Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. FAR-

Suffolk, ss.

GOVERNO LAW FIRM LLC,
Plaintiff-Appellant,

v.

CMBG3 LAW LLC, JENIFFER CARSON, BRYNA MISIURA, KENDRA BERGERON, DAVID A. GOLDMAN, BRENDAN GAUGHAN, and JOHN GARDELLA,
Defendants-Appellees.

On Appeal From A Final Judgment Of
Suffolk County Superior Court C.A. No. 1684CV3949BLS2

FURTHER APPELLATE REVIEW OF DEFENDANTS-APPELLEES CMBG3 LAW LLC, JENIFFER CARSON, BRYNA MISIURA, KENDRA BERGERON, DAVID GOLDMAN, BRENDAN GAUGHAN, and JOHN GARDELLA

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April 25, 2025

CORPORATE DISCLOSURE STATEMENT

CMBG3 Law LLC has no parent corporation, and no public corporation owns ten percent or more of the firm.

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DEFENDANTS' REQUEST FOR FURTHER APPELLATE REVIEW

I. Request for Review

Pursuant to Mass. R. App. P. 27.1, the defendants seek further appellate review of the Appeals Court's decision of April 4, 2025, which erred in holding that basic subject categories law firms use to organize client files are "confidential business information" that is not part of the "client file," and erred by entering judgment for violation of c. 93A without identifying any unfair use by the defendants of any protected intellectual property of Governo Law Firm.

II. Statement of Prior Proceedings[1]

On June 17, 2019 a Suffolk County jury found the defendants liable on three common-law claims for downloading documents from the computer server of their former employer, Governo Law Firm ("GLF"), and using those documents at their new firm, CMBG3. The jury found the defendants not liable for trade secret and c. 93A claims, and the plaintiff appealed the c. 93A verdict. (App. R.A. Vol. I at 16, 19.)

On April 9, 2021, the Supreme Judicial Court remanded the c. 93A claim for a new trial after finding that the trial court's instructions may have led jurors to

[1] References are to the Addendum to this Petition ("Add.") and the Appeals Court Record Appendix (App. R.A. Vol. – at –).

disregard relevant evidence that the defendants downloaded GLF files while still employed at GLF. (487 Mass. 188 (2021).)

The Superior Court conducted the retrial without a jury and entered judgment for the defendants on the c. 93A claim, concluding that they had not unfairly and deceptively used downloaded documents or features of GLF's FileMaker Pro databases and the "8500 New Asbestos Litigation" files ("8500 Files"), as these constituted client files. (Add. 48-80.) The Court also found that the defendants' failure to comply with its orders to erase downloaded materials was "inadvertent," and declined to impose sanctions. (Add. 80-83.)

The plaintiff appealed (App. R.A. Vol. I at 31), arguing that the FileMaker Pro databases were GLF property, not client files, but during briefing waived any challenge to the Superior Court's ruling that the 8500 Files, a library of thousands of documents used to store case file materials and documents relevant to asbestos litigation, belonged to clients who transferred to CMBG3.[2] (Add. 84-86.)

[2] The 8500 Files were not organized using any document management software; they were sorted and filed by subject-matter in Windows Explorer folders and subfolders. (Add. 57.)

The Appeals Court reversed, stating (incorrectly) that the trial court had found CMBG3 was "entitled to use **the entire [FMP] databases**,"[3] (emphasis added). (Add. 41-42.) The panel also concluded as a matter of law that GLF was not required to transfer client files by exporting FileMaker Pro data, because FMP data files incorporated GLF's intellectual property—i.e., the "fields and layouts of the FMP databases." (Add. 42.) The panel proceeded to enter judgment against the defendants for unfair use of GLF's intellectual property; but instead of basing the judgment on defendants' use of the supposedly-"confidential" FMP "fields and layouts," (Add. 43) the panel ruled that defendants had "used **the copied materials**[4] to compete with GLF, which was unfair and deceptive as a matter of law." (RA 43.)(emphasis added). The Appeals Court rejected plaintiff's argument that the jury's verdicts on the common-law counts preclusively established c. 93A

[3] As explained at pp. 14-25, *infra,* the panel misstated the trial court's rulings, which found that CMBG3 was only entitled to review file material in the FMP databases that belonged to CMBG3's clients, and that GLF had charged each client for every occasion on which its files were added to or accessed in the FMP databases.

[4] As discussed below, the panel concluded that GLF owned the FMP fields and layouts, but clients owned the file content stored in the databases. *See* Add. 32; p. 16, *infra*. Without explanation, the panel proceeded to enter judgment against the defendants for using "the copied materials," without citing evidence that the defendants had unfairly used the FMP "fields and layouts" to compete with Governo. (*Id*.) The "copied materials" included the entire range of downloaded GLF files—plaintiff files, client files, the 8500 folder, etc.—in short, a vast array of documents that were <u>not</u> stored in FMP databases, and did not have the FMP "fields and layouts" that, according to the panel's analysis, were the basis for finding the defendants liable for using GLF's intellectual property. (*Id*.)

liability and damages (Add. 35-37), rejected plaintiff's argument that possession of the downloaded files, standing alone, proved damages under c. 93A (Add. 39, n. 8), declined to alter the trial court's rulings on contempt (Add. 45-46), and declined the plaintiff's request to reassign the case to a different judge on remand. (Add. 44, n. 14.) The defendants now seek further appellate review of the Appeals Court judgment.[5]

III. Statement of Relevant Facts

The six defendants were, until November of 2016, non-equity partners at Governo Law Firm. (Add. 53-54.) David Governo hired Jeniffer Carson in 2000 and directed her to take control of the asbestos defense practice. (*Id*.) Although she had no prior experience, he provided no training or guidance and was away from the office for weeks at a time dealing with a contentious divorce. (*Id*.) Bryna Misiura joined GLF in 2001, and David Goldman was hired in 2002. (Add. 54.) Four years later, John Gardella became an associate in 2006. (*Id*.) Brendan Gaughan was added in 2007, and Kendra Bergeron joined GLF in 2008. (*Id*.) Although GLF publicly described Carson, Misiura and Goldman as "partners" from 2007 onward, and had given this title to the remaining three defendants by 2015, they owned no equity and David Governo alone controlled the firm. (Add.

[5] The defendants have not sought reconsideration of the Appeals Court judgment.

54.) Even though the defendants were not owners, during their tenure at GLF they developed and were responsible for effectively all of GLF's asbestos defense practice. (Add. 54-55.) David Governo, who owned 100% of the firm's equity, did virtually no legal work from 2006 onward, and spent roughly half the year on Martha's Vineyard. (Add. 54.) His limited efforts were so deficient that several of GLF's clients no longer permitted him to work on their files. (*Id.*)

In 2016, Governo and the defendants discussed a potential sale of the firm to the defendants. (Add. 65-66.) Governo was doing virtually no legal work and had no productive client relationships (Add. 54), but was withdrawing over $3 million per year from the firm. (Add. 65.) He demanded that they pay $9.25 million to purchase the firm. (*Id.*) The defendants concluded that GLF's value was based upon their client relationships and legal work, and saw no reason to pay over $9 million to purchase a practice they had developed and maintained. (*Id.*) They also balked at Governo's insistence that after a year rights to the "Governo Law Firm" name would revert to him; that the defendants would indemnify him for liability on certain foreseeably expensive employment claims; and that they would employ and pay severance to his office manager at a salary that Governo refused to disclose. (Add. 65; App. Ct. R.A. Vol. VII at 66-72.) In mid-September of 2016, the defendants still hoped to reach agreement with Governo, and made a counter-offer

of $2.25 million. (Add. 78.) Governo responded that this was not a serious offer, and refused to continue negotiations. (*Id*.)

The defendants reluctantly concluded that agreement with Governo was unlikely, and that they would probably need to form their own firm. (*Id*.) They were confident that nearly all their clients at GLF would transfer to their new firm. (Add. 65.) They also were certain, based on long experience with David Governo, that if they formed their own firm he would refuse to transfer essential client files to them. (Add. 65-66.) To ensure that clients would have access to their files if the defendants were forced to form a new firm, the defendants downloaded most of GLF's litigation files and some administrative materials before they left GLF. (Add. 66.)

The downloaded files included active case files, client information files, spreadsheets listing cases, the 8500 Files,[6] a variety of GLF administrative documents, and the data files for six FileMaker Pro databases.[7] (Add. 60-63, 66, 69.)

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[6] GLF has waived any claim to ownership or intellectual property rights in the 8500 Files. (Add. 84-86.)

[7] Three of the FMP databases (ECR, Eckel and Talc) were commissioned by clients and are indisputably owned by those clients. (Add. 62-63.) GLF clients paid the firm to create the remaining databases, and were charged for each addition or access to those databases. (Add. 55-63.) The Mail Log Database was a list of the dates physical mail was received, organized by plaintiff. (Add. 62.) It did not contain copies or reflect the substance of any logged correspondence. (*Id*.) There is no evidence that the defendants used the Mail Log Database at CMBG3. The

Negotiations for sale of GLF failed in November of 2016, and the defendants began operation of their new firm, CMBG3, on November 20. (Add. 65, 67-68.) In short order, GLF clients transferred over 95% of the firm's cases to CMBG3. (Add. 67.) The defendants had accurately foreseen that David Governo would withhold client files and attempt to prevent CMBG3 from effectively representing former GLF clients. (Add. 70-71.) They decided that the files downloaded from GLF could be used to confirm whether client files GLF transferred to the new firm were complete, and could be used in exigent circumstances to find client file material GLF had refused to turn over. (Add. 41.) Accordingly, at their new firm the defendants sequestered the downloaded materials on a laptop exclusively controlled by CMBG3 founding partner Bryna Misiura, who only agreed to search the downloaded GLF files on behalf of clients[8] if CMBG3 lawyers were unable to find the required documents from any other source. (Add. 70-72.)

Bankruptcy Database contained information about payments from bankruptcy trusts to plaintiffs who had asserted asbestos-related claims against bankrupt entities, and was the only database that linked to documents in the 8500 Files. (*Id*.) There is no evidence that the defendants used the Bankruptcy Database at CMBG3. The State of the Art Database contained attorney memoranda analyzing documents from the 8500 Files concerning knowledge of asbestos' health effects. (Add. 59.) There is no evidence that the defendants used this database at CMBG3.

[8] The Superior Court's unchallenged findings establish that on the limited occasions when Misiura was convinced that CMBG3 could only find a needed client file by searching the downloaded files, she only searched for and only accessed files that belonged to CMBG3's clients. (Add. 68, 32.)

The trial court found that the CMD ("CMD") information could readily be exported as FMP data files to CMBG3 and opened using FMP software purchased by CMBG3. (Add. 63.) GLF refused to use this simple means of transferring essential client litigation files. (Add. 70.) Instead, it provided none of the attorney notes and other client files from the CMD for eleven months after the defendants opened their new firm in November of 2016. (App. Ct. RA Vol. VI at 56-57.) GLF compounded this delay by choosing to export the data in each category—e.g., occupational histories of each plaintiff—and pasting thousands of unrelated plaintiffs' work histories one after another into Word and .pdf documents. (App. Ct. R.A. Vol. X at 70-73.) GLF followed the same process with other CMD categories such as notes on depositions, notes on medical records, etc. (*Id*.) The combined Word and .pdf documents were thousands of pages of daisy-chained, unrelated records, a format that made it impossible, for all practical purposes, to find and re-combine the deliberately scrambled categories of attorney notes about each plaintiff's case. (*Id*.) Even worse, the Word and .pdf collections of unrelated records GLF delivered in October of 2017 were thousands of pages long, and were so massive that opening them crashed CMBG3's computers for at least two months after they were finally transferred in October of 2017. (*Id*.)

GLF's refusal to turn over client files went well beyond the calculated delay and disorganization of the case file information from the CMD. Client Settlement

summaries that belonged to CMBG3 clients were not turned over until the fall of 2019, three years after they should have been transferred. (Add. 70.) The Talc database, which was commissioned and paid for by five GLF clients—and was thus indisputably their joint property—has never been turned over. (*Id*.) The 8500 folder, to which GLF waived any claim in February of 2025 (Add. 84-86), has yet to be delivered.

The fields and layouts created at GLF to organize data in FMP databases involved no creative thinking. To the contrary, the fields used in the CMD (App. Ct. RA Vol. 6 at 360)—e.g., "Things to Do," "Complete Occupational History," "Medical Notes" simply described the content of attorney and paralegal notes and memos routinely prepared at GLF for each case file. GLF created nothing new, original, innovative, imaginative, creative or confidential in—for example—putting a "Things to Do" field in a database for storing "Things to Do" memos. (*See* discussion at pp. 21-22, *infra*.)

IV. Grounds for Further Appellate Review

a. The Appeals Court failed to consider whether GLF's eleven-month delay in transferring client file information that had been stored at client expense in FileMaker Pro databases, and GLF's delivery of file information after eleven months in an essentially useless format, violated GLF's duty to transfer client files

promptly and in a useable format, justifying the defendants' limited use of client files contained in downloaded FileMaker Pro data files.

b. The Appeals Court erred by not concluding that when prior counsel has billed clients to store and organize their files exclusively in an FMP database, the client and successor litigation counsel are entitled to receive those client files in the same FMP data format.

c. The Appeals Court's analysis concluded that the defendants would be liable to GLF if they unfairly and deceptively used GLF's "confidential information"—i.e., the "fields and layouts" of FMP databases—to find and use client files. But the simplistic fields and layouts GLF used in organizing FMP databases were not protectible intellectual property, and the panel appears to have entered judgment against the defendants for using organizational features available to every purchaser of FileMaker Pro software and the Microsoft Windows operating system.

V. Legal Argument in Support of Further Appellate Review

a. The panel ignored GLF's duty to take "reasonable steps to protect the[ir] client's interests," and insupportably redefined the "client file."

