. 209-10.

5. Discussion

Defendants' motion only challenges the reliability of Zyla's opinion with regard to the Third Party Opportunity, the Mound Treatment Opportunity, and the Perimeter Treatment Opportunity. As for the Make Whole Payment and loan transaction, Defendants very briefly argue that because the Make Whole Payment has been made and the loan transaction has been reversed, Zyla's opinion on damages as to these two issues is irrelevant,

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and further, Defendants claim that "[t]o the extent Zyla's opinions regarding the loan transaction and its effect on the make-whole payment remain relevant, they are internally duplicative and should be ignored." D.E. [98-1], 37. Regarding the Third Party, Mound Treatment, and Perimeter Treatment opportunities, Defendants challenge Zyla's reliance on revenue forecasts that he himself did not produce or even analyze. Defendants also challenge many of the underlying assumptions Zyla made in calculating lost profits such as his use of Tech Pac's historical expense figures and his calculation of damages over a ten-year period. Plaintiff, on the other hand, contends that Zyla's methodology and analysis are reliable, and further, that Defendants' arguments go to the weight and credibility of Zyla's opinion and testimony, rather than to admissibility.

Under *Daubert*'s reliability prong, a trial court must ensure that the proposed testimony is supported by appropriate validation. In other words, to be reliable, expert testimony must be premised on "good grounds." *Daubert*, 509 U.S. at 590. To facilitate a determination of reliability, the Court provided a list of four factors courts should consider where relevant: (1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a known or potential rate of error; and (4) whether the theory has attained general acceptance in the relevant community. *Daubert*, 509 U.S. at 593-94; *see also Kumho Tire*, 526 U.S. at 149 (indicating that trial judge must determine whether expert testimony has reliable basis in knowledge and

experience of relevant discipline). These four factors, however, "do *not* constitute a definitive checklist or test," and the "gatekeeping inquiry must be tied to the facts of a particular case." *Kumho Tire*, 526 U.S. at 150 (internal quotations and citations omitted) (emphasis in original). Plaintiff bears the burden of showing that Zyla's methodology is sufficiently reliable. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

The court begins by discussing Zyla's methodology for calculating the Third Party Opportunity, Mound Treatment, and Perimeter Treatment damages, as Defendants' main argument is directed at all three calculations. The starting place for Zyla's calculations of both the Mound Treatment and Perimeter Treatment damages was the revenue forecasts or projections created by Gulfstream and presented to the Tech Pac Board of Directors. For the Third Party Opportunity damages, Zyla began with forecasted revenues created by Gulfstream and found in Gulfstream and the Third Party's "FY09-13 Long Range New Product Plan."[8] Zyla did not calculate any of the initial projections he relied upon. Defendants contend that Zyla failed to conduct any kind of independent verification or analysis of the revenue projections, and therefore, his methodology was clearly unreliable.

[8] It appears that Gulfstream and the Third Party created new revenue projections every month, and they varied widely. For instance, in May of 2009, the revenue projection for 2010 was $30,224,054 and the revenue projection for 2011 was $37,885,684. D.E. [98-1], 17. In June of 2009, the projection for 2010 was $13,888,582 and for the year 2011, $16,330,508. *Id.* Then in July 2009, the month Zyla chose to use as the basis for his calculations, the projection for 2010 was $8,850,277, but the projection for 2011 was $56,820,880. *Id.*

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In return, Plaintiff contends that Defendants' arguments go to the weight and credibility of Zyla's testimony, not the reliability. Plaintiff does not, however, argue that Zyla did any kind of independent analysis or verification of the projections he relied upon. Instead, Plaintiff contends that Zyla relied upon the projections for the Mound Treatment because they were prepared by Gulfstream (which has a financial interest in Tech Pac), recommended to the Tech Pac Board by Gulfstream, and approved by the Tech Pac Board. Further, James Hills, a Tech Pac board member and a high-level employee of Gulfstream, testified that he believed that Gulfstream did "very good work" in preparing the projections. As for the Perimeter Treatment, Plaintiff contends that these were also presented to the Board, the projections are the only and best available evidence of the potential profits because Defendants blocked the rollout of the Treatment, and further, Hills testified that although they were "preliminary," Gulfstream tried to the best job it could in creating the projections. With respect to the Third Party Opportunity, Zyla testified that it was reasonable for him to rely on those projections because Gulfstream prepared them based on Gulfstream's marketing expertise and relationship with customers of the product, they were very detailed, and there was testimony that the projections were attainable.

First, Plaintiff's argument that Zyla's use of the projections goes to weight and credibility rather than admissibility is unfounded. Although Defendants do argue that the underlying projections are speculative and uncertain, Defendants also contest Zyla's blind

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reliance on the projections, which constitute the assumptions on which all of his calculations are based. That argument goes directly to the reliability of Zyla's methodology, and therefore, is an appropriate basis for a *Daubert* motion. Further, the court finds Defendants' argument persuasive. Numerous courts have found that where a damages expert's failure to conduct any independent research as to the reliability of his assumptions requires exclusion of that expert's report and testimony. *See, e.g.*, *Victory Records, Inc. v. Virgin Records Am., Inc.*, 2011 WL 382743, *2-3 (N.D. Ill. Feb. 3, 2011); *C & O Motors, Inc. v. Gen. Motors Corp.*, 2007 WL 2156587, *5-6 (S.D. W. Va. July 25, 2007); *Leeward v. Cablevision of Marion Cnty., LLC*, 2006 WL 5163931, at *3 (M.D. Fla. Oct. 19, 2006); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 2003 WL 21506808, at *2 (N.D. Ill. June 27, 2003); *JRL Enters., Inc. v. Procorp Assocs., Inc.*, 2003 WL 21284020, at *7-8 (E.D. La. June 3, 2003); *Total Containment, Inc. v. Dayco Prods., Inc.,* 2001 WL 1167506, at *6-7 (E.D. Pa. Sept. 6, 2001); *JMJ Enters., Inc. v. Via Veneto Italian Ice, Inc.,* 1998 WL 175888, at *7-8 (E.D. Pa. Apr. 15, 1998). Although Zyla contends that it is "reasonable" to rely on projections that he did not create or analyze, it is undisputed that he did not independently examine the projections or how Gulfstream came up with them. There is no evidence that Zyla did any kind of research regarding the pesticide industry generally or independent market evaluation, nor did he consult any treatises, expert reports, or books in formulating his analysis. There is no argument before the court that experts in Zyla's field typically rely on projections

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created by others without independent analysis. There is also no evidence of a known rate of error for Zyla's method. The starting point of Zyla's analysis was the assumption that the projections created by Gulfstream were accurate and attainable, and although an expert may rely on assumptions, he must premise his opinion on reliable assumptions. Instead, Zyla has merely accepted the Gulfstream projections as true based on the opinions of others and on Gulfstream's alleged marketing expertise without any independent examination. The court finds that Zyla's expert report and testimony regarding the damages stemming from the Third Party Opportunity, the Mound Treatment, and Perimeter Treatment rest on unreliable methods.

The court now turns to Zyla's opinions regarding the 2008 Make Whole Payment, and the allegedly wrongful loan transaction. Defendants' argument, in full, is that:

> The last component of Zyla's analysis relates to the effects of a loan transaction, which has been reversed. Zyla himself testified that if the transaction were reversed and if the interest were refunded, then these categories of damages would be eliminated. As set forth in detail in . . . Defendants' Memorandum of Law in Support of its Motion for Summary Judgment, this issue has been rendered moot. To the extent Zyla's opinions regarding the loan transaction and its effect on the make-whole payment remain relevant, they are internally duplicative and should be ignored.

D.E. [98-1], 37. Defendants' arguments do not appear to be addressed to Zyla's qualifications, the methodology of his opinion, or whether his testimony and opinion would assist the trier fact. As such, Defendants arguments are not proper in a *Daubert* motion. However, the court recognizes that Defendants made the same arguments in their Motion

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for Summary Judgment and that Zyla testified that if the loan was reversed, the interest repaid, and the Make Whole Payment made, this damages calculation would be moot. Defendants' Motion to Exclude Opinions of Mark Zyla is GRANTED IN PART and DENIED IN PART [98].

B. Motion to Strike

Defendants have also moved to strike Plaintiff's First Supplement to its Initial Disclosures, which relates to Plaintiff's damages, contending that the disclosures were untimely. Federal Rule of Civil Procedure 26(a)(1)(A) states that the parties "must, without awaiting a discovery request, provide to the other parties . . . (iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered . . . ." The Northern District of Georgia's Local Rules state that "[t]he court has prepared a form, Initial Disclosures, which counsel shall be required to use." L.R. N.D. Ga. 26.1B(1). The form instructs parties to "provide a computation of any category of damages claimed . . . . In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such

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documents or evidentiary material available for inspection and copying as under Fed. R. Civ. P. 34." L.R. N.D. Ga., App'x B.

Parties have a continuing duty to supplement their Initial Disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ." Fed. R. Civ. P. 26(e). A party's failure to properly disclose or supplement results in the non-disclosing party's inability to "use that information or witness to supply evidence on a motion, at a hearing, or at a trial, **unless** the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "The burden of establishing that a failure to disclose was substantially justified or harmless rests on the nondisclosing party." *Mitchell v. Ford Motor Co.,* 318 F. App'x 821, 825 (11th Cir. 2009) (quoting *Leathers v. Pfizer, Inc.,* 233 F.R.D. 687, 697 (N.D. Ga. 2006) (Evans, J.)). "Rule 37(c), which is a 'self-executing sanction for failure to make a disclosure,' is 'the more effective enforcement' mechanism of the disclosure requirement when 'the party required to make the disclosure would need the material to support its own contentions.'" *Barron v. Fed. Reserve Bank of Atlanta*, 129 F. App'x 512, 519 (11th Cir.) (citing Fed. R. Civ. P. 37, advisory committee's note (1993)).

In Plaintiff's Initial Disclosures, which are dated January 22, 2009, Plaintiff wrote the following in response to the question about damages:

> As a direct and proximate result of Defendants' breaches of their contractual obligations, Defendants' breaches of their fiduciary and other duties to [Plaintiff], and Defendants' other tortuous misconduct, [Plaintiff] is entitled to actual and punitive damages in an amount to be determined at trial by jury, but in no event less than $75,000. With respect to Defendant [Gulfstream's] failure to submit to [Plaintiff] the Make Whole Payment, [Plaintiff] has also suffered damages in the amount of $2,175,700, together with pre- and post-judgment interest thereon. In addition, Plaintiff CPI is seeking attorney's fees and costs incurred in the course of this litigation, which are continuing to accrue as the litigation progresses.

D.E. [24]. Throughout this litigation, the parties have sought multiple extensions of discovery. This court granted several extensions, finally setting the end of fact discovery as October 28, 2009. The parties' expert reports were due September 28, 2009, and the expert depositions had to be completed by November 23, 2009.

Plaintiff's First Supplement to its Initial Disclosures is dated October 27, 2009, the day before fact discovery ended. The Supplemental Disclosures make the following update to Plaintiff's above-quoted disclosure of its damages:

> As a direct and proximate result of Defendants' breaches of their contractual obligations, Defendants' breaches of their fiduciary and other duties to CPI, and Defendants' other tortuous misconduct, CPI is entitled to actual and punitive damages in an amount to be determined at trial by jury, but in no event less than $75,000. **In addition, Plaintiff CPI is entitled to the following specific items of damages:**
>
> **Loss of Anticipated Profits from Third Party Opportunity: $8,000,000**
>
> **Loss of Anticipated Profits from Mound Treatment: $1,511,000**

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Loss of Anticipated Profits from Perimeter Product:	**$3,254,000**
Loss in Value from October 31, 2008 Loan:	**$2,297,426**
Make Whole Payment:	**$2,175,700**
Loss of Anticipated Profits from Bayer Settlement:	**$1,610,325**
Reimbursement of Over'NOut Advertising Costs:	**$5,661,542**

D.E. [97-24] (emphasis added to show new language). According to Defendants, the first five categories of damages had been disclosed throughout the litigation by Plaintiff's expert report or, in the case of the Make Whole Payment, in Plaintiff's Initial Disclosures. However, the claim for damages relating to the Bayer Settlement and ONO Advertising were not disclosed until the morning of the last day of fact discovery. The court notes that the two new sets of damage calculations actually sound like more than just undisclosed damage calculations, and instead like an addition of two separate causes of action.

