UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PENN, LLC, et al.,

Plaintiffs,

v.

Case No. 2:10-cv-0993
JUDGE GREGORY L. FROST
Magistrate Judge Terence P. Kemp

PROSPER BUSINESS DEVELOPMENT CORPORATION, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of:

(1) Defendants' motion for summary judgment on Plaintiffs' breach of fiduciary duty and conversion/unjust enrichment claims (ECF No. 234), Plaintiffs' memorandum in opposition (ECF No. 241), and Defendants' reply in support (ECF No. 245); and

(2) Plaintiffs' motion for summary judgment on Defendants' counterclaims (ECF No. 236), Defendants' memorandum in opposition (ECF No. 242), and Plaintiffs' reply in support of their motion (ECF No. 247).

For the reasons that follow, the Court **DENIES** both motions.

I.

This case is only one action in a contentious commercial dispute involving a series of legal actions spanning several different courts. Plaintiff Penn, LLC ("Penn") filed this action on behalf of itself and derivatively on behalf of Plaintiff Big Research, LLC ("Big Research"). Big Research is a Delaware limited liability company of which Penn and Defendant Prosper Business

Development Corporation ("Prosper") were members. The motions currently before the Court comprise the fourth and fifth set of summary judgment motions this Court has had to endure. The Court has recited factual and procedural background in its previous summary judgment decisions and need not repeat those recitations here. (ECF Nos. 179, 180, 237.)

As a result of the Court's various orders on the multitude of dispositive motions, the only claims in Plaintiffs' Complaint that remain for adjudication are those for conversion/unjust enrichment and breach of fiduciary duties as against Prosper and individual Defendants Phil Rist and Gary Drenik. Also remaining are the counterclaims of Defendants. (ECF Nos. 5 and 6.) Defendant Prosper asserts counterclaims for abuse of process and breach of fiduciary duty (ECF No. 6); Defendants Rist and Drenik allege a counterclaim for abuse of process (ECF No. 5). Defendants move for summary judgment on the remaining claims in Plaintiffs' Complaint while Plaintiffs move for summary judgment on Defendants' counterclaims. Both motions are fully briefed and ripe for this Court's decision.

II.

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material only if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 202 (1986). There is no issue of material fact unless the evidence is sufficient to support a reasonable jury finding in favor of the nonmoving party. *Id.*

The burden is on the moving party to show that the opposing party has failed to establish an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 403 (6th Cir. 1992). If the moving party meets its burden, the party opposing summary judgment has the burden of bringing specific facts to the court's attention to show that a material issue for trial exists. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *see also* Fed. R. Civ. P. 56(c)(1). Ultimately, the Court must determine whether the evidence is so one-sided that the moving party must prevail as a matter of law. *Anderson*, 477 U.S. at 252.

A. Defendants' Motion for Summary Judgment

Defendants move for summary judgment on the breach of fiduciary duty and unjust enrichment/conversion claims that still remain. The gist of Plaintiffs' remaining claims is that Defendants engaged in self-dealing in violation of the Big Research operating agreement and unjustly enriched themselves at the expense of Penn and Big Research. Defendants' motion for summary judgment attempts to punch holes in every theory of liability pursued by Penn, but fails to establish entitlement to judgment as a matter of law.

1. "Going Concern" Value

First, Defendants contend that they are entitled to summary judgment on any claims related to the alleged "conversion and/or improper transfer of alleged Big Research LLC assets." (Defs.' Mot., ECF No. 234 at PageID# 12665.) Among the assets at issue are "business models," "client relationships," "intellectual property," "goodwill," "trademarks," "database and

processes," "employees," "customers," "contracts," and "licenses." Defendants argue that Penn's entire theory of damages for the alleged conversion and/or improper transfer of these and other assets consists of a so-called "going concern" theory. But because Defendants "had no obligation to sell Big Research LLC as a going concern after it was dissolved in December 2009," they argue that a "going concern" value is an improper measure of damages. Thus, Defendants argue they are entitled to summary judgment on any claims based on the alleged conversion of these assets.