The panel misread key superior court factual findings. The lower court's Findings and Conclusions of February 24, 2023 only held that CMBG3 was entitled to access "**portions** of the FMP databases that contained **their client** file

materials," (Add. 63) where "the work done to update and maintain these repositories and databases was billed to and paid for by **the affected client** or clients." (Add. 55.) (emphasis added). The Appeals Court misstated these findings, claiming incorrectly that "the judge found that the departing GLF clients were entitled to receive exported electronic versions of **all portions of the FMP databases**," (Add. 33) and were "**entitled to the entire databases** that were developed to efficiently represent multiple clients." (Add. 41-42.) (emphasis added). The panel also altered the finding that GLF billed each client every time client file information was added or accessed in a database, stating incorrectly that CMBG3's clients had merely "paid for some [unspecified] portion of GLF's time creating and updating those databases." (Add. 42.) Further, no evidence backs the panel's assertion that "the FMP databases provided the mechanism that GLF used to track [the 8500 Files]." (Add. 30, n. 4.)[9]

After this inaccurate review of the Superior Court's findings, Appeals Court acknowledged that "To be sure, a departing client was entitled to its own client file under Mass. R. Prof. C. 1.16 (e)," (Add. 40-41) but created new law for Massachusetts by holding that "the fields and layouts of the FMP databases were

[9] The Bankruptcy Database did contain links to bankruptcy court documents stored in the 8500 files. (Add. 62.) But no evidence establishes that 8500 Files could be "tracked" by software or another kind of "mechanism" built into GLF databases. Furthermore, no evidence suggests that the defendants used the Bankruptcy Database at CMBG3 to access material in the 8500 Files.

not part of the individual client files." (Add. 42.) In the circumstances of this case, this limitation was error. The Superior Court found that the CMD contained client files for "each active asbestos case" in the form of "notes by GLF attorneys and paralegals about all aspects" of active cases. (Add. 61-62.) These notes were "work product [that] belonged to the relevant client" and, except for limited settlement information, were "not available . . . anywhere else" in GLF files. (*Id*.) It is also undisputed that CMBG3's use of the CMD "never accessed or used any other client materials that did not belong to clients that transferred their legal representation from GLF to CMBG3." (Add. 68.)

The panel concluded that the trial court committed "clear error" in holding that CMBG3's clients were entitled to any of the "indexing, cross-linking, database structure and other organization" that was inherently part of client data files in GLF's FMP databases. (Add. 42.) In holding that these features of FMP were not part of the "client file," the panel unaccountably chose not to consider how this limitation met the ethical standard "that a lawyer is not free to provide client material to a departing client in an organizational mess." (Add. 41-42.) GLF did not send CMBG3 any client files from the CMD for eleven months after leaving GLF. (App. Ct. R.A. Vol. VI at 56-57.) Instead of exporting individual departed clients' data in FMP data files, GLF took attorney notes from fields in the CMD tabs (including, for example, notes on a plaintiff's medical records, notes on that

plaintiff's workplace, notes on depositions in that plaintiff's case) and pasted all of the thousands of unrelated plaintiffs' medical records sequentially, followed by thousands of records in the other categories, into Word and .pdf documents. (App. Ct. R.A. Vol. VI at 64-73.) The resulting strings of unrelated client files were functionally useless. (*Id*.)

GLF could effortlessly have exported CMBG3 clients' FMP data files from the CMD. (Add. 63.) The trial court found that GLF's delivery of files from the CMD was equivalent to taking conventional paper client files "out of their binders or folders," "shuffl[ing] these thousands of documents into random order," and delivering after eleven months "a huge volume of materials that were incredibly difficult to use because the organizing devices for which the client had paid were gone." (Add. 64.)

The Appeals Court paid lip service to GLF's obligation to protect its former clients' interests (Add. 40-42), but ducked the core issue in this case: what did GLF need to do to provide client file information to successor counsel in a timely manner and a useable form? Client files in the 21st century are stored electronically using document management software, litigation management software, e-discovery software, and predictably will be accessed, even without any organizing structure whatever, using search tools developed by Artificial Intelligence. Even the decade-old ABA opinion the panel cites with approval states that:

> when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

(Add. 42.)

Opinions by state bar associations, the Restatement (Third) of the Law Governing Lawyers ("Restatement") and scholarly articles recognize that when a law firm's client file storage software renders those files functionally inaccessible unless successor counsel uses the same (or compatible) software, the discharged firm is obligated to deliver client files in the format it used to store them. *See, e.g.*:

> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> (3) . . . [A] lawyer must deliver to the client or former client . . . promptly after the representation ends . . . [such] documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement, § 46.

> [I]f the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. **For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel.** Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

North Carolina State Bar Formal Ethics Opinion 15 (2015)(emphasis added).

> A client's file that is maintained in an electronic format should be provided in that same format if requested.

State Bar of North Dakota Ethics Committee Opinion 01-03 (2001).

> Given the general professional obligation to minimize prejudice to clients upon withdrawal, however, logic would dictate that the lawyer should transmit the file to a client in its most useable format--its native format with metadata intact.

Allison D. Rhodes & Robert W. Hillman, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, 43 Suffolk U. L. Rev. 897, 914 (2010).

> If the data exists in a format that will be of use to the client, and the software produces a "portable" version of the data without violating the licensing agreement between the software vendor and the law firm, the data should be turned over with the client file in the most useful format.

Id. at 917.

In concluding that the fields and layouts of GLF's FMP databases do "not fit squarely into the type of materials the rule [Mass. R. Prof. C. 1.16] required to be transferred," the panel created a new definition of the "client file" that ignored GLF's substantive duty to "take all reasonable steps to protect the[ir] client's interests, including surrendering papers and property to which the client is entitled." *Malonis v. Harrington*, 442 Mass. 692, 701 (2004). The defendants did not violate c. 93A when on limited occasions they accessed their clients' file material using FileMaker Pro data files GLF failed to transfer to them.

b. The Appeals Court erred in entering judgment without identifying any unfair and deceptive use of GLF intellectual property.

The Appeals Court panel held that CMBG3's mere possession of "confidential" downloaded GLF intellectual property, standing alone, did not establish that GLF had suffered a "loss" under c. 93A: proof of damages required "a subsequent misuse of that property." (Add. 39, n. 8.) But the panel erred by entering judgment against CMBG3 without identifying any unfair use by defendants of intellectual property in GLF's FMP databases. The Court concluded that organizational features in GLF's FileMaker Pro databases—"fields and layouts," "indexing, cross-linking, database structure"—were created "for [GLF's] own purpose" (Add. 42) and were not client files under Rule 1.16. (Add. 42-43.) But the panel then inexplicably dropped reliance on "fields and layouts" as the basis for a c. 93A violation, and concluded that CMBG3's use of the "copied materials 'to find and access discovery materials, investigatory materials, case history summaries, or other materials' . . . to compete with GLF . . . was unfair and deceptive as a matter of law." (Add. 43.)

The Superior Court's Findings and Conclusions of January 21, 2023 (Add. 48-83) did not include any finding on defendants' actual use of the FMP database features the Appeals Court deemed "confidential," (Add. 43) and only a fraction of the "copied materials"—which included, among others, client-owned documents

such as the 8500 Files, settlement charts and the Eckel and ECR FileMaker Pro databases (Add. 56-63)—contained the "fields and layouts" that, in the Appeals Court's view, were protected intellectual property. The panel's entry of judgment based on a vague reference to the defendants' use of "copied materials" failed to identify any unfair and deceptive use of GLF's protected intellectual property, and must be reversed.

Furthermore, there is no apparent basis for the panel's finding that the "fields and layouts" in GLF's databases were protected intellectual property. The subject categories used to organize client files in databases—for example, fields in the CMD for deposition notes, medical history notes, plaintiff's occupational history, etc. —were no different from the tabs a law firm would assign to folders in conventional paper files. Database fields that mimic standard law firm file labels are not protected creative choices, *See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 346-348 (1991), and are certainly not "protectible, confidential [business] information." *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 169 (1991). In finding that the defendants misused GLF's intellectual property by using FileMaker Pro's "indexing, cross-linking, database structure, and other organization," the Appeals Court was really referring to the software tools available to any owner of FileMaker Pro software. The simplistic categories GLF

used for FMP "fields and layouts" were not a "confidential" organizational scheme and did not merit protection as intellectual property.

Based on the foregoing, the defendants petition this Court pursuant to Mass. R. App. P. 27.1 for further appellate review of the Appeals Court decision of April 4, 2025.

Respectfully submitted,

/s/ Samuel Perkins

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April 25, 2025

ADDENDUM

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Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 23-P-1195

GOVERNO LAW FIRM LLC

vs.

KENDRA ANN BERGERON & others.

Pending in the Superior

Court for the County of Suffolk

Ordered, that the following entry be made on the docket:

So much of the judgment dated March 6, 2023, as entered in favor of the defendants under G. L. c. 93A, § 11, is reversed, and that claim is remanded for entry of judgment for the plaintiff and a determination of damages, attorney's fees, and costs, consistent with the memorandum and order of the Appeals Court. In all other respects, the judgment is affirmed.

By the Court,

Paul Lettle, Clerk

Date April 4, 2025.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-1195

GOVERNO LAW FIRM LLC

vs.

KENDRA ANN BERGERON & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Governo Law Firm LLC (GLF), brought this action against the defendants, six former GLF employees (attorney defendants) and the former employees' new law firm, CMBG3 Law LLC (CMBG3), after the attorney defendants secretly copied electronic files and databases while still employed at GLF and took those materials with them when opening a competing firm. A Superior Court jury found the defendants liable for conversion, among other claims, and awarded GLF $900,000 as fair

[1] Jeniffer A.P. Carson, Bryna Rosen Misiura, David A. Goldman, Brendan J. Gaughan, John P. Gardella, and CMBG3 Law LLC.

compensation for the misuse of its documents or databases.[2] Although the jury also made a binding determination that the defendants did not violate G. L. c. 93A, § 11, the Supreme Judicial Court (SJC) vacated that portion of the judgment on appeal and remanded the matter to the Superior Court for a new trial on that claim. See Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 202 (2021) (Governo). After a bench trial, the same trial judge found that the defendants did not violate c. 93A because their unfair and deceptive conduct did not harm or injure GLF. The judge also found that the defendants violated two permanent injunctions, albeit not willfully, but declined to impose sanctions on GLF's complaints for contempt.

In this appeal from the ensuing judgment, dated March 6, 2023, GLF argues that the judge erred in finding that GLF suffered no harm or injury from the defendants' conduct, both because the judge was bound by the jury verdict on the conversion claim, and because GLF proved that element of the G. L. c. 93A claim. GLF further argues that it was entitled to sanctions for the defendants' violations of the injunctions. Because we conclude that some of the judge's findings on the

[2] The jury also found the attorney defendants liable for breach of the duty of loyalty, and some of the defendants liable for conspiracy. The jury found that none of the defendants misappropriated trade secrets, however.

issue of harm or injury were clear error, we reverse so much of the judgment as relates to the claim under c. 93A, and we remand that claim for entry of a new judgment in favor of GLF and for an assessment of damages consistent with this decision. We otherwise affirm the judgment.

Background. The decision in the prior appeal describes in detail the background of this case. See Governo, 487 Mass. at 190-192. After the second trial, the judge found the following facts.

1. Defendants' departure from GLF. David Governo is the sole owner and equity partner of GLF. Between 2000 and 2008, he hired the attorney defendants to work in the firm's asbestos litigation practice, with each attorney eventually becoming a nonequity partner. At least as of 2006, the six attorney defendants and one other nonequity partner ran the firm, grew its business, and represented its clients with essentially no involvement from Governo.

In 2016, Governo began to discuss the possibility of selling GLF to the nonequity partners. The attorney defendants initially were interested in this course -- an option they dubbed their "plan A" -- but negotiations proved unsuccessful. Specifically, the nonequity partners rejected Governo's offer to sell the firm for $9.25 million in August 2016. Governo then

declined the nonequity partners' counteroffer of $2.25 million and refused to negotiate further.

After these failed negotiations, the attorney defendants moved forward with their "plan B." Under this plan, they prepared to leave GLF and start their own firm, anticipating that almost all of GLF's clients would follow them to the new firm. To that end, during fall 2016, some of the attorney defendants secretly copied electronic materials (discussed more fully below) from GLF onto "thumb drives" and an external hard drive (WD drive) and took them from the firm.[3] All attorney defendants were aware of and approved of this conduct.

Thereafter, on November 18, 2016, the nonequity partners met with Governo and gave him a choice: sell GLF for $1.5 million plus all revenue collected through the end of that year, or all nonequity partners would resign. Governo rejected the offer to sell the firm but convinced one nonequity partner to stay at GLF. Two days later, Governo told the attorney defendants via e-mail message that he was terminating their employment effective immediately, and asked them to confirm that they had not taken or downloaded any files from GLF; the attorney defendants did not respond.

[3] GLF continued to have access to these materials both before and after they were copied by the attorney defendants.

The attorney defendants then promptly formed CMBG3 and brought the copied materials from GLF with them. Ultimately, the majority of GLF's clients, representing more than ninety-five percent of GLF's annual revenue, decided to transfer their asbestos litigation business to CMBG3.

2. Copied materials from GLF. The materials the attorney defendants copied included "essentially all" files and databases used to represent GLF's clients, as well as a "large volume" of GLF's administrative materials. Among the copied materials were six databases that GLF created via "FileMaker Pro" software to organize, track, and store client file materials (FMP databases).[4] The first of the FMP databases, the asbestos case management database, tracked key information about each active asbestos case, including deposition summaries and notes from attorneys on their mental impressions of the case and settlement discussions with opposing counsel. Most of the information in this database was not saved elsewhere, such as in the client files. The second FMP database, the talc database, was used to store and locate literature and analyses gathered and prepared

[4] On appeal, GLF does not challenge the judge's finding that certain materials, known as the 8500 New Asbestos Files, were part of the files belonging to clients who transferred their legal work to CMBG3. Therefore, we do not further discuss those files, other than to note that the FMP databases provided the mechanism that GLF used to track them.

for GLF clients who were involved in talc litigation, an emerging subspecialty of GLF. The third, the mail log database, contained a list (but not the contents) of all case-related physical and electronic mail received by GLF, apart from e-mail messages. This database was used to generate chronological lists of correspondences received by case. The fourth database, the bankruptcy trust database, was used to track payments from bankruptcy trusts to plaintiffs in asbestos cases. That database also linked to publicly-available documents that had been gathered by GLF and stored elsewhere on GLF's system. Finally, the Eckel and ECR databases were developed for two clients whom GLF represented as national coordinating counsel in all of their asbestos-related litigation. The attorney defendants also copied most of GLF's administrative materials, including GLF's client contact list; employee handbook; asbestos litigation procedures manual; office procedures manual; marketing, training, and billing manuals; summary of asbestos litigation reporting requirements; and client service assessments and plans.

After the attorney defendants formed CMBG3, defendant Bryna Rosen Misiura placed most of the copied materials onto a laptop (alternative laptop). Misiura was the only person who used the alternative laptop, and she served as a de facto gatekeeper when others wanted to use any materials copied from GLF; she would

not grant the other attorney defendants access to those materials unless they convinced her "that a particular document or item was critically important to defending a client," and that they could not obtain a copy through other means. Misiura only accessed client files that belonged to clients who transferred their representation to CMBG3, although other client files were still copied and brought to CMBG3.

