SECOND DIVISION
June 10, 2014

Nos. 11-1460, 12-0964, 12-1052 & 12-1110 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CATMET, INC. and RECOVERED ASSET MANAGEMENT, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees	)	
v.	)	No. 05 L 9164
MICHAEL MELNICK, MARK TOMASSINI, 4M TRADING, LLC, S&S CAPITAL, LLC, and STEVEN HANSEN,	)	Honorable Allen S. Goldberg, Judge Presiding.
Defendants-Appellants.	)	
(North Shore Core, Inc., Midwest Core & Catalytics, LLC, 15 N. 9th Avenue, LLC, Michael Siegel, 4M Trading, an Illinois Partnership,	)	
Defendants.)	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Jury verdict for plaintiff company on counts of breach of fiduciary duty, fraud, conspiracy, and aiding and abetting fraud was not against the manifest weight of

the evidence and denial of motion for judgment *n.o.v*. was proper. Denial of motion to strike expert testimony was proper where defendants did not object to qualification of expert and defendants' claims that testimony was based on conjecture went to weight of testimony, not admissibility. Jury did not err in awarding damages based on plaintiff's expert testimony where defendants failed to present any expert rebuttal testimony and defendants' own rebuttal testimony suffered from credibility issues and lack of supporting evidence. Sanctions awarded pursuant to Rule 137 for costs related to motion and deposition of Canadian witness were not an abuse of discretion where defendants admittedly lied in affidavits and discovery responses, delayed deposition of witness, moved to dismiss the cause of action based on false statements and responses, and deposition of witness exposed defendants' false representations. Punitive damages were proper based on defendants' repeated acts of fraud and willful disregard of the truth, plaintiff's well-being, and the court.

¶ 2 Plaintiffs Catmet, Inc. and Recovered Asset Management, Inc. (RAM) filed the original complaint in this matter on August 19, 2005. On November 9, 2010, plaintiffs filed their 25-count, sixth amended complaint against defendants Michael Melnick, North Shore Core, Inc. (North Shore), Midwest Core & Catalytics, LLC (North Shore became Midwest Core in late 2004 and hereinafter will be referred to as North Shore), 15 N. 9th Avenue, LLC, Michael Siegel, S&S Capital, LLC (S&S), Steve Hansen, Mark A. Tomassini, 4M Trading, LLC (4M) and 4M Trading, an Illinois Partnership.[1] Catmet alleged that defendants misappropriated millions of dollars in transactions spearheaded by Melnick, Catmet's former employee. Catmet advanced claims for fraud and breach of fiduciary duty against Melnick; unjust enrichment against 4M and Tomassini; inducing breach of fiduciary duty and aiding and abetting fraud against S&S, Hansen, 4M and Tomassini; and conspiracy against all defendants.

[1] At the close of evidence, Catmet abandoned its claims for unjust enrichment and RAM abandoned all of its claims. While RAM is a named appellee and filed an appearance in this appeal, judgment was entered only for Catmet and Catmet is therefore treated as the sole appellee in this appeal. On March 13, 2009, the circuit court entered a default judgment against Siegel, North Shore, Midwest Core & Catalytics, LLC, (North Shore Defendants) in the amount of $5 million and these defendants did not appear at trial and are not parties to this appeal. Melnick filed a *pro se* notice of appeal in case number 1-12-1110, appealing various orders including the judgment against him, but did not otherwise participate in this appeal. Separate briefs were filed by 4M and Tomassini (4M defendants) and S&S and Hansen (S&S defendants), with Catmet filing separate response briefs.

¶ 3 During discovery, the trial court granted in part Catmet's motion for relief and sanctions against Melnick, Siegel, and the 4M defendants, pursuant to Illinois Supreme Court Rules 137 and 219(b) and (c). Ill. S. Ct. Rs. 137 (eff. Feb. 1, 1994), 219(b), (c) (eff. July 1, 2002). The court barred Melnick and the 4M defendants from further restating discovery responses, awarded attorney fees and costs associated with the discovery that was the subject of the motion and for bringing the motion for sanctions, and allowed an inference at trial that data, information and files that were on Siegel's computer before he destroyed them would have been prejudicial to his case. The parties proceeded to trial in August and September 2011. On September 7, 2011, the jury entered a verdict against defendants. Specifically, the jury found Melnick liable for breach of fiduciary duty, fraud, and conspiracy relating to both the 4M defendants and S&S defendants. The 4M defendants were not found liable for inducing breach of fiduciary duty, but were found liable for conspiracy and aiding and abetting fraud. The S&S defendants were found liable for all three claims of inducing breach of fiduciary duty, aiding and abetting fraud, and conspiracy. Compensatory damages were entered in the amount of $498,476.25 against the 4M defendants and $415,182.25 against the S&S defendants, both awards were granted jointly and severally against Melnick. The jury entered an award of $2,834,710.50 against Melnick on the third claim, accordingly, a total of $3,748,369 of compensatory damages was entered against Melnick. Punitive damages of $500,000 were also entered individually against Melnick, the 4M defendants, and the S&S defendants.

¶ 4 In these consolidated appeals, defendants challenge the sufficiency of the evidence presented to support the jury verdict. The 4M defendants argue that: the jury committed reversible error by finding the 4M defendants aided and abetted Melnick's fraud, and caused Catmet damages as co-conspirators; the trial court erred in failing to grant their motion for

directed verdict; damages were improperly assessed against the 4M defendants; and the trial court erred in entering discovery sanctions against them for $100,000. The S&S defendants argue that the circuit court erred in: failing to grant judgment notwithstanding the verdict based on plaintiffs' failure to prove actual damages; denying their motion to exclude plaintiffs' damages expert; and submitting the question of punitive damages to the jury without sufficient proof of actual damages or aggravating circumstances.

¶ 5 In addition, the S&S defendants filed a supplemental appendix with their reply brief containing the transcript of the posttrial hearing, which was *de hors* the record. Catmet moved to strike portions of that brief relying on the hearing transcripts that were not a part of the record and for leave to file a sur-reply. We granted leave to file a sur-reply, but the motion to strike was taken with the case. Catmet subsequently filed a motion to supplement the record, *instanter*, which was granted for the sake of a complete record in this case and discussed further below. For the following reasons, the judgment of the circuit court is affirmed in part, and we modify the damages award against Melnick for the unsupported checks scheme liability to $2,353,931.50.

¶ 6 I. BACKGROUND

¶ 7 A. The Parties and Industry

¶ 8 Catmet is an automobile scrap dealer owned by Joe Leahy and operated out of a facility located in Harvey, Illinois. Catmet's primary business and what is at issue in this case, was the buying and selling of scrap catalytic converters and processing them to extract the valuable catalyst within. Catmet operated machinery that would cut the converters open, allowing for extraction of the precious metals used as catalyst (platinum, palladium, and rhodium), which it would then sell and ship to parties for processing and recycling. The "loose" or "cut" catalyst

would be either pelletized or honeycomb in form and of various grades to indicate the concentrations of precious metals. These grades were typically identified, from lowest to highest concentrations, as: after-market; domestic (including Chrysler, Ford, and GM); low-grade foreign; and high-grade foreign. The foreign converters contained higher grade concentrations because the foreign-made vehicles must pass through customs and manufacturers utilized higher concentrations to avoid return of the vehicles.

¶ 9 Melnick had worked with Leahy at other scrap metal dealers and he went to work for Leahy when Catmet was formed in 1994. Based on his experience in the industry, Melnick was responsible for purchasing, sales, and operations for Catmet. Melnick's authority continued to grow through his years at Catmet and included bank authority for the corporate accounts for writing checks, authorizing wire transfers, and other financial matters.

¶ 10 Hansen formed S&S in 2002 as a consulting firm and advised North Shore concerning the purchase and sale of scrap catalytic converters. In 2003, S&S purchased its own processing equipment and entered the business of processing catalytic converters and selling the extracted catalyst. S&S' operations were outsourced to North Shore and Hansen completed the business end of transactions for supplying the catalyst to its customers, which included Catmet.

¶ 11 Tomassini started 4M Trading as a sole proprietorship in February 2004, registering as a limited liability company in July 2004. 4M entered into the business of buying and selling catalytic converters in 2004 after Melnick approached Tomassini about a business opportunity. Tomassini, an accountant, provided capital for 4M and was responsible for overseeing the financial aspects of 4M. Melnick worked with various suppliers to complete transactions for catalytic converters that were sold by 4M to Catmet. Catmet alleged that Melnick and 4M defrauded it through these transactions.

¶ 12 Siegel owned North Shore, a supplier of catalytic converters to Catmet. Catmet alleged that the North Shore defendants conspired with codefendants to defraud Catmet. As noted above, a default judgment was entered against the North Shore defendants in the amount of $5 million. The North Shore defendants did not appear at trial or enter an appearance in this appeal.

¶ 13 In the August 19, 2005, complaint, Catmet alleged that Melnick and the 4M defendants conspired to earn profits by having 4M negotiate the purchase of catalytic converters from Joseph Gelbard Enterprises (JGE), a Canadian supplier owned by Joseph Gelbard. Under the alleged scheme, 4M would purchase the catalytic converters from JGE and sell the catalytic converters to North Shore, which would then sell the converters to Catmet. Catmet alleged that Melnick actively set up and negotiated these transactions for 4M and they in turn conspired to sell the catalyst to the North Shore and S&S defendants who then overcharged Catmet.

¶ 14 B. Discovery Issues and Sanctions

¶ 15 During pretrial motion practice and discovery, Catmet filed several amended complaints as well as several sets of interrogatories, requests to admit facts, and requests for production. Melnick and the 4M defendants filed responses and amended responses to these requests. In their initial discovery responses, the 4M defendants and Melnick explicitly denied Melnick's involvement in the transactions with Gelbard. In addition, on April 28, 2006, the 4M defendants filed a motion to dismiss the second amended complaint that included an attached affidavit from Tomassini.

¶ 16 In the affidavit, Tomassini averred that he entered into 13 transactions involving purchases of catalytic converters from Gelbard that were then sold to North Shore. He claimed that he decided to terminate operations by 4M because the precious metals market had tightened and he was not making money. Tomassini further asserted that Melnick had no involvement

with any 4M transactions and only worked with him after Catmet had fired Melnick and Melnick persuaded Tomassini to restart 4M with Melnick as a consultant. Tomassini also claimed to have had several conversations with Gelbard during 2004.

¶ 17 On October 4, 2006, the trial court denied the 4M defendants' 2-619(a)(9) motion to dismiss, finding that Tomassini's affidavit did not constitute an affirmative matter negating the cause of action. However, the court granted the 2-615 motion to dismiss the breach of fiduciary duty count, with leave to re-plead within 28 days of the order. On November 15, 2006, Catmet filed its third amended complaint.

¶ 18 In December 2006, Catmet petitioned the court for letters rogatory to the Ontario Superior Court of Justice for the deposition of Gelbard in Canada. Following numerous delays by defendants in their attempts to put off or bar the deposition, Gelbard was deposed in May 2008. Gelbard testified that he dealt directly and exclusively with Melnick in negotiating the transactions with 4M in 2004, including transportation arrangements, price terms, and payment. Gelbard further stated that he did not even know of Tomassini's existence until 2005, after all of the challenged transactions had been completed.

¶ 19 On August 29, 2008, the 4M Defendants and Melnick amended their responses to admit that Melnick was involved in the Gelbard transactions. Melnick admitted to being an intermediary between Tomassini and Gelbard. However, the defendants still had not admitted that they knew that the catalytic converters purchased from Gelbard in these transactions were ultimately purchased by Catmet.

¶ 20 On September 15, 2008, Catmet filed motions for relief under Illinois Supreme Court Rules 137 and 219(c) (Ill. S. Ct. Rs. 137 (eff. July 1, 2013) & 219(c) (eff. July 1, 2002)) against Melnick and the 4M defendants. Catmet asserted that Gelbard's deposition demonstrated that the

4M defendants and Melnick actively misled Catmet and the court by submitting a knowingly false affidavit and false discovery responses. Catmet argued that it was harmed by defendants' actions which required Catmet to depose Gelbard in Canada and further damaged by defendants' delaying the deposition of Gelbard while attempting to have the cause of action dismissed before the truth could be discovered. Catmet sought appropriate relief under both Illinois Supreme Court Rules 137 and 219 in the form of a default judgment, barring any further amendment to discovery answers by defendants, and awarding fees and costs relating to obtaining Gelbard's deposition testimony, seeking the discovery related to the motion for sanctions, and bringing the motion for sanctions.

¶ 21 Following briefing and argument, the trial court entered an order granting Catmet's motion against Melnick and the 4M defendants. The trial court rejected defendants' attempts to explain the discrepancies in their filings, especially in light of the timing of the modifications after Gelbard had been deposed. The court held that default judgment was too severe a sanction, but barred further modification of any discovery responses. The court also granted Catmet's motion for fees and costs in obtaining Gelbard's deposition and bringing defendants' Rule 137 violations to light. The court granted leave to file an associated fee petition.[2]

¶ 22 In the fee petition, Catmet detailed the fees and costs it incurred in seeking Gelbard's deposition in Canada and the delays incurred as a result of defendants' tactics for a total of $171,005.03. On July 22, 2010, the trial court awarded sanctions of $100,000 against Melnick,

[2] The trial court also entered sanctions against Siegel for removing files from his computer after his attorney had been told the computer would have to be produced.

Tomassini, and 4M. The court specifically found defendants' jointly and severally liable for the judgment based on its "finding of uniform misconduct."

¶ 23 In a December 7, 2007, motion claiming spoliation of Hansen's computer hard drive, Catmet also sought monetary sanctions, adverse jury instructions, and default judgment against the S&S defendants. Catmet argued that both Melnick and Tomassini had claimed their computers had "crashed" and were disposed of while Hansen reformatted his hard drive after he was advised to preserve such evidence. The court ultimately denied the request for default judgment, took the issue of the jury instruction under advisement, and granted the motion for sanctions against the S&S defendants, awarding $15,000.

¶ 24 C. Catmet's Case-In-Chief

¶ 25 At trial, Catmet presented the testimony of Jack Henry and Jeffery Weingartner, both employees of RAM. Henry testified that he was Leahy's cousin and began working for RAM in 2001. RAM and Catmet shared the same facility and offices and some duties were shared by employees across companies, so Henry was "pretty familiar" with Melnick's work at Catmet as he was responsible for payables and receivables for both companies. Andrea Guidry, the office administrator, was responsible for maintaining all of the office files. In July 2005, Melnick was on vacation when Leahy informed Henry that he had found discrepancies in Melnick's financials. In response, Henry, Leahy, Weingartner, Guidry and Catmet's accountant at the time, George Reynolds, analyzed purchase orders and receipts for RAM and Catmet. Henry testified to discrepancies identified related to RAM.

¶ 26 Weingartner testified that he worked for RAM under Henry and had regular contact with Melnick in 2002-2004. Because it was a small office, from 2002 to mid-2003 Weingartner was

responsible for entering Catmet purchase orders into the company's database. In addition, he testified to the reconstruction of financials with Henry, Reynolds, and Guidry.

¶ 27 Weingartner testified that Melnick had become "very bitter" in 2003 because he felt that Leahy should make him a partner in the business. Weingartner felt that this bitterness turned to anger with Melnick repeatedly stating his hatred of various situations at work. Specifically, in mid-2004, Melnick expressed disgust that Leahy wanted the employees to sign non-compete agreements and told Weingartner that he might just go into business himself. When Weingartner asked how he could finance such a venture, Melnick told him that he could borrow money from Tomassini.

¶ 28 George Smith testified that in February 2004, Smith and Tomassini started a private equity firm called Freedom Venture Partners. Freedom Venture Partners was incorporated as a limited liability company in November 2004 with Tomassini as managing partner. Smith testified that in mid-2004, Tomassini told him that he was a financial backer for a business called 4M Trading. Tomassini informed Smith that his friend would run the operations and Tomassini would only run the financial part of the operations. Tomassini assured Smith that 4M would not be a significant use of his time or interrupt his time for other interests. Smith testified that he stayed in business with Tomassini and Freedom Venture Partners until 2007.

¶ 29 Catmet next presented the evidence deposition of Joseph Gelbard. Gelbard testified that he owned and operated JGE in Canada as a scrap metal and catalytic converter supplier. Gelbard stated that he sold catalytic converters to Melnick and that he negotiated all of these transactions completely with Melnick, including price, shipping terms and destinations, and payment terms. Gelbard testified that he never negotiated with Tomassini, and that he did not know Tomassini existed until he met him in 2005.

¶ 30 Tomassini was called as an adverse witness by Catmet. Tomassini testified that he was childhood friends with Melnick and, after conversations with Melnick, he started 4M in February 2004 to help Melnick out and to make some quick money. Although he had no experience in the scrap metal or catalytic converter industry, he stated that Melnick only needed upfront cash and the rest of the work would be done by Melnick.

¶ 31 At this time, and repeatedly throughout his testimony, Tomassini was questioned about inconsistent responses made in his affidavit in support of his motion to dismiss and his initial interrogatory responses. Tomassini admitted that his statements were incomplete or incorrect. In particular, he admitted that his responses that he completed transactions with JGE and that Melnick was not involved in the transactions were not true. In fact, Tomassini admitted, Melnick took care of every part of the dealings with Gelbard. Additionally, he admitted that Melnick had access to the 4M checking account, made personal draws on the account, and completed several banking transactions for the company.

¶ 32 Tomassini testified that he knew that Melnick worked for Catmet at the time Melnick approached him about the 4M business opportunity. Tomassini stated that he went ahead with the venture because he believed it would help Melnick and Catmet, while making some money for himself. Tomassini did not create a business plan or marketing plan because he viewed the opportunity as a short-term commitment and North Shore was their only customer. While Melnick did not have a financial interest in 4M and he was not to be compensated, Tomassini did purchase a computer for Melnick and set up a business checking account with Melnick listed as an authorized signer. Melnick was allowed to use the 4M business checking account to pay for various personal expenses such as his cellular phone bill. Starting in August 2005, Melnick was employed as an independent contractor and compensated by 4M.

¶ 33 Tomassini explained that Melnick took care of all aspects of the transactions with Gelbard, including order amount and price, payment terms, and shipping arrangements for all 13 transactions 4M was involved in between JGE and North Shore. Tomassini would then create invoices from the information provided by Melnick and wire funds to JGE. On at least two occasions, Tomassini needed to borrow funds from a friend to complete the wire transfers, but testified that he repaid each loan within approximately one week for a small fee. Tomassini testified that he knew the catalytic converters ultimately ended up being sold to Catmet and that, for a couple of their transactions, Siegel requested the shipment be sent directly from JGE to Catmet.

¶ 34 The court questioned Tomassini concerning the corruption of his computer hard drive. Tomassini explained that his IBM laptop was approximately two years-old at the time and it just stopped working. He noted that this was after he knew about the lawsuit and he unsuccessfully attempted to recover the data. During his testimony, Tomassini admitted that, because the computer crashed, he had recreated receipts and invoices from documentation he had from Melnick and Gelbard.

¶ 35 Steve Hansen was also called by Catmet as an adverse witness. Hansen testified that he attended the University of Wisconsin, receiving an undergraduate degree in engineering, an MBA in finance, and a law degree. Hansen worked for a law firm for approximately one year after graduating before he decided to get into consulting in 1994. In about 2000, Hansen met Siegel and learned about North Shore and the catalytic converter resale market. Hansen began to work with North Shore in 2002, formed S&S in September 2002 as an independent business consulting company, and incorporated the company in July 2003.

¶ 36 Hansen met Melnick sometime in 2002 or 2003 and Melnick consulted for S&S sometime during 2002-04. Hansen testified that S&S paid Melnick $2,000 a month for his consulting on catalyst processing, but did not have a contract with Melnick or create any payment receipts or W-2 forms. As a result of these consultations, S&S purchased a cutter and placed it in North Shore's facility and began processing catalyst.

¶ 37 Hansen testified that in 2003 and 2004, Catmet purchased cut catalyst twice a week from S&S. Neither S&S nor Catmet performed an assay of the catalyst exchanged and did not maintain purchase orders or bills of lading for these transactions. Hansen admitted that S&S trusted North Shore's representations on the grading of the catalytic converters purchased. Until August 2004, Catmet was S&S's preferred buyer because there was a 3 to 4 day turnaround for payment while other companies had 35 to 75 day turnarounds to allow time to perform an assay of the catalyst. Hansen testified that Catmet did not pay for two loads of catalyst in August 2004 and S&S did not pursue payment for those, but just quit selling to Catmet. S&S began purchasing catalytic converters from Tomassini and 4M and re-sold them to A-1.

¶ 38 Hansen also testified that he suffered a malfunctioning laptop after the date the instant lawsuit had been filed. Hansen stated that he presented his old desktop hard drive, representing it as his work computer to plaintiff's computer expert, even though he only used his laptop computer for his business. Hansen admitted that he had first stated that he did not know about the laptop, then claimed that he had no recollection, and then that he left it at the recovery center because they were unable to extract any data.

¶ 39 Michael Melnick testified as an adverse witness. Melnick worked with Leahy in the early 1990s when Melnick started as a route truck driver and progressed to industrial buyer. Leahy hired Melnick to operate Catmet because of his expertise in the catalytic converter

industry and Melnick was responsible for the day-to-day management of the company, which included purchasing, invoicing, receiving, grading of converters, and shipping. These responsibilities required Melnick to work in the offices and on the cutting floor. Melnick had authority to access RAM and Catmet's computers and signature authorization on their bank accounts.

¶ 40 Melnick testified that Siegel introduced him to Hansen because Hansen was interested in processing catalytic converters. Melnick understood that S&S and Catmet would be in the same business and that Catmet had purchased converters from S&S, but he agreed to help Hansen and continued to receive payments from S&S. Melnick admitted that Catmet would later purchase cut catalyst from S&S.

¶ 41 Melnick testified that Catmet shipped approximately 100,000 pounds of catalyst per month from 2003 to 2005. He admitted that about 50,000 pounds of cut catalyst were purchased from S&S during this time and were part of the 1.3 million pounds Catmet shipped out. There were checks for $900,000 for these transactions for foreign-grade catalyst, but Catmet did not perform any assays or even inspect the catalyst to confirm it was high-grade foreign. Melnick admitted that he never told Leahy that he was buying cut catalyst from S&S and that he had informed the night shift foreman not to tell Leahy that Catmet had purchased from S&S.

¶ 42 For the 13 transactions involving Gelbard, Melnick testified that Gelbard dictated the terms and that he told them to Tomassini. Melnick stated that Gelbard required wire transfers and Catmet could not wire the amounts necessary so he enlisted Tomassini. He knew that Tomassini was uncomfortable accepting Catmet checks, so Tomassini sold the catalytic converters to North Shore, which then sold them to Catmet. Melnick testified that he,

Tomassini, and Siegel agreed to the plan because it eventually helped Catmet out by allowing them to purchase the converters.

¶ 43 On cross-examination, Melnick explained his role at Catmet and his procedures in ordering and operating the facility. Melnick explained that he became very busy in 2004 and 2005 and because the profit of Catmet relied on high volumes, he stopped using the purchase order forms. Melnick testified that he relied on the representations of his suppliers and tracked incoming deliveries, payments, and receivables on the daily sheets.

¶ 44 Melnick testified that after he was fired by Catmet, he talked with Tomassini about working for 4M. They agreed to a monthly compensation and Melnick was granted authority to wire funds from 4M's account. Melnick testified that around this time 4M began supplying North Shore. The financials of Midwest Core and 4M indicated that funds were going from North Shore to 4M instead of the other way. Melnick also testified that between January 2006 and December 2009, 4M had loaned him $470,000 that he had not repaid.

¶ 45 John Evans testified that he was hired to perform forensic investigations of the computer hard drives of Melnick, Siegel and Hansen. Evans explained the process of examining a hard drive and searching for relevant files. He also explained that reformatting, reinstalling operating systems, and deleting user profiles on a computer's hard drive all eventually lead to the complete elimination of access to files on the hard drive, especially if there are periods of subsequent use as the computer overwrites the files and access links. Evans testified that the hard drive on Melnick's laptop had been reformatted with a new operating system installed on January 27, 2006, Siegel's computer had a user profile named "Mickey" that had been deleted in January 2007, and Hansen's computer had a record indicating a bad drive and files were transferred to a

new drive. Evans was able to locate some relevant e-mails, links, and folders in Siegel's and Hansen's hard drives, but no actual files were recovered.

¶ 46 Leahy testified that he had worked in the scrap metal industry for years before starting Catmet in 1994 and RAM in 2001. Leahy met Melnick in 1993 when Melnick started as a truck driver for Multimetco and the two continued to work together at Chemetco. Leahy testified that he thought he had a good relationship with Melnick as the two worked closely together for years and also often golfed and attended professional sporting events together. While he was always present at the office, Leahy delegated responsibility to Melnick to fully run Catmet and the catalytic converter business. Leahy stated that he and Melnick both were initially trained on the industry at Multimetco and they were trained to never buy cut catalyst because it was impossible to identify the true value after the catalyst had been de-canned.

¶ 47 Leahy testified that he reviewed Melnick's daily sheet every day and that indicated Catmet's daily balance in its checking account, but he did not review bank statements. Leahy added that between 2003 and 2005, Catmet did not bounce any checks and did not have any wire transfer requests denied. Leahy testified that in the summer of 2005, he had expected good financials based on Catmet's output, but the June financials he received on Friday, July 15, 2005, had marked the third month in a row that the company suffered a loss. When he returned to the office on Monday, July 18, 2005, Leahy began reviewing the RAM and Catmet files because Melnick had gone on vacation.

¶ 48 Leahy discovered that, despite his direct order to avoid overdraft fees, RAM and Catmet had been charged numerous overdraft fees. Leahy reviewed all of the companies' financials with Henry, Weingartner, and Guidry, as well as their accountant, Reynolds. Leahy testified that the review identified "huge disbursements" to North Shore without corresponding purchase orders.

He called Melnick in Las Vegas and told him not to come in to the office while they reviewed the company files. Leahy testified that Melnick never informed him that Catmet could not make wire transfers, that he was buying cut catalyst, that he was working as a consultant for S&S, or that he stopped completing purchase orders for transactions with North Shore.

¶ 49 On cross-examination, Leahy testified that Catmet's loss in July 2005 concerned him because it totaled $160,000 and he had expected a profit. He admitted that he had borrowed $602,000 from RAM and Catmet starting in January 2004, and that remained outstanding in July 2005. However, the loans were in the books and Leahy testified that they were not related to the losses they tied to Melnick.

¶ 50 Leahy testified that he called Melnick in Las Vegas to ask him about a fax to RAM. He talked to Melnick again later in the week and expressed concern about the high amount of receivables and low payables. In particular, he noted a lot of transactions with money going to North Shore without any supporting documentation about receiving product. Melnick expressed surprise and informed Leahy that he had stopped completing purchase orders for the bigger customers. Leahy's next contact with Melnick included his request for Melnick's laptop computer. Melnick initially said he would comply and later changed his mind. Leahy decided to fire Melnick in August 2005.

¶ 51 Leahy testified that there was very little documentation available to figure out who was paid what amount or any corresponding material or price lists for transactions. He acknowledged that there was no way to know whether the catalyst was coming or going or how much Catmet stood to gain or lose on the transactions. Leahy admitted that A-1 never provided an assay to Catmet and did not reject any of its shipments of catalyst.

¶ 52 Leahy testified that his first verified complaint sought $17 million in damages because that was the amount that the forensic accountants had initially determined. He knew there were $15.5 million in disbursements to North Shore, but could not speak to the final loss calculation. He stated that amount was subsequently changed to roughly $5 million based on further research by the accountants. Leahy added that after Melnick was fired, revenue dropped dramatically for Catmet, suppliers dried up, and it stopped doing business.

¶ 53 Allen Berger testified as Catmet's expert on damages that he was an "audit partner" and had been a CPA and senior partner of his firm since 1973. Berger testified that he was engaged in the instant matter to analyze Catmet's books and records to determine losses suffered due to defendants' alleged fraudulent actions. Berger was qualified as an expert to testify. Defendants did not object to his qualification as an expert "[o]bviously subject to cross-examination on the work he has done in this particular case."

¶ 54 Berger testified that he identified three separate schemes undertaken by defendants. "Scheme No. 1" was an "overpayment scheme" where a middleman was inserted into transactions resulting in a loss to Catmet of $183,856. Berger designated "Scheme No. 2" the "inflated price scheme," which involved Catmet paying more than the true value of catalytic converters and cut catalyst that it received, resulting in $555,000 in damages. "Scheme No. 3" was a "payment for unsupported goods scheme," where Catmet issued checks for goods never received, resulting in $3,779,614 in damages. Adding in Melnick's wages of $209,453 for the relevant time period, Berger testified that Catmet suffered total damages of $4,798,068.

¶ 55 Berger explained that the first scheme involved 17 total transactions. Twelve of these transactions involved payment by Catmet for catalytic converters originating with JGE and passing through 4M and North Shore as middlemen. The middlemen transactions added to the

cost to Catmet and decreased profits. Berger reviewed the invoices and checks for the transactions to determine what 4M paid JGE, what North Shore paid 4M, and then what Catmet paid to North Shore. The total difference for the transactions, all but one involving a loss in possible profit to Catmet, was $136,004. Berger added that he could not prove or disprove whether or not Catmet received the shipments of three of the orders; therefore, he noted that damages would be an additional $480,779 under the overpayment scheme if Catmet did not receive these based on the lost payment, lost profit, and cost of goods.

¶ 56 The five remaining transactions under the overpayment scheme involved the shipment of catalytic converters directly from JGE to North Shore. Berger computed a lost profit amount for these transactions, in addition to a payment of $7,462 by Catmet for one of the shipments, for a total of $47,852. Berger explained that utilizing Catmet's documents to determine his lost profit multiplier was out of the question because they were corrupted and he determined a 7.8% profit rate by analyzing sales from S&S to A-1 and Techemet. Berger stated that he tried to match the timeframe for Catmet's transactions because of the volatility of the precious metals market involved.

¶ 57 Berger explained that under the inflated price scheme, S&S sold unverified cut catalyst to Catmet at the high-grade foreign catalyst price of $16.98 per pound. Unlike the sales to A-1 and Techemet, no assay was conducted on these shipments to verify the contents as the higher grade of catalyst. Berger calculated that Catmet paid S&S roughly $900,000 for 52,964 pounds of unverified cut catalyst. He added the $12,000 paid to Melnick from S&S as part of this scheme as inducement to accept the shipments from S&S without performing an assay.

¶ 58 In determining the loss to Catmet, Berger reasoned that Catmet was not in the business of purchasing cut catalyst, and no company should buy unverified catalyst. Therefore, he looked to

find an industry price for unverified cut catalyst from arms length transactions. Berger identified three invoices from North Shore where it purchased cut catalyst from Sadoff and Rudoy and Block Iron Supply at prices of $6 per pound, $7 per pound, and $6 per pound. Therefore, Berger determined that the market price for unverified cut catalyst was $6.50 per pound. Subtracting the price paid by Catmet of $16.98 per pound resulted in overpayment of $10.48 per pound or $555,144.69 total to S&S.

¶ 59 Scheme No. 3, the unsupported checks scheme, involved a comparison of purchase order data and check data to determine where it was impossible to match payments with receivables and complete a computation of unsupported payments to North Shore. Berger testified that his research showed that in the first 10 months of 2002, there was only a 1% rate of unsupported purchase orders, but that number jumped to roughly 8% in the last 2 months of 2002 and then went up to 57.1% unsupported from 2003 until Melnick's termination. Berger also observed that purchase orders and payments started to be made in round numbers rather than specific amounts. Berger noted that the lack of purchase orders and the usage of round numbers made it near impossible to match payments and receivables.

¶ 60 Berger calculated $15,000,536.91 from 394 checks written from Catmet to North Shore from March 1, 2003 until July 18, 2005. He matched $6,552,489 to purchase orders from Catmet and $108,220 from purchase orders supplied by Siegel to create a total of $8,075,382 of unsupported checks. Berger testified that Melnick indicated he had stopped creating purchase orders and went to his spreadsheet model for tracking orders and maintained files at his home. Berger stated that it was unusual to keep corporate financial documents in one's home and added that many of the forms from Melnick were incomplete, but he followed the rule that if a dollar

amount was supported, it was given credit. Therefore, assuming these numbers were correct, Berger subtracted another $5,095,768 from the total, for a final number of $3,779, 614.

¶ 61 Following Berger's recap of his financial analysis, he added testimony in support of his conclusion that fraud was committed in this case. Berger pointed to the increasing credit lines for Catmet and RAM and negative account balances from this time period juxtaposed with North Shore's increase in account balances and pay down of loans. Berger added that numerous fraud indicators were evident in this case, starting with Melnick's conflict of interest by working for Catmet, setting up a competitor in S&S and receiving $12,000 for his services. Next, Berger detailed established purchasing schemes evident in this case: extra layers of suppliers; reducing or eliminating documentation; paying round numbers that covered multiple invoices; failure to establish the quality of purchases; maintaining several sources of corporate information; fictitious revenues, such as intercompany transfers between RAM and Catmet treated as income; and frequent cash deposits.

¶ 62 On cross-examination, Berger admitted that he had no experience in the catalytic converter industry. Berger testified that he did not believe the middleman scheme was necessary and that Catmet could have bought the catalytic converters directly from JGE. He stated that Leahy indicated to him that the bank would lend or wire funds they needed and Catmet did not have a large outstanding amount of money at the time. Therefore, he believed the bank would have wired the funds, as they funded all of Catmet's checks, and Melnick's enlistment of Tomassini and 4M was unnecessary. However, he admitted that he did not meet with Reynolds and did not know the bank balance in February 2004 or until the end of 2004.

¶ 63 Berger testified that he used monetary values and not pounds for the transactions because he had the monetary values, but he did not have as much data on the weights sold and shipped.

Berger looked at the daily sheets for a gross understanding of the transactions, but did not use them in his report or use them to back out weight totals because they were corrupt. He did not use the A-1 price sheet or conduct an industry analysis to determine prices or profit margins. Berger agreed that his $6.50 calculation was at the low end of the scale and that A-1's lower end price was $7.25 at the relevant times, but maintained it was the proper price to determine damages.

¶ 64 Berger expected more detail on Catmet's invoices because Gelbard had broken down the numbers and types. He saw more than 12 transactions by A-1 and Techemet where the cut catalyst content was assayed and expected that to be the industry norm. He admitted that there were no terms on the invoices from Sadoff & Rudoy and Block Iron Supply such as grade or total volume and he had no other evidence concerning the relationship with S&S. Despite having over 40 concurrent transactions between S&S and A-1, he did not use these terms because those transactions were corrupted. He admitted that the price fluctuated greatly, sometimes week to week and that he did not factor in costs associated with sorting, loading, cutting, packing, and shipping when determining gross profits. Berger also did not factor in the sale of by-products including the converter shells, catalyst dust from the cutting operation, or sale of other scrap metal items.

¶ 65 Berger did not complete a cash flow analysis and could not explain why there were some fluctuations, but stated they were evidence of fraud. He did not factor in the loan to Leahy in his calculations. Berger stated that for the transaction that Catmet paid less than 4M, there simply had been a mistake made, but the other transactions remained evidence of the fraud scheme. Berger found no evidence of concealment of checks.

¶ 66 Defendants pointed to revisions Berger made prior to his deposition and prior to his testimony in court. Berger admitted that he had made corrections after revisiting some sections. He also admitted to several errors in his final report. These errors included double entry of invoices, failure to back out totals for invoices indicating "non-catalyst sales," and discovery of supported checks and invoices. Berger dismissed the errors as small and inconsequential to the final calculations.

¶ 67 Over defendants' standing objection to the presentation of any evidence after July 2005, William Metzdorff testified that he completed records review of financial documents and focused on the period from July 2005 to December 2008. Metzdorff testified that payments from 4M to Melnick over this time period totaled $1.05 million and Tomassini received approximately $413,000. From July 2005 to June 2006, Midwest Core made payments to 4M of approximately $2 million. Metzdorff opined that Melnick's prepared summary was fatally flawed as it left out the key consideration of the money spent on converters.

¶ 68 On cross-examination, Metzdorff explained that plaintiff's theory was that money came back to 4M and Melnick during this period as backlog payments for the fraud scheme. He stated that he was only asked to review the payments between the companies for that first 12 month period and he only reviewed the documents provided by Catmet's attorneys. He admitted that he only reviewed the flow of money and did not review documents to determine whether any supply was coming in or out of the businesses.

¶ 69 Metzdorff admitted that his calculation of pounds shipped of 2,074,733 was the same as that determined by Melnick. Metzdorff's computation of the cost of the converters of $29 million was much higher however, largely because Melnick used a cost of $8 per pound, not $14 per pound, which Metzdorff stated his analysis of the records supported. Metzdorff indicated

that he had backed out the cost of the cut catalyst from S&S and also backed out the cost of aluminum rims that were sold based on what he believed was a conservative rate of profit of 10%. Metzdorff stated that cut converter shells were a byproduct and, although he was not certain, he thought the return on the sale of the shells was a "very low dollar amount" and not relevant. Therefore, he did not back out any amounts for Catmet's sale of the cut shells. Metzdorff included the sale of the dust in the catalyst calculation, but did not know if it was more or less than the shell value.

¶ 70 D. The Defense

¶ 71 Following the close of plaintiff's case, defendants moved for a directed verdict. In addition, the S&S defendants sought to strike the testimony of plaintiff's expert, Berger. Expressing an interest in efficiency and preserving the jury's time, the trial court requested that the motions be heard together at the conclusion of all evidence. The parties agreed to this request and defendants presented their witnesses.

¶ 72 Andrea Guidry testified that she had been the administrative assistant for RAM and Catmet since May 2003 and was responsible for completing the bank reconciliations and periodically met with the accountant to review financial statements and taxes. Guidry maintained the financial information binders for the companies that contained the daily sheets, purchase orders, receivables, payables, drivers' account balances, A-1's monthly balance sheets and operational expenses. Guidry also maintained the general ledger with Melnick.

¶ 73 Guidry testified that on the June 1, 2004, general ledger there was a $634,596.33 amount charged to Leahy as a receivable. She testified that this was converted to a payable on the July 31, 2005, ledger at the direction of the accountant. Guidry did not recall Melnick stating that purchase orders would no longer be used or that he was using a different system. To Guidry's

knowledge, the bank never refused a wire request or bounced a check, but the company was regularly charged overdraft fees by the bank.

¶ 74 Melnick testified that he had informal discussions with Leahy at social functions concerning the possibility of becoming a partner, but there was never a timeframe involved. He stated that the non-compete agreement was for new employees of RAM and he was not upset about that or angry with Leahy about anything else. After he was terminated by Catmet, Melnick went to Tomassini to see if they could get 4M operating full scale because it was the only business he knew and they started buying catalytic converters from various sources across the country and selling to Midwest Core.

¶ 75 Melnick testified that A-1 provided $100,000 advances at a time, with up to $1 million on the ledger for Catmet. Catmet would have to fill those advances as they came in and at the market price at the time the advances were made. Therefore, because of the volatility of the market, Melnick had to fill those orders as soon as possible. Melnick explained that this is what motivated him to purchase the cut catalyst from S&S, as they could more quickly fill orders and get new advances from A-1. He testified that A-1 performed assays at times, but they had stopped sending assays in early to mid-2003. While A-1 had not rejected shipments, Melnick stated that they used this as a negotiation tool. Techemet was more rigorous in its testing and also tested the dust byproduct that Catmet sold them for concentrations of precious metals. In addition, Melnick did not recall any discrepancies between S&S's invoices or returns from the shipments they forwarded.

¶ 76 Melnick repeated that Tomassini and 4M got involved with Catmet because Gelbard required wire transfers to make purchases and Catmet did not have sufficient funds to complete these transactions. He stated that 4M was involved in the 13 transactions, but in October 2004,

Gelbard agreed to accept checks from Catmet and 4M was no longer needed to complete transactions. Catmet continued its relationship with JGE until Melnick was terminated.

¶ 77 Melnick admitted that one of his weaknesses was "paperwork." However, he prepared monthly summaries for the litigation with information derived from Catmet's binders. These documents included: daily sheets; purchase orders; cut yields; bills of lading; driver purchase orders; shipments; and bank statements. Melnick's total amount of catalyst shipped to A-1 and Techemet matched the amount that Metzdorff calculated, but the total amount of pounds actually produced by Catmet and the cost of product and return did not match. Related to this, Melnick estimated that the return on the sale of aluminum rims was roughly 2-3% and Catmet could get roughly $1 per cut converter shell and $24 per pound for the cutting dust. Under Melnick's calculation, Catmet processed 829,893 catalytic converters and, therefore, received approximately $829,000 from the sale of those shells.

¶ 78 Hansen testified that after starting S&S in 2002, he worked with Siegel and North Shore and bought his own cutter. Hansen consulted with Melnick on the business, having dinner with him once and then talking with him on the phone. S&S paid Melnick at least $12,000 for this consulting advice. With respect to S&S sales, Techemet would make an initial payment, a payment on receipt and the remainder after an assay of the catalyst to determine the moisture content and quality and reduce payment for the amount of moisture and any quality issues. Because of this process, S&S determined it was "too expensive" to ship to Techemet because of the long delays in payment. While Techemet generally paid a higher amount, S&S preferred the faster turnaround of Catmet and other buyers. In 2003, S&S began shipping 1-2 loads of cut catalyst to Catmet per week.

¶ 79 Hansen testified that he had no personal knowledge of the contents of his shipments. Hansen stated that S&S may have cut one load of after-market catalytic converters, but they did not cut more because the value was too low. He testified that he took Siegel at his word for the quality of shipments they received from North Shore.

¶ 80 E. Motions for Directed Verdict and to Strike Expert Testimony

¶ 81 At the close of defendants' case, as agreed to by the court and the parties, defendants presented a motion to strike the testimony of Berger and motions for a directed verdict. Defendants argued that Catmet failed to present any evidence of actual damages caused by defendants and the transactions in question and, therefore, Catmet's claims failed, and a directed verdict was proper. With respect to Berger, defendants asserted that his opinions were critically flawed based on a lack of support and his baseless speculation and assumptions. Defendants concluded that, because Berger's opinions were without sufficient factual basis, they should have been barred by the trial court.

¶ 82 In ruling on the motion to strike Berger's testimony, the court noted that Berger had been deposed and provided various reports to put defendants on notice. Accordingly, the court opined that a proper motion to strike should have been brought earlier that would have allowed plaintiff to improve Berger's presentation or seek a new witness. Ultimately, the court reasoned that defendants' arguments went to the weight of Berger's testimony and not its admissibility. The court added that defendants would be able to argue all of the stated issues with Berger's testimony to the jury to explain why they found his testimony inadequate. Likewise, the court denied the motions for directed verdict, finding that enough evidence was presented on each count and it was up to the jury to assign weight and determine the credibility of evidence presented.

¶ 83 F. Jury Verdict and Posttrial Motions

¶ 84 The jury was instructed by the court. The court instructed the jury, *inter alia*, that there was testimony concerning the failure to produce computer hard drives or the spoliation of evidence by reformatting the hard drives by Hansen and Melnick. The jury was instructed that it could infer that evidence on the computers would be adverse to the defendants, if it determined that: (a) the computers were under the defendants' control; (b) the computers should reasonably have been produced; (c) the computers and information were not available to Catmet; (d) a reasonably prudent person would have offered the computers; and (e) there was no reasonable excuse not to produce or reformat the computers.

¶ 85 The jury entered a verdict for Catmet. Specifically, the jury found Melnick liable for breach of fiduciary duty, fraud, and conspiracy relating to both the 4M defendants and S&S defendants. The 4M defendants were not found liable for inducing breach of fiduciary duty, but were found liable for aiding and abetting fraud and conspiracy. The S&S defendants were found liable for the claims of inducing breach of fiduciary duty, aiding and abetting fraud, and conspiracy. Compensatory damages were entered in the amount of $498,476.25 against the 4M defendants and Melnick, $415,182.25 against the S&S defendants and Melnick, and an additional $2,834,710.50 against Melnick for the unsupported checks scheme. Punitive damages of $500,000 were also entered against all three defendants.

¶ 86 Defendants filed a joint posttrial motion arguing they were entitled to judgment notwithstanding the verdict on the counts for fraud, aiding and abetting fraud, breach of fiduciary duty, inducing breach of fiduciary duty, and conspiracy. Defendants maintained that the verdict was against the manifest weight of the evidence produced at trial as it was either nonexistent or

speculative and conjecture-based. Defendants asserted that there was no basis for an award for punitive damages and the trial court erred in giving the punitive damages jury instruction.

¶ 87 Defendants also claimed that the trial court erred in allowing Metzdorff to testify because of plaintiff's late disclosure of Metzdorff as a testifying witness. Defendants also objected to the trial court's allowing Metzdorff to testify concerning activity after July 2005, over defendants' standing objection on that issue. Finally, defendants asserted that the trial court erred in not dismissing Hansen from the case because there was no evidence that he acted in his individual capacity, but only within the scope of his role as owner of S&S. Following the denial of the posttrial motions, these appeals were filed.

¶ 88 II. ANALYSIS

¶ 89 A. Waiver of Issues and Motion to Bar Expert Testimony

¶ 90 Catmet argues that defendants waived appellate review of their claims that plaintiff failed to provide sufficient evidence of damage and the S&S defendants' claim that the circuit court erred in failing to strike Berger's testimony. Catmet asserts that the parties were apprised of Berger's opinions by a report presented more than two years' before trial as well as two days of depositions during the discovery period. Despite this, Catmet contends, defendants did not object to Berger's testimony and did not move to strike his testimony until after it was completed. Furthermore, Catmet claims, there was no mention of Berger's testimony or a motion to strike that testimony in defendants' combined posttrial motion. Therefore, Catmet argues that both parties' challenge to the damage evidence presented and S&S defendants' claim as to Berger's testimony are forfeited. *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1016-19 (2006); Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994).

¶ 91 In addition, in conjunction with their reply brief, the S&S defendants filed a supplemental appendix containing transcripts of the posttrial hearing *de hors* the record. The S&S defendants argued that the issue of Berger's testimony was not waived because there were several references to that issue during the hearing on posttrial motions. However, the transcript of this hearing was not originally made a part of the record. While the S&S defendants stated that they would move to supplement the record, on July 8, 2013, Catmet first moved to strike the appendix to the reply brief containing this transcript as well as portions of that brief relying on the hearing transcripts that were not a part of the record. This court took the issue of the motion to strike with the case, but granted Catmet the opportunity to file a sur-reply, which was filed on July 26, 2013. On March 6, 2014, almost eight months later, the S&S defendants moved to supplement the record, *instanter*, with the missing posttrial hearing testimony.

¶ 92 We agree with Catmet that it is well settled that the appellant has the burden of presenting a sufficiently complete record and failure to do so results in forfeiture of argument based on a deficient record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). S&S defendants' attempt to supplement the record by including a supplemental appendix with their reply brief is not in conformance with the rules and was prejudicial to the appellee. However, despite the extensive delay in filing the request, for the purposes of a complete record, we granted the motion to supplement the record, thereby mooting the motion to strike.

¶ 93 Based on the record, we agree that defendants failed to preserve the claim that the trial court erred in refusing to strike Berger's testimony in their written motion, but did present this argument at the hearing. More importantly, we agree that the trial court properly denied the motion to strike. Defendants did not object to Berger's qualifications as an expert, though they did note that the lack of objection was pending cross-examination. In ruling on the motion to

strike Berger's testimony, the court acknowledged that Berger had been deposed and provided various reports to put defendants on notice. Accordingly, it opined that a proper motion to strike should have been brought earlier that would have allowed plaintiff to improve Berger's presentation or seek a new expert witness. Ultimately, the court correctly reasoned that defendants' arguments went to the weight of Berger's testimony and not its admissibility.

¶ 94 Likewise, the court denied the motions for directed verdict, finding that enough evidence was presented on each count and it was up to the jury to assign weight and determine credibility of the evidence presented. Defendants asserted in their posttrial motion that Catmet failed to prove it suffered damages as a result of Melnick's alleged breaches and that Catmet only presented "speculative, conjecture-based damages alleged by Allen Berger." This argument raises defendants' issue with the damages evidence presented at trial and does not constitute waiver of that issue. As in the trial court, defendants remain free to argue that the weight of Berger's testimony was insufficient to prove the damages awarded in this case.

¶ 95 B. Sufficiency of the Evidence

¶ 96 1. *Judgment Notwithstanding the Verdict*

¶ 97 Defendants claim that the court below erred in denying its motions for judgment notwithstanding the verdict (judgment *n.o.v.*). A circuit court may only enter judgment *n.o.v.* where all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006).

¶ 98 This standard is a "high one" and "judgment *n.o.v.* is inappropriate if 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *Id.* quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). We review the circuit court's ruling on such a motion *de novo*. *Id.* In so doing, we do not weigh the evidence or credibility of witnesses or substitute our judgment for that of the jury. *Id.* In fact, "the trial court may not grant judgment *n.o.v.* where there is any evidence demonstrating a substantial factual dispute or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Bulger v. Chicago Transit Authority*, 345 Ill. App. 3d 103, 123 (2003).

¶ 99 Defendants argument that Catmet failed to introduce any evidence of damage to support submitting the case to the jury or for the jury's verdict is not persuasive. There was evidence that Melnick was disgruntled at Catmet and upset with Leahy at the time he began working with the 4M defendants and the S&S defendants. Also at this time, Melnick began changing operating procedures, paperwork deficiencies proliferated, and Melnick was concealing various operations with and payments from Leahy. The jury also heard evidence that Melnick went to work for 4M after he was fired and saw documentation that large sums were transferred amongst 4M, North Shore, and Melnick during this time.

¶ 100 Berger testified that he was familiar with established purchasing schemes and testified that evident in this case were: extra layers of suppliers; reducing or eliminating documentation; paying round numbers that cover multiple invoices; failure to establish the quality of purchases; maintaining several sources of corporate information; fictitious revenues, such as intercompany transfers between RAM and Catmet treated as income; and frequent cash deposits. Berger also testified to the vast increase in unsupported or conflicting financial information in Catmet's

records. This testimony was corroborated by the testimony of Leahy and others that documentation was missing from the files and Melnick was acting against Catmet policy and industry norms.

¶ 101 Defendants did present testimony in rebuttal and challenged Berger's findings. However, they did not present their own expert to rebut any testimony and rested on defendants' own testimony concerning the facts and evidence of the case. Defendants all suffered vast credibility concerns based on their repeated impeachments. Furthermore, as instructed by the court, the facts could be proven by circumstantial evidence and the jury could infer defendants' computers contained information adverse to their case. Accordingly, there is evidence demonstrating a substantial factual dispute and the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome and judgment *n.o.v.* was properly denied.

¶ 102 2. *Jury Verdict*

¶ 103 Defendants contend that the jury verdict was not supported by the evidence presented. As such, they argue that they are entitled to a new trial because the verdict was against the manifest weight of the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). While not as high a standard as that for judgment *n.o.v.*, a verdict is against the manifest weight of the evidence where an opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* We grant the finder of fact deference as it is in the best position to observe the conduct of the parties and witnesses and assess the credibility of witnesses, the weight to give to the evidence, and the inferences to be drawn from the evidence. *Tully v. McLean*, 409 Ill. App. 3d 659, 670-71 (2011).

¶ 104 Catmet presented evidence to support the jury's verdict. The credibility of the witnesses is obviously a central matter in this case and great deference is granted to the fact finder's conclusions. Berger testified to the fraud indicators he found while researching the files associated with this case. He presented the results of his investigation, including unsupported checks and money transfers and provided a basis for his calculations. Defendants attacked Berger's calculations and argued that his conclusions were speculative and improper. Melnick presented testimony asserting that these calculations were incorrect.

¶ 105 Despite the foregoing characterizations by defendants, we find that the evidence presented was sufficient to support the jury's findings, especially considering the fact that the credibility of the witnesses was key to this case. The jury was properly instructed that the missing computer files could be used against defendants where a negative implication arose. Defendants were repeatedly impeached based on the spoliation of evidence and their false discovery responses and affidavit. Therefore, the jury's findings were not unreasonable, or arbitrary, and reflect that they were based on the evidence. We will " ' not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.' " *Id.* quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53. (1992).

¶ 106 3. *Damages*

¶ 107 Defendants contend in their third argument that the jury erred in awarding monetary damages because Catmet failed to provide sufficient evidence of any damage. The determination of damages is a question of fact and a reviewing court will not lightly substitute its judgment for that of the trier of fact. *Tri-G, Inc. v. Burke, Bosselman & Weaver,* 222 Ill. 2d 218, 247 (2006). For a reviewing court to upset a jury's assessment of damages, there must be a clear indication

that the award resulted from a failure to follow a rule of law, consideration of erroneous evidence, or from passion or prejudice. *Id.* Where these factors are not clear and the plaintiff establishes damages to a reasonable degree of certainty, they will be affirmed on review. *Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 383-84 (2004).

¶ 108 Defendants again attack Berger's testimony as speculative and based on faulty assumptions. They assert that Berger's lack of industry knowledge lead to incorrect conclusions as to value and his failure to include value for the resale of items such as empty canisters and the cutting dust. They contend that Berger's reliance on the three transactions to determine his base price of $6.50 per pound of loose catalyst was completely unreliable and he should have considered A-1's documents to determine the rate they paid.

¶ 109 Berger was qualified as an expert and he provided support for his opinions by testifying that he utilized other relevant arms-length transactions in reaching his opinions. Berger did not utilize defendants' transactions because they had deleted and corrupted their files which led him to believe that anything relating to defendants' transactions was unreliable. Defendants did not offer an expert to refute Berger's opinions, and defendants faced severe credibility issues that would hobble any attempt to demonstrate that Catmet's evidence was erroneous.

¶ 110 Berger gave explanations as to his methods and defendants were free to submit evidence to rebut those findings. However, defendants asserted nothing more than open-ended statements and unsupported claims to try and discount Berger's testimony. Defendants did not introduce into the record any reliable or credible evidence to support rejection of the jury's findings. It is clear that any attempt by defendants to do so was impaired by the negative assumptions based on the spoliation of evidence by Hansen and Melnick, the many undocumented transactions resulting from Melnick and Hansen's paperwork methods, their failure to produce their computer

hard drives, lack of any third party support, and defendants' weak arguments relating to Berger's calculations and conclusions were very limited and do not support vacating the jury's award.

¶ 111 The 4M defendants also assert that 4M was not incorporated until July 2004; therefore, they argue that it was improper to hold 4M liable for the 11 transactions with Gelbard that occurred before 4M existed. However, as pointed out by Catmet, 4M was found liable for conspiracy and the function of such a claim is to extend full liability to all who have merely planned, assisted, or encouraged the action. *Gillenwater v. Honeywell International, Inc.,* 2013 IL App (4th) 120929 ¶ 71. Accordingly, 4M faces full liability for the scope of the conspiracy claim against it, which includes that time frame that Tomassini operated 4M as a sole proprietorship.

¶ 112 The 4M defendants add that a party may not receive multiple recovery for the same injury and, if this court finds damages were proved, may modify the award of damages to remedy the issue of multiple recovery. *Turner v. Firstar Bank*, 363 Ill. App. 3d 1150, 1158 (2006). Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994). The 4M defendants argue that the jury erred by awarding damages of $480,779 for the additional loss attributable to the overpayment scheme in the unsupported checks scheme damages awarded against Melnick. Therefore, the 4M defendants conclude that the award against them must be vacated because this is an impermissible double recovery.

¶ 113 We agree that the award should be modified as suggested by Catmet, not vacated. The jury awarded damages against the 4M defendants and Melnick in the overpayment scheme and, as noted by the 4M defendants, could only reach the amount awarded by accepting Berger's calculation for the additional losses of $480,779. These transactions were included in the unsupported checks scheme damages entered against Melnick, and we find that the proper

remedy is to reduce the damages awarded under that scheme by $480,779 to $2,353,931.50, so as not to allow the 4M defendants to escape liability as clearly found by the jury.

¶ 114 4. *Punitive Damages*

¶ 115 Defendants contend that the jury erred in awarding punitive damages or, alternatively, the punitive damages awarded were excessive in light of the alleged harms caused. We begin by noting that punitive damages are not favored in the law. *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 828 (2003). The purpose of punitive damages is retributive, to deter the defendant, and others, from committing similar wrongs in the future and will only be awarded where the conduct is willful or outrageous due to evil motive or a reckless indifference to others. *Tully*, 409 Ill. App. 3d at 669-70. If the defendant's conduct does not rise above and beyond that required for the basis of the underlying action, punitive damages should not be awarded. *Petty*, 343 Ill. App. 3d at 828.

¶ 116 Our review of a challenge to an award of punitive damages begins with consideration of the initial decision by the trial court of whether punitive damages are available as a matter of law. *Id.* at 828-29. Punitive damages are available as a matter of law for a cause of action for fraud (*Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 179 (2008)) as well as for a claim of breach of fiduciary duty (*Tully*, 409 Ill. App. 3d at 670), and there is no dispute that they are available in the instant matter. Thus, our standard of review is *de novo*.

¶ 117 We next consider the jury's determination that the defendants actions were willful and outrageous due to evil motive or reckless indifference to others. This presents a question of fact and is reviewed under the manifest weight of the evidence standard. *Tully*, 409 Ill. App. 3d at 670. The evidence showed that defendants were all sophisticated businessmen who repeatedly entered into transactions that clearly did not benefit Catmet. In addition, Melnick, while

employed by Catmet, took actions against Catmet's interests, including accepting at least six cash payments from S&S totaling $12,000 for what was testified to as a few minutes of consulting work. We agree with Catmet that defendants' willfulness and the aggravating factors were proven at trial and the jury's finding was not against the manifest weight of the evidence.

¶ 118 The foregoing actions demonstrated a willful breach of fiduciary duty and disregard for Catmet. Moreover, the defendants' subsequent behavior after Catmet sought redress in court for defendants' lying under oath, submitting false discovery responses, hiding and destroying evidence, and delaying proceedings in attempts to avoid depositions of key witnesses and preemptively dismiss the matter, all constitute aggravating factors. These actions demonstrate a complete disregard for the parties and the court and support the imposition of punitive damages.

¶ 119 Finally, the question of whether punitive damages are excessive is a constitutional question based on the due process clause of the fourteenth amendment, which prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 466-67 (2006). This issue is reviewed *de novo*. *Gehrett*, 379 Ill. App. 3d at 181. Three "guideposts" are to be considered in this review, " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " *Lowe Excavating Co.*, 225 Ill. 2d at 470, quoting *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003).

¶ 120 An award of compensatory damages raises the presumption that a plaintiff has been made whole; however, where a defendant's behavior is reprehensible, further sanctions to punish or

deter similar actions may be proper. *Id.* The degree of reprehensibility is the key consideration in determining the reasonableness of punitive damages and is determined by considering five factors, any one of which may lead to a finding of reprehensibility alone if the facts warrant:

> "(1) whether the harm caused was physical as opposed to economic; (2) whether the tortuous conduct evinced an indifference to or a reckless disregard for the health and safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or mere accident." *Id.*

¶ 121 In the instant matter, the harm was purely economic and defendants' conduct did not evince an indifference to the health and safety of others. However, the evidence, and the defendants' own testimony, demonstrated that Catmet was financially vulnerable and ultimately quit the catalytic converter processing business. Furthermore, defendants repeatedly committed their fraudulent transactions and repeatedly submitted false information to the court. These actions were deliberate acts of trickery and deceit and were not accidental.

¶ 122 As for the considerations of the disparity between the actual harm to Catmet and actual damages and the punitive damages, we find that the ratio of damages is not constitutionally infirm. The *Tully* court fully addresses this issue and notes that there is no firm rule or standard, but that courts have affirmed damages in a ratio of punitive damages to compensatory damages anywhere from 1:1 to 50,000:1. *Tully*, 409 Ill. App. 3d at 678-79. The jury awarded punitive damages just over a 1:1 ratio against the defendants in this case. Based on the repeated, extreme behavior of the defendants' and the disregard displayed toward their business counterparts and

the court, the jury properly found defendants' conduct reprehensible and the punitive damage awards were proper and not excessive.

¶ 123 5. *Testimony of William Metzdorff*

¶ 124 The 4M defendants argue that the trial court erred in allowing William Metzdorff to testify regarding transactions by 4M that occurred after July 15, 2005. 4M asserts that the only purpose for Metzdorff's testimony was to prejudice the jury by introducing evidence of payments from Midwest Core to 4M and 4M to Melnick from September 2005 to December 2008. 4M asserts that because Melnick stopped working for Catmet on July 15, 2005, these transactions have no probative value as to the alleged fraud in this case. 4M also maintains that the high amount of the jury award demonstrates that this evidence only served to enflame the jury and prejudice 4M's case.

¶ 125 A trial court's ruling with regard to the admission of evidence will not be disturbed absent a clear abuse of discretion. *Gill v. Foster,* 157 Ill. 2d 304, 313 (1993). A court clearly abuses its discretion on evidentiary rulings when they are "arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the court." *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1151 (2010). Evidence may be excluded, even if relevant, "if its probative value is substantially outweighed by such factors as prejudice, confusion, or potential to mislead the jury." *Gill*, 157 Ill. 2d at 313. If we determine the trial court erred in resolving an evidentiary issue, we will remand for a new trial only if the error was substantially prejudicial and affected the outcome of the trial. *Liberty Mutual Ins. Company v. American Home Assurance Company*, 368 Ill. App. 3d 948, 960 (2006).

¶ 126 We cannot say that the trial court clearly abused its discretion in allowing Catmet to present Metzdorff's testimony in support of its theory that the 4M defendants continued to reap

the rewards of their schemes after Melnick had been fired. This was confirmed by Metzdorff's testimony regarding the $1 million paid to Melnick by 4M and the $2 million paid to 4M by North Shore.

¶ 127 Metzdorff's testimony also substantiated Melnick's earlier testimony as Catmet's adverse witness that he received $470,000 from 4M in loans that remained unpaid. This testimony corroborated the testimony of Melnick and Tomassini about disbursements to Melnick and that these payments were not supported. The 4M defendants were granted the opportunity to attempt to refute Catmet's theory by presenting evidence that North Shore's payments were for goods received, but were unable to produce proof that all payments were legitimate. Accordingly, Metzdorff's testimony was relevant to Catmet's theory as to how defendants received payment under the fraud scheme and was not unduly prejudicial, especially since the defendants had the opportunity to counter the testimony.

¶ 128 C. Sanctions Against 4M and Tomassini

¶ 129 The 4M defendants assert that the circuit court erred in granting plaintiffs' motion for discovery sanctions against them in the amount of $100,000 for failing to comply with discovery. Catmet sought sanctions against 4M and Tomassini pursuant to Illinois Supreme Court Rules 137 and 219(c). Following briefing and argument of the parties on these issues, the trial court ruled, *inter alia*, that monetary sanctions pursuant to Rule 137 were proper in this case and granted Catmet leave to file a fee petition for costs related to the deposition of Gelbard. After consideration of the petition, which sought $171,005.03, the court entered a sanction of $100,000 against 4M, Tomassini, and Melnick, finding them jointly and severally liable.

¶ 130 The 4M defendants acknowledge that Catmet's petition for fees was for $171,005.53, but parse it stating that $136,688.22 related to Gelbard's deposition, $1,877 was related to obtaining

compliance with discovery, and the remainder was the cost of bringing the motion for sanctions. They argue that these amounts are not only unreasonable, but maintain that Gelbard's deposition only related to the 12 transactions involving 4M and damages from those transactions that could be attributed to the 4M defendants were only $64,827. The 4M defendants contend that, as Berger worked with Catmet since 2006, it may be presumed that Catmet knew the true value of damages and should not be rewarded now for such expenditures that exceed the damages available.

¶ 131 The 4M defendants argue in their brief that sanctions should not have been imposed pursuant to Rule 219(c) and were unreasonable under case law considering that Rule, citing to this court's discussion in *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464 (2006), noting that sanctions must be just and proportionate to the offense; however, that discussion in *Gonzalez* is limited to the consideration of sanctions imposed under Rule 219. The 4M defendants argue that when awarding sanctions, the trial court must serve the goal of accomplishing discovery rather than inflicting punishment. *Mueller v. Insurance Benefit Administrators, Inc.*, 175 Ill. App. 3d 587, 598 (1988). In a footnote in their reply brief, the 4M defendants string cite cases that discuss the premise that there must be a reasonable connection between fees awarded and the amount involved in the litigation. *Gambino v. Boulevard Mortgage Corporation*, 398 Ill. App. 3d 21, 66-67 (2010); *Plambeck v. Greystone Management*, 281 Ill. App. 3d 260, 273 (1996); *Richardson v. Haddon*, 375 Ill. App. 3d 312, 315 (2007).

¶ 132 We agree with Catmet that the trial court did not err in granting sections pursuant to Rule 137. The 4M defendant's cite to the *Gonzalez* court's discussion of Rule 219 and focus their argument on that rule, a more restrictive rule and another attempt to dissemble the record and avoid the repercussions of their admitted misdeeds. The *Gonzalez* court provides a helpful

overview of Rule 137 and our standard of review which we must consider in affirming the sanctions imposed against the 4M defendants:

> "The rule authorizes the court, upon motion or upon its own initiative, to impose on a represented party, an attorney, or both, 'an appropriate sanction.' [Citation.] The decision to impose sanctions under Rule 137 is entrusted to the sound discretion of the trial court, is 'afforded considerable deference' on appeal, and will be overturned only where the appellate record discloses an abuse of discretion. [Citation]. An abuse of discretion occurs where the trial court's finding is against the manifest weight of the evidence or where no reasonable person would adopt the same view. [Citation.] Accordingly, a reviewing court considers whether the imposition of sanctions was informed, based on valid reasoning, and follows logically from the facts." *Gonzalez,* 369 Ill. App. 3d at 463-64.

As any pleading, a motion for sanctions is judged at the time it is filed. Therefore, the court considering such a motion determines what was reasonable at the time and does not engage in hindsight. *Gambino*, 398 Ill. App. 3d at 73.

¶ 133 This case is distinguishable from those cited by the 4M defendants on the law and/or the facts and the trial court's finding the 4M defendants and Melnick jointly and severally liable for discovery sanctions in this case was proper. While *Plambeck* and *Richardson* discuss the reasonableness of a petition for attorney fees, both cases involve landlord-tenant disputes and not Rule 137 sanctions. In *Gambino*, the court noted that Rule 137 is to prevent counsel or a party from making assertions of fact or law without support. However, sanctions may be reversed if at the time the defendants presented their answer, there was evidence of record that would have

validated their answer. *Id.* In *Mueller*, sanctions were not proper because there was no evidence that plaintiff's counsel willfully failed to appear at a deposition and his actions were not a "deliberate and pronounced disregard for the discovery rules or court." *Mueller*, 175 Ill. App. 3d at 598.

¶ 134 In this case, there is ample evidence, and admissions, of the 4M defendants' and Melnick's deliberate and pronounced disregard for the court. The defendants argue that they voluntarily amended their responses when they were made known. But, as the trial court found, the defendants made numerous affirmative misrepresentations and intentionally omitted facts in their responses and affidavit. They also attempted to have the cause of action dismissed using these misrepresentations and omissions as support. These actions are clear violations of Rule 137 and sanctions were appropriate.

¶ 135 The 4M defendants' argument that the fees are disproportionate to the claim is not well taken. As highlighted in *Gambino*, the consideration of a motion for sanctions does not include hindsight, but is done under the light of what was reasonable at the time. We will not presume that Catmet understood the extent of damages because Berger had been reviewing documents for them. Even if this were true, the argument would fail. As Catmet points out, the misrepresentations were central to the cause of action and had to be disproved for the cause of action to advance, especially as the defendants' actively contested Catmet's discovery requests and moved to dismiss the case. The total damages in this case far exceeded the damages from the direct claims involving Gelbard and can be considered in relation to the sanction as Gelbard's deposition was necessary to maintaining the cause of action.

¶ 136 III. CONCLUSION

¶ 137 For the reasons stated, we affirm the judgment of the circuit court and modify the damages award against Melnick for the unsupported checks scheme liability to $2,353,931.50.

¶ 138 Affirmed, modified in part.