

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**
DAR-30474
Appeals Court No. 2025-P-0435

GIUL, LLC,
Plaintiff/Appellant,

vs.

SHENGHUO MEDICAL, LLC, MICHAEL J. ANTONOPLOS,
RICHARD P. BLUMBERG, MARK L. FAUPEL, MARK S. PEARLSTEIN,
Defendants/Appellees.

On Appeal From A Judgment Of Suffolk County Superior Court

APPELLANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

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Dated: August 6, 2025

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REQUEST FOR DIRECT APPELLATE REVIEW

Plaintiff/Appellant GIUL, LLC hereby respectfully requests that the Supreme Judicial Court take on direct appellate review under Mass.R.App.Pro. 11 this matter now pending in the Appeals Court as No. 2025-P-0435.

EXPECTED RESPONSE OF OPPOSING COUNSEL

On Friday, August 1, 2025, pursuant to Mass.R.App.Pro. 15(a), counsel for Appellant/Plaintiff GIUL, LLC inquired of counsel for all Appellees/Defendants as to their likely responses to this Application. He asked for their responses by close of business on Monday, August 4, 2025. No counsel for Appellees/Defendants made any response whatsoever by close of business on Monday, August 4, 2025. However, counsel for Appellees/Defendants have previously indicated that they would oppose and file oppositions to any application for direct appellate review.

STATEMENT OF PRIOR PROCEEDINGS

This is a case is brought by Plaintiff GIUL, LLC (“GIUL”), a limited liability company, whose principal place of business is 9 Blueberry Lane, Upton, Massachusetts, and whose principal is Mr. Paul Conte. RAIV/104. Mr. Conte was a lawyer with an LLM degree in taxation who has performed many types of legal and other work over the course of his career. RAI/38-39. To the extent Mr. Conte had individual claims here apart from those of GIUL, he executed a Notice And Assignment of those claims to GIUL. RAIV/100-102.

GIUL in 2019 brought claims against Defendants: (1) Shenghuo Medical, LLC, a Pennsylvania limited liability company, which had no active business but did in June 2016 enter into a License Agreement with another company called Guided Therapeutics, Inc. (“GTI”) to market in parts of Asia GTI’s cervical cancer detection device called LuViva – RAV/162, 163; (2) Richard Blumberg, Shenghuo’s managing member and later a director of GTI – RAV/162; RAIV/201; (3) Mark Faupel, the inventor of GTI’s technology, previously its CEO, and later a director and chief operating officer of GTI – RAV/162; RAIV/201; (4) Mark Antonoplos, initially a managing member of Shenghuo – RAV/162; and (5) and Mark Pearlstein, Shenghuo’s attorney and later a managing member - RAV/162; RAIV/143.

GIUL’s principal claims against Defendants were for material omissions, misrepresentation of facts, misrepresentation of intent to perform, and nondisclosures, all in connection with the sale of Shenghuo’s securities to GIUL. GIUL’s pending claims at time of trial in 2024 were: (1) violation of the Massachusetts Uniform Securities Act, G.L. c. 110A, § 410 (“MUSA”); and (2) violation of G.L. c. 93A, § 11. RAV/161. The securities which were the subject of GIUL’s MUSA and 93A claims consisted of an equity interest in Shenghuo (and thus a security governed by MUSA)¹ coupled with repayment of the funds advanced

¹ The Trial Court held in an Order dated August 7, 2020 that GIUL had “plausibly” stated some claims under MUSA. RAV/139. Defendants thereafter

(also referred to here by Plaintiff as the “loan” or “loan feature”); Defendants refer to it as the “conditional right to repayment” term; the Trial Court adopted Defendants’ terminology. RAV/166. The loan funds were to be provided to GTI and GTI was to be the source of repayment. RAIV/16 (“\$200k payment (loan) to GT”). Shenghuo, which had no active business, could not make any repayment. RAV/166.

The loan feature terms included: the “original amount, add 50% to that and then add another 20% annualized starting on January 1, 2017.” RAIV/81, ¶ 2 (Faupel email dated September 22, 2017 to Mr. Conte when Mr. Faupel was a managing member of Shenguo; RAIV/143 – see Resolution dated March 17, 2017 making him a managing member). In his email Mr. Faupel also stated: “Of course these generous terms were granted with the assumption that the funds would roll into the next offering. All of your co-investors including me intend to do so.” RAIV/85, ¶ 2. Mr. Faupel testified that “roll into” meant to convert debt for equity in GTI. RAIII/25 line 20 – 26 line 7, RAIII/30 line 20 – 31 line 16.

A jury-waived trial was held over four days in March 2024 and Mr. Conte and all of the individual Defendants testified. RAV/161. Forty-seven exhibits were admitted. RAV/161.

never argued that the sale of the equity interest coupled with the loan features was not a security subject to MUSA. RAV/24, 90.

All of the parties filed their post-trial requests for findings of fact and conclusions of law on April 12, 2024. RAV/24, 90, and 115. GIUL's Request For Findings Of Fact and Rulings Of Law is referred to here as "RFFRL."

The Trial Court Findings And Conclusions After a Bench Trial ("FCABT") was docketed on August 21, 2024. RAI/23, #123. The FCABT contained rulings on GIUL's claims under MUSA and Chapter 93A for material omissions in connection with the loan feature issues as follow:

(1) As to GIUL's claim that Defendants did not disclose that it was financially very unlikely for GIUL to be repaid under the loan feature (all debts would have to extinguished before a needed institutional investor would invest); the Trial Court ruled that Defendants had good intentions to repay but never decided that the nondisclosure was not material. RAV/180-181.

(2) As to GIUL's claim that Defendants did not disclose that GIUL was not going to receive an individual right to convert its loan into "stock" of GTI (GIUL says it was promised such a right in writing), as opposed to such right being retained entirely by Shenghuo, the Trial Court held that Mr. Conte was sufficiently sophisticated that he knew or should have known that GIUL would not receive such an individual right. RAV/180.

(3) As to GIUL's claim that Defendants did not disclose the undisputed dire financial condition of GTI besides stating in writing to Mr. Conte that the deal

“has a short fuse, check the website,” the Trial Court held that this language should have prompted GIUL to investigate GTI’s web site including all of its SEC filings which would have revealed its dire financial condition. RAV/180-181; RAV/167 (“GTI was not and had not been profitable, had almost no cash on hand, and had substantial debt and other current liabilities.”). There is no evidence that Mr. Conte or GIUL knew in advance of the truth of GTI’s severe financial condition. RAIV/5 – RAV/23.

(4) As to GIUL’s claim that Defendants did not disclose that repayment was conditioned on GTI first reaching a \$1 million fundraising threshold where Defendants admit such condition would be a “big” and “salient point”, RAIII/299, lines 14-25; RAIII/303 line 23 – 304 line 5, the Trial Court held that Defendants did verbally disclose this condition, RAV/166, 182, although not one of Defendants many emails to Mr. Conte contained such a disclosure, no email contained any disclosure of conditions or risks of any kind, RAIV/16, 18, 20, 21, 32, 44, 48, 57, 58, 60, and most emails extravagantly touted the deal offered, “This [*sic*] as good a deal [*sic*] one could get Paul...,” RAIV/21.

(5) As to GIUL’s 93A claim for material omissions, the Trial Court denied such claim for the exact same reasons it denied GIUL’s MUSA claim for material omissions. RAV/31-32.

Judgment issued on August 21, 2024. RAV/191. GIUL filed its Notice of Appeal on September 18, 2024. RAI/23, #125; RAV/192.

STATEMENT OF FACTS

Per Mass.R.App.Pro. 16(a)(7) GIUL does not repeat here facts already included in the Statement of Prior Proceedings.

The key events here took place in June and July 2016, before GIUL advanced funds to Shenghuo and Shenghuo turned them over to GTI. As of June 5, 2016 Shenghuo and GTI had entered into the License Agreement referred to above. RAIV/5 & 15. This License Agreement served two purposes: (1) provide \$200,000 in total funds to GTI to continue operating, RAIV/6, but which was otherwise unbankable and was essentially broke (“almost no cash on hand” and “has substantial debt”; RAV/167); and (2) give Shenghuo a chance to make money as a licensee of GTI’s products if GTI was able to continue in business, RAIV/6. The License Agreement provided that Shenghuo had to raise the \$200,000 by the end of July 2016. RAIV/6, ¶ 1. In return Shenghuo was to receive a convertible note with very generous repayment terms if the loan was not repaid by December 31, 2016. RAIV/7 (50% premium in principal and plus 20% interest compounded annually). As the note was convertible *Shenghuo* could decide to excuse the debt owed and convert the note to stock of GTI (*italics added*). RAIV/7. The License Agreement also had a condition upon repayment which was that GTI first had to raise \$1 million

in funds. RAIV/7. There is no evidence that Mr. Conte ever saw this License Agreement before GIUL advanced funds; no email from Defendants sends it to Mr. Conte and he testified he first saw it during discovery. RAIV/16, 18, 20, 21, 32, 44, 48, 57, 58, 60; RAI/66. Mr. Conte also testified that neither Mr. Antonoplos nor anyone else ever told him in advance about repayment being conditioned upon GTI first raising \$1 million. RAI/208.

By June 10, 2016 Shenghuo had raised \$136,000 towards its goal of a total of \$200,000 and desperately needed the last \$64,000. RAIV/16. Then Mr. Antonoplos of Shenghuo had the idea of contacting his old acquaintance Mr. Conte in Massachusetts to see if he could supply the last \$64,000. RAIV/16. Mr. Antonoplos, with the help of Mr. Blumberg, then drafted a series of emails to Mr. Conte asking for the \$64,000, which described Mr. Conte as a “lender” who “will have the ability to convert their loan into stock and receive an interest in Shenghuo.” RAIV/16. That the “lender has [*sic*] option to convert” is again set forth in another email to Mr. Conte dated June 11th. RAIV/21.

In late July GIUL received a Subscription Agreement from Shenghuo which GIUL never signed. RAIV/49. Mr. Conte did not read it or return it. RAI/68. It did not provide for or even mention any right, individual or otherwise, to convert GIUL’s loan into stock of any kind. RAIV/48-54. Nor did it mention any condition

that GTI first had to raise \$1 million before any repayment was to be made. RAIV/48-54.

On January 5, 2020 the managing members of Shenghuo signed a Resolution exercising Shenghuo's right under the License Agreement to extinguish the debt owed to it by Shenghuo and convert it into shares of GTI. RAIV/131, ¶ 6). The Resolution also stated that it was extinguishing any claim of GIUL that it was owed repayment of any debt or loan. RAIV/131, ¶ 6). The Resolution further stated that all this was necessary because "Shenghuo's success is wholly dependent upon GTI being successful because, if GTI fails, Shenghuo will have no product upon which to receive monies." RAIV/131, ¶ 5).

Long after GIUL had advanced funds in 2016, Mr. Conte began asking for money to be paid back to GIUL. RAI/71 (asked "about 45 times"). Defendants responded saying that GTI could not repay anything until the \$1 million fundraising threshold in the License Agreement had been met. RAIV/193. In order to salvage something Mr. Conte then repeated back the condition about which the Defendants now referred: "Please advise me on where you stand on my entity ... being repaid from GTI being funded the first \$1 million." RAIV/88 (bottom email).

GTI in 2020 succeeded in beginning to raise funds from institutional investors. RAIV/131, ¶¶ 2) & 3). In order for GTI to receive those funds all of its many creditors, including Shenghuo, entered into exchange agreements whereby

they extinguished the debts GTI owed to them in return for GTI stock. RAIV/136, (listing creditors including Shenghuo at \$10.50, which was listed in the name of “K2”, a d/b/a for Shenghuo, with attached form Exchange Agreement at RAIV/137-138).

Neither GIUL nor Mr. Conte ever received back a penny. RAI/88-89.

As of trial in this matter, under the terms stated by Defendants, they owed Plaintiff its principal, including a 50% year-end 2016 premium, plus interest at 20% compounded annually, RAIV/85; RAIV/116-117 (totaling at least \$405,419).

STATEMENT OF THE ISSUES OF LAW; WHETHER RAISED BELOW

(1) Whether the Trial Court committed error by applying an incorrect legal standard in holding that Defendants did not engage in a material omission where they never disclosed to GIUL that it was financially very unlikely for it to be repaid under the loan term (all debts would have to be extinguished before a needed institutional investor would invest); the correct standard was the materiality of the omission, not Defendants’ good intentions.

GIUL offered proof and argued below that, “Mr. Faupel and Mr. Blumberg both admitted in testimony that from the beginning any such loan could never be repaid but would have to be rolled over into equity of Guided.” RAV/139-140, 142, RFFRL, §§ 4.26, 4.37.

(2) Whether the Trial Court committed error by applying an incorrect legal standard in holding that Defendants did not engage in a material omission where they never disclosed to GIUL GTI's dire financial condition besides stating the deal "has a short fuse, check the website"; the correct standard is that GIUL had no duty to investigate to discover omitted material facts and that the availability of truthful information elsewhere is not a defense.

GIUL made these legal points below at RAV/123, RFFRL, § 3.1.7 & 8. GIUL also set forth below the applicable facts under the correct legal doctrines at RAV/123, RFFRL, § 4.39.

(3) Whether the Trial Court's Judgment against GIUL's Chapter 93A claim should be reversed for the same reasons as GIUL seeks reversal of the Judgment against its MUSA claim; the grounds supporting GIUL's MUSA material omission claim also support its 93A material omissions claim.

GIUL set forth and argued these points about its 93A claim in the Trial Court. RAV/128, 137, 139-140, 142-143, 154, RFFRL, on the law at § 3.2.6, and on the facts at §§ 4.17, 4.26, 4.23, 4.37-4.42.

STANDARD OF REVIEW ON APPEAL

(1) Standard of Review Where The Trial Court's Conclusions Are Not Consistent With Relevant Legal Standards.

“In reviewing a judge’s decision after a jury-waived trial, we ... scrutinize without deference the legal standard which the judge applied to the facts.” *EventMonitor, Inc. v. Leness*, 473 Mass. 540, 546 (2016), quoting, *Kendall v. Selvaggio*, 413 Mass. 619, 620-621 (1992). “We are not bound, however, by the judge’s conclusions of law, and we must ensure that the judge’s ultimate findings and conclusions are consistent with relevant legal standards.” *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 510 (1997); *EventMonitor, Inc. v. Leness*, at 546 (same). “We set aside a judge’s ultimate conclusion if we find it either ‘clearly erroneous or inconsistent with the relevant legal standard.’” *Yankee Microwave, Inc. v. Petricca Communications Sys., Inc.*, 53 Mass. App. Ct. 497, 504 (2002).

(2) Standard of Review Where The Trial Court's Findings Are Drawn From Documentary Evidence.

Massachusetts practice before the adoption of the Mass. Rules of Civil Procedure was that, “We may, however, draw our own conclusions from documentary evidence unaffected by the conclusions of the court below.” *Ward v.*

McGlory, 358 Mass. 322, 323 (1970).² In the SJC’s 2018 decision in *Commonwealth v. Tremblay*, 480 Mass. 645, 654-655 (2018) it reaffirmed the Massachusetts pre-rules practice as to “both civil and criminal cases”³:

Because the judge’s subsidiary findings rested on both testimonial and documentary evidence, we must first settle the open question whether our long-standing practice of independently reviewing documentary evidence survives in light of more recent legal developments We now affirm the principle that an appellate court may independently review documentary evidence, and that lower court findings drawn from such evidence are not entitled to deference.

This pre-rules practice continues to be followed in Massachusetts appellate courts.

Commonwealth v. Hart, 493 Mass. 130, 135 (2023) (“On the other hand, we review de novo any findings based entirely on documentary evidence.”); *Commonwealth v. Piard*, 105 Mass. App. Ct. 428, 435 (Apr. 28, 2025) (“To the extent that the motion judge’s findings were based on documentary evidence, including the recordings of the defendant’s interviews and the telephone call, we review those findings de novo because ‘we are in the same position as the motion judge to determine what occurred.’”).

² *Strand v. Herrick & Smith*, 396 Mass. 783, 789 n. 6 (1986) (“Our prior practice permitted an appellate court to ‘draw [its] own conclusions from documentary evidence unaffected by the conclusions of the court below.’ *Ward v. McGlory*, 358 Mass. 322, 323 ... (1970).”

³ *Id.* at 653.

(3) Standard of Review On A Finding Where Court Is Left With The Firm Conviction A Mistake Has Been Committed.

“A finding is ‘clearly erroneous’ only when, ‘although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.’” *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 509 (1997) (quoting, *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 160 (1977); *Fecteau Benefits Group, Inc. v. Knox*, 72 Mass. App. Ct. 204, 212-213 (2008) (same, citing *Demoulas* and *Building Inspector of Lancaster*); *RCS Learning Center, Inc. v. Pratt*, 103 Mass. App. Ct. 1118, 2024 WL 139034, *3 (2024)(same, citing *Fecteau Benefits* quoting *Demoulas*); *Care and Protection of Vijay*, 105 Mass. App. Ct. 1122, 2025 WL 1098416, at *3 (Apr. 14, 2025) (same, quoting, *Building Inspector of Lancaster*).

ARGUMENT

I. The Trial Court Committed Error By Applying An Incorrect Legal Standard In Holding That Defendants Did Not Engage In A Material Omission Where They Never Disclosed To GIUL That It Was Financially Very Unlikely For It To Be Repaid Under The Loan Term (All Debts Would Have To Be Extinguished Before A Needed Institutional Investor Would Invest).

A. The Court’s Findings. The Court found, “First, GIUL contends that the defendants never intended to provide Conte or GIUL with any conditional repayment right, or never intended that Conte or GIUL to be able to exercise such a right, and yet never disclosed that intent. These assertions cannot be squared with

the facts Shenghuo and all four defendants always intended that if GTI were to repay Shenghuo's investment in GTI, then Shenghuo would live up to its conditional repayment agreement to repay GIUL's investment in Shenghuo with the agreed-upon interest." RAV/21-22, FCABT, § 2.4.1.

B. Argument. The Trial Court has entirely missed GIUL's point, where GIUL offered proof and argued below that, "Mr. Faupel and Mr. Blumberg both admitted in testimony that from the beginning any such loan could never be repaid but would have to be rolled over into equity of Guided." RAV/139-140, 142, RFFRL, §§ 4.26, 4.37. From at least early June 2016, Messrs. Faupel, Blumberg, in spite of the litany of initial assurances to Mr. Conte of repayment,⁴ knew that no lender to GTI would ever be repaid their loan. RAV/137, RFFRL, § 4.17. In other words, the point was not the subjective good intentions of Defendants, but that they failed to disclose the objective material fact as found by the Trial Court that GTI "was not and had not been profitable, had almost no cash on hand, and had substantial debt and other current liabilities." RAV/180-181; RAV/167. And, as a result, GTI itself could never repay GIUL's loan.

The legal standard governing material omissions requires disclosure of all objective material facts. "The test whether a statement or omission is material is

⁴ RAV/16, RAV/21, last ¶, RAV/32 ("one of them, sits in [*sic*] the GT board so they are both convinced they will get their money back in 90 days... this is a great deal Paul").

objective: there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57-58 (2004).

And there was substantial evidence at trial supporting the objective material fact that it was highly unlikely that GIUL could ever be repaid. First, as noted above and as found by the Trial Court, GTI had never been profitable, had almost no cash on hand and had substantial debts. RAV/180-181; RAV/167. Second, all of its assets had liens on them; Guided had “a note outstanding that is collateralized by a security interest in all of our assets...” RAV/197, Form 10-K (middle of the page).

As a result of GTI’s dire financial circumstances Mr. Blumberg, a managing member of Shenghuo, knew and testified that *all debts of GTI* including the loan repayment owed to Shenghuo (and therefore the loan repayment owed by Shenghuo to GIUL) had to be converted from debt to equity, as follows, RAV/328-329 (italics added):

... from a game theory perspective, *either everybody does it or it isn’t going to happen*. One – all the – one of the – debt holders are not going to say, ‘Yeah. We agree. Oh. But K2 [Shenghuo] isn’t. We’re out’ It was a collective effort.