Of the administrative materials, the attorney defendants also accessed the client contact list and employee handbook. Specifically, shortly after their departures from GLF, the attorney defendants used addresses from the client contact list to notify clients that they had left the firm and opened CMBG3 (notification letters). Additionally, the attorney defendants made minor edits to GLF's employee handbook and submitted it to their insurance broker to obtain insurance coverage for CMBG3.

3. General Laws c. 93A claim. On the c. 93A claim, the judge determined that the defendants acted unfairly and deceptively when they secretly copied GLF's electronic materials and took them to CMBG3 before the new firm had any clients, but concluded that GLF suffered no loss or injury from that conduct. On that point, the judge found that the defendants never accessed most of the materials they took from GLF.

Of the materials the defendants accessed, the judge found that the FMP databases were client file materials that had been

paid for by and belonged to the clients who eventually transferred to CMBG3. Specifically, the judge found that the departing GLF clients were entitled to receive exported electronic versions of all portions of the FMP databases in a format that maintained the same "indexing, cross-linking, database structure, and other organization that they had paid GLF to create and maintain for them."

As to the administrative files, the judge concluded that the attorney defendants were entitled to send notification letters to their clients after they left GLF. Although the attorney defendants used the client contact list from the copied materials to do so, according to the judge, they could have sent the same letters through other means. Moreover, the judge found that GLF "implicitly authorized [the] defendants to keep and use" the employee handbook because GLF's office manager later sent copies of the handbook (among other materials) to the defendants. Ultimately, the judge found that "GLF suffered no loss of any kind from [the] defendants' unfair or deceptive conduct, and [the] defendants did not earn any profits from any improper use of materials that they copied and took from GLF."

4. Contempt complaints. After the first trial, the judge issued a permanent injunction that required the defendants to delete most of the copied materials (unless later obtained from some other source), and to certify their compliance by October

2019 (first injunction). The judge later issued another injunction consistent with the SJC's remand order that expanded the scope of the materials to be deleted to include the administrative materials (second injunction). See Governo, 487 Mass. at 197-198. That injunction required certification of compliance by June 2021.

GLF then filed complaints alleging that the defendants were in contempt of the injunctions, and the contempt proceedings were consolidated with the retrial on the c. 93A claim. After trial, the judge found that, while the defendants did not fully comply with the deletion and certification requirements of the injunctions, the defendants never used any materials kept in violation of the injunctions, none of the violations were willful, and the defendants acted in good faith to comply.

The violations were as follows. The defendants incorrectly certified compliance with the first injunction in October 2019 based on their mistaken belief that their outside computer expert had wiped all devices of the copied materials. The defendants learned that their belief was mistaken, and that their first trial counsel had retained some copied materials, in May 2021, and they promptly notified GLF. Then, in July 2021, defendant Misiura remembered that prior counsel previously returned the WD drive to her, and so she provided the drive to GLF through successor counsel. Finally, despite certifying

compliance with the injunctions in January and February 2022, the defendants discovered in the middle of the second trial that Misiura had a thumb drive that contained some copied materials, all of which belonged to then-active clients of CMBG3. Ultimately, the judge found that the defendants were in full compliance with the injunctions as of June 2022. The judge declined to impose sanctions on the defendants or award attorney's fees or costs to GLF, however, because "GLF brought and pressed its complaints for contempt solely to punish [the] defendants."

Discussion. 1. General Laws c. 93A, § 11. a. Jury verdict. GLF first argues that, under the doctrine of issue preclusion, the judge was bound to find a knowing and willful violation of c. 93A based on the prior jury verdict and entry of final judgment on the conversion claim in favor of GLF. GLF raised this argument before the second trial through a motion for partial summary judgment.[5] In denying that motion, the judge rejected the argument that the jury verdict had a preclusive effect, and explained that the SJC's remand order required him "to conduct an entirely new trial on the c. 93A claim."[6]

[5] GLF's motion sufficiently preserved the issue for appellate review.

[6] In the prior appeal, the SJC found that the jury were erroneously instructed that any conduct that occurred while the attorney defendants were employed by GLF was "irrelevant" to the

We turn then to the issue whether the judge was bound by the prior verdict on the conversion claim. In a similar context, we have found that even after a jury trial and entry of separate and final judgment on a non-93A claim, "the subject matter of a c. 93A claim is sufficiently distinct so that a judge sitting independently on the c. 93A claim may arrive at findings different from those of the jury sitting on the non-93A claims." Wyler v. Bonnell Motors, Inc., 35 Mass. App. Ct. 563, 568 (1993). The same reasoning applies here where the judge opted to hold a bench trial on remand. See Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 186-187 (2013) (judge's findings on causation may conflict with jury's findings on parallel common-law claim and nonbinding advisory opinion on c. 93A claim, if judge reserved claim); Chamberlayne Sch. & Chamberlayne Jr. College v. Banker, 30 Mass. App. Ct. 346, 354-355 (1991) ("the broader scope and more flexible guidelines of

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c. 93A claim, including "negotiations, copying of materials, [and] anything else" occurring before the attorney defendants' separation from GLF. Governo, 487 Mass. at 193. The SJC distinguished the facts here from those of a purely intracompany dispute where G. L. c. 93A, § 11, ordinarily does not apply; the SJC explained, "[t]hat the individuals were employees at the time of the misappropriation does not shield them from liability under G. L. c. 93A, § 11, where they subsequently used the ill-gotten materials to compete with their now-former employer." Id. at 196. Additionally, the SJC noted that GLF's claim "required the jury to consider that the attorney defendants stole GLF's materials in order to determine whether the subsequent use of these materials was unfair or deceptive." Id.

c. 93A permit a judge to make [independent] decisions under c. 93A without being constrained by the jury's findings" [citation omitted]).

To the extent GLF argues that this case is distinguishable because the judge decided to submit the claim to the jury for a binding determination before the first trial, we disagree. See Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 22 n.31, cert. denied, 522 U.S. 1015 (1997) (judge did not err in treating jury verdict as advisory where judge "initially stated that 'the jury [will] decide the [c.] 93A claim[s],' but chose after trial to issue his own findings in order to avoid a retrial if one of his key jury instructions was found to be erroneous"); Wyler, 35 Mass. App. Ct. at 567-568 (separate and final judgment on abuse of process claim after jury trial had no preclusive effect on c. 93A claim tried before judge). On remand, only a c. 93A claim remained, and no right to a jury trial exists on that claim. See, e.g., Nei v. Burley, 388 Mass. 307, 315 (1983). Thus, the judge was free to decide the 93A question independently based on the evidence presented at the second trial. See Wyler, supra at 566. Cf. Acushnet Fed. Credit Union v. Roderick, 26 Mass. App. Ct. 604, 606, 608 (1988) (on retrial, judge could submit c. 93A claim to jury for binding determination after reserving claim at first trial).

b. Loss or harm. GLF next argues that the judge erred in finding that there was no loss or harm resulting from the defendants' unfair and deceptive conduct.[7] "We accept the trial judge's findings of fact on the c. 93A issue absent clear error, but review [the judge's] applications of law de novo." Exhibit Source, Inc. v. Wells Ave. Business Ctr., LLC, 94 Mass. App. Ct. 497, 500 n.3 (2018). "A ruling that conduct violates [c. 93A] is a legal, not a factual, determination[,] . . . [a]lthough whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact" (citation omitted). Klairmont, 465 Mass. at 171.

To prevail on a claim under G. L. c. 93A, § 11, a plaintiff must establish

> "(1) that the defendant engaged in an unfair method of competition or committed an unfair or deceptive act or practice, as defined by G. L. c. 93A, § 2, or the regulations promulgated thereunder; (2) a loss of money or property suffered as a result; and (3) a causal connection between the loss suffered and the defendant's unfair or deceptive method, act, or practice." (Footnote omitted.)

Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 820 (2014). The statute authorizes double or treble damages if

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[7] For the same reasons discussed in the previous section, we reject GLF's argument that, on the c. 93A claim, the judge was bound to accept $915,000 (the amount of the jury's award, plus costs) as the amount of "actual damages" based on the judgment entered after the earlier trial. G. L. c. 93A, § 11. See Wyler, 35 Mass. App. Ct. at 568 (judge deciding 93A claim is not bound by jury's assessment of damages on non-93A claim).

the defendant's unlawful conduct was "willful or knowing." G. L. c. 93A, § 11.

As the judge in the present case found, the attorney "defendants acted unfairly and deceptively when they secretly copied GLF client file materials and administrative materials and took them to their new law firm without permission from GLF and before they had any clients." Yet, the judge found no resulting injury to GLF because, essentially, the defendants only accessed copied materials that belonged to clients who had transferred to CMBG3, or that the attorney defendants were otherwise authorized to use after they left GLF.[8] As to the FMP databases, the findings underlying this conclusion are clearly erroneous.[9]

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[8] Although GLF argues that its loss of property (i.e., the copied materials) was sufficient in and of itself to establish damages, we disagree. There must be some connection between the loss of that property and the loss suffered by GLF (through, for instance, a subsequent misuse of that property) to establish damages. See Governo, 487 Mass. at 195-196; Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839 (1972), S.C., 377 Mass. 159 (1979). There was no such connection here.

[9] The judge's findings on the administrative materials, however, are not erroneous. The attorney defendants were free to notify clients of their move to CMBG3, see, e.g., Meehan v. Shaughnessy, 404 Mass. 419, 437 & n.15 (1989), and the judge found that the attorney defendants could have obtained the client addresses through other means for their notification letters. We also discern no error in the judge's finding that, considering GLF's treatment of its employee handbook, that handbook was not confidential and, thus, the defendants' subsequent use of that handbook did not give rise to a violation of c. 93A. See Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 169-

The judge concluded that "almost everything" in the FMP databases -- including the organizational system and file structure -- belonged to GLF's clients and not the firm. In so holding, the judge employed a "thought experiment," likening the FMP databases to a hypothetical paper filing system that a firm might have created in "the pre-electronic age of litigation." Such a system might include indexed binders, subfolders, and indices to make it "easy to locate items within those voluminous materials and work product memoranda" so the firm could use the same materials to defend the same clients in future cases. The judge reasoned that, if the clients paid the firm for its work to develop and maintain the system, a client leaving the firm "would be entitled to take with [it] not only all of [its] litigation-related documents and work product gathered and created on its behalf, but also the file structure and indices the client had paid the old firm to create and maintain for it."

To be sure, a departing client was entitled to its own client file under Mass. R. Prof. C. 1.16 (e), as appearing in 471 Mass. 1396 (2015) (rule 1.16).[10] See Malonis v. Harrington,

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170 (1991), S.C., 417 Mass. 484 (1994) ("the extent of measures taken by the employer to guard the secrecy of the information" is relevant to whether that information is confidential [citation omitted]).

[10] We cite to the version of the rule in effect when the attorney defendants left GLF. We understand this version of the rule to have encompassed materials in electronic form.

442 Mass. 692, 701 (2004) ("a discharged attorney must take all reasonable steps to protect the[ir] client's interests, including surrendering papers and property to which the client is entitled"). The organizational system developed by the attorney defendants while they were employed at GLF to streamline their practice does not fit squarely into the type of materials the rule required be transferred, however.[11] While we agree with the trial judge that a lawyer is not free to provide client material to a departing client in an organizational mess, the departing client is not entitled to the entire databases

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[11] The rule required a lawyer to make available to a former client, on request,

> "all papers, documents, and other materials the client supplied to the lawyer.
>
> "all pleadings and other papers filed with or by the court or served by or upon any party.
>
> "all investigatory or discovery documents except those for which the client is then obligated to pay under the fee agreement but has not paid, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence."

Rule 1.16 (e) (1)-(3). The rule also required a lawyer to provide copies of the lawyer's "work product." Rule 1.16 (e) (4), (5). Work product was defined as "documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant. . . . Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence." Rule 1.16 (e) (6).

that were developed to efficiently represent multiple clients defending against similar claims, even if that client paid for some portion of GLF's time creating and updating those databases.[12] Indeed, the fields and layouts of the FMP databases were not part of the individual client files, and were included so information could be searched across different clients. Thus, we conclude that the finding that each departing client was entitled to the "indexing, cross-linking, database structure, and other organization that they had paid GLF to create and maintain for them" was clear error.

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[12] This conclusion is consistent with the interpretation by the American Bar Association (ABA), of the analogous model rules:

> "Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled such as materials provided to the lawyer, legal documents filed or executed, and such other papers and properties identified in this opinion. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client."

ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 471, at 7 (2015). Examples of the types of materials generated for a lawyer's own purpose that may be turned over for active cases include internal notes and memoranda for which no final product has yet emerged. See id. at 6.

GLF did not provide exported copies of the entire FMP databases to the defendants, but instead supplied information pulled from the databases, saved in portable document format (.pdf) and Microsoft Word documents.[13] To use that information in the same way they did at GLF, the attorney defendants would have been required to rebuild the databases and reenter the data record-by-record. Instead, Misiura used the copied materials "to find and access discovery materials, investigatory materials, case history summaries, or other materials" while at CMBG3. This evidence was adequate to establish that the defendants used the copied materials to compete with GLF, which was unfair and deceptive as a matter of law. See Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172-173 (1991), S.C., 417 Mass. 484 (1994) (employee who plans to leave and compete with employer "may not carry away certain information"); Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839 (1972), S.C., 377 Mass. 159 (1979) ("although an employee may carry away and use general skill or knowledge acquired during the course of his employment, he may be enjoined from using or disclosing confidential information so acquired" [citation omitted]). GLF was harmed by that use of the copied materials, and it is thus entitled to

[13] Whether such production complied with GLF's ethical obligations under rule 1.16 is beyond the scope of this appeal.

judgment in its favor on the c. 93A claim. This matter must be remanded for entry of a new judgment and an assessment of damages.[14]

c. Damages. To provide guidance on remand, we note that, where an employee misuses confidential materials to compete with a former employer, the appropriate measure of damages is "the defendant's profits realized from his tortious conduct, the plaintiff's lost profits, or a reasonable royalty." Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co., 381 Mass. 1, 12 (1980). In this scenario, a plaintiff is ordinarily "entitled to the profit he would have made had his secret not been unlawfully used, but not less than the monetary gain which the defendant reaped from his improper acts." Specialized Tech. Resources, Inc. v. JPS Elastomerics Corp., 80 Mass. App. Ct. 841, 850 (2011), quoting Jet Spray Cooler, Inc., 377 Mass. at 170. Even if the scope of the monetary loss is difficult to quantify, disgorgement of profits still is an appropriate remedy for a defendant's misuse of confidential information. See Specialized Tech. Resources, Inc., supra. Yet, to the extent the attorney defendants here dispute that they profited from

[14] GLF requested that the matter be assigned to a different judge in the event of a remand. We decline to direct reassignment of the case, particularly given the limited nature of the issues to be decided on remand.

their misuse of the copied materials, GLF should be permitted on remand to present expert evidence establishing damages based on a reasonable royalty rate.[15] If GLF is unable to prove a specific loss and the defendants made no actual profits on the misuse of the copied materials, that may be the appropriate method of assessing damages. See Curtiss-Wright Corp., supra at 11 & n.9; Jet Spray Cooler, Inc., supra at 171 n.10.

