EFiled: Aug 14 2012 12:31PM EDT
Transaction ID 45882995
Case No. 3332-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERRY C. GOULD, SR., JERRY C. GOULD, JR., as Members of and Derivatively on Behalf of GOULD'S ELECTRIC OF ILLINOIS, LLC, a Delaware Limited Liability Company, Petitioners and Counterclaim Defendants, v. JAY STEPHEN GOULD and ANDREW CLARK GOULD, as Members of GOULD'S ELECTRIC OF ILLINOIS, LLC, Respondents and Counterclaim Plaintiffs, and JAY STEPHEN GOULD and GOULD MOTOR TECHNOLOGIES, INC., a Delaware Corporation, Third Party Plaintiffs, v. GOULD ELECTRIC MOTOR REPAIR, INC., a West Virginia Corporation, Third Party Defendant.	)	C.A. No. 3332-VCP

MEMORANDUM OPINION
Submitted: May 7, 2012
Decided: August 14, 2012

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PARSONS, Vice Chancellor.

This action arises from the dissolution of an electric motor repair company owned by two feuding brothers, Jerry and Jay Gould. As part of the dissolution, the company was auctioned in a trustee sale from which one of the brothers, Jay, emerged as the high bidder.[1] Before the sale closed, however, a dispute arose between the brothers as to what Jay was to receive from the sale. In particular, Jerry, who owns another motor repair shop that had a working relationship with the company, asserted that many of the motors and some of the equipment used in the company's business actually were owned by Jerry's business and, therefore, were required to be returned before closing. Jay contested Jerry's allegations in that regard and refused to close on the transaction until he was promised use of at least some of the motors for a limited period of time after closing.

To facilitate a timely closing on the sale, the trustee worked out a deal with Jay that accommodated his demands to keep the motors temporarily. After being informed about the deal between the trustee and Jay, however, Jerry took matters into his own hands and forcibly removed the motors against the trustee's orders. Moreover, rather than seek relief from the agreement between the trustee and Jay in this Court, Jerry filed a new action for preliminary injunctive and other relief in a state court in Illinois. In response, Jay brought this action asserting that Jerry's retrieval of the motors amounted to a conversion of Jay's interest in the motors pursuant to the agreement he had entered into

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[1] As noted in previous opinions in this matter, first names are used for clarity and without implying familiarity or intending disrespect.

with the trustee. Jay also asserted claims for breach of fiduciary duty, conspiracy, and aiding and abetting relating to Jerry's actions.

This Memorandum Opinion represents the Court's post-trial findings of fact and conclusions of law in this matter. Having carefully reviewed the full record and the parties' extensive post-trial briefs and oral argument, I find that the counterclaim plaintiffs have failed to prove their conversion and conspiracy claims and are barred from bringing claims for breach of fiduciary duty and aiding and abetting. As a result, I deny all of the counterclaim plaintiffs' requested relief, with two exceptions. First, I grant counterclaim plaintiffs' claim to recoup their reasonable costs in hiring private security guards to prevent Jerry's counterclaim defendants from removing certain of the disputed motors that gave rise to this action in contravention of the trustee's directives and the orders of this Court. Second, I grant the counterclaim plaintiffs' request for an injunction precluding the counterclaim defendants from continuing to prosecute the action they brought in Illinois and requiring them to bring any remaining claims from that action relating to the ownership of disputed motors or equipment before this Court.

I. BACKGROUND

A. The Parties

Respondents and Counterclaim Plaintiffs, Jay S. Gould ("Jay") and Andrew C. Gould ("Andrew"), are members of Gould's Electric of Illinois, LLC ("GEI" or the "Company"), as well as the owners of Third Party Plaintiff, Gould Motor Technologies, Inc. ("GMT"), a Delaware corporation. GEI is a Delaware limited liability company

engaged in the business of rebuilding electric motors used in the underground mining industry. Jay and Andrew formed GMT in 2009 to acquire GEI.

Petitioners and Counterclaim Defendants, Jerry C. Gould, Sr. ("Jerry") and Jerry C. Gould, Jr. ("JC"), are also members of GEI as well as owners of Third Party Defendant, Gould Electric Motor Repair, Inc. ("GEMR"). Jerry and Jay are brothers and JC and Andrew are their sons, respectively.[2] GEMR is a West Virginia corporation and, similar to GEI, its business relates to rebuilding electric motors used in underground mining.

B. FACTS

1. Corporate background

Jay and Jerry Gould formed GEMR in 1976 to serve mining operations in West Virginia. As the business grew over the years, GEMR expanded its operations into southern Illinois and western Kentucky. Because shipping motors from GEMR's shop in West Virginia to mines in Illinois and Kentucky was inefficient, Jerry and Jay formed GEI in 2004 to service mines in those regions. After the formation of GEI, Jerry exclusively managed GEMR and Jay managed GEI.[3]

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[2] For brevity and simplicity, I refer to Counterclaim Plaintiffs and Third Party Plaintiffs, collectively, as "Plaintiffs" and to Counterclaim Defendants as "Defendants." Moreover, because the interests of Jay and Andrew, on the one hand, and Jerry and JC, on the other, are effectively the same, I refer to these parties as "Jay" and "Jerry," respectively, except where the distinction is relevant.

[3] Although the brothers never entered into a written operating agreement for GEI, the trustee determined that Jerry and Jay each owned 39% of the Company, and that their sons each owned 11%. JX 47 at 3.

Despite being independent businesses, GEMR and GEI coordinated their operations and inventories. In fact, many of the motor cores GEI used in its business actually were owned by GEMR, but kept at GEI on consignment. Before the sale of GEI, GEMR and GEI operated under an oral consignment agreement (the "Consignment Agreement") between them that provided a way for GEI to compensate GEMR for the use of its motor cores in conjunction with the companies' "trade out exchange program." Under that program, customers could exchange nonworking "replacement cores" for working, refurbished motors for a fee. GEI then would rebuild the replacement cores and keep them in its inventory until they could be resold as refurbished motors to other customers. To compensate GEMR for the use of its motors under this trade out exchange program, the Consignment Agreement provided that where, for example, GEI refurbished a GEMR motor with GEI labor and parts, when GEI sold the refurbished GEMR motor GEI would keep 75% of the exchange price and remit the remaining 25% to GEMR as compensation for use of the GEMR core.

2. The Gould litigation

In April 2006, various disputes arose between Jerry and Jay regarding the ownership of GEI and Jay's handling of GEI's business. On November 7, 2007, Jerry and JC initiated this litigation, individually and derivatively on behalf of GEI, against Jay and Andrew, for a declaration of ownership and other related relief. On January 17, 2008, Jay and Andrew filed an Answer and Counterclaim that sought, among other things, the dissolution of GEI on the ground that it was no longer practicable to carry on

the business of the Company. Thereafter, the parties agreed to dissolve GEI and seek distribution of its assets among its four members.