Under Pennsylvania law applicable to Shenghuo, “the act of a manager ... binds the company ...” 15 Pa.C.S. § 8831(b).

Moreover, Mr. Faupel sent an email to Mr. Conte, on September 22, 2017, when Mr. Faupel was a managing member of Shenghuo, stating: “Of course these generous terms were granted with the assumption that the funds would roll into the next offering. All of your other co-investors including me intend to do so.” RAV/85, ¶ 2. Mr. Faupel also testified that “roll into” meant to convert debt in Shenghuo for equity in GTI (to be held by Shenghuo). RAI/25 line 20 – 26 line 7, RAI/30 line 20 – 31 line 16.

And then what actually happened was that *all* of GTI’s creditors, including Shenghuo, actually did agree to extinguish the debts owed to them by GTI. RAI/136, (listing 58 total creditors, including Shenghuo at §10.50, appearing in the name of “K2”, a d/b/a for Shenghuo, with attached form Exchange Agreement at RAI/137-138). This extinguishment of GTI’s debt included the debt owed to Shenghuo (K2) and therefore to GIUL. Shenghuo and GTI formally entered into an Exchange Agreement, like all of GTI’s other creditors, whereby Shenghuo exchanged the convertible note owed to it by GTI for equity in GTI. RAI/138, ¶ 3.c. (“the exchange of debt for equity contemplated by this Agreement ...”).⁵

⁵ These other creditors had a stake in GTI’s survival and that is why they agreed to exchange their debt for equity and thereby have their debt extinguished. For example, the other major lenders along with GIUL in June 2016, Messrs. Imhoff and Maloof, RAI/56, were “heavy investors in GT [GTI]” RAI/32. Mr. Imhoff was also a director of GTI. RAI/201.

In addition, Shenghuo admits it agreed to extinguish the debt owed to it by GTI in order to save GTI. RAIV/131, ¶¶ 1) – 6).

All of these facts, more than support the existence of the objective material fact that it was highly unlikely – and in fact impossible - that Shenghuo was ever going to be repaid, and therefore that it was highly unlikely and almost impossible, that GIUL was ever going to be repaid.⁶ This truth would have been highly material to any reasonable investor.

Accordingly, the Trial Court applied incorrect and prejudicial legal standards and thereby committed reversible error.

II. The Trial Court Committed Error By Applying An Incorrect Legal Standard In Holding That Defendants Did Not Engage In A Material Omission Where They Never Disclosed To GIUL GTI's Dire Financial Condition.

A. The Court's Findings. The Court found that GTI's severe financial condition was disclosed to Mr. Conte. "As the Court found in § 2.2.1 above, Antonoplos told Conte to go to GTI's website for more detailed information about that entity, Antonoplos provided Conte with a link to GTI's website, *if* Conte had done as Antonoplos suggested he could easily have accessed GTI's most recent 10-K and 10-Q filings with the SECs [*sic*], and those filings explained GTI's financial and business condition in some detail. It appears that Conte did not bother to read

⁶ The fact that the managing members of Shenghuo knew this is not a necessary element of proof under MUSA.

the disclosures that had been provided to him. But he has not shown that any material information was withheld from him.” RAV/181, FCABT, § 2.4.3 - “GTI’s Financial Condition” (*italics added*). At RAV/166, FCABT, § 2.2.1, the Court also found: “Antonoplos followed up with an email to Conte on June 9, 2016. At the start of that email, Antonoplos told Conte to ‘check the website for Guided Therapeutics, Inc.’ for more information about GTI; he also included a link to that website (www.guidedinc.com) in the subject line of the email.”

B. Argument.

First, the Court distorts what Antonoplos actually said in his June 9th email and then applies a legal standard putting the burden on Conte to check GTI’s web site, search for its SEC filings, and then again search and form a judgment about GTI’s adverse financial condition.

As for what Antonoplos actually said in his June 9th email: “Paul, here is a deal perhaps you can assist on, but it has a short fuse ... check the web site for Guided Therapeutics.” RAIV/16. Lower on that same email Mr. Antonoplos clearly states the short fuse: “Shenghuo need [*sic*] to come up with a total of \$200K payment (loan) to GT by July 31, 2016 ... so we need an additional \$64k by the end of July.” (Parentheses in original). RAIV/16. Mr. Antonoplos explained the short-fuse in his email, there was no need for Mr. Conte to go to the GTI web site for that purpose. Nowhere in his June 9th email – or anywhere at all! – does Antonoplos or any of the

Defendants suggest that Conte needs to be aware of the dire financial condition of GTI.

The reversible error here is that the Trial Court placed a duty on GIUL to investigate and discover the truth, not on Defendants to disclose it in the first place: “Conte never asked Antonoplos or anyone else connected with Shenghuo for any additional information about GTI’s financial condition before deciding to invest in Shenghuo.” RAV/167. As noted above, this inversion completely negates the Massachusetts Uniform Securities Act (“MUSA”), G.L. c. 110A, standards.

Instead, here are the correct legal standards. First, “[n]or does the buyer have any duty to investigate or to ‘verify a statement’s accuracy.’” *Marram*, at 53; J. C. Long, *Blue Sky Law* § 9:46 (June 2025 update) (“First, because only an investor’s actual knowledge is relevant, by extension, the investor has no obligation to conduct due diligence, make any investigation, or verify any information concerning the investment.”). Obviously, application here of the relevant and correct legal standards would mean, contrary to the Trial Court’s finding above, that Conte had absolutely no obligation under MUSA to go to GTI’s web site, find and review its SEC 10-K and 10-Q filings, and reach his own conclusion that GTI’s financial condition was *in extremis* (which the Trial Court itself admits: “almost no cash on hand” and “has substantial debt”; RAV/167).

Second, securities buyers will not lose their claims for material omissions even if truthful information exists elsewhere. *Mid-America Fed. Sav. & Loan Ass'n*, *supra*, at 1256; J. C. Long, *supra*, at § 9:45 (“... under Section 12(a)(2) availability elsewhere of truthful information cannot excuse untruth or misleading omissions by the seller.”).

As part of the disclosure Defendants did indicate that the funds they were seeking from Conte would be re-lent to GTI and that the “lender” (Conte) would be repaid an amount calculated by “tak[ing] the original amount, add 50% to that and add another 25% annualized interest starting on January 1, 2017.” RAIV/81 (brackets added). The repayment to GIUL was to come “solely through monies received for that purpose from GTI.” RAIV/33, ¶ 7. Obviously the terms being offered to GIUL were way above market, even “generous” as Faupel called them, RAIV/81, and since repayment was to come solely from GTI, GTI’s financial condition became critical. To compound even more – if possible - the critical nature of Defendants’ nondisclosure of GTI’s financial condition, as of 2016 GTI was essentially broke and that is why it needed the immediate cash infusion from Shenghuo.

Accordingly, the Trial Court again engaged in reversible error.

III. As For The Trial Court’s Judgment Against GIUL’s Chapter 93A Claim, Such Judgment Should Be Reversed For The Same Reasons As GIUL Seeks Reversal Of The Judgment Against Its MUSA Claim.

A. The Trial Court’s Findings.

“Based on the findings and discussions above, the Court finds and concludes that none of the Defendants has committed an unfair or deceptive act or engaged in any unfair or deceptive practice has harmed GIUL in any way.” RAV/189-190, FCABT, § 3.2.

B. Argument.

Just as material omissions are violations of MUSA they are also violations of Chapter 93A. “An act or practice will be found deceptive ‘if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is *material*.’” *Connor v. Marriott International, Inc.*, 103 Mass. App. Ct. 828, 836 (2024) (italics added; liability for omission found where the omission concerned a material or “central purpose” of plaintiff’s transaction with defendant).

Therefore, all the material omissions shown above under MUSA should also be held to be 93A violations.

STATEMENT OF REASONS SUPPORTING
DIRECT APPELLATE REVIEW

- 1. A MUSA claim for material omissions is a uniquely applicable and powerful state securities law claim versus more limited federal securities law claims.**

Under the Uniform Securities Act, on which MUSA is based, “unlike the Federal Rule 10b-5, the catchall for fraud, investor plaintiffs generally do not have to plead or prove reliance, loss causation, or the defendant’s scienter to prove a state law claim for material misstatements or omissions.” J. C. Long, *supra*, at § 9:1. Another federal remedy, section 12(2) of Securities Act of 1933, upon which the material omissions provision of MUSA § 410(a)(2) is based,⁷ is limited to material omissions in the context *only* of public offerings and does not apply to material omissions outside of that context. *Gustafson v. Alloyd, Co., Inc.*, 513 U.S. 561, 578, 115 S.Ct. 1061, 1071 (U.S. 1995) (“The intent of Congress and the design of the statute require that § 12(2) liability be limited to public offerings.”). And the Uniform Securities Act, or MUSA § 410(a)(2) under Massachusetts law, provides the sole private civil remedy for misrepresentations and omissions. *See Marram*, at 50 (“the only civil remedy”). Thus, a material omissions claim under MUSA, as with all such claims under state enactments of the Uniform Securities Act, is uniquely applicable and powerful under all U.S. securities law.

⁷ *See Marram*, at 50-51 (“§ 410(a)(2) is almost identical with § 12(2)”).

2. **Where the SJC declared in *Marram v. Kobrick*, that the purpose of MUSA is to reverse caveat emptor in the securities context, the SJC should make clear that the entire burden of disclosure is on the seller, contrary to the decision of the Business Litigation Session below.**

“The Securities Act was intended to reverse the age-old concept of caveat emptor and replace it with the concept of caveat venditor or seller beware.” *Marram*, at 51 (quoting, J. C. Long, *Blue Sky Law*). *See also Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151, 92 S.Ct. 1456, 1471 (U.S. 1972) (the Securities Acts of 1933 and 1934 “embrace a ‘fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of caveat emptor...’”). In the decision below in the Business Litigation Session, the court held that the securities buyers can lose their claim under MUSA if: (1) it is found that they should have had, as sophisticated persons, knowledge of omitted disclosures; or (2) if accurate and full facts, even in a one-on-one sales situation, could have been found elsewhere. The SJC should clarify that the rule of caveat venditor full disclosure governs MUSA in full and not caveat emptor anachronisms.

3. **Even *Marram* does not cover the full scope of issues relevant to material omissions; Appellees below cited mostly to Federal Court cases.**

In order to assemble the full scope of the law governing a Massachusetts material omissions claim under MUSA, § 410(a)(2), it is necessary to review and rely on decisions of the Massachusetts superior court, decisions of Federal Courts

under § 410(a) and related federal law, and relevant treatises. *E.g.*, *Sherter v. Ross Fialkow Cap. Partners, LLP*, 2013 WL 1324818, *8 (Mass. Super. Ct. Jan. 4, 2013) (helps define material omission); *Mid-America Fed. Sav. & Loan Ass’n v. Shearson/American Express Inc.*, 886 F.2d 1249, 1256 (10th Cir. 1989) (no duty to investigate or verify); J. C. Long, *supra*, § 9:46 (cited for many issues concerning material omissions including “only an investor’s actual knowledge is relevant ...”). And the Shenghuo Defendants below cited mostly to Federal Court decisions interpreting federal securities law. Shenghuo Defendants Proposed Findings of Fact and Conclusions of Law, RAV/24, pp. 29-33 (eleven citations to Federal case law).

4. There is limited state appellate court authority on material omissions after the SJC’s 2004 decision in *Marram*.

See *Welch v. Branch*, 84 Mass. App. Ct. 113, 119-120 (2013) (court limits itself to the principles in *Marram*, which it cites nine times, while also citing many Federal securities cases).

5. Where Chapter 93A also includes a material omissions claim, aligning such claims under both MUSA and 93A provides powerful additional remedies to investors harmed by such material omissions.

“The blue sky laws expressly contemplate an investor mixing and matching remedies from one cause of action to another to maximize recovery. Section 410(h) of the Uniform Securities Act provides that the ‘rights and remedies’ under the blue sky law ‘are in addition to any other rights or remedies that may exist at law or in

equity.’” J. C. Long, *supra*, at § 9:109. Section 410(h) of MUSA is the same. “[P]laintiffs are entitled to maximize recovery by electing to recover under the cause of action that provides the greatest recovery.” *Id.* Liability under MUSA can be established by a material omission. MUSA, § 410(a)(2). Liability under Chapter 93A can also be established by a material omission. *Connor v. Marriott International, Inc.*, 103 Mass. App. Ct. 828, 836 (2024) (“... omission ... is material”). Chapter 93A provides for the multiple powerful remedies of compensatory damages, multiple damages, and an award of attorney’s fees. G.L. c. 93A, § 11, ¶¶ 5, 6 (“actual damages,” “up to three, but not less than two ... times such amount,” and “attorney’s fees and costs”). The alignment of MUSA and 93A deserves careful attention because together they provide very powerful remedies for investors harmed by material omissions.

CONCLUSION

For all the reasons stated above, Plaintiff GIUL, LLC, respectfully requests that the Supreme Judicial Court grant GIUL’s Motion for DAR and take this matter on direct appellate review.

Respectfully submitted,

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By its attorneys,

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rules of Appellate Procedure 11(b) and Massachusetts Appeals Court Rule 20.0(d), I the undersigned hereby certify that the foregoing document complies with the requirements of Massachusetts Rules of Appellate Procedure 20(a)(4)(A-C) in that it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface, with 1-inch margins, and contains 1,994 words.

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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(d), I the undersigned hereby certify that I today served a copy of the foregoing through the Efilema.com System, and by emailing a copy to all counsel of record in the Suffolk Superior Court action as listed below.

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ADDENDUM

ADDENDUM
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1984CV02862 GIUL LLC vs. Shenghuo Medical LLC et al

- Case Type:
Contract / Business Cases
- Case Status:
Open
- File Date
09/11/2019
- DCM Track:
A - Average
- Initiating Action:
Security Transactions
- Status Date:
09/11/2019
- Case Judge:
- Next Event:

All Information Party Event Tickler Docket Disposition

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










More Party Information











Events
















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06/03/2020 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	BLS Rule 16 Litigation Control Conference		Not Held
06/12/2020 11:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Hearing for Judgment on Pleading		Held - Under advisement
12/16/2020 03:30 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	BLS Rule 16 Litigation Control Conference	Sanders, Hon. Janet L	Held as Scheduled
06/02/2021 02:00 PM	Business Litigation 2		BLS Rule 16 Litigation Control Conference		Held via Video/Phone
08/11/2021 02:30 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	BLS Rule 16 Litigation Control Conference	Salinger, Hon. Kenneth W	Held as Scheduled
08/30/2021 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Conference to Review Status	Ricciuti, Hon. Michael D	Held as Scheduled
12/06/2021 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Motion Hearing	Ricciuti, Hon. Michael D	Held as Scheduled
01/11/2022 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Motion Hearing to Amend Deadline	Salinger, Hon. Kenneth W	
01/11/2022 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Motion Hearing to Amend Complaint	Salinger, Hon. Kenneth W	
02/09/2022 11:30 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Conference to Review Status	Salinger, Hon. Kenneth W	Canceled
10/05/2022 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Rule 56 Hearing		Rescheduled
10/24/2022 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Rule 56 Hearing	Ricciuti, Hon. Michael D	Held - Under advisement
10/24/2022 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Hearing on Motion to Intervene	Ricciuti, Hon. Michael D	Held - Under advisement
05/31/2023 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Final Pre-Trial Conference	Salinger, Hon. Kenneth W	Held via Video/Phone
02/15/2024 02:00 PM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Final Trial Conference	Salinger, Hon. Kenneth W	Held as Scheduled
03/06/2024 09:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Jury Trial	Salinger, Hon. Kenneth W	Rescheduled
03/07/2024 09:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Jury Waived Trial	Salinger, Hon. Kenneth W	Held as Scheduled
03/08/2024 09:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Jury Waived Trial	Salinger, Hon. Kenneth W	Held as Scheduled
03/11/2024 09:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Jury Waived Trial	Salinger, Hon. Kenneth W	Held as Scheduled
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03/15/2024 09:00 AM	Business Litigation 2	BOS-10th FL, CR 1017 (SC)	Jury Waived Trial	Salinger, Hon. Kenneth W	Canceled















<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
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Ticklers					
<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>	
Service	09/11/2019	12/10/2019	90		
Answer	09/11/2019	01/09/2020	120		
Rule 12/19/20 Served By	09/11/2019	01/09/2020	120	08/22/2024	
Rule 12/19/20 Filed By	09/11/2019	02/10/2020	152	08/22/2024	
Rule 12/19/20 Heard By	09/11/2019	03/09/2020	180	08/22/2024	
Rule 15 Served By	09/11/2019	11/04/2020	420	08/22/2024	
Rule 15 Filed By	09/11/2019	12/04/2020	450	08/22/2024	
Rule 15 Heard By	09/11/2019	12/04/2020	450	08/22/2024	
Discovery	09/11/2019	08/31/2021	720	08/22/2024	
Rule 56 Served By	09/11/2019	05/13/2022	975	08/22/2024	
Rule 56 Filed By	09/11/2019	07/13/2022	1036	08/22/2024	
Final Pre-Trial Conference	09/11/2019	02/28/2022	901	08/22/2024	
Judgment	09/11/2019	09/12/2022	1097	08/22/2024	
Under Advisement	06/12/2020	07/12/2020	30	08/17/2020	
Under Advisement	10/24/2022	11/23/2022	30	02/22/2023	
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






















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09/11/2019	Attorney appearance On this date Michael C Gilleran, Esq. added for Plaintiff GIUL LLC				
09/11/2019	Case assigned to: DCM Track A - Average was added on 09/11/2019				
09/11/2019	Original civil complaint filed.	1			
09/11/2019	Civil action cover sheet filed. (188,006.40) (TRK)	2	 		
09/11/2019	Demand for jury trial entered.				
10/01/2019	General correspondence regarding Notice of transfer to Business Litigation Session assigned to BLS-2; (dated 9/27/19) notice sent 9/30/19	3	 		
10/07/2019	Notice of 93A complaint sent to Attorney General				
11/25/2019	Service Returned for Defendant Mark Pearlstein : Service through person in charge / agent;	4	 		
11/25/2019	Service Returned for Defendant Guided Therapeutics Inc: Service through person in charge / agent;	5	 		
11/25/2019	Service Returned for Defendant Faupel, Mark L: Service through person in charge / agent;	6	 		
11/25/2019	GIUL LLC's request for Default 55(a) Applies To: Guided Therapeutics Inc (Defendant)	7	 		