The Court is not persuaded by Defendants' argument, as it conflates the issues of liability and damages. Even if Defendants are correct that Big Research could not have been sold as a "going concern" after its dissolution in December 2009, it does not follow that Defendants cannot be found liable for conversion or breach of fiduciary duty as a matter of law. Whether the "going concern" value is a proper measure of Plaintiffs' damages is an issue for the jury to resolve at trial.

Even if the "going concern" value of Big Research is a relevant measure of damages, Defendants argue that Plaintiffs cannot establish that value in any event because they present no admissible evidence concerning that value. Under Delaware law (which governs Plaintiffs' remaining claims in this case), a plaintiff must demonstrate a basis for "a rational award of damages." *Cline v. Grelock*, No. 4046-VCN, 2010 WL 761142, at *2 n.11 (Del. Ch. Mar. 2, 2010). In this case, Defendants argue that Plaintiffs' sole evidence of damages comes from Jaffer Ali, whose testimony Defendants argue is inadmissible lay opinion.

Defendants previously sought to exclude the opinion testimony of Mr. Ali. This Court

allowed Mr. Ali to testify based upon Fed. R. Evid. 701, which allows opinion testimony on business valuation from a member of the company's board of directors:

> [T]he Sixth Circuit held that a district court does not abuse its discretion in allowing a member of a company's board of directors to testify about the company's projected value as it related to the company's alleged damages in the case. *See Lativafter Liquidating Trust v. Clear Channel Comm., Inc.*, 345 F. App'x 46, 51 (6th Cir. 2009). In this case, Ali is a founding member of BigResearch and a member of BigResearch's board of directors. Thus, assuming proper foundation is established at trial, his testimony concerning the valuation of BigResearch as a business falls within the scope of the non-expert opinion testimony allowed by Fed. R. Evid. 701 and the court's holding in *Clear Channel*. Accordingly, the Court finds Defendants' objection to Ali's intended opinion testimony to be without merit.

(ECF No. 203 at PageID# 9240 (footnote omitted).)

Following this Court's ruling, Defendants took Mr. Ali's deposition and obtained his testimony regarding the value of Big Research LLC. This Court's prior ruling notwithstanding, Defendants argue that the Court should now exclude Ali's valuation testimony because his testimony "is not based upon an intimate familiarity with Big Research LLC's business and amounts to expert opinion masquerading as lay testimony." (Defs.' Mot., ECF No. 234 at PageID# 12676.) The Court disagrees.

Ali's affidavit submitted in opposition to summary judgment testifies that he personally reviewed financial records of Big Research and that his calculations are based upon his personal knowledge of the business and operations of Big Research. (Ali Aff.¶ 19, ECF No. 241-2 at PageID# 12816.) The Sixth Circuit has found a board member's personal review of his company's financial records to be sufficient foundation to provide a lay opinion as to the business's valuation under Fed. R. Evid. 701. *See Lativafter*, 345 F. App'x at 51. Mr. Ali's

personal review of Big Research's records and his knowledge of the company's operations, despite Defendants' efforts to downplay them, are enough to get past the admissibility hurdle. The Court views Defendants' objection to Ali's knowledge and methodology as informing the weight, rather than admissibility, of his testimony.

2. Expenses Paid by Big Research LLC

Defendants also seek to remove from the jury's consideration any issues related to the expenses paid by Big Research from 2004 through 2010. Defendants contend that the Big Research Operating Agreement expressly authorizes the engagement of Prosper and its affiliated entities to perform services "so long as the services are reasonably necessary and the costs are no more favorable than those that would exist in an arms-length transaction (*i.e.* market rates)." (Defs.' Mot., ECF No. 234 at PageID# 12680.) Defendants further contend that "there is no genuine issue of material fact" that Big Research's payments to Prosper and its affiliate companies for various services and expenses "were reasonably necessary." (*Id.*) Defendants' motion then goes through a list of 14 individual categories of expenses that it deems to have been reasonably incurred. (*Id.* at PageID# 12680-12692.)