The judge also must assess the appropriate amount to award for attorney's fees. Based on the undisputed facts underpinning the attorney defendants' c. 93A violation, we conclude that GLF established that the violation was "willful or knowing," such that it is entitled to multiple damages.[16] G. L. c. 93A, § 11. See Renovator's Supply, Inc. v. Sovereign Bank, 72 Mass. App. Ct. 419, 431 (2008) (judge's credibility determinations on issue whether conduct was willful are entitled to "special deference").

2. Contempt. GLF also challenges the judge's decision not to impose sanctions for the defendants' violations of the

[15] Although the trial judge concluded that GLF waived this issue, we disagree. GLF sought to admit expert evidence on the issue prior to both trials and, in both instances, its motion was denied.

[16] Additionally, on remand, the judge may consider whether any or all of the $1,925 that GLF incurred in prelitigation attorney's fees is recoverable under c. 93A.

injunctions. We review that decision for an abuse of discretion and discern none. See Wong v. Luu, 472 Mass. 208, 220 (2015). The judge's decision was amply supported by his findings that the defendants were in compliance with the injunctions at the time of the second trial, their violations were inadvertent, and they had not used the wrongfully-retained materials after the injunctions issued. See Labor Relations Comm'n v. Salem Teachers Union, Local 1258, MFT, AFT, AFL-CIO, 46 Mass. App. Ct. 431, 435 (1999) ("sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained" [quotation and citation omitted]).

Conclusion. So much of the judgment dated March 6, 2023, as entered in favor of the defendants under G. L. c. 93A, § 11, is reversed, and that claim is remanded for entry of a new judgment in favor of GLF and for a determination of damages,

attorney's fees, and costs.[17] In all other respects, the judgment is affirmed.

So ordered.

By the Court (Rubin, Desmond, & Hand, JJ.[18]),

Clerk

Entered: April 4, 2025.

[17] As the prevailing party on a claim under G. L. c. 93A, § 11, GLF is entitled to appellate attorney's fees. Within fourteen days of the date of this decision, GLF may submit an application for appellate attorney's fees and costs with supporting documentation, in accordance with Fabre v. Walton, 441 Mass. 9, 10–11 (2004). The defendants will have fourteen days thereafter after in which to file a response.

[18] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1684CV03949-BLS2

GOVERNO LAW FIRM LLC

v.

CMBG3 LAW LLC AND OTHERS

FINDINGS AND CONCLUSIONS ON CHAPTER 93A CLAIM, AFTER REMAND FROM THE SUPREME JUDICIAL COURT, AND ON SUBSEQUENT COMPLAINTS FOR CONTEMPT

The Governo Law Firm LLC ("GLF") sued six of its former non-equity partners (Jeniffer Carson, Bryna Misiura, Kendra Bergeron, David Goldman, Brendan Gaughan, and John Gardella) and their new law firm (named CMGB3 LLC, after the founders' last names). GLF claimed that when the individual defendants left to start their own law firm they secretly and unfairly copied, took, and then used electronic files and databases that belong to GLF. Defendants conceded that they took copies of those materials, but disputed that the materials they used belong to GLF; defendants contended that they only used materials that belonged to clients that had transferred to CMBG3, plus a few administrative materials that they were entitled to use.

After a jury trial and verdict, the Supreme Judicial Court remanded the case for retrial of GLF's claim under G.L. c. 93A. The Court retried the c. 93A claim without a jury, and consolidated that proceeding with trial of complaints by GLF for contempt, based on allegations that defendants violated the permanent injunctions entered in this case.

The Court finds that defendants did not violate G.L. c. 93A, even though they unfairly and deceptively took copies of electronic files and databases, because GLF did not suffer any harm or injury as a result and defendants did not profit from any improper use of materials they had copied. Harm or injury is an element of a c. 93A claim; GLF has failed to prove that element.

For the most part, defendants only used copied materials that belonged to clients who transferred to CMBG3 and that GLF and its owner David Governo were ethically obligated to provide to, but wrongly withheld from, their former clients. The Court finds that GLF did not suffer any loss and defendants did not unfairly earn any profits from defendants' use of materials that belonged to their clients and that GLF should have promptly sent to CMBG3.

Defendants also used GLF's client contact list to notify clients that defendants had opened their own firm and that the clients could choose their legal representation going forward, and used an employee handbook that GLF had freely given to the defendants soon after their departure. The Court finds that GLF did not suffer any loss and defendants did not unfairly earn any profits from that limited use of GLF administrative materials.

The Court finds that defendants did not use any of the other materials that they copied and took from GLF, and that therefore GLF suffered no loss, harm, or injury from the copying of those other materials.

In sum, since defendants' conduct in secretly copying and taking with them GLF client file and administrative materials did not cause GLF to suffer any loss or injury and did not enable defendants unfairly to earn any profits, GLF has failed to prove its claim under c. 93A.

As for the complaints for contempt, the Court finds that defendants have at all times fully complied with the portions of the permanent injunctions that barred defendants from using materials they had copied from GLF servers.

Though defendants violated the permanent injunctions by not deleting or returning all such materials by the mandated deadlines, it also finds that defendants made good faith efforts to comply with the Courts' order; that their violations were inadvertent, did not cause GLF any harm, and did not result in defendants obtaining any advantage or profit; and that since June 2022 defendants have been in full compliance with the requirements that they delete or return all materials they had taken from GLF.

The Court will therefore exercise its broad discretion and not impose any fine or other penalty, or award GLF any attorneys' fees or costs, on the complaints for contempt.

Final judgment will enter in defendants' favor on the c. 93A claim and on the complaints for contempt.

1. **Procedural History**. The Court originally submitted all claims to a jury, which found in June 2019 that (i) defendants converted some electronic files or information that belonged to GLF, the six individual defendants breached their duty of loyalty by misusing some confidential information that belongs to GLF, and all but one of the defendants conspired to commit a tort, and (ii) none of the defendants misappropriated any trade secrets or committed any unfair or

deceptive act or practice in violation of G.L. c. 93A. The jury awarded GLF $900,000 on the claims for conversion and breach of duty of loyalty.

The Court entered a permanent injunction on September 4, 2019, that ordered the defendants not to use and by September 30 to delete all copies of the so-called 8500 New Asbestos Litigation files or any database they had copied and taken from GLF, except for any such materials that GLF transferred to defendants or their clients after November 20, 2016, or that defendants obtained from some other source. The injunction also ordered defendants to provide GLF with a copy of any parts of the 8500 New Asbestos Litigation files or of any databases that they had not permanently deleted from their devices and files, and to certify by October 4, 2019, that they had permanently deleted all other portions of the 8500 New Asbestos Litigation files or of any database that was copied and taken from GLF.

The Supreme Judicial Court held that the Court's jury instructions on the c. 93A claim contained a material error, and remanded the case with an order to retry that claim. See *Governo Law Firm LLC* v. *Bergeron*, 487 Mass. 188, 192–197 & 202 (2021). It vacated the judgment to the extent it was in defendants' favor on the c. 93A claim, but affirmed the rest of the judgment. *Id*. at 202. The SJC also ordered that the preliminary injunction be revised to require the return or deletion of administrative files that the defendants had copied and taken from GLF. *Id*.

The Court issued a modified permanent injunction on May 24, 2021, in a form proposed by GLF and consistent with the SJC's order, that barred defendants from using and required them to delete all copies of any documents, files, or databases they copied and took from GLF, except for any such materials that GLF transferred to defendants or their clients after November 20, 2016, or that defendants obtained from some other source. The modified permanent injunction also required defendants to certify by June 21, 2021, that they had permanently deleted all of those things.

GLF filed two complaints for contempt. The first contempt complaint alleged that defendants violated the two permanent injunctions by retaining and only later disclosing (i) an additional hard drive with copies of Governo Firm documents that was found in a desk at CMBG3 Law LLC, and (ii) several hard drives with additional copies of Governo Firm documents that were held by defendants' prior litigation counsel or by their forensic computing expert BDO Consulting. The second contempt complaint alleges that the defendants further

violated the second permanent injunction by failing to submit timely certifications that they had deleted all files covered by the injunction.

The Court exercised its discretion to hear and decide the retrial of the c. 93A claim without a jury, and to combine retrial of the 93A claim with trial of the two complaints for contempt. There is 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). As a result, whether to submit a c. 93A to a jury is a "matter of discretion." *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 225 n.7 (1994).[1]

Since the Court exercised its discretion to retry the c. 93A claim without empaneling a new jury, it must make its own independent findings and is not bound by the jury's prior verdict on the conversion and duty of loyalty claims. See, e.g., *Klairmont* v. *Gainsboro Restaurant, Inc.*, 465 Mass. 165, 186 (2013) ("a judge deciding a c. 93A claim [may] make findings of fact that are contrary to those made by a jury on a parallel common law claim") (quoting *Kattar* v. *Demoulas*, 433 Mass. 1, 12 (2000)); *Simas* v. *House of Cabinets, Inc.*, 53 Mass. App. Ct. 131, 141 (2001), rev. denied, 435 Mass. 1109 (2002) (where jury decides common law claim before judge decides related c. 93A claim, jury verdict is not entitled to preclusive effect and does not constraint judge); *Wyler* v. *Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563, 563–564 & 566–568 (1993), rev. denied, 416 Mass. 1111 (1994) (when judge hears c. 93A claim after jury verdict on common law claim has gone to judgment, jury's verdict does not have preclusive effect).

2. **Legal Background—Client Materials**. When a client that is represented by a lawyer or law firm decides to end that relationship and retain new counsel, the client's prior lawyer or law firm has an ethical obligation to transfer the client's entire file to the client or its new law firm. See Mass. R. Prof. Conduct 1.15A(b) (effective September 1, 2018); Mass. R. Prof. Conduct 1.16(e) (as in effect before September 1, 2018).

The clients file consists of the following materials, whether stored electronically or in some other physical form:

- all papers, documents, and other materials that the client supplied to the lawyer;

[1] The trial judge has the choice of letting a jury decide the c. 93A claim, asking the jury for nonbinding advisory findings on the 93A claim, or deciding all aspects of the 93A claim without a jury. See, e.g., *Global Investors Agent Corp.* v. *National Fire Ins. Co. of Hartford*, 76 Mass. App. Ct. 812 (2010).

- all correspondence relating to the matter;
- all pleadings and other papers filed with or by the court or served by or upon any party that are relevant to the client's claims or defenses;
- all investigatory or discovery documents, including investigative reports, expert reports, and depositions;
- all intrinsically valuable documents of the client; and
- copies of work product prepared in the course of representing the client by the lawyer or by their employee, agent, or consultant, including but not limited to legal research, investigatory materials, and reports of negotiations.

See Rule 1.15A(a) and Comment [2] (effective September 1, 2018); Rule 1.16(e) (in effect before September 1, 2018).[2] The lawyer may, at their own expense, keep copies of materials turned over to a departing client. *Id*.

In addition, when a lawyer stops representing a client, the lawyer must take all steps that are "reasonably practicable to protect a client's interests," including "surrendering papers and property to which the client is entitled" whether they are considered to be part of the client file or not. See Rule 1.16(d); *Malonis* v. *Harrington*, 442 Mass. 692, 702 (2004). The quoted language in this Massachusetts rule was taken from ABA Model Rule of Prof. Conduct 1.16(d). The American Bar Association has construed this provision to mean that, when the representation is terminated before the matter is concluded, the former client is entitled to obtain copies of "paper or property generated by the lawyer for the lawyer's own purpose," in addition to the "client file" items enumerated in Mass. R. Prof. Conduct 1.16(e), if withholding those materials "would likely harm the client's interest."[3] This is consistent with the comments to the Massachusetts rules, which state that when a client with unfinished matters

[2] Though Rule 16(e) did not refer to documents in electronic form, the American Bar Association construed the model rule upon which it was based to apply to all documents or information, whether in "tangible or electronic form." See ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 15- 471, at 5 n.28 (2015) (available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_471.authcheckdam.pdf) (last viewed February 3, 2023).

[3] *Id*. at 5.

transfers their legal representation to a different attorney or law firm, their former attorney must "give successor counsel what is needed to complete the representation." Comment 2 to Mass. R. Prof. Conduct 1.15A(b)(1) (effective September 1, 2018); Mass. R. Prof. Conduct 1.16(e)(1) & (3) (as in effect before September 1, 2018).

3. **Findings of Fact**. The Court makes the following findings of fact based on the evidence presented during the recent retrial of GLF's claim under G.L. c. 93A and its two complaints for civil contempt, and on reasonable inferences that the Court has drawn from that evidence. The evidence included testimony by ten witnesses over ten trial days, about 450 pages of transcripts of testimony by ten witnesses during the first trial, and 146 other exhibits.

3.1. **Firm Management before November 2016.** David Governo started his legal career at the law firm Burns & Levinson, where he became an equity partner and worked mostly on asbestos litigation. Governo became unhappy, feeling that he was not treated with respect, and left without any clients. He went to work with Richard Kirby, who needed help with his work as national coordinating counsel for a big asbestos client. They renamed the firm Kirby and Governo, and focused their work on defending companies that had provided products or materials containing asbestos against personal injury claims. After a few years, in the mid-1990s, Governo and Kirby were not getting along and agreed to separate their practices. Governo then opened his own firm, with Eileen Kavanagh as a junior partner, which they called Governo and Kavanaugh even though Governo was the sole equity partner.

Governo hired Jennifer Carson as an associate at Governo and Kavanaugh in June 2000. Soon thereafter, Governo told Carson that she should run the asbestos practice and come to him for guidance only if she encountered major problems. Governo was in the middle of a divorce proceeding, was away from GLF for weeks at a time or longer, and left Carson to train herself. Governo continued to distance himself from the firm's asbestos litigation work. Though Governo said he wanted to focus on developing other practice areas, involving non-asbestos toxic tort cases, he never developed much other business.

Not long after Carson started to work for Governo, Kavanagh left and took her non-asbestos practice with her. At that point Governo changed the name of the firm to Governo Law Firm LLC ("GLF"). Governo was at all times the sole owner of GLF.