In October 2008, pursuant to a stipulation of the parties, I appointed Collins J. Seitz, Esq., as a trustee (the "Trustee") to oversee the dissolution of GEI. The order appointing the Trustee (the "October 10 Order"), charged the Trustee with "consider[ing] and actively pursu[ing] an option for such winding up and distribution for the purpose of maximizing value for the members of GEI."[4] By order entered on August 20, 2009 (the "August 20 Order"), I approved the Trustee's dissolution plan, under which the Trustee proposed to sell GEI through an online, closed-bid auction.[5]

The online auction opened on or about September 30, 2009. On November 16, Jay bid $700,000 for GEI. Jerry and JC also bid for the Company, but not until hours before the auction closed, and their bid was substantially less than Jay's.[6] On November 20, the Trustee determined that Jay had won the auction. Shortly thereafter, Jay and the Trustee entered into a Business and Asset Purchase Agreement for GEI (the "Purchase Agreement"). The Purchase Agreement was set to close on December 18, 2009.

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4 JX 1 ¶ 12.

5 JX 6.

6 Trial Transcript ("Tr.") 17 (Trustee); Tr. 156 (JC). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the cited page of the transcript.

3. The Bid Package and Purchase Agreement

The Purchase Agreement provided that Jay would receive all of GEI's "right, title and interest in and to all of the property, assets and rights . . . owned or leased by Seller or used in the Business of every kind, character and description . . . whether carried on the books of Seller or not carried on the books of Seller . . . ."[7] The Bid Package distributed by the Trustee during the auction included a list of all GEI Inventory, including 49 GEI motors, that were being sold with the Company.[8] The GEMR motors on consignment with GEI, however, were not listed in the Bid Package, nor were they provided for under the Purchase Agreement. In fact, Section 5.1(b) of the Purchase Agreement stated that "Seller has advised Buyer that GEI does not have any written agreement with [GEMR], the entity . . . that has traditionally supplied motors and motor cores for repair by GEI" and that "Seller makes no warranty that the relationship between [GEMR] will continue after the Closing Date."[9] Section 5.2 of the Purchase Agreement further provided for a "Special Acknowledgment of Buyer" under which GMT acknowledged that it was its own responsibility to "negotiate with [GEMR] . . . to continue the current relationship with [GEMR]."[10]

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7 JX 10 § 1.1.

8 JX 2 at GEMR-000136.

9 JX 10 § 5.1(b).

10 *Id.* § 5.2.

4. The pre-closing dispute

During the auction, the Trustee sent a letter to the parties on November 12, 2009 stating that, if GEMR did not submit the winning bid, GEMR would be permitted to retrieve its motors from GEI before the closing on December 18, 2009.[11] On December 15, 2009, the Trustee sent a follow-up letter to the parties arranging for a supervised return of GEMR's motors and equipment the day before the closing.[12] In response to the Trustee's letter, Jay filed an objection in this Court on December 17, 2009, seeking to enjoin GEMR from retrieving its motors from GEI. According to Jay, GEI would be irreparably harmed if GEMR was allowed to remove its motors before closing.[13] In a transcript ruling that same day, I denied Jay's request for a preliminary injunction, holding that his application was untimely and barred by laches.[14] I also determined, on independent and alternative grounds, that Jay failed to prove a likelihood of success on the merits of his claimed right to retain possession of the GEMR motors beyond December 17, 2009.[15]

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11 JX 9.

12 JX 12.

13 JX 13 at 3-4.

14 JX 14 at 24.

15 *Id.* at 25. Moreover, to the extent Jay was seeking payment for the value of GEI labor and parts in the GEMR motors, I observed that Jay likely would have to pursue such claims in the form of monetary damages, or through a monetary "true up," as recommended by the Trustee. *Id.*

5. The Addendum

Despite failing to obtain a preliminary injunction, Jay refused to close on the sale unless the Trustee agreed to allow him to retain certain GEMR motors for a limited period of time after the closing. As a result, the Trustee informed Jay's counsel on December 18, 2009, the original closing date, that Jay was in breach of the Purchase Agreement.[16] Nevertheless, instead of terminating the agreement with Jay, the Trustee determined that it remained in the best interests of GEI to close on the transaction within the week to avoid any further disruption to GEI's business.[17] In a December 21, 2009 email, the Trustee proposed to the parties an addendum to the Purchase Agreement that would enable GEMR to receive a "substantial portion of its motors back immediately," while allowing Jay to "retain sufficient shelf inventory of GEMR motors and cores to operate for a period of 60 days after closing."[18] The Trustee also proposed that GEMR be allowed to pick up its Laguna mill and welding positioner at closing and that GEI pay GEMR $10,000 for GEMR's bake oven. The bake oven, Laguna mill, and welding positioner were located at GEI at that time and were being used in its business.

GEMR immediately objected to the proposed addendum and informed the Trustee that it intended to remove its motors from GEI on December 23.[19] The Trustee

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16 JX 15.

17 JX 17 at GEMR-000024.

18 *Id.* at GEMR-000025.

19 *Id.* at GEMR-000023-24.

responded that he "expect[ed] GEMR to agree to an orderly process" instead of imposing an immediate deadline for removal.[20] The Trustee also warned that any actions taken to remove unlawfully the GEMR motors would result in the Trustee bringing the matter before this Court.[21] GEMR then assured the Trustee that it had "no intention of breaching whatever oral contract may exist between GEMR and GEI" and that GEMR would "maintain the status quo" while the Trustee attempted to resolve the GEI situation.[22] GEMR cautioned, however, that if the "discussion [was] still taking place next week, GEMR may well decide to terminate any currently existing oral consignment agreement with GEI."[23]

Following this email exchange, and despite GEMR's express rejection of the proposal in the December 21 email, the Trustee secretly negotiated with Jay an addendum to the Purchase Agreement (the "Addendum") that included many of the same points as the December 21 proposal.[24] Central to the dispute here, the Addendum included a list of 40 GEMR motors in Exhibit D that were deemed "necessary and essential to maintain in

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20 *Id.* at GEMR-000023.

21 *Id.*

22 *Id.* at GEMR-000022.