Attached to the Supplemental Disclosures were two documents relating to the calculation of the last two categories of damages -- the Bayer Settlement and reimbursement of ONO Advertising Costs. Todd West, Plaintiff's Chief Financial Officer, is the person that prepared the two documents. The Bayer damages arise out of discussions between Tech Pac and a company called Bayer who is an active ingredient supplier. It appears that the two

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companies were in talks over a "settlement" to resolve various disputes, and Plaintiff contends that Defendants wrongfully blocked that settlement from occurring. The Advertising damages arise out of Plaintiff's contention that Defendants "sabotaged" the ONO products by "refusing to adequately fund advertising for later years and raising the price of an ONO product to treat fire ant mounds." D.E. [107], 4. Plaintiff seeks to recover its share of ONO advertising expenses for a number of years.

Defendants, in their original brief, contended that on the night of October 27, 2009, Plaintiff emailed the Supplemental Disclosures to Defendants, and served a hard copy on Defendants on October 28, 2009, the last day of fact discovery, just ten minutes before the deposition of Todd West. Plaintiff does not dispute this contention. In its reply brief, Defendants contend that they were mistaken in their original brief and that Plaintiff actually did not email the Supplemental Disclosures to Defendants the night before the deposition, and therefore, Defendants did not get a copy of the Supplemental Disclosures until the last day of discovery, minutes prior to Todd West's deposition.

Defendants assert that Plaintiffs have provided no explanation as to why Defendants were not informed of the claims or the basis for calculation of the damages sought. Defendants also maintain that they were clearly prejudiced because they did not have time to conduct any fact discovery regarding the claims, and even though Defendants had the chance to depose Todd West, the creator of the exhibits outlining the new damages claims, Defendants

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only became aware of the damages claims ten minutes before West's deposition. Defendants argue that this was not enough time to sufficiently prepare. Furthermore, Defendants point out that the affidavit of Keith Kelly, Plaintiff's Chief Executive Officer and President, which was filed with Plaintiff's Motion for Summary Judgment, speaks to those damages and the underlying bases for the claims, yet Defendants did not know about these claims until after Kelly's deposition and on the last day of fact discovery. Finally, Defendants maintain that even if the disclosures were timely, Plaintiff is attempting to offer an expert opinion through Todd West, who has not been identified as a witness who would testify about damages or as an expert. Defendants also contend that West does not have the training or experience to serve as an expert, and his calculations are unreliable.

Plaintiff, on the other hand, claims that its supplement was timely because it was made within the discovery period, and Plaintiff supplemented its disclosures as soon as it was aware that it would assert claims for the Advertising and Bayer damages.[9] Even if its Supplemental Disclosures were not timely, Plaintiff argues that Defendants have not been harmed because Plaintiff disclosed its intent to seek the Bayer and Advertising damages before the close of expert discovery, and Defendants should have been aware that Plaintiff

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[9] The court notes that Plaintiff's response brief is untimely. Defendants filed their motion to strike on July 1, 2010, and Plaintiff did not respond until August 10, 2010. Although the court extended the parties' time to respond to motions for summary judgment, as far as the court is aware, there was no extension of time allowed to reply to any other motion the parties might file. The court notes that it could, therefore, consider Defendants' motion unopposed.

would seek the Advertising damages. Plaintiff also contends that because Defendants never asked for an extension of time from the court to conduct more fact discovery and never asked Plaintiff for more information regarding the damages, Defendants cannot now complain. Furthermore, Defendants had all the documents that Plaintiff used to calculate its damages claims, and Defendants have unclean hands because they have failed to produce certain discovery requested by Plaintiff, forcing Plaintiff to file a motion to compel.

Rule 26(e)'s requirement that a party supplement its initial disclosures in a timely manner does not mean that a supplement made at *any time* during the discovery period is timely. Instead, "the timeliness of the supplementation depends on the time at which plaintiff or one or the other of his attorneys learned that the initial disclosures or responses to discovery were not correct" or incomplete. *Wright v. Hyundai Motor Mfg. Alabama, LLC*, 2010 WL 4739486, *3 (M.D. Ala. Nov. 16, 2010). Plaintiff claims that it was "not able to fully determine its damages in this lawsuit, including the Bayer and Advertising Damages, until it obtained, reviewed and analyzed sufficient documents and deposition testimony from Defendants and various third parties. Defendants slowed this process by designating tens of thousands of documents as "attorneys' eyes only" during document production . . . ."[10] D.E. [107], 8. The court finds this argument flawed, however. Defendants have presented portions

[10] Defendants contend that their records show that they only produced around 10,324 documents, and only 178 of those were designated as Attorneys' Eyes Only. Further, a majority of the documents designated as such were related to the Third Party Opportunity.

of the deposition of Todd West, who calculated the Bayer and Advertising Damages, which show that at least as to the Advertising Damages, West had the information necessary to make the calculations anywhere from two weeks to a month prior to Plaintiff's Supplement. Furthermore, the end of discovery was extended from June until October of 2009, and the parties had ample time to conduct discovery and review documents. This is evidenced by the fact that Plaintiff was able to offer calculations for their other claims for damages in September of 2009 through its expert's report.

Plaintiff claims that it "disclosed its intent to seek the Bayer Settlement and ONO advertising damages before the close of expert discovery, and Defendants' damages expert thus had ample time to consider these damages." D.E. [107], 10-11. However, Todd West was the person to calculate these damages, and Defendants did not receive the Supplemental Disclosure disclosing these two categories of damages until the morning of West's deposition. While Defendants' expert may have been able to "consider" the damages, Defendants were not adequately able to conduct discovery regarding the underlying basis for the claims nor were they given adequate time to prepare to question Todd West about his calculations. Plaintiff also claims that, at the least, Defendants should have been aware that Plaintiff would seek the advertising damages, and for this proposition, Plaintiff cites the affidavit of Keith Kelly, Plaintiff's President. D.E. [107], 11 (citing D.E. [106], ¶¶ 50-53). However, this affidavit was not filed until August of 2010, well after the discovery period

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ended, and though Mr. Kelly does discuss advertising relating to the ONO Mound Treatment, the court is unsure how this affidavit can show what Defendants should have known prior to the end of discovery. Plaintiff has not cited Mr. Kelly's deposition, which was taken before the end of fact discovery. Plaintiff has the burden of showing that it had substantial justification for failing to supplement its Initial Disclosures prior to the last day of discovery, and Plaintiff has not done so. The court therefore finds that Plaintiff's disclosure was untimely.

Even where a party has failed to timely disclose, if the party can show that the failure is harmless, then that party will still be allowed to use it as evidence at trial or in support of a motion. Fed. R. Civ. P. 37(c)(1). Defendants contend that they were harmed because by being given the information regarding damages ten minutes prior to Todd West's deposition, Defendants did not have the ability to prepare for questioning about those Supplemental Disclosures. Further, Defendants point out that Keith Kelly had already been deposed at the time the Supplemental Disclosures were made, and now, Plaintiff presents the affidavit of Keith Kelly in which he "has plenty to say" about the advertising and Bayer claims.

Plaintiff contends that Defendants were not harmed because, as addressed above, Plaintiff disclosed its intent to seek the Bayer and Advertising damages before the close of expert discovery. Again, this argument does not show that Defendants were not harmed. Plaintiff also contends that because Defendants never asked for an extension of time from

the court to conduct more fact discovery and never asked Plaintiff for more information regarding the damages, Defendants cannot now complain and clearly were not harmed. Although Defendants may have been able to do so, Defendants had no duty to request an extension of time or to request more information after the discovery period closed. Plaintiff also claims that Defendants were not harmed because they had all of the documents that Plaintiff used to calculate its damages claims. However, unless Plaintiff made Defendants aware that it would seek such damages, the fact that Defendants possessed the relevant documents is of no help. Plaintiff's argument that Defendants have unclean hands because they have failed to produce certain discovery requested by Plaintiff, forcing Plaintiff to file a motion to compel, also does not speak to whether Defendants were harmed by Plaintiff's own untimely supplement.

The court finds that Plaintiff's failure to timely supplement its Initial Disclosures was not harmless. It left Defendants unprepared to depose Todd West, and further, because the supplement was not made until the last day of fact discovery, it left Defendants unable to conduct any other discovery or depose any other knowledgeable witnesses regarding the Bayer and Advertising Damages. As per Rule 37(c) then, Plaintiff "is not allowed to use that information . . . to supply evidence on a motion . . . or at a trial . . . ." Fed. R. Civ. P. 37(c)(1). Defendants' Motion to Strike is GRANTED [99].

C. Plaintiff's Motion for Summary Judgment

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Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears "the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Where the nonmoving party bears the burden of proof at trial, the moving party may discharge this 'initial responsibility' by showing that there is an absence of evidence to support the nonmoving party's case . . .." *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004). Regarding "issues on which the movant would bear the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). All reasonable doubts should be resolved in the favor of the nonmovant. *Id.*

Plaintiff seeks summary judgment on Defendant Gulfstream's counterclaim for breach of contract. Defendant Gulfstream's counterclaim arises out of the following provision of the LLC Agreement:

> **Right of Inspection**. Any Member shall have the right to examine (and make copies thereof), at any reasonable time or times for all purposes, the books and

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> records of account, minutes and records of the (I) Company and (ii) Members as they relate to the Company.

LLC Agreement, § 7.2. In its counterclaim, Defendant Gulfstream claims that it is entitled to inspect Plaintiff's:

> [B]ooks, records of account, minutes and other records as they relate to Tech Pac, including those relating to (i) the Manufacturing Agreement, (ii) costs, expenses, expenditures and budgeted amounts (including without limitation Seller's Costs and Expenses) in connection with Management, Acquisition and Profit Sharing amounts, or (iii) CPI's increases for Management, Administration, and Profit Sharing, and (iv) the bases and justifications, if any, for such increases . . . .

Defendant Gulfstream's Answer, Counterclaim, ¶ 19. According to Defendant Gulfstream, it has requested these documents, but Plaintiff never allowed them to be inspected, and therefore breached the LLC Agreement. Out of that breach, Defendant Gulfstream requests damages and specific performance.

Plaintiff seeks summary judgment on Defendant Gulfstream's counterclaim for breach of contract for several reasons. First, although Plaintiff admits that the above-quoted portion of the LLC Agreement does govern Plaintiff and Defendant Gulfstream's rights, generally – Plaintiff claims that the right to inspection found in the LLC Agreement is modified by Schedule B of the Manufacturing Agreement.[11] It is undisputed that Schedule B reads:

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[11] As stated previously, the Manufacturing Agreement is the agreement governing the rights and duties of Plaintiff and Tech Pac as they relate to Plaintiff's manufacturing of Tech Pac products.

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> COST OF PRODUCTION ADJUSTMENT; REVIEW
>
> 2. Review. Following the delivery of the Review Period Report[12] by [CPI] to [Tech Pac], [Tech Pac] shall have ten (10) days in which to notify [CPI] that [Tech Pac] (or its designated representative) desires to review the calculation of the Payment Result for such applicable Review Period (including the 12-month period for the Annual Payments Result). [Tech Pac's] review shall not be an audit of the books and records of [CPI] but shall be limited to a review of [CPI's] determination and calculation of "Total Sales to [Tech Pac]" and "Total Cost to [CPI] to Produce Total Sales to [Tech Pac]."