As to the first category—executive compensation—Defendants repeat an argument that the Court addressed in a previous motion for summary judgment. Earlier in this case, Defendants moved for partial summary judgment on claims allegedly barred by res judicata. (ECF No. 119.) Defendants argued, among other things, that the previous arbitration between the parties (which was confirmed in state court) barred Penn from relitigating whether certain executive compensation paid by Big Research was unreasonable and therefore a breach of

fiduciary duty. This Court denied summary judgment on res judicata grounds. Noting that Defendants' argument sounded in *issue preclusion* rather than *claim preclusion*, the Court found that the arbitration did not resolve the same issue as the breach of fiduciary duty issue brought by Plaintiffs in this case with regard to the executive compensation:

> Among the fiduciary duty issues Penn seeks to litigate in this case is "whether the executive compensation received by Drenik and Rist violated their fiduciary duties owed to Plaintiffs." (ECF No. 134, at PAGEID# 4986.) Though Defendants make much of the fact that Penn filed a "Second Statement of Claims" in the arbitration that placed Drenik's and Rist's executive compensation at issue, the issue raised by Penn in this case is not the same issue that was litigated in the arbitration. In that Second Statement of Claims, Penn raised the executive compensation issue in the context of claims related to the approval of Big Research's 2008 budget. (ECF No. 119-1, at PAGEID#3653.) More specifically, Penn took the position that the 2008 budget was void because it was a "major financial decision requiring the approval of all three Board Members," which had not happened. (*Id.* at PAGEID# 3655.) Because the 2008 budget increased the level of Drenik's and Rist's executive compensation, Penn challenged the validity of the increase, seeking a "declaratory finding" that no Big Research executive could receive more than $100,000 per year in total compensation. (*Id.* at PAGEID# 3655-56.) Thus, the issue Penn placed before the arbitrator was not necessarily the reasonableness of the executive compensation, much less whether the level of compensation was a breach of fiduciary duty. Rather, the issue was whether the 2008 increase in executive compensation to Rist and Drenik was void because the increase was implemented by means of a void budget approval.
>
> Nor does the arbitrator's May 2010 decision touted by Defendants support application of issue preclusion. Citing to the arbitrator's May 5, 2010 order, Defendants contend that the arbitrator "specifically held that the 'levels of executive compensation existing on September 15, 2008 to be reasonable from an accounting standpoint,' and were in fact, 'in the bottom quartile of similarly situated executives.'" (ECF No. 119, at PAGEID# 3513 (quoting ECF No. 119-1, at PAGEID# 3675).) But Defendants' argument is slightly misleading. The portion quoted by Defendants comes from a passage that reads in its entirety:
>
> > Penn has resolved to prove that executive compensation in excess of . . . the original Operating Agreement *should be considered as additional qualifying distributions*. The complained of executive

> compensation is in the bottom quartile of similarly situated executives. The Master concluded that levels of executive compensation existing on September 15, 2008 to be reasonable from an accounting standpoint. Thus, what remains to be determined in the hearing on the Second Statement of Claims is not whether BIGresearch managers failed to use their best business judgment in increasing executive salaries, but rather, whether such increases are related to previously undisclosed evidence, and, if so, whether such increases in executive compensation are allowed in the absence of unanimous Board of Members approval. Any challenged executive compensation payments were made to individuals and not to any Member. Therefore, the arbitrator will not consider any payments for executive compensation as a qualifying distribution for resolution by this Order.

(ECF No. 119-1, at PAGEID# 3675.)

> Thus, the May 5, 2010 order determined only that the increase in executive compensation should *not* be considered a "qualifying distribution" for purposes of determining the amount of profit redistribution due Penn under the arbitrator's September 15, 2008 order. Though he noted that the executive compensation was "reasonable" in the judgment of the special master, the arbitrator did *not* decide whether the increase in compensation was a breach of fiduciary duty by any of the Defendants in this case. Whether executive compensation was reasonable "from an accounting standpoint" is not necessarily the same issue as whether it was reasonable from a fiduciary duty standpoint. The latter issue was simply not before the arbitrator.