23 *Id.*

24 The Trustee's representative, Max Walton, requested that GEI employees involved in the drafting process keep the process a secret from GEMR, reminding them that it was "very important [the] project is not leaked to anyone, so please do your best to keep it under wraps." JX 19.

inventory to operate GEI's business for a limited sixty (60) day period post-Closing ('GEMR Inventory Motors') . . . ."[25] As to these motors, the Addendum provided that:

> For a period of sixty (60) days post-Closing, [GMT] shall continue to honor the fee sharing arrangement, as currently exists between GEI and GEMR, for the GEMR Inventory Motors. During the sixty (60) day period post-Closing, upon purchase of any GEMR Inventory Motors or Essential GEMR Motors by a customer, any GEMR replacement core shall be returned to GEMR so that GEMR receives the equivalent make and model core, rather than be retained by [GMT], and in addition, GEMR shall receive its portion of the exchange price under the [Consignment Agreement]. . . . At the end of the sixty day (60) period, all GEMR Inventory Motors and Essential GEMR Motors, remaining in [GMT's] inventory or on consignment with GEI customers, which have not been sold to and in use by [GMT's] customers in the ordinary course of business, shall be immediately available for pick-up by GEMR.[26]

The Trustee and Jay finalized the Addendum on January 4, 2010, and notified Jerry of the agreement. Jerry immediately threatened to seek an injunction to stop the closing from going forward under the terms of the Addendum. In response to Jerry's comments, the Trustee agreed to delay the closing by a day until January 5, 2010, to allow Jerry to file for an injunction.[27]

6. Jerry retrieves the motors

Instead of seeking an injunction, Jerry, JC, and another GEMR employee, Jack Holcomb, drove overnight to the GEI facility in Illinois to retrieve the disputed motors.

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[25] JX 22 (Addendum) § 3.B.

[26] *Id.*

[27] Tr. 28 (Trustee).

On the morning of January 5, Jerry's counsel informed the Trustee that GEMR would not be seeking an injunction and the Trustee and Jay closed on the deal. Around the same time, Jerry, JC, and Holcomb arrived at the GEI facility to retrieve the GEMR motors. At the facility, they encountered Tiffany Martin, a GEI employee, who informed them that she was not authorized by the Trustee to release the motors. Martin then contacted the Trustee, who confirmed that fact and also instructed Jerry not to remove any motors until the next day, when the Trustee would be present to supervise the removal.[28]

Jerry ignored the Trustee's instructions, however, and began removing motors from the GEI facility. Jay contacted the local police to stop Jerry, but the police declined to intervene, describing the dispute as a civil matter. By the end of January 5, 2010, Jerry had loaded two tractor trailers with motors and informed the GEI employees present that Defendants would return the next day to remove any remaining motors belonging to GEMR.

That night, Jay arrived at the GEI facility. To ensure that Jerry could not remove additional motors, Jay hired private security guards to protect the facility. Thus, when Jerry returned the next morning to remove the remaining motors, Jay and his security guards stopped them. Overall, the parties agree that Jerry removed at least 86 motors from GEI on January 5, 2010.

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[28] Tr. 447 (Martin), 31 (Trustee).

7. The Illinois Action

To obtain the remaining GEMR motors and equipment, GEMR filed an action seeking a temporary restraining order ("TRO") against Jay and GMT in a state court in Franklin County, Illinois, on January 7, 2010 (the "Illinois Action").[29] In the Illinois Action, GEMR sought an injunction to prevent GEI from using or selling any of the remaining motors and equipment owned by GEMR that remained at the GEI facility. The Illinois court granted the TRO and scheduled a hearing on GEMR's preliminary injunction application for January 14. Before the hearing, however, the parties reached a settlement whereby Jay permitted GEMR to pick up the remaining motors and equipment on January 28 and February 11. GEMR recovered the rest of its motors on those dates, as well as its Laguna mill, welding positioner, and bake oven.

8. The West Virginia Action

On May 16, 2010, GEMR filed an action in West Virginia to recover amounts owed to it by GEI under the Consignment Agreement (the "West Virginia Action").[30] The Trustee responded to GEMR's complaint by agreeing to "true up" the claims between the companies under the Consignment Agreement. Accordingly, the Trustee, acting for GEI, and GEMR reached a tentative agreement on a settlement under which GEI would pay GEMR $299,000 to "true up" the claims between the companies. The

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29 The Illinois Action is styled, *Gould's Electric Motor Repair, Inc. v. Jay S. Gould and Gould's Electric of Illinois, LLC*, Civil Action No. 10-CH-02.

30 JX 52.

Trustee believed this settlement was fair for GEI in light of the size of GEMR's claims against GEI, the "cost to litigate the West Virginia Litigations, the difficulty in proving GEI's offset claims, and the limited funds remaining from the sale of GEI."[31] The settlement proposal was presented to the Court in the Trustee's Final Report on July 2, 2010.[32]

Jay objected to the proposed settlement and, at a September 23, 2010 hearing on the Final Report, I declined to approve the settlement and ordered the Trustee to continue to litigate the West Virginia Action.[33] The Trustee then filed a claim against GEMR in West Virginia seeking to recover $372,873.10 allegedly owed by GEMR to GEI under the Consignment Agreement. While litigating the West Virginia Action, however, the Trustee determined that GEI actually had less documentation of its claims against GEMR than the Trustee understood during the settlement negotiations. As a result, although GEMR still claimed that GEI owed $426,811.70 under the Consignment Agreement, the Trustee determined that GEI could substantiate only $53,726.85 in offsetting claims against GEMR. GEMR and the Trustee then filed cross motions for summary judgment on these amounts.

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31 Final Report and Recommendation of the Trustee for GEI ("Final Report"), Docket Item ("D.I.") No. 48, at 7 (July 2, 2010). All docket items cited in this Memorandum Opinion refer to the docket in this action, C.A. No. 3332–VCP.

32 *Id.*

33 Sept. 23, 2012 Hr'g Tr. 25.

On October 10, 2011, the Trustee submitted an Interim Order and Status Report in this Court (the "Interim Report") that informed the parties of the reduction in GEI's claim.[34] Jay promptly objected to the Interim Report and attempted to intervene in the West Virginia Action at a hearing on November 18, 2011.[35] The West Virginia court, however, denied Jay's request and entered a final judgment on the cross motions for summary judgment in favor of GEMR in the amount of $373,084.85.[36] Thereafter, I ordered the Trustee not to distribute any funds of GEI until all claims relating to GEI's dissolution had been resolved.[37]

C. Procedural History

On March 22, 2010, Jay sought leave to amend the pleadings in this action to add new claims to the counterclaim and bring a third party complaint on behalf of Jay and GMT. I granted that motion in a Memorandum Opinion issued on January 7, 2011.[38] Jay then filed an Amended Answer and Counterclaim and Third Party Complaint of Jay and GMT (the "Amended Counterclaim") on January 31, 2011. On March 29, 2011, Jerry replied to the Amended Counterclaim. Trial was held on November 24 through 26, 2011.