D.E. [101], ¶ 7. Plaintiff contends that any right to inspection Defendant Gulfstream has, is limited by this provision, including that Defendant Gulfstream's inspection cannot amount to an audit of Plaintiff's books and records. Plaintiff also argues that because Gulfstream has demonstrated that it is not willing to perform under the same provision of the LLC Agreement, based on a Motion to Compel filed by Plaintiff, Delaware law provides that Defendant Gulfstream is not entitled to specific performance.[13] Finally, Plaintiff argues that through the course of conducting discovery in this litigation, Plaintiff has already provided

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[12] The preceding paragraph in Schedule B to the Manufacturing Agreement requires Plaintiff to periodically provide Tech Pac with a written report called the "Review Period Report" that contains certain information regarding sales and Plaintiff's costs in manufacturing the Tech Pac products.

[13] "A federal court faced with the choice of law issue must look for its resolution to the choice of law rules of the forum state." *Frank Briscoe Co., Inc. v. Ga. Sprinkler Co., Inc.,* 713 F.2d 1500, 1503 (11th Cir.1983) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941); *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938)). The Marketing Agreement and the Manufacturing Agreement contain Delaware choice of law clauses, and there appears to be no dispute that Delaware law applies to the interpretation of all the relevant agreements, as both parties rely solely on Delaware law.

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Defendant Gulfstream with the documents it seeks, and therefore, Defendant Gulfstream's claim is moot.

Defendant Gulfstream, on the other hand, argues that its right to inspection under the LLC Agreement is not limited by the language in Schedule B of the Manufacturing Agreement. Furthermore, Defendant Gulfstream argues that it can show the elements necessary for specific performance. According to Defendant Gulfstream, Plaintiff's provision of documents in this litigation is not a sufficient remedy because production of those documents was made pursuant to a protective order, and therefore, the use of the documents produced in this litigation is subject to certain restrictions. Defendant Gulfstream contends that nothing in the LLC Agreement so limits Defendant. Further, not all documents sought have been produced.

The court first addresses whether the Manufacturing Agreement limits Defendant Gulfstream's rights as described in the LLC Agreement. Plaintiff argues that because the documents were executed together as part of the same transaction and on the same date, the contracts must be read together. Further, Plaintiff alleges that the LLC Agreement is incorporated by reference into the Manufacturing Agreement, and therefore, limited by the Manufacturing Agreement. Finally, Plaintiff alleges that the specific provisions of the Manufacturing Agreement control and govern the general provisions of Section 7.2 of the Tech Pac LLC Agreement.

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It is generally true that documents executed on the same day and which are coordinated to a high degree, must be examined as such. *See E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114-15 (Del. 1985). However, the court cannot ignore the plain language of the contract in doing so. The relevant provision of Schedule B of the Manufacturing Agreement, on its face, speaks to Tech Pac's rights for reviewing the "Review Period Report" created by Plaintiff. Gulfstream is not mentioned, and this is because the Manufacturing Agreement was clearly intended by the parties to govern the relationship between Plaintiff and Tech Pac, just as the Marketing Agreement was intended to govern the relationship between Defendant Gulfstream and Tech Pac, and just as the LLC Agreement was intended to govern the relationship between all three entities. Gulfstream is requesting review of Plaintiff's records - not Tech Pac.

Plaintiff's argument that the Manufacturing Agreement incorporates the LLC Agreement by reference also does not save Plaintiff.[14] First, although the Manufacturing

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[14] In fact, it is arguably irrelevant whether the Manufacturing Agreement incorporates the LLC Agreement, as the Manufacturing Agreement governs the relationship between Plaintiff and Tech Pac. Instead, the LLC Agreement, which governs the relationship between Gulfstream and Plaintiff, would have to incorporate Schedule B of the Manufacturing Agreement. The court finds that it does not. The incorporation by reference rule is only "deemed to incorporate matter in some other instrument or writing . . . to the extent that the same is specifically set forth or identified by reference." *State ex rel. Hirst v. Black*, 83 A.2d 678, 680 (Del. 1951). Although the LLC Agreement does mention the Manufacturing Agreement, the LLC Agreement in no way can be read to indicate that the terms of the Manufacturing Agreement were intended to be incorporated into and to alter or limit the portion of the LLC Agreement referring to the Members' right of inspection.

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Agreement does refer to the LLC Agreement, none of those references bind Gulfstream to the language found in Schedule B of the Manufacturing Agreement. E.g., D.E. [100-5] (For instance, the Manufacturing Agreement states that Tech Pac is "governed by that certain Limited Liability Company Agreement . . . made as of February 20, 1998 . . . .") Mere reference to another document does not incorporate the entire outside document. *See East Coast Plumbing & HVAC, Inc. v. Edge of the Woods, LP*, 2004 WL 2828286, at * 4 (Del. Super. July 30, 2004). Under the incorporation by reference rule, an agreement is only "deemed to incorporate matter in some other instrument or writing . . . to the extent that the same is specifically set forth or identified by reference." *State ex rel. Hirst*, 83 A.2d at 680. The Manufacturing Agreement contains no language that makes the inspection terms of the LLC Agreement part of the Manufacturing Agreement, or vice versa. *See Wolfson v. Supermarkets Gen. Holdings JCorp.*, 2001 WL 85679, at *5 (Del. Ch. Jan. 23, 2001) ("A mere reference in one agreement to another agreement, without more, does not incorporate the latter agreement into the former by reference. To incorporate one document into another, an explicit manifestation of intent is required."). The parties clearly knew how to incorporate specific terms of the LLC Agreement if they desired to do so. E.g., D.E. [100-5], 4 (defining a term in the Manufacturing Agreement by explicit reference to the LLC Agreement).

In conclusion, the portion of Schedule B of the Manufacturing Agreement that

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Plaintiff refers to does not limit Gulfstream's right to inspect that is found in the LLC Agreement. The LLC Agreement is very broad and makes it clear that either Gulfstream or Plaintiff has the right to inspect the other's books and records of account, minutes, or other records as they relate to Tech Pac.

The court moves on to Plaintiff's argument that Defendant Gulfstream cannot show the elements required to get specific performance. It is Defendant's burden as the "party seeking specific performance . . . to establish that (1) a valid contract exists, (2) [it] is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance." *Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del. Supr. 2010). Plaintiff contends that Defendant Gulfstream cannot show that it is ready, willing and able to perform the LLC Agreement based on a motion to compel discovery filed by Plaintiff that was still pending at the time Plaintiff filed its motion for summary judgment. According to Plaintiff, in that motion, Plaintiff "sought to obtain substantially similar information from Gulfstream regarding its costs, expenditures and revenues as they relate to Tech Pac." D.E. [100-1], 15. Plaintiff had requested the information through discovery, and in response to the discovery, Gulfstream "stated it would produce much of the information requested by" Plaintiff. *Id.* at 16. However, Gulfstream did not, and Plaintiff filed the aforementioned motion to compel.[15] Plaintiff argues that this shows that Gulfstream

[15] Although pending at the time Plaintiff filed its Motion for Summary Judgment, Plaintiff's motion to compel has since been ruled upon by this court. The court granted

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was not willing to perform its part of the LLC Agreement, and therefore, Plaintiff should be granted summary judgment on Gulfstream's request for specific performance.

There appears to be no case law on the issue, as neither party has cited any nor can the court find anything relevant. However, the court finds that Defendant Gulfstream's actions in this litigation in response to discovery requests made by Plaintiff cannot be construed to mean that Defendant Gulfstream was not ready, willing, or able to perform the LLC Agreement. The parties' arguments over the appropriate scope of discovery pursuant to Federal Rules of Civil Procedure have no bearing on that issue, especially where Plaintiff requested the documents in the context of litigation and does not argue that it ever informed Defendant Gulfstream that it was making a request for these documents pursuant to the LLC Agreement rather than pursuant to a discovery request.

Plaintiff's final argument is that because Plaintiff has already supplied Defendant Gulfstream with the documents it requests, and therefore, Gulfstream's claim is moot.[16]

Plaintiff's motion in part and denied Plaintiff's motion in part. Plaintiff has not supplemented its present motion to address the effect that ruling has, if any, on the present motion.

[16] Plaintiff also argues that the Tech Pac Board recently failed to pass a resolution, which if passed, would have found that CPI breached the Manufacturing Agreement by "including improper and unreasonable costs in its pricing and look back determinations." D.E. [100-1], 19. Plaintiff presumably is intending to argue that the failure to pass the resolution shows that Defendant Gulfstream has no need for the information. However, the LLC Agreement does not require that either Member give a reason for requesting the inspection of the other's documents.

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Defendant Gulfstream, in return, notes that any documents produced in this litigation were produced pursuant to a Protective Order, which limits the parties' ability to use the documents. The LLC Agreement, however, has no such limit. Furthermore, Defendant Gulfstream contends and cites to evidence showing that not all of the documents it has requested have been produced, and therefore, its claim for specific performance is not moot. D.E. [101], ¶ 10. The court finds that Defendant Gulfstream presented evidence that it seeks documents pursuant to its counterclaim that have not yet been produced by Plaintiff. Further, Defendant Gulfstream's Counterclaim seeks damages, as well as specific performance, and Plaintiff does not address Defendant's Counterclaim for damages. As such, Defendant Gulfstream has shown the existence of a genuine dispute of fact, which precludes summary judgment in Plaintiff's favor on this issue. Plaintiff's Motion for Summary Judgment on Defendant Gulfstream's Counterclaim is DENIED [100].

D. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment on all of Plaintiff's claims. Again, Plaintiff's Amended Complaint asserts claims against Gulfstream for failure to make the 2008 Make Whole Payment and for breaching the Marketing Agreement by entering into the Third Party Opportunity. Plaintiff also contends that both Gulfstream and Central breached certain fiduciary duties and the implied covenant of good faith and fair dealing. Plaintiff asserts that Defendants Brown and Reed also breached their fiduciary duties.

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Further, Plaintiff makes a demand for accounting against Central and Gulfstream. Finally, Plaintiff requests injunctive relief against Central, relating to the 2008 loan transaction and the line of credit extended from Central to Tech Pac.

1. Failure to Pay 2008 Make Whole Payment

It is undisputed that Tech Pac was required to make a specific monetary distribution to CPI each year, and if Tech Pac did not have the ability to make that payment, Gulfstream was obliged to make up the short fall. It is also undisputed that Gulfstream caused Tech Pac to borrow around $11,000,000 from Central in 2008, and Tech Pac used part of that money to make the 2008 Make Whole Payment to Plaintiff. According to Plaintiff, this resulted in Gulfstream not having to pay a Make Whole Payment. Upon learning about the loan transaction, Plaintiff returned the Make Whole Payment to Tech Pac. Plaintiff has asserted several different claims arising out of the 2008 loan transaction, but Count I of Plaintiff's Amended Complaint asserts only that Defendants still owe Plaintiff the 2008 Make Whole Payment.

According to Defendant Gulfstream, it has reversed the loan transaction, and it has made its 2008 Make Whole Payment to Plaintiff. For that proposition, Defendant Gulfstream cites the declaration of Defendant Reed. D.E. [97-7], ¶ 45. Although Plaintiff contends that it has not been given documents showing that Defendant Gulfstream reversed the loan, Plaintiff does not appear to dispute that Gulfstream did in fact pay Plaintiff the

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Make Whole Payment, nor does Plaintiff argue that this particular claim is not moot. Instead, in its response brief, Plaintiff focuses on the loan transaction itself and Defendant Gulfstream's allegedly wrongful actions in causing Tech Pac to borrow the money, including the alleged breach of fiduciary duty arising from that action. Plaintiff does not contend or present any evidence that it has not in fact received the 2008 Make Whole Payment from Defendant Gulfstream or argued that it is entitled to any additional damages related to this issue. As such, the court finds that this claim is moot.