Governo hired Bryna Misiura as an associate in May 2001. David Goldman joined Carson and Misiura at GLF in October 2002. John Gardella followed in September 2006. Brendan Gaughan came to the firm in January 2007; Kendra Bergeron did so in March 2008.

Governo eventually made Carson, Misiura, Bergeron, Goldman, Gardella, and Gaughan non-equity partners at GLF. Nancy Kelly was the only other non-equity partner at the firm. Governo remained the solely owner of the firm; he retained control over and withdrew substantial profits from GLF.

Carson ran GLF's asbestos litigation practice from the early 2000s until she and the other individual defendants left the firm in November 2016. Carson and the other non-equity partners built and substantially grew GLF's asbestos litigation business. Carson was the primary originator of the largest number of clients during the sixteen years she was at GLF.

From at least late 2006 until the six individual defendants left GLF and opened their own firm, CMBG3, Governo was generally not practicing law and not involved in running or growing GLF, managing its business, or representing its clients; he did very little legal work for clients and no longer supervised work performed by other lawyers. During this time, the seven non-equity partners were responsible for generating almost all of GLF's income, with very little economic contribution by Governo.

By 2016, though Governo was still the only person with an equity interest in GLF, he no longer had a relationship with any of the firm's major clients and had stopped playing any active role in representing GLF's clients or managing the firm. At that time, the firm's largest client was ECR, followed by Crane Co., and then Eckel and Spence Engineering. Governo never did any work for ECR or Spence, and for many years had done very little legal work for Eckel. For a time Governo had done more work for Crane Co., but that client removed Governo from the account and ordered that he no longer have any involvement in representing them several years before the individual defendants left GLF. Other, smaller firm clients had also asked that Governo stop doing any work on their matters.

Governo spent half of each year, from May to October, on Martha's Vineyard and almost never came into GLF's office during that time. Though he would occasionally send emails to one or more of the defendants during that time, he generally was not practicing law or paying much attention to GLF.

During the months that he was not on the Vineyard, Governo would occasionally come into GLF's office. When he did so, Governo would typically read some papers, review client bills, and go home; he did little or no legal work for clients and had little to no involvement in managing that work or GLF's client files and databases.

3.2. **Client File Materials and Databases**. The Court credits the testimony by the six individual defendants, and especially the testimony by Jeniffer Carson, about how GLF managed and kept client file libraries and materials during the ten years from late 2006 to late 2016, and about how its clients paid GLF to develop and maintain those materials.

GLF lawyers and paralegals created and maintained various electronic repositories of client file materials, as well as various electronic databases to allow them to find client file materials quickly and efficiently. The work done to update and maintain these repositories and databases was billed to and paid for by the affected client or clients. The Court does not credit Governo's testimony that none of this work was charged to clients, or that GLF incurred more than $100,000 of overhead time to develop the 8500 New Asbestos files discussed below, or that GLF incurred a total cost of $100,000 to develop and maintain the databases of client materials that are also discussed below.

Other than as expressly noted below, the Court does not credit the testimony by David Governo about the electronic files and databases that GLF maintained and used in representing clients during this period, for two reasons.

First, Governo had no personal knowledge of how GLF maintained and used client and other files from the mid-2000s until the individual defendants left GLF in November 2016, as discussed above. At best, his testimony about these topics is based is based on his vague memory of things that happened twelve or fifteen years before the individual defendants left GLF, not on anything that is relevant here.

Second, the Court finds that Governo's testimony was tainted and distorted by his patent and palpable animus toward the defendants, and his very strong desire to punish and hurt them. Governo considered and still considers the individual defendants' decision to leave his firm, and their success in attracting almost all of GLF's clients to follow them to their new firm, to constitute a heinous, personal betrayal. Governo considers the individual defendants to be,

using his word, despicable. He sees this litigation, including his complaints for contempt, as a chance to get revenge and extract retribution.

Governo's unrelenting personal animus toward the defendants has warped his memory and makes much of his testimony unreliable. For example, Governo's testimony on direct examination that he personally selected which materials to keep in the 8500 New Asbestos Files (discussed below), and that he had to do so because no one else at GLF had the experience to figure out which materials would be useful in defending clients against future asbestos claims, is incredible; it cannot be squared with the unchallenged testimony—which the Court fully credits—that for 10 or more years Governo had essentially no involvement in running the firm or representing its clients, and that he left it up to the non-equity partners to do so without his involvement or supervision.

The Court finds that GLF kept client file material, that was paid for and belonged to the firm's clients, in the following locations.

3.2.1. GLF used its **Active Plaintiff or Case Files** to store materials specific to each plaintiff and each civil action, such as pleadings in that case or the plaintiff's medical records. It was common for GLF to represent multiple defendants in a single lawsuit brought by one plaintiff, so any particular active plaintiff or case file may have constituted client file materials belonging to more than one GLF client. When an individual case was closed, for example if the case was tried or settled, GLF would strip materials from the active file for that case and move them to the Client Server or Client Outlook or 8500 files, all discussed below, so that they could be found quickly and used over and over in the client's active cases.

3.2.2. **Master Asbestos Case Spreadsheet**. GLF also kept and maintained a spreadsheet, in Excel format, that listed all its asbestos cases. Any time spent entering or revising information on this spreadsheet for a particular client was billed to and paid for by that client. The information for each client on this spreadsheet constituted client file material that belonged to that client.

3.2.3. The **Client Files**, which the parties also refer to as the Client Server Files, contained materials that were specific to each client, including: descriptions of the client's products prepared by GLF paralegals or attorneys; a ledger of all of the client's discovery responses in all cases; and any client statement that might be used against it in another case, such as discovery responses, rule 30(b)(6)

testimony by a client representative, and SEC filings. This was all client file material that belonged to each client.

3.2.4. **Client Outlook Files** were used to track all case-related emails. GLF set up an Outlook email box for each of its clients, and stored a copy of every email regarding a client in that client's Outlook area. These emails were part of each client's file.

3.2.5. **8500 New Asbestos Litigation Files**. GLF did not have a document management system. Instead, it used subfolders within the so-called "8500 New Asbestos Litigation" files to store, keep track of, and find electronic copies of documents that GLF would need to use and reuse for its clients.

GLF used the 8500 billing code to keep track of general work that benefitted many or all of its active clients, which it then charged to clients. The GLF office manager allocated all billable time and expenses charged to the 8500 code among all clients with active asbestos files, in proportion to each client's share of GLF's total business, and included proportionate shares of the 8500 time and expenses in each client's bill. As a result, GLF's clients paid for the documents saved in the 8500 files and for the maintenance of that file structure, with the largest clients paying the most.

As noted above, the Court does not credit Governo's rough estimate that GLF spent roughly $100,000 in unreimbursed time to gather and maintain the 8500 New Asbestos files, and does not credit his testimony that the cost to create and maintain these 8500 files was not charged to GLF clients.

The 8500 New Asbestos files were client file materials that clients paid to prepare or obtain, and to organize and store, so that they could be used across all of each client's active asbestos cases. Almost everything in the 8500 New Asbestos files was gathered or prepared after Carson joined GLF in 2000. The 8500 New Asbestos files did not include documents that Governo had taken from Burns & Levinson or had otherwise gathered or saved before Carson joined the firm that became GLF. They also did not contain any marketing articles written by Governo; those were saved in GLF's 9100 files, not in the 8500 New Asbestos files.

The Court does not credit the opinion testimony by Governo, or by GLF's witnesses Barbara Barron and Alan Rose, that the 8500 New Asbestos Files constituted a research library that belonged to GLF and that GLF could withhold from departing clients; the Court finds that none of these witnesses

had sufficient knowledge about what was actually in the 8500 New Asbestos Files and related databases, how those files were developed and maintained, and who paid for all of that work to form a credible opinion about whether they constituted client file materials.[4]

The Court instead finds that these electronic files contained investigatory materials, research memos, and other work product that was gathered or prepared for, paid for, and belonged to GLF's clients. It further finds that clients that transferred their legal representation from GLF to a different firm were entitled to take with them the 8500 New Asbestos materials for which they had paid GLF. Though GLF and Governo were entitled to keep and use copies of these materials even if the clients that paid for them left the firm, the clients themselves owned the materials and were entitled to take copies with them if they decided to transfer their legal representation away from GLF.

The Court does not credit Governo's belief that duplicates of all the documents and materials stored in the 8500 New Asbestos files were maintained in the Client Files. Instead, the Court finds that substantial portions of each client's file materials could be found only in the 8500 files, and nowhere else within GLF's files or databases.

The key subfolders within the 8500 New Asbestos files were as follows.

- The **Jurisdiction Files** folder contained copies of court decisions and orders. GLF did not save these materials in individual case files. Instead, they all were stored in and accessed through this subfolder.
- The **Trade Memoranda** folder was used to store and access research memoranda and investigatory materials that described or helped to document individual trades or jobs, for example at a Navy or other shipyard, that involved exposure to asbestos. The memoranda were prepared by paralegals on behalf of a particular clients in connection with ongoing litigation, and then moved or copied to this folder so that they could be used on behalf of the same clients in other cases.
- The **Worksite Materials** folder contained similar research memoranda and investigatory materials for each unique job site, such as a particular Navy ship, at which workers were exposed to

[4] The Court credits Rose's concession that he did not "have a great deal of familiarity about the specific contents" of the 8500 New Asbestos files or related databases.

asbestos. For example, a client paid for an archivist to travel to Washington, D.C., and buy historical records regarding work done on many Navy ships. These materials belonged to the client. They were saved in the 8500 New Asbestos files so that they could be used over and over in different lawsuits by different plaintiffs.

- The **Co-Defendant Files** folder contained discovery responses, sales records, and all other information concerning co-defendants that GLF did not represent, concerning actions in which GLF was defending one or more other parties. This information from and about co-defendants was used to evaluate risk and develop defense strategy for the clients that GLF did represent.
- The **Law or Legal Decisions** folder contained any legal memoranda that were prepared and paid for by GLF clients. This work product was typically prepared for a specific action and saved in the relevant active case file, and then copied or moved into this 8500 subfolder so that it could be re-used in other cases.
- The **Medical Research** folder contained copies of publicly-available medical literature that was regularly cited by asbestos plaintiffs' lawyers. Clients paid GLF to gather and organize this material so that it could be re-used in their cases.
- The **State-of-the-Art Folder and related Database** contained work product and investigatory materials relevant to client's "state-of-the-art" defense, regarding the state of knowledge about asbestos when various products left the manufacturer's possession. This defense is very important in asbestos litigation. The 8500 state-of-the-art folder contained historical, non-medical literature and materials, such as OSHA regulations, trade organization minutes, and conference material from experts. The related state-of-the-art database included attorney work product memoranda prepared for clients that summarized and analyzed other materials stored in this 8500 subfolder or in the medical research folder.

  GLF clients paid GLF to gather, prepare, and store the materials and analyses in its state-of-the-art folder and database. Misiura created the state-of-the-art database around 2006. It contained materials collected or prepared by GLF attorneys after that time. It did not

include any documents that Governo had collected before then, back when he was actively involved in asbestos litigation.

- The **Settlement History Charts** for all GLF clients were contained in a large Word document, with separate sections for each client. The clients paid GLF to prepare and maintain their section of this document.

  The Court credits Carson's testimony that the settlement history chart file contained information that could only be found here, in the 8500 New Asbestos files, and was not saved anywhere else in the client's file. Carson regularly worked with and used these materials at GLF, and knew how and where they were maintained and saved.

  The Court does not credit Governo's testimony that most of the settlement history information was saved in the Client Files. Though Governo may have assumed that each client's settlement chart would or should have been saved in each client file, that assumption was incorrect. Since Governo had stopped doing any meaningful legal work for GLF's asbestos clients by 2006, he had no personal knowledge of how each client's settlement history information was maintained and where it was saved.

- The **Trial and Witness Information** folders contained anything related to witness testimony, including from active cases. Work product, investigatory materials, and deposition and trial transcripts concerning or constituting witness testimony was stored in these 8500 subfolders; it was not saved in the Case File. The witness folder included a "product ID" subfolder that contained testimony by asbestos plaintiffs and their co-workers, a "corporate" subfolder that contained copies and analyses of non-client 30(b)(6) depositions, and an "expert" subfolder that contained transcripts, CVs, research memos, court rulings, Daubert motions, and any other materials about expert witnesses who had appeared or testified in asbestos cases. Once again, clients paid GLF to gather these materials and organize them so that they could be used and re-used to defend clients in numerous asbestos liability cases.

- **Boiler Registries**. A client named ECR paid GLF to collect, organize, and keep copies of boiler registries from various States. These

registries track the installation and removal of commercial boilers in that State. These materials all belonged to ECR, which left GLF and transferred to CMBG3.

- **Prove-In Kits**. ECR also paid GLF to prepare kits of information to establish liability of co-defendants in New York asbestos cases. These documents belonged to ECR and were stored in the 8500 New Asbestos Litigation folder.

3.2.6. **File Maker Pro Databases**. In addition to the State-of-the-Art database discussed above, GLF also maintained various other databases that it used to keep track of materials in the 8500 New Asbestos files, and to store and track related work product.

The Court credits Governo's testimony that much of the information and documents stored in these databases from client case files. It finds that the rest of the information and documents in these databases was either investigatory materials that were collected and paid for by clients, or work product performed and paid for by clients. The Court therefore finds that the information and materials in these databases belonged to those clients, not to GLF. It does not credit the opinion testimony by Governo, or GLF's witness Alan Rose, that the databases belonged to GLF and were not client file material.

As noted above, the Court does not credit Governo's rough estimate that GLF spent roughly $100,000 in unreimbursed time to develop and maintain its databases, and does not credit his testimony that the cost to create and maintain the databases was not charged to GLF clients. Though the Court finds that GLF paid from overhead the basic cost to license the File Maker Pro software, it further finds that GLF billed the cost of adding documents or information to or retrieving it from a database to the client or clients that benefited from that work, and that as a result GLF clients paid almost all of the cost incurred to create these databases.

The key databases that GLF used to store and track client file materials, other than the state-of-the-art database, were as follows.

- GLF used the **Asbestos Case Management Database** to track key information about each active asbestos case, including notes by GLF attorneys and paralegals about all aspects of the litigation. For example, deposition summaries prepared by GLF were stored here, as were each attorney's notes containing their mental impressions or

evaluation of the case. In addition, GLF lawyers saved their notes tracking settlement discussions with opposing counsel in this database. The work product saved in the case management database belonged to the relevant client. It was not available in the case files, plaintiff files, or client files. The Court credits Carson's testimony that none of the information saved in this case management database was saved anywhere else, with the exception of settlement negotiation information that was also saved in the settlement history charts discussed above.