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34 Pls.' Obj. to the Trustee's Interim Report, D.I. No. 110, Ex. A (Oct. 17, 2011).

35 *Id.*

36 Pls.' Opening Br. Ex. B at 5.

37 Order Implementing Rulings on Trustee's Final Report, D.I. No. 59, ¶ 7 (Nov. 30, 2010).

38 *Gould v. Gould*, 2011 WL 141168 (Del. Ch. Jan. 7, 2011).

D. Parties' Contentions

Through the Amended Counterclaim, Jay has brought claims for conversion, breach of fiduciary duty, aiding and abetting, and conspiracy. According to Jay, Jerry wrongfully converted the motors and equipment he removed from GEI on January 5, 2010, causing GMT to suffer damages because it had to acquire replacement motors on short notice. Of the approximately 86 motors taken, Jay contends that 18 were GEMR Inventory Motors listed under Section 3.B of the Addendum, and 29 were GEMR motors refurbished using GEI labor and parts. Jay also claims that, in addition to the 86 repossessed motors, Jerry took four motors that were wholly owned by GEI.

To avoid customer defections, Jay alleges that Plaintiffs mitigated their damages by obtaining replacements for the disputed motors. In particular, GMT bought a batch of motor cores for $68,500 and replaced 8 of the 18 GEMR Inventory Motors with working motors at a total cost of $111,000. GMT also bought a Laguna mill, welding positioner, and bake oven for $37,300. In total, Jay seeks damages of $283,925 plus pre-judgment interest and attorneys' fees. Jay also argues that, because of Jerry's alleged wrongdoing, GEMR's offset claim against GEI upon which the West Virginia court has entered a judgment, as well as GEMR's claims against Jay in Illinois, should be forfeited under the doctrine of unclean hands.

Jerry disputes all of Jay's contentions, arguing that Defendants could not have converted motors and equipment that already belonged to GEMR and that, in any case, GMT did not have any property interest or possessory right in the allegedly converted property. Jerry also makes several ancillary arguments, including that Jay is estopped

from bringing claims for breach of fiduciary duty based on representations Jay made to the Court when seeking to amend his counterclaim.

II. ANALYSIS

A. Breach of Fiduciary Duty

In the Amended Counterclaim, Jay asserts that Jerry, as a member of GEI, breached his fiduciary duties to GEI by removing the motors from the GEI facility on January 5, 2010. As Jerry points out, however, in moving to amend the Counterclaim, Jay asserted that he was not seeking to include a claim for breach of fiduciary duty. Instead, Jay stated in the reply brief in support of the Motion to Amend the Counterclaim and to Add New Parties and a Third Party Complaint (the "Motion to Amend") that the breach of fiduciary duty claims "ha[d] either been resolved by the Trustee or [were] otherwise no longer being pursued . . . ."[39]

I relied, in part, on this representation in deciding to grant the Motion to Amend. In particular, in response to Jerry's objection that the new claims would be futile, I noted that "[t]hat may have been true as to the breach of fiduciary duties claims," but Jay "no longer s[ought] to add those claims."[40] Therefore, because Jay represented to the Court that he was not seeking to bring a claim for breach of fiduciary duty and because I relied,

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[39] JX 54 at 2. The Trustee recommended against pursuing breach of fiduciary duty claims against Jerry arising from the post-closing removal of motors and cores from GEI in the Trustee's Recommendation for Party's Claims filed on March 24, 2010. JX 47 at 21.

[40] *Gould v. Gould*, 2011 WL 141168, at *12 (Del. Ch. Jan. 7, 2011).

at least in part, on that representation in granting the Motion to Amend, I hold that Jay now is estopped from bringing that claim.[41] Moreover, because Jay's aiding and abetting claims against JC and GEMR are premised on Jerry's alleged breach of fiduciary duty, Jay is estopped from bringing those claims as well.[42]

B. Conversion

Conversion is the "act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it."[43] In order to prove conversion, a plaintiff must show that: (1) it had "a property interest in equipment or other property"; (2) it had "a right to possession of the property"; and (3) "the property was converted."[44]

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41 *See Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) ("[J]udicial estoppel also prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling."). Tellingly, Plaintiffs did not respond to this aspect of Defendants' argument in their post-trial reply brief or at oral argument, essentially conceding the point. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

42 I also note that Jay did not include a count for aiding and abetting breach of fiduciary duty in the Amended Counterclaim. To the extent Jay's conspiracy claim might be interpreted as a claim for aiding and abetting, I reject that claim for the same reason that I conclude Jay failed to plead a valid breach of fiduciary duty claim and for the other reasons discussed *infra* in Part II.C.1.

43 *McGowan v. Ferro*, 859 A.2d 1012, 1040 (Del. Ch. 2004) (quoting *Arnold v. Soc'y for Savs. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996)).

44 *B.A.S.S. Gp., LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *8 (Del. Ch. June 19, 2009). There is at least a question as to whether Delaware or Illinois law should control Jay's conversion claims. Both parties, however, assumed that Delaware law controls. In any case, I find that the Delaware and Illinois law of conversion are substantially similar. *Compare id. with Cirrincione v. Johnson*, 703 N.E.2d 67, 70 (Ill. 1998) ("To prove conversion, a plaintiff must establish

Here, Jay has asserted conversion claims as to two different types of motors allegedly taken by Jerry. Jay also accuses Jerry of converting other pieces of equipment used in GEI's business. The allegedly converted motors include 4 motors wholly owned by GEI and 18 GEMR Inventory Motors listed in Exhibit D of the Addendum. With regard to the other equipment, Jay claims Jerry converted a: (1) "grove man" lift; (2) 200-ton press; (3) bake oven; (4) Laguna mill; and (5) welding positioner. Because GMT allegedly had varying interests in the different types of items in question, I address separately each category of motors and equipment.

1. The GEI motors

Jay alleges that, in addition to the 86 GEMR motors, Jerry took 4 motors that were wholly owned by GEI. In his Opening Brief, Jay identified these motors only as: (1) Model No. 600510-18; (2) Model No. 600306-164; (3) Model No. 284TYZ; and (4) Model No. 600505-123.[45] According to Jay, these motors had a combined value of $38,725.

As the claimant, Jay had the burden to prove his claim of conversion of these motors by a preponderance of the evidence.[46] Jay, however, has failed to adduce any

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that: (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property.").