(Opinion and Order, ECF No. 179 at PageID# 6673-75.)

Despite this Court's previous denial of summary judgment on issue preclusion grounds, Defendants reprise their argument here, arguing: "It is now clear however, that Penn's legal theories *in this case* as to why it believes the Executive Compensation payments are improper was already litigated and decided in the Arbitration." (Defs.' Mot., ECF No. 234 at PageID# 12681-82.) The Court disagrees. Though the Defendants want the Court to parse out individual theories that were litigated in the arbitration, the issue relevant for purposes of summary

judgment on grounds of res judicata/issue preclusion is whether the arbitration resolved the issue of whether executive compensation was a breach of fiduciary duty. The answer to that question was "no" when this Court ruled on the previous summary judgment motion and it remains "no" today. Whether the executive compensation paid by Big Research constituted a breach of fiduciary duty was simply not litigated in the previous arbitration.

As for the remaining arguments concerning the necessity and reasonableness of expenses, the Court finds that they do not warrant summary judgment. Defendants' passionate pleas notwithstanding, the Court is not about to delve into the minutiae of the amounts paid by Big Research for the various expenses cited by the parties and assess whether they were "reasonably necessary." Defendants claim the expenses were reasonable and necessary, and submitted supporting evidence as to that fact; conversely, Plaintiffs claim that the expenses were not reasonable and necessary and amount to self-dealing, and have identified record evidence supporting their position. What exists here is a genuine issue of fact for the jury to resolve.

The Court finds genuine issues of material fact exist with respect to Plaintiffs' remaining claims. The Court therefore finds summary judgment inappropriate.

B. Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaims

In addition to opposing Defendants' motion for summary judgment, Plaintiffs seek the Court's entry of summary judgment in Plaintiffs' favor on the counterclaims alleged by Defendants. Defendants' counterclaims plead causes of action for abuse of process. (ECF Nos. 5 and 6.) In addition, the counterclaim of Defendant Prosper asserts a counterclaim for breach of fiduciary duty. (ECF No. 6.)

1. Abuse of Process

As to the tort claim for abuse of process (which the parties agree is governed by Ohio law), the elements are "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rose Co., L.P.A.*, 68 Ohio St. 3d 294, 298, 626 N.E. 2d 115 (Ohio 1994). Abuse of process occurs "where someone attempts to achieve through use of the court that which the court is itself powerless to order." *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 271, 662 N.E.2d 9 (Ohio 1996). Thus, an action for abuse of process "is concerned with the improper use of process after it has been issued." *Ruggiero v. Kavlich*, 8th Dist. No. 92909, 2010-Ohio-3995, at ¶ 26 (Ohio Ct. App. 2010). Whereas the tort of malicious prosecution is concerned with a litigant's institution of a lawsuit he has no chance of winning, the tort of abuse of process is concerned with a *properly* initiated action used with an ulterior motive, usually taking the form "of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Robb*, 75 Ohio St. 3d at 271; *see also Kremer v. Cox*, 114 Ohio App. 3d 41, 51-52, 682 N.E. 2d 1006 (Ohio Ct. App. 1996).

Plaintiffs argue that Defendants' action for abuse of process is doomed because Defendants are bringing, in substance, a claim premised on the wrongful bringing of this action itself. In other words, Plaintiffs contend that Defendants are bringing—if anything—an action sounding in malicious prosecution, which is mutually exclusive of an action for abuse of process.

(Pls.' Mot., ECF No. 236 at PageID# 12730.)

In their opposition to summary judgment, Defendants illuminate the basis of their claim for abuse of process. Defendants point to two ulterior motives underlying the bringing of this action: (1) Plaintiffs' desire to "extract a settlement" in state court lawsuits pending at the time they filed this action and (2) Plaintiffs' strategy of depriving Defendants of their choice of counsel in other litigation.

