Circuit Court for Baltimore County
No. 03-C-18-003682

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 1385 & 1596

September Term, 2021

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FZATA INC., ET AL.

V.

YONGJUN GUAN

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Wells, C.J.,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: November 21, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from an action that primarily involves claims for breach of contract and fraud. The plaintiff, Dr. Yongjun Guan, alleged that he is a co-founder of FZata, Inc., a startup biotechnology company. He alleged that other founders of the company, defendants Dr. Zhiyong Yang and Dr. Hanping Feng, breached an agreement to give him a minority ownership interest in the company. Dr. Guan also alleged that Dr. Yang made false representations about this ownership interest.

After a trial in the Circuit Court for Baltimore County, the jury found FZata, Dr. Yang, and Dr. Feng liable for breach of contract. The jury awarded compensatory damages of $1,762,500, the amount that Dr. Guan had argued was the value of his claimed ownership interest in FZata. Finding Dr. Yang liable for fraud, the jury awarded punitive damages of $100,000.

The defendants have appealed. Among other things, the defendants contend that the evidence produced at trial was insufficient to prove the existence of an enforceable contract and insufficient to prove the amount of damages. For the reasons explained in this opinion, we agree that the evidence was insufficient to support the verdicts. Consequently, we reverse the judgments awarding compensatory and punitive damages to the plaintiff.

## BACKGROUND

### A. Founding of ATA, LLC and FZata, Inc.

As of 2014, Yongjun Guan worked as an assistant professor at the University of Maryland School of Medicine, the medical school affiliated with the University of Maryland, Baltimore. Dr. Guan, who holds a Ph.D. in immunology, has focused most of

his career on research concerning the Human Immunodeficiency Virus (HIV). His position primarily involved research aimed at developing an HIV vaccine.

Also as of 2014, Hanping Feng worked as an associate professor at the University of Maryland School of Medicine. Dr. Feng, who holds a Ph.D. in microbiology and immunology, was the leader of a research endeavor concerning clostridium difficile ("c.diff"). C.diff is a bacteria that is mostly resistant to antibiotics. C.diff can produce infections to the intestines, sometimes resulting in death.

Around March 2014, after funding for Dr. Guan's research position was not renewed, he accepted a position in the research team headed by Dr. Feng. During their collaboration, Dr. Guan worked to develop an antibody that can neutralize c.diff toxins and that might be used for the treatment of c.diff infections.

Zhiyong Yang, who holds a Ph.D. in neuroscience, is a former research associate at the University of Maryland School of Medicine and is married to Dr. Feng. On March 10, 2014, Dr. Yang filed articles of organization creating a Maryland limited liability company known as "ATA, L.L.C." The stated purpose of the company was to "develop[] novel antibodies for therapeutics and diagnostics and related technology." According to other documents, the name "ATA" stands for either "Antibody Technology & Application" or "Antibody Technology Appliance."

On April 5, 2015, Dr. Yang and Dr. Feng hosted a meeting at their home with Dr. Guan and with Jibin Zhao. Mr. Zhao, a longtime friend of Dr. Feng, is an investor and executive for various businesses, including companies based in China. During the meeting, the four participants discussed plans to start a new company that would use

antibody technology to develop treatments for c.diff and other diseases.

Dr. Yang summarized the group discussions in a three-page memo titled "ATA 1st Founder meeting." Afterwards, Dr. Yang emailed a copy of the memo to the other participants. The memo included a list of "[t]hings to do" assigned to the participants. One of the tasks, assigned to Dr. Yang, was to "[c]hange ATA to C. Corp. format."

The "ATA 1st Founder meeting" memo concluded with a section under the heading "[Mr. Zhao]: Company Structure."[1] That section reads:

> [Mr. Zhao]: CEO, $1M initial investment, 45% share, no salary for now
>
> [Dr. Feng]: consultant, no share, no salary
>
> [Dr. Yang]: VP, 45% share, no salary for now (compensate later when funding available)
>
> [Dr. Guan]: CTO, 10% share, $75K/yr salary +health insurance (salary is subjected to adjustment later based on the performance of the company)

Throughout much of 2015, Dr. Yang made similar memos documenting meetings in which she, Dr. Feng, Dr. Guan, and Mr. Zhao participated. Dr. Yang titled some of these memos "Weekly Board Meeting" memos. After each meeting, Dr. Yang sent a copy of the memo to each participant by email. These memos summarized discussions of ongoing efforts to set up the operations for the new company.

The memo dated August 24, 2015, describes a "readjust[ment]" of the ownership structure. It states: "ATA founders will readjust the shares due to the fact that ATA will be mainly operated in US as for now, so [Mr. Zhao] is less involved[.]" It specifies:

[1] The memo used each person's first and last initials instead of the person's name: "JZ" for Mr. Zhao, "HF" for Dr. Feng, "ZY" for Dr. Yang, and "YG" for Dr. Guan.

"[Mr. Zhao] will give out 10% share, 5% to [Dr. Feng], 5% to [Dr. Guan]." It states that the resulting ownership structure would be the following: "[Dr. Feng]: 50%; [Mr. Zhao]: 35%, [Dr. Guan]: 15%."[2]

Dr. Yang's memos indicate that, although she engaged in preliminary consultations with attorneys, she herself undertook most of the tasks associated with forming a new corporation. On October 6, 2015, Dr. Yang filed a certificate of incorporation in the State of Delaware with the name "FZATA, INC." According to Dr. Yang, the two letters "F" and "Z" stand for "Feng" and "Zhao." The letters "ATA" come from the name of the prior entity, ATA, LLC, meaning either "Antibody Technology & Application" or "Antibody Technology Appliance."

After the creation of FZata, Dr. Yang began acting as "CEO" of the new company. It appears, however, that FZata began its operations without any elected board of directors. At that time, no written shareholder agreement existed, and no person had received stock certificates reflecting any ownership of the company.

In November 2015, Dr. Guan began working full time for FZata under the title of Chief Scientific Officer, without any written agreement governing the terms of his employment. FZata paid Dr. Guan a salary of approximately $75,000 per year, plus certain benefits. His job responsibilities included supervising FZata's laboratory in two main branches of research: one focusing on an antibody for c.diff, and the other focusing

[2] The memo noted: "Founders all agree that [Mr. Zhao] made a big sacrifice. ATA shall makeup for [Mr. Zhao] when form China company." According to the parties, their long-term vision included plans to set up a manufacturing facility in China.

on a vaccine and antibody for HIV.

### B. Incubator Agreement and Supplemental Agreement

During the early stages of FZata's operations, FZata engaged in negotiations with Sage-angel BioIncubator Corp., an American company that is related to a Chinese investment entity known as Shenzen Sangel Venture Capital, Limited Partnership (collectively "Sage-angel"). Sage-angel sought to acquire a minority interest in FZata by making a loan or capital investment that would help fund FZata's operations.

FZata and Sage-angel entered into a contract titled the "Incubator Agreement" on or about November 30, 2015.[3] The parties named in the Incubator Agreement included not only FZata and Sage-angel, but also Dr. Yang, Dr. Guan, Mr. Zhao, and Ms. Qing Hu (Mr. Zhao's wife). In the Incubator Agreement, Sage-angel promised to make an interest-free loan of $750,000 to FZata. In return, FZata and its "shareholders" promised to "transfer 6% equity in [FZata]" to Sage-angel.

The Incubator Agreement stated that FZata had "registered capital" of $500,000 at the time of the agreement. The document identified Dr. Yang, Dr. Guan, and Ms. Hu as "shareholders" and "Current Shareholders" of FZata. FZata and its "Current Shareholders" represented that all shareholders were "in legal possession of [their] respective shares." The document included a table setting forth the "current shareholding structure" of FZata:

[3] The document states that the parties entered into the contract on "November 31, 2015."

| Shareholder | Subscription of Registered Capital ($10,000) | Equity Percentage |
|---|---|---|
| Zhiyong Yang | 30 | 60% |
| Qing Hu | 12.5 | 25% |
| Yongjun Guan | 7.5 | 15% |
| Total | 50 | 100% |

The Incubator Agreement provided that, after Sage-angel made the incubation loan, the "ratio of all parties' equities" would be as follows:

| Shareholder | Subscription of Registered Capital ($10,000) | Equity Percentage |
|---|---|---|
| Zhiyong Yang | 28.2 | 56.4% |
| Yongjun Guan | 7.05 | 14.1% |
| Qing Hu | 11.75 | 23.5% |
| [Sage-angel] | 3 | 6% |
| Total | 50 | 100% |

On or about November 30, 2015, FZata also entered into the "Incubator Agreement: Supplemental Agreement," which set forth additional terms concerning the $750,000 loan and acquisition of six percent of the equity. In addition to the parties listed in the Incubator Agreement, the Supplemental Agreement identified Dr. Feng as a party.

Consistent with the Incubator Agreement, the Supplemental Agreement described the "current shareholder structure" as follows: "Zhiyong Yang 60%; Qing Hu 25%; Yongjun Guan 15%." The Supplemental Agreement stated that, after settlement of the incubation loan, the structure would be: "Zhiyong Yang 56.4%[;] Yongjun Guan 14.1%[;] Qing Hu 23.5%[;] [Sage-angel] 6%."

Each of the following parties signed the Supplemental Agreement: representatives of Sage-angel, Dr. Yang, Dr. Guan, Ms. Hu, Mr. Zhao, and Dr. Feng. Ultimately,

however, Sage-angel did not make the $750,000 loan and did not acquire a six percent equity interest as a result of the Incubator Agreement. Sage-angel nonetheless continued to negotiate with FZata with the goal of making a different investment agreement.

### C. The "ATA LLC Company's By-law"

On December 18, 2015, Dr. Yang filed articles of cancellation terminating the Maryland limited liability company known as ATA, LLC.

A few weeks later, on January 12, 2016, Dr. Yang sent an email to Dr. Guan and Dr. Feng with the subject "Company's By-law." The body of the email was a single sentence, identifying an attached file as the "Company By-law mentioned this morning written by [Mr. Zhao] that was sent to [a representative of Sage-angel]."

The attached file was titled "ATA LLC Company's By-law." The document purported to set forth rules for the organization and conduct of "ATA." Among other things, it set forth the rights and obligations of "shareholders," including the right to vote for representatives on the board of directors in proportion to their "capital contribution."

The ATA bylaws included a section titled "Name of Shareholders, Method and Amount of Capital Contribution." This section included the following table:

| Order | Name or title originator | # of Shares | Ratio of shares (%) | Method |
|---|---|---|---|---|
| 1 | Zhiyong Yang | 7,500,000 | 60 | Technology |
| 2 | Qing Hu | 3,125,000 | 25 | Cash |
| 3 | Yongjun Guan | 1,875,000 | 15 | Technology |
| Total | | 12,500,000 | 100 | |

The ATA bylaws stated that each shareholder had the obligation to "[p]ay the subscribed capital contributions on time, or provide all of the current and future technical

resources, intellectual property and professional skills and background[.]" It further provided: "Upon the establishment of ATA, a certificate of capital contribution shall be issued to the shareholders."[4]

### D. Application for Biotechnology Investment Incentive Tax Credit

On June 24, 2016, Dr. Yang, acting as CEO of FZata, submitted an application for a Maryland Biotechnology Investment Incentive Tax Credit. The purpose of the application was to obtain a tax credit based on a proposed $500,000 investment from Sage-angel.

One section of the application asked for "[t]he name, address and the percentage of ownership of each person or entity" holding "equity interests" in the company "of any class or classes that constitute five percent (5%) or more of the total equity capital of the company." In response, Dr. Yang identified three persons: Dr. Yang herself, as an owner of a 60 percent interest in FZata; Ms. Hu, as an owner of a 25 percent interest in FZata; and Dr. Guan, as an owner of a 15 percent interest in FZata.

On October 18, 2016, FZata, acting through Dr. Yang as CEO, entered into an investment agreement with Sage-angel. Under that agreement, Sage-angel agreed to invest $500,000 in FZata, in exchange for four percent of the shares of FZata. The record includes no indication that Dr. Guan or Ms. Hu approved this investment agreement.

[4] A limited liability company is owned by its "members" rather than its "shareholders." *See* Md. Code (1975, 2014 Repl. Vol.), § 4A-101(n) of the Corporations and Associations Article. It does not have "shares" of capital stock.

### E. Proposed Shareholder Agreement

Meanwhile, in a meeting memo dated July 5, 2016, Dr. Yang noted discussions of a "shareholder agreement." This section of the memo states: "So far, its only an Orally agreement[.]" It goes on to say: "[W]e must formalize the shareholder agreement. The (formerly) agreed shareholder structure does not change."

Shortly after that meeting, Dr. Yang circulated a copy of a proposed contract titled "Shareholder Agreement of FZata, Inc." Dr. Yang had drafted the document herself. The document set forth a proposed agreement among FZata and three persons identified as "shareholders": Dr. Yang, Ms. Hu, and Dr. Guan.

The proposed shareholder agreement stated that, although FZata was authorized to issue 5,000 shares of stock, only 1,000 of those shares would "actually be issued" upon signing of the agreement. It attributed "[a]ll of the issued shares" to three shareholders, in accordance with the following table:

| Shareholder | Number of shares | % |
|---|---|---|
| Zhiyong Yang<br>(in stand for Hanping Feng) | 600 | 60 * |
| Qing Hu<br>(in stand for Jibin Zhao) | 250 | 25 * |
| Yongjun Guan | 150 | 15 |

The proposed shareholder agreement included a section titled "Termination of Employment." This section purported to govern the rights of "[s]hareholders who acquire their shares through the employment at FZata" if one of those shareholders "cease[d] to be an employee" of FZata "voluntarily or otherwise[.]" It set forth "service time based restriction[s]" for those shareholders.