45 Pls.' Opening Br. 29.

46 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *24 (Del. Ch. May 18, 2009) *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

evidence supporting his allegation that Jerry removed these 4 disputed motors from GEI on January 5, 2010. Instead, Jay's claim depends entirely on his argument that he is entitled to an adverse inference that Jerry took the GEI motors. According to Jay, this Court "can obviously take an adverse inference" that Jerry is "responsible for those four [GEI] motors" based on Jerry's allegedly improper actions in removing the other 86 GEMR Inventory Motors.[47]

Because Jay did not mention this adverse inference argument in his post-trial briefs; and instead raised it for the first time in passing, at oral argument, Jay has waived this argument.[48] Furthermore, because he has not adduced any other evidence supporting the alleged conversion of the GEI motors, Jay has failed to carry his burden of proving this aspect of his claim by a preponderance of the evidence.[49]

Moreover, even if I were to consider the merits of Jay's argument for an adverse inference, I would find that he failed to prove an entitlement to such an inference here. The law of adverse inference is a rule of evidence that applies where a party already possesses, or should be in possession of, relevant evidence and acts intentionally or

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47 May 7, 2012 Hr'g Tr. 10.

48 *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

49 Indeed, what scant evidence there is supports a finding that Jerry did not take the GEI motors. In particular, Tiffany Martin, a GEI employee who was present at the GEI facility on January 5, 2010, testified that she did not believe Jerry had taken any GEI motors. Tr. 451.

recklessly to destroy or suppress that evidence.[50] Jay, however, has not shown that Jerry ever possessed, or should have been in possession of, documentation or other evidence regarding the whereabouts of the GEI motors. Furthermore, Jay has failed to make any showing or argument that Jerry destroyed such evidence in response to this litigation or engaged in any other action that led to the spoliation of evidence. Rather, the general thrust of Jay's argument is that, because Jerry acted improperly when he removed the GEMR Inventory Motors and other GEMR equipment, the Court should shift the burden of proof to Jerry to prove what he did not take on January 5, 2010.

But, Jay has not cited any authority or made any substantive legal argument that would support this proposition, nor has he shown that Jerry's actions intentionally or recklessly prevented GEI's employees from effectively documenting and creating a proper record of what was taken. Instead, despite Jay's characterization of Jerry's actions as "looting" or "theft,"[51] the evidence presented does not support a reasonable inference that Jerry either engaged in a disorderly ransacking of the GEI facility or took the 4 missing GEI motors. Jerry appears to have engaged in a fairly transparent removal of motors and equipment, the vast majority of which, if not all, have been identified as belonging to GEMR. Moreover, Jerry's removal was done under the direct observation

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[50] *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006) ("An adverse inference . . . is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item.").

[51] Pls.' Opening Br. 15.

of GEI employees, who photographed the entire removal and collected identification tags for 81 of the 86 GEMR motors taken from the facility. Consequently, it appears unlikely that Jay could adduce sufficient evidence to support his claim that GEMR also removed GEI motors. Therefore, even if Jay's argument were not waived, I find that Jay has not established any right to an adverse inference relating to the GEI motors or otherwise proven a claim for conversion of those motors.

2. The GEMR Inventory Motors

The primary dispute between the parties involves Jerry's alleged conversion of 18 GEMR Inventory Motors owned by GEMR, but possessed by GEI, at the time of closing. Jay argues that, through the Addendum, the Trustee granted GMT a property interest in the GEMR Inventory Motors and the right to possess them for a period of no longer than 60 days after the closing. On that basis, Jay asserts that Jerry's removal of the GEMR Inventory Motors immediately after the closing amounted to a conversion of GMT's legitimate interest in the motors.

In response, Jerry argues that Jay failed to establish any of the necessary elements of conversion as to the GEMR Inventory Motors. According to Jerry, GMT has no property interest in the GEMR Inventory Motors because those motors belong exclusively to GEMR, and the Trustee had no authority to create or grant a property interest in the motors without GEMR's consent or participation. In that regard, Jerry emphasizes that GEMR was not a party to the Purchase Agreement or Addendum. Therefore, Jerry asserts that Jay cannot establish that the Addendum (or the Purchase

Agreement) created either a property interest or a valid possessory interest in the GEMR Inventory Motors.

a. GMT has no property interest in the motors

Jay asserts that the Addendum created a property interest in the GEMR Inventory Motors that gave GMT the right to possess and use the GEMR Inventory Motors for a period of up to 60 days by extending the Consignment Agreement between GEI and GEMR. Specifically, the Addendum grants GEMR a security interest in the GEMR Inventory Motors and provides that, "[f]or a period of sixty (60) days post-Closing, Buyer shall continue to honor the fee sharing arrangement, as currently exists between GEI and GEMR, for the GEMR Inventory Motors."[52]

The Addendum was negotiated exclusively between the Trustee, acting on behalf of GEI, and Jay. GEMR, the exclusive owner of the GEMR Inventory Motors, was not represented in connection with, and did not sign or participate in, the Addendum.[53] Although the Trustee was authorized to act on behalf of Jerry and JC, as members of GEI, Jay has made no argument that the Trustee had authority to act on behalf of GEMR. Therefore, because GEMR was not a party to the Addendum and the Trustee apparently had no authority to bind GEMR, the Addendum could not create or extend rights in the

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52 JX 22 § 3(B). The Addendum creates similar rights and obligations as to the "Essential GEMR Motors" under Section 3(A). The Essential GEMR Motors are those motors listed in Exhibit C to the Addendum that were on consignment with GEI customers at the time of closing. *Id.* § 3(A).

53 In fact, the existence of the Addendum purposefully was kept from Jerry until it was executed. *See supra* note 24 and accompanying text.

GEMR Inventory Motors.[54] Instead, because the Trustee negotiated the Addendum exclusively on behalf of GEI, the only property interests that could be created or transferred under the Addendum were those belonging to GEI.

The only rights GEI had in the GEMR Inventory Motors, however, were (1) the right to possess the motors under the Consignment Agreement and (2) the right to compensation for the value of the labor and parts GEI added to the refurbished GEMR Inventory Motors. GEI's right to compensation regarding the GEMR Inventory Motors, however, already had been resolved and credited in the "true up" between the Trustee and GEMR in the West Virginia Action. Indeed, Jay admittedly understood that those issues would be dealt with exclusively by the Trustee in a post-closing "true up."[55] As for the Consignment Agreement, Jay likewise testified that the parties knew that the Consignment Agreement would terminate at closing, eliminating GEI's rights under that relationship.[56] Because GEMR was not a party to the Addendum, it is unclear how the

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54 Upon review of the plain language of the Addendum, it is not apparent that the Addendum even purports to bind GEMR or create any sort of property interest in the GEMR Inventory Motors. Instead, the express language of the Addendum appears only to obligate Jay. In fact, the Trustee himself acknowledged that he had not considered the legal effect the Addendum could have on GEMR at the time it was executed and that he was not sure that the Addendum legally could bind Jerry or GEMR. Tr. 55-56.

