

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

**TOCCI CORPORATION AND WILLIAM TOCCI
Intervenor-Plaintiffs / Cross-Appellants**

v.

**JOHN TOCCI,
Defendant-Appellee**

**APPLICATION OF APPELLANTS
TOCCI CORPORATION AND WILLIAM TOCCI
FOR DIRECT APPELLATE REVIEW**

**Appeals Court Docket No. 2021-P-0674
On Appeal from the Superior Court, Middlesex County**

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I. REQUEST FOR DIRECT APPELLATE REVIEW.

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, Intervenor-Plaintiffs / Appellants Tocci Corporation and William Tocci hereby request direct appellate review of the Middlesex County Superior Court's judgment. Direct appellate review is appropriate because this appeal raises two novel questions of law:

First, whether the equitable remedy of surcharge authorizes a court to order reimbursement of the prevailing party's attorneys' fees and costs from a defendant liable for breach of fiduciary duty to a close corporation. The trial court did not analyze that question, stopping after noting that no Massachusetts court had yet addressed that precise question. This Court should grant direct review to determine whether surcharge can be applied in the close corporation context that is based on trust law, under the same analysis employed by the United State Supreme Court in recognizing the applicability of surcharge in the ERISA context. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011).

Second, whether all relevant factual findings made following a bench trial in one phase of a case are conclusively established for later phases. The trial court, while recognizing that the findings from an earlier trial were the law of the case, limited the binding factual findings from the earlier trial to a small fraction of the actual findings, including omitting dozens of factual findings demonstrating in

detail how John Tocci intentionally sought to cover up his wrongful takings of money from Tocci Corporation. *See* Decision and Order dated January 6, 2020 (Dkt. No. 132) (Exh. D).¹ This Court should grant direct review to determine whether all of the findings should have been conclusively established.

The Supreme Judicial Court should accept direct review of this appeal and answer these novel questions of law.

II. PRIOR PROCEEDINGS.

A. Tocci Corporation's claims.

On April 4, 2014, John Tocci ("John") and Tocci Building Corporation ("TBC") filed a complaint against Michael Tocci ("Michael") seeking declaratory and injunctive relief to prevent Michael from reviving Tocci Corporation, which John had administratively dissolved in the 1990s. Michael filed an answer and counterclaim.

On March 23, 2016, Tocci Corporation and William Tocci ("William"), individually and derivatively on behalf of Tocci Corporation, filed their intervener complaint. On June 29, 2017, Tocci Corporation filed its second amended intervener complaint (the operative complaint in this case), which included claims for conversion (Counts I, II); breach of fiduciary duty (Count III); fraud (Count

¹ Exhibits to this brief are enclosed with the addendum filed herewith. The addendum includes material required by Mass. R. A. P. 11(b) and 16(a)(13) as well as portions of the record cited in this application.

IV); negligent misrepresentation (Count V); c. 93A, § 11 (Count VI); unjust enrichment (Count VII); negligence (Count VIII); tortious interference with business relations (Count IX); accounting (Count X); declaratory judgment (Count XI); fraudulent transfer (Count XII); and reach and apply (Count XIII).

B. 2019 bench trial on the 1993 “Deed of Transfer.”

In August 2019, in an effort to narrow the issues to be tried to the jury and with the consent of the parties, the court conducted a jury-waived trial solely on the threshold question of whether Michael validly executed a 1993 “Deed of Transfer” and thereby relinquished his interest in Tocci Corporation to John. Justice Rosemary Connolly presided over a four-day bench trial on this issue. At the parties’ request to “streamline the jury process ... and narrow what would be left for the jury to decide,” (Bench Trial Transcript (“BTT”) Day 1 at 5:10-17) (Exh. B), the court made written factual findings, included in a 28-page Decision and Order dated January 6, 2020 (Dkt. No. 132) (Exh. D). The Decision and Order made detailed findings regarding John’s efforts to mitigate his legal risk stemming from his self-dealing transactions through a series of misrepresentations, concluding that John fraudulently induced Michael to sign the Deed of Transfer such that it was unenforceable. *Id.* The court determined that Michael “remained one third (1/3rd) shareholder of Tocci Corp after signing the 1993 Deed because

that instrument did not validly transfer Michael Tocci's shares in Tocci Corp to John Tocci.” *Id.* at 28.

C. 2020 jury trial and verdict.

The remaining claims were set for trial in March 2020. In advance of the trial, Tocci Corporation requested that the court establish as binding for the upcoming trial 61 factual findings made by Justice Connolly at the 2019 trial. Dkt. No. 139.1. Ultimately, the jury trial court drafted its own set of twelve findings, which it read to the jury at the start of the case. Jury Trial Transcript (“JTT”) Day 2 at 262:8 – 265:5 (Exh. C). Those findings omitted virtually all of the relevant factual findings about John’s particular efforts to cover up his self-dealing.

On March 2, 2020, a nine-day jury trial before Justice H  l  ne Kazanjian commenced on Tocci Corporation’s claims against John for conversion and breach of fiduciary duty, with all other remaining claims reserved for the Court’s decision. The jury returned verdicts in favor of Tocci Corporation on both claims and awarded it \$1,000,000.

D. Post-trial briefing and motion for new trial.

After the jury trial, the parties submitted post-trial briefing to the trial court concerning remaining equitable claims that were not decided by the jury, along with proposed findings of fact and conclusions of law. Tocci Corporation requested that the court apply the equitable remedy of surcharge to require John,

who the jury found had breached his fiduciary duties to Tocci Corporation, to reimburse Tocci Corporation for its attorneys' fees and costs. Dkt. No. 157. The court declined to order such a remedy: "Tocci Corporation cites no Massachusetts cases applying [surcharge] outside the context of trusts and trustees, or to the payment of attorney's fees. For this reason alone, the court declines to order such a remedy here." Omnibus Memo. dated Jan. 29, 2021 (Dkt. No. 161) at 10 (Exh. E). The court denied all other post-trial relief sought by Tocci Corporation relevant to this appeal. *Id.* at 12.

Tocci Corporation then moved pursuant to M. R. Civ. P. 59 for additur or a new trial on remedy because the jury's award of \$1,000,000 was against the great weight of the evidence. Dkt. No. 174.² The court denied Tocci Corporation's motion. *See* Order dated May 21, 2021 (Exh. F).

Tocci Corporation and William Tocci timely filed their Notice of Appeal.

III. STATEMENT OF FACTS.

A. Formation of Tocci Corporation and TBC.

Valentino Tocci built a successful construction company in Massachusetts called John Tocci & Sons. Valentino sought to set up his sons John, Michael, and William in their own building and construction company through the creation of a company ultimately called Tocci Corporation. Each of the three sons—John,

² The trial court docket incorrectly identifies this motion as having been filed by John and TBC.

Michael, and William—received a one-third ownership interest in Tocci Corporation. Valentino named himself president and treasurer of Tocci Corporation and named four directors of the company: himself, Michael, William, and John. Over time, Valentino turned over the day-to-day operations of Tocci Corporation to John and relied on him to run the business.

In 1985, John created another construction business which he named Tocci Building Corporation (“TBC”). Neither Michael nor William had any ownership or management interest in TBC. Instead, John incorporated TBC as its 100% owner.

B. Over time, John transferred all monies from Tocci Corporation to himself or TBC.

Between 1984 and 1995, John caused all of Tocci Corporation’s assets to be transferred to John or TBC. The principal transactions by which he accomplished that were the following: a \$500,000 bonus he paid to himself in 1984 (the “Bonus”); (b) \$1.1 million in proceeds from settlement of litigation with the FDIC that John paid to TBC in 1991 and 1992 (the “FDIC Payment”); and (c) all of Tocci Corp.’s remaining assets of about \$70,000 upon its dissolution, paid by John to TBC in 1995 (the “Dissolution Distribution”). At trial, John did not dispute that he caused these amounts to be transferred to himself or to TBC.

C. As the trial court found in the first phase of the litigation, John sought to insulate himself from this self-dealing by lying to Michael to induce him to sign a document that purported to transfer Michael's ownership interest to John.

Justice Connolly found that, through the late 1980s and into the 1990s, John unilaterally changed the corporate documentation of Tocci Corporation to show himself as the sole owner and director even though such was not true. On its late 1980s and early 1990s federal tax returns, for example, John represented that he was the 100% owner of Tocci Corporation, though John had not acquired the shares owned by William and Michael. Similarly, John eliminated Valentino, Michael, and William as directors in corporate filings though there had been no decision by the company to make those changes.

In early 1991, Tocci Corporation settled litigation with the FDIC (the "FDIC Litigation") that resulted in a payment to Tocci Corporation of over \$2.5 million. John signed the settlement agreement on Tocci Corporation's behalf, certifying that the settlement was approved by both Tocci Corporation's Board of Directors and its shareholders. In fact, John did not even tell Michael or William about the settlement.

Instead of telling Michael and William that the company they owned 2/3 of had received \$2.5 million – and aware of the exposure to them for taking that money without authorization – John sought to cover up the takings. He first attempted to purchase his brothers' ownership interest in the company with

agreements backdated to a time prior to the company's receipt of the settlement proceeds. When Michael would not do so without reviewing the company's financials, John refused to provide the financials and instead resorted to outright fraud.

Playing on Michael's sense of familial loyalty, in 1993 John told Michael that he needed a backdated document showing that John had acquired Michael's shares to "satisfy the bean counters." John told Michael the document would not mean anything, and he convinced Michael there were no net proceeds from the FDIC Litigation. In truth, with the document "in hand, John believed he could manage Michael and get him to stop asking difficult questions about Tocci Corp." Decision and Order (Exh. D) at 19. In reliance on John's statements, Michael signed a "Deed of Transfer" that purported to transfer his shares to John. As he intended, John then used the Deed of Transfer in 2012 to argue that Michael had no interest in Tocci Corporation.

D. At the jury trial, John sought to defend the self-dealing as intrinsically fair because of John's efforts on behalf of Tocci Corporation, despite the evidence being uniform that the market value of his efforts did not justify the takings.

John made no effort to defend the Dissolution Distribution. He sought to defend the remainder of the takings principally based on an argument that he had earned the monies. Though John offered evidence describing what he did, he offered zero evidence, expert or otherwise, as to the market value of those services.

The only evidence of the market value of John's services came from Stephen Kirkland, an expert on compensation, who testified that the takings did not reflect anything close to market compensation. John also contested that he was motivated to try to purchase his brothers' shares and to obtain the Deed of Transfer by the risk posed by his self-dealing, as Justice Connolly had found.

IV. ISSUES RAISED BY THE APPEAL.

The following two issues are raised by Tocci Corporation's appeal and merit direct appellate review:

1. Whether the equitable remedy of surcharge authorizes a court to order reimbursement of the prevailing party's attorneys' fees and costs from a defendant liable for breach of fiduciary duty to a close corporation.
2. Whether all relevant factual findings made following a bench trial in one phase of a case are conclusively established for later phases.

Both of the issues above were raised and properly preserved in the trial court. As to the first issue, Tocci Corporation requested in its post-trial brief—which addressed equitable claims reserved for the court rather than the jury—that the court apply the equitable remedy of surcharge to require John, who had breached his fiduciary duty to Tocci Corporation, to reimburse Tocci Corporation for its attorneys' fees and costs. Dkt. No. 157. The trial court declined to order such a remedy for the sole reason that no Massachusetts courts had applied the

remedy “outside the context of trusts and trustees, or to the payment of attorney’s fees.” Exh. E at 10.

As to the second issue, Tocci Corporation requested that the Court provide the jury with all 61 relevant factual findings made by the bench trial court, which the jury trial court denied in favor of reading the jury its own summary of twelve factual findings. Dkt. No. 139.1; Exh. C (JTT) Day 2 at 216:5-13 (“I know that’s not exactly how you want to proceed... Your record is made on that.”).

Tocci Corporation also raises a third issue in its appeal, though it does not involve a novel issue of law: whether the court erred by denying Tocci Corporation’s motion for additur or a new trial on remedy on grounds that the jury award was against the great weight of the evidence. John presented no evidence, expert or otherwise, of the fair market value for the services he purportedly provided to Tocci Corporation in exchange for the Bonus or the FDIC Payment, as is required by Massachusetts law. *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 14 (1983). In fact, the only evidence about the value of John’s services was presented by Tocci Corporation’s expert. Nor did John present any evidence disputing Tocci Corporation’s expert testimony on the current value of John’s takings from Tocci Corporation, which occurred in the 1980s and 1990s. Nonetheless, the jury award reflected much less than the value of the takings, even before including interest to reflect the current value of the funds. Accordingly, the

jury award was against the great weight of the evidence, and a new trial on damages is warranted.

V. ARGUMENT.³

A. The surcharge remedy should be available to parties who prevail on breach of fiduciary duty claims involving close corporations.

Surcharge is “the imposition of personal liability on a fiduciary for wilful or negligent misconduct in the administration of his fiduciary duties.” *Moitoso v. FMR LLC*, 451 F.Supp.3d 189, 218 (D. Mass. 2020) quoting Black's Law Dictionary 1441 (6th ed.1990); *accord* 90A C.J.S. Trusts § 611. It is well established under Massachusetts law that a court can surcharge a trustee who breaches his or her fiduciary duty. *See, e.g., Shear v. Gabovitch*, 43 Mass. App. Ct. 650, 652 (1997); *In re Will of Crabtree*, 449 Mass. 128, 153 (2007). No Massachusetts court has yet addressed whether surcharge may be applied to require reimbursement of a prevailing party’s attorneys’ fees in the case of breach of fiduciary duties involving close corporations, or whether surcharge is strictly limited to the trust context or may also be applied in areas of law that are based on trust law principles. The law is uniform outside of Massachusetts, however, that courts can do both.

³ The arguments contained here focus on the issues raised by the appeal that are most pertinent to the Application for Direct Appellate Review in order to comply with the applicable page limits. Mass. R. A. P. 11(b).

One specific use of surcharge employed by various courts across the country—and endorsed by the Restatement of Trusts—is to require payment by the breaching fiduciary of a successful plaintiff’s attorneys’ fees and costs. *See* Restatement (Third) of Trusts § 100 (Liability of Trustee for Breach of Trust) (2012) (“The ‘make whole’ objective” of recovery from trustee that commits breach of trust “may include, in an appropriate case, the attorney fees and other litigation costs of a successful plaintiff.”); *see also Heller v. First Nat. Bank of Denver*, N.A., 657 P.2d 992, 999 (Colo. App. 1982); *Crutcher v. Joyce*, 146 F.2d 518, 520-21 (10th Cir. 1945); *Allard v. Pac. Nat. Bank*, 99 Wash. 2d 394, 408 (Wash. 1983). We are aware of no case anywhere in the country considering and rejecting this application of surcharge.

The United States Supreme Court has squarely addressed the issue of whether surcharge can be applied not only to trustees but also to other fiduciaries under laws that are based on trust principles. In *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), the Supreme Court expressly found that, because ERISA was based on trust principles, it would be appropriate to apply surcharge to an insurer that was the fiduciary under a welfare benefit plan even though the insurer was not a trustee. *See id.* at 442 (“insofar as an award of make-whole relief is concerned, the fact that the defendant in this case ... is analogous to a trustee makes a critical difference”). Other courts have reached the same conclusion. *See, e.g., Silva v. Metro. Life Ins.*

Co., 762 F.3d 711, 722 (8th Cir. 2014); *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 761 (3d Cir. 1974).

Massachusetts' body of law governing corporate fiduciaries emerges from the law of trusts. As the Supreme Judicial Court noted nearly a century ago, "[t]he directors of a business corporation have often been called trustees." *Albert E. Touchet, Inc. v. Touchet*, 264 Mass. 499, 507 (1928). Early Massachusetts cases establishing the fiduciary duties owed in the corporate context drew directly from trust law. For example, in *Durfee v. Durfee & Canning*, 323 Mass. 187, 203 (1948), a shareholder derivative suit, the Court described a corporate director's duty to disclose a self-dealing transaction as implicating the "trustee's duty of disclosure." *Id.* at 203. In so holding, the Court relied on Scott on Trusts and on caselaw addressing duties owed by "traditional" trustees, such as estate executors. *Id.*, citing *Ball v. Hopkins*, 268 Mass. 260, 262 (1929)).

As the law developed around fiduciary duties owed in the corporate context, Massachusetts courts have consistently looked to trust law. *See, e.g., Elliott v. Baker*, 194 Mass. 518, 522 (1907) ("The directors of a corporation act in a strictly fiduciary capacity. Their office is one of trust and they are held to the high standard of duty required of trustees."); *Reed v. A.E. Little Co.*, 256 Mass. 442, 448 (1926) ("Directors are trustees for the stockholders and are bound to act solely for the benefit of the corporation"); *In re Allen-Foster Willett Co.*, 227 Mass. 551,

556-57 (1917) (a corporate director “is not permitted to serve two masters; his personal pecuniary interests in whatever form they may arise are, as between himself and the company subordinate to his paramount obligations as trustee, to the faithful performance of which he is strictly accountable in a court of equity,” and holding that because no fiduciary duties existed after corporation was dissolved, the court was “unable to perceive that ... [defendant] committed a breach of trust”); *Broomfield v. Kosow*, 349 Mass. 749, 756 (1965) (determining fiduciary relationship existed among business partners after extensive discussion of Bogert, *Trusts and Trustees*, and noting Bogert’s statement that “equity has continued to take an active interest in the fostering and protection of these intimate relationships which it calls fiduciary”) (internal quotations omitted); *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 526 (1997) (breach of fiduciary duty claims against corporate fiduciary were “ground on a breach of trust” and equitable relief was available “[c]onsistent with the trust theory”). It makes good sense that the duties owed by corporate fiduciaries emerge from trust law, as corporate directors “have control in a trust character” over corporate property. *Elliott v. Baker*, 194 Mass. 518, 522 (1907).

There are particularly compelling reasons to extend the remedy of surcharge to the close corporation context, where shareholders “must discharge their management and stockholder responsibilities in conformance with [a] strict good

faith standard,” which is even more stringent than the fiduciary duties owed by fiduciaries in the general corporate context. *Donahue v. Rodd Electrottype Co. of New England*, 367 Mass. 578, 593 (1975); *see also Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 528–29 (1997) (same).

Furthermore, Massachusetts courts have long recognized the importance of deterring misconduct by corporate fiduciaries. *Demoulas v. Demoulas Supermarkets, Inc.*, 1995 WL 476772 (Mass. Super. March 13, 1997) at * 97 (*quoting Angoff v. Goldfine*, 270 F.2d 185, 192 (1st Cir. 1959)) (“It is well recognized that the minority stockholder’s derivative right of action is not only his legal remedy for corporate mis-management but also is a powerful deterrent to greedy corporate management generally.”). As the *Angoff* court noted, the “prophylactic aspect of suits of this kind has been held to warrant a liberal attitude in awarding fees.” 270 F.2d at 192. This case provides a good example. It is established that John stole money from his brothers and committed fraud in an effort to cover it up. Because of the litigation fees and costs associated with pursuing a six-year litigation involving two trials to establish those facts, Tocci Corporation itself will keep little of the remedy awarded by the jury.

The trial court declined to order surcharge for the sole reason that no Massachusetts courts had applied the remedy “outside the context of trusts and trustees, or to the payment of attorney’s fees.” Exh. E (Omnibus Memo.) at 10.

However, the trial court did not find that Massachusetts courts rejected this application of surcharge; it did not analyze how this Court would likely address the issue; and it did not discuss the policy reasons supporting application of the remedy here. The Supreme Judicial Court should accept direct appellate review and hold that surcharge is available against a fiduciary that breaches duties owed in the close corporation context to pay a prevailing party's costs and attorneys' fees.

B. All factual findings made at the earlier bench trial should have been conclusively established.

A second, independent reason exists for the Supreme Judicial Court to grant direct appellate review of this case: the decision by the court overseeing the jury trial (Kazanjian, J.) not to give conclusive effect to the full factual findings made by the earlier court (Connolly, R., J.) following the bench trial.

Under Massachusetts law, it is well established that facts established in one proceeding are conclusively established for purposes of another action between the same parties, and that the jury should be told as much. *See Alba v. Raytheon Co.*, 441 Mass. 836, 841 (2004) (determination made in first proceeding “is conclusive in a subsequent action ... whether on the same or a different claim”) (emphasis added); *Martinez v. Waldstein*, 89 Mass. App. Ct. 341, 347, 49 N.E.3d 245, 250 (2016); *Red Rock Trading Co. v. Shutzer*, 92 Mass. App. Ct. 1110 at *1 (2017); Restatement (Second) of Judgments § 27 at cmt. d; Mass. Sup. Ct. Civil Prac. Jury Instr. § 13.10.

And the parties and the judges from both phases of the case recognized this was so. As John's counsel told the court at the outset of the bench trial:

[B]ecause there are several fact issues that will be decided in connection with this particular part of the case that overlap with some of the remaining facts, we felt that Your Honor having heard the evidence would be in a position to make findings of fact that would then streamline the jury process. Our entire intent here was to try to narrow what ultimately would be left for the jury ... to decide.

Exh. B (BTT) Day 1 at 5:10-17. After a short colloquy, Justice Connolly explained to the parties that:

[I]f there are certain facts that are found here, you don't [get] to reargue them at the jury trial. ... [H]ypothetically, if in order to decide this case I find that the light was red, you don't get to relitigate in the jury trial that the light was red at the time of the accident.

Exh. B (BTT) Day 1 at 7:2-13; *accord* Exh. C (JTT) Day 4 at 716:1-6 (recognition by jury trial judge that findings were law of the case).

Yet, rather than provide the jury with all relevant factual findings made at the earlier bench trial, the jury trial court condensed the bench trial court's 13 pages of factual findings into only twelve findings. *See* Exh. C (JTT) Day 2 at 262:8 – 265:5. Many of the findings that the court omitted were centrally relevant to the jury trial. One of the principal issues in the jury trial was whether John's taking of the proceeds of the settlement of the FDIC Litigation was justified. It would be highly probative of whether the takings were justified that John sought to

hide their existence from his brothers, because that would suggest that even John did not believe that they were justified – otherwise, why hide them? And there were numerous findings specifically addressing this cover-up. Indeed, virtually the entire decision sets forth in detail the scheme John employed to do so. As just one example, the court found: “John knew he had potential exposure to his fellow shareholders for what they may contend was self-dealing or breach of the duties he owed them as shareholders. Consequently, John saw an opportunity in 1993 when Michael returned to work at Tocci Corporation to accomplish two things: he wanted to protect himself from Michael’s claims and demands on Tocci Corp. and he wanted to protect himself from any third parties challenging his representation as the sole owner. To accomplish this former goal, John played on Michael’s attachment to family and his deep loyalty to John...” Exh. D (Decision and Order) at 24-25.

These facts were established by the first trial. Plaintiffs were entitled to have the court instruct the jury at the outset that they were established and to argue to the jury that even John himself had effectively admitted through his conduct that the takings were wrongful. This Court should grant direct review to clarify that all relevant factual findings from a prior phase of the case are conclusively established.

VI. REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE.

Direct appellate review is warranted here because the case presents two novel questions of law that have not been decided by Massachusetts courts: *first*, whether the equitable remedy of surcharge can be applied to require a defendant liable for breach of fiduciary duty in the close corporation setting to reimburse the prevailing party's attorneys' fees and costs; and *second*, whether all material factual findings made by the first court after the bench trial should have been provided to the writing in the subsequent jury trial.

A. Whether the surcharge remedy is available in Massachusetts against corporate fiduciaries is a novel question of law.

The trial court denied Tocci Corporation's post-trial request for attorneys' fees and costs, stating that no Massachusetts court has applied the surcharge remedy "outside the context of trusts and trustees, or to the payment of attorney's fees." Exh. E (Omnibus Memo.) at 10. That is accurate, but incomplete: in fact, no Massachusetts authority appears to address, one way or the other, whether surcharge is available against a breaching close corporation fiduciary. Similarly, no Massachusetts authority appears to address, one way or the other, whether surcharge may be applied to require a breaching fiduciary to pay attorneys' fees and costs. The Supreme Judicial Court should grant direct appellate review and, consistent with principles of equity and the law of fiduciary duties, hold that

surcharge is available to require a breaching close corporation fiduciary to pay the attorneys' fees and costs of prevailing plaintiffs.

B. The appropriate standard for determining the relevance of binding findings from a prior proceeding is not expressly addressed by Massachusetts law.

The trial court never clearly articulated the standard by which it condensed the bench trial findings into the 12 findings that it read to the jury. It appears that the trial court employed a novel relevance standard in deciding which findings from a prior phase of the case would be binding in the subsequent trial. No Massachusetts authority appears to address this situation. However, this situation may occur with increasing frequency as the Superior Court's docket continues to grow. (The limited bench trial here was scheduled in response to repeated cancellations of the jury trial on all claims, which was first scheduled for January 2019; then rescheduled for August 2019; then rescheduled again for March 2020.)

Where factual findings are made that bind a jury that is subsequently impaneled, the Court should apply a traditional relevance standard in determining which findings are binding, rather than some heightened standard. To do otherwise risks wasting the effort that went into preparing the factual findings. It also risks the jury making findings inconsistent with the findings already made. The Supreme Judicial Court should accept direct appellate review to provide guidance to the trial courts.

VII. CONCLUSION

For all the foregoing reasons, Tocci Corporation and William Tocci respectfully request that this Honorable Court grant direct appellate review on their appeal of the judgment and rulings of the Middlesex Superior Court.

Respectfully submitted,

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Date: August 17, 2021

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

Pursuant to Mass. Rules of Appellate Procedure 11(b), 16(k), and 20(a), 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); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 11(b) because it is produced in proportional font Times New Roman in size 14, contains 4849 total words, and the Argument section contains 1953 total words, as counted using the word count feature of the Microsoft Word program.

Dated: August 17, 2021

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I, Katherine S. Kayatta (BBO #675487), counsel for Intervenor Plaintiffs / Appellants Tocci Corporation and William Tocci in the matter *Tocci Building Corp. et al. vs. Michael J. Tocci*, Appeals Court No. 2021-P-0674, hereby certify that the Application for Direct Appellate Review of Intervenor Plaintiffs / Appellants Tocci Corporation and William Tocci is being served on the following counsel of record by email and through the Supreme Judicial Court's electronic filing system on August 17, 2021:

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ADDENDUM

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