<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/25/2019	GIUL LLC's request for Default 55(a) Applies To: Pearlstein, Esq., Mark S (Defendant)	8	 Image
11/25/2019	GIUL LLC's request for Default 55(a) Applies To: Faupel, Mark L (Defendant)	9	 Image
12/03/2019	GIUL LLC's request for Default 55(a) Applies To: Shenghuo Medical LLC (Defendant)	10	 Image
12/03/2019	Affidavit of service on defendant Shenghuo Medical LLC Applies To: Shenghuo Medical LLC (Defendant)	11	 Image
12/05/2019	Opposition to Plaintiff's Request for Default filed by Mark S Pearlstein, Esq.	12	 Image
12/05/2019	Received from Defendant Pearlstein, Esq., Mark S: Answer with claim for trial by jury;	13	 Image
12/05/2019	Attorney appearance On this date Mark William Shaughnessy, Esq. added for Defendant Mark S Pearlstein, Esq.		 Image
12/05/2019	Attorney appearance On this date Matthew H Greene, Esq. added for Defendant Mark S Pearlstein, Esq.		 Image
12/05/2019	Attorney appearance On this date Timothy Joseph Wadman, Esq. added for Defendant Mark S Pearlstein, Esq.		 Image
01/06/2020	Document: Default order Mass. R. Civ. P. 55(a) Sent On: 01/06/2020 11:51:54		
01/06/2020	Default 55a Entered as to Shenghuo Medical LLC (Defendant); Faupel, Mark L (Defendant); Guided Therapeutics Inc (Defendant)	14	 Image
01/13/2020	Attorney appearance On this date Suzanne Elovecky, Esq. added for Defendant Shenghuo Medical LLC		
01/13/2020	Attorney appearance On this date Suzanne Elovecky, Esq. added for Defendant Michael J Antonoplos		
01/13/2020	Attorney appearance On this date Suzanne Elovecky, Esq. added for Defendant Richard P Blumberg		
01/13/2020	Attorney appearance On this date Suzanne Elovecky, Esq. added for Defendant Mark L Faupel		
01/13/2020	Attorney appearance On this date Suzanne Elovecky, Esq. added for Defendant Guided Therapeutics Inc		
01/13/2020	Received from Defendant Shenghuo Medical LLC: Answer to original complaint;	15	 Image
01/13/2020	Received from Defendant Antonoplos, Michael J: Answer to original complaint;	16	 Image
01/13/2020	Received from Defendant Blumberg, Richard P: Answer to original complaint;	17	 Image
01/13/2020	Received from Defendant Faupel, Mark L: Answer to original complaint;	18	 Image
01/13/2020	Received from Defendant Guided Therapeutics Inc: Answer to original complaint;	19	 Image
01/17/2020	Defendant's Notice of intent to file motion pursuant to superior court rule 9A ; serve notice of their motion to vacate entry of default Applies To: Shenghuo Medical LLC (Defendant); Blumberg, Richard P (Defendant); Faupel, Mark L (Defendant); Guided Therapeutics Inc (Defendant)	20	 Image
02/06/2020	Plaintiff GIUL LLC's Assented to Motion of plff Giul to enlarge the time for it to file rule 55(b) (2) Defaults pending a decision on defts Motion to vacate rule 5(a) (2) defaults	21	 Image
02/18/2020	Endorsement on Motion to Enlarge Time (#21.0): ALLOWED (dated 2/10/20) notice sent 2/13/20		 Image






















<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/18/2020	Defendants Shenghuo Medical LLC, Mark L Faupel's Motion to Vacate Entry of Default (with opposition)	22	 Image
02/26/2020	Plaintiff's Notice of intent to file motion To Strike the reply brief and affidavits of defendants in support of their motion to vacate defaults Applies To: GIUL LLC (Plaintiff)	23	 Image
02/27/2020	Endorsement on Motion to Vacate Entry of Default (with opposition) (#22.0): ALLOWED (Dated 2/21/20) Allowed the defaults are hereby vacated. As no answers accompanied this motion, defendants shall file their answers forthwith notice 2/25/20		 Image
05/20/2020	Defendant Mark S Pearlstein, Esq.'s Motion for Judgment on the Pleadings (with opposition)	24	 Image
05/22/2020	Opposition to to Motion of Defendant for Judgment on the Pleadings filed by GIUL LLC	25	 Image
05/22/2020	The following form was generated: Notice to Appear Sent On: 05/22/2020 15:32:35		
06/03/2020	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 06/03/2020 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding		
06/08/2020	Plaintiff GIUL LLC's Motion to amend the original complaint with opposition and reply brief	26	 Image
06/12/2020	Matter taken under advisement: Hearing for Judgment on Pleading scheduled on: 06/12/2020 11:00 AM Has been: Held - Under advisement Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
07/23/2020	Plaintiff GIUL LLC's Notice of Assignment to it from Paul Conte of all his Claims and Interests in this Litigation	27	 Image
08/17/2020	Endorsement on Motion for judgment on the pleadings MRCP 12(c) (#24.0): ALLOWED in Part as to Count III (fiduciary duty) and Count VIII (constructive trust). DENIED in part as to Count II and V. See memorandum and Order Judge: Salinger, Hon. Kenneth W		 Image
08/17/2020	Endorsement on Motion to amend the Complaint (#26.0): DENIED as futile. See memorandum and Order Judge: Salinger, Hon. Kenneth W		 Image
08/17/2020	MEMORANDUM & ORDER: on Defendant Pearlstein's Motion for Judgment on the Pleadings and Plaintiffs Motion to Amend the Complaint-Defendant Mark S Pearlsteins Motion for Judgment on the Pleadings is ALLOWED in Part as to the claim against him for Breach of Fiduciary Duty and the claim seeking to establish a constructive trust against assets or property owned or held by Mr. Pearlstein, which are hereby DISMISSED with Prejudice. This motion is DENIED in Part as to the Claims against Mr. Pearlstein under the Massachusetts Uniform Securities Act and violation of G.L. c 93A. Plaintiffs Motion to Amend the Complaint is DENIED because the Proposed claims against Guided Therapeutics Inc. would be futile Judge: Salinger, Hon. Kenneth W	28	 Image
11/10/2020	The following form was generated: Notice to Appear - BLS Sent On: 11/10/2020 14:12:25 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow & Hahn LLP 30 Federal St. Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111		
12/16/2020	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 12/16/2020 03:30 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding		












<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
12/16/2020	The following form was generated: Notice to Appear - BLS Sent On: 12/16/2020 15:47:00 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow & Hahn LLP 30 Federal St, Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111		
12/21/2020	The following form was generated: Notice to Appear - BLS Sent On: 12/21/2020 08:19:53 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow & Hahn LLP 30 Federal St, Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Michael Gilleran 9 Sessions Street, Wellesley, MA 02482		
12/24/2020	Plaintiff, Defendant GIUL LLC, Shenghuo Medical LLC, Michael J Antonoplos, Mark L Faupel, Richard P Blumberg, Mark S Pearlstein, Esq.'s Submission of Proposed Tracking Order	29	 Image
01/04/2021	Endorsement on Submission of Proposed Tracking Order (#29.0): ALLOWED (date 12/16/20) adopted without extending deadline for rule 15 which had already passed. if the good or for good cause to amend plaintiff will not be band from amending if that showing can be made Notice 12/24/20		 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Motion to Compel a continued Deposition of Paul A. Conte and request for Attorney's Fees and costs	30	 Image
05/04/2021	Mark S Pearlstein, Esq.'s Memorandum in support of DEFENDANT MARK S. PEARLSTEIN'S MOTION TO COMEPLA CONTINUED DEPOSITION OF PAUL A. CONTE AND REQUEST FOR ATTORNEY'S FEES AND COSTS	30.1	 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Certificate of NOTICE OF FILING PURSUANT TO SUPERIOR COURT RULE 9A	30.2	 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Submission of LIST OF DOCUMENTS	30.3	 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Submission of RULE 9A AFFIDAVIT OF MATTHEW H. GREENE	30.4	 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Submission of RULE 9C CERTIFICATE OF MATTHEW H. GREENE	30.5	 Image
05/04/2021	Opposition to to Defendant Mr. Pearlstein's motion to compel and for fees as to Mr. Conte's deposition filed by GIUL LLC	31	 Image
05/04/2021	Defendant Mark S Pearlstein, Esq.'s Request for HEARING	32	 Image
05/11/2021	Plaintiff(s) GIUL LLC motion filed for protective order as to the Deposition of Mr. Conte to Date and as to be Continued	33	 Image
05/11/2021	Exhibits/Appendix EXHIBIT A re: Motion for Protective Order		 Image
05/11/2021	Opposition to to Motion for Protective Order filed by Mark S Pearlstein, Esq.	34	 Image
05/11/2021	Plaintiff GIUL LLC's Notice of Filing--Rule 9A		 Image
05/11/2021	Plaintiff GIUL LLC's Submission of Rule 9A List of Documents		 Image
06/02/2021	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 06/02/2021 02:00 PM Has been: Held via Video/Teleconference Hon. Kenneth W Salinger, Presiding		

















<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Staff: Philip Drapos, Assistant Clerk Magistrate		
06/02/2021	The following form was generated: Notice to Appear - BLS Sent On: 06/02/2021 15:46:28 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow and Hahn LLP 30 Federal St, Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111		
06/07/2021	Endorsement on Motion to Compel a continued Deposition of Paul A. Conte and request for Attorney's Fees and costs (#30.0): ALLOWED, DENIED in part, after hearing. Mr. Pearlstein's counsel may ask factual questions about emails among the parties after April 11, 2018, and before this action was filed, and ask reasonable follow up to any answers by Conte to questions posed by counsel for the other parties. this motion is otherwise DENIED. (dated 6/02/21) notice sent 6/07/21		 Image
06/07/2021	Endorsement on Motion for protective order as to the deposition of Mr. Conte to date and as to be continued (#33.0): DENIED after hearing. (dated 6/02/21) notice sent 6/07/21		 Image
06/07/2021	ORDER: Scheduling Order (dated 6/02/21) notice sent 6/07/21	35	 Image
08/07/2021	Plaintiff(s) GIUL LLC motion filed to compel from Defendants Claimed Newly Remembered Documents with all Meta-Data, Testimony about Internal Discussions of Such Documents, and Earlier Internal Discussions of the Deceptive Business Terms they Provided to Plaintiff	36	 Image
08/07/2021	Plaintiff(s) GIUL LLC motion filed to compel ***Exhibits 1-10	36.1	 Image
08/07/2021	Plaintiff(s) GIUL LLC motion filed to compel ***Exhibits 11-15	36.2	 Image
08/07/2021	Defendant(s) Mark S Pearlstein, Esq. motion filed to compel ***Defendant Mark Pearlstein's Opposition to Motion to Compel	37	 Image
08/07/2021	Defendants(s) Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc motion filed to compel ***Defendants' Opposition to Motion to Compel	38	 Image
08/07/2021	Defendants(s) Guided Therapeutics Inc motion filed to compel ***Defendants Exhibits A-K to Opposition to Motion to Compel	38.1	 Image
08/07/2021	Plaintiff(s) GIUL LLC motion filed to compel ***Plaintiff's Reply in Further Support of Motion to Compel	39	 Image
08/07/2021	Plaintiff(s) GIUL LLC motion filed to compel ***Plaintiff's Notice of Service of Motion to Compel		 Image
08/11/2021	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 08/11/2021 02:30 PM Has been: Held as Scheduled Hon. Michael D Ricciuti, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		 Image
08/12/2021	The following form was generated: Notice to Appear Sent On: 08/12/2021 07:45:48 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow and Hahn LLP 30 Federal St, Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111		
08/16/2021	Attorney appearance electronically filed.		 Image
08/16/2021	Attorney appearance On this date Brian Fishman, Esq. added for Defendant Shenghuo Medical LLC		 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/16/2021	Attorney appearance On this date Brian Fishman, Esq. added for Defendant Michael J Antonoplos		
08/16/2021	Attorney appearance On this date Brian Fishman, Esq. added for Defendant Richard P Blumberg		
08/16/2021	Attorney appearance On this date Brian Fishman, Esq. added for Defendant Mark L Faupel		
08/16/2021	Attorney appearance On this date Brian Fishman, Esq. added for Defendant Guided Therapeutics Inc		
08/16/2021	Attorney appearance electronically filed.		
08/19/2021	ORDER: Scheduling Order (see P#40 for order) (dated 8/11/21) notice sent 8/16/21	40	 
08/30/2021	Event Result:: Conference to Review Status scheduled on: 08/30/2021 02:00 PM Has been: Held as Scheduled Hon. Michael D Ricciuti, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		
09/29/2021	MEMORANDUM & ORDER: on Plaintiff's Motion to Compel: ALLOWED in part Judge: Ricciuti, Hon. Michael D (see P#41 for full decision) (dated 9/23/21) notice sent 9/24/21	41	 
11/18/2021	Self-Represented Plaintiff GIUL LLC's Reply in Support of Extension of Tracking Order	43	
11/18/2021	Plaintiff GIUL LLC's Motion to Extend tracking order with limited opposition	42	 
11/29/2021	Plaintiff GIUL LLC's Notice of filing Rule 9A package on it's motion to amend		 
11/29/2021	Plaintiff GIUL LLC's Motion to amend to add reach and apply defendant Guided Therapeutics, Inc. as a principal defendant and to add supplemental claims against the original parties (w/opp. and reply).	44	 
11/29/2021	Exhibits/Appendix		
11/29/2021	Exhibits/Appendix		 
11/29/2021	Exhibits/Appendix		 
11/29/2021	Opposition to plaintiff's motion to amend filed by Mark S Pearlstein, Esq.	45	 
11/29/2021	Opposition to plaintiff's motion to amend filed by Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc	46	 
11/29/2021	Reply/Sur-reply in support of it's motion to amend Applies To: GIUL LLC (Plaintiff)	47	 
11/29/2021	Reply/Sur-reply in support of it's motion to amend Applies To: GIUL LLC (Plaintiff)	48	 
11/30/2021	The following form was generated: Notice to Appear Sent On: 11/30/2021 10:48:57 Notice Sent To: Michael C Gilleran, Esq. FisherBroyles LLP 470 Atlantic Ave, Boston, MA 02210 Notice Sent To: Suzanne Elovecky, Esq. Partridge Snow and Hahn LLP 30 Federal St, Boston, MA 02110 Notice Sent To: Brian Fishman, Esq. Partridge Snow and Hahn LLP 30 Federal St Seventh Floor, Boston, MA 02110 Notice Sent To: Mark William Shaughnessy, Esq. Boyle and Shaughnessy Law PC 695 Atlantic Ave, Boston, MA 02111 Notice Sent To: Timothy Joseph Wadman, Esq. Boyle - Shaughnessy Law, P.C. 695 Atlantic Ave 11th		










<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Floor, Boston, MA 02111 Notice Sent To: Matthew H Greene, Esq. Boyle - Shaughnessy Law PC 695 Atlantic Ave 11th Floor, Boston, MA 02111		
12/06/2021	Event Result:: Motion Hearing scheduled on: 12/06/2021 02:00 PM Has been: Held as Scheduled Hon. Michael D Ricciuti, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		
01/03/2022	The following form was generated: Notice to Appear Sent On: 01/03/2022 08:35:55		
01/21/2022	Defendants Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc's Supplement to their opposition to plaintiff's motion to amend	49	 Image
01/24/2022	GIUL LLC's Memorandum in support of motion to amend (supplemental)	50	 Image
01/28/2022	Plaintiff GIUL LLC's EMERGENCY Motion to strike much of defendant Shenghuo, et al's supplement to their opposition to Plff's motion to amend.	51	 Image
02/04/2022	Opposition to Plaintiff Giul's Motion to Strike filed by Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc	52	 Image
02/08/2022	Event Result:: Conference to Review Status scheduled on: 02/09/2022 11:30 AM Has been: Canceled For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		
02/28/2022	Attorney appearance On this date Brian Fishman, Esq. dismissed/withdrawn for Defendant Shenghuo Medical LLC		
02/28/2022	Attorney appearance On this date Brian Fishman, Esq. dismissed/withdrawn for Defendant Michael J Antonoplos		
02/28/2022	Attorney appearance On this date Brian Fishman, Esq. dismissed/withdrawn for Defendant Richard P Blumberg		
02/28/2022	Attorney appearance On this date Brian Fishman, Esq. dismissed/withdrawn for Defendant Mark L Faupel		
02/28/2022	Attorney appearance On this date Brian Fishman, Esq. dismissed/withdrawn for Defendant Guided Therapeutics Inc		
03/17/2022	Endorsement on Motion to extend tracking order (#42.0): DENIED (dated 3/15/22) notice sent 3/17/22		 Image
03/17/2022	Endorsement on Motion to amend the complaint to add reach and apply defendants and to add supplemental claims against the original parties (#44.0): ALLOWED In part. see memorandum and order		 Image
03/17/2022	MEMORANDUM & ORDER: on plaintiff's motions to amend it's complaint and to extend the scheduling order. (dated 3/15/22) notice sent 3/17/22 Judge: Salinger, Hon. Kenneth W	53	 Image
03/25/2022	Amended: amended complaint filed by GIUL LLC	54	 Image
04/01/2022	Notice of docket entry received from Appeals Court Please take note that on March 31, 2022, the following entry was made on the docket of the above-referenced case (2022-J-0157): Petition pursuant to G.L. c. 231, s. 118 filed for GIUL, LLC by Attorney Michael Gilleran.	55	 Image
04/01/2022	Notice of docket entry received from Appeals Court Please take note that on April 1, 2022, the following entry was made on the docket of the above-referenced case: ORDER (RE #1): After review, the petition is denied as the petitioner has failed to demonstrate an abuse of discretion or error of law on the part of the trial court judge. See Jet-Line Services, Inc. v. Board of Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988). (Desmond, J.). *Notice/attest	56	 Image
