55 Tr. 319-20.

56 Tr. 359. In fact, Jay acknowledges in his Reply Brief that he knew that "the consignment agreement with GEMR would not continue and [he] would have [to] create his own motor inventory for the exchange program, to the extent the motors he was acquiring from GEI [were] not sufficient." Pls.' Reply Br. 5-6; *see also* Tr. 359 (Jay). As discussed *supra*, the Purchase Agreement includes an express

Addendum could extend GEMR's participation in the Consignment Agreement beyond the closing. As a result, I hold that the Addendum could not create or extend rights in GEMR's property.

Because Jay has not asserted any other basis for finding that GMT had a property interest in GEMR's Inventory Motors, Jay failed to prove a valid property interest in those motors and, therefore, cannot prove conversion of them.[57] Likewise, because Jay's claim to a possessory interest in the GEMR Inventory Motors also is premised on the validity of the Addendum, I find GMT did not have a valid possessory interest in the GEMR Inventory Motors. Therefore, in addition to GMT's lack of a property interest, the lack of a possessory interest provides an alternative and independent ground for rejecting Jay's conversion claim as to the GEMR Inventory Motors.

"Special Acknowledgment of Buyer" under which Jay agreed that, after the closing date, it would be his responsibility to negotiate with GEMR for the continuation of the Consignment Agreement. JX 10 § 5.2. Likewise, the Addendum itself states that "Buyer acknowledges . . . [that the Consignment Agreement] is terminable by GEMR, and GEMR has claimed a right to the immediate return at Closing of all GEMR motors or property . . . ." JX 22 ¶ 2. Therefore, to the extent Jay argues that the Consignment Agreement, independent of the Addendum, provided GMT with rights and interests in the GEMR Inventory Motors post-closing, I find that argument unpersuasive as well.

[57] In reaching this conclusion, I am not condoning or sanctioning in any way the actions of Defendants in ignoring the Trustee's directives regarding the Addendum and the orders of this Court prescribing the procedure for challenging such an agreement.

b. Jay failed to provide an adequate basis for awarding conversion damages

Finally, even if I had found that Jerry converted the GEMR Inventory Motors, I would be unable to award Jay any relief based on his damages theory. In total, Jay seeks an award of $179,500 in "mitigation" costs from buying eight working motors and a batch of motor cores to replace the GEMR Inventory Motors.[58] But, this amount represents the full purchase price of the new motors. As discussed *supra*, however, GMT did not own the GEMR Inventory Motors or have a right to their entire value. At most, Jay claims to have had a possessory interest in the motors for 60 days. Therefore, Jerry's liability would be capped at the damages GMT suffered from being deprived of that sixty-day interest.

Such damages could include, among other things, lost profits from not being able to provide motors to customers who needed them and from having to incur higher costs to acquire working motors on short notice, instead of motor cores that GMT could have rebuilt at a lower cost. Although these damages could amount to more or less than $179,500, Jay made no effort to prove these types of damages. Instead, Jay has claimed the entire value of the new motors, arguing that the "proper measure of damages for conversion of property is the value of the property at the time of conversion, plus interest."[59] The cost of the new motors, however, is not a reasonable measure of GMT's

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[58] Pls.' Opening Br. 30.

[59] Pls.' Opening Br. 30 (citing *Dionsi v. DeCampli*, 1995 WL 398536, at *18 (Del. Ch. June 28, 1995)).

damages because GMT never was entitled to the full value of the GEMR Inventory Motors. Indeed, even if GMT had retained the motors under the terms of the Addendum, at most, it would have received 75% of the exchange value of those motors paid by customers, which, in fact, it eventually did receive under the "true up."[60] Moreover, GMT presumably received additional benefits from the replacement motors it purchased by being able to trade them out multiple times in the ordinary course of its business, as well as from selling them as part of the sale of GMT to Wallace Electrical Systems, LLC in 2011.[61]

Therefore, GMT's claim for the full value of the motors purchased as a result of Jerry's removal of the GEMR Inventory Motors both (1) is inconsistent with their theory of liability and the actual damages they might have suffered and (2) would result in an unwarranted windfall to GMT. Accordingly, because Jay failed to adduce evidence of damages commensurate with the harm Plaintiffs allegedly suffered, I could not award GMT any damages relating to the GEMR Inventory Motors without engaging in impermissible speculation.[62]

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60 Jay testified he would have been fine if GEMR had paid the value of the GEI work and parts in the motors in cash when Jerry took the motors. Tr. 363. Jay believed, however, that the best way for GMT to reap the value GEI put into the motors would have been to allow the motors to go through one trade out exchange. Tr. 300.

61 Tr. 387-88 (Jay).

62 *See Laskowski v. Wallis*, 205 A.2d 825, 826 (Del. 1964) ("The law does not permit a recovery of damages which is merely speculative or conjectural.").

3. The GEI equipment

In addition to the motors, Jay asserts that GEMR improperly possesses a 1997 grove man lift and a 200-ton press purchased in the sale of GEI. GEMR does not dispute that it has the grove man lift.[63] In fact, according to JC, GEMR has advised GMT that it may retrieve the grove man lift at any time.[64] GMT, however, has not retrieved the lift or offered any explanation for its failure to do so.

Moreover, GEMR had been in possession of the grove man lift for years before the sale of GEI.[65] Although the lift was sold to GMT under the Purchase Agreement, there is no provision in the Purchase Agreement obligating GEMR physically to deliver the lift to GMT. In these circumstances, GMT's failure, without any proffered justification, to take possession of its own equipment precludes any claim for conversion of that equipment.

As for the 200-ton press, GEMR asserts that it is not, and never has been, in possession of the press. Furthermore, Jay has presented no evidence that GEMR ever possessed the 200-ton press. Hence, if GMT was owed the 200-ton press under the Purchase Agreement and did not receive it in the sale, it might have a claim against the Trustee or GEI, but not GEMR. In any event, because Jay failed to prove that GEMR ever possessed the 200-ton press, I reject his claim for conversion of that press.

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63 Tr. 248 (JC).