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2. Breach of the Marketing Agreement

Count II of Plaintiff's Complaint is for breach of the Marketing Agreement, which Plaintiff contends occurred when Defendant Gulfstream entered into a marketing agreement with the Third Party. Defendants first seek summary judgment on this claim by arguing that Plaintiff has no standing to bring this claim because Plaintiff is not a party to the Marketing Agreement, nor is Plaintiff a third-party beneficiary. Defendants also argue that Plaintiff has offered no proof of damages from the breach. Plaintiff argues that because its consent was required before Tech Pac and Defendant Gulfstream could enter into the Marketing Agreement, and because Plaintiff is a signatory to the contract, Plaintiff has standing. Plaintiff also argues that it is a third-party beneficiary to the Marketing Agreement. In response to Defendants' argument that Plaintiff has not shown damages, Plaintiff alleges that Gulfstream is "double dipping" because it is having its expenses paid by both Tech Pac and the Third Party. Plaintiff, however, cites no evidence in support of its position. Plaintiff claims that this is due to Defendants' failure to complete discovery, and Plaintiff requested that the court not consider that portion of Defendants' motion until discovery was complete. Plaintiff, at the time of filing its response brief, had a pending motion to compel the documents it claims it needed to support its damages argument. The court ruled on that motion some months ago, and discovery has ended, yet Plaintiff has not updated its response to Defendants' motion for summary judgment on this claim. In order to survive summary

judgment, Plaintiff must show some evidence that it was harmed by Defendant Gulfstream's alleged breach. *See VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. Supr. 2003) (holding that the elements of a breach of contract claim are the existence of a contract, breach of an obligation imposed by the contract, and damages). Plaintiff has not done so here. Defendants must be granted summary judgment on Plaintiff's claim for breach of the Marketing Agreement.

3. Breach of Fiduciary Duties

Plaintiff asserts that Defendants breached their fiduciary duties of loyalty to Plaintiff through the following decisions:

> (1) to reduce the advertising spend and increase the price for the mound treatment; (2) to abandon the perimeter treatment product; (3) to pursue the Third Party Opportunity outside of Tech Pac; (4) to abandon Tech Pac's established strategy for ONO advertising and media buys; (5) to refuse to enter into a settlement agreement with Bayer; (6) to take an unauthorized loan; and (7) to permit [Gulfstream] to breach its agreements with Tech Pac.[17]

D.E. [103], 8. Defendant first contends that Defendant Central, who is not a member or director of Tech Pac, owes no fiduciary duties to Plaintiff. As to the remaining Defendants, Defendants argue that Plaintiff cannot show either an existing duty or a breach of that duty regarding the Mound Treatment, the Perimeter Treatment, the alleged abandonment of Tech Pac's advertising strategy, or the Bayer settlement. Defendants also assert that Plaintiff

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[17] The court is unclear as to what breaches of contract Plaintiff contends gave rise to breaches of fiduciary duty as Plaintiff does not address this argument further.

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cannot show injury with respect to those issues, nor can it show any injury from Defendant Gulfstream's agreement with the Third Party. Defendants further contend that the business judgment rule protects all of their decisions.

In return, Plaintiff argues that the business judgment rule does not apply because none of the relevant decisions were properly approved by the Board of Directors as required by the LLC Agreement. Plaintiff contends that Defendant Brown unilaterally made the decisions regarding the Mound Treatment, the Perimeter Treatment, the abandonment of ONO advertising, and the abandonment of the Bayer settlement discussion. The remaining decisions are attributed to Gulfstream. Plaintiff also indicates that Defendants Reed and Brown made or were at least part of the making of the decision to take out the loan from Central and for pursuing the Third Party Opportunity outside of Tech Pac. Plaintiff further contends that there is a genuine issue of material fact as to whether Defendants breached their duty of loyalty with regard to each of the decisions above, and as such, Defendants are not entitled to summary judgment. Finally, Plaintiff argues that it has presented evidence of injury from each of the breaches, and even it had not, Plaintiff does not have to prove damages as an element of its claim.

For the most part, Plaintiff addresses all Defendants as if they are all one and all liable for each other's actions. So the court begins by addressing which Defendants actually owe fiduciary duties to Plaintiff. It is clear that members of an LLC owe the traditional

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fiduciary duties of care and loyalty to one another. *See* 6 Del.C. § 18-1101(c) ("To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement . . . ."); *Kelly v. Blum,* 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) (citing cases and stating, "Delaware cases interpreting Section 18-1101(c) have concluded that, despite the wide latitude of freedom of contract afforded to contracting parties in the LLC context, 'in the absence of a contrary provision in the LLC agreement,' LLC managers and members owe 'traditional fiduciary duties of loyalty and care' to each other and to the company."). It is also clear that Tech Pac is a manager-managed LLC, although the managers are referred to as "Directors" in the LLC Agreement. LLC Agreement, §§ 1.1, 1.6, 11.1. Managers of an LLC also owe the traditional fiduciary duties of care and loyalty to the LLC and to the members. *Kelly*, 2010 WL 629850, at *10. Although an LLC agreement may limit the duties owed, the limitations must be explicit. *Id.* (citing Delaware cases). The Tech Pac LLC agreement does not explicitly limit the fiduciary duties owed by the members or the managers, and therefore, the traditional duties are in place.[18]

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[18] The LLC Agreement also states, "Except as otherwise provided in this Agreement, each Member and its Affiliates may engage in whatever activities they choose without

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Consequently, Defendant Gulfstream, as a member of Tech Pac, owes fiduciary duties to Plaintiff and Tech Pac. Defendants Brown and Reed, as managers of Tech Pac, owe fiduciary duties to both Tech Pac and to Plaintiff. However, Defendant Central is not a member of Tech Pac nor is Central a manager of Tech Pac. Defendants contend that Plaintiff has made no argument as to how Central, Gulfstream's parent company, owes any fiduciary duty to Plaintiff. Plaintiff does not directly respond to this claim. In a footnote, Plaintiff briefly states that "Defendants are jointly liable for Defendant Brown's breaches of his fiduciary duties, as liability may be imposed on anyone who knowingly assists a fiduciary in breaching his duties." D.E. [103], 10 n. 2. However, what Plaintiff refers to is a separate cause of action – one for "aiding and abetting" a breach of fiduciary duty. *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038-39 (Del. Ch. 2006)

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having or incurring any obligation to offer any interest in such activities to the Company or any member and neither this Agreement nor any activity undertaken pursuant hereto shall prevent any Member or its Affiliates from engaging in such activities, or require any Member to permit the Company or any member or its Affiliates to participate in any such activities, and as a material part of the consideration for the execution of this Agreement by each Member, each Member hereby waives, relinquishes and renounces any such right or claim of participation." LLC Agreement, § 2.6(b). However, the LLC Agreement also states that "Neither [Plaintiff] or [Gulfstream] nor any of their respective Affiliates shall engage, directly or indirectly, in any activity which is competitive with any line of business being conducted by the Company . . . ." *Id.* at § 2.6(c)(i). "Affiliate" is defined as "a Person that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with, another specified Person." *Id.* at § 1.2. The definition of "Person" includes corporations as well as individuals. *Id.* at § 1.13.

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("[T]he test for stating an aiding and abetting claim is a stringent one, turning on proof of scienter-a plaintiff must prove: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) knowing participation in that breach by the non-fiduciary."). Plaintiff did not plead or assert a cause of action for aiding and abetting, and therefore, cannot rely on it now to hold Defendant Central liable for the other Defendants' purported breaches of fiduciary duty. Plaintiff presents no other theory by which Central, neither a member nor manager of the LLC, could be considered to owe Plaintiff fiduciary duties. As such, Plaintiff has given the court no basis for holding Defendant Central liable, and Defendants' motion is granted as to the breach of fiduciary duty claims against Central.[19]

Generally under Delaware law,[20] courts examining claims for breach of fiduciary

[19] Further, to the extent Plaintiff is arguing that Defendant Reed should be held liable for Defendant Gulfstream's or Defendant Brown's alleged breaches of fiduciary duty by knowingly participating or assisting in such a breach, that argument fails for those reasons articulated above. Although the court has some concerns over Defendant Reed's potentially direct liability, as it appears that Plaintiff contends that Defendant Brown made most of the decisions unilaterally, Defendants have not argued that Defendant Reed cannot be held liable for any of the alleged breaches of fiduciary duty because he did not participate in them. Defendants, as the movants for summary judgment, have the burden of first establishing the basis for their summary judgment motion.

[20] "A federal court faced with the choice of law issue must look for its resolution to the choice of law rules of the forum state." *Frank Briscoe Co., Inc. v. Ga. Sprinkler Co., Inc.,* 713 F.2d 1500, 1503 (11th Cir. 1983) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941); *Erie R.R. v. Tompkins,* 304 U.S. 64, (1938)). Pursuant to Georgia law, Delaware law applies to Plaintiff's breach of fiduciary duty claims because Tech Pac is a Delaware LLC. *See Diedrich v. Miller & Meier & Assocs., Architects and Planners, Inc.*,

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duty begin by determining which tier of review applies to the case at hand.[21] "Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness." *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *14 (Del. Ch. Feb. 14, 2011). The default standard is the business judgment rule. *Reis v. Hazelett Strip-Casting Corp.*, 2011 WL 303207, at *8 (Del. Ch. Jan. 21, 2011). Managers and members of an LLC must act in compliance with the fiduciary duties of care and loyalty. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). At the same time however, directors, officers, and managers must have the ability to manage the corporation or limited liability company as they see fit, which is where the business judgment rule comes into play. "The business judgment rule . . . operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." *Id.* The business judgment rule is an evidentiary rule creating a "presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company." *Id.* (internal quotations omitted). Essentially, the decisionmakers are

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254 Ga. 734, 735 (1985). Both parties also rely solely on Delaware law.

Much of Delaware law revolves around corporations and officers. However, members and managers of LLCs do generally owe the same fiduciary duties as directors and officers of corporations. Therefore, the court (and the parties) rely on some case law regarding directors and officers of corporations, keeping in mind that the statutes covering corporations and limited liability companies are different.

[21] The parties dispute the appropriate level of review.

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"presumed to have acted properly." *Orman v. Cullman*, 794 A.2d 5, 19-20 (Del. 2002). Indeed, "[t]he rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'" *Cede & Co.*, 634 A.2d at 361. A plaintiff, in challenging the decision, "has the burden at the outset to rebut the rule's presumption." *Id*. To do so, the plaintiff must show that the defendant breached one of his fiduciary duties. *Id*. Basically, "[f]our elements define the business judgment rule presumption: (1) a business decision; (2) disinterestedness and independence; (3) due care; and (4) good faith." *Roselink Investors, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 216 (S.D. N.Y. 2004) (applying Delaware law and citing *Cinerama, Inc. v. Technicolor, Inc.,* 663 A.2d 1156, 1162-64 (Del. 1995) and *Cede,* 634 A.2d at 360-61). In this case, Plaintiff only asserts breaches of the duty of loyalty (failure to be disinterested and independent).

Under Delaware law, the duty of loyalty "mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Id.* Therefore, decisionmakers should be independent and disinterested, with independence and disinterest being two separate inquiries. *See Orman*, 794 A.2d at 25. Plaintiff contends all decisions made were self-interested. Under Delaware law, a "disabling interest" occurs in one of two situations. *Id*. at 25, n. 50 (internal quotations omitted). The first occurs where

the defendant:

> (1) . . . personally receive[d] a benefit . . . (2) as a result of, or from, the challenged transaction, (3) which is not generally shared with (or suffered by) the other[s] . . . , and (4) that benefit . . . is of such subjective material significance to that particular [defendant] that it is reasonable to question whether that [defendant] objectively considered the advisability of the challenged transaction to the corporation and its shareholders.