<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/04/2022	Answer to amended complaint with Jury Demand Applies To: Pearlstein, Esq., Mark S (Defendant)	57	 Image
04/07/2022	Answer to amended complaint Applies To: Blumberg, Richard P (Defendant)	58	 Image
04/07/2022	Answer to amended complaint Applies To: Faupel, Mark L (Defendant)	59	 Image
04/07/2022	Answer to amended complaint Applies To: Antonoplos, Michael J (Defendant)	60	 Image
04/07/2022	Answer to amended complaint Applies To: Shenghuo Medical LLC (Defendant)	61	 Image
04/07/2022	Answer to amended complaint Applies To: Guided Therapeutics Inc (Defendant)	62	 Image
04/21/2022	Notice of docket entry received from Appeals Court Please take note that on April 21, 2022, the following entry was made on the docket of the above-referenced case (2022-J-0196): ORDER (RE#1): The petitioner seeks interlocutory review pursuant to G.L. c. 231, s. 118 (first par.), of the 3/17/2022 Suffolk Superior Court order denying its motion to amend to add a claim against reach and apply defendant Guided Therapeutics, Inc. The petitioner filed the same petition in 2022-J-157, albeit arguing a different standard of review. Treating the within as a motion for reconsideration of my 4/1/2022 order in 2022-J-157, after reconsideration, the motion is denied. (Desmond, J.). *Notice/attest/Salinger, J.	63	 Image
05/05/2022	Defendant Shenghuo Medical LLC's Joint Motion to Extend Summary Judgment and Expert Deadlines: ALLOWED (dated 4/29/22) notice sent 5/2/22	64	 Image
06/21/2022	Plaintiff GIUL LLC's Assented to Motion to add pages to its opposition to defendants' motion for summary judgment.	65	 Image
06/21/2022	Endorsement on Motion to add pages to its opposition to defendants' motion for summary judgment. (#65.0): ALLOWED (dated 6/21/22) notice sent 6/21/22		 Image
06/27/2022	Plaintiff GIUL LLC's EMERGENCY Motion for a two-day extension for service of it's opposition for only one of two summary judgment motions; as to the other it served it's opposition on Friday.	66	 Image
07/11/2022	Defendant Mark S Pearlstein, Esq.'s Motion for Summary Judgment.	67	 Image
07/11/2022	Affidavit of Mathew Greene (Rule 9A and 9C)	71	 Image
07/11/2022	Mark S Pearlstein, Esq.'s Appendix of Exhibits in support of Motion for Summary Judgment.		 Image
07/11/2022	Mark S Pearlstein, Esq.'s Memorandum in support of Motion for Summary Judgment	68	 Image
07/11/2022	Opposition to the Motion for Summary Judgment. filed by GIUL LLC	69	 Image
07/11/2022	Defendant Mark S Pearlstein, Esq.'s Notice of Filing Superior Court Rule 9A and 9C, List of Documents, certificate of service.		 Image
07/11/2022	Defendant Mark S Pearlstein, Esq.'s Statement of Material Facts in support of Motion for Summary Judgment.	70	 Image
07/11/2022	Defendant Mark S Pearlstein, Esq.'s Request for Hearing.	72	 Image
07/13/2022	Defendants Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc's Motion for Summary Judgment	73	 Image
07/13/2022	Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc's Memorandum in support of Motion for Summary Judgment	74	 Image
07/13/2022	Opposition to Motion of the Defendants' Motion for Summary Judgment filed by GIUL LLC	75	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/13/2022	Reply/Sur-reply Defendants Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc's Reply Brief in Support of their Motion for Summary Judgment	76	 Image
07/13/2022	Plaintiff GIUL LLC's Response to the statement of undisputed Material Facts of the Shenghou defendants	77	 Image
07/13/2022	Exhibits/Appendix		 Image
07/13/2022	Exhibits/Appendix		 Image
07/13/2022	Exhibits/Appendix		 Image
07/13/2022	Affidavit of Superior Court Rule 9A, Superior Court Rule 9C Certificate and Notice of Filing		 Image
07/18/2022	Endorsement on Motion for two-day extension for service of it's opposition for only one of two summary judgment motions; as to the other it served it's opposition on Friday (#66.0): ALLOWED Extension ALLOWED but the court shall separately determine whether the motion as described comply with Rule 9A (dated 7/1/22) notice sent 7/13/22		 Image
07/26/2022	Plaintiff GIUL LLC's Assented to Motion to Add Pages to its Opposition to Defendants' Motion for Summary Judgment where Defendants were Granted Extra Pages for their Motion for Summary Judgment in order Extending Deadlines: DENIED without prejudice to re-file with an explanation as to why the additional pages are necessary. The mere fact that one party needs them is not a reason to conclude the opponent does (dated 7/22/22) notice sent 7/26/22	78	 Image
08/01/2022	The following form was generated: Notice to Appear Sent On: 08/01/2022 13:31:01		
10/05/2022	The following form was generated: Notice to Appear Sent On: 10/05/2022 10:14:11		
10/05/2022	Event Result:: Rule 56 Hearing scheduled on: 10/05/2022 02:00 PM Has been: Rescheduled For the following reason: Request of Defendant Hon. Michael D Ricciuti, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
10/05/2022	Attorney appearance On this date Christopher Michael Reilly, Esq. added for Other interested party Hanover Insurance Company		
10/05/2022	Attorney appearance On this date Mara Finkelstein, Esq. added for Other interested party Hanover Insurance Company		
10/05/2022	Other Interested Party Hanover Insurance Company's Motion to Intervene	79	 Image
10/05/2022	Hanover Insurance Company's Memorandum in support of Motion to Intervene	80	
10/05/2022	Opposition to Motion to Intervene filed by GIUL LLC	81	 Image
10/05/2022	Request for hearing filed Applies To: Hanover Insurance Company (Other interested party)	82	 Image
10/07/2022	The following form was generated: Notice to Appear Sent On: 10/07/2022 12:14:57		
10/24/2022	Matter taken under advisement: Rule 56 Hearing scheduled on: 10/24/2022 02:00 PM Has been: Held - Under advisement Hon. Michael D Ricciuti, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
10/24/2022	Matter taken under advisement: Hearing on Motion to Intervene scheduled on: 10/24/2022 02:00 PM Has been: Held - Under advisement		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Hon. Michael D Ricciuti, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
02/22/2023	MEMORANDUM & ORDER: [For the reasons stated in the Memorandum of Decision]: (a) The Shenghuo Defendants' motion for summary judgment is ALLOWED as to Counts I, III, IV, VI, VIII, and IX (fraud) and DENIED as to Counts II, V, IX (Chapter 93A) and X; (b) Pearlstein's motion for summary judgment is ALLOWED as to Count VIII and DENIED as to Counts II, V, X; and (c) Hanover's motion to intervene is DENIED. SO ORDERED. Dated: February 21, 2023 Judge: Ricciuti, Hon. Michael D	83	 Image
05/24/2023	GIUL LLC, Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Guided Therapeutics Inc's Memorandum Joint Pre Trial And Objection Of Defendant Pearlstein	84	 Image
05/31/2023	Event Result:: Final Pre-Trial Conference scheduled on: 05/31/2023 02:00 PM Has been: Held via Video/Phone Hon. Kenneth W Salinger, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
06/15/2023	GIUL LLC, Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel, Mark S Pearlstein, Esq., Guided Therapeutics Inc, Michael Gilleran, Hanover Insurance Company's JointMemorandum (partially amended) pre-trial memorandum - agreed case description	85	 Image
01/10/2024	Attorney appearance electronically filed.		 Image
02/09/2024	Defendant Mark S Pearlstein, Esq.'s Motion in limine to apply Pennsylvania Limited Liability Company Law	86	 Image
02/09/2024	Defendant Shenghuo Medical LLC, Michael J Antonoplos, Richard P Blumberg, Mark L Faupel's Notice of Assent and Partial Joinder of Motions in Limine Filed by Mark S. Pearlstein	87	 Image
02/09/2024	Opposition to Defendant Pearlstein's motion in limine to apply Pennsylvania Limited Liability company Law (and exonerate all Defendant from liability) filed by GIUL LLC	88	 Image
02/09/2024	Reply/Sur-reply Defendant Mark S. Pearlstein's Reply in further Support of motion in limine to apply Pennsylvania Limited Liability Company Law	89	 Image
02/09/2024	Rule 9A Affidavit of Matthew H. Green, Esq, Certificate of Notice of Filing pursuant to Superior Court Rule 9A, List of Documents		 Image
02/09/2024	Defendant Mark S Pearlstein, Esq.'s Motion in limine to preclude evidence or argument regarding standard of care applicable to corporate legal counsel	90	 Image
02/09/2024	Opposition to Defendant Pearlstein's motion in limine regarding standard of care applicable to corporate legal counsel filed by GIUL LLC	91	 Image
02/09/2024	Rule 9A Affidavit of Matthew H. Green, Esq, Certificate of Notice of Filing pursuant to Superior Court Rule 9A, List of Documents		 Image
02/09/2024	Defendant Mark S Pearlstein, Esq.'s Motion in limine to preclude Plaintiff from arguing intra-enterprise violations of G.L. c. 93A	92	 Image
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Case Disposition**Disposition****Date****Case Judge**

Judgment after Finding on Motion

08/22/2024

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT
1984CV02862-BLS2

GIUL, LLC

v.

SHENGHUO MEDICAL, LLC, D/B/A K2 MEDICAL;
MICHAEL J. ANTONOPLOS, RICHARD P. BLUMBERG,
MARK L. FAUPEL, AND MARK S. PEARLSTEIN

Parties notified
8/21/24
by email
Bill
Asst Clerk

FINDINGS AND CONCLUSIONS AFTER A BENCH TRIAL

GIUL, LLC, contends that it was duped into making a bad investment in Shenghuo Medical, LLC, with the understanding that Shenghuo would use the money invested by GIUL to help fund Shenghuo's own investment in Guided Therapeutics, Inc. ("GTI"). Some of GIUL's claims were dismissed. Others were resolved in favor of defendants Shenghuo, Michael Antonoplos, Richard Blumberg, Mark Faupel, and Mark Pearlstein on summary judgment.

The Court recently tried GIUL's remaining claims without a jury. Based on the findings below, the Court concludes that GIUL has failed to prove that it is entitled to any relief under the Massachusetts Uniform Securities Act (G.L. c. 110, § 410(a), known as "MUSA") or under the Massachusetts Consumer Protection Act (G.L. c. 93A, § 11). GIUL did not prove its MUSA claim because it failed to show that any of the defendants offered or sold any security by making a false statement or by withholding material information. The MUSA claim against Faupel and Pearlstein also fails for the additional reasons that neither of them offered, sold, or transferred any security to GIUL; had control of Shenghuo; or materially aided the sale of securities to GIUL as an agent of Shenghuo. Finally, GIUL did not prove its c. 93A claim because it failed to prove that any of the defendants engaged in unfair or deceptive conduct in connection with GIUL's investment in Shenghuo, either before GIUL made that investment or later on. Final judgment will therefore enter providing that GIUL shall take nothing on its claims.

1. Procedural Background. The following background explains the scope of the issues that the Court must now decide, and why the Court is deciding them without a jury.

1.1. Pre-trial Disposition of Certain Claims. Shenghuo's original complaint asserted claims against Shenghuo, Antonoplos, Blumberg, Faupel, and Pearlstein. It also asserted reach-and-apply claims against Shenghuo and GTI.

The Court granted partial judgment on the pleadings, in August 2020, in favor of Mr. Pearlstein as to the claims against him for breach of fiduciary duty and to establish a constructive trust against his assets or property.

At the same time, the Court also denied GIUL's motion to amend its complaint to assert substantive claims against GTI under MUSA and c. 93A. It concluded that these claims would be futile because GIUL's proposed allegations did not plausibly suggest that GTI had control over Shenghuo or that any of the current defendants had actual or apparent authority to act as agents for GTI.

Fifteen months later, GIUL sought leave to file a different amended complaint. In March 2022, the Court permitted GIUL to add certain claims against existing defendants. But it denied the motion to the extent that GIUL sought to assert a claim for "fraud on the court" against the five current defendants, because there is no such thing as a cause of action for fraud on the court. The amended complaint that GIUL filed in accord with the Court's March 2022 ruling is now the operative pleading.

The Court also denied GIUL's request to add new claims against GTI for fraud, violation of G.L. c. 93A, and conspiracy to commit fraud. The Court concluded that the factual allegations in the proposed amended complaint did not plausibly suggest that GTI ever said or did anything to give Mark Faupel authority to serve as GTI's agent in raising money from GIUL or others. GIUL twice sought interlocutory review of the Court's second denial of leave to add claims against GTI. An Appeals Court single justice denied both petitions.

Judge Ricciuti granted summary judgment in favor of the Defendants in February 2023 on GIUL's claims for fraud, breach of fiduciary duty, and breach of contract, as well as the two reach and apply claims. One year later, this Court (Salinger, J.) granted summary judgment in favor of the Defendants on GIUL's claim for conspiracy, because there can be no civil conspiracy without an underlying common law tort and Judge Ricciuti had granted summary judgment in favor of the defendants on all of GIUL's remaining tort claims.¹

¹ See *Greene v. Philip Morris USA Inc.*, 491 Mass. 866, 871 (2023) (claim for concerted action civil conspiracy "is 'akin to a theory of common law joint
<continued...>

1.2. Bench Trial of the MUSA and c. 93A Claims. This left only GIUL's claims under MUSA and G.L. c. 93A to be tried. The Court ruled that GIUL had no right to a jury trial on either claim, and exercised its discretion to try these claims without a jury.

GIUL had no right to have a jury decide its MUSA claim because GIUL sought to rescind its investment in Shenghuo as the remedy for the alleged MUSA violation, this statutory remedy is analogous to cases within the Superior Court's equity jurisdiction as to which there is no constitutional right to a trial, and MUSA does not create any statutory right to a jury trial. See *Bertolino v. Fracassa*, Suffolk Super. Ct. no. 1784CV00210-BLS2, 2020 WL 8183088, at *1 (Oct. 27, 2020) (Sanders, J.); see generally *Rosati v. Boston Pipe Covering, Inc.*, 434 Mass. 349, 350 (2001) (if plaintiff's claim " 'is analogous, in either subject matter or remedy sought, to cases within the court's equity jurisdiction, as it existed at the time of the adoption of the Constitution,' there is no right to trial by jury") (quoting *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 223 (1994)); see also *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 526–527 (1997) (no right to jury trial on shareholder derivative claim for rescission); *Ginn v. Almy*, 212 Mass. 486, 494–495 (1912) (no right to jury trial on claim for rescission of transfer of money or stock); *Keville v. McKeever*, 42 Mass. App. Ct. 140, 147 (1997) (no right to jury trial on claim for rescission of transfers of real and personal property).

There is similarly no constitutional or statutory right to a trial by jury on a claim under G.L. c. 93A. See *Nei v. Burley*, 388 Mass. 307, 315 (1983).

2. Findings of Fact. The Court heard testimony from five witnesses, and admitted 47 exhibits into evidence, during a four-day bench trial. The witnesses were Paul Conte, who owns and controls GIUL, and the four individual defendants. The Court makes the following findings of fact based on the testimony and exhibits presented at trial, and on reasonable inferences that the Court has drawn from that evidence. The Court does not credit any trial testimony, by Mr. Conte or the individual defendants, that is inconsistent with its findings below.

liability in tort' ") quoting *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1564 (1st Cir. 1994); *Bartle v. Berry*, 80 Mass. App. Ct. 372, 383–384 (2011) (to prove a claim for concerted action civil conspiracy, plaintiff "must show an underlying tortious act in which two or more persons acted in concert and in furtherance of a common design or agreement").

2.1. Events Preceding any Solicitation of Conte or GIUL. As discussed in sections 2.2.1 through 2.2.4 below, Shenghuo solicited Conte to invest in the company, and he agreed to do so through GIUL, LLC, in June and July of 2016. The formation of Shenghuo, its licensing agreement with GTI, and the subscription agreements entered into by the first two investors in Shenghuo provide the context for GIUL's subsequent investment.

2.1.1. The Formation of Shenghuo. Dr. Mark Faupel is a co-inventor of a cervical cancer screening and diagnostic device that is manufactured and marketed by Guided Therapeutics, Inc. ("GTI"). This device, called the LuViva® Advanced Cervical Scan device, uses spectroscopy to project light onto a woman's cervix, causing cells associated with cancer to fluoresce or to give other recognizable signals. Dr. Faupel served as GTI's chief executive officer from 2008 to 2013. He was succeeded by Dr. Gene Cartwright. Faupel worked as a consultant for GTI through mid-2015. He rejoined GTI's board of directors in December 2016. After Cartwright retired in 2023, Faupel once again became CEO of GTI.

Richard Blumberg met Faupel around 2006 or 2007. He became a shareholder of GTI a few years later.

Blumberg became interested in forming a company that could commercialize the LuViva device in China and elsewhere in Asia. He ran this idea past Mark Antonoplos, who was the CEO for a breast cancer diagnostic company. Antonoplos expressed interest in participating in this new venture.

Blumberg and Antonoplos formed this company, which they called Shenghuo Medical LLC, in February 2015. Antonoplos arranged for Mark Pearlstein, a lawyer, to draft and file the paperwork needed to create Shenghuo.

Blumberg and Antonoplos were Shenghuo's initial Managing Members. Soon after Shenghuo was formed, Faupel and Pearlstein also became members of this limited liability company, but did not serve as Managing Members until well after GIUL made its investment in the company. Pearlstein served as Shenghuo's legal counsel.

At some point, after a potential commercial partner in China objected to the name Shenghuo, the company began doing business using the name K2 Medical. Shenghuo started using the K2 name before June 2016. As a result, some of the documents admitted into evidence refer to Shenghuo as K2. The

Court will refer to the entity as Shenghuo, as the parties generally did throughout the trial of this case.

2.1.2. Shenghuo's Licensing Agreement with GTI. Not long after Shenghuo was formed, GTI granted it exclusive distribution rights for LuViva in China, Hong Kong, and Macau.

About a year later, Blumberg negotiated a broader licensing agreement under which GTI gave Shenghuo the exclusive right to to sell, distribute and also manufacture LuViva in China, Hong Kong, and Macau, as well as in the Philippines and in eight other countries in Southeast Asia and Indonesia. The agreement provided that Shenghuo would not have a right to use this License until Shenghuo invested, or arranged for a consortium of others to invest, \$200,000 in GTI. Shenghuo and GTI executed this contract on June 5, 2016.

The required investment in GTI was to be structured as a conditional loan that would be repaid with interest, but only after GTI succeeded in obtaining at least \$1 million in additional financing from another source or sources. If GTI obtained such additional funding within 90 days after the licensing agreement was executed, then GTI would be obligated to pay \$240,000 to Shenghuo or its consortium of investors, which would provide a 20 percent return on this very short-term loan. If GTI obtained additional financing of \$1 million or more at a later time, then GTI would be obligated to pay Shenghuo or the consortium \$300,000, or 1.5 times the amount that Shenghuo or the consortium was loaning to GTI. And if GTI made this payment after December 31, 2016, it would also have to pay additional interest of 20 percent per year compounded annually. GTI had no obligation under the licensing agreement to repay anything to Shenghuo or the consortium if GTI failed to obtain at least \$1 million in additional financing.

This licensing agreement also provided that the investment by Shenghuo, or a consortium arranged by Shenghuo, would be treated as a convertible note giving Shenghuo or the consortium the right to convert the loan into GTI common stock.²

² The Court finds that, although the licensing agreement says that the note will be convertible "at the Consortium's option," the plain meaning of the contract, when read as a whole, was to give either Shenghuo or a consortium of investors the right to convert the note to common stock. That was Shenghuo's

<continued...>

2.1.3. Initial Investors in Shenghuo. After Shenghuo entered into its licensing agreement with GTI, it promptly set about raising the \$200,000 that needed to provide to GTI to satisfy the financing condition.

Shenghuo had pulled together \$136,000 in funding before arranging for GIUL to invest the remaining \$64,000. John Imhoff and Stephen Maloof were investors in GTI and very interested in helping GTI survive and grow. Mark Faupel ultimately convinced them both to invest \$60,000 in Shenghuo; Imhoff made the investment personally and Maloof had his spouse make the investment. In addition, Faupel invested \$10,000 in Shenghuo. And Shenghuo itself was able to contribute \$6,000 of the money that it needed to satisfy its obligation to make the conditional loan to GTI.

Faupel was the person who approached Imhoff and Maloof about making equity investments in Shenghuo, because he knew them through their shared involvement in GTI. After Imhoff and Maloof both expressed interest in investing in Shenghuo, Faupel negotiated the terms of those investments on behalf of Shenghuo; he did so in consultation with and as authorized by Blumberg. It was Blumberg, in his capacity as one of the Managing Members of Shenghuo, who decided what terms Shenghuo would accept in exchange for investments by Imhoff and Maloof.

At first, Imhoff and Maloof each agreed to pay \$50,000 to purchase specified ownership interests in Shenghuo. Pearlstein, acting at Blumberg's direction, prepared and sent Imhoff and Maloof draft Membership Interest Subscription Agreements reflecting the initial terms that Imhoff and Maloof said they would accept; these drafts provided that Imhoff and Maloof would each invest \$50,000 in Shenghuo in exchange for receiving a specified number of membership units at a specified price per unit.

Blumberg and Faupel knew that GTI was working with an investment banker (the firm Ladenberg Thalmann) that was preparing an S-1 registration statement to raise \$5 million in equity for the company from outside investors. They believed at the time that there was a good likelihood that GTI would be

understanding at the time, as reflected in a letter from Blumberg to Shenghuo investors dated 7 June 2016, in which Blumberg said that Shenghuo will be investing \$200,000 in GTI, and in exchange "will receive a convertible note and warrants from GTI." That was GTI's understanding as well; after Shenghuo completed its \$200,000 investment, GTI stated in a Form 10-K filed with the SEC in March 2017 that it had agreed to issue a convertible note to Shenghuo.

successful, and therefore would soon repay Shenghuo. That belief was reasonable because Imhoff and Maloof, who held ownership stakes in GTI and were very familiar with its business plans and prospects, had told Faupel that GTI would soon be soliciting new investments and that both Imhoff and Maloof expected GTI to succeed in doing so fairly soon.

Based on that understanding, Blumberg and Faupel decided that they would sweeten the offer to Imhoff and Maloof, in an attempt to convince them to increase their investments to \$60,000 each. Shenghuo proposed that, if Imhoff and Maloof agreed to invest at this higher level, Shenghuo would give them an additional, conditional repayment right providing that, if GTI repaid the conditional loan it obtained from Shenghuo, then Shenghuo would use part of those proceeds to repay Imhoff's and Maloof's investments—but Imhoff and Maloof would nonetheless retain their equity interest in Shenghuo.

Imhoff and Maloof agreed to these revised terms. The revised subscription agreements that Imhoff and Maloof's spouse entered into with Shenghuo included this conditional repayment provision, in addition to granting them membership interests in Shenghuo, in exchange for each of them investing \$60,000 in the company. The conditional repayment provision was set out in two "whereas" clauses in the revised subscription agreements, which said that each investor would be repaid in full "but solely through monies received for that purpose from GTI" and also that each of them would retain their membership units in Shenghuo whether their investment was repaid "solely through monies received for that purpose from GTI" or was not repaid. The conditional repayment provision was also reflected in side-letters sent by Blumberg, which promised Imhoff and Maloof's spouse that if GTI was successful in raising at least \$1 million in its planned public offering, and as a result Shenghuo received a repayment from GTI, then Shenghuo would distribute all funds received to its investors within five days "in the pro rata amount of their investment."