64 Tr. 249.

65 *Id.*

4. The GEMR equipment

Jay also asserts that Jerry converted other equipment that was located at GEI at the time of closing, including a bake oven, Laguna mill, and welding positioner. Jay admits in the Amended Counterclaim, however, that this equipment was the property of GEMR.[66] The equipment was not included under the Purchase Agreement, and Section 5 of the Addendum states only that "GEI will attempt to facilitate acquisition by Buyer of the bake oven, Laguna mill and welder positioner from GEMR."[67] That section further states that "[i]f GEI cannot successfully negotiate with GEMR to sell the Disputed GEMR Property to Buyer, then Buyer shall be solely responsible for resolving the Disputed GEMR Property with GEMR."[68]

Nevertheless, Jay contends that he acquired this equipment under Section 1.1 of the Purchase Agreement, which states:

> Seller [i.e., GEI] is hereby selling, conveying, assigning, transferring and delivering to Buyer all of Seller's right, title and interest in and to all of the property, assets and rights . . . owned or leased by Seller or *used in the Business* of every kind, character and description . . . *whether carried on the books of Seller or not carried on the books of Seller, due to expense, full depreciation or otherwise* . . . .[69]

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66 Am. Counterclaim ¶ 190.

67 JX 22 § 5.

68 *Id.*

69 JX 10 § 1.1 (emphasis added).

According to Jay, the fact that the disputed GEMR equipment arguably was not included in the Purchase Agreement is irrelevant because, under the Purchase Agreement, Jay purchased all assets used in GEI's business "whether carried on the books of Seller or not carried on the books of Seller."[70]

Jay's interpretation, however, disregards certain aspects of the quoted portion of Section 1.1, which provides, among other things, that the Purchase Agreement transfers all of GEI's "right, title, and interest in and to all of the property, assets and rights" used in the business that were not included on its books "due to expense, full depreciation or otherwise."[71] Read as a whole, the plain language of that section provides that GEI transferred all assets to which it had a right, title, or interest, even if those assets were not carried on the books of GEI due to their accounting treatment. Jay and Andrew controlled 50% of GEI and oversaw its day-to-day operations. Therefore, Jay was in a unique position to prove whatever "right, title, or interest" GEI had in the disputed GEMR equipment. Nevertheless, Jay failed to prove the existence of any such interest in GEI. To the extent Jay interprets Section 1.1 of the Purchase Agreement as transferring title to, or an interest in, assets that GEI did not own or have rights to already, merely

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70 *Id.*

71 *Id.*

because it was used in GEI's business, I reject that interpretation as unreasonable and contrary to the plain language of the Purchase Agreement.[72]

Lastly, I note that, although the bake oven, Laguna mill, and welding positioner were located at the GEI facility on January 5, 2010, GEMR did not remove those items from the facility on that date. Rather, GMT voluntarily returned that equipment to GEMR on January 28 and February 11, 2010 pursuant to the Agreed Order between the parties settling GEMR's motion for a temporary restraining order in Illinois.[73] Therefore, GMT also is precluded by that circumstance from pursuing a claim that GEMR tortiously converted the equipment in question.

C. Plaintiffs' Remaining Claims

1. Conspiracy

Jay claims that Jerry, JC, and GEMR conspired to convert the motors and equipment taken on January 5, 2010. To prove a claim of civil conspiracy, a plaintiff must establish the following elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a

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[72] This apparently mistaken interpretation of what Jay and GMT acquired under the Purchase Agreement illustrates a recurring theme in this action. Jay appears to have had an earnest, but erroneous, belief that he would receive GEI in exactly the same condition as it existed under his management before dissolution. In that regard, Jay may have misunderstood what actually was owned by GEI or what the Trustee was capable of transferring in the sale. In either case, however, Jay's misunderstanding was the result of his own lack of due diligence and cannot obligate GEMR or create rights in GEMR's property.

[73] JX 37.

proximate result thereof."[74] Additionally, "[t]he combination must be undertaken in furtherance of some unlawful purpose."[75] Here, because Jay failed to prove any wrongdoing on the part of Defendants, he cannot establish a claim for civil conspiracy.[76] Therefore, I will dismiss Jay's conspiracy claim.

2. Unclean hands

Jay also contends that Jerry's wrongful removal of the GEMR motors and equipment in violation of the Trustee's instructions and this Court's orders bars Jerry from bringing any claims against GEI or Jay relating to amounts owed under the Consignment Agreement. According to Jay, Jerry's actions in converting the motors and then suing Jay and GMT in West Virginia and Illinois violated the October 10 Order, which required Jerry and JC to cooperate with the Trustee and bring any legal challenge to any action, recommendation, or decision by the Trustee in the Court of Chancery.[77] Jay further asserts that Jerry's actions violated the August 20 Order, which required that all disputes "concerning whether certain motor cores or other major pieces of equipment

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74 *Matthew v. Laudamiel*, 2012 WL 605589, at *8 (Del. Ch. Feb. 21, 2012); *accord AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 437 n.8 (Del. 2005); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

75 *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 n.143 (Del. Ch. Apr. 15, 2004).

76 *See Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998) ("[C]ivil conspiracy is not an independent cause of action in Delaware[;] . . . it must arise from some underlying wrong."); *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009).

77 JX 1 ¶¶ 11, 12.

are owned by GEI or [GEMR]" be resolved by the Trustee's representative.[78] In light of these violations, Jay argues that "this Court must not permit GEMR to receive anything from the remaining proceeds held by the Trustee from the sale of GEI,"[79] including amounts awarded to GEMR in the West Virginia Action.

Under the unclean hands doctrine, a court of equity may close its doors to an applicant seeking equitable relief where the applicant has acted in violation of a fundamental concept of equity in connection with the matter in controversy.[80] Courts applying this doctrine therefore consider whether the litigant's own acts offend the very sense of equity to which he appeals.[81] Traditionally, application of the unclean hands doctrine rests within the reviewing court's sound discretion, unbounded by restrictive formulas.[82]

a. The West Virginia Action

Here, I find that, while Jerry did act in violation of the Trustee's Orders, his actions were not so egregious as to warrant barring any recovery from the "true up" adjudicated in West Virginia. Jerry did act improperly by retrieving the GEMR Inventory Motors and equipment against the Trustee's directives. He was given the time

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78 JX 6.

79 Pls.' Opening Br. 41-42.

80 *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947).

81 *In re Silver Leaf L.L.C.*, 2005 WL 2045641, at *12 (Del. Ch. Aug. 18, 2005).

82 *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 448-49 (Del. 2000).

and opportunity to challenge the Addendum and seek a temporary restraining order in this Court, and he should have done so. Instead, Jerry engaged in self-help that has added significantly to the complexity of this litigation. By not pursuing the appropriate avenues for relief available to him and required by the orders of this Court and the directives of the Trustee, Jerry acted improperly.

At the same time, Jerry's actions were not wholly unreasonable. Jerry repeatedly made clear his intent to retrieve the GEMR motors and equipment from GEI before the closing on the sale to GMT. Yet, despite Jerry's vocal and persistent objections to allowing Jay to retain any GEMR motors or equipment after the closing, the Trustee and Jay negotiated in secret the Addendum that purported to afford Jay and GMT certain rights in GEMR's property. The Trustee and Jay did not notify Jerry of the Addendum until the scheduled day of closing, leaving Defendants in the unenviable position of having to choose between pursuing immediate emergency relief in this Court or allowing Jay to take possession of GEMR's property.[83] In these circumstances, it is at least understandable that Jerry decided to engage in self-help.