Id. "This personal benefit must be so significant that it is improbable that the [person] could perform her fiduciary duties . . . without being influenced by her overriding personal interest." *Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009). The second situation occurs when a decisionmaker "stands on both sides of the challenged transaction." *Orman*, 794 A.2d at 25 n. 50. Where the defendant stands on both sides of the transaction, the first three elements from above usually exist. *Id.* "As for the fourth element, whenever a [decisionmaker] stands on both sides of the challenged transaction he is deemed interested and allegations of materiality have not been required." *Id.* Most importantly,

> The key issue is not simply whether a particular director receives a benefit from a challenged transaction not shared with the other shareholders, or solely whether another person or entity has the ability to take some benefit away from a particular director, but whether the possibility of gaining some benefit or the fear of losing a benefit is likely to be of such importance to that director that it is reasonable for the Court to question whether valid business judgment or selfish considerations animated that director's [decision].

Id.

If the plaintiff fails to show a breach of fiduciary duty, "the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and . . .

courts will not second-guess these business judgments." *Cede & Co.*, 634 A.2d at 361. However, if the plaintiff can rebut the rule by showing breach of the duty of loyalty, then "the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the 'entire fairness' of the transaction to the shareholder plaintiff." *Id*. This is the third and most intrusive tier of review.

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations . . . .

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). The test of entire fairness is not a "bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness." *Id.*

The second tier of review, which neither party has addressed, is the enhanced scrutiny review – an intermediate review. *See Reis*,2011 WL 303207, at *8. The enhanced scrutiny review is not applied by Delaware courts with the same regularity as the business judgment rule or entire fairness review, but has been applied in the context of hostile takeovers, *see, e.g.*, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985), or "where the law provides stockholders with a right to vote and the directors take action that intrudes on the space allotted for stockholder decision-making," *see Reis*,2011 WL 303207, at *8 (citing *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 810 (Del. Ch.

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2007) and *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *10-11 (Del. Ch. Dec. 4, 2000)), or in the merger and acquisition context, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994). "Delaware applies enhanced scrutiny when directors face potentially subtle structural or situational conflicts that do not rise to a level sufficient to trigger entire fairness review, but also do not comfortably permit expansive judicial deference." *In re Del Monte Foods Co.,* 2011 WL 532014, at *14. In other words, "[e]nhanced scrutiny applies when the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested directors." *Reis*, 2011 WL 303207, at *8. The enhanced scrutiny review generally "requires that the defendant fiduciaries 'bear the burden of persuasion to show that their motivations were proper and not selfish' and that 'their actions were reasonable in relation to their legitimate objective.'" *Id.* (citing *Mercier,* 929 A.2d at 810).

As an initial matter, Defendants argue that all the relevant decisions are protected by the business judgment rule. Plaintiff contends that the business judgment rule does not protect Defendants. According to Plaintiff, Defendant Brown unilaterally made the relevant decisions regarding the Mound Treatment, the Perimeter Treatment, the Bayer settlement, and abandoning the ONO advertising strategy, without getting the required approval from the Board of Directors. Defendant Gulfstream, through some individual, made the decisions regarding the 2008 loan transaction without Board approval. The failure to obtain Board

approval through those processes set out in the LLC Agreement precludes application of the business judgment rule presumption according to Plaintiff. Instead, Plaintiff argues the entire fairness review applies. Neither party addresses the appropriateness of an enhanced scrutiny review.

The court begins by discussing whether Gulfstream, as the majority owner of Tech Pac, can make decisions for Tech Pac without Board approval. Pursuant to Delaware law, management of an LLC defaults to the members "in proportion to the then current percentage" owned by each respective member. 6 Del. C. § 18-402. However, an LLC agreement may vest some or all of the management in a manager or managers, and a manager has "the responsibilities accorded to it by or in the manner provided in a limited liability company agreement." *Id*. The Tech Pac LLC Agreement clearly shows that Tech Pac is a manager-managed LLC, as it states that "The business and affairs of the Company shall be managed under the direction of a Board of Directors . . . comprised of individuals . . . elected thereto from time to time by the Members." LLC Agreement, § 4.1(a). The LLC Agreement defines "Directors" as having the authorities and obligations of "managers," as such term is used under Delaware law. *Id*. at §§ 1.1, 1.6, 11.1. There are to be five Directors.[22] *Id*. at § 4.1(b). The Tech Pac LLC Agreement allows each member to appoint

[22] The LLC Agreement also contemplates that the Directors will select an individual to serve as President, and could select other officers it they so choose. *Id*. § 4.3. The President would be responsible for the "general overall supervision of the business and affairs of the Company." *Id*. at § 5.1.

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directors to the Board in proportion to the member's interest in Tech Pac. D.E. [104], ¶ 59. Therefore, Gulfstream appoints four directors and Plaintiff appoints one. The LLC Agreement also outlines the "specific authority and responsibility of the Directors," which includes, in part, "effectuation of" the LLC Agreement and "the decisions of the Members," as well as the "direction and supervision of the operations of the Company." LLC Agreement, § 4.1(a)(1)-(2). The LLC Agreement further states that "The approval of not less than a majority of the Directors present at a duly constituted meeting **shall govern all of the Board's actions** and constitute approval by the Board." *Id*. at § 4.3 (emphasis added).

Despite the aforementioned, Defendants argue that Gulfstream, as the majority member of Tech Pac, had a right to act on behalf of Tech Pac without Board action. In support, Defendants rely on the following statement in the LLC Agreement, which states that, "Except as hereinafter provided or as may otherwise be required by law, the act of the holders of a majority of the Interests shall be the act of the Members." LLC Agreement, § 3.8. Defendants also contend that Delaware's LLC statute states that "the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling . . . ." 6 Del. C. § 18-402. However, that phrase in the statute is qualified by the phrase "Unless otherwise provided in a limited

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liability company agreement . . .," *id*., and the Limited Liability Agreement in the present case clearly states that management of business and affairs of Tech Pac is vested in the Board of Directors and contemplates that the directors are to effectuate the decisions of the Members. LLC Agreement, § 4.1(a). Further, as stated previously, **all** director action is governed by "[t]he approval of not less than a majority of the Directors present at a duly constituted meeting . . . ." *Id*. at § 4.3. Nothing in the LLC Agreement allows the individual Board members or the majority member to act on their own without proper Board approval.

When the facts are viewed in the light most favorable to Plaintiff, it appears that many of the decisions Plaintiff complains of were not made in accordance with the LLC Agreement, which delegates general management of Tech Pac to the Board of Directors and requires approval of a majority of the Directors at a duly constituted meeting. This does not automatically mean, however, that Defendants cannot be protected by the business judgment rule. The court cannot find and Plaintiff has not cited any Delaware case law that explicitly addresses the present situation – whether the business judgment rule and its underlying presumptions apply in situations where there was action taken or a decision made by a single director or member, instead of in accordance with an LLC Agreement. In the cases the court could find, the requisite number of board members made a decision, and the plaintiff was challenging the decision of the whole board based on the conduct or interest

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of some of the directors.[23]

In one of the seminal Delaware cases on the issue, the Delaware Supreme Court stated that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The court cannot say that such a presumption does not apply solely because a director or member does not follow the proper procedure for making a relevant decision. Limited liability companies are creatures of contract, and failure to abide by the LLC Agreement does not alone indicate that the relevant Defendants were behaving without an honest belief that they were acting in the best interests of Tech Pac or putting Tech Pac's interests after their own. *Cf. In re Tyson Foods, Inc.*, 919 A.2d 563, 601 (Del.

[23] Plaintiff contends that by unilaterally making these decisions outside of the Board, Defendants violated the Tech Pac Agreement, and the decisions are subject to being invalidated and voided. Plaintiff cites two unpublished Delaware cases in support of that proposition . However, as far as the court is aware, Plaintiff is not seeking to void any of the actions of Defendants, and neither of the cases cited by Plaintiff deal with breach of fiduciary duty or the application of the business judgment rule. Further, Plaintiff contends that before the business judgment rule applies, the whole board must have made a decision, through the proper process – whatever that process may be. For that proposition, Plaintiff cites cases in which courts state generalities about the business judgment rule, and in doing so, refer to a "board." For instance, Plaintiff quotes *Off v. Ross*, No. 3468-VCP, 2008 WL 5053448, at *11 (Del. Ch. Nov. 26, 2008) (emphasis added by Plaintiff), where the court states that courts in Delaware "generally afford[] conduct and decisions of the **board** of a Delaware business entity the protection of the business judgment rule." In *Off*, however, the board did in fact make a decision. The question of whether the unilateral decisions made by one LLC member or one director deserves application of the business judgment rule was not before that court, or the courts in the other cases cited by Plaintiff.

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Ch. 2007) ("A director might well breach a contract without violating any fiduciary duty. Similarly, a director can behave utterly disloyally while attending to the terms of a contract.").[24] Under Delaware law, a more scrutinizing review is done after there is a showing that it is necessary, and an entire fairness review is necessary where self-interested parties are making the decisions or where some other breach of fiduciary duty has occurred. As such, Plaintiff must prove the elements of its claims for breach of fiduciary duty of loyalty: the existence of a duty and breach of that duty before an entire fairness review is appropriate.[25] Defendants clearly owed Plaintiff the fiduciary duty of loyalty, but Plaintiff must show that they breached their duty of loyalty as to each of the following decisions: "(1) to reduce the advertising spend and increase the price for the mound treatment; (2) to abandon the perimeter treatment product; (3) to pursue the Third Party Opportunity outside of Tech Pac; (4) to abandon Tech Pac's established strategy for ONO advertising and media buys; (5) to refuse to enter into a settlement agreement with Bayer; (6) to take an unauthorized loan." D.E. [103], 8. However, the court does find that the failure to follow

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[24] Plaintiff certainly could have brought suit against several Defendants for express breach of the LLC Agreement, but Plaintiff did not. Plaintiff did bring claims for breach of the implied covenant of good faith and fair dealing that may have encompassed Defendants' actions in failing to comply with the LLC Agreement, but as discussed below, Plaintiff has failed to address their claims for breach of the implied covenant of good faith and fair dealing.

[25] This is also the method by which Plaintiff can rebut the presumption of the business judgment rule.

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proper decisionmaking procedures is relevant to which standard of review is appropriate.

The facts in this case are highly disputed, and as explained below, the court finds that Plaintiff has produced sufficient evidence from which a reasonable jury could conclude that the relevant Defendants breached their fiduciary duty of loyalty to Plaintiff, at least with respect to most of the relevant decisions. Therefore, even if the business judgment rule applies at the outset, when the facts are viewed in the light most favorable to Plaintiff, Plaintiff could rebut that presumption, requiring that an entire fairness review be applied, which shifts the burden to Defendants to justify their actions. In their brief, Defendants do not argue that they are still entitled to summary judgment even if an entire fairness review applies, and again, neither party addresses the applicability of the enhanced scrutiny review. Defendants' arguments are directed to the business judgment rule instead, which requires only that Defendants' decision be justified by "any rational business purpose"[26] and also requires Plaintiff to rebut that presumption. The court's decision below potentially affects both the standard of review and the burden on the parties. Because there are material disputes of fact remaining and because the application of an entire fairness or enhanced scrutiny review was not addressed by either party, the court also declines to address whether Defendants' actions can survive either of those standards. The court now addresses Plaintiff's ability to show the existence of a breach of fiduciary duty and damages for all of

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[26] *Sinclair Oil Corp. v. Levin*, 280 A.2d 717, 710 (Del. 1971).