- GLF created a separate **Talc Database** starting around 2015. This was essentially a state-of-the-art database for talc litigation, which was becoming a sub-specialty. Like the original state-of-the-art files and database, the talc database was used to store and find talc-related literature and analyses that were gathered and prepared for GLF clients, who paid for that work and to have those materials maintained in this database. When the client Cypress left GLF because of concern about conflicts, GLF gave Cypress a copy of the entire talc database, because it was one of the clients that had paid a proportionate share of the case to create and maintain that collection of materials. The talc database similarly belonged to the other clients that had also paid GLF to create and maintain it.
- The **Mail Log Database** was a listing of all cases-related mail (whether physical or electronic) other than email received by GLF. This database could be searched by plaintiff and contained a complete chronological list of all mail, other than e-mail, for each case handled by GLF. The database did not include copies of the correspondence and did not disclose the substance of any confidential communications with clients.
- The **Bankruptcy Trust Database** was used to track the payment of bankruptcy trust money to asbestos plaintiffs. It was linked to publicly-available, bankruptcy-related documents stored in a corresponding 8500 New Asbestos folder. GLF clients paid GLF to gather and store these documents, and to keep track of them through this database.
- The **Eckel and ECR Databases** were used in connection with work for these clients as national coordinating counsel. The Court credits

> Governo's testimony from the first trial, which was introduced as evidence in this retrial, that ECR and Eckel paid GLF to develop and maintain those databases, and that the databases therefore belonged to those clients.

The Court finds that the database entries concerning documents or information used to defend each client constitute attorney work product that belonged to the client and was part of that client's file. Just like the Eckel and ECR databases that Governo concedes were paid for and therefore belonged to the clients, the other databases and file repositories maintained by GLF were also paid for and therefore belonged to GLF's clients.

When GLF first started organizing and storing client documents electronically, the firm was using Apple computers. It therefore began using Apple's "FileMaker Pro" software ("FMP") to store and run its various databases, and chose to continue doing so thereafter. The Court infers and therefore finds that FMP can be run on Windows-based computers. The FMP software allows a user to export information and documents in FMP format, so that the recipient can then import that data into their own FMP database and use it there with little effort. CMBG3 uses FileMaker Pro software.

3.2.7. **File Organization as Client Materials**. For the reasons discussed above, the Court finds that when GLF clients with active cases transferred their representation to a new law firm, they were entitled to take with them all contents of the active plaintiff or case files, client server files, client outlook files, 8500 New Asbestos Litigation files, and FMP databases that concerned or was being used or saved for use in their cases.

In addition, the Court finds that departing GLF clients were also entitled to receive these materials with the indexing, cross-linking, database structure, and other organization that they had paid GLF to create and maintain for them. For example, departing GLF clients were entitled to receive an exported electronic copy of all portions of the FMP databases that contained their client file materials, as well as electronic copies of all other relevant files with the file organizational structure intact.

A thought experiment from the pre-electronic age of litigation will help explain why this is so. Imagine a law firm that, 30 years ago, defended clients against hundreds of toxic tort cases. For each case, the firm created physical pleading binders, with a paper copy of each document in the court docket organized

behind number tabs, and an index for the entire set of pleadings. Over time, the firm created an elaborate and efficient system for preserving and finding copies of discovery materials, investigatory materials, work product, and correspondence summarizing or analyzing those materials, so it could use those materials over and over to defend the same clients in future cases. The firm kept the materials in carefully labelled and organized manilla folders. And it created indices that made it easy to locate items within those voluminous materials and work product memoranda. Finally, assume that the clients paid the firm for its work to develop and maintain these filing systems.

In this imagined example, if a client decided to leave the firm and transfer large numbers of open cases to a different firm, then the client would be entitled to take with them not only all of their litigation-related documents and work product gathered and created on its behalf, but also the file structure and indices the client had paid the old firm to create and maintain for it.

Should the client leave, lawyers at the old firm would breach their ethical obligation to the departing client if they took the pleadings, correspondence, discovery and investigatory materials, and work product documents out of their binders or folders; shuffled these thousands of documents into random order; destroyed the corresponding binders, folders, and indices; and gave the department client a huge volume of materials that were incredibly difficult to use because the organizing devices for which the client had paid were gone.

Much the same is true here. GLF's clients that chose to transfer open cases to a new law firm were entitled to take with them not only the pleadings, correspondence, investigatory materials, work product, historical summaries, and other documents that pertain to their cases, but also the electronic organization of those materials and exported copies of the databases that made it possible to locate particular items within those materials. Since GLF's clients had paid for these files and databases to be created and maintained on their behalf, the file structure and related databases constituted client file materials that a departing client was entitled to take with them.

3.3. **Departure from GLF**. The individual defendants left GLF and opened their new firm, called CMBG3, in November 2016. They took with them copies of the client file materials (discussed above) as well as much of GLF's administrative documentation (as explained below).

3.3.1. **Negotiations**. At some point around early 2016, Governo began to speak with Carson and some of the other non-equity partners about possibly selling the firm to them. Eventually all seven non-equity partners became involved in these discussions. They explored in good faith the possibility of buying out Governo and taking over the firm, which they came to call their Plan A. Later, they began alternative preparations to leave GLF and start their own firm, which they called their Plan B. The defendants anticipated that almost all of GLF's clients would follow the defendants to a new firm, since the clients had no meaningful relationship with Governo.

On August 22, 2016, Governo offered to sell the firm to its non-equity partners for $9.25 million. Governo's proposed terms included that he would take the firm name with him after 12 months, so that the defendants would lose any good will associated with the GLF name. Governo shared with the defendants a valuation that had been prepared for him, which revealed that Governo was withdrawing more than $3 million in profits per year from GLF.

The defendants believed that Governo's asking price was much too high, because the true value in the firm was their own relationships with the firm's clients. They viewed the valuation obtained by Governo as an estimate of the value of the defendants selling their services to an outside buyer, not as a fair value to the defendants of the existing GLF structure minus the GLF name.

They made a counteroffer in mid-September to buy out Governo for $2.25 million. Governo found the offer to be insulting, told the defendants "you can't be serious," and refused to negotiate any further. Governo saw no need to do so, because he did not think it was very likely that the defendants would leave GLF to start their own firm.

And so GLF's non-equity partners started to move forward with their Plan B. They settled on a name for their new firm, set up an Internet domain name, and arranged for new secure email. And they started to work on a "to do list" that included developing business plans for both plan A (a buyout) or plan B (starting a new firm), setting up an LLC for the potential new firm, arranging for bank financing and office space, and attending to other administrative details that would need to be in place before they could launch a new law firm.

3.3.2. **Copying of Client and GLF and File Materials**. The defendants did not trust Governo. They feared that, if they started their own firm and GLF's clients transferred their legal representation from GLF to the new firm, Governo

would refuse to transfer copies of all the files and databases that belonged to the clients. Defendants therefore decided that, as part of their Plan B preparations, they would copy GLF's electronic files and databases and be ready to bring those copied materials with them if they could not negotiate a mutually agreeable sales price with Governo and left to start their own firm.

Defendants did so for two reasons. First, for any clients that may choose to transfer their legal representation from GLF to defendants' new firm, the defendants wanted to be able to audit whatever client file materials that Governo sent to the new firm, to make sure that he sent the entire client file. Second, the defendants wanted to ensure that any clients that transferred to the new firm would have access to all of the client file materials held by GLF, even if Governo did not send them all to the new firm.

During the Fall of 2016, the defendants set to work making electronic copies of the client file materials and databases described above. And they did not stop there; they also made copies of most of GLF's administrative materials that did not belong to any client, including GLF's client contact list and its employee handbook. Misiura did most of this copying; Bergeron and Goldman copied parts of these materials as well. The other non-equity partners knew about and approved of copying these GLF client and administrative files with the shared intent to take those copies if they left GLF and started their own firm.

When defendants made copies of these materials, they left the original electronic files and databases on the GLF servers intact; defendants never deprived GLF of access to any of its administrative materials, or its copy of any of its client file materials.

Misiura, Bergeron, and Goldman copied the client file materials and databases and the GLF administrative files onto various thumb drives. In addition, Misiura copied many of the same files, plus many additional files, onto an external Western Digital hard drive (the "WD Drive"). The Court credits the testimony by James Berriman (a computer forensic expert retained by GLF) that he compared hash values of files to determine that the WD Drive contained roughly 7,000 files that were not also on the thumb drives, but that he never did any content analysis to determine what was in any of those files.[5]

[5] Hash values are generated and used in computer digital forensics to identify unique sets of data, such as an electronically-stored file. A hash value is a specific number string generated by an algorithm based on analysis of every

The Court does not credit Mr. Berriman's conclusions about how many of the files copied by the defendants belonged to GLF rather than to its clients. Berriman was given a hard drive that he was told contained forensic images of the thumb drives described above. A colleague of Berriman created hash values for every file in those images. Berriman then compared those hash values to a set of hash values that a different computer forensic consulting firm had created from an unidentified set of files that Berriman was told constituted the entire universe of GLF client files. But GLF offered no proof that this second set of hash values was complete. And the Court finds that it almost certainly was not. Governo has contended throughout this lawsuit that the 8500 New Asbestos files and the other documents and information contained in the FMP databases discussed above belonged to GLF and did not contain any client file materials. But the Court has found that is wrong, and that in fact almost everything in the 8500 New Asbestos files and the related databases belonged to GLF's clients, not to GLF. The Court therefore finds that Berriman almost certainly was given hash values for "client files" that did not include values for the large volume of client file materials that GLF stored in the 8500 New Asbestos files and its FMP databases. Berriman's conclusions are based on faulty inputs and therefore are entitled to no weight.

3.3.3. **Departure**. The morning of Friday, November 18, 2016, the seven non-equity partners of GLF met with Governo. They offered to pay him $1.5 million, plus all additional revenue collected through the end of 2016, for the firm. At the same time, they all gave Governo resignation letters, and told him that if he did not accept their offer they would leave. Governo rejected that offer.

Later that day, Governo tried to convince Nancy Kelly, Bryna Misiura, and John Gardella to stay with him at GLF. Kelly eventually decided to stay. Misiura and Gardella told Governo that they still intended to leave with the others if he did not accept their buyout offer.

Two days later, on Sunday November 20, Governo emailed the individual defendants, told them that he was terminating their employment at GLF effective immediately, and asked them to confirm that they had not taken any "firm data" and that they "will not download any documents, files, databases

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bit in a file, for example. Each file produces a unique hash value. If a file is altered in any way, its hash value will change. If a file is copied without any change made to its contents, its hash value will not be affected.

or other information of the Firm without my express consent." The defendants did not respond to this request.

In this email, Governo accepted the defendants' offer to continue working for GLF clients for a short period of time, and to let Governo keep the billings for that work, to ensure that clients were not left in the lurch while deciding whether to stay with GLF or transfer their representation to CMBG3. But Governo told the defendants that their transition work had to be completed in the next ten days, that in the meantime none of the defendants would be allowed into GLF's office without Governo's express approval, and that he had arranged for their security passes and parking passes to be disabled to ensure that none of them could get into GLF's office space. In other words, Governo locked them out.

So the six individual defendants left GLF and formed their own law firm, which they called CMBG3. The defendants took with them all the client file materials and administrative materials they had copied from GLF's computers, as described above.

Soon thereafter, the vast majority of GLF's clients, representing more than 95 percent of GLF's annual revenue, decided to transfer their asbestos litigation business to CMBG3.

The clients that transferred their representation from GLF to CMBG3 had paid for and owned almost everything in the 8500 New Asbestos files and the other electronic files and databases that the defendants copied and took with them when they left GLF.

The copied materials included a limited amount of confidential settlement-related communications with the very few clients that did not transfer to CMBG3; those confidential communications with non-transferring clients did not belong to the clients that moved to CMBG3.

The Court finds that after defendants left GLF they never accessed or used any confidential communications with non-transferring clients, and never accessed or used any other client materials that did not belong to clients that transferred their legal representation from GLF to CMBG3.

Soon after the defendants were locked out of GLF and started their own firm, GLF's office manager—acting as agent for Governo and GLF—packed up and sent to each defendant the contents of their desks at GLF. On December 15, 2016, movers transferred these materials, along with 74 boxes of paper files and

two hard drives with electronic files that belonged to clients that had transferred to CMBG3, from GLF to CMBG3. GLF's office manager supervised the packing and transfer of these materials. The Court finds that, more likely than not, GLF's office manager carefully reviewed all of these materials, including the contents of defendants' desks at GLF, to make sure that defendants would receive only materials that they and their clients were entitled to have and use.

The Court credits the testimony by Jeniffer Carson, elicited on cross-examination by GLF's counsel, that GLF's office manager included a copy of GLF's employee handbook in the materials they sent to each defendant. In so doing, GLF's agent made clear that GLF did not consider this handbook to be confidential and implicitly authorized the defendants to use the handbook for their own purposes. This was consistent with past practice. Although the GLF employee handbook was marked "confidential" on the cover, GLF regularly let employees take their copy of the handbook when they stopped working for and left the firm.

3.4. **Subsequent Use of Copied Materials**. Though defendants took with them essentially all of the client file materials maintained by GLF and a large volume of GLF's administrative materials, they used only a small subset of those materials after leaving GLF. The Court finds that defendants never looked at or used the vast majority of files and other materials that they copied and took from GLF, other than to respond to discovery requests as part of this litigation or to prepare their defense regarding what materials they had used and why that use was justified.

The Court finds that, to the extent that defendants took copies of materials from GLF that they never used in any way thereafter, GLF did not suffer any adverse consequence or loss, and defendants did not unfairly earn any profits, as a result. Though the defendants acted unfairly and deceptively in secretly making and taking copies of GLF client file and administrative materials, doing so without ever using those materials did not harm GLF or result in defendants becoming unjustly enriched.

What matters with respect to GLF's claim under G.L. c. 93A is whether GLF suffered any compensable injury or defendants unfairly earned any profits that they must disgorge as a result of defendants' actual use of materials that they took with them when they left GLF. For the reasons discussed below, the Court finds that GLF did not suffer any adverse consequence or loss, and defendants

did not unfairly earn any profits, due to defendants' use of some of the materials that they copied and took from GLF.

3.4.1. **Client Files and Databases**. With respect to client file materials, defendant's fears were realized. After most of GLF's clients transferred their legal representation to CMBG3, Governo improperly withheld much of the client file material that belonged to the transferred clients, including the 5800 New Asbestos files and the various databases that were gathered, created, and maintained at the expense of those clients.

When clients transferred to CMBG3 or another firm, Governo arranged to send the new firm the relevant Client Files, that clients' Case Files redacted to exclude confidential communications with other clients, and the Outlook email files for those clients.