Having considered all the circumstances, I find that Jerry acted improperly by retrieving the GEMR motors and equipment on January 5, 2010 in violation of the Court's orders and that, therefore, he should be required to pay the costs Jay incurred in hiring private security guards to prevent Jerry from returning after January 5 and

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[83] The Trustee did extend the closing by a day to give Jerry time to seek a TRO or otherwise challenge the Addendum.

continuing the unsupervised retrieval of motors and equipment. Jay would not have had to incur those costs if Jerry had sought relief in this Court, as the procedures for the trusteeship contemplated, rather than engaging in self-help.

As for Jay's contention that Jerry should be barred from receiving any other recovery awarded in West Virginia, however, I decline to award such relief. Jerry's actions were not so egregious as to warrant barring GEMR from receiving the more than $300,000 in payments the West Virginia court held were due to it under the Consignment Agreement. Furthermore, although this Court controls the final release of the funds held by the Trustee as a result of the sale of GEI, that does not empower the Court in the circumstances of this dispute to alter the final judgment of the West Virginia court.

Jay contends this Court should not give full faith and credit to the final judgment in the West Virginia Action because the "true up" should not have been brought in West Virginia.[84] This is not the proper time or forum, however, to make that argument. Instead, any argument that the "true up" should have been determined by this Court should have been made in the West Virginia Action by way of a motion to dismiss or stay that action. The Trustee, however, did not contest personal jurisdiction in West Virginia and Jay did not seek to intervene in the West Virginia Action until after the Trustee (1) had consented to jurisdiction there and (2) had agreed with the Trustee and GEMR upon

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[84] May 7, 2012 Hr'g Tr. 50.

a proposed settlement.[85] Moreover, I refused to approve the proposed settlement between the Trustee and GEMR of the claims underlying the West Virginia Action based, at least in part, on Jay's objections and suggested that the parties continue to litigate those claims in West Virginia. Thereafter, GEI and GEMR actively litigated their respective claims against one another there and the West Virginia court entered a valid, final judgment as to the "true up." That judgment is now entitled to full faith and credit in this Court.[86]

Jay's contrary argument that this Court "can charge the Trustee to review Jay's claims of error" regarding the "true up" to "make a determination in the first instance on this collateral issue of the amount owed to GEI from GEMR" and that such an order "[a]llowing the Trustee . . . the opportunity to correct any errors, would be consistent with the West Virginia Order and the Orders in the action authorizing the Trustee to determine collateral disputes in the first instance"[87] is unavailing. The final order in the West Virginia Action only provides that "the issue of whether the actions of the Trustee are proper, and whether the performance of the Trustee's fiduciary duties in this matter were sufficient are matters over which the State of Delaware has jurisdiction . . . ."[88]

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85 Jay's oral motion to intervene was rejected by the West Virginia court as untimely. Pls.' Opening Br. Ex. B at 4.

86 *See McElroy v. McElroy*, 256 A.2d 763, 765 (Del. Ch. 1969) ("Under Article 4, Section 1 of the Federal Constitution, a judgment of another state properly authenticated shall be given full faith and credit in this State to the same extent as given in the state in which it was entered.").

87 Pls.' Reply Br. 11.

88 Pls.' Opening Br. Ex. B at 4.

Nothing in the final order in the West Virginia Action suggests that Jay could challenge in this Court the merits of the West Virginia court's determination of the amount owed to GEMR. Instead, Jay can pursue, at most, claims against the Trustee for breach of fiduciary duty, but no such claims are before me.

b. The Illinois Action

I reach a different conclusion, however, as to the Illinois Action. This Court's October 10 and August 20 Orders regarding the Trustee's authority and duties provide that any challenges to the Trustee's actions, or any dispute over the ownership of the GEI motors and equipment, shall be resolved in this Court. Jerry, as a member of GEI, violated those orders not only by engaging in self-help, but also by bringing a separate action in Illinois seeking the return of the disputed GEMR motors and equipment. Therefore, to the extent that there are any remaining issues in the Illinois Action relating to the ownership of disputed motors and equipment that are not resolved by this decision, I will enjoin Defendants from continuing to prosecute the Illinois Action and order that those issues or claims promptly be brought here.

3. Attorneys' fees

Finally, with respect to Jay's request for attorneys' fees, I note that the general or American Rule is that a litigant must defray his own attorneys' fees and costs associated with litigation.[89] Among other exceptions to the American Rule, however, the Court may

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[89] *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

award fees and costs for the totality of an action if the party against whom fees are sought has acted in "bad faith and vexatiously" or has engaged in conduct that was so egregious as to have caused unreasonable delay or otherwise prejudiced the opposing party.[90]

Although this litigation has been very contentious, I cannot say that any party has made frivolous claims or litigated in bad faith. As previously discussed, I do not approve of Jerry's actions, but I do not consider his conduct so egregious as to warrant an award of attorneys' fees. Likewise, while I ultimately have decided to dismiss most of Jay's claims, those claims were not frivolous. Indeed, Jay will recover at least some damages in the amount of the cost of hiring private security guards to protect the GEI facility from Jay's removal of additional motors. Therefore, I deny both Plaintiffs' and Defendants' requests for attorneys' fees.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I find that Plaintiffs have failed to prove conversion of any of the disputed motors and equipment and are estopped from pursuing their claims for breach of fiduciary duty. Therefore, I dismiss those claims with prejudice. Likewise, because Plaintiffs failed to prove a claim for conversion or breach of fiduciary duty, I dismiss with prejudice their claims for conspiracy and aiding and abetting.

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[90] *Triton Constr. Co. v. E. Shore Servs., Inc.,* 2009 WL 1387115, at *27 (Del. Ch. May 18, 2009).

In terms of Defendants' actions on and after January 5, 2010 to repossess or control GEMR property in the hands of Jay and GMT, I find those actions violated this Court's orders and hold Defendants jointly and severally liable for Plaintiffs' reasonable costs in hiring private security guards in the amount of $5,900. With regard to Plaintiffs' claims based on the doctrine of unclean hands, I reject Plaintiffs' request to have this Court review or modify the final judgment in the West Virginia Action, but will enjoin Defendants from litigating any remaining issues or claims in the Illinois Action and require those matters to be brought, if at all, in this Court. Finally, I reject the parties' various requests for attorneys' fees.

An order reflecting these rulings is being entered concurrently with this Memorandum Opinion.