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the relevant of decisions.

a. Mound Treatment

Defendants contend that Plaintiff cannot show a breach of fiduciary duty with respect to the decisions made regarding the Mound Treatment. Even if Plaintiff can, Defendants contend that Plaintiff has not been injured by the breach, and therefore, Defendants' motion must still be granted. The court addresses both issues separately.

i. Breach of Fiduciary Duty

As explained before, Tech Pac owns the trademark and brand OVER-N-OUT, which encompasses products used to kill fire ants. D.E. [104], ¶ 12. The original ONO product was "designed to be spread over a broad area," and it is referred to as a "broadcast" product. *Id.* Tech Pac also introduced the Mound Treatment under the ONO brand, which was used to directly treat fire ant mounds. *Id.* at ¶ 19. It is undisputed that Central, under the brand name AMDRO, produces certain products that compete with ONO products, including the Mound Treatment. The following facts are disputed. According to Plaintiff, in relation to the introduction of the Mound Treatment to the marketplace, the Tech Pac Board decided between two advertising plans – a low media plan and a high media plan. Under the high media plan, $7 million would have been put towards media for the mound product, while the low media plan had a "media buy" of $3.7 million. D.E. [103], 13 n. 4. Plaintiff contends that the Board approved the high media plan and approved a selling price of $9.49. Plaintiff

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also alleges that Defendant Brown was informed by a Central employee that launching the ONO Mound Treatment under the high media plan would have an "unfavorable" impact on Central's competing AMDRO product. Subsequently, Defendant Brown reduced the ONO Mound Treatment media spend, and in fact, reduced it even lower than the low media plan previously considered by the Board. Defendant Brown then raised the price of the ONO Mound Treatment by $2 to $11.49, which "had the effect of making Tech Pac's ONO Mound Treatment more expensive on a per-pound basis than Central's competing AMDRO products." D.E. [103], 18-19. It is undisputed that the launch of the Mound Treatment was not successful, and it was "phased out" in 2008. D.E. [104], ¶ 24. James Hills testified that he believed the poor results for the Mound Treatment were due to a combination of too little advertising and too high a price. Hills Depo., pp.131-32.

Plaintiff contends that Defendant Brown's decisions to raise the price of the Mound Treatment and to lower the amount of advertising spent on the Mound Treatment ensured that the product would fail, which protected Central's AMDRO products by removing a competing product. Indeed, Plaintiff alleges that aforementioned facts show "Defendant Brown's decisions regarding the ONO mound treatment were undeniably motivated by his desire to protect Central's competing AMDRO products." D.E. [103], 19. As such, Plaintiff concludes that Defendants breached their duty of loyalty to Plaintiff. Defendants, on the other hand, argue that there was "ample basis" for Gulfstream's decisions regarding the

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Mound Treatment. First, the Tech Pac Board decided that the Mound Treatment price should be $11.49, not Defendant Brown, a decision that was supported by contemporaneous market analysis. Defendants also argue that there is no evidence that the higher price actually affected the sales of the Mound Treatment. Defendants contend that Tech Pac's contemporaneous analysis demonstrated that the lower advertising spend would generate more profits than the higher advertising spend.

Again, the two classic ways of showing that a defendant breached his duty of loyalty, and the only two Plaintiff rely upon, include proving (1) that the defendant was on both sides of a transaction or (2) that the defendant received a benefit not received by those to whom he owed the fiduciary duty. *Orman*, 794 A.2d at 23. Plaintiff has failed to make it clear exactly which of those legal theories it is asserting with regard to Defendants' alleged self-interest, so the court addresses both. First, as to standing on both sides of the transaction, the decisions made regarding the ONO Mound Treatment are not the type of "transaction" usually at issue in duty of loyalty cases where Defendants are found to stand on both sides of a transaction. That generally occurs where the defendant "deals directly with the corporation, or has a stake in or is an officer or director of a firm that deals with the corporation." *Cinerama,* 663 A.2d at 1169. For instance, where the director sells something to the company or where the director causes the company to enter into a contract with another entity that the director has a stake in or with the director himself. *E.g.*, *eBay*

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Domestic Holdings, Inc. v. Newmark, 2010 WL 5903398, at *19 (Del. Ch. Sept. 9, 2010). No matter which type of self-interest Plaintiff is relying upon, it is unclear to the court how Defendant Brown benefitted personally from any of his actions regarding the Mound Treatment, much less whether that benefit was material. Plaintiff repeatedly alleges that Central benefitted from Brown's actions, but there are no allegations that Defendant Brown personally received any benefit. The court will not presume that solely because Defendant Brown is an employee, officer, and/or director of Central, he somehow personally benefitted by the fact that there were fewer competing products on the marketplace to compete with Central's AMDRO products. *Cf. In re ALH Holdings LLC*, 675 F. Supp. 2d 462, 483-84 (D. Del. 2009) (applying Delaware law and finding that the fact that several of the directors

were also employed by the majority member of the LLC did not alone overcome the presumption of the business judgment rule). There are also no allegations that Defendants Reed or Gulfstream personally benefitted from the failure of the Mound Treatment.[27]

Plaintiff contends that the "obvious effect" of Defendant Brown's decisions to ensure failure of the Mound Treatment was to increase profits to Central because Central receives 100% profit from the sales of AMDRO products but only 80% of the profits from any ONO product, due to Gulfstream's ownership percentage in Tech Pac.[28] It is actually not clear to the court that Central would necessarily benefit by getting rid of all competing ONO products. Plaintiff cites evidence stating that between 25 and 33% of ONO mound product sales would have come from former AMDRO customers, which the court presumes means that Tech Pac would "steal" that number of customers from Central. However, the logical conclusion then, is that the remaining 75 to 67% of purchasers of the ONO brand products would not be former Central customers but either completely new customers or customers taken from other competing companies. As such, Central would receive 80% of the profits from those customers, plus 100% of the profits from its remaining AMDRO customers. While this may or may not have benefitted Central, depending on many other factors such

[27] In fact, most of the decisions that allegedly injured Tech Pac and Plaintiff, would have similarly affected Gulfstream as the majority owner of Tech Pac.

[28] Neither party has discussed the relationship between Central and Gulfstream, other than to state that they are parent and subsidiary. However, Plaintiff implies throughout its brief that Central receives profits from Gulfstream's ownership of Tech Pac.

as how much revenue the Mound Treatment brought in, Plaintiff's blanket statement that Central would necessarily benefit financially by getting rid of competing ONO products is not supported.

In addition to arguing that Defendant Brown was self-interested, Plaintiff could have argued that Defendant Brown was not independent, as a director may also breach his duty of loyalty by not being independent. Whether Defendant Brown was "independent," is a separate question from whether he is interested in a transaction. *See Orman*, 794 A.2d at 24. Showing lack of independence is not a light undertaking. A director is not independent where he is "controlled by another;" however, there must be "particularized facts manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling." *Id*. (internal quotations omitted). A "director may be considered beholden to (and thus controlled by) another when the allegedly controlling entity has the unilateral power (whether direct or indirect through control over other decisionmakers), to decide whether the challenged director continues to receive a benefit, financial or otherwise, upon which the challenged director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit might create a reason to question whether the controlled director is able to consider the corporate merits of the challenged transaction objectively." *Id*. at 25, n. 50. Plaintiff has not argued that Defendant Brown (or Defendants Reed or Gulfstream) were being controlled

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by Central. Plaintiff focuses only on Defendants' alleged "self-interest."

Showing that a defendant stood on both sides of the transaction or that the defendant received a personal benefit from his actions are the traditional ways of showing a breach of the fiduciary duty of loyalty. And as explained above, Plaintiff has shown neither of those as to any of the relevant Defendants. However, there is a line of cases under Delaware law recognizing a breach of the duty of good faith as a subsidiary of the duty of loyalty, which the court finds relevant to the present discussion. Plaintiff has not actually mentioned "good faith" or "bad faith" or proffered any discussion of this line of cases. Although the court could assume that Plaintiff did not intend to argue that Defendants acted in bad faith, because Plaintiff has alleged that Defendants breached their duty of loyalty and because bad faith is a subset of the duty of loyalty, the court will address it.

In 2006, the Supreme Court of Delaware stated that "the universe of fiduciary misconduct is not limited to . . . disloyalty in the classic sense (*i.e.*, preferring the adverse self-interest of the fiduciary or of a related person to the interest of the corporation)." *In re Walt Disney Co. Derivative Litig.,* 906 A.2d 27, 66 (Del. 2006). The Supreme Court recognized that:

> Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed. A

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> vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.

Id. The court further acknowledged that the "duty to act in good faith [was] up to [that] point, relatively uncharted." *Id*. at 67. In that case, the Delaware Supreme Court affirmed the decision of the lower court, which stated that:

> To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation. The presumption of the business judgment rule creates a presumption that a director acted in good faith. In order to overcome that presumption, a plaintiff must prove an act of bad faith by a preponderance of the evidence.

In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005). The lower court recognized that one example of bad faith is "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation." *Id. See also Disney*, 906 A.2d at 66-67; *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369 (Del. 2006) ("[A] director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest."); *Guttman v. Huang*, 823 A.2d 492, 506 n. 34 (Del. Ch. 2003) ("[T]here is no case in which a director can act in subjective bad faith towards the corporation and act loyally."); *Kahn v. Portnoy*, 2008 WL 5197164, at *6-7 (Del. Ch. Dec. 11, 2008) (quoting *Disney*, 906 A.2d at 65) ("[A] director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company. This is 'classic, quintessential bad faith.'").

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However, "to hold a disinterested director liable for a breach of the fiduciary duty of loyalty for acting in bad faith, a strong showing of misconduct must be made." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 653 (Del. Ch. 2008).

The court finds that when the evidence viewed in the light most favorable to Plaintiff, a reasonable jury could find that Defendant Brown breached his duty of loyalty to Plaintiff by intentionally failing to act in the best interest of both Tech Pac and Plaintiff. Under Plaintiff's version of the facts, Defendant Brown, Central's President, was informed by an employee of Central that adopting the high media plan for the Mound Treatment would be unfavorable to Central. Defendant Brown then allegedly lowered the media spend, even though the Tech Pac Board had already approved the high media plan, and further, Defendant Brown lowered the media spend even beyond the low media plan considered by the Board. Defendant Brown also, without Board approval, purportedly raised the price of the Mound Treatment by $2.00 per package, making it more expensive than Central's competing product. And all of this was done after Tech Pac informed some of its larger customers that it was proceeding with the higher media spend.[29] All of this circumstantial

[29] Plaintiff also contends that in a 2006 conversation between Kelly and Hills, Hills told Kelly that Defendant Reed told him that Brown sought "to prevent [Plaintiff] from building any value in Tech Pac in order to allow Defendant Central to buy [Plaintiff's] interest in Tech Pac at a reduced price at a later date and, thus, gain 100% control of Tech Pac." D.E. [103], 23 (citing the affidavit of Keith Kelly, D.E. [106], ¶ 60.). It is unclear to the court whether Brown actually said this, or whether this was simply Reed's opinion of Brown's motives.

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evidence, if believed to be true, could allow a reasonable jury to find that Defendant Brown was intentionally acting with a purpose other than that of advancing the best interests of Tech Pac and Plaintiff, and further, that he may have been explicitly advancing the interests of Central over those of Tech Pac or Plaintiff. As such, Plaintiff has proffered evidence sufficient to rebut the business judgment rule and sufficient to show a breach of the duty of loyalty, which precludes the court from granting Defendants' Motion for Summary Judgment on that basis.

ii. Injury

According to Defendants, Plaintiff's only evidence of damages are found in Zyla's expert report and Plaintiff's Supplemental Initial Disclosures. As discussed above, the court granted Defendants' motion to exclude Zyla's report and testimony regarding the Mound Treatment, Perimeter Treatment, and the Third Party Opportunity. Further, Zyla testified that his own calculations with regard to the 2008 Make Whole Payment and loan transaction would be moot if the loan transaction was reversed, the Make Whole Payment was made, and the interest paid back. Defendants have presented evidence that this has been done.[30] The court also struck Plaintiff's Supplemental Initial Disclosures, which disclosed Plaintiff's

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[30] Although Plaintiff takes issue with the fact that Defendants have not given it some sort of paperwork showing that the loan transaction was reversed, Plaintiff does not contend that the Make Whole Payment was not made, and Defendants have presented uncontroverted evidence that the loan transaction was reversed. Plaintiff does argue that while Zyla's calculations may be moot, Zyla did not take into consideration punitive damages or attorney's fees associated with the loan transaction and getting the loan transaction reversed.

calculation of damages as to the Bayer and advertising issues, holding that Plaintiff could not introduce the information to supply evidence on a motion or at a trial. Fed. R. Civ. P. 37(c)(1). As such, Defendants contend that Plaintiff cannot show injury or damages arising out of any of the alleged breaches.

Plaintiff argues that under Delaware law, Plaintiff does not have to prove damages as an element of its breach of fiduciary duty claims. Further, Plaintiff argues that any damages should be calculated liberally. Even without the opinion of Zyla and the evidence of damages found in its Supplemental Disclosures, Plaintiff argues that it can still recover some damages because under Delaware law, even if transactional damages are not available incidental damages are. Further, at least one Delaware court has allowed a plaintiff to recover an amount equivalent to attorneys' fees and costs where calculating damages was difficult, and Plaintiff contends that punitive damages may also be awarded.[31]

Plaintiff is correct that under Delaware law, unlike other states, damages are not an

[31] The two cases Plaintiff cites for the proposition that Delaware law allows punitive damages for breach of fiduciary duty do not actually support that contention. The first is a Georgia case applying Georgia law. *See Caswell v. Jordan*, 184 Ga. App. 755 (1987). The second is a decision by the District Court of Delaware in which the court cited no Delaware case for the proposition that punitive damages are available for a breach of fiduciary duty based on Delaware law. *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232 (D. Del. 1992). Courts of Chancery in Delaware clearly lack the jurisdiction to award punitive damages for breaches of fiduciary duty. *Adams v. Calvarese Farms Maint. Corp., Inc.*, 2010 WL 3944961, at *21 (Del. Ch. Sept. 17, 2010).

element of a claim for breach of fiduciary duty.[32] Instead, the only two elements of the claim are (1) existence of a fiduciary duty and (2) breach of that duty. *See, e.g.*, *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010) ("A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty.") (emphasis added); *In re Fuqua Indus., Inc.*, 2005 WL 1138744, *6 (Del. Ch. May 6, 2005) ("[I]in cases of the breach of the duty of loyalty, the plaintiff need not prove damages to establish a breach of that duty."). This is because "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Thorpe by Castleman v. CERBCO, Inc.***,** 676 A.2d 436, 445 (Del. 1996). Indeed,

> [T]he absence of specific damage to a beneficiary is not the sole test for determining disloyalty by one occupying a fiduciary position. It is an act of disloyalty for a fiduciary to profit personally from the use of information secured in a confidential relationship, even if such profit or advantage is not gained at the expense of the fiduciary. The result is nonetheless one of unjust enrichment . . . .

Id. Further,

> The strict imposition of penalties under Delaware law are designed to discourage disloyalty. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

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[32] For example, under Georgia law, a claim for breach of fiduciary duty requires a plaintiff to show (1) a duty, (2) a breach of that duty, and (3) that the duty proximately caused the plaintiff's damages. *Bienert v. Dickerson*, 276 Ga. App. 621, 623 (2005).

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Id. Once a duty of loyalty has been established, Delaware law requires that the fiduciary not profit personally from his conduct and that the beneficiary not be harmed by the conduct. *Id*. *See also Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 441 (Del. 2000) ("[T]he imposition of damages should eliminate the possibility of profit flowing to defendants from the breach of the fiduciary relationship."). Even where there are no transactional damages, incidental damages may be available where the fiduciary benefits from his actions. *See Thorpe*, 676 A.2d at 445 (holding that all profit to defendant be disgorged, and further, that defendants were liable for any expenses, including legal and due diligence, and costs that the corporation incurred as a breach of defendant's fiduciary duty). Some Delaware courts have gone out of their way to fashion some sort of remedy for the wrong caused by a breach of fiduciary duty. *See, e.g.*, *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (holding that where plaintiff was harmed by defendant's breach of fiduciary duties in "several identifiable, but inherently measurable, ways," an award of damages equivalent to

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costs and attorney's fees was appropriate, in an effort "to directly match the cost of the wrongdoing with the clearest proof of the monetary costs to remedy th[e] wrongdoing").[33]

Because it is clear that damages are not an element of Plaintiff's claim for breach of fiduciary duty, and it appears from the record that Plaintiff could show that it suffered some injury from Defendants' alleged actions, the court cannot grant summary judgment to Defendants. However, while damages are not an element of Plaintiff's claim for breach of fiduciary duty, Plaintiff is clearly seeking a monetary recovery from Defendants' alleged breaches of fiduciary duty. To recover damages, the court warns Plaintiff that it must still prove damages by a preponderance of the evidence. *See Beard Research*, 8 A.3d at 613. While Delaware does not require certainty in calculation, if a wrong has been proven and an injury established, the court or fact finder must be able to make a "responsible estimate of damages." *Id*. However, "[p]ublic policy has led Delaware courts to show a general willingness to make a wrongdoer 'bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven.'" *Id*. Plaintiff must show that it suffered some sort of detriment because of Defendants' actions or that Defendants benefitted somehow from their actions, as a fact finder cannot "set damages based on mere

[33] Defendants contend, in their reply brief, that Plaintiff is has already taxed its legal fees in this litigation to Tech Pac. Plaintiff has not had the opportunity to rebut this argument or the evidence Defendants have presented. The evidence Defendants point to does indicate that at least some of the legal fees arising out of this case may have already been charged to Tech Pac. D.E. [102-2], West Depo., p. 107.

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'speculation or conjecture' where a plaintiff fails to adequately prove damages." *Beard Research, Inc.*, 8 A.3d at 613. This will clearly be more difficult for Plaintiff to do after the court's ruling on Defendants' Motion to Exclude Opinions of Mark Zyla.

b. Perimeter Treatment

At some point, Tech Pac also considered introducing a Perimeter Treatment under the ONO brand, which would be used to treat the "boundaries of an area, thereby preventing fire ants from crossing the treated perimeter." *Id.* at ¶ 25. However, the Perimeter Treatment was never introduced to the marketplace. *See id.* at ¶ 28. Plaintiff contends that this is because Defendant Brown would not let the Tech Pac Board consider issues relevant to the Perimeter Treatment development. According to Plaintiff, Hills came to Defendant Brown to get approval to proceed with development of the Perimeter Treatment, and Defendant Brown refused to give that approval. In the portion of Hills' deposition that Plaintiff cites, Hills actually testifies that when he approached Defendants Brown and Reed seeking approval to move forward on the Perimeter Treatment, he never got an affirmative yes or an affirmative no. Hills Depo., pp. 141-42. Hills does not testify that Brown refused to allow the development of the Perimeter Treatment to move forward, and Hills was also never actually instructed not to proceed. Plaintiff contends that around the same time, Central started developing a Perimeter Treatment that would have been in direct competition with the ONO Perimeter Treatment. Again, Plaintiff is arguing that the destruction of ONO

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products benefitted Central because Central would receive 100% of the profits from sales of its AMDRO products but only 80% of the profits from ONO products.[34]

Defendants argue that they had no duty to pursue the Perimeter Treatment product, as the LLC Agreement does not require that Tech Pac pursue new opportunities or products. Defendants also contend that they chose not to pursue the Perimeter Treatment product for a number of reasons, including that market conditions were not favorable, that Gulfstream was unable to negotiate an acceptable agreement with the supplier of the active ingredient,[35] and that Tech Pac was in the midst of negotiating with the Third Party and might need substantial working capital. Defendants further argue that there is no evidence that Central actually had its own perimeter treatment product, and in fact, they never launched one. And again, Defendants point out that even if Central and Tech Pac had competing perimeter treatment products, Central may have actually benefitted from this.

As to the traditional ways of showing breach of the fiduciary duty of loyalty, Plaintiff has again not explained what benefit, if any, Defendant Brown received from purportedly blocking the development of the Perimeter Treatment. Nor are there allegations that Defendants Gulfstream or Reed personally benefitted from blocking the Perimeter Treatment. The only benefit would be to Central, and as explained above, Central would not

[34] The court has already explained that this statement may or may not be true, depending on a multitude of factors.

[35] Plaintiff highly disputes this fact.

necessarily benefit from removing all competing ONO products from the market. However, while a much closer call than the Mound Treatment, the court also finds that Plaintiff has made a sufficiently strong showing from which a reasonable jury could conclude that Defendants Brown and Reed acted in bad faith with regard to the Perimeter Treatment. Defendants' failure to allow the Tech Pac Board to consider development of the Perimeter Treatment cannot be looked at in isolation. Although Central may not have ultimately developed its own perimeter treatment, Plaintiff's evidence shows that Central intended to or was in the process of trying to develop one. When the facts are viewed in the light most favorable to Plaintiff, Defendants' alleged blocking of the development of the ONO Perimeter Treatment, especially when also considering the actions surrounding the ONO Mound Treatment, indicate that Defendants were not acting in the best interests of either Tech Pac or Plaintiff and may have been protecting Central's interests instead. The court concludes that this is enough to show a breach of the duty of loyalty through bad faith. Additionally, the court's prior discussion regarding damages and injury equally applies here, and the court cannot grant summary judgment based on Defendants' argument that Plaintiff failed to show damages.

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c. ONO Advertising Strategies

Plaintiff alleges that prior to Central's purchase of Gulfstream, Tech Pac's business strategy was to contribute heavily to advertising the ONO brand in an effort to build the brand up and create brand awareness so that the ONO line would be profitable in the future, for a long time. According to Plaintiff, Defendant Brown destroyed this strategy by deciding to "'move up profits to the current year as opposed to downstream and drastically reduc[ing] advertising for the ONO product." D.E. [103], 29. He did this without consulting the Tech Pac Board. The alleged result of Brown's actions was that he "effectively destroyed the ONO brand, thereby ensuring that Central's AMDRO products will have one less competitor."[36] *Id*. Further, "Defendants reaped immediate benefits from the time and money [Plaintiff] invested in the ONO brand, milking the ONO brand for all it was worth until it was successfully run into the ground . . . ." *Id*. Defendants contend that Gulfstream had no duty to continue the same level of advertising for the ONO brand that had previously been spent. Further, Hills testified that even though he believed it was better to have a long-term

[36] The court notes that the evidence cited by Plaintiff does not support its contention that the ONO brand has been "destroyed," although it does indicate that the profitability of the ONO brand could decline in the future.

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view of advertising and brand building, it was not the only strategy, and he could not say whether Brown's strategy was right or wrong.[37] Hills Depo., p. 91.

Plaintiff claims that the decision to suspend advertising money resulted in "moving profits up to the current year as opposed to downstream," but it seems to the court, that moving profits up would have affected Plaintiff in the same way it affected Defendant Gulfstream – both would have received more profit, in amounts equal to their percentage of ownership, and therefore, Plaintiff and Defendant Gulfstream were treated the same. And again, there is no evidence showing that Defendants Brown or Reed received any personal benefit from this transaction. However, Plaintiff's theory of the case is that Defendants intended to get rid of the ONO brand products because they directly competed with Central's AMDRO brand products, and therefore, the decision regarding ONO's overall, long-term advertising cannot be looked at in complete isolation. When Defendant Brown's allegedly unilateral decision regarding ONO's overall advertising strategy is looked at in conjunction with the actions taken regarding the Mound and Perimeter Treatment, the court concludes that a reasonable jury could find that Defendant Brown was again intentionally not acting in Plaintiff or Tech Pac's best interest. Further, the court's previous discussion

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[37] Although Defendants also argue that the Marketing Agreement allowed them to determine what advertising was appropriate up to a certain amount, the Marketing Agreement also states that approval of the Tech Pac Board of Directors is necessary to authorize the annual sales and marketing plans introduced by Gulfstream. D.E. [97-6], Marketing Agreement, § 2.

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regarding damages and injury equally applies here, and the court cannot grant summary judgment based on Defendants' argument that Plaintiff failed to show.

d. Bayer Settlement

The parties have provided very little detail regarding the Bayer issues in their briefs. It appears to the court that Bayer owns the trademark "SEVIN," and also the active ingredient used in the Sevin products, which is Tech Pac's other major product line. According to Plaintiff, "[i]n or around 2006, Mr. Hills, Mr. Kelly [a Tech Pac Board member and Plaintiff's president], and John Wichtrich, Tech Pac's former president, met with representatives from Bayer to discuss the settlement of certain issues related to combination products containing the active ingredient Carbaryl. As a result, Tech Pac believed it had reached an agreement in principle with Bayer to resolve the outstanding issues. . . . However, before the parties could execute an agreement, Defendant Brown removed Hills from the negotiations with Bayer and took over control of these negotiations himself." D.E. [103], 30. No settlement was ever reached with Bayer, and Plaintiff contends this was due to Defendant Brown's actions in stalling negotiations and failing to present a finalized agreement to Bayer. *Id.* Plaintiff alleges that Defendant Brown "never provided any reason for refusing to enter into a settlement with Bayer . . . and never permitted the Tech Pac Board to consider the issue." *Id.* at 31. Plaintiff alleges that this constituted a breach of loyalty, and Plaintiff would have made $1.6 million in profits if the Bayer

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settlement had happened. The court, of course, has stricken Plaintiff's Supplemental Disclosures, which addresses the calculation of those lost profit damages.

A director may breach his duty of loyalty by being either interested or not being independent. The court is unclear as to how Defendant Brown's purported actions with regard to the Bayer settlement benefitted him, Reed, Gulfstream, or even Central. Plaintiff makes no allegations that any Defendant received a benefit from the Bayer settlement not occurring, only that Plaintiff lost profits. Further, to the extent Plaintiff would have made more money if the Bayer settlement had occurred, it seems only logical that Gulfstream would have also made more money. A director may breach his duty of loyalty by acting in bad faith and intentionally acting with a purpose other than that of advancing the best interests of Tech Pac. However, Plaintiff advances no argument, and the court will not presume, that even Tech Pac could have entered into the Bayer Settlement, that doing so on the terms reached was in the best interests of the corporation or of Plaintiff. Plaintiff simply asserts that a specific Bayer agreement was in the works, and therefore, Defendant Brown should not have blocked it. Plaintiff has not made a strong showing that Defendant Brown intentionally acted against the best interests of Plaintiff or in bad faith.

e. Third Party Opportunity

Defendants do not argue that Plaintiff cannot show a breach of the fiduciary duty of loyalty pursuant to Defendant Gulfstream's usurpation of the Third Party Opportunity from Tech

Pac. The court, therefore, presumes for the purposes of this motion that Plaintiff can indeed show that Defendants Gulfstream, Reed, and Brown breached their duty of loyalty. Defendants contend instead that Plaintiff cannot show it was injured by this usurpation because the Third Party Opportunity has done poorly, and therefore, Plaintiff's claim cannot survive summary judgment. It is true that the court has struck the expert opinion and testimony of Zyla who calculated Plaintiff's lost profit damages with respect to the Third Party Opportunity, and it is also true that the Third Party Venture is not as doing well as hoped and may have in fact been terminated. However, this does not mean that there has been no benefit to Defendants and no harm to Plaintiff arising out of Defendants' actions, and the court's above discussion regarding injury applies equally here. The court will not grant summary judgment on this claim based on a failure to show damages.

f. Unauthorized Loan

Plaintiff also maintains that a breach of fiduciary duty occurred when Defendant Gulfstream caused Tech Pac to borrow around $11 million from Central, and then used the loan proceeds and cash from earnings to make its full guaranteed distribution to CPI. Defendants do not directly address or recognize that Plaintiff is asserting a breach of fiduciary duty arising out of this transaction. There is no contention that such actions could not breach the duty of loyalty, as Defendants just contend generally, that all claims relating to the loan transaction are moot. The court presumes they intended this mootness argument

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to apply to any alleged breach of fiduciary duty as well. It is undisputed that Defendant Gulfstream caused Tech Pac to take out this loan and increase Tech Pac's line of credit with Defendant Central, which resulted in Tech Pac being able to make the 2008 Make Whole Payment and Defendant Gulfstream not having to make up any shortfall. Plaintiff contends that a jury could find that there might still be some benefit that inured to Defendant arising out of this transaction, even if Zyla's damages calculations are moot. The court's above discussion regarding injury applies equally here, and the court will not grant summary judgment on this claim based on a failure to show damages.

4. Breach of Implied Covenant of Good Faith and Fair Dealing

In its Amended Complaint, Plaintiff brings claims against Defendants Central and Gulfstream for breaches of the implied covenant of good faith and fair dealing found in the Tech Pac LLC Agreement, the Marketing Agreement, and the other Tech Pac agreements. In Delaware, there exists in every contract, including LLC agreements, the implied covenant of good faith and fair dealing. *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009). That covenant "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Id*. (internal quotations omitted). Unlike

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breaches of fiduciary duty, LLC members may not contract around this covenant. Del. Code. Ann. tit. 6, § 18-1101(c). However, "consistent with its narrow purpose, the implied covenant is only rarely invoked successfully." *Kuroda*, 971 A.2d at 888.

Defendants have moved for summary judgment on these claims on several bases. Defendants allege that Plaintiff's claims for breaches of the implied covenant of good faith and fair dealing are based on the same conduct that Plaintiff contends were breaches of fiduciary duty, and the breach of the implied covenant claims cannot be maintained because "Delaware courts have held that claims for breach of fiduciary duty cannot be maintained where such claims are based on the same contractual obligations and facts that are alleged as a breach of contract or breach of the implied covenants." D.E. [97], 45. Defendants also argue that Plaintiff's claims fail for those same reasons that Plaintiff's claims for breach of fiduciary duty fail – lack of duty and lack of injury. Finally, Defendants argue that as the majority member, it had the right, pursuant to the Tech Pac LLC Agreement to exercise its judgment regarding new products, supplier contracts, and potential new ventures, and because it was exercising its contractual rights, Plaintiff cannot maintain a claim for the implied breach of the covenant of good faith and fair dealing.

In its brief in opposition, Plaintiff does not mention its claims for the breach of this implied covenant. "[I]t is well-accepted in this district that the failure to respond to arguments relating to a claim constitutes abandonment of the claim." *White v. GA Dept. of*

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Motor Vehicle Safety, No. 1:06-CV-0124-TWT, 2006 WL 1466254, at *1 (N.D. Ga. May 19, 2006) (Thrash, J.) (citing cases). *See also Resolution Trust Corp. v. Dunmar Corp.,* 43 F.3d 587, 599 (11th Cir. 1995) (*en banc*) (stating that "grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned" while declining to exercise its discretion to consider on appeal an argument in response to defendant's motion for summary judgment which plaintiff had previously failed to allege); *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) (Carnes, J.) ("When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned."). The court finds that the claims for implied breach of the covenant of good faith and fair dealing have been abandoned.

5. Accounting

Defendants also seek summary judgment on Count VIII of Plaintiff's Amended Complaint. In that count, Plaintiff demands an accounting of all transactions between Central, Gulfstream, and Tech Pac due to Central and Gulfstream's misuse of Tech Pac assets since taking control of Tech Pac. Defendants argue that Plaintiff has an adequate remedy at law, as shown by Plaintiff's multitude of other claims that all arise out of Central and Gulfstream's alleged misuse. Plaintiff has not responded to Defendants' arguments or even mentioned these claims. If Plaintiff has "a remedy at law that will afford them full, fair, and complete relief," equitable relief is not available. *Massachusetts Mut. Life Ins. Co. v.*

Certain Underwriters at Lloyd's of London, 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010). A demand for accounting is an equitable remedy. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962). *See also Schuss v. Penfield Partners, L.P.*, 2008 Del. Ch. LEXIS 73, at *36 (Del. Ch. June 13, 2008); *Tharp v. St. Georges Trust Co.*, 34 A.2d 253, 255 (Del. Ch. 1943). By not responding to Defendants' arguments regarding its claim for accounting, Plaintiff has provided no reason why it does not have an adequate remedy at law through its other claims. Furthermore, as stated previously, "[w]hen a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned." *Hudson*, 209 F. Supp. 2d at 1324. Defendants' request for summary judgment on Plaintiff's claim for an accounting must be granted.[38]

E. Motion to Supplement

On January 7, 2011, Defendants filed a motion requesting leave from the court to file supplemental evidence in support of their Motion for Summary Judgment and Motion to Exclude Opinions of Mark Zyla [119]. According to Defendants, the Third Party Venture between Defendant Gulfstream and the Third Party has been terminated, effective December 31, 2010. Defendants seek to file the letter terminating the venture, some of the venture's

[38] The court notes that Plaintiff, like Defendants, has a right pursuant to the Tech Pac Agreement to inspect Defendant Gulfstream and Tech Pac's books and records of account, minutes and records. LLC Agreement, § 7.2. It is unclear to the court, however, whether this is what Plaintiff was requesting under Count VIII of its Amended Complaint, as Plaintiff has not addressed the claim or Defendants' arguments.

financial information, and the declaration of Darren L. Horst authenticating the documents. Defendants contend that the evidence did not exist until well after the briefing schedule adopted in this case, and therefore, Defendants seek to file this supplemental evidence on the record.

Plaintiff opposes Defendants' motion and requests that the court deny it. Plaintiff argues that Defendants acted in bad faith for several reasons. First, because the termination letter was signed by Defendant Reed in his capacity as President of Tech Pac, there has been another violation of the LLC Agreement because he did not seek Board approval to sign the termination letter. Furthermore, Plaintiff contends that because Defendants executed the letter on December 3, 2010 and the letter allegedly became effective on December 31, 2010, Defendants have wrongfully with held these documents from the court and from Plaintiff by not filing the motion until January 7, 2011. Finally, Plaintiff contends that Defendants have ignored their obligations to supplement their discovery responses as they only provide these few documents, when there are clearly other relevant documents that are related to the decision of Defendant Gulfstream and the Third Party to terminate their agreement. If the court allows Defendants to supplement, Plaintiff would like to take limited discovery relating to the issue.

It seems to the court that the documents Defendants seek to file go solely to their claim that Plaintiff cannot show damages arising out of the breach of fiduciary duty for the Third Party Venture. The court has already ruled in Defendants' favor on its motion to exclude Mark Zyla's opinion with regard to this issue and addressed the injury issue. Further, the eventual termination of the Third Party Venture does not speak to whether Plaintiff was damaged as much as it does to how much Plaintiff was damaged. As such, the documents would not alter the court's opinion in this order. Defendants' Motion for Leave to File Proposed Submission of Supplemental Evidence is DENIED AS MOOT [119].

III. Conclusion

Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART [97]. Defendants' Motion to Exclude Opinions of Mark Zyla is GRANTED IN PART and DENIED IN PART [98]. Defendants' Motion to Strike is GRANTED [99]. Plaintiff's Motion for Summary Judgment is DENIED [100]. Defendants' Motion for Leave to File Proposed Submission of Supplemental Evidence In Support of Motion to Exclude Opinions of Mark Zyla and Motion for Summary Judgment is DENIED AS MOOT [119]. The only remaining claims are Defendant Gulfstream's counterclaim and Plaintiff's claims for breach of fiduciary duty against Defendants Gulfstream, Brown, and Reed, as discussed

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above. As such, the parties are DIRECTED to file a pretrial order within thirty (30) days of the date of this Order.

IT IS SO ORDERED this 31st day of March, 2011.

/s/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE

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