But Governo withheld the 8500 New Asbestos files and the various FMP databases, even though—as discussed above—those repositories contained client file materials that were not included in the materials that Governo was willing to transfer. For example, Governo did not send to CMBG3 the settlement history charts for clients that transferred to the new firm, as that information was kept in the 8500 New Asbestos files and not in the Client Files. Defendants kept pressing Governo to transfer this material. He did not do so until July 2019, a month after the first trial and almost three years after most of GLF's clients decided to transfer to CMBG3. The Court does not credit Governo's testimony that he previously had produced most of the settlement history charts as part of the Client Files; instead, and as discussed above, the Court credits Carson's testimony that the settlement history charts were saved only in the 8500 New Asbestos files that Governo withheld, and were not saved anywhere else in the client's file.

Since Governo refused to send to CMBG3 most of the client file materials that belonged to clients who transferred their representation to the new firm, the defendants decided to use some of those materials that they had copied and taken with them from GLF, as discussed below.

Misiura copied most of the materials that defendants took from GLF onto a computer that the parties have referred to as the "alternative laptop," and for a time held onto the thumb drives and WD drive that defendants had used to copy materials from GLF's servers. After the individual defendants left GLF, Misiura was the only person who could access any of the electronic materials

that defendants had copied and taken from GLF. In March or April 2017, Misiura gave defendants' first trial counsel these thumb drives, the WD drive, and the alternative laptop, so that defendants' consulting computer expert (BDO) could make forensic copies of these devices. Counsel kept the bag of thumb drives when the expert was finished with them. He returned to WD Drive to Misiura, who put it in her desk drawer and eventually forgot about it. He also returned the alternative laptop to Misiura.

Misiura was the only person who used the alternative laptop; if other defendants wanted to obtain and use some file that defendants had copied from GLF's servers, they had to get it from Misiura, who would search for the file on the alternative laptop.

From time to time, Misiura opened defendants' copy of GLF's Master Asbestos Case Spreadsheet, but used it for only two, limited purposes. First, Misiura checked this spreadsheet to make sure that GLF sent over copies of every active case file for each client that transferred to CMBG3. Second, when a client decided to transfer its active cases to CMBG3, Misiura would copy from the GLF spreadsheet each row listing an active case of that client, and copy that information into a new CMBG3 case list. The information copied by Misiura from the GLF case list belonged to the clients that transferred to CMBG3, because the clients had paid GLF to enter the information in the spreadsheet in the first place. The Court finds that GLF suffered no loss, and defendants did not unfairly reap any profits, from these limited uses of Master Asbestos Case Spreadsheet.

Misiura would not let any of the defendants have or use other client materials that defendants copied and took from GLF unless they could convince her that a particular document or item was critically important to defending a client, and that the attorney had been unable to get the document from GLF, the client, or one of the lawyers representing other asbestos defendants. From time to time, Misiura was satisfied that these conditions were met, and used defendants' copy of client materials from GLF to find and access discovery materials, investigatory materials, case history summaries, or other materials that belonged to clients that had transferred but that Governo improperly withheld from CMBG3. Misiura did so only for some of the individual defendants; no one who joined CMBG3's second office in California ever obtained access to any materials that defendants copied and took from GLF.

The Court finds that, with the exception of the client contact list and employee handbook discussed below, everything that defendants copied from GLF and then used in representing clients at CMBG3 had been paid for and thus belonged to clients that had transferred their legal representation to CMBG3. In other words, the Court finds that, other than the contact list and handbook, clients who transferred to CMBG3 had paid GLF to gather or prepare, and maintain file structures and databases to store and organize, all of the copied materials that defendants used.

After leaving GLF, defendants never accessed or used any materials that belonged only to clients that did not transfer their representation to CMBG3, or any confidential communications with such clients.

The Court finds that GLF suffered no loss, and defendants did not unfairly reap any profits, from defendants' use of materials that belonged to clients who transferred to CMBG3 and that Governo and GLF should have, but refused, to transfer to the clients' new law firm.

3.4.2. **Client Contact List**. In his November 20, 2016, email, Governo said that he would send the defendants "a proposed form letter that we can jointly send to the appropriate clients" to inform them that the defendants had left GLF. But Governo never did so.

The Court credits Governo's testimony from the first trial, which was introduced as evidence in this retrial, that instead (i) he and the defendants discussed but could not agree upon the form of a mutual letter to each of the firm's clients, to explain that defendants had left GLF and that the client could decide whether to stay with GLF, transfer its representation to CMBG3, or find new counsel, and (ii) the defendants therefore told Governo in advance that they planned to send their own letter to every GLF client other than John Deere (which was Nancy Kelly's client, and had come to GLF with Kelly) stating that defendants had left GLF and opened CMBG3, and that the client should choose which lawyer or law firm it wanted to be represented by going forward.

Defendants starting to send such notification letters on November 22, 2016; they did not tell any client that they were thinking about leaving GLF or that they had left GLF before then. Defendants had long-standing relationships with each of the clients to whom they sent letters.

The defendants used GLF's client contact list to get the addresses to which they sent these letters. They made no other use, at any time, of GLF's client list or any of the information contained in or saved with it.

GLF suffered no loss, and defendants did not unfairly reap any profits, from this limited use of GLF's client list. Defendants were entitled to send this notification letter. The same letter would have been sent to the same client contacts at the same time whether defendants mailed the letter themselves using GLF's client list, did so using printed mailing labels that GLF generated from the list, or had GLF mail each letter on its behalf. Though the defendants had no right to copy GLF's client list, their very limited use of information from that list caused no harm to GLF and gave defendants no unfair advantage.

3.4.3. **Employee Handbook**. After leaving GLF, defendants worked with an insurance broker to obtain necessary insurance coverage. The broker told them that to obtain the insurance coverage they were seeking CMBG3 needed to have an employee handbook.

So Kendra Bergeron obtained a copy of GLF's employee handbook from Bryna Misiura, changed the firm name in the document from GLF to CMBG3, and made some minor edits to the text of the handbook. Bergeron did this around December 5 or the morning of December 6, 2016; Carson sent the new CMBG3 employee handbook to their insurance broker by email the afternoon of December 6. This was just over two weeks after Governo had locked the defendants out of the GLF offices.

As the Court found above, roughly ten days after defendants used GLF's employee handbook as the basis for CMBG3's initial employee handbook, GLF's office manager sent the copies of the GLF employee handbook to the defendants and thereby implicitly authorized defendants to keep and use that document. The Court finds that GLF suffered no loss or injury, and defendants incurred no unfair advantage and did not improperly earn any profits, by making use of the employee handbook that GLF voluntarily gave them and implicitly authorized them to use just a few days later.

3.4.4. **Other Administrative Materials**. Although defendants took copies of other administrative materials that belonged to GLF and that GLF continued to treat as proprietary, the Court finds that defendants never used any of those materials after the individual defendants left GLF. They did not use GLF's asbestos litigation procedures manual; office procedures manual; marketing,

training, or billing manuals or other materials; prospect analysis form or other forms; summary of asbestos litigation reporting requirements; client service assessment and plan; or any other GLF administrative materials other than the employee handbook and client contact list discussed above.

Since the defendants never used any of GLF's other administrative materials, other than the client list and employee handbook discussed above, GLF suffered no injury or loss, and defendants did not gain any advantage or reap any profits, from defendants having copied and taken away those other materials. Defendants' conduct in secretly copying and taking GLF's other administrative materials was improper, but doing so without ever using those other materials in any other way did not harm GLF or give defendants any kind of unfair advantage.

3.4.5. **No Copies**. As discussed above, defendants' original trial counsel arranged for their computer forensic expert to copy the thumb drives, WD Drive, and the alternative laptop. The Court finds that defendants never made, sent, or transferred any other copies of the administrative or client files or databases that they had taken from GLF to any other person, place, or device.

3.4.6. **Use in This Lawsuit**. The only other use that defendants made of documents that they copied and took from GLF was in connection with this lawsuit. At various times Misiura reviewed documents or other electronic materials that defendants took with them from GLF in order to answer discovery requests made by GLF in this action, or to help prepare defendants' strategy in this case. The Court finds that this use of materials copied and taken from GLF was not unfair or deceptive, and that GLF did not suffer any adverse consequence or loss and defendants did not unfairly earn any profit, as a result of this use of GLF client file materials or administrative materials in connection with this litigation.

3.5. **Implementing the Permanent Injunction**. The Court makes the following additional findings regarding defendants' partial compliance, and unintentional partial failure to comply, with the original and modified permanent injunctions entered in this case.

The Court finds that defendants have fully complied, at all times, with the portions of both injunctions that bar further use of files or databases that they copied and took from GLF. Defendants complied with so much of the original permanent injunction entered on September 4, 2019, that ordered the

defendants not to use any of the 8500 New Asbestos Litigation files or any database they had copied and taken from GLF, except for any such materials that GLF transferred to defendants or their clients after November 20, 2016, or that defendants obtained from some other source. And defendants similarly complied with so much of the modified permanent injunction issued on May 24, 2021, that barred defendants from using copies of any documents, files, or databases they copied and took from GLF, except for any such materials that GLF transferred to defendants or their clients after November 20, 2016, or that defendants obtained from some other source.

The Court further finds that defendants sincerely believed they had complied with so much of the original permanent injunction that ordered them to delete files they had copied and taken from GLF. Defendants believed that as of September 2019 those copies of those files existed only on various thumb drives that their original trial counsel had retained, and on the alternative laptop that they returned to their original counsel, and that counsel had given those devices to BDO (their outside computer expert) and instructed BDO to wipe those devices clean. Defendants therefore certified in October 2019 that they had complied with the Court's original order to delete files not transferred by GLF after November 20, 2016.

But it turns out that these certifications were inaccurate because defendants' original trial counsel had instructed BDO to make a copy of the alternative laptop before wiping the machine, and that counsel or BDO had kept other copies of materials that defendants had copied from GLF, all without informing defendants or GLF's counsel. The Court finds that defendants had no idea that these copies of materials taken from GLF still existed until late May 2021, when defendants' original trial counsel informed successor counsel that he had instructed BDO to keep a copy of the contents of the alternative laptop, that the original counsel had kept another copy of GLF materials on a portable hard drive, and that the original counsel had also kept the original unerased thumb drives onto which defendants had copied materials from GLF's servers. Successor defense counsel then spoke with BDO, and learned that it had retained copies of thumb or hard drives onto which defendants had copied materials from GLF servers. The Court credits defendants' testimony that prior counsel never informed them that he or BDO had kept any of the materials that defendants had copied from GLF's servers after the original permanent injunction was issued.

Defendants' current counsel promptly informed GLF's counsel that they had learned that BDO and prior trial counsel had kept copies of materials taken from GLF's servers. Defendants then filed a motion asking the Court to modify the permanent injunction to allow BDO and successor trial counsel to keep files or databases that had been copied from GLF servers and use them only in connection with the further trial in this case. After conducting a hearing, the Court denied that motion on September 30, 2021. Defendants promptly caused BDO to erase the known remaining copies of files or databases copied from GLF's services, and certified that they had done so.

In the meantime, in July 2021, Misiura was speaking with successor counsel and remembered the WD drive that was still in her desk drawer. Defendants' counsel immediately informed GLF's counsel and delivered this device to him. The Court finds that Misiura had not intended to conceal the WD drive, but instead had forgotten that prior trial counsel had returned it to her and that she he put it away in her desk drawer.

In January and February 2022, each defendant signed further certifications that they no longer had in their possession any of the files or databases that they had downloaded from GLF.

In the middle of trial, defendants discover that these certifications were not accurate either, because Misiura found a thumb drive that contained copies of 38 files that she had taken from GLF's servers. Defense counsel immediately informed GLF's counsel and gave them this thumb drive. The Court finds that Misiura had not intended to conceal this thumb drive.

The Court credits Misiura's testimony that all of these files on this additional thumb drive belonged to clients that had transferred their representation to CMBG3. GLF had collected most of these files at ECR's expense to prepare prove-in filings to establish liability of co-defendants in New York asbestos cases; ECR then transferred its legal work to CMBG3, and was entitled to a copy of this part of its client file materials. The other documents on the thumb drive were paid for either by CraneCo or by Allied, both of which had also transferred to CMBG3, and were entitled to copies of these materials.

The Court does not credit Governo's testimony that all of these documents were "library" materials that belonged to GLF and not to its clients. It credits Carson's testimony that Governo had never done any work for ECR, which explains why he had no idea that many of these documents had been gathered,

organized, and stored at ECR's expense and therefore belonged to ECR. The Court also credits Carson's testimony that CraneCo had removed Governo from its account and instructed him to stop doing any work on its behalf several years before defendants left GLF. The Court finds that Governo had no personal knowledge of which files belonged to CraneCo or Allied at the time that they transferred to CMBG3.

The Court finds that since June 1, 2022, defendants have been in full compliance with the modified permanent injunction, and no longer have any copies of files or databases that they took from GLF's servers, except for any such materials that GLF transferred to the defendants or their clients after November 20, 2016, or that the defendants obtained from some other source.

4. **Chapter 93A Claim**. As explained above, since the Court exercised its discretion to retry the c. 93A claim without empaneling a new jury, it must make its own independent findings and is not bound by the jury's prior verdict. See, e.g., *Klairmont*, 465 Mass. at 186 (2013); *Simas*, 53 Mass. App. Ct. at 141; *Wyler*, 35 Mass. App. Ct. at 563–564 & 566–568.

4.1. **Proof of Injury Is Required**. GLF has sued the defendants under G.L. c. 93A, § 11. To prove this claim, GLF had the burden of proving that (i) each defendant did something while acting in trade or commerce that was "unfair or deceptive," and (ii) as a result GLF suffered some "loss of money or property." See *Lumbermens Mut. Cas. Co.* v. *Offices Unlimited, Inc.*, 419 Mass. 462, 468 (1995); *Frullo* v. *Landenberger*, 61 Mass. 814, 822–823 (2004); G.L. c. 93A, § 11.

Proof of legally cognizable harm or injury is a necessary element of any claim under G.L. c. 93A. See *Bellermann* v. *Fitchburg Gas & Elec. Light Co.*, 475 Mass. 67, 73 (2016); *Tyler* v. *Michaels Stores, Inc.*, 464 Mass. 492, 501–503 (2013); *Hershenow* v. *Enter. Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 800–802 (2006).