Under these restrictions, if the shareholder worked at FZata for less than three years, the shareholder would lose ownership of all shares upon termination of employment. If the shareholder worked at FZata for more than three years but less than five years, the shareholder would lose 75 percent of the shares previously owned. If the shareholder worked at FZata for more than five years but less than ten years, the shareholder would lose 50 percent of the shares previously owned. Finally, if the shareholder worked at FZata for more than ten years, the shareholder would retain all shares. If a shareholder lost ownership of shares under these provisions, those shares would be redistributed to the other shareholders.

After Dr. Yang sent this proposed shareholder agreement to Dr. Guan, he objected to several terms, including the terms governing the rights of shareholders upon the termination of employment. Dr. Guan declined to sign the proposed shareholder agreement.

On October 28, 2016, Dr. Yang sent what she described as an "Employment Termination letter" to Dr. Guan. Acting on behalf of FZata, Dr. Yang stated: "We hereby accept your resignation from FZata, Inc., . . . effective immediately[.]" The letter stated that Dr. Guan would no longer be entitled to any compensation or other benefits from FZata.

Two months after the termination of his employment, Dr. Guan sent a demand letter asking to inspect the books and records of FZata. Through counsel, FZata denied the request, asserting that Dr. Guan was not a shareholder. According to FZata's counsel, Dr. Guan had been obligated to "contribute certain intellectual property and cash" to

FZata in order to acquire an ownership interest, but he had not done so.

### F. Dr. Guan's Complaint and the Defendants' Counterclaims

On April 10, 2018, Dr. Guan filed a complaint in the Circuit Court for Baltimore County against three defendants: FZata, Inc.; Dr. Yang; and Dr. Feng. The complaint centered on allegations that Dr. Yang and Dr. Feng had promised Dr. Guan that he would receive a minority ownership interest in FZata. Dr. Guan sought compensatory damages from all three defendants in the amount of $1,800,000. In addition, he sought punitive damages from Dr. Yang and Dr. Feng.

The first count of the complaint alleged a breach of contract by the two individual defendants and the corporation. Dr. Guan alleged that, in April 2015, Dr. Yang and Dr. Feng agreed that Dr. Guan would receive a 10 percent ownership interest in "the existing company," ATA, LLC, in exchange for his "knowledge and skills" and his "commitment to serve" as Chief Scientific Officer.[5] Several months later, according to the complaint, Dr. Yang and Dr. Feng established FZata, Inc., as the "successor in interest" of ATA, LLC. Dr. Guan alleged that, in November 2015, the parties agreed to increase his ownership share to 15 percent. He further alleged that, in December 2015, the parties agreed to reduce his ownership share to 14.1 percent as part of the Incubator Agreement with Sage-angel. He alleged that the defendants breached these agreements by refusing to recognize his ownership interest in FZata.

[5] The complaint alleged that Dr. Yang and Dr. Feng acted "in their individual capacities as co-founders of [FZata] and as officers of [FZata]" when they made the alleged contract.

In the second count of the complaint, Dr. Guan alleged that Dr. Yang and Dr. Feng had knowingly converted his ownership interest in FZata.

In the third count of the complaint, Dr. Guan alleged that Dr. Yang and Dr. Feng committed fraud. Dr. Guan alleged that, in January 2016, he requested proof of his ownership of FZata. He alleged that, in response, Dr. Yang and Dr. Feng sent a copy of a document titled "ATA Company Bylaws," which showed that Dr. Guan had a "15% vested ownership interest" in "ATA, LLC." According to the complaint, when Dr. Guan "asked why FZata's name [was] not on the document," Dr. Yang "responded . . . by stating that 'the two companies are the same' and further assured Dr. Guan that the 'ATA Company Bylaws are FZata's Bylaws[.]'" Dr. Guan alleged that, at the time when Dr. Yang made these statements, Dr. Yang knew that she had already dissolved ATA, LLC.

The defendants filed an answer in which they denied liability for all causes of action set forth in the complaint. The defendants also filed counterclaims against Dr. Guan, alleging a violation of the Maryland Uniform Trade Secrets Act, a violation of the federal Defend Trade Secrets Act of 2016,[6] and breach of fiduciary duty.

The counterclaims concerned FZata's research and development of vaccines and antibodies for HIV. The defendants alleged that, after his departure from FZata in October 2016, Dr. Guan refused to return "project plans, experimental designs, experimental data, and documents related to FZata's HIV research[.]" The defendants alleged that, as a result of Dr. Guan's refusal to return these materials, FZata was forced

[6] 18 U.S.C. § 1836.

to discontinue its HIV research. The defendants sought compensatory damages based on Dr. Guan's alleged misappropriation of trade secrets.

More than a year after the filing of the pleadings, FZata, Inc., issued stock certificates to five stockholders: Dr. Yang, Dr. Feng, Ms. Hu, Sage-angel, and the University of Maryland, Baltimore. Around the same time, FZata and its stockholders executed a Stockholders Agreement governing their voting rights and other rights with respect to their shares of capital stock.

### G. Pretrial Matters

Two weeks after the filing of the complaint, the circuit court issued a scheduling order, which established deadlines for the identification of expert witnesses and for making related disclosures set forth in Md. Rule 2-402(g)(1). Under that Rule, a party may require another party "to identify each person . . . whom the other party expects to call as an expert witness at trial; . . . to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions." Md. Rule 2-402(g)(1)(A). The scheduling order established October 22, 2018, as the deadline for Dr. Guan to complete his expert witness disclosures

Shortly after the court issued the scheduling order, the defendants propounded interrogatories to Dr. Guan. One of the interrogatories asked Dr. Guan to provide each of the expert witness disclosures covered by Md. Rule 2-402(g)(1)(A). In response, Dr. Guan stated that he had not identified any expert witnesses at that time and that he reserved his right to supplement his response.

Dr. Guan filed a designation of expert witnesses on October 24, 2018. Dr. Guan expressed his intention to call three persons to give expert testimony at trial: one described as an expert in "vaccine research and development"; one described as an expert in "corporate valuation"; and one described as an expert in "business valuation."[7] Dr. Guan stated that each witness would testify based on the witness's "education, training, and background" and would render opinions "within a reasonable degree of certainty." Otherwise, the filing provided no information about the findings or opinions of the three designated experts.

The defendants filed their own expert witness designation on October 24, 2018. The defendants expressed their intention to call "Michael J. Kresslein, JD, CPA, CFE, CVA," to testify as an expert concerning the damages sustained in connection with their counterclaims. Along with this filing, the defendants served a copy of a written report prepared by Mr. Kresslein.

In that report, Mr. Kresslein expressed his opinion about the damages that the defendants sustained as a result of Dr. Guan's alleged misappropriation of HIV research materials. Mr. Kresslein assessed the damages by determining "the value of FZata both with and without the business unit pertaining to the HIV research" as of the date of Dr. Guan's departure from FZata. He opined that the value of "a 100% ownership interest in FZata, *with* the HIV-related business unit" was $12,500,000 as of the valuation date. He opined that the value of a "100% ownership [interest] in FZata *without* the HIV-related

[7] In addition, Dr. Guan "reserve[d] the right to call to testify at trial any of the experts designated by any other party."

business unit" was "80-85% of this value, or $10,000,000 to $10,625,000." On that basis, he calculated that the defendants sustained "damages in the range of $1,875,000 to $2,500,000."

Within two weeks after Dr. Guan filed his designation of expert witnesses, the defendants moved to strike that filing. The defendants asserted that, in violation of the scheduling order, Dr. Guan had failed to provide the expert witness disclosures required by Md. Rule 2-402(g)(1)(A).

In December 2018, the court issued an order partially granting the motion to strike Dr. Guan's designation of expert witnesses. The court ruled that, as of the date of the order, the three persons whom Dr. Guan had identified as experts were not "authorized to give expert testimony" in the case.

Several months later, Dr. Guan filed a written statement addressing matters to be considered at a pretrial conference under Md. Rule 2-504.2. In his pretrial statement, Dr. Guan listed Mr. Kresslein—the valuation expert retained by the defendants—as an expert witness that he intended to call during his case-in-chief. Dr. Guan also stated that he intended to offer the report prepared by Mr. Kresslein as evidence at trial.

The defendants filed a motion in limine, asking the court to preclude Dr. Guan from calling Mr. Kresslein as an expert witness during his case-in-chief. The defendants argued that Mr. Kresslein's opinions about the damages resulting from the alleged misappropriation of trade secrets had no relevance to the claims for breach of contract, conversion, and fraud. After a hearing, the court denied the motion in limine.

A jury trial on all claims began in March 2020. After five days of trial, Chief

Judge Barbera of the Court of Appeals (now known as the Supreme Court of Maryland) issued an order suspending all jury trials in Maryland as an emergency measure in response to the COVID-19 pandemic. Consequently, the circuit court suspended the trial in this case indefinitely. Several months later, the court formally declared a mistrial and scheduled a new trial to begin in September 2021.

### H. Evidence Presented at Trial

For eight days beginning in September 2021, the circuit court conducted a jury trial on Dr. Guan's claims for breach of contract, conversion, and fraud, and on the defendants' counterclaims for misappropriation of trade secrets and breach of fiduciary duty.

Dr. Guan introduced several documents that, he contended, were evidence of an agreement under which the defendants promised to give him an ownership interest in FZata. These documents included: the "ATA 1st Founder meeting" memo dated April 5, 2015, which attributed a "10% share" of a new company to Dr. Guan; the memo dated August 24, 2015, which stated that Mr. Zhao would "give" an additional "5%" share to Dr. Guan, increasing Dr. Guan's share to "15%"; the Incubator Agreement and Supplemental Agreement dated "November 31, 2015," which identified Dr. Guan as a shareholder of FZata and provided that his ownership interest would decrease from 15% to 14.1%; the "ATA LLC Company's By-law" document, emailed by Dr. Yang on January 12, 2016, which stated that Dr. Guan was a 15% shareholder of "ATA"; and the Biotechnology Investment Incentive Tax Credit application dated June 24, 2016, which identified Dr. Guan as the owner of a 15% equity interest in FZata.

During her testimony, Dr. Yang admitted that, at their first meeting in April 2015, the parties made an oral agreement under which Dr. Guan would receive a 10 percent ownership interest in a new corporation. Dr. Yang further admitted that, at the meeting in August 2015, the parties agreed that Mr. Zhao would give a five percent ownership interest to Dr. Guan, increasing Dr. Guan's ownership interest to 15 percent. According to Dr. Yang, however, the parties "did not reach a final agreement" at those times. In her understanding, the parties made an "agreement to give him 15 percent of [the] shares[,]" but this agreement was "conditional" on the parties signing a "final agreement with all the details and conditions listed[.]" Dr. Yang characterized the company structures listed in her memos as mere "proposal[s]," which were "under discussion" and remained subject to change. Dr. Yang said that, when she prepared these memos, she was "just jotting down some notes" and did not intend for her notes to constitute a binding contract.

To similar effect, Dr. Feng testified that the memo from April 2015 reflected a "proposal" for the company's ownership structure and that the memo from August 2015 reflected "change[s]" that the parties had "proposed" at that time. According to Dr. Feng, these memos recorded their "plan," but "[n]othing was finalized" at those times.

In his testimony, Dr. Guan disagreed with Dr. Yang's assertion that the parties failed to reach a "final agreement" on the company's ownership structure. Dr. Guan asserted that, at the first meeting in April 2015, the parties "reached an agreement on the shareholder structure" of the new company, under which Dr. Guan would own a 10 percent share. Dr. Guan further stated that, during that first meeting, the parties agreed to "convert ATA LLC into ATA, Inc." Dr. Guan asserted that, at the meeting in August

2015, the parties "reached a new agreement," under which Dr. Guan would own a 15 percent share of the new company. Dr. Guan asserted that these agreements were "recorded" in the memos prepared by Dr. Yang and shared with all participants by email.

Dr. Guan testified that the other participants did not place any "conditions" on the promise that he would receive 10 percent (and later 15 percent) ownership of the new company. Dr. Guan recalled: "In fact, at the very beginning, Mr. Zhao as the only investor . . . said specifically during the board meeting, founder meeting, that he will not set any condition on us because we should trust each other as a co-founder." Dr. Guan testified that he initially began working without a salary, performing tasks such as drafting the company's business plan and helping to create the company's website, because he considered himself to be a "co-founder and owner of the company," and not a mere employee.

Dr. Yang testified that, during various meetings in 2015, the parties discussed a "vesting" requirement, under which Dr. Guan would be required to work for the company for several years before gaining ownership of shares. Dr. Yang stated that, "from the very beginning," the parties discussed a "long process for the development of the company." Dr. Yang asserted that Dr. Guan "underst[ood]" that his ownership interest would be subject to a "vesting schedule." According to Dr. Yang, any scientist working for a startup biotechnology company would understand that, because the company will not release a product for several years, an employee will need to work for several years before earning shares. Dr. Yang stated that the parties did not discuss an "exact vesting schedule," but that they mentioned that Dr. Guan would need to work "for 8 to 10 years"

before he would be "completely vested" in his ownership of shares.

For his part, Dr. Feng testified that the parties discussed "a schedule or vesting period" from the "[v]ery beginning" of the discussions about forming a new company. Dr. Feng said that the parties discussed vesting "all the time" at their meetings, and that Dr. Guan "did not complain" about the contemplated vesting requirement.

Mr. Zhao testified that, at the first meeting in April 2015, the participants discussed a "time frame" of around "8 to 10 years" for Dr. Guan to earn shares of the new company. Mr. Zhao recalled that he suggested that Dr. Guan could begin earning shares after working for the company for five years, and then "gradually" earn more shares until he had worked for the company for ten years, at which point he could "take the full 15 percent."