With regard to the alleged ulterior motives, Defendants cite the actions of one of Plaintiffs' lawyers during the pendency of a state court action between these same parties. According to James E. Arnold, counsel for Prosper in this matter, Penn lawyer Richard J. Cochran "threatened that if Big Research LLC did not settle the cases *pending in state court* on terms favorable to Penn . . . Penn would file suit in federal court against the Defendants *and* also name Mr. Arnold's law firm and Mr. Arnold personally as defendants." (Defs.' Opp'n, ECF No. 242 at PageID# 12832; Arnold Aff. ¶ 6, ECF No 33-1.) When the state court issued its decision modifying an arbitration award to reduce Penn's damage award, Plaintiffs filed this action, naming Attorney Arnold and his law firm as Defendants. Following the filing of this lawsuit, Defendants contend that Attorney Cochran repeated his demand that Big Research settle the state court cases "on terms favorable to Penn" in exchange for Penn dismissing this case. (*Id.* at ¶ 15.) Defendants argue that a reasonable jury could conclude that Penn brought this action, which originally included "inflammatory RICO and fraud claims," in an attempt to "bully" Defendants into giving Penn more money than it was legally entitled to receive in the state court action. (ECF No. 242 at PageID# 12834.)

The Court finds that a reasonable jury could find an ulterior motive underlying Plaintiffs' lawsuit and that Defendants could therefore succeed on an abuse of process claim. In reaching this conclusion, the Court finds *Luciani v. Schavone*, 210 F.3d 372 (table), 2000 WL 331974 (6th Cir. Mar. 24, 2000), instructive here. In *Luciani*, the Sixth Circuit reversed a grant of summary judgment on an Ohio abuse of process claim based on the defendant's role in instituting a legal separation action in an Ohio court on behalf of the plaintiff's then-wife. The plaintiff's wife had previously instituted a divorce proceeding in New Mexico (where she and her husband resided), but had moved to Ohio. The court of appeals held that a reasonable fact finder could infer that the defendant brought the Ohio action "to pressure [the husband] to submit to Ohio's jurisdiction on issues that were not properly before the court." *Id.*, 2000 WL 331974 at *6. Specifically, the court of appeals found that "a jury could infer that he was using the Ohio action as a bargaining chip to obtain a custody arrangement and property settlement that the Ohio court had no power to order" or to obtain judgments "that it had no power to grant." *Id.* So characterized, the Ohio lawsuit was an attempt to achieve something that the Ohio court was powerless to order. *Id.*

Luciani's analysis provides support for Defendants' theory of abuse of process in this case. Under Defendants' theory, Plaintiff Penn instituted this lawsuit (albeit with probable cause) with the ulterior motive of using it as a bargaining chip to extract a more favorable settlement in the *Ohio state court* action related to the confirmation of an arbitration award. If a jury so found, it could find Penn liable for abuse of process for using this lawsuit to obtain a collateral advantage in another proceeding.

In their reply in support of summary judgment on the abuse of process claim, Plaintiffs

attempt to undermine this reasoning with a number of arguments. First, they argue that Defendants' so-called "improper settlement theory" is flawed because it is premised upon conduct *before* Plaintiffs filed this lawsuit and the tort of abuse of process requires that the abuse-of-process defendant "subsequently" pervert the proceeding. Even though Defendants allege that Attorney Cochran perverted this proceeding by renewing his settlement demand after Plaintiffs filed this action, Plaintiffs argue that this conduct cannot be a valid basis of Plaintiffs' claim because settlement negotiations, no matter how frivolous, cannot support a claim for abuse of process. *See Kavlich v. Hildebrand*, 8th Dist. App. No. 91489, 2009 Ohio App. LEXIS 854 (Ohio App. Mar. 12, 2009). But *Kavlich* speaks to the conduct of a litigant in seeking to obtain money in the lawsuit before the Court; in other words, if Defendants were basing their abuse of process claim on Cochran's attempts to extract a settlement *in this case* then Plaintiffs' argument might have more traction. But Defendants' theory is that Penn is perverted *this* lawsuit by using it to extract a more favorable outcome *in another case* (*i.e.*, the state court action). That scenario brings this case outside of *Kavlich* and into the realm of *Luciani*.