"[T]o meet the injury requirement under G.L. c. 93A, § 9(1) or 11, a plaintiff must have suffered a 'separate, identifiable harm arising from the [regulatory] violation' that is distinct 'from the claimed unfair or deceptive conduct itself.' " *Bellermann*, *supra*, quoting *Tyler*, *supra*. A business or consumer is not entitled to collect even nominal damages under c. 93A without proving that the violation caused some sort of "separate" and "distinct" injury. *Tyler*, *supra*; *Karaa* v. *Kuk Yim*, 86 Mass. App. Ct. 714, 725 (2014). In enacting c. 93A, "the Legislature … did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to

a sometimes significant attorney's fee recovery." *Aspinall* v. *Philip Morris Cos. Inc.*, 442 Mass. 381, 401 (2004), quoting *Lord* v. *Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 321–322 (2004). A c. 93A plaintiff must therefore "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." *Rhodes* v. *AIG Domestic Claims, Inc.*, 461 Mass. 486, 496 (2012).

In this case, proof of adverse consequence could come through proof that GLF suffered some loss, even if unquantifiable, and defendants made some profit because defendants took and improperly used materials that belonged to GLF. GLF seeks disgorgement of profits that defendants allegedly earned because they misused materials that belong to GLF.

Where an employee misappropriates confidential information or proprietary material, uses it unfairly to compete with their prior employer, and thereby violates c. 93A, § 11, disgorgement of profits unfairly earned by the prior employee is a permissible remedy for the employee's "improper use" of the prior employer's property where the employer can show that it suffered "*some* monetary loss" that "is difficult to quantify" (emphasis in original). *Specialized Technology Resources, Inc.* v. *JPS Elastomerics Corp.*, 80 Mass. App. Ct. 841, 850 (2011). Proof of unquantifiable monetary loss satisfies the § 11 requirement that the plaintiff suffered a loss of money or property. *Id*.[6]

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[6] Before the first trial, the Court ruled that GLF was not entitled to seek a "reasonable royalty" measure of damages because it was undisputed that the defendants made actual profits since leaving GLF, and the Supreme Judicial Court has repeatedly instructed that "the 'reasonable royalty' measure of damages is only appropriate where the defendant has made no actual profits and the plaintiff is unable to prove a specific loss." *Curtiss-Wright Corp*. v. *Edel-Brown Tool & Die Co*., 381 Mass. 1, 11 n.9 (1980), quoting *Jet Spray Cooler, Inc*. v. *Crampton*, 377 Mass. 159, 171 n.10 (1979).

GLF did not challenge this ruling when it appealed the first judgment to the SJC, even though the reasonable royalty figure that the Court excluded from trial was more than three times the amount of damages that the jury awarded. As a result, it has waived any argument that the Court erred in ruling that reasonable royalty damages are unavailable under the circumstances of this case. See *Gram* v. *Liberty Mut. Ins. Co.*, 391 Mass. 333, 335–336 (1984) ("it is too late" for party to raise claim of error after remand that could have been raised in first appeal), and other decisions cited in the Court's prior decision dated March 11, 2022.

If GLF were to make such a showing, and also establish that defendants made some profit as a result of "improper use" of materials that belonged to GLF, then the burden would shift to the defendants to "demonstrate those costs properly to be offset against its profit and the portion of its profit attributable to factors other than the trade secret" or proprietary information. *USM Corp.* v. *Marson Fastener Corp.*, 392 Mass. 334, 338 (1984). "The guiding principle" of this measure of damages "is to order the wrongdoing defendant to give up all gain attributable to the misuse of the [misappropriated property] and to measure that gain as accurately as possible." *Id*. at 339–340.

4.2. **Findings and Ultimate Conclusions as to Chapter 93A Claim**. The Court finds that defendants acted unfairly and deceptively when they secretly copied GLF client file materials and administrative materials and took them to their new law firm without permission from GLF and before they had any clients.

When clients transferred their legal representation from GLF to CMBG3, David Governo and GLF had an ethical obligation to provide those clients with complete copies of all of their client file materials, including all relevant parts of the 8500 New Asbestos files that clients paid GLF to gather and prepare, as well as all relevant parts of the FMP databases that clients paid GLF to populate and maintain. Governo's insistence that the 8500 New Asbestos files and FMP databases belonged to GLF and not to its clients is mistaken and incorrect.

Nonetheless, the defendants were not entitled to engage in self-help by taking copies of client materials when they left GLF, just in case clients decided to transfer their legal representation from GLF to the defendants' new law firm. Defendants' fear that Governo would improperly withhold materials and databases belonging to clients that chose to transfer to CMBG3 did not justify defendants' conduct in taking copies of essentially all client file materials maintained by GLF. And the fact that defendants' fears proved to be well-founded, and that Governo improperly withheld substantial amounts of client file materials that he was obligated to transfer to CMBG3, does not excuse defendants' secret copying of file materials belonging to clients that had not yet been asked whether they wanted to transfer their legal representation.

As explained in detail above, however, the Court finds that defendants' misconduct in copying and taking electronic materials from GLF's servers did not cause GLF to suffer any loss or injury of any kind, and that the defendants made no profits by improperly using files, databases, or other materials that

belonged to GLF. As a result, GLF has failed to prove its claim that any defendant violated G.L. c. 93A.

GLF suffered no loss merely because defendants copied and took materials with them when they left to start their own law firm. The Court has found that the defendants never used the vast majority of the materials that they took with them from GLF. With respect to the materials that defendants never used, GLF has suffered no loss or injury of any kind and thus is not entitled to obtain any damages under c. 93A.

The Court has also found that GLF suffered no loss or injury from defendant's limited use of GLF's client contact list or its use of GLF's employee handbook. Defendants used GLF's client contact list only to send letters informing clients that defendants had left GLF and that the client could decide which lawyer or law firm would represent them going forward. Since defendants were entitled to send such letters, GLF suffered no loss from the fact that defendants used the GLF client list to do so. As for the employee handbook, GLF voluntarily gave defendants copies of that document soon after they had left GLF, and thereby gave defendants permission to use the document however they wished. GLF therefore suffered no loss from defendant's use of the handbook.

Finally, the Court has found that all of the other materials that defendants took from GLF and actually used in running their business were client file materials that belonged to clients who transferred to CMBG3. GLF has not suffered any loss whatsoever from defendants' use of materials that belong to their clients and that GLF should have, but failed to, transfer to CMBG3.

Since GLF suffered no loss of any kind from defendants' unfair or deceptive conduct, and defendants did not earn any profits from any improper use of materials that they copied and took from GLF, the Court concludes that GLF has failed to prove its claim under G.L. c. 93A. As a result, GLF is not entitled to compensatory damages, punitive damages, or attorneys' fees and costs under c. 93A.

5. **Complaints for Contempt**. The Court must also decide the merits of GLF's complaints for civil contempt.

5.1. **Legal Background**. A party seeking a judgment of civil contempt bears the burden of proving "by clear and convincing evidence" that the opposing party has disobeyed "a clear and unequivocal command" by a court. *In re Birchall*, 454 Mass. 837, 852-853 (2009).

Proof of "actual intent to disobey a court order" is not an element of civil contempt. See *Hoort* v. *Hoort*, 85 Mass. App. Ct. 363, 367 (2014). Thus "good faith is not a defense to a charge of contempt." *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissions of the Dept. of Mental Retardation*, 424 Mass. 430, 453 (1997); accord *United Factory Outlet, Inc.* v. *Jay's Stores, Inc*., 361 Mass. 35, 38 (1972) ("'good faith,' 'absence of wilful disobedience,' and 'lack of intent to violate a decree do not constitute a valid defence" to civil contempt.).

Nonetheless, "[t]he absence of wilful disobedience … may be a mitigating factor in the assessment of an appropriate sanction" for violating an injunction or other civil contempt. *City of Worcester* v. *College Hill Properties, LLC*, 80 Mass. App. Ct. 757, 764 n.20 (2011), vacated on other grounds, 465 Mass. 134 (2013); see also *United Factory Outlet*, 361 Mass. at 37–38 (that persons alleged to be in contempt were acting in good faith does not excuse their violation of court order, but "may be taken into consideration in mitigation of their offense") (dictum in parenthetical, quoting *Lustgarten* v. *Felt & Tarrant Mfg. Co.*, 92 F.2d 277, 280 (3d Cir. 1937)); *Petition of Crystal*, 330 Mass. 583, 589 (1953) (court has "no jurisdiction to adjudge [a party] in contempt for failing to perform [a] decree" until party has opportunity "to prepare her defense either in excuse or mitigation").[7]

"'The purpose of civil contempt proceedings is remedial,' and the formulation of the remedy is within the judge's discretion." *Eldim, Inc.* v. *Mullen*, 47 Mass. App. Ct. 125, 129 (1999), quoting *Demoulas* v. *Demoulas Super Markets, Inc.*, 424 Mass. 501, 571 (1997). "[T]he trial judge in contempt proceedings has broad discretion to fashion remedies." *Mills* v. *Mills*, 4 Mass. App. Ct. 273, 278 (1976).

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[7] Accord, e.g., *Lorillard Tobacco Co.* v. *Amouri's Grand Foods, Inc.*, 453 F.3d 377, 383 (6th Cir. 2006) ("even though a lack of wilfulness does not insulate against a finding of violation of an injunction, 'the contemnor's state of mind, such as his good faith…, is relevant to mitigation of any penalty' that might be imposed") (quoting *Rogers* v. *Webster*, 776 F.2d 607, 612 (6th Cir. 1985)); *Washington Metropolitan Area Transit Auth.* v. *Amalgamated Transit Union, National Capitol Local Division 689*, 531 F.2d 617 (D.C. Cir. 1976) (good faith should be considered in mitigation of penalty for civil contempt); *Morse-Starrett Products Co.* v. *Steccone*, 205 F.2d 244, 248 (9th Cir. 1953) (good faith attempt to comply "is not a defense where an injunction has been violated," but "may be considered in mitigation of the offense on the question of damages and other relief").

"[A] civil contempt proceeding is … 'intended to achieve compliance with the court's orders.'" *In re Johnson*, 450 Mass. 165, 172 n.4 (2007), quoting *Furtado* v. *Furtado*, 380 Mass. 137, 141 (1980). In determining an appropriate remedy for civil contempt, a judge must be careful not to "blur[] the line between civil contempt, which is remedial in nature, and criminal contempt, which is punitive in nature." *Department of Revenue Child Support Enforcement Unit* v. *Grullon*, 485 Mass. 129, 137 (2020).

5.2. **Findings and Ultimate Conclusions as to Contempt**. The purpose of the permanent injunctions entered in this case was to ensure that the defendants would not use any of the files or other materials that they copied and took from GLF, unless GLF transferred other copies of those materials to CMBG3 after November 20, 2016, or the defendants were able to obtain duplicate copies from some other legitimate source. The further orders that defendants return or destroy all materials that they were not permitted to retain and use, and certify that they had done so, were intended to ensure that defendants could not use any materials in violation of the rest of the injunction.

The Court has found that defendants complied at all times with the primary requirement of the permanent injunctions; they never used any materials taken from GLF in violation of either the original or the modified permanent injunction.

Unfortunately, it took defendants far longer than it should have to return or destroy all copied materials that were subject to the injunction. As a result, for some time the defendants failed to comply with return-or-destroy and certification requirements of the two injunctions.

The Court has found, however, that none of those violations was willful and that defendants at all times were acting in good faith.

Defendants cannot fairly be blamed for the decision by their prior trial counsel to retain or to have their consulting computer expert retain copies of materials taken from GLF servers, since defendants did not know that had happened and immediately informed GLF's counsel and took steps to remedy the problem when they eventually learned that these copies had been retained.

Defendants also violated the injunctions for a time because Misiura had retained the WD drive and a thumb drive with certain client files copied from GLF. But the Court has found that she did not do so deliberately.

The Court finds that GLF never suffered any kind of harm and defendants never obtained any kind of advantage or profit from defendants' series of inadvertent violations of the permanent injunctions.

And the Court has found that since June 2022 defendants have been in full compliance with all requirements of the modified permanent injunction. As a result, there is no ongoing violation that needs to be remedied in any way.

Considering these circumstances as a whole, the Court exercises its broad discretion not to impose any kind of sanction for defendants' temporary violation of the permanent injunctions. The Court also exercises its discretion not to award any attorneys' fees or costs to GLF, because it concludes that GLF brought and pressed its complaints for contempt solely to punish defendants, which is not a proper ground for seeking civil contempt sanctions. See generally *Giannetti* v. *Thomas*, 32 Mass. App. Ct. 960, 961 (1992) (court is not required to award attorneys' fees and costs upon a finding of civil contempt, as that "is a matter properly left to the sound discretion of the trial judge").

ORDER

A separate final judgment shall enter in Defendants' favor, stating that Plaintiff shall take nothing, on Plaintiff's claim under G.L. c. 93A and on its complaints for contempt.

Kenneth W. Salinger
Justice of the Superior Court

24 February 2023

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. No. 2023-P-1195

Governo Law Firm LLC

v.

Kendra Ann Bergeron, et al.

APPEAL OF A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

Reply Brief of Appellant, Governo Law Firm LLC

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April 4, 2024

Appellees' Brief, p. 33). Although GLF strongly disagrees with the trial judge's factual determination that the 8500 New Asbestos Files were part of the client file, GLF does not challenge that error on appeal.

Rather, GLF on appeal focuses on the Databases that the Defendants converted from GLF. After the first trial, the trial judge ordered the Defendants to delete and not use the Databases, and the Defendants did not challenge that decision on appeal. Accordingly, the trial judge's initial determination that the Defendants were not entitled to the Databases cannot now be challenged by the Defendants. (See Appellant's Brief, p. 40-42).

As also set forth in GLF's opening brief, the trial judge's subsequent reversal of his position, and determination that the Defendants were entitled to use the Databases, was error as a matter of law. The Massachusetts Rules of Professional Conduct do not support the trial judge's decision, and ABA Formal Opinion 471 is counter to it. Tellingly, the Defendants' brief fails to cite to *any* authority in support of their argument that they were entitled to use the Databases. (See Appellees' Brief, pp. 32-36). There is no such authority, and the trial judge erred

CONCLUSION

For the reasons set forth in GLF's opening brief and above, GLF requests that the Court reverse the trial judge's rulings, hold that GLF is entitled to a minimum of two, and not more than three, times its actual damages of $915,937.23 as against each Defendant, hold that GLF is entitled to recover its attorneys' fees and costs, hold that the Defendants are to be sanctioned, and order that a different trial judge decide any remaining issues consistent with the Court's opinion.

Respectfully Submitted,
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By its attorneys,

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CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents);

Mass. R. A. P. 21 (redaction); and

Mass. R. A. P. 27.1 (further appellate review).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 1,874, total non-excluded words as counted using the word count feature of Microsoft Word 2013.

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April 25, 2025

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on April 25, 2025, I have made service of this Further Appellate Review upon the attorney of record for each party by email on:

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