It was undisputed that, in November or December 2015, all named parties, including Dr. Yang, Dr. Feng, and Dr. Guan, signed the Supplemental Agreement to the Incubator Agreement. Under those contracts, the "shareholders" of FZata agreed to dilute their respective equity interests so that Sage-angel could acquire a six percent equity interest in FZata. Because Sage-angel ultimately declined to make the required $750,000 loan, however, Sage-angel did not receive the six percent interest.

The parties offered competing interpretations of the "current shareholding structure" table from the Incubator Agreement, which stated:

| Shareholder | Subscription of Registered Capital ($10,000) | Equity Percentage |
|---|---|---|
| Zhiyong Yang | 30 | 60% |
| Qing Hu | 12.5 | 25% |
| Yongjun Guan | 7.5 | 15% |
| Total | 50 | 100% |

According to Dr. Yang, Sage-angel specifically requested, as a condition of the Incubator Agreement, that Dr. Yang and Dr. Guan make capital contributions to FZata. Dr. Yang testified that she understood that the Incubator Agreement required Dr. Yang to contribute $300,000 (30 times $10,000) to FZata and required Dr. Guan to contribute $75,000 (7.5 times $10,000) to FZata. Dr. Yang testified that, although she and Dr. Guan were "supposed to" make those contributions under the Incubator Agreement, they never did so because Sage-angel withdrew from the transaction.

Dr. Guan testified that the Incubator Agreement did not, in fact, require him or Dr. Yang to make any capital contribution to FZata to acquire their respective shares. Dr. Guan said that the figures on the table reflected the "company's total capital" of $500,000, all of which had been contributed by Mr. Zhao. Dr. Guan said that the numbers showing the "Subscription of Registered Capital" of each shareholder had simply been "allocate[d]" to the three shareholders in proportion to their respective ownership of the company. Under this interpretation, 60 percent of the total capital ($300,000) was allocated to Dr. Yang as the owner of 60 percent of the shares, and 15 percent of the total capital ($75,000) was allocated to Dr. Guan as the owner of 15 percent of the shares. Under this same interpretation, only 25 percent of the total capital ($125,000) was allocated to Ms. Hu (Mr. Zhao's wife) as the owner of 25 percent of the

shares, even though Mr. Zhao, in fact, had agreed to contribute $500,000 to acquire those shares.[8]

Dr. Guan testified that, at a meeting in January 2016, he asked Dr. Yang for a "record" as "proof of [his] ownership" interest in FZata. Dr. Guan testified that, in response, she sent him the document titled "ATA LLC Company's By-Law." That document purported to set forth an agreement between Dr. Yang, Ms. Hu, and Dr. Guan as the shareholders of "ATA." It identified Dr. Yang as the owner of 60 percent of the shares and listed her method of acquisition as "Technology." It identified Dr. Guan as the owner of 15 percent of the shares and listed his method of acquisition as "Technology." It identified Ms. Hu as the owner of 25 percent of the shares and listed her method of acquisition as "Cash."

Dr. Yang testified that, at the time that she sent the ATA bylaws document, she understood that she and Dr. Guan would acquire their respective shares by contributing "technology" rather than paying cash. When asked to explain the meaning of the term "Technology" in the ATA bylaws, Dr. Yang answered: "Technology is technology. Like, your knowledge, your know-how, your technique." Dr. Yang stated that, instead of acquiring shares by paying cash, a person would "use their technique to develop new

[8] Dr. Guan's interpretation of the Incubator Agreement is consistent not only with the first table but also with a second table, which describes the ownership structure after Sage-angel would acquire a six percent equity interest. In both tables, the "Subscription of Registered Capital" listed for each of the four shareholders is equal to their respective percentage of equity multiplied by the total capital of $500,000. For instance, Dr. Guan's "Subscription of Registered Capital" decreased from 7.5 to 7.05 as his equity percentage decreased from 15% to 14.1%.

[intellectual property], new product[,]" which "[e]ventually" would "become value" for the company. Dr. Guan offered similar testimony about his understanding of the term "technology" in the ATA bylaws. He stated: "That means we gain the share because [of] our expertise. Not because we put money in there."

Dr. Guan testified that, after receiving the ATA bylaws, he visited Dr. Yang's office and asked her why the company's name was "still list[ed] as ATA" in the document even though he had asked for "documented proof" of his ownership of FZata. Dr. Guan testified that, in response, Dr. Yang "assured" him that "ATA and FZata [were] the same, same companies." Dr. Guan further testified that, when he mentioned the subject at a later meeting, he was told that "[t]hey forgot to change the name" when drafting the document.

In her testimony, Dr. Yang maintained that Dr. Guan never asked for documentation of ownership of FZata. Dr. Yang stated that the reason that she emailed the ATA bylaws document was to seek "comments and corrections" on a draft prepared by Mr. Zhao for review by a potential investor. Dr. Yang testified that it was simply a "mistake" that she and Mr. Zhao "did not change the name" of the company in their draft. Dr. Yang said that, at that time, Dr. Guan, Dr. Feng, and Mr. Zhao already knew that "ATA ha[d] been canceled" and that the document should have used the name FZata.

During Dr. Yang's testimony, counsel for the defendants stipulated that "there is a signed version of the ATA bylaws that were [sic] admitted" into evidence "as Plaintiff's

Exhibit 15."[9] The exhibit itself does not include a signature page, but its text purports to govern the rights and obligations of FZata, Dr. Yang, Dr. Guan, and Ms. Hu.

Despite the stipulation, Dr. Yang denied ever signing a version of the ATA bylaws. Dr. Yang claimed that another version of the document (other than the one admitted into evidence) "has a signature part, but nobody signed." Later during the trial, the court asked: "is the stipulation that there is a signed copy of the bylaws a stipulation that it is the bylaws that have been marked in evidence as Plaintiff's Exhibit 15?" Counsel for the defendants answered, "[n]o," and insisted that she "would disagree" with the court's description of the stipulation.[10]

During her testimony, Dr. Yang acknowledged that, in May 2016, she listed Dr. Guan as a 15 percent owner of FZata on an application for the Biotechnology Investment Incentive Tax Credit. Dr. Yang asserted that, when she included that information, she was attempting to complete the application to the best of her knowledge. Dr. Yang claimed that, to the best of her understanding, Dr. Guan was not an "official stockholder" because the parties had not yet signed a "final agreement." Dr. Guan did not prepare or sign the tax credit application.

As recounted earlier, Dr. Yang emailed a proposed shareholder agreement to Dr. Guan in July 2016. Dr. Guan testified that, when he received the proposed shareholder

[9] The defendants made this stipulation immediately after counsel for Dr. Guan began questioning Dr. Yang about statements that she made during a deposition.

[10] Ultimately, the court gave the following instruction to the jury: "The parties have agreed that there exists a signed version of the ATA bylaws. This fact is now not in dispute and should be considered proven."

agreement, he was "totally shocked" because, in his understanding, the parties had already agreed "to co-own the company together." Dr. Guan asserted that the proposed shareholder agreement included new restrictions that the parties had "never discussed" during their meetings.

Dr. Guan recalled that, in particular, he took issue with three provisions of the proposed shareholder agreement. First, he stated that, under the "original agreement," he was entitled to 15 percent of FZata. Under the proposed shareholder agreement, however, Dr. Guan would receive only 15 percent of the 1,000 shares actually issued, while FZata would be authorized to issue up to 5,000 shares in total. Dr. Guan found it objectionable that he would, "in reality," own only three percent of FZata's total shares rather than 15 percent. Second, Dr. Guan objected to the "vesting" provisions, under which shareholders who acquired shares through employment would lose ownership of some or all shares unless they worked for the company for ten years.[11] Third, Dr. Guan objected to certain non-competition provisions restricting the employment of employees after leaving the company.

Dr. Guan testified that he explained his concerns about the proposed shareholder agreement at a meeting in July 2016. He testified that, in response, Dr. Feng and Mr. Zhao assured him that the document was just "a draft from a template." According to Dr. Guan, as a result of his objections, "[t]he whole draft was abandoned" and the other

[11] Dr. Guan testified that, although he doubted that this provision would apply to him as an "original founder" of FZata, he thought that the vesting schedule was "not reasonable" and would dissuade other employees from working for FZata in the future.

parties assured him that they would prepare an entirely new one. Afterwards, however, no one presented an alternative draft.

Dr. Yang testified that, after Dr. Guan refused to sign the proposed shareholder agreement, she expected him to make a "counteroffer," but he never did so. Dr. Yang stated that she considered the terms of the proposed shareholder agreement to be consistent with the prior discussions about a vesting requirement.

Dr. Yang testified that, at some point after he refused to sign the proposed shareholder agreement, Dr. Guan informed Dr. Yang and other FZata employees that he wanted to leave the company. On October 28, 2016, Dr. Yang sent a termination letter stating that FZata was "accept[ing] [his] resignation" from his position. According to Dr. Guan, he never tendered his resignation. Dr. Guan testified that, a few weeks before his termination, he had introduced a proposal to "separate" FZata into two companies, one focusing on c.diff research and the other focusing on HIV research.

During his case-in-chief, Dr. Guan called Michael Kresslein as an expert witness on the subject of business valuation. Overruling the defendants' objection, the court permitted Dr. Guan to elicit testimony from Mr. Kresslein.

Mr. Kresslein explained that FZata had retained him to calculate the damages resulting from Dr. Guan's alleged misappropriation of HIV research materials. Mr. Kresslein rendered an opinion about the value of FZata as of October 28, 2016, the date of Dr. Guan's departure from FZata. Mr. Kresslein employed a "market approach" to this valuation, under which he examined one "guideline sale" of FZata stock that was "contemporaneous" with the valuation date. Specifically, ten days before Dr. Guan's

departure, Sage-angel paid $500,000 to acquire a four percent interest in FZata. Based on that information, Mr. Kresslein concluded, to a reasonable "degree of accounting certainty," that the total value of FZata was $12,500,000 as of the valuation date.

During cross-examination by the defendants, Mr. Kresslein stated that he had not formed any opinion about the value of Dr. Guan's alleged ownership interest in FZata. Mr. Kresslein explained that, when attempting to calculate a fractional interest in a company, a valuation analyst "need[s] to consider" "a lot of factors" that he "did not consider because it wasn't part of [his] engagement." Mr. Kresslein stated that determining the value of a fractional interest is "not as simple as just . . . taking the whole and multiplying it by a certain percent." Mr. Kresslein explained that the valuation of a fractional interest would require him to examine vesting provisions and to make a comparison of the shareholder's rights and obligations relative to other shareholders. Mr. Kresslein noted that the valuation of a minority interest might involve "discounts" for a shareholder's "lack of control."

When the defendants called Mr. Kresslein during their case-in-chief on their counterclaims, he opined that the total value of FZata, with the HIV research unit intact, was $12,500,000 as of the date of Dr. Guan's departure. Mr. Kresslein opined that the HIV research unit represented about 15 to 20 percent of the total value of FZata. On that basis, he concluded that the defendants sustained damages of between $1,875,000 and $2,500,000 as a result of Dr. Guan's alleged misappropriation of HIV research materials.

## I. Denial of Defendants' Motion for Judgment

At the close of the evidence offered by Dr. Guan, the defendants moved for

judgment in their favor on all claims. The defendants renewed their motion at the close of all the evidence. Among other things, the defendants argued: that Dr. Guan had failed to establish the elements of his claims for breach of contract, conversion, and fraud; that he had failed to prove that Dr. Yang and Dr. Feng were personally liable for breach of contract; and that he had produced insufficient evidence of the amount of damages. The court rejected most of these arguments.

With respect to the claims for breach of contract, the defendants argued that Dr. Guan failed to prove the existence of a contract with "definite" terms. They argued that Dr. Guan had presented evidence of "differing terms" as to the "percentage" of his ownership interest in FZata and "differing terms as to what he would have to do to earn those shares[.]"

The court denied the motion for judgment on the claims for breach of contract. The court reasoned that, in addition to the parties' testimony about their oral agreements, Dr. Guan had produced "multiple documents reflecting the agreement of the parties" as to his ownership interest. The court noted that these documents showed a sequence of agreements in which the agreed percentage started at 10 percent, increased to 15 percent, and then decreased to 14.1 percent.

Before the close of all evidence, counsel for Dr. Guan and counsel for the defendants jointly agreed that the court should give a jury instruction based on Maryland Civil Pattern Jury Instruction (MPJI-Cv) 9:7. The first part of that pattern instruction, used for breach-of-contract claims governed by a Maryland statute of frauds, states: "In this case, the law requires the agreement to be in writing." When they renewed their

motion for judgment, the defendants argued that any alleged contract was unenforceable because it was not in writing. The court rejected this argument, reasoning that Dr. Guan had produced "ample documentary evidence of an agreement," including: the meeting memo from April 2015, the meeting memo from August 2015, the Incubator Agreement from November 2015, and the ATA bylaws sent in January 2016.

In their motions, the defendants argued that Dr. Guan had failed to prove that Dr. Yang and Dr. Feng should be personally liable for any damages. The defendants argued that the evidence showed that Dr. Yang and Dr. Feng acted as shareholders, officers, employees, or agents of FZata and, consequently, could not be held liable for obligations of FZata. The court rejected this argument, reasoning that Dr. Guan had produced evidence of an agreement "between the individual founders" "with respect to their percentage ownership of shares."

Addressing the count for conversion, the defendants argued that Dr. Guan presented no evidence that he ever possessed a tangible instrument, such as stock certificates, and no evidence that the defendants exercised dominion and control over any such instrument. The defendants relied on the principle that "Maryland law does not recognize a tort claim for conversion of intangible property interests unless they are merged into a tangible document over which the defendant exercises some form of ownership or dominion." *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 563 (1999). On that ground, the court granted judgment in favor of the defendants as to the conversion count.

With respect to the claim of fraud, the defendants argued that Dr. Guan failed to produce evidence of any "fraudulent statements" made by either Dr. Yang or Dr. Feng.

The defendants argued that Dr. Yang could not have committed fraud when she sent Dr. Guan the ATA bylaws document in January 2016, because he "already knew that ATA was being converted or changed over to FZata."

The court denied the motion for judgment as to the fraud claim against Dr. Yang. The court relied on Dr. Guan's testimony that, in response to his request for proof of ownership of FZata in January 2016, Dr. Yang sent him the ATA bylaws document, which listed him as a 15 percent shareholder, and then assured him that "the ATA bylaws were really the bylaws of FZata." The court concluded, however, that there was no evidence that Dr. Feng made any similar misrepresentation. For that reason, the court granted judgment in favor of Dr. Feng as to the fraud claim against him.

The defendants also argued that Dr. Guan had failed to produce sufficient evidence of the amount of damages. The defendants asserted that Mr. Kresslein's opinion about the damages associated with the counterclaims for misappropriation of trade secrets could not be used to determine the damages resulting from Dr. Guan's claims for breach of contract and fraud.

Rejecting the defendants' argument, the court pointed to Mr. Kresslein's expert opinion testimony that "the value of the business in October of 2016" was $12.5 million. The court reasoned that this testimony was an "adequate" basis for the jury to determine "the value of the business at that point[.]" The court concluded that the jury could determine that the damages were "14 point some percent of that value."

### J. Jury Verdict and Entry of Judgment

As a result of the court's rulings, the case proceeded to the jury on the claims

against FZata, Dr. Yang, and Dr. Feng for breach of contract and on the claim against Dr. Yang for fraud. The case also proceeded to the jury on the counterclaims against Dr. Guan for misappropriation of trade secrets and breach of fiduciary duty.

In closing arguments, counsel for Dr. Guan argued that the defendants made an agreement to give Dr. Guan a 15 percent share of FZata and that, under the Incubator Agreement, Dr. Guan had agreed to reduce his share to 14.1 percent. Counsel asked the jury to award 14.1 percent of $12,500,000, the amount that Mr. Kresslein had determined to be the total value of FZata at the time of Dr. Guan's departure from FZata.

The jury found all three defendants (FZata, Inc.; Dr. Yang; and Dr. Feng) liable for breach of contract. The jury awarded compensatory damages to Dr. Guan in the requested amount of $1,762,500, an amount equal to 14.1 percent of $12,500,000.[12] The jury also found Dr. Yang liable for fraud. The jury awarded punitive damages in the amount of $100,000. The jury found in Dr. Guan's favor on the counterclaims against him for misappropriation of trade secrets and breach of fiduciary duty and, accordingly, awarded no damages to the defendants.

On October 8, 2021, the court entered a judgment against all three defendants, jointly and severally, in the amount of $1,762,500 of compensatory damages. The court entered a separate judgment against Dr. Yang alone in the amount of $100,000 of punitive damages. The defendants filed a notice of appeal within 30 days after the entry of the judgments.

[12] The verdict sheet did not ask the jury to distinguish between compensatory damages awarded for breach of contract and compensatory damages awarded for fraud.

Within 10 days after the entry of judgment on the jury verdict, the defendants filed a motion for judgment notwithstanding the verdict, as well as a motion for new trial. The court denied both motions, without issuing a written opinion. The defendants filed a second notice of appeal within 30 days after the entry of the orders denying their motion for judgment notwithstanding the verdict and their motion for new trial.[13]

## DISCUSSION

In this appeal, the defendants seek reversal of the judgments entered on the jury verdicts. They argue that this case "should not have gone to the jury" on any of Dr. Guan's claims. They contend that the evidence at trial failed to establish the existence of an enforceable contract, failed to establish that Dr. Yang and Dr. Feng were personally liable for breach of contract, failed to establish that Dr. Yang committed fraud, and failed to establish an adequate basis to determine the amount of damages.

In their brief, the defendants present the following questions:

> I. Was the jury verdict for breach of contract legally invalid, where there was no single written shareholder subscription agreement and no collection of writings that set forth the required elements of a shareholder agreement?
>
> II. Did the circuit court err by allowing Dr. Yang and Dr. Feng to be held personally liable for the breach of contract claims against FZata, when Dr. Guan made no effort to pierce the corporate shield?
>
> III. Was the fraud verdict against Dr. Yang legally unsupportable when it was premised on her alleged misrepresentation of the terms of the

[13] Under Md. Rule 8-202(c), the first notice of appeal is treated as if it were filed on the same day as, but after, the entry of the order disposing of the motion for judgment notwithstanding the verdict and the motion for new trial. *See Edsall v. Anne Arundel County*, 332 Md. 502, 508 (1993). Consequently, the second notice of appeal was unnecessary.

contractual agreement that Dr. Guan claimed had been breached?

IV. Did Dr. Guan fail to meet his burden of proving damages for breach of contract when he relied solely on Appellants' expert witness, and that witness said he was not competent to opine about the value of Dr. Guan's purported equity stake?

By challenging the sufficiency of the evidence, the defendants are, in substance, seeking review of the circuit court's denial of their motions for judgment and motion for judgment notwithstanding the verdict. *See Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011). Where, as here, an appellant makes arguments about the sufficiency of the evidence "in the abstract and does not tie them to a particular ruling by the court[,]" this Court "assume[s] . . . that the alleged basis for error is the denial of the appellant's motion for judgment" made at trial. *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 335 (2010).

Under Md. Rule 2-519(a), a party may "move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." "'[W]hen a defendant moves for judgment based on . . . the legal insufficiency of the plaintiff's evidence, the trial judge must determine if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question[.]'" *Webb v. Giant of Maryland, LLC*, 477 Md. 121, 136 (2021) (quoting *Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 394 (2011)). When evaluating the motion, the court must "consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519(b). The court must submit the claim for resolution by the jury if, based on the evidence,

"'reasonable jurors [applying the appropriate standard of proof] could find in favor of the plaintiff on the claims presented[.]'" *Beall v. Holloway-Johnson*, 446 Md. 48, 69 (2016) (alteration in original) (quoting *Hoffman v. Stamper*, 385 Md. 1, 16 (2005)).

Within 10 days after the entry of judgment on a jury verdict, a party may move for judgment notwithstanding the verdict under Md. Rule 2-532. A party may assert such a motion, however, "only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion." Md. Rule 2-532(a). The basic standard used to evaluate a motion for judgment notwithstanding the verdict is the same as the standard used to evaluate a motion for judgment at the close of the evidence. *See, e.g.*, *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. 569, 581 (2020). The moving party is entitled to a judgment notwithstanding the verdict "'when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.'" *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 464 (2013) (quoting *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94, 101 (2008)).

On appeal, "[t]he standard of review of a question of the sufficiency of the evidence is *de novo*." *University of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012). This Court reviews a trial court's ruling on a motion for judgment or a motion for judgment notwithstanding the verdict "to determine whether it was legally correct." *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. at 503 (citation and quotation marks omitted). The appellate court "will find error in a denial of a motion for judgment or [motion for judgment notwithstanding the verdict] if the evidence does not

rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty." *Id.* (citation and quotation marks omitted). In sum, we review without deference the trial court's evaluation of the arguments made in support of the motion for judgment and the motion for judgment notwithstanding the verdict. *See UBS Fin. Servs., Inc. v. Thompson*, 217 Md. App. 500, 514 (2014).

## I. Breach of Contract

In this appeal, the defendants contend that they were entitled to judgment in their favor on the claim against them for breach of contract. They argue that the evidence produced at trial failed to establish that the parties made an enforceable contract under which Dr. Guan was entitled to an ownership interest in FZata.

Throughout their brief, the defendants point to two distinct sets of legal requirements that, they argue, govern the issue of whether the parties made an enforceable contract. In some instances, the defendants focus on specific requirements imposed by the General Corporation Law of the State of Delaware (or parallel provisions of the Maryland General Corporation Law). In other instances, the defendants focus on general principles of contract formation and, in particular, contract formation for a contract that must be in writing. Because these two sets of requirements are meaningfully different, we will address them separately.

Under their first framework, the defendants begin with the premise that Maryland recognizes the "internal affairs doctrine." *See Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 52 (2007). This doctrine "'is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters

peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.'" *Id.* (quoting *N.A.A.C.P. v. Golding*, 342 Md. 663, 674 (1996)) (further citation and quotation marks omitted). According to the defendants, Delaware corporate law should govern a contract concerning shares of FZata, Inc., a corporation organized under the laws of Delaware.

The defendants argue that, under Delaware statutes (including 8 Del. Code, §§ 152, 153, and 157), a contract obligating a corporation to issue shares of stock must be approved by the board of directors in writing. The defendants rely prominently on *Grimes v. Alteon, Inc.*, 804 A.2d 256, 260-66 (Del. 2002), in which the Supreme Court of Delaware held that an oral agreement between a stockholder and a CEO, purporting to obligate the corporation to sell 10 percent of future private stock offerings to the stockholder, was unenforceable because it was not approved by the board of directors and not memorialized in a written instrument. The defendants theorize that Dr. Guan cannot enforce a contract for shares of FZata because there is no written agreement, approved by FZata's board of directors, establishing the price or other consideration. The defendants further argue that the result should be no different under Maryland corporate law because, in their view, statutes governing Maryland corporations (Md. Code (1975, 2014 Repl. Vol.), §§ 2-202, 2-203 of the Corporations and Associations Article) impose similar requirements before a corporation may issue shares of stock.

In response, Dr. Guan disputes many aspects of the defendants' proposed application of Delaware corporate law or Maryland corporate law to the facts of this case.

Dr. Guan also argues that the defendants failed to preserve their arguments based on requirements imposed by corporate law statutes. We agree that the defendants' arguments about the requirements imposed by the Delaware General Corporation Law (and the fallback arguments about the Maryland General Corporation Law) are not preserved. Thus, we will not address the potential merits of those arguments.

Under Maryland Rule 2-519(a), a party moving for judgment must "state with particularity all reasons why the motion should be granted[.]" The purpose of this particularity requirement "is to make the trial judge aware of the exact basis for the movant's contention that the evidence is insufficient." *Hickey v. Kendall*, 111 Md. App. 577, 603 (1996). A party's failure to state a reason why a motion for judgment should be granted "'serves to withdraw the issue from appellate review.'" *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 335 (2010) (quoting *Kent Vill. Assocs. Joint Venture v. Smith*, 104 Md. App. 507, 517 (1995)).

When the defendants moved for judgment at the close of the evidence offered by Dr. Guan, they made the following argument concerning the contract claim:

> [COUNSEL FOR DEFENDANTS:] . . . Plaintiff has failed to prove that there was a contract with definite reasonable terms in place between the Plaintiff and the Defendants, or that there was a breach of that contract.
>
> Dr. Guan's testimony was that there were differing terms for a percentage in the company and differing terms as to what he would have to do to earn those shares in the company.
>
> So we would submit that Plaintiff's evidence does not meet the burden for breach of contract and no reasonable jury could find otherwise.

In their renewed motion for judgment at the close of all the evidence, the

defendants made the following argument concerning the contract claim:

> [COUNSEL FOR DEFENDANTS:] For breach of contract, Dr. Guan testified that there was no final shareholders' agreement. And the jury instructions reflect that there must be a written agreement. Oral agreements do not count.

The record includes a written motion for judgment under Md. Rule 2-519 and a supporting memorandum. In support of that motion, the defendants argued that Dr. Guan "failed to meet the basic threshold of establishing that there was an enforceable contract[.]" They argued that the evidence showed that "there was no mutual agreement between the parties[,]" and "no consideration for [Dr. Guan] to get his ownership interest in FZata." They also argued that the evidence "showed that no definite term as to [Dr. Guan's] ownership interest in FZata was agreed by Defendants."

The defendants' appellate invocation of Delaware and Maryland corporate law bears no resemblance to the arguments made in support of their motion for judgment under Md. Rule 2-519. At trial, the defendants did not mention or allude to any requirements of corporate law statutes of Delaware or Maryland. The defendants did not argue that the contract required written approval from the board of directors specifying the consideration for the stock. They did not even mention the board of directors. The defendants failed to state with particularity any argument based on requirements of Delaware corporate law (or Maryland corporate law) as a reason for granting their motion for judgment. The court could not have erred by failing to grant judgment in the defendants' favor on grounds that were not included in their motion.

In their reply brief, the defendants insist that they preserved their arguments based

on Delaware corporate law because they filed a pretrial notice of their "intention to rely on Delaware law at trial[.]" In that filing, the defendants asserted that Delaware law should "control[] the question of whether [Dr. Guan] has any ownership in FZata, Inc." They asked the court to "take judicial notice of Delaware law at trial."

The defendants misconceive of the effect of their notice of intention to rely on Delaware law. A party seeking to present evidence of foreign law or to request that the court take judicial notice of foreign law must give "reasonable notice . . . to the adverse parties either in the pleadings or by other written notice." Md. Code (1974, 2020 Repl. Vol.), § 10-504 of the Courts and Judicial Proceedings Article. "The purpose behind this notice requirement is to prevent unfair surprise and to allow the adverse party to prepare . . . legal arguments based on the laws of the foreign jurisdiction." *Storetrax.com, Inc. v. Gurland*, 397 Md. at 51 n.8.

The pretrial notice alerted Dr. Guan and the court that the defendants intended to rely on Delaware law at trial. Accordingly, the defendants were free to make arguments at trial based on Delaware law, as part of a motion for judgment or another motion, such as a request for a jury instruction based on Delaware law. But merely notifying an adversary and the court of the party's intention to rely on foreign law at trial does not relieve the party of the need to actually rely on foreign law at trial. As Dr. Guan notes in his brief, the defendants "never followed through" on their stated intention to rely on Delaware law at trial.[14]

[14] Although these materials are not in the record extract, the record includes various pretrial filings in which the defendants made arguments based on Delaware law.

In their reply brief, the defendants also assert that they "expressly relied on Delaware law" in their "post-trial motions." The defendants cite pages from their motion for judgment notwithstanding the verdict, in which they made arguments about Delaware and Maryland corporate law, which are similar to the ones that they advance on appeal. When opposing the motion for judgment notwithstanding the verdict, Dr. Guan correctly pointed out that the defendants had not advanced those grounds when they made their motions for judgment. He argued that the court should not permit the defendants to advance their new argument about the purported statutory requirement of board approval.

Maryland Rule 2-532(a) states that a party may move for judgment notwithstanding the verdict "only on the grounds advanced in support of the earlier motion" for judgment at the close of the evidence. If a party fails to articulate a ground for granting a motion for judgment at the close of the evidence, the party cannot raise that ground for the first time in a motion for judgment notwithstanding the verdict. *See Sage Title Grp., LLC v. Roman*, 455 Md. 188, 215-16 (2017); *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 487 (2013). By failing to raise arguments based on Delaware and Maryland corporate law in their motion for judgment, the defendants "relinquished the right to argue" those grounds in their motion for judgment

For instance, the defendants made arguments about Delaware corporate law in a motion for dismissal or in the alternative for summary judgment. When a party moves for judgment under Md. Rule 2-519, the party may incorporate by reference arguments made in a previously filed memorandum. *See Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 648-49 (2020). Here, however, the defendants did not refer to arguments made in previous filings when they moved for judgment at trial. Consequently, the court considered only the arguments actually made in support of the motion.

notwithstanding the verdict. *Leake v. Johnson*, 204 Md. App. 387, 405-06 (2012). The court would have erred if it had granted a judgment notwithstanding the verdict on a ground not included in the defendants' motion for judgment. *See Davis v. Board of Educ. for Prince George's Cnty.*, 222 Md. App. 246, 266 (2015).

In summary, the defendants' contentions that they were entitled to judgment in their favor based on a failure to satisfy requirements of Delaware or Maryland corporate statutes, such as a purported requirement of written approval of the transaction in a resolution by the board of directors, are not properly preserved for review.

At trial, the defendants moved for judgment based on grounds of indefiniteness and the absence of a written instrument. In their initial motion for judgment, they argued that Dr. Guan "failed to prove that there was a contract with definite reasonable terms in place." In their renewed motion at the close of all evidence, the defendants also argued that there was no "written agreement" between the parties and that an "[o]ral agreement" would not suffice. The circuit court rejected their arguments, reasoning that Dr. Guan had introduced "multiple documents reflecting the agreement of the parties that Dr. Guan w[ould] receive 15 percent" of the company. The court concluded that Dr. Guan produced "ample documentary evidence of an agreement," including the meeting memo from April 2015, the meeting memo from August 2015, the Incubator Agreement from November 2015, and the ATA bylaws sent in January 2016.

On appeal, the defendants contend that the various documents in evidence, either individually or in combination, were insufficient to constitute a written contract between the defendants and Dr. Guan entitling him to an ownership interest in FZata.

The defendants observe that, during the trial, Dr. Guan agreed that the court should instruct the jury that the contract that he sought to enforce needed to be in writing. Specifically, Dr. Guan agreed that the court should give the following instruction, based on Maryland Civil Pattern Jury Instruction (MPJI-Cv) 9:7:

> In this case, the law requires the agreement to be in writing. The writing can be anything as long as it identifies the parties to the agreement, the terms of the agreement, and the consideration given for the promises. It must have been signed or adopted by the party whose promise is the subject of the suit. No particular or formal words are needed.

The defendants treat Dr. Guan's agreement on this jury instruction as a concession that the contract that he sought to enforce is governed by a statute of frauds.[15] The defendants point out that a writing cannot satisfy a statute of frauds unless it sufficiently indicates that the parties have made an agreement and expresses the essential terms of their agreement. *See* Restatement (Second) of Contracts § 131 (1981) (stating that "a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which (a) reasonably identifies the subject matter of the contract, (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract"). In other words, a writing cannot satisfy a statute of frauds unless it "'set[s]

[15] The term "statute of frauds" might refer to any number of statutes requiring particular types of contracts to be in writing. The defendants fail to specify which of these various statutes might govern the purported contract. When counsel agreed on the jury instructions, neither party specified whether a purported writing requirement was imposed by Maryland law or Delaware law. Counsel for Dr. Guan merely stated, "whether Maryland law applies or Delaware law applies, the result is the same."

forth the terms and conditions of all the promises constituting the contract made between the parties[.]'" *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 434 (2008) (listing criteria to satisfy the statute of frauds applicable to contracts for sale of real property) (quoting *Beall v. Beall*, 291 Md. 224, 229 (1981)).

The defendants contend that none of the documents in evidence specified the necessary terms of the contract that Dr. Guan sought to enforce. They argue that none of the documents included an expression of the parties' intent to be bound under an agreement to give Dr. Guan an ownership interest in FZata. They also argue that these documents either "say nothing" about the consideration that Dr. Guan would provide for his ownership interest or are "far too vague" to be understood to specify the consideration.

In response, Dr. Guan contends that he produced sufficient evidence "for the jury to conclude that there was a binding written contract between the parties along with adequate consideration." Dr. Guan notes that, under Maryland law, "a series of communications can satisfy" the statute of frauds and that "e-mail communications can amount to a sufficient writing" under the statute of frauds. *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. at 339. Dr. Guan argues that he introduced "at least five written documents" that Dr. Yang had "adopted," either by signing the document or by sending it to Dr. Guan by email. Dr. Guan refers to the following five documents that mention his ownership interest: the "ATA 1st Founder meeting" memo; the meeting memo dated August 24, 2015; the Incubator Agreement and Supplemental Agreement; the "ATA LLC Company's By-law" document; and the Biotechnology Investment

Incentive Tax Credit application. According to Dr. Guan, the agreed-upon "consideration" was his "technology and invention contribution" and his "employment with the company." He asserts that this consideration term was both "adequate and sufficiently definite[.]"

We will assume, for the sake of argument, that the documents in evidence are sufficient expressions of one side of the bilateral agreement that Dr. Guan sought to enforce.[16] Specifically, we will assume that these documents adequately show that the parties agreed that Dr. Guan would receive a 15 percent ownership interest in FZata and that they sufficiently memorialized this aspect of the agreement in writing. The defect in Dr. Guan's contract theory is that the evidence failed to show that the parties ever expressed in definite terms the other side of the agreement: the consideration that Dr. Guan would provide in exchange for a 15 percent ownership interest. Even though the parties may have communicated in definite terms when discussing Dr. Guan's promised share of the company, they expressed nothing more than broad generalities about what he would be required to do to earn that 15 percent share.[17]

As the defendants note: "Whether oral or written, a contract is not enforceable

[16] This Court has treated a promise to give a "fixed percentage" of the total stock of a corporation that is not yet formed as a sufficiently definite contractual term. *See Jones v. Cecil Sand & Gravel, Inc.*, 97 Md. App. 87, 95 (1993), *aff'd on other grounds*, 335 Md. 539 (1994).

[17] When the circuit court denied the motion for judgment, the court identified an agreed-upon term as to Dr. Guan's percentage ownership interest. The court did not address the defendants' argument that there was no agreed-upon term "as to what [Dr. Guan] would have to do to earn those shares."

unless it expresses with definiteness and certainty the nature and extent of the parties' obligations and the essential terms of the agreement." *Maslow v. Vanguri*, 168 Md. App. 298, 321 (2006). An "'essential prerequisite'" to the formation of a contract is the manifestation of mutual assent between the parties, through their expression of both: "'(1) intent to be bound, and (2) definiteness of terms.'" *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177 (2015) (quoting *Cochran v. Norkunas*, 398 Md. 1, 14 (2007)). A contract "'must extend to all terms which the parties intend to introduce, and material terms cannot be left for future settlement.'" *Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners Ass'n, Inc.*, 441 Md. 290, 304 (2015) (quoting *Peoples Drug Stores, Inc. v. Fenton Realty Corp.*, 191 Md. 489, 494 (1948)). The failure to express agreement on an essential term "may indicate that the mutual assent required to make a contract is lacking." *Cochran v. Norkunas*, 398 Md. at 14.

"'Vagueness of expression[] [or] indefiniteness and uncertainty as to any of the essential terms of an agreement'" will "'prevent the creation of an enforceable contract.'" *Goldstein v. Miles*, 159 Md. App. 403, 431 (2004) (quoting *Kiley v. First Nat'l Bank of Maryland*, 102 Md. App. 317, 333 (1994)) (further quotation marks omitted). To form a binding contract, "'[t]he parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean.'" *Dolan v. McQuaide*, 215 Md. App. 24, 32 (2013) (quoting *Robinson v. Gardiner*, 196 Md. 213, 217 (1950)). A purported contract is not enforceable if it "omits an important term, or is otherwise too vague or indefinite with respect to essential terms[.]" *Maslow v. Vanguri*, 168 Md. App. at 322.

Even where the parties intend to make an agreement, "'too much indefiniteness [of terms] may invalidate the agreement, because of the difficulty of administering the agreement.'" *Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners Ass'n, Inc.*, 441 Md. at 304 (alteration in original) (quoting 1 Joseph M. Perillo, *Corbin on Contracts* § 2.8, at 131 (rev. ed. 1993)). The parties' communication "'must not only be sufficiently definite to clearly inform the parties to it of what they may be called upon by its terms to do, but also must be sufficiently clear and definite in order that the courts, which may be required to enforce it, may be able to know the purpose and intention of the parties.'" *Dolan v. McQuaide*, 215 Md. App. at 32 (quoting *Robinson v. Gardiner*, 196 Md. at 217). A court cannot enforce contractual terms unless it can ascertain what those terms are. *See 8621 Ltd. P'ship v. LDG, Inc.*, 169 Md. App. 214, 227 (2006). Without a clear expression of the extent of the parties' obligations, it is impossible for a factfinder to determine whether a party has satisfied those obligations. *See Dolan v. McQuaide*, 215 Md. App. at 34; *Mogavero v. Silverstein*, 142 Md. App. 259, 273 (2002).

"Because the 'law does not favor, but leans against, the destruction of contracts because of uncertainty[,] . . . courts will, if possible, so construe the contract as to carry into effect the reasonable intention of the parties if that can be ascertained.'" *8621 Ltd. P'ship v. LDG, Inc.*, 169 Md. App. at 227 (quoting *Quillen v. Kelley*, 216 Md. 396, 407 (1958)). Moreover, "'[a] contract is not rendered unenforceable merely because the parties do not supply every conceivable detail or anticipate every contingency that may arise.'" *Cnty. Comm'rs for Carroll Cnty. v. Forty West Builders, Inc.*, 178 Md. App. 328, 381 (2008) (quoting *Scheffres v. Columbia Realty Co., Inc.*, 244 Md. 270, 285 (1966)).

Nevertheless, courts "may not cure indefinite or vague contract language by supplying missing contract terms or definitions" not expressed by the parties themselves. *8621 Ltd. P'ship v. LDG, Inc.*, 169 Md. App. at 227; *see Horsey v. Horsey*, 329 Md. 392, 419 (1993) (stating that "'courts cannot make a contract for the parties or supply missing terms'") (quoting *Rocklin v. Eanet*, 200 Md. 351, 357 (1952)).

One useful illustration of these principles is *Mogavero v. Silverstein*, 142 Md. App. 259 (2002), in which this Court considered an alleged oral contract between a construction contractor and a real estate developer. The contractor had agreed to "help" the developer "with the construction end" of a renovation project, "in return for a fee of 5 percent of the estimated construction contract." *Id.* at 265. The contractor gave the developer the following description of the services that he would provide in exchange for the fee:

> I told him that I would help him with the construction, I told him I would get him the architect, I told him I would get him the contractor to do the job, I would check on the construction. I would advise him in reference to the system and the design of the architect. . . . I told him I would monitor the construction phase of the project. And that is basically it.

*Id.* at 266.

The contractor provided services to the developer until the developer unilaterally decided to "put the [construction contract] out for competitive bids rather than accept a fixed-fee contract" from a company recommended by the contractor. *Mogavero v. Silverstein*, 142 Md. App. at 268. Because the contractor interpreted this action "as 'effectively terminating [his] services,'" the contractor did no further work on the project. *Id.* at 269-70. The contractor subsequently brought an action alleging that the developer

breached an oral employment contract. *Id.* at 263. The trial court granted summary judgment against the contractor, concluding that "the alleged oral contract was too vague to be enforceable." *Id*. at 271. The court reasoned that "one could not determine what agreement, if any, was reached between the parties regarding the nature and extent of the duties that [the contractor] had undertaken." *Id.*

On appeal, this Court agreed with the conclusion that "the alleged oral agreement between [the contractor] and [the developer] was too vague and indefinite to be enforceable." *Mogavero v. Silverstein*, 142 Md. App. at 272. The Court observed that the "vague wording" of the oral agreement created an "'extent of duty' problem[.]" *Id.* at 271. "The parties only agreed that [the contractor] would help [the developer] 'with the construction end of the project in return for a fee of 5% of estimated construction contract [costs].'" *Id*. This purported agreement was "so vague that there [was] no way to tell" if the developer had breached the agreement by making a unilateral decision about the project or if the contractor had breached the agreement when he stopped providing services. *Id.* at 273.

Another useful illustration of these principles is *Dolan v. McQuaide*, 215 Md. App. 24 (2013), in which this Court considered an alleged oral contract between two business partners who planned to start a carwash business. The plaintiff alleged that, before the defendant founded the carwash business, he agreed to share half of the net profits from the business in consideration for the plaintiff's financial planning services and other services. *Id.* at 29. The plaintiff performed various services to help start the business: she "drafted a business plan and financial projections, wrote contracts for [the

defendant] to use with his architect, general contractor, and investors, and created a logo and website for the business." *Id.* at 30. Just before the business opened, the parties' business relationship ended. *Id.* The plaintiff sued for breach of contract, claiming that the defendant failed to compensate her as promised. *Id.*

This Court affirmed the grant of summary judgment against the plaintiff on the claim for breach of contract. *Dolan v. McQuaide*, 215 Md. App. at 31-35. The Court explained that, to generate a triable issue on the breach-of-contract claim, the plaintiff could not simply rely on testimony in which she stated "her mere legal conclusions that 'an agreement' or 'a contract' existed between the parties[.]" *Id.* at 33-34. The Court observed that "an oral contract requires an oral communication." *Id.* at 33. The plaintiff's testimony "establish[ed] that the parties spoke only in general terms about what she would do in exchange for a share in the business: 'planning, financial and otherwise' and 'providing much subject matter expertise and intellectual capital, business know-how for the planning, financing, and start up.'" *Id.* at 34.

The Court reasoned that "the promise to help 'plan' opening of a business in three subject areas [was] no more definite than the words used in *Mogavero v. Silverstein*, . . . which were not sufficiently definite to form a contract." *Dolan v. McQuaide*, 215 Md. App. at 34. The Court explained: "If we are to bind the parties in contract, the express terms must be as definite as a reasonable conversation between parties who fully intend to carry out a major undertaking, like starting the business in this case." *Id.* The Court concluded: "[T]he only alleged promise was to help in 'planning,' without further detail, and as in *Mogavero*, the parties cannot be bound by such vague terms as a matter of law."

law." *Id.* The vague language used to describe the plaintiff's obligations "would leave the court unable to determine whether [the plaintiff] had satisfied her obligations." *Id.* Even though the plaintiff testified that "she *performed* specific services," she did not testify that the parties "discussed [those services] in detail at the time that the alleged oral contract was formed." *Id.* (emphasis in original).

With these principles in mind, we will evaluate Dr. Guan's contention that the parties expressed in definite language the agreed-upon consideration for his ownership interest in FZata. Examining the five documents relied upon by Dr. Guan, we fail to see how these documents could be construed to include a sufficiently definite expression of the consideration term. Dr. Guan's effort to locate the agreed-upon consideration somewhere in these documents simply highlights the vagueness problem.

***"ATA 1st Founder meeting" Memo***

The "ATA 1st Founder meeting" memo, dated April 5, 2015, includes nine numbered items, recording oral discussions among Dr. Yang, Dr. Feng, Mr. Zhao, and Dr. Guan. The ninth and final item has the heading "[Mr. Zhao]: Company Structure." Next to Dr. Guan's initials, it states: "CTO, 10% share, $75K/yr salary +health insurance (salary is subjected to adjustment later based on the performance of the company)."

Although this memo mentions a "10% share" of a company to be formed, it does not specify what Dr. Guan might be obligated to do in order to receive that share. The memo suggests that Dr. Guan did not agree to contribute cash, unlike Mr. Zhao who had pledged to make a "$1M initial investment" and expected to receive a "45% share." The memo does not specify whether Dr. Guan would earn his respective share through

employment (and, if so, how long he would need to work) or whether he would earn his share through some other contribution.

In his appellate brief, Dr. Guan says that this memo "detailed the parties' respective equity percentages along with assigned tasks *in exchange* for such equity." (Emphasis added.) He points to an earlier section of the memo, which sets forth a list of "Things to do," alongside the names of one or more participants. Dr. Guan says that he "was assigned to '[i]nvestigate space-renting options,' '[i]nvestigate equipment purchase,' and '[identify] [n]ext [t]arget selection.'" Dr. Guan also points to another section of the memo, with the heading "Time frame." He asserts that this section established deadlines for him to "identify the target" and to "submit basic contents" for the "[w]ebsite design." He argues that these "tasks and deadlines" were "enforceable consideration" for an agreement entitling him to a 10 percent share of the company.

No language from the memo supports a conclusion that the parties expressed agreement that Dr. Guan would receive a 10 percent share "in exchange" for undertaking a few preliminary tasks associated with starting the new company. The memo makes no direct or indirect connection between the various tasks assigned to the four participants (stated in sections 7 and 8) and the respective shares of three of those participants (stated in section 9). It would be unreasonable to insert such a connection where none was expressed in the document.[18] Neither Dr. Guan nor any other witness testified that these

[18] Other meeting memos describe weekly "assignments" and the outcomes of assignments from previous weeks. None of these memos indicate that the parties promised to complete these "assignments" in exchange for an ownership interest.

lists of "tasks and deadlines" were intended to express the extent of each owner's obligations. The after-the-fact assertion that the parties agreed that Dr. Guan would receive ownership of the company "in exchange" for completing a few tasks discussed at the April 2015 meeting is nothing more than conjecture.

***Meeting Memo Dated August 24, 2015***

Dr. Guan next points to the meeting memo dated August 24, 2015. One section of that memo states: "ATA founders will readjust the shares due to the fact that ATA will mainly be operated in US as for now, so [Mr. Zhao] is less involved[.]" It further states: "[Mr. Zhao] will give out 10% share, 5% to [Dr. Feng], 5% to [Dr. Guan]."

This document encounters the same deficiency as the "ATA 1st Founder meeting" memo. At most, this document reflects that the parties discussed an increase in Dr. Guan's share of the company from 10 percent to 15 percent. This document does not specify what Dr. Guan was obligated to do to acquire his share in the first place. It does not supply the essential term that was absent from the earlier memo.

In his brief, Dr. Guan asserts that this "shift in percentages of ownership was supported by consideration." He points to other language in the memo stating: "Founders all agree that [Mr. Zhao] made a big sacrifice. ATA shall makeup for [Mr. Zhao] when form China company."

Contrary to Dr. Guan's suggestion, this memo does not indicate that Dr. Guan or anyone else made definite promises to induce Mr. Zhao to give up a 10 percent ownership share. The memo, as well as the parties' testimony, suggests that the four participants merely expressed an intention that the company should do some unspecified

favors for Mr. Zhao in the future. According to the trial testimony, the parties expected that their company eventually would set up a manufacturing facility in China and that, in some way, the company would make a future deal that would benefit Mr. Zhao. Their assurance that the company would "make[ ]up" for Mr. Zhao's "sacrifice" is far too vague to supply the essential term of an enforceable contract. *See Goldstein v. Miles*, 159 Md. App. at 431 (holding that lawyer's promise to sell his firm "for a price below market value, upon his retirement" was not enforceable, where the lawyer did not express "any material terms of the sale such as purchase price, date of sale, interest rate, or terms of payment").[19]

***Incubator Agreement and Supplemental Agreement***

The next document relied upon by Dr. Guan is the Incubator Agreement and Supplemental Agreement, dated "November 31, 2015," which Dr. Guan treats as "merged" into a single document. Those contracts included representations that Dr. Guan was one of the "Current Shareholders" of FZata, Inc., along with Dr. Yang and Ms. Hu. In those contracts, FZata and its three "Shareholders" agreed to transfer a "6% equity" interest to the investor Sage-angel, in return for an interest-free loan of $750,000. The Incubator Agreement and Supplemental Agreement both state that, after the acquisition by Sage-angel, Dr. Guan's ownership interest would decrease from "15%" to "14.1%."

[19] In his brief, Dr. Guan also mentions the meeting memo dated July 5, 2016, which says: "[W]e must formalize the shareholder agreement. The (formerly) agreed shareholder structure does not change." Like the other two memos relied upon by Dr. Guan, this memo does not specify what Dr. Guan had promised to do in order to obtain his share.

All named parties signed the Supplemental Agreement, but Sage-angel did not make the promised loan and did not receive the promised six percent equity interest.

In his brief, Dr. Guan asserts that the Incubator Agreement "was fully supported by consideration that was binding and enforceable." This assertion might be true, but it is immaterial. The Incubator Agreement is not an agreement by anyone to give Dr. Guan 15 percent ownership of FZata. In this action, Dr. Guan was not suing any party for an alleged breach of the promises made to him in the Incubator Agreement or Supplemental Agreement. Dr. Guan was seeking to enforce an alleged pre-existing promise to give him 15 percent ownership of FZata.

The Incubator Agreement and Supplemental Agreement identify Dr. Guan as a shareholder owning 15 percent of FZata, but those instruments do not specify how he might have acquired that ownership interest. Some language that remotely suggests some type of consideration for his ownership interest is found on the "current shareholder structure" table on the Incubator Agreement. That table lists Dr. Guan's "Subscription of Registered Capital" as "7.5" units of "$10,000," for a total of $75,000. Dr. Yang testified that, to her understanding, this table meant that Dr. Guan would be required to contribute $75,000 to acquire his shares of FZata. In his testimony, however, Dr. Guan disagreed with Dr. Yang's interpretation, maintaining that he never promised to make a capital contribution to FZata. It was undisputed that Dr. Guan never, in fact, made a capital contribution of $75,000 or some other amount.

Overall, the Incubator Agreement and Supplemental Agreement do not provide any definite statement expressing the agreed-upon consideration for Dr. Guan's 15

percent ownership interest. To the extent that these documents might be construed to require a capital contribution from Dr. Guan as consideration, it is undisputed that he did not make any capital contribution.

***"ATA LLC Company's By-law"***

Dr. Guan also points to the "ATA LLC Company's By-law" document, which Dr. Yang emailed to him on January 12, 2016. The ATA bylaws purport to govern the rights and obligations of Dr. Yang, Ms. Hu, and Dr. Guan as three "shareholders" of "ATA, LLC."[20]

The ATA bylaws identify Dr. Guan as a shareholder owning 15 percent of the total shares of "ATA, LLC." The bylaws list his "Method" of "Capital Contribution" as "Technology" rather than "Cash." They provide that each shareholder has an obligation to "[p]ay the subscribed capital contributions on time, or provide all of the current and future technical resources, intellectual property and professional skills and background[.]"

In his brief, Dr. Guan asserts that the ATA bylaws "confirmed" that his ownership share was 15 percent and, "more importantly," state that his "method of obtaining [his] ownership interest was by way of Dr. Guan contributing 'technology' to the Company." Dr. Guan cites Dr. Yang's testimony, in which she said that the term "technology" meant "your knowledge, your know-how, your technique." Similarly, Dr. Guan testified that he

[20] In their brief, the defendants tell us that the ATA bylaws document was "never signed" and was "merely a draft." The defendants fail to mention that, during the trial, their counsel stipulated that "there is a signed version of the ATA bylaws that were [sic] admitted as Plaintiff's Exhibit 15."

understood this term to mean that he and Dr. Yang would "gain the share because [of] our expertise[,] [n]ot because we put money in there." According to Dr. Guan, the documents in evidence establish that "the parties had reached an agreement whereby [Dr. Guan] had promised to contribute 'technology' to the Company in exchange for his ownership interest in the Company."

The defect in this theory is that, even with the benefit of the additional language ("provide all of the current and future technical resources, intellectual property and professional skills and background"), and even with the benefit of the parties' testimony, this purported promise to contribute "technology" has no reasonably definite meaning. This promise is not substantially more definite than other promises which this Court has deemed inadequate to create an enforceable contract.

This Court has held that a construction contractor's agreement to "help [a real estate developer] 'with the construction end of [a renovation] project in return for a fee of 5% of estimated construction contract [costs]'" was "too vague and indefinite to be enforceable." *Mogavero v. Silverstein*, 142 Md. App. at 271-72. The Court reached that conclusion, despite the contractor's testimony that he explained to the developer that he would "'get him the architect,'" "'get him the contractor to do the job," "'check on the construction[,]'" "'advise him in reference to the system and the design of the architect[,]'" and "'monitor the construction phase of the project.'" *Id.* at 266. This Court has held that a plaintiff's agreement to "help 'plan' the opening of a [carwash] business in three subject areas" in exchange for a 50 percent share of the net profits was too vague to create an enforceable contract. *Dolan v. McQuaide*, 215 Md. App. at 34. In

that case, "the parties spoke only in general terms about what [the plaintiff] would do in exchange for a share in the business: 'planning, financial and otherwise' and 'providing much subject matter expertise and intellectual capital, business know-how for the planning, financing, and start up.'" *Id.*

In the present case, the statements alleged to have formed the contract are no more definite than those in *Mogavero v. Silverstein* and *Dolan v. McQuaide*. Viewed in the light most favorable to Dr. Guan, the evidence still fails to establish that the parties communicated in definite terms about the "technology" that Dr. Guan would provide in exchange for his promised ownership interest in FZata. At best, the evidence established that the parties had discussed the general nature of his obligations, stating that he would be required to contribute his "current and future technical resources, intellectual property and professional skills and background" for the benefit of FZata. The evidence does not establish that they expressed an agreement on the extent of those obligations. Consequently, a court has no basis to assess whether he satisfied those obligations during his tenure with FZata.[21]

***Biotechnology Investment Incentive Tax Credit Application***

Finally, Dr. Guan cites the Biotechnology Investment Incentive Tax Credit application, submitted by Dr. Yang on June 24, 2016. In that application, Dr. Yang represented to the Maryland Department of Commerce that Dr. Guan was the owner of a

[21] "On a claim for breach of contract, the plaintiff . . . asserting the claim for damages bears the burden of proving all elements of the cause of action, including [the] plaintiff's own performance of all material contractual obligations." *Collins/Snoops Assocs., Inc. v. CJF, LLC*, 190 Md. App. 146, 161 (2010).