Plaintiffs also argue that this Court has already rejected Defendants "improper settlement" theory twice in previous orders. First, in an order granting in part and denying in part Prosper's motion for judgment on the pleadings and motion to dismiss for lack of subject matter jurisdiction (ECF No. 31), this Court allowed Penn's derivative action on behalf of Big Research to proceed, rejecting Defendants' argument that Penn had the sort of "vindictiveness" that foreclosed it from adequately representing the interests of Big Research. (ECF No. 31 at PageID# 1446-47.) Then, in an order denying Prosper's motion for sanctions against Plaintiffs'

prior counsel, the Court rejected the argument that sanctions were warranted for Penn having filed its claims here "for the improper purposes of gaining leverage in other litigation currently pending between these parties." (ECF No. 66 at PageID# 2127.) But the Court's rulings in these contexts do not necessarily foreclose Defendants from establishing an abuse of process claim. Finding that there was not the requisite "vindictiveness" to foreclose a derivative lawsuit from proceeding and failing to find an "improper purpose" behind this lawsuit for purposes of Rule 11 sanctions does not prevent Defendants from demonstrating to a trier of fact that Penn brought this lawsuit with an ulterior motive for purposes of an abuse of process claim. The issues before the Court in the previous rulings highlighted by Plaintiffs are legally distinct from the issues that the jury can consider in Defendants' abuse of process claim.

Finally, Plaintiffs argue that Defendants' "improper settlement" theory must fail because it depends on "inadmissible evidence" under Fed. R. Civ. P. 408. Rule 408 states:

> (a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--*either to prove or disprove the validity or amount of a disputed claim* or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Plaintiffs argue that all of the discussion between Attorneys Arnold and Cochran, the substance of which supports Defendants' abuse of process theory of liability, came during the context of settlement, triggering the exclusion set forth in Rule 408. The Court disagrees.

Rule 408 prohibits the admissibility of any conduct or statement made in settlement negotiations *to prove or disprove the validity or amount of a disputed claim*. Defendants are not using Attorney Cochran's statements to prove or disprove the validity or amount of a disputed claim in this case. Rather, Defendants are using Cochran's statements to demonstrate the ulterior motive underlying this lawsuit, namely, the alleged motive of trying to leverage more favorable terms in a settlement of a state-court lawsuit.

Based on the evidence and arguments placed before the Court, there is a genuine issue of material fact for trial on Defendants' abuse of process counterclaim.

2. Breach of Fiduciary Duty

Plaintiffs also move for summary judgment on Prosper's counterclaim alleging breach of fiduciary duty. Plaintiffs' sole basis for summary judgment on the breach of fiduciary claim is its argument that the claim is "part and parcel of the fatally defective 'abuse of process' claim from which it is derived." (Pls.' Mot., ECF No. 236 at PageID# 12726.) Plaintiffs do not forward any additional basis for summary judgment on the breach of fiduciary duty counterclaim.

As set forth above, the Court finds a genuine issue of fact for trial on Defendants' counterclaim for abuse of process. Accordingly, the Court likewise denies Plaintiffs' motion for summary judgment as to Prosper's breach of fiduciary duty counterclaim. In doing so, the Court

expresses no opinion on whether the breach of fiduciary claim is—in Plaintiffs' words—merely "part and parcel" of the abuse of process counterclaim.

III.

For the foregoing reasons, the Court **DENIES** Defendants' motion for summary judgment on Plaintiffs' claims alleging breach of fiduciary duty and conversion/unjust enrichment. (ECF No. 234.) The Court also **DENIES** Plaintiffs' motion for summary judgment on Defendants' counterclaims. (ECF No. 236.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE