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New York Supreme Court
Appellate Division - Second Department

Docket Nos. 2019-07603
2020-09262

EFRAT GAM and
SLIM'S BAGELS & BIALYS, INC.,

Appellants-Respondents,

- against -

JOSEPH DVIR,

Respondent-Appellant.

BRIEF FOR APPELLANTS-RESPONDENTS

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PRELIMINARY STATEMENT

In his appeal from the judgment entered on December 9, 2020, Defendant-Respondent-Appellant Joseph Dvir seeks to overturn a verdict in which the jury found he was unjustly enriched when he paid himself salary and distributions from Plaintiff-Appellant-Respondent Slim's Bagles and Bialys, Inc.' profits, in amounts that exceeded what Joseph's partner, Plaintiff-Appellant-Respondent Efrat Gam, received. Joseph also seeks to reverse the trial court's post-trial order in which it granted Efrat's request to remove Joseph as an officer of Slim's and to recover the attorneys' fees she expended on behalf of Slim's claim against Joseph.

Joseph's principal argument on appeal is that Slim's and Efrat never had a viable unjust enrichment claim. Prior to trial, Joseph moved to dismiss the unjust enrichment claim along with various other claims asserted by Efrat and Slim's, including for breach of fiduciary duty and conversion. The trial court granted Joseph's motion as to the breach of fiduciary duty and conversion claims, but permitted the unjust enrichment claim to proceed. Joseph did not appeal the trial court's denial of his request to dismiss the unjust enrichment claim, though Efrat and Slim's appealed the dismissal of the breach of fiduciary duty and conversion claims (which appeal was fully briefed and consolidated with this appeal).

After a jury rendered a verdict against him, Joseph now asserts the unjust enrichment claim should have been summarily dismissed because it is duplicative

of the breach of fiduciary duty and conversion claims and barred by a three-year statute of limitations. He further argues the verdict was against the weight of the evidence because, according to him, his testimony was more plausible. Joseph also asserts it was an abuse of the trial court's discretion (i) to permanently remove him as an officer of Slim's, given he was in all other respects a responsible and competent officer, and (ii) to award Efrat her requested attorneys' fees, because they were grossly disproportionate to the amount ultimately recovered for Slim's on the unjust enrichment claim.

This Court should deny Joseph's appeal entirely. A jury's verdict is entitled to great deference, and Joseph presents no compelling reason to overturn it. The trial court did not err when it permitted the unjust enrichment claim to be tried. Efrat and Slim's were entitled to plead their claims in the alternative, and though the unjust enrichment claim derives from the fiduciary duty Joseph owed to Efrat and Slim's, the claim is not identical to the breach of fiduciary and conversion claims. Joseph's fiduciary duty to Efrat and Slim's is also the reason why the trial court was correct to not dismiss the unjust enrichment claim as barred by the three-year statute of limitations. Case law establishes that an unjust enrichment claim centered on a fiduciary duty is subject to a six-year statute of limitations.

Contrary to Joseph's assertion, the jury's verdict was rational and supported by the evidence. There was no dispute that Joseph and Efrat, as co-equal owners of

Slim's, understood they would each receive an equal share of Slim's profits and that Joseph would receive a certain weekly salary. Efrat presented evidence—through her testimony and the business records she created for Slim's—to show that Joseph wrote himself checks for amounts exceeding their understanding in 2011, 2012, and 2013. Joseph did not dispute that he received the checks. His defense was based on a single allegation: that Efrat received cash payments equivalent to the excess amounts paid to him in those years. The jury took less than three hours to reject Joseph's cash transfer theory and award Slim's the entire amount documented by Efrat. Joseph's request to overturn the verdict would require this Court to invade the province of the jury to substitute a contrary finding based on nothing more than the supposition that Joseph's testimony was more believable. This Court is constrained by well settled law from doing so.

The trial court's decision to remove Joseph as an officer and award Efrat the vast majority of her requested attorneys' fees was also correct. The removal decision flowed from the jury's verdict, which found wrongdoing on the part of Joseph. The law does not require the the trial court to weigh Joseph's prior good conduct against the jury's finding that he unfairly paid himself a greater share of Slim's profits. Joseph's complaint regarding the fees awarded to Efrat is equally unfounded. Efrat supported her request with documented billing records. The same judge (Hon. Leonard Livote) oversaw this case from start to finish and determined

the fees Efrat requested were reasonable. Joseph agrees the decision regarding removal and attorneys' fees was up to the trial court's discretion, but he presents nothing to show that the discretion was abused.

In addition to opposing Joseph's appeal, Efrat and Slim's cross-appeal the judgment on a single issue. At the trial, the trial court excluded Efrat's evidence regarding Joseph's payments to himself in 2010—the sum certain of \$75,200, which Joseph has never disputed—because it was outside the six-year statute of limitations (the unjust enrichment claim was asserted in 2017). Efrat and Slim's argued the fiduciary tolling rule applied, and the statute of limitations was never triggered because Joseph never repudiated his fiduciary role. Case law from this Court supports Efrat's argument; the trial court erred by rejecting it. Given the jury accepted the exact amounts that Efrat and Slim's presented as Joseph's unfair check payments for 2011, 2012, and 2013, it is reasonable to conclude they would have included the \$75,200 amount for 2010 had they seen that evidence.

Accordingly, Efrat and Slim's respectfully request this Court to affirm both the judgment based on the jury's verdict and the post-trial order removing Joseph as an officer and granting Efrat's attorneys' fees request. They also request an order modifying the verdict and judgment to include the \$75,200 in excess payments taken by Joseph in 2010 as set forth in Efrat and Slim's evidence.

COUNTER-QUESTIONS PRESENTED

1. Where a plaintiff alleges similar but not identical facts that support multiple causes of action in the alternative, including breach of fiduciary duty, conversion, and unjust enrichment; and where the unjust enrichment claim is derived from the fiduciary duty the defendant owed to the plaintiff, does the plaintiff have a viable unjust enrichment claim subject to a six-year statute of limitations?

The trial court correctly held yes.

2. When a jury elects to accept a plaintiff's version of the facts over that presented by the defendant, can a court reverse the jury's finding because the defendant thinks his version is more plausible?

The trial court did not reach this question, but the answer should be no.

3. Where a jury finds a defendant corporate officer unfairly transferred the corporation's profits to himself—clandestinely and in contravention of a fiduciary agreement with his fellow corporate officer—is it a provident exercise of discretion for the trial court to permanently remove the defendant as an officer?

The trial court correctly held yes.

4. Where a jury awards a corporation the amounts a defendant corporate officer unfairly transferred to himself, and where the plaintiff presents detailed evidence of the amount she expended on attorneys' fees in prosecuting the claim on behalf of the corporation, is it a provident exercise of discretion to award the plaintiff her requested attorneys' fees?

The trial court correctly held yes.

CROSS APPEAL QUESTION PRESENTED

1. Where a defendant co-owner of a corporation was acting in his fiduciary capacity when he transferred the corporation's profits to himself without advising the plaintiff co-owner, should the statute of limitations for unjust enrichment be tolled?

The trial court incorrectly held no.

STATEMENT OF FACTS

Efrat and Slim's incorporates the complete statement of facts set forth in their previously filed Appellant's Brief (in the appeal from the summary judgment order). *See* App. Br. at 5-12. Citations in the Appellant's Brief are to the Record on Appeal ("R"). The following is a summary of those and additional facts as relevant to the appeal from the judgment with citations to the Supplemental Record on Appeal ("SR").

Efrat and Joseph ran Slim's business together successfully until Joseph suddenly ceased distributions to Efrat.

Efrat and Joseph were family friends who together purchased Slim's back in 1999. R 17; 48; 334. They each contributed an equal amount for the down payment. R 17; 336. They did not enter into a written operating agreement, but they agreed Efrat would work in the store as a "working partner" after the purchase. R 17; 54; 338-340; 350. They also agreed that Efrat would be paid \$1,000 per week as salary, Joseph would be paid \$250 per week for his expertise (because he had prior experience in the food business), and they would split the corporate profits evenly according to their respective 50% interests. R 54; 58-60; 348-349; 353-354.

This arrangement continued from 1999 until 2007, when Efrat moved to Australia with her husband. R 50; 130; SR 171-172. She then moved to Florida in

2009. *Id.* Efrat spoke to Joseph before she left, and he agreed to take her place in working full time as the “working partner” at Slim’s. R 94; 355-356. Joseph was paid a salary of \$1,000/week for his new role. R 358-359. Efrat no longer received a salary. R 359-360. However, they each continued to receive an equal amount in distributions from Slim’s profits. R 361-362.

While Efrat was in Australia, she was limited in her ability to cash distribution checks because of legal limits on the amount of a foreign check (due to a law enacted after 9/11); for this reason, Joseph paid Efrat her distributions partly by check and partly by cash. SR 175; 322-324. When Efrat moved to Florida she continued to receive her distributions from Joseph, but only by check; she did not receive any cash payments from him from 2010 onward. SR 177-178; 328.

Efrat spoke to Joseph periodically while she was in Australia and Florida, and he regularly assured her that the store was doing great so she had nothing to worry about. SR 177-181; 308. Joseph said the same thing when Efrat visited the store on one of her several trips to New York to visit her daughter between 2010 and 2016. *Id.* During the time she was away from New York, Efrat received her K-1 tax form (which shows partner distributions), but she did not receive complete copies of Slim’s tax returns because the accountant sent them to Slim’s, not to her personally. R 53-54. Efrat did not ever ask Joseph or the accountant to send the tax returns to her because “I trusted him [Joseph] because he knew what he was

doing.” SR 311. She also never asked the accountant to see Slim’s payroll records because she knew they were in the store and did not believe the accountant had them. R 88. Occasionally, Efrat obtained Slim’s bank statements and reviewed them, but nothing looked suspicious so “there was no reason for me not to trust [Joseph] and to look into things.” SR 318.

In November 2016, Joseph sent an email to Efrat abruptly informing her that “due to lower sales” Slim’s “will stop distributions until further notice.” R 182. At the time, Efrat and Joseph were each receiving \$5,000 per month in distributions. R 77-78. Joseph later explained that he made the decision due to a sharp decline in sales at the store. R 13. However, when he emailed Efrat, he did not provide her with any explanation—or any financial information to support his decision. R 182.

Efrat went to Slim’s in early December 2016 seeking to access the books and records located in the store to determine what was happening with the business. R 18. Joseph responded by changing the locks and telling Efrat to not come back to the store because he “didn’t want her to come and create a problem” while he was not there. R 19; 381-382. When Efrat was able to meet with Joseph and ask him what was going on, he told her, “[y]ou don’t have rights to the store anymore.” SR 187. Joseph threatened to have her arrested if she tried to access the store. SR 188. Efrat had no choice but to file a complaint seeking injunctive relief

to restore her access to the store and Slim's books and records. R 170-178. The trial court granted Efrat's demand for access in February 2017. R 272; 273.

Efrat examined Slim's books and records and discovered Joseph paid himself more than \$216,000 in checks not disclosed to her.

Efrat immediately began working at Slim's again, and she spent considerable time examining all of Slim's records, including cancelled checks, checkbook stubs, and the payroll record. SR 192-193. After looking at each check side-by-side she noticed that, between 2010 and 2013, Joseph had paid himself more than \$216,000 in distribution and salary checks that did not match the amounts she had received as distributions and exceeded the \$1,000/week amount he was receiving as salary. *Id.*; *see also* R 104-106; 245-246; 248-260.

Efrat knew nothing at all about any of Joseph's payments to himself because he did not disclose them to her, despite being her co-equal business partner. SR 315. One morning, after Joseph realized that Efrat had discovered the payments, Efrat came into the store and Joseph "came right into my face and told me if I keep pursuing this, he is going to say that he gave me cash instead." SR 200.

Alarmed by the intimidation, Efrat filed a supplemental complaint against Joseph that asserted claims for breach of fiduciary duty, conversion, and unjust enrichment on behalf of her individually and Slim's derivatively. R 15-30. Efrat also alleged a fraudulent scheme by Joseph that involved his unauthorized

diversion of corporate assets to himself and his other businesses. R 22-23. And she alleged that Joseph concealed his misconduct by failing to disclose the payments while Efrat did not have access to the corporate books and records. R 18-19.

With respect to unjust enrichment, Efrat alleged that Joseph's actions resulted in a loss of income, profits, and salary to Efrat and Slim's and that "it would be unjust and unfair to allow [Joseph] to retain custody and control of the assets and profits of the business which were rightly and properly owned by [Slim's and Efrat]." R 21. Efrat also asserted claims to remove Joseph as an officer of Slim's pursuant to [BCL § 716](#) and to recover reasonable attorneys' fees pursuant to [BCL § 626](#). R 25-26.

Efrat and Slim's claims for breach of fiduciary duty and conversion were summarily dismissed, and the unjust enrichment claim proceeded to trial.

Joseph moved for summary judgment seeking dismissal of each of the claims. R 8-12. The crux of his motion was the argument that all the claims were time-barred by a three-year statute of limitation or otherwise lacked merit. SR 25-55. Joseph did not dispute that he wrote checks to himself between 2010 and 2013 from Slim's account for more than \$216,000. R 12-14; 197-204; 267-269. Instead, he asserted, as he threatened Efrat he would, that the checks he paid to himself were equivalent to amounts given to Efrat in cash. *Id.*; SR 25-55.

Joseph also did not dispute that he owed a fiduciary duty to both Efrat and Slim's as a 50% shareholder. R 419. The trial court partially granted Joseph's motion, dismissing the claims for breach of fiduciary duty and conversion but permitting the unjust enrichment claim to proceed to trial. R 5-6. Efrat's claims for removal and attorneys' fees were reserved for decision after the trial. SR 10; 88-89.

At the beginning of trial, the trial court told the jury that on the issue of whether Joseph was unjustly enriched, the jury was "the sole judges of the facts" and they alone must decide which of the witnesses they will believe, what portion of their testimony to accept, and what weight to give the testimony. SR 88; 100; 490. Efrat's attorney also told the jury that the case was a simple one of he-said-she-said because "either you believe [Efrat] or you believe [Joseph]." SR 112; *see also* SR 471 (telling the jury in summation "you had a chance to assess her demeanor and her testimony. Do you believe her? Or do you believe the defendant?").

In addition to her testimony, Efrat presented a handwritten list of the excess amounts Joseph paid to himself from Slim's account. SR 204-205. As she explained, Efrat created the list when she compared each of the checks paid to Joseph alongside the ones she received and the payroll book. SR 209-212. The trial court admitted the excess payments list as a business record from Slim's. SR 209 (marking plaintiff's Exhibit 1). The list as introduced showed the payroll checks

Joseph sent to himself as salary on top of the agreed upon \$1,000/week (\$52,000/year) for the years 2010 (\$75,200 in excess), 2011 (\$50,000 in excess), and 2012 (\$21,000 in excess). The list also showed the excess amounts Joseph paid to himself as distribution checks for 2012 (\$39,839) and 2013 (\$21,500). And it showed the amount of payroll tax Slim's paid for the excess salary Joseph paid to himself (\$8,760). R 248.¹ Efrat also introduced copies of the cancelled checks and another list comparing the distribution checks sent to Efrat and Joseph, respectively. SR 214-220; 538-557; 569.

At the close of Efrat's direct testimony, Joseph moved to strike the evidence showing the payments he made to himself in 2010, based on the argument that the unjust enrichment claim is subject to a six-year statute of limitations and, given the claim was asserted in 2017, the only permissible evidence is that from 2011, 2012, and 2013 (within the six-year period). SR 227. Efrat argued the statute of limitations was tolled because Joseph, as co-owner of a closely held corporation, owed a fiduciary duty to Slim's which he never repudiated; therefore, the statute of limitations for unjust enrichment was never triggered. SR 230-231.

Though it was unclear from the pleadings, the trial court noted that Slim's unjust enrichment claim is essentially "based on a fiduciary relationship

¹ The excess payments list also shows the credit card payments Dvir made to pay for supplies he bought for Slim's. *Id.*

agreement” and that Slim’s is “seeking to enforce...an oral agreement between [Efrat and Joseph] to be partners.” SR 234.² Given the nature of the claim, the trial court determined the six-year statute of limitations applied, but “any alleged unjust enrichment dating back to 2010 is time barred.” SR 243. The jury was directed to not consider evidence of the 2010 payments, and the parties redacted the 2010 payments from the excess payments list. SR 493-494; 537.

Joseph’s theory of defense was the same one he has asserted from the beginning of the case: he did not deny receiving more than \$216,000 in payroll and distribution checks from Slim’s, but he asserted that Efrat received envelopes of cash in an equivalent amount. SR 118-119; 145. Joseph relied entirely on his own testimony because he had no written record of any of the cash payments allegedly given to Efrat. SR 132. He was not a great witness, at one point being admonished by the judge “Don’t posture. Just talk.” SR 397; *see also* SR 391; 401-403; 406 (examples of Joseph’s testy answers). Joseph also put forth the argument that Efrat’s claim—that she received cash payments for some years but stopped receiving them after 2010—was not plausible. SR 119-120; 456.

² At the close of evidence, Efrat and Slim’s made a motion to conform their pleadings to the proof, which was granted. SR 430.

The jury returned a verdict in Slim’s favor; the trial court granted Efrat’s claims for removal and attorneys’ fees.

The judge directed the jury to make a finding of fact regarding unjust enrichment by deciding whether to believe Efrat’s evidence regarding the excess checks or Joseph’s theory that Efrat received the same amount in cash payments. SR 494-495. During deliberations, the jury asked to see the distribution checks, corporate tax returns, and payroll checks admitted into evidence. SR 510. The trial court explained that the distribution checks and payroll checks were not entered into evidence, only the excess payments list was entered as Exhibit 1; the jury asked to see the list. *Id.*

Within three hours the jury reached a unanimous verdict. SR 514. The jury answered yes to the question of whether Joseph was unjustly enriched. SR 534. In answer to the question of “what amount was the defendant unjustly enriched for excess salary and distributions,” the jury entered the amount of \$141,099. SR 535. To the side of the total amount, the foreperson jotted the breakdown, which was copied line for line from the excess payments list submitted as Exhibit 1 (minus the amount for 2010, which was redacted). *Id.*³

Efrat submitted a post-trial memorandum in which she urged the trial court to grant her claim to remove Joseph as an officer of Slim’s given his misconduct in

³ The jury rejected Efrat and Slim’s claim with respect to the credit card payments. SR 536.

paying himself excess amounts in salary and distribution without ever telling Efrat. SR 576-577. She also urged the trial court to grant her request for attorneys' fees, arguing the legal work expended on Slim's behalf was necessary to achieve the return of the excess amounts Joseph paid to himself from Slim's profits. Efrat submitted detailed billing records to justify the amount requested. SR 585-657.

In a post-trial order incorporated into the judgment, the trial court—through the same judge that handled the entire case from its commencement (*see* SR 589-590)—held that Efrat proved that removal of Joseph as an officer of Slim's was an appropriate remedy under the circumstances. SR 11. The trial court further held that Efrat was entitled to reasonable attorneys' fees, and it granted the amount Efrat requested (minus a certain amount expended for two motions that it deemed unnecessary or improper). SR 11-12.

ARGUMENT

Efrat and Slim's request this Court to affirm the judgment and jury verdict as set forth herein. A jury verdict is entitled to great deference, and it should not be lightly cast aside. Joseph presents no compelling reason to overturn the verdict here. The unjust enrichment claim was pleaded in the alternative and not identical to the pleaded breach of fiduciary duty and conversion claims. Given the nature of Slim's claim, the trial court was correct to apply a six-year statute of limitations and decline to dismiss the claim as untimely or on the merits.

Further, the jury's verdict—which it delivered with speed and unanimity—is consistent with the evidence, in particular the excess payments list that Efrat introduced as evidence. The jury was charged with deciding who to believe, and they chose to believe Efrat. This Court should not replace the jury's conclusion with Joseph's—or its own—view of the competing testimony.

This Court should also affirm the post-trial order. The jury's finding that Joseph was unjustly enriched by paying himself excess amounts in salary and distributions—without ever disclosing it to Efrat to whom he owed a fiduciary duty—is sufficient cause for his removal as an officer of Slim's. There is nothing in the law that required the trial court to weigh Joseph's good conduct against his demonstrated wrongdoing. There is also nothing in the law that required the trial judge to eliminate bits and pieces of the total amounts of attorneys' fees incurred

by Efrat in achieving a positive result for the corporation, i.e., the return of \$141,099 of profits to Slim's. There is nothing in the record so show an abuse of discretion.

In their cross-appeal, Efrat and Slim's request this Court to reverse the trial court's ruling regarding the evidence from 2010. The trial court wrongly limited the damages to the excess payments made in 2011, 2012, and 2013 because the fiduciary tolling rule applies—and Slim's unjust enrichment claim was not ever triggered. Accordingly, this Court should modify the jury's verdict and judgment to include the amount set forth in the evidence of Joseph's \$75,200 in excess payments to himself in 2010.

I. The trial court correctly declined to dismiss Slim's unjust enrichment claim because it was meritorious and timely filed.

Efrat and Slim's pleaded a claim for unjust enrichment based on the allegations that (1) Joseph was enriched, (2) at Slim's expense, and (3) that it is against equity and good conscience to permit Joseph to retain what Slim's sought to recover, i.e., the amount Joseph paid to himself in excess salary and distributions. *See Mannino v. Passalacqua*, 172 A.D.3d 1190, 1193 (2nd Dept 2019) (stating the elements required for an unjust enrichment claim). Joseph moved to summarily dismiss the unjust enrichment claim on the argument that it lacked merit and was barred by a three-year statute of limitations. The trial court

rejected Joseph’s argument and allowed Efrat and Slim’s to present the unjust enrichment claim to a jury, who rendered a verdict in Slim’s favor. Joseph now asserts the unjust enrichment claim should have been dismissed on summary judgment. However, the trial court’s denial of summary judgment on the unjust enrichment claim was correct for the following reasons:

A. Slim’s unjust enrichment claim was based on different facts and pleaded in the alternative.

The “theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.” *Mannino, supra*, 172 A.D.3d at 1193. The central question in such a claim is “whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Id.* In this case, while Efrat and Slim’s pleaded facts in support of claims for fraud, breach of fiduciary duty, and conversion, the central allegation in the unjust enrichment claim was that “it is against equity and good conscience” to permit Joseph to retain the excess salary and distribution payments that he took from Slim’s. The particular allegation about the unfairness of Joseph’s payments to himself is what sets the unjust enrichment claim apart from the others. In addition, a claim for breach of fiduciary duty can involve—as Efrat pleaded in the supplemental complaint—a demand for punitive damages, which is not part of the claim for unjust enrichment. *See Stein v. McDowell*, 74

A.D.3d 1323, 1326 (2nd Dept 2010) (noting that punitive damages are recoverable for breach of fiduciary duty in some circumstances).

The fact that the other asserted claims required more allegations—such as Joseph’s intentional concealment of Slim’s financial records—to sustain them does not erase the fact that the unjust enrichment claim stands on its own as a distinct claim. The crux of an unjust enrichment claim is that it would be unfair to allow Joseph to retain the payments, and that is exactly what Efrat and Slim’s alleged and proved at trial.

Moreover, it has long been the law that “where a plaintiff has several remedies available to him, arising from the same transaction or incident, he may elect the form of remedy to pursue.” *King v. King*, 13 A.D.2d 437, 440 (2nd Dept 1961) (explaining “[a] single act or default causing a single injury may constitute a breach of different duties and may give rise to causes of action based upon different grounds of liability and subject to different statutory periods of limitation”); *see also Carr v. Lipshie*, 8 A.D.2d 330, 331 (1st Dept 1959) (holding “when the remedy of an action for breach of contract or warranty coexists with an action grounded in tort, a plaintiff may exercise his option”). Pleading alternative demands for relief is particularly important when a plaintiff has both tort and contract theories available to it, which would permit a more favorable statute of limitations period. *Baratta v. Kozlowski*, 94 A.D.2d 454, 460-461 (2nd Dept 1983).

Though the facts underlying a tort and contract claim might be similar, certain “policy considerations are involved in actions for damages to property or pecuniary interests” that warrant granting a plaintiff the right to elect his form of relief. *Id.*; see also *Dentists’ Supply Co. v. Cornelius*, 281 A.D. 306, 308 (1st Dept 1953) (permitting a plaintiff to waive his conversion claim and plead unjust enrichment instead in order to avail himself of the six-year statute of limitations).

In this case, Efrat and Slim’s pleaded their claims for unjust enrichment, breach of fiduciary duty, and conversion in the alternative. The breach of fiduciary duty and conversion claims were dismissed as barred by the statute of limitations. Given the *prima facie* evidence that it would be unfair to permit Joseph to retain the excess payments at Slim’s expense, the trial court was correct to permit the unjust enrichment claim to proceed because the other remedies were no longer available to Slim’s.

The trial court’s decision was also in accordance with the law. There are multiple cases in which the trial court dismisses a conversion or other tort claim yet declines to dismiss an unjust enrichment claim arising from the same facts, which decisions have been upheld by the Appellate Division. See, e.g., *Mannino*, *supra*, 172 A.D.3d at 1193 (dismissing a conversion claim as barred by the statute of limitations but declining to dismiss an unjust enrichment claim); *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dept 2013) (affirming dismissal of conversion

claim as time-barred but reversing dismissal of unjust enrichment claim). In other cases, including a few of those cited by Joseph in his brief, the courts permit both tort and unjust enrichment claims to survive motions to dismiss, even though they are based on the same allegations. *See, e.g., Berkovits v. Berkovits*, 190 A.D.3d 911, 917 (2nd Dept 2021) (affirming denial of motion to dismiss both conversion and unjust enrichment claims); *Greenberg v. Wiesel*, 186 A.D.3d 1336, 1337-1338 (2nd Dept 2020) (reversing dismissal of both the breach of fiduciary duty and unjust enrichment claims).

Given the foregoing case law, the trial court was correct when it declined to dismiss the unjust enrichment claim. Joseph's argument that unjust enrichment is duplicative of Efrat and Slim's other claims is belied by the facts alleged by them, not least the unfairness caused by Joseph's conduct. And although other remedies were available to Efrat and Slim's, they were entitled to plead their requests for relief in the alternative, and to avail themselves of the relief sought in the unjust enrichment claim after the other claims were dismissed.

B. Slim’s unjust enrichment claim is subject to a six-year statute of limitations because it derives from the fiduciary agreement between Efrat and Joseph.

Efrat and Slim’s asserted the claim for unjust enrichment in 2017 based on Joseph’s excess payments to himself occurring in 2011, 2012, 2013. During trial, the trial court determined that the six-year statute of limitations applied because the claim was essentially one seeking to enforce a fiduciary agreement between Efrat and Joseph. SR 234.⁴ The trial court was correct, and Joseph’s argument that the unjust enrichment claim is barred by the three-year statute of limitations should be rejected.

It is well settled that the six-year statute of limitations applies where the allegations underlying an unjust enrichment claim arise from a defendant’s breach of an agreement with a person or entity to whom he owes a fiduciary duty. *See Loengard v. Santa Fe Industries, Inc.*, 70 N.Y.2d 262, 266 (1987) (holding a claim based on a breach of a fiduciary obligation the defendant owed to plaintiff is equitable in nature and subject to a six-year statute of limitations); *Ripley v. International Railways of Central America*, 8 A.D.2d 310, 322 (1st Dept 1959) (holding plaintiff’s claim was equitable in nature and subject to the six-year statute

⁴ There is no dispute that Joseph was in a fiduciary relationship with both Efrat and Slim’s. *See* Point V below.

of limitations because it was a claim for money had and received by a defendant with whom he stood in a fiduciary relationship).

This Court affirmed the application of the foregoing doctrine in its decision in *Loeuis v. Grushin*, 126 A.D.3d 761, 765 (2nd Dept 2015), which has similar facts to those found here. In *Loeuis*, the plaintiff sought the return of money taken by the defendants, with whom he was in a fiduciary relationship, and he pleaded numerous claims, including one for unjust enrichment. The *Loeuis* court held the unjust enrichment claim sounded in equity, and therefore, the six-year limitations period applied. Joseph cites to this case as standing for the proposition that a fraud based unjust enrichment claim is subject to a six-year statute of limitations. Resp. App. Br. at 17. But Joseph ignored the fact that the *Loeuis* plaintiff's claim derived from a breach of the fiduciary obligation the defendants owed to him.

The other cases cited by Joseph to support his argument that a three-year statute of limitations applies are similarly distinguishable in that they do not involve a claim arising from a fiduciary obligation. *See* Resp. App. Br. at 17-18 (citing to *Ingrami v. Rovner*, 45 A.D.3d 806, 808 (2nd Dept 2020); *Bandler v. DeYonker*, 174 A.D.3d 461, 462 (1st Dept 2019); *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dept 2013)). Here, the reasoning and holding in *Loeuis* apply more than those found in Joseph's cited cases because Joseph paid himself excess salary and distributions in violation of the fiduciary obligation he owed to Efrat

and Slim's. The trial court correctly recognized the fiduciary nature of Slim's unjust enrichment claim and applied the six-year statute of limitations accordingly. This Court should not disturb the trial court's decision or otherwise dismiss Slim's unjust enrichment claim.

II. The jury's verdict is consistent with the evidence and the jury's decision to believe Efrat's testimony over that of Joseph.

The jury's verdict is entitled to great deference given it was largely based on the jury's resolution of Efrat and Joseph's competing testimony about whether Joseph paid Efrat an amount in cash equivalent to the amount he paid himself in salary and distribution checks in 2011, 2012, and 2013.

It is beyond cavil that questions regarding the credibility of witnesses and the resolution of their conflicting testimony are ones for the jury to determine. *Jurgen v. Linesburgh*, 159 A.D.2d 689, 691 (2nd Dept 1990). This is because the jury is in the unique position of being able to observe the witnesses' demeanor along with other evidence. *Bertelle v. NY City Transit Auth.*, 19 A.D.3d 343 (2nd Dept 2005); *see also Warnke v. Warner-Lambert Co.*, 21 A.D.3d 654, 657 (3rd Dept 2005) ("...we accord due deference to the jury's resolution of the experts' conflicting testimony based upon its opportunity to observe and hear the witnesses and weight their testimony..."); *Teneriello v. Travelers Cos.*, 264 A.D.2d 772, 773

(2nd Dept 1999) (noting “great deference is accorded to the fact-finding function of the jury as it is in the foremost position to assess witness credibility”).

The jury’s role is to choose what portion of the witnesses’ testimony—all, part, or none—to accept and what conclusions to draw from it. *See People v. Price*, 67 A.D.2d 990, 991 (2nd Dept 1979) (noting “it has always been the jury’s province to totally believe [a witnesses’] testimony or totally disbelieve their testimony, or believe it in part and disbelieve it in part”), *app. denied*, 46 N.Y.2d 1083 (1979).

This Court exercises caution in setting aside a jury verdict as against the weight of evidence because:

in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and “unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to a usurpation of the jury’s duty...” (citations omitted)

Nicastro v. Park, 113 A.D.2d 129, 133 (2nd Dept 1985).

An appellate court may not set the verdict aside merely because it would have reached a different result. *Carroll v. Wolfe*, 35 A.D.2d 842 (2nd Dept 1970); *Serra v. Bonofiglio*, 26 A.D.2d 955, 956 (2nd Dept 1966). A verdict is against the

weight of the evidence only where the jury could not have reached it on any fair interpretation of the evidence. *Barnett v. Schwartz*, 47 A.D.3d 197, 205 (2nd Dept 2007) (declining to set aside the verdict because a fair interpretation of the evidence supported the jury’s conclusion).

The test to be employed is not whether the jury erred in weighing the evidence presented, but rather, whether any viable evidence exists to support the verdict. *Lachanski v. Craig*, 141 A.D.2d 995, 996 (3rd Dept 1988); *Kozlowski v. City of Amsterdam*, 111 A.D.2d 476, 477 (3rd Dept 1985). If there is a valid line of reasoning, and permissible inferences, that could lead a rational person to the conclusion reached by the jury, the jury’s verdict should not be set aside. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978); *Patti v. Fenimore*, 181 A.D.2d 869 (2nd Dept 1992). Where the jury’s verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view. *Land v. City of New York*, 177 A.D.2d 477 (2nd Dept 1991). In other words, if the jury’s verdict is not “palpably wrong,” it should not be set aside. *Bernstein v. Red Apple Supermarkets*, 227 A.D.2d 264, 265 (1st Dept 1996), *app. dismissed*, 89 N.Y.2d 961 (1997).

In considering whether to set aside the verdict, this Court must grant Efrat and Slim’s “the benefit of every favorable inference reasonably drawn from the facts adduced at trial.” *Johnson v. Ingalls*, 95 A.D.3d 1398, 1399 (3rd Dept 2012);

Calabrese v. Ontario County, 58 A.D.2d 1008, 1009 (4th Dept 1977) (to set a verdict aside as against the weight of the evidence, the court must view the proof in the light most favorable to the prevailing party).

In this case, the jury performed their duty—to listen to the evidence and observe the witnesses—and they chose to credit Efrat’s testimony that she did not receive cash payments equivalent to what Joseph paid himself in payroll and distribution checks while they rejected Joseph’s testimony that he did make the cash payments to Efrat. In the verdict, the jury expressly credited the exact amounts set forth in the list of payments Efrat created as a Slim’s business record: the jury specifically asked to see the excess payments list introduced as Exhibit 1 during its deliberations and included a notation on the verdict sheet indicating the total amount awarded to Slim’s was the amount Efrat calculated that Joseph took. Both of the jury’s findings—that Efrat was more believable than Joseph and that he was unjustly enriched in the exact amount Efrat claimed—are rational conclusions and well within the bounds of a fair interpretation of the evidence.

On appeal, Joseph asserts the jury should not have answered the question of whether to believe Efrat or Joseph’s testimony “by deciding who told the truth on the witness stand,” but instead by “examining the behavior of each at a time when neither was preparing a self-interested story for litigation.” Resp. App. Br. at 19. Joseph further argues that Efrat’s “credibility is questionable” and her story

regarding Joseph paying himself excess payroll and distribution checks during 2011, 2012, and 2013 “makes no sense” because, *inter alia*, the financial records of Slim’s “would quickly reveal the misconduct” and Joseph had no reason to pay Efrat equivalent amounts to him 2007-2009 and again in 2014-2016 but not in 2011, 2012, and 2013. *Id.* at 20-22.

Joseph’s argument is unsupported by any caselaw and conflicts with every principle set forth above regarding the standard for assessing whether a jury verdict is against the weight of the evidence. The question of Efrat’s credibility was squarely within the jury’s province, as the parties’ attorneys and the trial court recognized and repeated to the jury. Moreover, in his opening and closing summations, Joseph raised the same arguments about Efrat’s testimony making no sense. Yet the jury chose to believe Efrat’s explanations regarding Joseph’s allegations: she explained that she did not look at Slim’s financial records until 2017 (after she was restored access following Joseph locking her out) because she trusted Joseph to run Slim’s properly and not take excess payments without telling her. Joseph’s repeated assertions that Efrat’s testimony “makes no sense” misses the crucial point, because the jury was specifically asked to determine whether Efrat’s testimony made sense. The jury decided Efrat’s testimony *did* make sense after hearing all the testimony—including that about the parties’ behavior “at a time when neither was preparing a self-interested story for litigation.” *See* Resp.

App. Br. at 19. The jury was free to reach any decision regarding Efrat and Joseph's honesty and motivations. There is nothing in the trial transcript that supports Joseph's argument that his version of events was more plausible as a matter of law—especially because it is clear from the transcript that Joseph performed poorly on the witness stand, was asked to stop posturing, and was testy with Efrat's attorney.

Joseph's argument falls woefully short of the standard applied to determine whether a verdict is against the weight of the evidence. This Court should therefore decline Joseph's invitation to invade the province of the jury and should affirm the jury's verdict and judgment as fully supported by the evidence.

III. The decision to remove Joseph as an officer of Slim's was a provident exercise of the trial court's discretion given the record of Joseph's wrongdoing.

Efrat asserted a claim under [BCL § 716\(c\)](#) “to procure a judgment removing an officer for cause.” Under the law, a plaintiff is only required to show that she is a holder of “ten percent of the votes of the outstanding shares” and that “cause” exists for removal. There was never any dispute that Efrat is eligible to assert the claim because she holds 50% of Slim's shares. In her post-trial memorandum (SR 576-577), Efrat demonstrated there was also good cause to remove Joseph as an officer: as the jury found in the verdict, Joseph unfairly paid himself excess amounts from Slim's profits without telling Efrat. The record also demonstrates

that Joseph engaged in misconduct when he locked Efrat out of the store back in 2016, forcing Efrat to seek an injunction granting her access to the books and records. As Efrat described at trial, Joseph also threatened her when he realized that she discovered he had taken Slim's profits through the improper payments.

Regardless of whether Joseph's conduct met the legal standard to prove he committed fraud or concealed his wrongdoing, there is no question that Joseph misbehaved in way that was disloyal and caused harm to both Efrat and Slim's. Given Joseph's conduct, and the fact that he threatened Efrat, it is not tenable for them to continue working together as corporate officers of Slim's. The trial court agreed when it held "the jury verdict finding that [Joseph] unjustly enriched himself constitutes cause for removal" and granted Efrat's request to permanently remove Joseph as an officer. SR 11.

On appeal, Joseph agrees that Efrat's removal claim was left to the trial court's discretion. Resp. App. Br. at 25-26. Joseph argues the trial court abused its discretion in ordering him permanently removed as an officer because (1) it "failed to weigh the effect on Joseph measured against the potential harm to Slim's should Joseph remain an officer" and (2) the evidence shows the remedy was inappropriate given Joseph "by and large" acted in Slim's best interests while he was manager. Resp. App. Br. at 23. However, Joseph's argument is not supported by either the record or the law.

Contrary to what Joseph asserts, the record shows the trial court *did* weigh the effect on Joseph against the harm caused to Slim's. SR 11. In its decision, the trial court considered the reasoning found in *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 71 (1984), regarding the important interests held uniquely by partners in closely held corporations. The trial court relied on that reasoning to consider Joseph's interest in being a co-owner of Slim's and the corresponding negative effect on him if he is removed as an officer. The trial court noted removal "will severely impact the value of Joseph's investment" but also noted "it was [Joseph's] own actions that have resulted in this situation." SR 11. This "situation" was the years-long litigation that started with Efrat demanding to be restored to access to Slim's and culminated in a five-day trial where the jury found Joseph unfairly paid himself excess salary and distributions.

Moreover, there is nothing in BCL § 716(c) or case law that requires the trial court to consider the benefit to the corporation when removing an officer or the prior good conduct of the corporate officer; there is nothing requiring the trial court to limit removal to a temporary period; and there is nothing that requires a plaintiff to provide evidence that a defendant will continue to harm the corporation if he continues as an officer. Resp. App. Br. at 26-28. The statute merely provides the words "for cause" and otherwise leaves it to a trial court's discretion. After shepherding the case from start to finish, the trial court, in its discretion, decided

that Joseph's removal was "an appropriate remedy under the circumstances." SR 11. Joseph provides no persuasive reason why the decision amounts to an abuse of discretion.

Joseph is correct that there is little case law interpreting the statute. However, Efrat and Slim's have uncovered at least one case where a corporate defendant's use of a corporation's profits to benefit only himself was sufficient to state a *prima facie* claim for removal under BCL § 716(c). See *Colucci v. Canastra*, 130 A.D.3d 1268, 1270 (3rd Dept 2015). In *Colucci*, the defendant used the corporation's profits to pay for clubhouse operations that benefitted him as a shareholder of another company. There was a question of fact regarding whether the defendant's use of the profits was permitted under an agreement, so the plaintiff was denied summary judgment on the removal claim. However, the main point is that using corporate profits to enrich oneself is sufficient to sustain a claim for removal. Cf *Benedict v. Whitman Breed Abbott & Morgan*, 110 A.D.3d 935, 938 (2nd Dept 2013) (holding there was no basis to remove defendant as an officer under BCL § 716 where plaintiff failed to prove any wrongdoing).

Efrat's removal claim is similar to the one pleaded in *Colucci*, but even more compelling: Efrat not only stated facts alleging Joseph's wrongdoing, she also proved them at trial. Efrat had no obligation to prove that Joseph's continuation as an officer would cause further harm (and it is reasonable for her to doubt he would

always conduct himself honestly given his past behavior). Under these circumstances, the trial court providently exercised its discretion to grant Efrat's removal claim. The jury's verdict, along with the other facts established in the record—such as Joseph's unlawfully locking Efrat out of the store in December 2016—is sufficient to affirm the trial court's discretionary decision to permanently remove Joseph as an officer of Slim's. *See, e.g., McGinnis v. Cowhey*, 24 A.D.3d 629 (2nd Dept 2005) (affirming the trial court's equitable determination where it was supported by the record).

Efrat submits that the jury's verdict is sufficient to warrant removal under [BCL § 716\(c\)](#) even if this Court grants Joseph's request to dismiss the unjust enrichment claim as lacking in merit or time barred. Throughout his brief Joseph makes the argument, in footnotes, that “dismissal of the cause of action” or “reversal of the verdict” should result a dismissal of the action and vacatur of the order removing Joseph as an officer. Resp. App. Br. at fn 8-9, 12. Efrat requests this Court to reject Joseph's conclusory argument because the jury's finding regarding Joseph's conduct establishes his wrongdoing—which fact cannot be erased due to a failure of the unjust enrichment claim on a technicality.

IV. The trial court's grant of reasonable attorneys' fees in the amount requested by Efrat was a provident exercise of discretion because she achieved a benefit for Slim's.

In Efrat's post-trial memorandum, she moved under [BCL § 626\(e\)](#) for an award of reasonable attorneys' fees (and disbursements) incurred by her in bringing and prosecuting this case on behalf of Slim's. SR 578-581. Efrat submitted detailed billing records from her attorney (SR 585-657), along with the argument that Efrat was entitled to an award of attorneys' fees because she achieved an award in favor of Slim's. Efrat also argued that she was entitled to all the fees she requested because the allegations supporting her and Slim's various causes of action, including those that had been dismissed, were intricately intertwined such that it was not reasonable to limit the fee award to that incurred in prosecuting the unjust enrichment claim. SR 578-579.

The trial court agreed and held Efrat was entitled to attorneys' fees because "the action resulted in a judgment in favor of the corporation." SR 12. After reviewing Efrat's attorneys' billing records, the trial court determined she was entitled to the amount she requested minus the amounts billed for two motions that it deemed unnecessary or improper. SR 12 (awarding \$126,845 in fees and \$2,955 in disbursements). Notably, the amount awarded did not exceed the amount Efrat recovered on behalf of Slim's.

On appeal, Joseph requests this Court to reduce the fee award by some unspecified amount because Efrat's request did not demonstrate "any connection between the paperwork and the needs of the litigation." Joseph further argues that the fee award is disproportionate to the benefit inured to Slim's, and that Efrat should not be permitted to recover for the amounts billed to pursue the claims that were dismissed. Resp. App. Br. 29-32. This Court should reject Joseph's request for the following reasons:

First, BLC § 626(e) provides that "if the action on behalf of a corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs...as the result of a judgment...the court may award the plaintiff or plaintiffs...reasonable expenses, including reasonable attorney's fees...." The only showing required to be entitled to an award of reasonable attorneys' fees is that a plaintiff achieved a judgment in favor of the corporation. There is nothing in the statute that requires the award of attorneys' fees to be proportionate to the benefit achieved. Indeed, an award of attorneys' fees can be appropriate even where the exact amount of a benefit to the corporation is still unknown. *See, e.g., Seinfeld v. Robinson*, 246 A.D.2d 291, 297 (1st Dept 1998) ("It is irrelevant to plaintiff's entitlement to attorney's fees that...the amount of the benefit conferred may not be precisely ascertained"). In this case, Efrat obtained a judgment forcing Joseph to return more than \$140,000 of Slim's profits that he paid to himself. It is impossible

to ascertain the precise benefit Slim's will achieve having use of those additional profits. However, the fact that Efrat obtained the judgment on Slim's behalf is enough to warrant an award of attorneys' fees under the statute.

Next, the basis for an award of attorneys' fees incurred in a derivative action "is to reimburse the plaintiff for expenses incurred on the corporation's behalf." *Glenn v. Hoteltron Systems, Inc.*, 74 N.Y.2d 386, 393 (1989). Though Efrat was not successful on each of the claims she asserted on Slim's behalf, she incurred significant attorneys' fees in her effort to prove the facts that ran through the center of all the claims: that Joseph took more than \$216,000 of Slim's profits for his own benefit while failing to disclose it to her, and she did not receive an equivalent amount in cash. Though Joseph suggests it took very little effort to prove the facts underlying the unjust enrichment claim, the record shows otherwise: all the discovery, motion practice, and five-day trial involved an analysis of the evidence supporting Efrat's claim that Joseph took excess salary and distributions in 2010, 2011, 2012, and 2013; it also involved refuting Joseph's defense theory that he gave Efrat an equivalent amount in cash in envelopes during those years, which defense Joseph maintained adamantly despite never producing or presenting any credible evidence to support it. Efrat's prosecution efforts also included the \$75,200 in payments from 2010, which she discovered in her review of Slim's records, regardless of the fact the trial court ultimately excluded the evidence as

barred by the statute of limitations (wrongly in Efrat and Slim's view, *see* Point V below).

Joseph's argument that Efrat should not be compensated for the fees incurred in her attempt to prove Joseph wrongly diverted Slim's assets to pay his personal credit card bills is similarly baseless. The evidence showing Joseph's improper credit card payments was part-and-parcel of the evidence showing his improper taking of excess salary and distributions. It is impossible to unpick which portion of an hour Efrat's attorney spent looking at Joseph's credit card statements as opposed to looking at the cancelled checks Joseph wrote to himself; it is equally impossible to pick apart the portions spent researching and analyzing the law supporting the claims, especially because they were based on similar (though not identical) facts. Indeed, Joseph does not attempt to do so: he merely asks this Court to reduce the attorneys' fee award by some unspecified amount.