15 percent equity interest in FZata. As the defendants note, this tax credit application was not an agreement of any kind between Dr. Guan and any other person. The application says nothing about whatever consideration Dr. Guan may have agreed to provide in order to acquire the 15 percent ownership interest. The defendants correctly observe that this application cannot "be said to supply the terms of an agreement concerning what Dr. Guan needed to do to earn his equity stake."

***Other Consideration***

In addition to statements from the five documents examined above, Dr. Guan asserts that he made an "agreement to assign[]" an "invention over to the Company." He cites exhibits concerning the invention of a "humanized antibody" capable of neutralizing toxins associated with c.diff. Trial testimony indicated that Dr. Guan had worked to develop an antibody known as "ABAB" during his collaboration with Dr. Feng at the University of Maryland School of Medicine and later developed a version known as "FZ001" while working for FZata. Dr. Guan cites an intellectual property disclosure form in evidence, which states that the lead inventors of FZ001 are Dr. Guan and Dr. Feng and that the contributing inventors are Dr. Yang and three other persons.

Dr. Guan does not explain his assertion that he "assign[ed]" this invention to FZata. In any event, Dr. Guan cites no evidence that the defendants agreed, whether orally or in writing, for him to acquire an ownership interest in exchange for the intellectual property rights in this invention. Evidence that Dr. Guan provided something of value for FZata is not evidence that the parties made an agreement that he would do so in consideration for 15 percent ownership of the company. *See Dolan v. McQuaide*, 215

Md. App. at 34 (explaining that evidence showing that a plaintiff "*performed* specific services" was not evidence that the parties "discussed [those services] in detail at the time that the alleged . . . contract was formed") (emphasis in original). Thus, even if Dr. Guan did, in fact, assign certain intellectual property rights to FZata, there is still no evidence that the parties agreed that he would acquire an ownership interest in exchange for that assignment.[22]

In addition to arguing that the documents in evidence expressed the essential terms of a contact, Dr. Guan challenges the defendants' reliance on the statute of frauds. He argues that the defendants failed to raise an issue relating to the statute of frauds at trial. He argues that any writing requirement imposed by a statute of frauds was satisfied by his "part performance" of his obligations. *See generally Beall v. Beall*, 291 Md. at 230 (stating that "part performance is adequate to remove the bar of the statute of frauds when there is 'full and satisfactory evidence' of the terms of the agreement and the acts constituting part performance") (quoting *Hall v. Hall*, 1 Gill 383, 393 (1843)). He cites *Jones v. Cecil Sand and Gravel, Inc.*, 97 Md. App. 87, 95 (1993), *aff'd on other grounds*, 335 Md. 539 (1994), in which this Court held that a former statute of frauds requiring contracts for the sale of securities to be in writing did not apply to an oral employment contract, under which the employer had agreed to give 25 percent of a company's stock

[22] At oral argument, counsel for Dr. Guan said that Dr. Guan "transferred" both a "patent" and a research "grant" to FZata. Dr. Guan has not identified any evidence that the parties agreed that he would make those transfers in exchange for an ownership interest in FZata.

to the employee in exchange for the employee's services.[23]

Yet even after setting aside the writing requirement imposed by a statute of frauds, the problem of vagueness persists. The requirement of definiteness applies to all contracts, "[w]hether oral or written[.]" *Maslow v. Vanguri*, 168 Md. App. at 321 (citing *Mogavero v. Silverstein*, 142 Md. App. at 272). Here, the purported agreement is incurably vague not just in the written instruments but also in the totality of the testimony about the parties' oral discussions. Even after examining all written and oral statements in the light most favorable to Dr. Guan, a court cannot ascertain with reasonable certainty the essential terms of the purported agreement. The purported agreement under which Dr. Guan would acquire a 15 percent ownership interest in FZata by providing "technology," through some combination of services or intellectual property, is too vague and indefinite to be enforceable. *See Dolan v. McQuaide*, 215 Md. App. at 34; *Mogavero v. Silverstein*, 142 Md. App. at 272.

Because the purported contract was too vague and indefinite to be enforceable, the defendants were entitled to judgment in their favor on the claims against them for breach of contract. The judgment is reversed to the extent that it holds the defendants liable for breach of contract.

## II. Personal Liability of Dr. Yang and Dr. Feng for Breach of Contract

As the second argument in their brief, the defendants contend that Dr. Yang and

[23] Formerly, both Maryland and Delaware had special statutes requiring a contract for the sale or purchase of securities to be in writing. Both statutes have been repealed. *See* Editor's Note to Md. Code (1975, 2013 Repl. Vol.), § 8-113 of the Commercial Law Article; Editor's Note to 6 Del. Code § 8-113.

Dr. Feng cannot be held personally liable for a breach of contract by FZata, Inc.

The defendants presuppose that the contract that Dr. Guan sought to enforce is a contract between Dr. Guan and FZata. They assert that, outside of a few narrow exceptions, shareholders or officers of a corporation are not personally liable for contractual obligations owed by the corporation. They argue that the evidence in this case did not satisfy any exception to the general rule protecting individual shareholders and officers from liability for the breach of contract by a corporation.

As explained in Part I above, all defendants were entitled to judgment in their favor on the count for breach of contract. Because none of the defendants are liable for breach of contract, it is unnecessary to address the personal liability of Dr. Yang or Dr. Feng for a breach of contract by FZata.

## III. Dr. Yang's Liability for Fraud

As their third issue presented, the defendants challenge the judgment to the extent that it holds Dr. Yang liable for fraud.

"To establish fraud, a plaintiff must prove by clear and convincing evidence that '(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.'" *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 334 (2013) (quoting *Hoffman v. Stamper*, 385 Md. 1, 28 (2005)).

In this case, Dr. Guan's claim of fraud was based on a series of communications with Dr. Yang. Dr. Guan testified that, in January 2016, he asked Dr. Yang for documented proof of his ownership interest in FZata. He testified that, in response, Dr. Yang emailed him the document titled "ATA LLC Company's By-law." That document identifies Dr. Guan as a shareholder owning 1,875,000 shares of "ATA," or 15 percent of the total shares. One month before sending the ATA bylaws, Dr. Yang had already filed articles of cancellation terminating the company with the name "ATA, LLC."

Dr. Guan testified that, after receiving the ATA bylaws, he asked Dr. Yang why the document used the name "ATA" instead of "FZata." Dr. Guan testified that, in response, Dr. Yang "assured" him that "ATA and FZata [were] the same, same companies." As stated in Dr. Guan's brief, his theory was that "Dr. Yang falsely informed [him] that ATA's bylaws were in fact FZata's bylaws."

At trial, the circuit court denied the defendants' motion for judgment as to the fraud claim against Dr. Yang. The court reasoned that the jury could find that Dr. Yang made false representations when she sent him the ATA bylaws, which listed him as a 15 percent shareholder, and informed him that "the ATA bylaws were really the bylaws of FZata."

On appeal, the defendants now argue that Dr. Yang was entitled to judgment in her favor on the fraud claim. The defendants purport to rely on a principle that one party to a contract "cannot reasonably rely on an agreement or representation that was specifically negotiated out of the parties' contract." *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 167 (2003) (citing *Cooper v. Berkshire Life Ins. Co.*, 148 Md.

App. 41, 60-623 (2002), and *Maryland Envt'l Trust v. Gaynor*, 370 Md. 89, 98-99 (2002)). The defendants assert that the *Steele Software* opinion is "particularly instructive" on this point.

In *Steele Software*, this Court upheld a judgment holding a bank, First Union, liable for breaching a contract with a provider of real estate settlement services, Steele Software. *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. at 106-07. This Court reversed the judgment to the extent that it held First Union liable for fraud on the theory that First Union had fraudulently induced Steele Software to enter into the contract. *Id.* at 106. At trial, Steele Software presented evidence that, during contractual negotiations, an officer of First Union had "discussed a potential ten-year relationship" between the two companies. *Id.* at 109. Another First Union officer "proposed a long term service contract that would have a five-year term with an option for a five-year renewal." *Id.* at 110. Lengthy negotiations culminated in a final written "Service Agreement," which provided that it would be in effect for at least three years. *Id.* at 121. First Union began breaching the minimum volume requirements of the Service Agreement during the second year and stopped fulfilling its obligations altogether during the third year. *Id.* at 128, 131.

In its analysis of the fraudulent inducement claim, the Court addressed the contention that First Union committed fraud by promising "two five-year terms, or a 'ten-year agreement'" between the two parties. *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. at 167. The Court observed that this term "was specifically negotiated out of the [Service Agreement], and a three-year contract . . . was substituted."

*Id.* at 167. The Court reasoned that Steele Software could not "reasonably rely on an agreement or representation that was specifically negotiated out of the parties' contract." *Id*. In other words, the earlier representations that the parties would have a ten-year relationship "could not reasonably be relied on by a sophisticated business entity entering a negotiated contract because [those representations] were contradicted by the explicit terms of the [Service Agreement]." *Id.* at 161. The Court further noted that the principal of Steele Software "testified that he knew the agreement might only last for three years[.]" *Id.* at 170. "Given the clear language of the [Service Agreement], as well as [the principal's] understanding about its limited term," the Court concluded that it could not "affirm a finding of fraud predicated on a promise of a longer term." *Id.*

Any reader of this opinion may reasonably wonder what applicability the *Steele Software* opinion might possibly have to Dr. Guan's claim of fraud. The facts of the present case are nowhere near to being analogous to those in the *Steele Software* case. The core fact pattern analyzed in *Steele Software*—allegedly false statements of intention by the defendant, followed by the execution of a written contract contradicting those earlier statements—does not exist here.

Here, Dr. Guan claimed that, well before Dr. Yang's alleged misrepresentations, the defendants had already made an agreement to give him 15 percent of FZata. Dr. Guan claimed that Dr. Yang misled him when, in response to his request for proof of his ownership of FZata, she sent him a document showing that he owned 15 percent of ATA, LLC, a company that no longer existed. Then, when Dr. Guan asked Dr. Yang why the document used the name "ATA," she told him that the two companies were the same,

meaning that the bylaws document governed the existing company, FZata, Inc. *Steele Software* and other opinions cited by the defendants do not address whether it may have been reasonable for Dr. Guan to rely on these types of representations.

Although their argument is difficult to comprehend, the defendants describe Dr. Yang's alleged statements about the ATA bylaws as a "purported misrepresentation about the terms" of a contract. They tell us that a plaintiff cannot "use a statement *about a contract's terms*" to establish fraud. (Emphasis in original.) They assert that "there can't be a fraud about the terms of a contract where one party simply disagrees about what the agreement was." They insist that "Dr. Yang could not have defrauded Dr. Guan by disagreeing with him about the terms of a contract."

These attempts to draw some analogy between the present case and *Steele Software* are unconvincing. For one thing, the defendants rely on an unduly broad characterization of the holding that a party to a contract "cannot reasonably rely on an agreement or representation that was specifically negotiated out" of the contract. *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. at 167. Even on its own terms, the defendants' argument does not correspond to any party's version of the facts of this case. The defendants fail to explain their suggestion that, through her statements about the ATA bylaws document, Dr. Yang was expressing some "disagree[ment]" about the "terms" of a contract. The defendants fail to explain what "terms" Dr. Yang may have been discussing or how these "terms" somehow contradict other express terms of some contract.

The defendants have not meaningfully addressed the actual content of the alleged

representations. Dr. Yang's alleged representations were presenting the ATA bylaws as documentation of Dr. Guan's ownership interest in FZata, along with her statement that ATA and FZata were the "same company," so that the ATA bylaws applied to FZata. These representations concern the nature of the ATA bylaws document, as well as the relationship between the two entities. These were not representations about the "terms" of some agreement, such as a promise to undertake a ten-year performance period as opposed to a three-year period.

Moreover, even if there were any merit to the defendants' appellate argument about the claim of fraud (and we see none), their argument is substantially different from the arguments made in support of their motion for judgment. At trial, the defendants moved for judgment on the fraud claim by arguing that Dr. Guan "testified that he knew that ATA was being converted or being changed over to FZata." Their motion concerned Dr. Guan's knowledge at the time of the alleged misrepresentations; it did not concern the effect of some contract. Even in their motion for judgment notwithstanding the verdict, the defendants failed to raise an issue based on the principles applied in *Steele Software.* At a minimum, therefore, the defendants' new appellate arguments about a purported deficiency in the fraud claim are not properly preserved. *See, e.g.*, *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 341 (2012).

In short, the defendants have not identified any basis to conclude that Dr. Yang is entitled to a judgment in her favor on the claim of fraud. The verdict finding Dr. Yang

liable for fraud will stand.[24]

## IV. Sufficiency of Evidence to Award Compensatory Damages

In their final challenge to the judgment, the defendants contend that Dr. Guan failed to produce sufficient evidence to support the award of compensatory damages in the amount of $1,762,500. They argue that the only witness who testified on the issue of damages did not render an opinion on the damages claimed by Dr. Guan.[25]

As a general rule, for a party to recover compensatory damages, the damages "'must be proved with reasonable certainty, and may not be based on speculation or conjecture[.]'" *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 350 (2014) (quoting *Aisbem Assocs., Ltd. v. Rill*, 264 Md. 272, 276 (1972)). The plaintiff seeking to recover damages bears the burden of producing evidence from which the fact-

[24] The damages for fraud are designed to compensate a plaintiff for the harm suffered because of detrimental reliance on a false representation of material fact. The defendants do not contend the damages awarded in this case—the putative value of the shares that Dr. Guan was allegedly promised—were calculated to compensate him for some harm other than whatever harm he may have suffered as result of his detrimental reliance on what Dr. Yang said. Because the defendants make that contention that argument, we do not consider it.