Imhoff and Maloof's spouse each signed the revised subscription agreements and made a \$60,000 in Shenghuo in early June 2016.

2.2. GIUL's Investment in Shenghuo. Antonoplos had met Paul Conte about 10 years earlier. They stayed in close contact, often speaking by telephone several times each week. Conte has a law degree and decades of professional experience with financial transactions and investments.

2.2.1. Antonoplos Approaches Conte. As Faupel and Blumberg were working to finalize the Imhoff and Maloof investments, Antonoplos thought that Conte might have clients who could be interested in providing the remaining funds that Shenghuo needed to raise.

So Antonoplos, acting on behalf of Shenghuo and as one of its Managing Members, called Conte in early June 2016 and explained in general terms the opportunity that Shenghuo had to market GTI's LuViva product in China and elsewhere in Asia. He also explained that Shenghuo had to come up with \$200,000 in order to be able to distribute the LuViva product, and it had to come up with a partner in China that would be acceptable to GTI. Antonoplos let Conte know that Shenghuo had secured \$136,000 of the amount that it needed to raise and was looking for someone to invest the remaining \$64,000, so that Shenghuo could then invest \$200,000 in GTI.

Antonoplos made clear to Conte during this conversation that Shenghuo had no present income, and that the reason to invest in Shenghuo was to become a part-owner of a company with great future revenue potential from selling GTI's product. Antonoplos also made clear, and Conte understood, that Shenghuo's only real asset was its license agreement with GTI.

Antonoplos explained in general terms that anyone willing to invest the remaining \$64,000 would receive an ownership interest in Shenghuo as well as a conditional right to repayment of the investment amount.

The Court credits Antonoplos' testimony on cross-examination that he told Conte that repayment of the final \$64,000 investment was contingent on GTI raising an additional \$1 million and then repaying Shenghuo. This was consistent with the licensing agreement between Shenghuo and GTI, and with the terms of the subscription agreements that were offered to and accepted by Shenghuo's first two investors (Imhoff and Maloof's spouse). The Court finds that Conte was aware of and understood this part of Shenghuo's offer. The Court also credits Antonoplos' testimony that he never told Conte that repayment would be guaranteed or that there would be any deadline by which Shenghuo would be required to repay this investment.

During this telephone conversation, Conte asked Antonoplos to send him an email summarizing the opportunity to invest in Shenghuo.

As requested, Antonoplos followed up with an email to Conte on June 9, 2016. At the start of the email, Antonoplos told Conte to "check the website for

Guided Therapeutics, Inc.” for more information about GTI; he also included a link to that website (www.guidedinc.com) in the subject line of the email. GTI is and in 2016 was a publicly traded company. It has, and in 2016 had, a public website that (among other things) provided information to potential investors in GTI, including through links to all of GTI’s prior regulatory filings with the Securities and Exchange Commission (“SEC”); those filings contained a wealth of information about GTI’s finances and business prospects, and also contained the Licensing Agreement that GTI had entered into with Shenghuo.

Antonoplos went on in this June 9 email to summarize Shenghuo’s right under its licensing agreement to manufacture, sell, and distribute GTI’s portable cervical cancer detection device, and to list the countries where Shenghuo could do so. He reiterated that Shenghuo had to come up with \$200,000 that it would loan to GTI, that Shenghuo had raised \$136,000 of that amount so far, and that it needed to raise the remaining \$64,000 by the end of July. Antonoplos also reiterated that the investor who provided the \$64,000 would be given certain repayment rights “plus receive an interest in Shenghuo.”

The GTI website that Antonoplos told Conte to review fully disclosed GTI’s financial condition, including that GTI was not and had not yet been profitable, had almost no cash on hand, and had substantial debt and other current liabilities. Conte was a sophisticated investor who had the ability to review and understand the financial information that GTI made available in the then-current and historic SEC filings that Conte was able to access through the GTI website link that Antonoplos had sent to Conte.

If Conte had clicked on the link to GTI’s website that Antonoplos provided, he could easily have accessed GTI’s regulatory filings with the SEC, including its most recent 10-K annual report and most recent 10-Q quarterly report. Conte never asked Antonoplos or anyone else connected with Shenghuo for any additional information about GTI’s financial condition before deciding whether to invest in Shenghuo.

The Court takes judicial notice that at the time Conte was deciding whether to invest in Shenghuo, GTI’s most recent 10-K and 10-Q filings, which were available at GTI’s website, included the following disclosures:³

³ The Court may take judicial notice of facts “capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be
<continued...>

- o GTI's 10-K report for the year ending December 31, 2015, disclosed at pages 8–9 that: (i) "Although we will be required to raise additional funds during the second quarter of 2016, there is no assurance that such funds can be raised on terms that we would find acceptable, on a timely basis, or at all;" and (ii) "If we cannot obtain additional funds or achieve profitability, we may not be able to continue as a going concern."⁴

questioned." *Commonwealth v. Greco*, 76 Mass. App. Ct. 296, 301 n.9, *rev. denied*, 457 Mass. 1106 and 458 Mass. 1105 (2010), quoting Mass. Guide Evid. § 201(b)(2). This includes the content of SEC filings that are publicly accessible. See, e.g., *Cyntec Co., Ltd. v. Chilisin Elec. Corp.*, 84 F.4th 979, 989 n.6 (Fed. Cir. 2023) (taking judicial notice of disclosures in Apple's 2020 Form 10-K, in reviewing trial court's denial of motion to exclude expert opinion as to damages); *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 351 n.7 (Del. 2017) (taking notice of facts disclosed in plaintiff's Form 10-K, in reviewing trial court's findings in appraisal action); see also *Fire & Police Pension Ass'n of Colorado v. Abiomed, Inc.*, 778 F.3d 228, 232 n.2 (1st Cir. 2015) (trial court properly considered contents of defendant's filings with SEC in deciding motion to dismiss, even though they were not referenced in or attached to the complaint); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (same); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (same); *Yates v. Municipal Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014) (same); *Basic Capital Mgmt, Inc. v. Dynex Capital, Inc.*, 976 F.3d 585, 589 (5th Cir. 2020) (same); *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043 (9th Cir. 2015) (same); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276–1277 (11th Cir. 1999) (same); see also G.L. c. 233, § 76A (authenticated copies of SEC filings are admissible in evidence).

The statements by GTI in these 10-K and 10-Q filings are not hearsay because the Court is considering them not for the truth of those statements, but only to understand the nature of the financial and business disclosures by GTI to which Antonoplos had directed Conte. "If a statement is offered for any purpose other than for its truth, it is not hearsay." *Commonwealth v. Keown*, 478 Mass. 232, 245 (2017). For example, "[a]n extrajudicial statement is not hearsay when offered to prove that the person to whom it was addressed had notice or knowledge of the contents of the statement." *Pardo v. General Hosp. Corp.*, 446 Mass. 1, 19 (2006), quoting P.J. Liacos, M.S. Brodin, & M. Avery, *Massachusetts Evidence* § 8.2.2., at 466 (7th ed. 1999).

⁴ This 10-K report is publicly available from the SEC at <https://www.sec.gov/Archives/edgar/data/924515/000112178116000420/gthp10k123115.htm>.

- GTI's 10-Q report for the quarter ending March 31, 2016, disclosed at page 20 that GTI had only \$56,000 in cash on hand, had a "working capital deficit of approximately \$4.0 million," and "will be required to raise additional funds through public or private financing, additional collaborative relationships or other arrangements, as soon as possible." This page also disclosed that GTI "cannot be certain that our existing and available capital resources will be available to satisfy our funding requirements through the second quarter of 2016," that "[s]ubstantial capital will be required to develop our products," and that these factors "raise substantial doubt about our ability to continue as a going concern."⁵

If the Court did not take judicial notice of the specific contents of these 10-K and 10-Q filings, that would not cause it to alter any of its other findings of fact or reach any different conclusions in this case. The contents of these filings merely confirm Blumberg's testimony at trial, which the Court fully credits, that the information available at GTI's website when Antonoplos directed Conte to it fully disclosed GTI's financial condition. The Court would credit that testimony, and would still make its other findings and reach its other conclusions, even if it had not considered the actual contents of GTI's disclosures in the SEC filings quoted above.⁶

2.2.2. Conte Expresses Interest. Two days later, on June 11, 2016, Conte responded to Antonoplos by email, asking "Does the lender get the 64k in stock too in making the loan?" Conte said that, if so, he may be "interested personally" in making this investment. Antonoplos immediately responded in a one-word email that said simply, "Yes."

Later that day, Antonoplos sent a clarifying email. In it, he told Conte that the "\$64k lender" would: (i) get \$76,800, or have the right to convert that amount into roughly 4.41 million shares, if repaid within 90 days; (ii) get \$83,200, or

⁵ This 10-Q report is publicly available from the SEC at <https://www.sec.gov/Archives/edgar/data/924515/000112178116000472/gthp10q33116.htm>.

⁶ Nonetheless, if GIUL believes that the Court should not have taken judicial notice of these disclosures in the GTI filings that were made available to Conte before he decided to invest in Shenghuo, or if it wishes to be heard on this issue for some other reason, it may seek reconsideration on that basis. Cf. Mass. G. Evid. § 201(d) ("If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.").

have the right to convert that amount into roughly 4.78 million shares, if repaid later; and (iii) "in addition, lender will receive 10% interest in Shenghuo at \$600k pre-valuation." In other words, Antonoplos informed Conte that this investor would be a lender with certain repayment rights, and also obtain a 10 percent ownership interest in Shenghuo. Antonoplos did not tell Conte, either in this email or at any other time, that this investor would have any right to be repaid by Shenghuo by any particular date.

2.2.3. The Meeting of the Minds. A few weeks later, on June 29, 2016, Antonoplos sent to Conte a copy of the revised subscription agreement that Imhoff had signed, with Imhoff's name removed. Conte understood that Shenghuo was offering to let him invest on the same terms, albeit at the \$64,000 level rather than the \$60,000 referenced in the specimen subscription agreement that Antonoplos provided. Conte read and understood the terms contained in this specimen agreement.

The specimen subscription agreement that Antonoplos forwarded to Conte said, in the sixth and seventh whereas clauses, that Shenghuo would repay the investor "solely through monies received for that purpose from GTI." Antonoplos had told Conte, and Conte understood, that this meant that if he invested \$64,000 in Shenghuo that investment would be repaid with interest if and only if GTI raised \$1 million in additional financing and therefore repaid what it owed to Shenghuo. The Court does not Conte's testimony that Antonoplos failed to disclose this to him or that Conte did not understand this before he agreed to invest in Shenghuo.

When Antonoplos was soliciting an investment by Conte on behalf of Shenghuo, Antonoplos and Blumberg both (1) reasonably expected that GTI would soon be able to raise at least \$1 million in additional funding, and would therefore repay Shenghuo's loan to GTI with substantial interest before the end of 2016, and (2) intended that Shenghuo would then repay Conte's investment with interest in accord with the conditional repayment right that it had offered to Imhoff and Maloof's spouse and was now offering to Conte.

And Antonoplos disclosed the basis for that expectation to Conte. In the June 29, 2016, email, Antonoplos explained that the specimen subscription agreement attached to the email was the agreement that Shenghuo used for its prior two investors. He added that the other two investors in Shenghuo were also "heavy investors" in GTI, one of them was a GTI board member, and "they are both convinced that they will get their money back [from Shenghuo] in

90 days,” meaning that Imhoff and Maloof had both made clear that they expected GTI to succeed in raising at least \$1 million in new funding and then repay Shenghuo without about three months.

Conte sought corroboration that he would be granted the same conditional loan terms by Shenghuo, and sought better to understand GTI’s conditional obligation to repay Shenghuo. So Antonoplos arranged for a brief three-way conversation among Conte and Shenghuo’s two Managing Members, Antonoplos and Blumberg. During this call, Blumberg reiterated that GTI was obligated to repay Shenghuo if GTI raised at least \$1 million from another source, and explained that GTI had a strong incentive to do so as quickly as it could because the Licensing Agreement that GTI had entered into with Shenghuo would require GTI to pay 150 percent of Shenghuo’s \$200,000 loan if GTI failed to repay Shenghuo within 90 days, plus 20 percent annual interest if it failed to repay Shenghuo by the end of 2016.⁷

Conte then agreed to invest \$64,000 in Shenghuo on the terms contained in the specimen agreement that Antonoplos had sent to him, including the contingent repayment provisions. Conte understood at the time that there had been what he described as a “meeting of the minds” based on the terms that Shenghuo offered in the specimen agreement and that Conte then accepted. Conte accepted this offer orally by telling Antonoplos that he wanted to make this investment in Shenghuo, and reiterated the acceptance by paying \$64,000 to Shenghuo on behalf of GIUL.

Although Antonoplos, in his July 11 email to Conte, had floated the idea of giving Conte to option to convert his conditional repayment right into an additional ownership interest in Shenghuo, no such provision was included in the specimen agreement. The Court finds that Conte reviewed and understood the terms contained in the specimen agreement, and that Conte understood

⁷ The Court does not credit Conte’s memory that this conversation took place among Conte, Antonoplos, and Faupel. In a February 2018 email, discussed in more detail below, Conte said he was promised “by the Managers of K2” (aka Shenghuo) that Conte would be repaid “when and if GT receives funding.” Conte knew that Antonoplos and Blumberg were the Managing Members of Shenghuo in 2016, and that Faupel was not a Manager of the Company. This email therefore confirms that Conte had this conversation with Antonoplos and Blumberg, rather than with Antonoplos and Faupel.

and agreed that Shenghuo was not going to grant him any option to convert his conditional repayment right into Shenghuo stock or membership units.

Once Conte said that he wanted to make this investment, Antonoplos and Blumberg instructed Pearlstein to prepare a subscription agreement for Conte with the same terms as the final, revised agreement signed by Imhoff and Maloof's spouse, but for an investment of \$64,000 rather than \$60,000. Pearlstein prepared a subscription agreement for Conte that he thought was in this form; Pearlstein emailed it to Antonoplos on July 18, 2016, and Antonoplos promptly forwarded it by email to Conte (copying Pearlstein, Faupel, and Blumberg). This draft agreement said that it was being entered into by Conte "or an entity later designated by him."

Conte signed this subscription agreement, and returned his signature pages to Shenghuo, on July 18, 2016. Conte signed the agreement and exhibit A to the agreement above the line labelled "Paul Conte, Investor," which he revised to add "or assignee."

In signing this written agreement, Conte agreed (as provided in the contract) that he had obtained "sufficient information to evaluate the merits and risks of an investment" in Shenghuo, and that Conte had "sufficient knowledge and experience in financial and business matters to evaluate the merits and risks associated with such investment and to make an informed investment decision with respect thereto."

The next day, Conte decided he would rather make the investment through GIUL, LLC. So Conte sent an email asking that the agreement be revised to show that his investment in Shenghuo was being made by "Giul LLC." Antonoplos or Blumberg instructed Pearlstein to make that change. So Pearlstein did so, and emailed a subscription agreement in GIUL's name to Conte on July 19, copying Antonoplos, Faupel, and Blumberg); Pearlstein asked that Conte, Faupel, and Blumberg sign and return the signature pages to him.

Conte then caused GIUL to pay \$64,000 to Shenghuo; GIUL is bound by the allegation in its complaint (at ¶ 26) that "GIUL, on July 19, 2016, provided its \$64,000 in loan and investment funds to Shenghuo."⁸ Two days later, Conte

⁸ See G.L. c. 231, § 87 ("In any civil action pleadings ... shall bind the party marking them."); *Adiletto v. Brockton Cut Sole Corp.*, 322 Mass. 110, 112 (1947) (this statute provides that "facts admitted in pleadings" are "conclusive upon" the party making them).

sent an email saying that he would execute the revised subscription agreement and return a pdf copy. There is no evidence that he ever did so.

Shenghuo accepted GIUL's \$64,000 investment with the shared understanding that GIUL was receiving not only the ownership interest specified in the version that Conte had signed but also the conditional repayment rights contained in the prior specimen subscription agreement (identical to the agreement signed by Imhoff) that Conte had reviewed and the terms of which he had accepted. Conte manifested GIUL's acceptance of these terms—which Antonplos had offered when he sent Conte the specimen subscription agreement—by first signing the subscription agreement on behalf of himself or his assignee, then asking that the agreement be revised to show that the investment was actually being made by GIUL, LLC, and then causing GIUL to pay the \$64,000 investment amount to Shenghuo. Conte performed GIUL's obligations under its subscription agreement by paying \$64,000 to Shenghuo, and accepted GIUL's benefits under that contract by accepting GIUL's membership interest in Shenghuo and its agreed-upon conditional repayment rights; that performance and acceptance of benefits constituted and demonstrated acceptance of the terms of this contract.⁹

Conte confirmed later on that he had always understood the contingent nature of the repayment provisions in GIUL's subscription agreement before deciding and agreeing to invest in Shenghuo. In February 2018, Conte sent emails to Faupel, Antonplos, and Pearlstein seeking reassurance that he would be repaid when GTI raised its first \$1 million in financing. Conte said in these emails that is what he had been promised when he agreed to invest \$64,000 in Shenghuo. (In these emails, Conte refers to his investment in K2, rather than Shenghuo, because by then Shenghuo was doing business as K2.) In the first of these emails, Conte says he had been promised that he "would be paid back upon funding of GT," and based on that promise said he expected to be repaid \$90,000 "when and if GT receives funding." In the second of these emails, Conte clarifies that he agreed to invest in Shenghuo only after being promised that his initial investment would be repaid with interest "upon [GTI] raising the first

⁹ See *Polaroid Corp. v. Rollins Envt'l Servs. (NJ), Inc.*, 416 Mass. 684, 691 (1993). A party that acts as though it has accepted an offer and entered into a contract is bound by that contract. *Martino v. First Nat. Bank of Boston*, 361 Mass. 325, 332 (1972). "There is no surer way to find out what parties meant, than to see what they have done." *Id.*, *supra*, quoting *Insurance Co. v. Dutcher*, 95 U.S. 269, 273 (1877).

\$1 Million in financing,” and that this promise “is what induced” him to make GIUL’s \$64,000 investment. The Court credits these statements by Conte in his February 2018 emails. It does not credit Conte’s attempts when he testified at trial to disavow what he admitted in this emails.

The Court also does not credit Conte’s testimony during the 2024 trial that Antonoplos had made an unconditional promise that Shenghuo would repay Conte’s \$64,000 investment within 90 days, or that Antonoplos ever said or indicated that Conte would have an absolute right to be repaid at any other time. Instead, based on Conte’s admissions in his February 2018 emails, the Court finds that Conte was always well aware that GIUL’s subscription agreement with Shenghuo does not set any deadline for repayment, and that the subscription agreement instead provided that Shenghuo would repay Conte if and only if GTI repaid Shenghuo, and that GTI had no obligation to do so until it raised \$1 million from other investors.

2.2.4. The Scrivener’s Error and the Parties’ Mutual Intent. When Pearlstein sent the first subscription agreement to Conte for his signature, Pearlstein thought he had taken the final, revised subscription agreement that was prepared for and signed by Imhoff or Maloof’s spouse, changed the name of the investor to Paul Conte, changed the amount of the investment from \$60,000 to \$64,000, and made a corresponding change to the number of membership units in Shenghuo that Conte would acquire. In other words, Pearlstein intended to prove a draft consistent with the specimen agreement that Conte had reviewed and accepted, including the conditional repayment provision included in two of the “whereas” clauses.

But Pearlstein mistakenly started with an original draft of the subscription agreement for Imhoff or Maloof’s spouse. As a resulted, when Pearlstein sent Conte his subscription agreement it did not include the conditional repayment provisions that Antonoplos had offered to Conte and that Conte had accepted. No one noticed that this feature was not reflected in the subscription agreement prepared for Conte’s signature.

When Conte signed this draft subscription agreement on behalf of himself or any assignee, he and Shenghuo believed and intended that their contract included the same conditional repayment terms that had been added to the subscription agreements executed by Imhoff and Maloof’s spouse.

After Conte asked to revise his subscription agreement to indicate that Conte's investment in Shenghuo was being made by GIUL rather than Conte individually, Pearlstein made that change in the version that he had previously sent to Conte and that Conte had already signed. As a result, the version of the subscription agreement that Conte accepted on GIUL's behalf also did not include the conditional repayment "whereas" provisions that Conte and Shenghuo had agreed to.

The Court finds that the written subscription agreement that Conte signed in his own name, and the revised version in GIUL's name that Conte accepted by causing GIUL to pay \$64,000 to Shenghuo, were not fully integrated contracts. Whether a written contract is fully integrated "is 'a question of fact [that] turns upon the intention of the parties.'" ¹⁰ Although the subscription agreement signed by Conte includes a clause stating that it represents the parties' entire agreement and "supersedes any other writing or conversation," the Court finds that in fact the parties intended that their agreement would include additional provisions, and that as a result the written form of their subscription agreement was not a fully-integrated contract. ¹¹

More specifically, the Court finds that Conte and Shenghuo both understood and had agreed that the conditional repayment provisions—stating that Conte's or GIUL's investment would be repaid in full "but solely through monies received for that purpose from GTI" and also that Conte or GIUL would retain their membership units in Shenghuo whether their investment was repaid "solely through monies received for that purpose from GTI" or not—were part of their contract, even though inadvertently they had not been

¹⁰ *Green v. Harvard Vanguard Med. Associates, Inc.*, 79 Mass. App. Ct. 1, 9 (2011), quoting *Holmes Realty Trust v. Granite City Storage Co.*, 25 Mass. App. Ct. 272, 275 (1988).

¹¹ "[E]ven apparently straightforward contractual language asserting integration will not always compel a conclusion that a writing reflects a complete and integrated agreement." *Green*, 79 Mass. App. Ct. at 9. "Put differently, although such a clause is evidence of integration ..., it is not conclusive on the question." *Chambers v. Gold Medal Bakery, Inc.*, 83 Mass. App. Ct. 234, 243 (2013). Thus, if a party has "raised sufficient doubt about the intended meaning of [an] integration clause," then the trial judge should allow "evidence of the parties' negotiations and circumstances surrounding the execution of the [contract] to determine if [it] was an integrated agreement." *Chambers*, 83 Mass. App. Ct. at 244.

included in the written subscription agreements that Conte signed for himself and then accepted on GIUL's behalf.¹²

In sum, the Court finds that the conditional repayment provisions sought by Conte, in the form previously shown to Conte and included in the final subscription agreements signed by Imhoff and Maloof's spouse, were included in and part of the subscription agreement between GIUL and Shenghuo even though those two paragraphs were inadvertently omitted from the final written contract.

In July 2021, Shenghuo offered to revise its written subscription agreement with GIUL to include in writing the conditional repayment provision that was agreed to by the parties but had inadvertently been omitted from the final form of the document that Conte accepted on behalf of GIUL. That offer was consistent with the contract terms that Shenghuo had previously offered to Conte, and that Conte had accepted on GIUL's behalf. Conte was aware of but never responded to this proposal to correct the written form of GIUL's subscription agreement.

2.2.5. Faupel Played No Role, and Pearlstein Play a Very Limited Role, in GIUL's Investment. Faupel had no conversations or other direct communications or contact with Conte before he agreed to invest and then caused GIUL to invest in Shenghuo. The Court does not credit Conte's testimony that he had a brief three-way conversation with Antonoplos and Faupel before Conte decided to invest in Shenghuo.

During 2016, Faupel was acting as Shenghuo's agent in China, as he worked to identify a Chinese partner who could help to commercialize the LuViva product in that country. But Faupel never acted as Shenghuo's agent in connection with any potential investment by Conte or GIUL. Faupel was not involved in deciding what terms to offer to Conte; that was decided by Shenghuo's Managing Members at that time, i.e. by Antonoplos and Blumberg. Nor was Faupel a de facto manager or otherwise exercise control over Shenghuo during 2016. Instead, the company was being run by its two Managing Members, Antonoplos and Blumberg.

Pearlstein's communications with Conte prior to GIUL's investment were limited to those described above. Pearlstein never did anything to help solicit

¹² Cf. *Antonellis v. Northgate Const. Corp.*, 362 Mass. 847, 849–851 (1973); *Ryder v. Williams*, 29 Mass. App. Ct. 146, 149–150 (1990).

an investment in Shenghuo by Conte or GIUL. His only role was to perform traditional legal work in connection with the transaction; he prepared and sent proposed solicitation agreements to Conte, and tried to obtain signatures on those contracts by Conte and by the two Managing Members of Shenghuo, Antonoplos and Blumberg.

Neither Faupel nor Pearlstein exercised any control over Shenghuo, or over Shenghuo's Managing Members, at any time before GIUL made its investment in Shenghuo in July 2016. Later on, in March 2017, Antonoplos resigned as Managing Member of Shenghuo, Blumberg continued in that position and Faupel and Pearlstein joined him as Managing Members of Shenghuo. Faupel resigned from that position in early 2018, around February of that year.

2.3. Subsequent Events, After GIUL's Investment in Shenghuo.

2.3.1. Shenghuo's Investment in GTI. Once Shenghuo received the investments by Imhoff, Maloof's spouse, Faupel, and GIUL, Shenghuo paid over \$200,000 to GTI and thereby activated its rights under its licensing agreement with GTI. Shenghuo made this investment in its own name; it did not arrange for a consortium of investors to do so. Shenghuo made this payment to GTI in late July 2016.

2.3.2. No Repayments to Shenghuo or to GIUL. GTI's efforts to raise additional capital from mid-2016 through early 2017 were not successful. Though the S-1 filed by GTI on July 1, 2016, was renewed several times, all efforts by GTI's investment banker to raise funds for the company failed.

Since GTI had failed to raise at least \$1 million from another source by the end of 2019, it was not obligated to and did not repay any part of or pay any interest on Shenghuo's \$200,000 investment in GTI.

And since Shenghuo never received repayment from GTI, it was not obligated to and never did repay any part of or pay any interest on GIUL's \$64,000 investment in Shenghuo.

2.3.3. Shenghuo's Exchange Agreement with GTI. As late as mid-2019, GTI sincerely believed that it would be able to secure new funding and then be obligated and able to repay Shenghuo. In early June 2019, GTI's CEO Dr. Gene Cartwright sent an email to Conte, copying Conte's lawyer (Attorney Michael Gilleran) and Dr. Faupel, in which Cartwright again assured Conte that GTI was obligated to repay Shenghuo if GTI was able to raise at least \$1 million in

funding from another source, and assuring Conte that GTI was “in the end stages of completing a financing for the Company of >\$1 million.”

By late 2019, however, GTI was suffering a severe cash-flow crisis. GTI’s continued efforts to secure additional financing had failed. As a result, it was unable to pay all of its bills; GTI could not even pay for heat and lighting.

GTI concluded, and Shenghuo agreed, that GTI would not survive without raising substantial additional capital. At that time, GTI had considerable debt. GTI determined that it would not be able to raise additional capital unless it was able to eliminate its existing debt, as it had become clear to GTI that no new investor would be willing to invest in GTI only to have that money go to pay existing creditors rather than fund future company operations.

In early January 2020, Blumberg and Pearlstein—who at that time were the only remaining Managing Members of Shenghuo—concluded that it was in the best interest of Shenghuo to enter into an Exchange Agreement with GTI, under which Shenghuo’s loan to GTI would be converted to an equity interest. They believed and concluded that Shenghuo’s success was wholly dependent on GTI being successful; that if GTI were to fail then Shenghuo would have been worthless, because it would not be able to sell the LuViva product and would have no prospect of generating any income; that GTI would fail if it was not able to raise more working capital; and that GTI could not raise more capital unless Shenghuo and GTI’s other lenders agreed to exchange their rights as lenders for an ownership share in GTI. The Court finds that these conclusions were a reasonable exercise of business judgment.

Shenghuo therefore agreed to enter into an Exchange Agreement with GTI, with an effective date of December 30, 2019. This agreement had the effect of extinguishing GTI’s debt to Shenghuo, by exchanging that debt for shares of stock in GTI. The decision by Blumberg and Pearlstein to have Shenghuo enter into this Exchange Agreement was also a reasonable exercise of business judgment.

The Exchange Agreement between Shenghuo and GTI did not terminate GIUL’s conditional right to repayment by Shenghuo. But by eliminating GTI’s obligation to repay Shenghuo, and thereby ensuring that Shenghuo would never receive any repayment from GTI, it meant that the condition under which Shenghuo would have to repay GIUL would never be triggered.

Conte and GIUL were never promised and never had any right to participate in Shenghuo's business decision as to whether Shenghuo should convert its conditional loan to GTI into an equity stake in GTI.

2.3.4. Current Status of GIUL's Investment in Shenghuo. GIUL continues to hold its almost 11 percent ownership interest in Shenghuo, which in turn holds an ownership interest in GTI. The Court credits Blumberg's unchallenged opinion that GTI has become very valuable. This suggests that GIUL's ownership interest in Shenghuo also has real current and likely future value.

2.4. No Material Omissions. In its post-trial memorandum, GIUL contends that Shenghuo and some or all of the individual defendants withheld six categories of material information from Conte before he caused GIUL to invest in Shenghuo. The Court finds that GIUL has not proved any of these contentions.

2.4.1. Granting GIUL a Conditional Repayment Right. First, GIUL contends that the defendants never intended to provide Conte or GIUL with any conditional repayment right, or never intended Conte or GIUL to be able to exercise such a right, and yet never disclosed that intent. These assertions cannot be squared with the facts.

As discussed in § 2.2.4 above, Antonoplos, Blumberg, and Pearlstein always intended that Conte's or GIUL's subscription agreement with Shenghuo would include the conditional repayment feature. (As discussed in § 2.2.5, Faupel had nothing to do with these discussions and negotiations.) And the Court has found that the conditional repayment terms always were and remain part of GIUL's subscription agreement with Shenghuo, even though they were inadvertently omitted from the final forms of the agreement the Pearlstein sent to Conte for his signature.

The Court further finds until late 2019, just before Shenghuo entered into its Exchange Agreement with GTI, all defendants intended that GIUL would be able to exercise its conditional repayment rights, subject to the condition (that Conte understood and accepted at the time) that GTI obtain at least \$1 million in financing from another source and therefore repay Shenghuo.

The Court finds that when Antonoplos was trying to convince Conte to invest in Shenghuo, he (Antonoplos), Blumberg, Faupel, and Shenghuo all expected that GTI was likely to be successful in raising at least \$1 million in additional

financing within the next three to six months, and expected that when GTI did so it would repay Shenghuo in accord with its licensing agreement.

It further finds that, while Antonoplos was soliciting Conte to invest in Shenghuo, Pearlstein exercised no control over Shenghuo or its managing members, and that Pearlstein had no knowledge of any made no representations to Conte or GIUL about the likelihood that GTI would repay Shenghuo and therefore trigger GIUL's conditional right to repayment from Shenghuo.

The Court finds that Shenghuo and all four individual defendants always intended that if GTI were to repay Shenghuo's investment in GTI, then Shenghuo would live up to its conditional agreement to repay GIUL's investment in Shenghuo with the agreed-upon interest.

2.4.2. Conversion of Shenghuo's Loan to GTI. Second, GIUL contends that no one told Conte in advance that Shenghuo's Managing Members, and not Conte or GIUL, would make any future decision by Shenghuo to exchange its loan to GTI for shares in GTI.

The Court finds that no such disclosure was required because Conte knew, and any reasonable investor in Conte's position would have known, that Conte and GIUL would have no control over any of Shenghuo's business decisions. When Conte agreed to the terms in the specimen subscription agreement (including the conditional repayment provision), he understood that Shenghuo would be controlled by its Managing Members, that Conte or GIUL were not going to be Managing Members of Shenghuo, and that Conte or GIUL were going to be minority owners with no right or ability to control Shenghuo.

Furthermore, Conte was never offered, promised, or given any right to convert GIUL's conditional right to be repaid by Shenghuo into an ownership interest in GTI, which was a wholly separate business entity. To the extent that GIUL now contends that it had such a right, and that Shenghuo's Exchange Agreement with GTI deprived GIUL of that conversion right, that contention cannot be squared with the facts; GIUL was never promised, never had, and was never deprived of that non-existent right.

2.4.3. GTI's Financial Condition. Third, GIUL contends that GTI's financial condition before GIUL invested in Shenghuo was never disclosed. That is incorrect.

As the Court found in § 2.2.1 above, Antonoplos told Conte to go to GTI's website for more detailed information about that entity, Antonoplos provided Conte with a link to GTI's website, if Conte had done as Antonoplos suggested he could easily have accessed GTI's most recent 10-K and 10-Q filings with the SECs, and those filings explained GTI's financial and business condition in some detail. It appears that Conte did not bother to read the disclosures that had been provided to him. But he has not shown that any material information about GTI was withheld from him.

2.4.4. Shenghuo's Financial Condition and Business Model. Fourth, GIUL contends that no one ever told him that as of June 2016 Shenghuo "had no sales, approvals, products, partners, or manufacturer or manufacturing expertise, and that its only real asset was its License Agreement with Guided" (meaning GTI). None of that is correct.

The Court finds that Antonoplos clearly disclosed all of those things to Conte before he invested in Shenghuo on behalf of GIUL. It does not credit Conte's testimony to the contrary.

2.4.5. Role of GTI's Investment Banker. Fifth, GIUL complains that it never learned that the investment banker working with GTI as of June 2016 was not promising to invest its own funds in the company but instead would be seeking funds on GTI's behalf from other investors.

The Court finds that GIUL has not shown, and indeed has presented no evidence suggesting, that a reasonable investor deciding whether to invest in Shenghuo would have viewed this information as significantly altering the total mix of information made available. Investment banks often act as an intermediary between a company seeking to raise funds and investors will to loan money to or make an equity investment in the company. Though investment banks may sometimes invest their own funds, GIUL has not shown that a reasonable investor would have considered the fact that GTI's investment broker was acting solely as a potential intermediary to be material to any decision as to whether to invest in Shenghuo.

These findings do not turn on, but are corroborated by, the disclosures in GTI's 10-K filing for 2015, which the Court discussed and took judicial notice of in § 2.2.1 above. As noted above, this 10-K disclosed that GTI had to raise additional funds, and warned potential investors that "there is no assurance that such funds can be raised on terms that we would find acceptable, on a

timely basis, or at all.” A further disclosure that GTI had hired an investment banker to solicit funding from other investors, but that the investment banker had not committed to investing any of its own money in GTI, would not have significantly altered the total mix of information made available, in light of GTI’s explicit warning that its efforts to raise more funding may fail.

2.4.6. Repayment to GIUL Conditioned on GTI Raising \$1 million. Finally, GIUL contends that no one ever told Conte that any payback from GTI to Shenghuo (and thus any payback from Shenghuo to GIUL) was conditioned on GTI raising \$1 million in funding from another source. That is not true.

As discussed in §§ 2.2.1 and 2.2.3 above, the Court credits Antonoplos’ testimony on cross-examination that he told Conte that repayment of the final \$64,000 investment was contingent on GTI raising an additional \$1 million, and credits Conte’s explicit admissions in his February 2018 emails that Conte agreed to invest in Shenghuo only after being promised that his initial investment would be repaid with interest “upon [GTI] raising the first \$1 Million in financing,” and that this promise “is what induced” him to make GIUL’s \$64,000 investment.

The Court does not credit any of Conte’s contrary testimony at trial.

3. Analysis and Conclusions. GIUL has not met its burden of proving either of its remaining claims against any of the defendants.

3.1. MUSA Claim. First, GIUL has not shown that any of the defendants violated the Massachusetts Uniform Securities Act.

3.1.1. Legal Background. MUSA imposes primary liability on anyone who “offers or sells a security” by means of a material false statement or omission. See G.L. c. 110A, § 410(a)(2). The statute also imposes secondary liability upon any person “who directly or indirectly controls” a seller that violates § 410(a) (a so-called “control person”), and upon any “agent who materially aids in” such a sale. See G.L. c. 110A, § 410(b).

3.1.1.1. Primary Liability under § 410(a). To prevail on a claim under § 410(a), a plaintiff must prove that: “(1) the defendant ‘offers or sells a security’; (2) in Massachusetts; (3) by making ‘any untrue statement of a material fact’ or by omitting to state a material fact; (4) the plaintiff did not know of the untruth or omission; and (5) the defendant knew, or ‘in the exercise of reasonable care [would] have known,’ of the untruth or omission” (bracketed word in original).

Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 52 (2004), quoting G.L. c. 110A, § 410(a)(2).

Someone sells or offers a security within the meaning of § 410(a) if they pass or transfer title to or other interest in the security, or if they make an offer to sell or actively solicit an offer to purchase a security. See *Pinter v. Dahl*, 486 U.S. 622, 642–646 (1988).¹³ Others who may play some other role in marketing or selling a security cannot be held liable under this provision, even if their participation was “a substantial factor in causing the transaction to take place.” *Id.* at 649–650. In other words, “[p]roof the defendant *caused* a plaintiff’s purchase of a security is not enough to establish that the defendant ‘solicited’ the sale.” See *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1215 (1st Cir. 1996) (emphasis in original, applying *Pinter*).¹⁴

3.1.1.2. Secondary Liability under § 410(b). There are two possible ways to prove secondary liability under MUSA, either by proving that someone controlled an entity that made a fraudulent offer or sale of a security, or by proving that they acted as an agent of the offeror or seller and materially aided the sale.

To prove that someone is liable for securities fraud as a control person under MUSA § 410(b), a plaintiff “must prove ‘(1) that a primary violator violated the

¹³ Since MUSA “is almost identical with” parallel provisions in the Federal Securities Act of 1933, *Pinter* and other decisions and commentary construing the federal statute provides useful guidance on how to construe and apply MUSA. *Marram*, 442 Mass. at 50-51. As a result, when the Court cites or discusses federal case law construing and applying the Federal Securities Act, it will treat that precedent as if it were construing and applying MUSA, and will not each time note that the Federal decision concerns the Federal statute.

¹⁴ That is because one who offers or sells a security by means of a material misrepresentation is only “liable to the person buying the security from him.” G.L. c. 110A, § 410(a)(2). This “purchase from” requirement “focuses on the defendant’s relationship with the plaintiff-purchaser;” it is therefore materially different than the substantial-factor test, which “focuses on the defendant’s degree of involvement in the securities transaction and its surrounding circumstances.” *Pinter, supra*, at 651. Thus, potential liability under § 410(a) is limited to those “who pass title” to a security and other “persons who ‘offer,’ including those who ‘solicit’ offers.” *Cambridge Place Inv. Mgmt., Inc. v. Morgan Stanley & Co.*, 1084CV02741-BLS1, 2012 WL 5351233, at *24 (Mass. Super. Sept. 28, 2012) (Billings, J.) (quoting *Pinter, supra*, at 650, and applying *Pinter* to MUSA).

federal securities laws; (2) that the alleged control person actually exercised control over the general operations of the primary violator; and (3) that the alleged control person possessed—but did not necessarily exercise—the power to determine the specific acts or omissions upon which the underlying violation is predicated.’ ” *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1093–1094 (8th Cir. 2021), quoting *Lustgraaf v. Behrens*, 619 F.3d 867, 873 (8th Cir. 2010); see also *In re Stone & Webster, Inc., Securities Litigation*, 414 F.3d 187, 194 (1st Cir. 2005); *In re Lehman Bros. Mortgage-Backed Securities Litigation*, 650 F.3d 167, 185 (2d Cir. 2011).

“To meet the control element, the alleged controlling person must not only have the general power to control the company, but must also actually exercise control over the company.” *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 85 (1st Cir. 2002); accord, e.g., *Commodity Futures Trading Comm’n v. Baragosh*, 278 F.3d 319, 330 (4th Cir. 2002); *Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 911–912 (7th Cir. 1994); *Lustgraaf v. Behrens*, 619 F.3d 867, 873–874 (8th Cir. 2010); *Varjebedian v. Emulex Corp.*, 888 F.3d 399, 403 n.2 (9th Cir. 2018); *In re Galectin Therapeutics, Inc. Securities Litigation*, 843 F.3d 1257, 1276 (11th Cir. 2016).