The final reason this Court should reject Joseph's request is because it is well settled that "the issue of whether and to what extent to award attorneys' fees [under BCL § 626(e)] 'is an issue addressed to the discretion of the Court in the exercise of its equitable powers.'" *Seinfeld, supra*, 246 A.D.2d at 300; *see also Napoli v. Carrano*, 109 A.D.2d 828, 829 (2nd Dept 1985) (declining to overturn the trial court's exercise of discretion awarding attorneys' fees). The same trial court judge handled this case from commencement through the trial. He was privy to all

the work done by Efrat's attorney on behalf of Slim's. He also reviewed Efrat's detailed billing submissions. Considering the record of Efrat's attorney's work, and the circumstances of the entire case, the trial court exercised its discretion to award what Efrat requested (minus an amount for two motions). The trial court's decision is supported by the record, and Joseph presents nothing to show that it was an abuse of discretion.

V. The trial court erred by excluding evidence of Joseph's 2010 payments to himself because the statute of limitations for unjust enrichment was not triggered while Joseph was in a fiduciary relationship with Slim's.

The trial court prevented the jury from examining the evidence of Joseph's 2010 excess payments to himself based on its ruling that Slim's unjust enrichment claim from 2010 was barred by the six-year statute of limitations. However, the trial court erred by failing to apply the fiduciary tolling rule to the facts presented.⁵

It is beyond cavil that a fiduciary duty exists between the shareholders of a closely held corporation. *See Stein v. McDowell*, 74 A.D.3d 1323, 1326 (2nd Dept 2010) (holding a 50% shareholder owed a fiduciary duty to the other 50% shareholder); *Cassata v. Brewster-Allen-Wichert, Inc.*, 248 A.D.2d 710 (2nd Dept 1998) (holding "the shareholders of a close corporation owe each other a duty to

⁵ Efrat and Slim's assert this argument in their appeal from the summary judgment order, in which they seek reinstatement of their breach of fiduciary duty and conversion claims. App. Br. at 14-17. They assert it here in support of their request to modify the judgment to include the payment amounts from 2010.

act in good faith”). A shareholder in a closely held company stands in a fiduciary relationship with the corporation as well. *See, e.g., Jones v. Voskresenskaya*, 125 A.D.3d 532, 533 (1st Dept 2015) (noting “the members of an LLC may stand in a fiduciary relationship to each other and the LLC”).

As this Court recently reiterated, the statute of limitations for a cause of action against a fiduciary “does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.” *Franklin v. Haffka*, 140 A.D.3d 922, 924 (2nd Dept 2016). The doctrine is known as the “fiduciary tolling rule” and it applies to all claims brought against a fiduciary, regardless of whether the duty arises from a corporation, a joint venture, or a family relationship.

For example, in *Westchester Religious Institute v. Kamerman*, 262 A.D.2d 131 (1st Dept 1999), a non-profit corporation brought a breach of fiduciary claim against its former officers based on misconduct occurring more than six years before the filing of the complaint. The former officers had left their positions less than six years before the complaint was filed. Noting the former officers could not “openly repudiate” their fiduciary obligations prior to leaving their positions, the Appellate Division held the six-year statutory period did not begin to run until they no longer worked for the corporation. *Id.* at 132. The “fiduciary tolling rule”

therefore applied, and the plaintiff was permitted to base its claims on the misconduct that occurred more than six years before the complaint was filed. *Id.*

A similar result has been reached in cases involving myriad types of fiduciary relationships. See *Franklin, supra*, 140 A.D.3d at 924 (applying the rule to toll a fiduciary-based claim by a plaintiff against two defendants with whom he purchased property); *Loeuis v. Grushin, supra*, 126 A.D.3d at 764 (applying the rule to toll claim by one family member against other family members who were in a fiduciary relationship); *Frame v. Maynard*, 83 A.D.3d 599, 602 (1st Dept 2011) (applying the rule to a breach of fiduciary claim brought by limited partners against a general partner in a joint venture).

In this case there is no dispute that Joseph owed a fiduciary duty to Slim's during the time he paid himself excess amounts in salary and distributions. Indeed, Joseph conceded the point in the trial court. See R 419 (“That a shareholder, officer or director of a close corporation is subject to a fiduciary duty to the corporation is an unremarkable proposition and one which [Joseph] has not disputed”). There is also no dispute that Joseph did not ever repudiate or terminate his fiduciary position (prior to the trial court terminating it by granting Efrat's removal claim). Given these undisputed facts, in accordance with the case law discussed above, the “fiduciary tolling rule” applies to Slim's claim for unjust enrichment against Joseph; the statute of limitations was never triggered; the trial court wrongly

concluded that Slim's 2010 unjust enrichment claim was time-barred, and it wrongly excluded the evidence of Joseph's 2010 excess payments.

As explained previously, the jury returned a verdict for a total amount—\$141,099—that precisely tracked the amount of Efrat documented for 2011, 2012, and 2013 in the excess payments list she created as a business record for Slim's. It is reasonable to conclude that had the jury been permitted to examine the evidence concerning the 2010 payments, it would have included the 2010 amount—\$75,200, which is a sum certain amount that Joseph has not disputed—in its verdict. Accordingly, Efrat and Slim's request this Court to modify the verdict to include the 2010 payments for a total of \$216,299 as the amount by which Joseph was unjustly enriched.

CONCLUSION

The jury returned a verdict finding that Joseph was unjustly enriched, at the expense of Slim's, in the amount of the excess salary and distribution payments he paid to himself in 2011, 2012, and 2013. The jury chose to disbelieve Joseph's theory that he paid Efrat an equivalent amount in cash. The verdict is entitled to great deference. This Court should decline to set it aside for the reasons put forth by Joseph, which are insufficient under the law and the facts.

The jury and the trial court heard the same evidence at the same time, and the trial court reached the same decision: that Joseph behaved improperly. The trial

court providently exercised its discretion in removing Joseph as an officer of Slim's and awarding Efrat her reasonable attorneys' fees. There is nothing in the record that supports a finding of abuse. In addition, the evidence for Joseph's 2010 excess payments to himself in the amount of \$75,200 was wrongly excluded as barred by the six-year statute of limitations because the trial court erred in failing to apply the fiduciary tolling rule to the facts presented.

Accordingly, Efrat and Slim's respectfully request this Court to enter an order affirming the judgment and post-trial order for the reasons set forth herein, and modifying the verdict and judgment amounts to include the excess payments of \$75,200 that Joseph paid to himself in 2010.

Dated: Jericho, New York
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Respectfully submitted,

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