Secondary liability may also be imposed upon an “agent who materially aids in the sale,” unless the agent proves that they “did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.” G.L. c. 110A, § 410(b).

3.1.1.3. Materiality of False Statement or Omission. Under MUSA, “[t]he test whether a statement or omission is material is objective: ‘there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.’ ” *Marram*, 442 Mass. at 57–58, quoting *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 641 (3d Cir. 1989).

3.1.1.4. Remedy. If a security is offered or sold in violation of MUSA, and liability attaches under § 410(a) or § 410(b), the purchaser is entitled to tender the security to the liable party or parties and recover from them an amount equal to the entire consideration that the purchaser paid for the security, plus six percent annual interest running from the date they made that payment, plus litigation costs and reasonable attorneys’ fees. See *Id.*, § 410(a)(2).

"While not imposing strict liability on the seller for untrue statements or omissions," MUSA provides that if an investor proves that securities were sold by means of such misrepresentations then burden shifts to the seller to prove " 'that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.' " *Marram, supra*, at 52, quoting § 410(a)(2).

This statute "creates a strong incentive for sellers of securities to disclose fully all material facts about the security," and "provides strong protections for a buyer who received misleading information from a seller of securities." *Marram*, 442 Mass. at 51-52. It does so by "rendering tainted transactions voidable at the option of the defrauded purchaser," without the purchaser having to prove that the misrepresentation caused them to suffer any loss or even that they relied upon the misrepresentation when they bought the security. *Id.* at 51, 53, 57 n.24. "The buyer's sophistication is also irrelevant." *Id.* at 53.

MUSA "seeks not only to secure accuracy in the information that is volunteered to investors, but also, and perhaps more especially to compel disclosure of significant matters that were heretofore rarely, if ever, disclosed." *Marram, supra*, at 51-52, quoting Shulman, Civil Liability and the Securities Act, 43 Yale L.J. 227, 227 (1933). MUSA imposes a duty of full disclosure on sellers of securities; the buyer has no "duty to investigate or to 'verify a statement's accuracy.'" *Id.* at 53, quoting *Mid-America Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc.*, 886 F.2d 1249, 1256 (10th Cir. 1989).

3.1.2. MUSA Claim against Shenghuo, Antonoplos, and Blumberg. GIUL proved several elements of its MUSA claim against Shenghuo, Antonoplos, and Blumberg. But this claim still fails because GIUL has not proved that these defendants offered or sold any security by making 'any untrue statement of a material fact' or by omitting to state a material fact. See G.L. c. 110A, § 410(a).

3.1.2.1. Status as Sellers, Offerors, or Control Persons. The Court concludes that Shenghuo faces potential MUSA liability because it sold a security to GIUL in Massachusetts, Antonoplos faces potential primary liability because he offered a security to GIUL, and Antonoplos and Blumberg both face potential primary liability because they passed sold securities by signing Conte's subscription agreement and in any case face potential secondary liability because they were the Managing Members of and thus exercised control over Shenghuo at the time that it sold a security to GIUL.

GIUL's purchase of an ownership interest in Shenghuo together with a conditional right of repayment constituted the purchase of a "security" within the meaning of MUSA. The statute defines the term "security" broadly. It includes, among other things, any "evidence of indebtedness," any "investment contract," and any interest commonly known as a security. See G.L. c. 110A, § 401(k).

Antonoplos participated in "offering" the sale of a security to GIUL by actively soliciting Conte's investment in Shenghuo. MUSA defines "offer" broadly, to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." G.L. c. 110A, § 401(i)(2). Under this definition, "offers 'are not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security. Rather, ... they include 'any document [or oral communication] which is designed to procure orders for a security.'" ' " *Bulldog Investors General Partnership v. Secretary of the Commonwealth*, 460 Mass. 647, 653 (2011) (construing identical provision of federal 1933 act), quoting *Matter of Carl M. Loeb, Rhodes & Co.*, 38 S.E.C. 843, 848 (1959), quoting in turn Security Act Release No. 2623 (July 25, 1941).

Antonoplos and Blumberg also face potential liability as sellers of securities. They both signed Conte's original subscription agreement and agreed to sign the revised subscription agreement in GIUL's name. Since Antonoplos and Blumberg were the ones who passed title or other interest in the Shenghuo security to GIUL, they can be held liable as sellers of the security. See *Pinter*, 486 U.S. at 642.

And both Antonoplos and Blumberg also face potential MUSA liability as "control persons" because, as the two Managing Members of the company, they "actually exercised control over the general operations" of Shenghuo and had the power to determine the contours of the offer to Conte and what information was shared with him. Cf. *Donelson*, 999 F.3d at 1093–1094.

3.1.2.2. No False Statement or Material Omission. GIUL has failed, however, to prove that it was offered or sold any security by means of a material false statement or omission.

GIUL's contention that he relied on false promises is without merit. Shenghuo and its Managing Members in 2016 (Antonoplos and Blumberg) did **not** make a false promise that Conte or GIUL would receive the same conditional

repayment right that had been offered to prior investors. To the contrary, as the Court found in § 2.2.3 and § 2.2.4 above, those conditional payment terms became part of GIUL's subscription agreement with Shenghuo even though they were inadvertently omitted from the final documents provided to Conte.

The defendants also did **not** make a false promise that Shenghuo would honor GIUL's conditional repayment right, if the condition that GTI raise \$1 million in funding from other sources and therefore repay Shenghuo were satisfied. The Court has found in § 2.2.3 above that Antonoplos, Blumberg, and thus Shenghuo reasonably expected in June and July 2016 (when Conte was deciding whether to invest in Shenghuo) that GTI would likely repay Shenghuo by the end of 2016, and that these defendants fully intended that Shenghuo would then promptly repay Conte's or GIUL's investment with interest.

Although circumstances later changed, and Shenghuo was convinced three-and-a-half years later (at the end of 2019 or beginning of 2020) to forego its right to repayment by GTI in exchange for being granted an equity interest in GTI—which meant that the condition triggering GIUL's right to repayment by Shenghuo would never occur—does **not** establish that defendants made a false promise to Conte and Shenghuo in mid-2016. An "intention not to perform a promise ... cannot be shown merely by [subsequent] nonperformance of the promise." *Galotti v. United States Trust Co.*, 335 Mass. 496, 501 (1957); accord *McCartin v. Westlake*, 36 Mass. App. Ct. 221, 230 n.11 (1994).

GIUL's contention that Shenghuo, Antonoplos, and Blumberg failed to disclose that GTI's finances were shaky, and that it could not seek without an infusion of new funding, is also without merit. As discussed in § 2.2.1 and § 2.4.3 above, Antonoplos told Conte to look at GTI's website for more information about the company, Antonoplos provided Conte with a link to GTI's website. If Conte had gone to that resource he could have easily accessed and been able to review GTI's filings with the SEC in which GTI fully disclosed its financial and business prospects and its need for additional funding. Where a public corporation discloses that it is grappling with serious and ongoing financial problems in its 10-K and 10-Q filings with the SEC, "no reasonable investor could have been misled into believing' that the corporation's "financial health was anything more than tenuous." *J & R Marketing, SEP v. General Motors Corp.*, 549 F.3d 384, 395–396 (6th Cir. 2008).

Finally, in the rest of § 2.4 above, the Court details its findings that the Shenghuo defendants did not withhold any other material information from Conte. The Court finds and concludes that GIUL has not shown that the defendants made any other false statements to him or withheld any other material information from him.

3.1.3. MUSA Claim against Faupel and Pearlstein. GIUL has failed to establish that Faupel or Pearlstein face even potential primary or secondary liability under MUSA.

The Court has found that Faupel had no communications with Conte before Conte invested in Shenghuo on behalf of GIUL. Faupel cannot be held primarily liable under MUSA because he had no involvement in making an offer to sell a security to GIUL or in soliciting an offer to purchase any security by GIUL, and did nothing to pass or transfer to GIUL any title to or other interest in any security. Cf. *Pinter*, 486 U.S. at 642–646. He cannot be held secondarily liable as a control person, because the Court has found that during 2016 Faupel did not have legal control over Shenghuo and did nothing to exercise control over Shenghuo. See *Aldridge*, 284 F.3d at 85.

Finally, although Faupel was acting as Shenghuo's agent during 2016 in trying to identify a commercial partner in China, he cannot be held secondarily liable as an agent because he did nothing to materially aid Shenghuo's sale of a security to GIUL. See G.L. c. 110A, § 410(b); *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F.Supp.2d 1122, 1185–1189 (N.D. Ala. 2012) (seller's agent who did not "materially aid" in unlawful sale of securities not liable under similar State Blue Sky law); accord *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 922 (6th Cir. 2007); *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark General Partners, Inc.*, 463 S.E.2d 600, 117–118 (S.C. 1995). That Faupel was Shenghuo's agent for purposes unrelated to GIUL's investment is irrelevant.

Pearlstein cannot be held primarily liable under MUSA either. He had no involvement in make an offer to sell a security to GIUL or soliciting an offer by GIUL to invest in Shenghuo. Antonoplos and Blumberg, as Shenghuo's Managing Members, were the ones who transferred title or interest in Shenghuo to GIUL; Pearlstein did not. Though Pearlstein prepared the Conte and GIUL subscription agreement, and was involved in the mechanics of closing that transaction, that does not subject him to primary liability. See *Pinter*, *supra*, at 649–650.

Like Faupel, Pearlstein had no legal control and did nothing to exercise control over Shenghuo in 2016, so he also cannot be held secondarily liable as a control person.

Finally, although Pearlstein was acting as Shenghuo's legal counsel in connection with GIUL's investment, by drafting and trying to arrange for executing of GIUL's subscription agreement, that limited role as agent for Shenghuo cannot subject Pearlstein to secondary liability. An attorney performing traditional legal work like drafting or revising a subscription agreement does not "materially aid" the sale of securities for the purposes of so-called Blue Sky statutes like MUSA. See, e.g., *Batson v. RIM San Antonio Acquisition, LLC*, 2018 WL 1581675, at *8–*9 (S.D.N.Y. Mar. 27, 2018); *Bennett v. Durham*, 683 F.3d 734, 738–740 (6th Cir. 2012); *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, *supra*; *Ward v. Bullis*, 748 N.W.2d 397, 405 (N.D. 2008); *In re Infocure Securities Litigation*, 210 F.Supp.2d 1331, 1364 (N.D. Ga. 2002); *CFT Seaside Investment L.P. v. Hammet*, 868 F.Supp. 836, 844 (D.S.C. 1994); *Baker, Watts & Co. v. Miles & Stockbridge*, 620 A.2d 356, 368 (Md. Ct. Special App. 1993).

3.2. Chapter 93A Claims. In addition, GIUL has also not shown that any of the defendants violated the Massachusetts Consumer Protection Act, G.L. c. 93A, § 11. Based on the findings and discussion above, the Court finds and concludes that none of the Defendants has committed any unfair or deceptive act or engaged in any unfair or deceptive practice that has harmed GIUL in any way.

The findings and discussion above show that none of the defendants violated c. 93A when Shenghuo was soliciting an investment by Conte or GIUL during 2016.

The Court finds that the subsequent decision in late 2019 or early 2020 by Blumberg and Pearlstein (who were then Shenghuo's Managing Members) to enter into an agreement that exchanged Shenghuo's loan to GTI for an equity interest in GTI was not unfair to GIUL, was not deceptive, and also did not violate c. 93A. As discussed in § 2.3.3 above, this was a reasonable exercise of business judgment. Blumberg and Pearlstein reasonably concluded that agreeing to this exchange was in the best interests of Shenghuo, and therefore in the best interests of Shenghuo's members.

GIUL may disagree with the decision and believe that it was a big mistake. But making a mistake of business judgment does not implicate c. 93A. "[A] violation of G.L. c. 93A requires, at the very least, more than a finding of mere

negligence.” *Boyle v. Zurich American Ins. Co.*, 472 Mass. 649, 662 (2015), quoting *Darviris v. Petros*, 442 Mass. 274, 278 (2004). Thus, “a negligent miscalculation” that involved no intentional deceit or negligent misrepresentation does not violate c. 93A. *Id.* In other words, if a business entity or any of its principals “acts in good faith” and exercises “its honest business judgment,” it cannot be held liable under c. 93A. See *Bolden v. O’Connor Café of Worcester, Inc.*, 50 Mass. App. Ct. 56, 67 (2000), quoting *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990).

ORDER

Final judgment in this case shall enter providing as follows:

This case having come before the Court and the issues having been duly heard and decided, first on a motion for judgment on the pleadings, then on motions for summary judgment, and finally after a non-jury trial on Plaintiff’s remaining claims under G.L. c. 110A, § 410, and G.L. c. 93A, § 11, it is hereby declared, ordered, and adjudged that Plaintiff GIUL, LLC, shall take nothing on any of its claims.

16 August 2024

/s/
Kenneth W. Salinger
Justice of the Superior Court

**FINAL
JUDGMENT**

**Trial Court of Massachusetts
The Superior Court**



DOCKET NUMBER

1984CV02862

John E. Powers III, Acting Clerk of Court
Suffolk County Civil

CASE NAME

GIUL LLC
vs.
Shenghuo Medical LLC et al

COURT NAME & ADDRESS

Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

This action came before the Court, Hon. Kenneth W Salinger, presiding, and upon consideration thereof,

It is ORDERED and ADJUDGED:

JUDGMENT ON FINDINGS OF THE COURT

Final judgment in this case shall enter providing as follows:

This case having come before the Court and the issues having been duly heard and decided, first on a motion for judgment on the pleadings, then on motions for summary judgment, and finally after a non-jury trial on Plaintiff's remaining claims under G.L. c. 110A, s. 410, and G.L. c. 93A, s. 11, it is hereby declared, ordered and adjudged that Plaintiff GIUL, LLC shall take nothing on any of it claims. Dated: August 16, 2024.

JUDGMENT ENTERED ON DOCKET
PLAINTIFF TO THE PROVISIONS OF MASS. R. CIV. P. 77(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(a) AS FOLLOWS

Notice
sent
08/22/24

DATE JUDGMENT ENTERED
08/21/2024

CLERK OF COURTS/ ASST. CLERK
X

[Signature]

105 Mass.App.Ct. 1122

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

CARE AND PROTECTION OF VIJAY.¹

24-P-619

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Entered: April 14, 2025

By the Court (Rubin, Henry & Walsh, JJ.²)MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** Following a trial, a Juvenile Court judge found the father currently unfit to parent Vijay and awarded permanent physical custody to the mother. The father appeals, arguing that several of the judge's findings of fact were clearly erroneous, and the unfitness determination was therefore not supported by clear and convincing evidence. The father also argues that the judge erred by ignoring evidence of the mother's unfitness when granting her permanent custody of Vijay. We affirm.

Background. We recount the relevant facts from the judge's findings, reserving certain details for later discussion. The mother and father met in 2013 and were married in 2015. Vijay was born in 2015. The father has been diagnosed with anxiety, depression, delusional disorder, a mood disorder, and a thought disorder with significant paranoid thinking. His mental illness has resulted in numerous episodes in which he displayed paranoid behavior. For example, he spoke about aliens, he believed his cell phone was being hacked, and he believed the mother was being unfaithful and would not allow her to go to work with other men, believing that the mother had a "sexual addiction." Other times, he stated that he believed he was being monitored by his television and other electronics or watched by the police. In August of 2021, this fear had grown to the point that he contacted the FBI about his devices being hacked, who in turn informed the Department of Children and Families (department). The father denies that he has any mental health issues and has not engaged in mental health treatment for the problems at issue in this case.

In 2017, after the department filed a prior care and protection petition, a Juvenile Court judge ordered that the mother have sole physical custody of the child, that the parents have shared legal custody, and that the father have visitation. In February 2019, the mother experienced substance use issues and, with her consent, a judge of the Probate and Family Court awarded sole physical custody of Vijay to the father. In August 2020, the mother, having remarried, moved to Virginia with her husband and his three children, while Vijay remained in Massachusetts with the father.

While in the father's care, the father's paranoia affected Vijay in several ways.³ The father's paranoia entered an acute phase after a visit to a hospital emergency room in February 2021, where the father, understandably concerned, took Vijay because the child had blood in his stool. The father reported that Vijay had told him the mother's husband had sexually abused him. The doctor who examined Vijay found no signs of sexual abuse and determined the blood was likely caused by constipation. Vijay

later admitted that his allegations of sexual abuse were untrue and that he made up the story when he was bored and lonely at the father's home. The father reported the alleged abuse to the department, who investigated and found no support for the allegations.

***2** In May 2021, the father abruptly went to Brazil, in part due to his paranoid belief that he was being tracked by the mother's husband. The father planned for Vijay to reside with the mother and her husband while he was in Brazil, which the child did for two months. The mother moved Vijay to Virginia, enrolled him in school and football, and obtained a pediatrician and therapist for him. The father returned from Brazil the first week of August 2021 and drove to Virginia to take Vijay from the mother's house.⁴ The father brought Vijay back to Massachusetts, falsely promising the mother he was only going to take the child away for two weeks. At all times, the parents retained joint legal custody. Once back in Massachusetts, Vijay, who had just turned six, told a department social worker that the father had to leave because "people [were] after my dad because it's not a safe world." Later that month, the father took Vijay to urgent care, reporting Vijay was urinating frequently, and expressed his concern that Vijay had contracted a sexually transmitted disease at the mother's house. Tests showed no issue, and the doctor noted no other concerns.⁵ The next day, the father took Vijay to his pediatrician for what turned out to be a fungal infection. After the child was seen, the father asked to meet with the doctor alone to discuss his belief that Vijay was sexually abused by the mother's husband. The doctor noted concerns about the father's paranoia and questioned his truthfulness. He recommended that Vijay would benefit from therapy and that the child start meeting with a social worker until enrolling in therapy. The father did not follow up on the doctor's recommendation.

In September 2021, the father brought Vijay to a different pediatrician, again for symptoms he believed were related to sexual abuse. This visit resulted in the pediatrician, a mandatory reporter, filing a report pursuant to G. L. c. 119, § 51A, alleging sexual abuse of Vijay by the mother's husband. The department, upon conducting an investigation pursuant to G. L. c. 119, § 51B, learned from the pediatrician that Vijay never reported any abuse by the mother's husband but rather the father had supplied that information. The pediatrician saw no signs of sexual abuse or trauma during Vijay's examination, and indicated that the father appeared to be encouraging Vijay to say things she felt may have been untrue.

In addition to the repeated doctor visits, the father's mental illness interfered with his ability to provide care for Vijay. The father lacked housing stability -- he and Vijay lived in a shelter prior to obtaining a studio apartment through the Department of Transitional Assistance (DTA). By January 2022, Vijay had accrued twenty-three absences from school that year. The school's social worker reported the school absences to the department, noting that one of Vijay's teachers expressed concerns for Vijay as he often told teachers that the mother was "evil" and "wicked." The teacher believed that Vijay was struggling academically because of the school absences and attempted to communicate with the father about the importance of Vijay attending school regularly. The father was not receptive to this conversation and was not concerned about Vijay's school absences, telling the teacher that he was proud of how well Vijay was doing, and that his only concern was with the school sharing any information about Vijay with the mother. The father also ignored the advice of Vijay's pediatrician that Vijay would benefit from therapy. When requested to enroll Vijay in therapy by a department interim action plan,⁶ the father engaged a therapist only to seek a sexual abuse evaluation in order to provide evidence to a judge that the mother's husband had abused Vijay. The therapist had concerns that the father's untreated and unmedicated mental health issues were negatively affecting Vijay's own mental health and sense of reality. The father became upset when the therapist did not provide the sexual abuse assessment he was seeking and terminated her services.

***3** In February 2022, the department filed the underlying care and protection petition "seeking a non-emergency hearing date to determine whether custody should remain with" the father. The father was granted conditional custody of Vijay later that month. In May 2022, after the father failed to enroll Vijay in therapy -- one of the conditions of the father's conditional custody -- the department was granted custody of Vijay. After a four-day trial, a Juvenile Court judge determined the father was unfit to assume parental responsibility and granted custody of Vijay to the mother. This appeal followed.

Discussion. 1. Standard of review. "[A] finding of parental unfitness must be based on clear and convincing evidence in care and protection cases." Custody of a Minor, 392 Mass. 719, 725 (1984). "When making this determination, subsidiary findings of fact must be supported by a preponderance of the evidence, with the ultimate determination of unfitness based upon clear

and convincing evidence.” Adoption of Rhona, 63 Mass. App. Ct. 117, 124 (2005). “Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases.” Care & Protection of Yetta, 84 Mass. App. Ct. 691, 696 (2014), quoting Custody of Eleanor, 414 Mass. 795, 800 (1993).

2. Unfitness determination. The father challenges certain of the judge's factual findings and claims the determination of his unfitness therefore was not based on clear and convincing evidence. The father argues that the judge erred in finding (i) that there was no evidence to corroborate his belief that Vijay was sexually abused; (ii) that the father brought Vijay to multiple doctors seeking treatment for sexual abuse; and (iii) that the father lacked housing stability “throughout the pendency of the case.” “We do not substitute our judgment of the evidence for the subsidiary findings of the judge absent clear error.” Mason v. Coleman, 447 Mass. 177, 186 (2006). “A finding is clearly erroneous when there is no evidence to support it, or when, ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’ ” Custody of Eleanor, 414 Mass. at 799, quoting Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977).

The father points to facts in the record that he argues corroborated his belief that Vijay was abused.⁷ He argues, accordingly, that the judge's finding that there was “no evidence corroborating Father's beliefs that [Vijay] had been the victim of any sexual abuse” was clearly erroneous. The father's argument is misplaced. The question before the judge was not whether the father earnestly believed Vijay was abused, but rather whether that belief was a product of the father's untreated mental illness. The judge had an obligation to evaluate the credibility of the evidence including the father's testimony and make findings of fact. See Custody of Eleanor, 414 Mass. at 800. Here, the judge did not credit the father's beliefs regarding sexual abuse, so it was appropriate for the judge to look for corroboration elsewhere. The record supports the judge's finding that there was no evidence, other than the father's uncredited assertions, that corroborated the father's belief that Vijay was sexually abused. See Adoption of Rhona, 63 Mass. App. Ct. at 124.

*4 Next, the father challenges the finding that he brought Vijay to multiple doctors seeking treatment for sexual abuse. Although the father articulated reasons other than sexual abuse for the visits, it was within the judge's discretion to weigh the credibility of the father's ostensible reasons. See Adoption of Nancy, 443 Mass. 512, 515 (2005). We see no error in the judge's conclusion that the main purpose of the multiple visits to doctors was to seek corroboration of sexual abuse, particularly where the father broached the subject of sexual abuse each time. See id.

Finally, the father disagrees with the judge's characterization that he lacked housing stability “throughout the pendency of this case.” At the end of the day, this argument amounts to a disagreement with the judge's weighing of the evidence. See Smith v. Jones, 69 Mass. App. Ct. 400, 404 (2007) (“As in other contexts where cases center on the best interests of the child, we will not disturb the judge's findings or substitute our judgment for that of the trial judge absent clear error”). Although it is undisputed that the father did temporarily reside at an apartment through DTA, the record is also clear that the father had a history of housing instability and was homeless when the judge determined him unfit. Even if the judge's finding was erroneous as to that period of time, the record supports the conclusion that the father lacked stable housing because he was homeless and had turned down the opportunity to obtain housing due to his mental health issues.

After arguing the above facts were clearly erroneous, the father argues the remaining facts do not amount to clear and convincing evidence of his unfitness. The father maintains that he took good care of Vijay and that the judge's findings do not support a nexus between his mental illness and a detriment to Vijay's welfare. We disagree.

In a comprehensive decision, the judge recognized the bond between the father and Vijay and the father's care of Vijay, but her primary concern was with the father's mental illness. “Mental disorder is relevant only to the extent that it affects the parents' capacity to assume parental responsibility, and ability to deal with a child's special needs.” Adoption of Luc, 484 Mass. at 146, quoting Adoption of Frederick, 405 Mass. 1, 9 (1989). Here, the judge's conclusion that the father was unfit due to his untreated mental illness and his resultant inability to assume parental responsibility is well supported by the record. As discussed above,

his continued irrational belief that Vijay had been sexually abused exposed the child to unnecessary medical treatment and challenged Vijay's sense of reality. Even if we were to ignore the contested facts above, the uncontested evidence supports the judge's determination of the father's unfitness. The judge properly considered the father's lengthy history of untreated mental health conditions and the fact that he had refused to acknowledge that he had mental health issues or engage in treatment. In addition, the judge properly considered the fact that the therapist and doctors who evaluated Vijay expressed concerns that the father's mental illness was affecting Vijay's emotional and mental health.⁸ Vijay had an excessive number of absences from school, and a teacher had difficulty communicating to the father about the effect of these absences on Vijay's academics. The father did not enroll Vijay in therapy despite numerous recommendations by providers that the child would benefit from it. Finally, the father's refusal to acknowledge or seek treatment for his mental illness is also relevant to the judge's unfitness determination. See Adoption of Luc, *supra* at 147. We disagree with the father's contention that the evidence failed to establish a nexus between his mental health issues and his ability to parent Vijay. In sum, we discern no error in the judge's determination that the department met its burden of proving the father's unfitness by clear and convincing evidence.

***5 3. Mother's fitness.** The judge granted permanent physical custody to the mother. The department presented no evidence of the mother's unfitness at trial and asked that she be granted custody. The father did not object at trial and argues for the first time in this appeal that the mother was unfit. "As a general practice we do not consider issues ... raised for the first time in this court." Adoption of Donald, 52 Mass. App. Ct. 901, 901 (2001). Although the issue was likely not preserved in the trial court, the evidence nevertheless supported the judge's finding of fitness and grant of custody to the mother. The judge offered the requisite guidance on Vijay's placement, indicating that placement with the mother was in the child's best interests. See Care & Protection of Three Minors, 392 Mass. 704, 717 (1984). The judge's findings of fact acknowledge the mother's previous and ongoing struggles. However, the judge also found that Vijay was doing well with the mother and was living in a safe and appropriate environment where he was engaged in school and therapy, played football, and had a good relationship with his family members. We discern no error in the judge's determination on the record before her that despite some of her challenges in the past, the mother was currently fit.

Conclusion. Given the judge's findings, we discern no abuse of discretion or clear error in the judge's determination that the father was currently unfit, that the mother was fit to assume parental responsibility, and that Vijay's best interests were served by granting the mother physical custody.

Judgment affirmed.

All Citations

105 Mass.App.Ct. 1122, 257 N.E.3d 903 (Table), 2025 WL 1098416

Footnotes

- 1 A pseudonym.
- 2 The panelists are listed in order of seniority.
- 3 In August 2019, the father reported to Vijay's physician that either the father's girlfriend or his girlfriend's mother was poisoning Vijay. The father later explained that his own thinking may have been delusional and admitted that he sometimes blew things out of proportion. He explained that Vijay had vomited that day and that he let his thoughts get away from him.
- 4 The father did not inform the mother he was traveling from Massachusetts to Virginia to take Vijay. When he arrived there, he told the mother he would return Vijay to her in two weeks so he could start school in Virginia. She asked to put that agreement in writing, but he believed she was "blackmailing" him into signing documents that would give her custody of Vijay. The father then refused to share information with the mother about where he and Vijay were living, despite the fact that they shared legal custody.

- 5 Later that month, the father obfuscated his true reasons for this visit when a department social worker asked him why he had taken Vijay to urgent care. The father became defensive when the social worker brought up the father's belief that Vijay had a sexually transmitted disease.
- 6 The department created the interim action plan for the father after a meeting on October 28, 2021.
- 7 These facts include that the father discovered blood in Vijay's stool, that Vijay alleged to the father that the mother's husband had abused him, that Vijay's penis was itchy, that Vijay engaged in age-inappropriate sexual behaviors, and that a department social worker followed up after an interview with the father and Vijay to determine whether further investigation was necessary.
- 8 The father appears to argue that some of the medical opinions the judge relied on in making these findings were unreliable. The father did not object to the introduction of the exhibits containing these opinions. To the extent the father believes the judge should not have relied on the information, he merely disagrees with the judge's weighing of the evidence. See Smith v. Jones, 69 Mass. App. Ct. at 404.

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103 Mass.App.Ct. 1118

Unpublished Disposition

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Appeals Court of Massachusetts.

RCS LEARNING CENTER, INC., & another¹

v.

Ann B. PRATT, trustee,² & others.³

22-P-951

I

Entered: January 12, 2024

By the Court (Vuono, Meade & Walsh, JJ.⁴)MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

*1 This case arises out of a failed real estate transaction between the plaintiffs, RCS Learning Center, Inc. and RCS, Behavioral & Educational Consulting LLC (collectively “RCS”), and the defendants, Ann B. Pratt, trustee of the Nobscot Realty Trust (“the trust”), Northside LLC (“Northside”), Robert E. Foley (“Foley”), and Foley’s son, Luke R. Foley (“Luke”). In May 2015, the plaintiffs entered into a purchase and sale agreement (“the agreement”) whereby RCS agreed to purchase two contiguous parcels of real estate located in Framingham, one owned by the trust and the other owned by Northside. When, after extensive unsuccessful negotiations, RCS failed to acquire the property, it commenced this action in the Land Court seeking specific performance or, in the alternative, damages and restitution of all payments it had made toward the purchase price. The amended verified complaint alleges breach of contract (count one), breach of the covenant of good faith and fair dealing (count two), detrimental reliance (count three), and unjust enrichment (count four) against the trust and Northside. Count five of the complaint was directed solely to defendants Foley and Luke and sought recovery of approximately \$138,000 in loans (“money had and received”).⁵

On the eve of trial, RCS waived its claim for specific performance and proceeded to trial on its alternative claims. The Land Court judge, who was appointed to sit as a judge of the Superior Court, concluded that neither party had breached their agreement, and that instead the parties had “abandoned” it. The judge then determined that RCS was entitled to the return of the money it had paid to the trust, Northside, and Foley, and entered judgment against the trust and Northside on count four and against Foley on count five in the total amount of \$763,000. All remaining claims were dismissed with prejudice. The judge further concluded that RCS was not entitled to prejudgment interest or costs.

RCS appeals on one issue: it claims that the judge erred by not awarding prejudgment interest. The defendants cross-appeal on three issues: first, they claim that the judge erred by finding that RCS did not breach the agreement. Second, they argue that due to the alleged breach they are entitled to retain the money they received from RCS as liquidated damages. Third, Foley

argues that because he was the “acting agent” for the trust and Northside at all times, he cannot be held personally liable under a theory of money had and received.

Background. We briefly summarize the relevant facts from the judge's detailed findings. RCS wished to purchase land to build a facility from which it could operate its day care program and provide services for children and young adults diagnosed with autism spectrum disorder. With the assistance of Foley, RCS located two parcels of land owned by the trust and Northside and agreed to purchase the property for approximately \$2.5 million. The agreement was signed on May 6, 2015, and required a \$25,000 deposit. Among other terms, the agreement provided that if RCS defaulted, the defendants were to retain “all deposits” as liquidated damages. A few weeks later, on May 22, 2015, the parties amended the agreement to effect a change of the escrow agent but otherwise ratified and confirmed the original agreement.

*2 Thereafter, over the course of approximately two years, the parties discussed and drafted numerous amendments to the agreement. The question whether some or all of these proposed modifications were binding was hotly disputed at trial. There was no dispute, however, that while the parties were negotiating modifications to the agreement, RCS made significant payments to the trust, Northside, Foley, and Luke. By September 2016, RCS had paid the defendants a total of \$763,000. Some of those payments were characterized as loans and were used by the trust and Northside to meet their mortgage and real estate tax obligations. Other payments were made directly to Foley, and RCS also loaned money to Luke for personal business purposes. The judge found that the loans to Foley and Luke were “not tied to the acquisition of the property.” Although Luke repaid the loan to Foley, RCS was not repaid.⁶ According to RCS, Foley agreed that all the money he had received would be put toward the deposit on the property.⁷

Ultimately, notwithstanding how the monies paid to the defendants were described or used, the judge found that RCS intended all of the payments to be credited towards the purchase of the property. Moreover, as the judge explained, the extent to which the agreement was modified and the question whether one party or the other breached the agreement as modified was inconsequential because, in the final analysis, “neither party tendered performance under the agreement as modified so as to put the other in breach and that, instead, the parties abandoned their agreement.” As previously noted, the judge then concluded that RCS was entitled to restitution of the \$763,000 it paid to the defendants under the theories of unjust enrichment (count four) and money had and received (count five). The judge further concluded that RCS was not entitled to prejudgment interest because it initially sought specific performance and the return of the monies paid by them to the defendants was not an award of damages that would trigger the prejudgment interest statute.

Discussion. 1. RCS's appeal. RCS contends that it is entitled to prejudgment interest under G. L. c. 231, § 6C or § 6H.⁸ We disagree. As we discuss below, there can be no assessment of interest under either section because there was no award of damages.

In pertinent part, G. L. c. 231, § 6C provides:

“In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand.”

In Henry v. Morris, 62 Mass. App. Ct. 714 (2004),⁹ on which the judge properly relied, we observed that “[F]or a claim to come within the compass of [§ 6C], a breach of a contractual obligation must occur, and that breach ultimately must ripen into a judgment for pecuniary damages.” Id. at 717, quoting Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P., 171 F.3d 52, 54 (1st Cir. 1999). Here, the judge specifically found there was no breach of the agreement. “Therefore, the judge's decision to return the deposit [payments] to the buyers was not an award of damages that would trigger the statute.” Henry, supra at 717.

*3 In addition, as we further observed in Henry, “the policy underlying G. L. c. 231, § 6C, is that ‘[p]rejudgment interest serves to compensate [a party] for the loss of use of money wrongfully withheld.’ ” Id. at 717-718, quoting Cambridge Trust

Co. v. Commercial Union Ins. Co., 32 Mass. App. Ct. 561, 568 (1992). Here, RCS did not demand that the defendants return the payments it made toward the purchase price. Instead, it pursued a claim of specific performance until the first day of trial. Up to that point, had RCS prevailed and specific performance been granted, the defendants would have retained the payments. That RCS ultimately did not pursue its claim for specific performance is of no moment where, as here, the judge made no finding that the payments were wrongfully withheld by the defendants. Compare National Starch & Chem. Co. v. Greenberg, 61 Mass. App. Ct. 906, 908 (2004) (ordering award of prejudgment interest on deposit wrongfully retained where buyer demanded return of deposit and seller's refusal to release it “deprive[d] the buyer of funds to which she was then rightfully entitled”). Accordingly, as the judge concluded, G. L. c. 231, § 6C is not applicable.

RCS's argument that it is entitled to prejudgment interest under G. L. c. 231, § 6H, the so-called “catch-all” provision of the statute, fares no better. See Herrick v. Essex Regional Retirement Bd., 465 Mass. 801, 807 (2013), quoting G. L. c. 231, § 6H (“Section 6H is a catch-all interest provision that applies to ‘any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law’”).

Section 6H provides in pertinent part:

“In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the amount of damages interest thereon at the rate provided by section six B to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law.”

This provision “reflects the Legislature's intent that prejudgment interest always be added to an award of compensatory damages.” George v. National Water Main Cleaning Co., 477 Mass. 371, 378 (2017). However, “[n]ot all forms of monetary relief are compensatory and, accordingly, not all monetary awards are considered damages.” Brennan v. Ferreira, 102 Mass. App. Ct. 315, 317 (2023). “In assessing whether G. L. c. 231, § 6H, requires the assessment of prejudgment interest ... we are guided by the difference between compensatory damages, on the one hand, and restitutionary remedies, on the other.” Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 199 (2021). A restitutionary remedy does not require an assessment of prejudgment interest. See id. In this case, the judge's decision to order the return of money RCS paid to acquire the property was not an award of damages that requires the assessment of prejudgment interest because the recovery was “restitutionary.” Thus, the award of \$763,000 does not constitute damages within the meaning of G. L. c. 231, § 6H and an assessment of prejudgment interest was not warranted.

2. Defendants’ appeal. The defendants assert that they are entitled to retain the payments made by RCS as liquidated damages. This claim is based on the unfounded premise that the judge erroneously determined that the parties abandoned the agreement. “A finding is ‘clearly erroneous’ only when, ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” Fecteau Benefits Group, Inc. v. Knox, 72 Mass. App. Ct. 204, 212-213 (2008), quoting Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997). There was no mistake here.

The judge made extensive and detailed findings based in large part upon her assessment of the credibility of the witnesses. She specifically found that the parties were not working toward the consummation of the agreement and that neither party had tendered performance within a reasonable period of time after the closing should have occurred. The judge also found that although by May 2017, RCS did not appear ready, willing, and able to close due to a lack of financing, by that time the defendants’ position was that the agreement had “expired and was unenforceable” and not that RCS was in breach. In sum, because the judge's finding that neither party was in breach of the agreement and that instead the agreement had been abandoned was not clearly erroneous, the liquidated damages clause was not triggered, and the defendants were not entitled to retain the deposits.

*4 The defendants’ final claim that the judge erred in holding Foley individually liable was never raised before or during trial. “Objections, issues, or claims -- however meritorious -- that have not been raised at the trial level are deemed generally to have been waived on appeal.” Palmer v. Murphy, 42 Mass. App. Ct. 334, 338 (1997). Because this claim “fits none of the usual

exceptions to the general rule that claims not raised below are waived,” we need not address it. *Id.* at 338-339. In any event, even if the claim were preserved, we discern no error. “An action for money had and received lies to recover money which should not in justice be retained by the defendant, and which in equity and good conscience should be paid to the plaintiff.” *Cannon v. Cannon*, 69 Mass. App. Ct. 414, 423 (2007). It is undisputed that RCS made numerous payments to Foley both personally and on behalf of the defendants that were to be credited against the purchase price. RCS did not acquire the property. Thus, the evidence fully supported the judge's decision that it would be against equity and good conscience to permit Foley to retain the payments.¹⁰

Judgment affirmed.

All Citations

103 Mass.App.Ct. 1118, 225 N.E.3d 838 (Table), 2024 WL 139034

Footnotes

- 1 RCS, Behavioral & Educational Consulting LLC.
- 2 Of the Nobscot Realty Trust.
- 3 Northside LLC, Robert E. Foley, and Luke R. Foley.
- 4 The panelists are listed in order of seniority.
- 5 The plaintiffs also sought recovery of money they spent toward improving the property. The judge concluded that the plaintiffs were not entitled to be reimbursed for these expenditures and the plaintiffs do not contest this aspect of the judgment on appeal.
- 6 Foley testified at trial that Luke repaid all the money borrowed from RCS to him and that he did not return the funds to RCS.
- 7 It does not appear from the record that Foley argues to the contrary.
- 8 RCS has not pursued its claim for costs.
- 9 We agree with the judge that *Henry*, 62 Mass. App. Ct. at 715-718, is dispositive. In that case the buyers brought an action for specific performance of a purchase and sale agreement. *Id.* at 715. The trial judge found that neither party had breached the agreement and ordered the return of the deposit to the buyers and awarded prejudgment interest and costs. *Id.* at 716. We reversed the award of interest and costs because the return of the buyers’ deposit was not an award of damages and because the buyers were seeking specific performance and the trial judge made no finding that the deposit was wrongfully withheld. See *id.* at 717-718. RCS's attempt to distinguish the present case from *Henry* is unavailing. It matters not, as RCS claims, that RCS ultimately waived its claim for specific performance. Nor is it significant that the payments at issue were not held in escrow as the deposit was in *Henry*. Lastly, contrary to RCS's assertion, the buyers in *Henry*, like here, sought specific performance and, in addition, “costs, damages, interest, attorney's fees, and other further relief.” *Id.* at 715.
- 10 The defendants’ request for costs and fees is denied.