[25] In this analysis, we assume that the jurors awarded $1,762,500 of compensatory damages for breach of contract *and* for fraud. Questions One through Three of the verdict sheet asked the jurors whether they found three defendants (FZata, Dr. Feng, and Dr. Yang) liable for breach of contract. Question Four asked the jurors whether they found Dr. Yang liable for fraud. The verdict sheet directed the jurors that, if they answered yes to any of the first four questions, they should go on to answer Question Five, which asks for the amount of compensatory damages. Thus, the finding that Dr. Yang committed fraud might be an independent basis for the award of compensatory damages. There may be reason to doubt whether the damage award here, representing the value of Dr. Guan's claimed interest in FZata, is an appropriate measure of damages for fraud. *See generally Goldstein v. Miles*, 159 Md. App. 403, 422-24 (2004); *see also* n.24, *supra*. Because the defendants have not raised that issue, we will not address it.

finder can determine the amount of damages with reasonable certainty. *See, e.g.*, *Brock Bridge Ltd. P'ship, Inc. v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 157 (2007).

"In a breach of contract action, upon proof of liability, the non-breaching party may recover damages for 1) the losses proximately caused by the breach, 2) that were reasonably foreseeable, and 3) that have been proven with reasonable certainty." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007). In this context, "'reasonable certainty' of contract damages means the likelihood of the damages being incurred as a consequence of the breach, and their probable amount." *Id.* at 595. "Losses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as 'reasonably certain' and therefore recoverable as contract damages." *Id.* The requirement that a plaintiff must prove damages with reasonable certainty applies to tort claims, including claims of fraud. *See Crawford v. Mindel*, 57 Md. App. 111, 122-23 (1984).

In some circumstances, expert testimony may be required to prove compensatory damages. *E.g.*, *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 418 (2013) (stating that "[e]xpert testimony is required ordinarily to establish diminution in property value resulting from environmental contamination"). Generally, "[e]xpert testimony is *not* required for matters that would be within the common knowledge of an average person." *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 737 (2020) (emphasis in original). Expert testimony, however, is required on a matter "'when the subject of the inference [to be drawn by the jury] is so particularly related to some science or profession that it is beyond the ken of the average lay[person].'" *Id.* (quoting *Johnson v. State*, 457

Md. 513, 530 (2018)) (further quotation marks omitted). "If the plaintiff presents no expert when one is needed, then the trial court 'may rule, in its general power to pass upon the sufficiency of the evidence, that there is not sufficient evidence to go [to] the jury.'" *Jones v. State*, 425 Md. 1, 26 (2012) (quoting *Rodriguez v. Clarke*, 400 Md. 36, 71 (2007)); *see also* Joseph F. Murphy, Jr. & Erin C. Murphy, *Maryland Evidence Handbook* § 1401, at 686-87 (5th ed. 2020) (explaining that, "[w]hen substantive law requires expert testimony to generate an essential element of a claim or defense, the party who bears the burden of production on that issue will lose on a motion for judgment unless testimony is presented on the critical issue").

Additionally, courts "'require[] expert opinions to be established within a reasonable degree of probability.'" *Reiss v. American Radiology Servs., LLC*, 241 Md. App. 316, 334 (2019) (quoting *Karl v. Davis*, 100 Md. App. 42, 51-52 (1994)), *aff'd*, 470 Md. 555 (2020). This requirement exists "'to make sure that the expert's opinion is more than speculation or conjecture.'" *American Radiology Servs., LLC v. Reiss*, 470 Md. 555, 581 (2020) (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1404, at 649 (4th ed. 2010)). If an expert witness declines to state an opinion on an issue to a reasonable degree of probability, the testimony does not generate a triable issue. *See Ramsey v. Physicians Mem'l Hosp., Inc.*, 36 Md. App. 42, 49 (1977) (affirming grant of judgment notwithstanding the verdict in medical malpractice action, where expert witness could not give a "definite opinion," to a reasonable degree of medical certainty, that physician violated standard of care).

In the present case, Dr. Guan claimed that the defendants wrongfully deprived him

of a 14.1 percent ownership interest in FZata, Inc. He argued that the proper measure of damages was the value of that ownership interest as of the time of his departure from FZata in October 2016. At that time, FZata was a startup biotechnology company, created just one year earlier, whose shares were not publicly traded. Understandably, Dr. Guan attempted to use expert testimony to prove the value of his alleged ownership interest. "'It is a matter of common knowledge that in most instances there is no easily ascertainable market value for the shares of closely held corporations.'" *Boland v. Boland*, 423 Md. 296, 368 (2011) (quoting *Yeng Sue Chow v. Levi Strauss & Co.*, 122 Cal. Rptr. 816, 820 (Ct. App. 1975)).[26] "Because 'business valuation is far more complex' than the valuation of most types of assets, courts usually require expert testimony to determine the value of a business." *Goicochea v. Goicochea*, 256 Md. App. 329, 354 (2022) (quoting *Long v. Long*, 129 Md. App. 554, 570 (2000)).

During discovery, Dr. Guan filed a designation of expert witnesses, in which he identified three experts, including one expert in corporate valuation and one expert in business valuation. The defendants identified one expert witness, Michael J. Kresslein, a certified public account and certified valuation analyst. The defendants disclosed a report in which Mr. Kresslein summarized his opinion about the damages that the defendants sustained as a result of Dr. Guan's misappropriation of HIV research materials.

[26] "The term 'closely held corporation' is used to describe a corporation with certain defining attributes, namely, '(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction, and operations of the corporation.'" *Eastland Food Corp. v. Mekhaya*, 486 Md. 1, 26 (2023) (quoting *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 257 (2005)).

Dr. Guan failed to make timely disclosures about the findings or opinions of the three expert witnesses that he had identified. On that basis, the circuit court issued an order precluding Dr. Guan from offering any testimony from the three persons identified in his designation of expert witnesses.

Several months later, Dr. Guan filed a pretrial statement in which he stated his intention to call Mr. Kresslein as a witness at trial, to solicit expert testimony from Mr. Kresslein, and to offer the report prepared by Mr. Kresslein as evidence. The court denied the defendants' motion to preclude Dr. Guan from calling Mr. Kresslein as a witness at trial.

On the second day of the eventual trial, Dr. Guan called Mr. Kresslein as a witness. Counsel for Dr. Guan proceeded to establish Mr. Kresslein's qualifications. Mr. Kresslein stated that he works as a director of an accounting firm where he provides forensic accounting services, including valuation analysis. He stated that for 15 years he has maintained certification as a Certified Valuation Analyst (CVA) from the National Association of Certified Valuation Analysts. The court accepted Mr. Kresslein as an expert on the subject of the "valuation" of a "business" or "company."

Mr. Kresslein explained that defendant FZata, Inc., had retained him to calculate the damages resulting from Dr. Guan's alleged misappropriation of HIV research materials. As part of the engagement, he interviewed Dr. Yang, Dr. Feng, and Mr. Hiping Chang, a representative of Sage-angel BioIncubator Corp. In addition, Mr. Kresslein reviewed documents provided by Dr. Yang and Dr. Feng.

To form his opinion, Mr. Kresslein began with the premise that Dr. Guan's refusal

to return various HIV research materials caused FZata to abandon its HIV research unit. Mr. Kresslein explained that he set out to determine the "lost value" suffered by FZata by comparing two values: the value of FZata with an HIV research unit and the value of FZata without the HIV research unit.

Mr. Kresslein considered three valuation methodologies: an income approach, an asset approach, and a market approach. He rejected the income approach, reasoning that it would be unduly speculative to attempt to calculate the future income of a startup medical research company that would not earn any profits for many years. He rejected the asset approach, reasoning that the value of FZata's assets would not provide an accurate measure of the company's value because FZata was not an "asset intensive" business.

Mr. Kresslein decided to employ a "market approach" to his valuation of FZata. He explained that a market approach to valuation often uses data from public or private sales of stock. He identified two main challenges to using that type of data to value a company like FZata: first, it is difficult to find companies that could be considered "comparable" to the subject company; and, second, it is difficult to find data that is "fairly contemporaneous" with the date of valuation.

"[U]ltimately," Mr. Kresslein used the "[e]ntity method," which uses data from "transactions in this entity's stock." Mr. Kresslein focused on one "guideline sale" of FZata stock that was "contemporaneous" with the valuation date of October 28, 2016, the date of Dr. Guan's departure from FZata. He said that, ten days before the valuation date, Sage-angel "invested $500,000 and acquired a 4 percent interest" in FZata. According to

Mr. Kresslein, this transaction meant that Sage-angel, a venture capital company, "valued [FZata] at 12 and a half million dollars." Mr. Kresslein concluded that $12.5 million represented the total value of FZata "with the HIV business unit intact." He expressed that opinion to a reasonable degree of accounting certainty.

Next, Mr. Kresslein set out to determine what part of the total value represented the HIV research unit. On that point, he considered the opinions of FZata (expressed through Dr. Yang) and the investor, Mr. Chang, at the time of Sage-angel's investment. From his interviews, Mr. Kresslein learned that Mr. Chang estimated that the HIV research unit was worth around 10 to 15 percent of the overall value of FZata, while FZata estimated that the HIV research unit was worth around 20 percent of the overall value. Based on that information, Mr. Kresslein reasoned that the value of FZata without the HIV research unit was in "a range of 80 to 85 percent of the total value of FZata." Mr. Kresslein concluded that the total value of FZata without the HIV research unit was in "a range of 10 million to 10.625 million" dollars.

Calculating the differences between the total value of FZata and the range of values for the HIV research unit, Mr. Kresslein concluded that FZata lost between $1,875,000 and $2,500,000 of its total value as a result of the misappropriation of HIV research materials. Mr. Kresslein expressed his conclusion to a reasonable degree of accounting certainty.

Dr. Guan introduced Mr. Kresslein's written report, which the defendants had disclosed during discovery. In that report, Mr. Kresslein opined that the value of "a 100% ownership interest in FZata, *with* the HIV-related business unit" was $12,500,000

as of the valuation date. Mr. Kresslein opined that the value of a "100% ownership [interest] in FZata *without* the HIV-related business unit" was "80-85% of this value, or $10,000,000 to $10,625,000." On that basis, he concluded that the defendants suffered "damages in the range of $1,875,000 to $2,500,000" as a result of Dr. Guan's alleged misappropriation of trade secrets.

During cross-examination, counsel for the defendants sought clarification about the scope of Mr. Kresslein's valuation opinions. The following exchange occurred:

> [COUNSEL FOR DEFENDANTS:] Did you ever calculate the damages that the Plaintiff Dr. Guan alleges that he suffered . . .?
>
> [MR. KRESSLEIN:] No, I did not.
>
> [COUNSEL FOR DEFENDANTS:] What was it that you valued in your damages report?
>
> [MR. KRESSLEIN:] I valued the loss of business value to FZata related to the HIV unit, business unit as a result of the misappropriation as of October 28th, 2016.
>
> [COUNSEL FOR DEFENDANTS:] Now, would that valuation be not to value Guan's claimed interest in his complaints?
>
> [MR. KRESSLEIN:] No, it would not.
>
> [COUNSEL FOR DEFENDANTS:] And why not?
>
> [MR. KRESSLEIN:] My understanding of the allegations are that Dr. Guan believes he's entitled to an ownership share in the entity. When you are calculating a share of the company, it's -- there are a lot of factors that you need to consider that I did not consider because it wasn't part of my engagement.
>
> There are -- it's not necessarily -- it's not as simple as just taking the value, taking the whole and multiplying it by a certain percent.
>
> [COUNSEL FOR DEFENDANTS:] So it's not simple math?

[MR. KRESSLEIN:] It's not necessarily simple math, no. No. There are things that need to be considered to look at interest in a company. For example, we would need to look at the vesting and what he was entitled and what someone was entitled to at specific dates to determine the interest.

But you also need to look at to the rights and obligations of that interest relative to others. You need to see what the terms of that stake of that ownership stake are compared to others.

There could be -- there may be preferred interest especially when you got outside investors coming in which generally take priority. And they have terms relative available to them that may not be available to others that --

[COUNSEL FOR DEFENDANTS:] So venture capitalist interest could be valued differently than an employees' stock?

[MR. KRESSLEIN:] They certainly could be. I mean, it's not something that I considered because it was outside of the engagement. But they certainly could. You know, there were -- you would have to look at the terms of that stake in relation to others.

I would also need to consider lack of control discounts. Generally, for example, a 10 percent interest of a whole. When you are really valuing that, it's going to be worth less than just taking the whole and multiplying it by 10 percent. . . .

When you are dealing with a minority share like this, they don't -- it doesn't come with elements of control. So typically there are discounts. You would discount value of a share for a lack of, you know, for lack of control. And you would look at factors to determine whether it's appropriate and how much and things of that nature, which I did not do.

[COUNSEL FOR DEFENDANTS:] So you did not valuate any of those factors in this case?

[MR. KRESSLEIN:] No, it's not relevant to valuate -- to looking at a 100 percent interest in the entity. So I did not. I wouldn't. I wouldn't need to.

[COUNSEL FOR DEFENDANTS:] So have you ever formulated an opinion as to the value of Dr. Guan's alleged interest in FZata?

[MR. KRESSLEIN:] No.

During redirect examination, counsel for Dr. Guan elicited that Mr. Kresslein's opinion as to "a 100 percent valuation of the entire company" was "based on" the sale of four percent of the company to Sage-angel for $500,000. Mr. Kresslein agreed that this sale of four percent of the company was the sale of "a minority share" of the company.

When the defendants moved for judgment at the end of Dr. Guan's case, they contended that Dr. Guan had failed to produce sufficient evidence of damages. The defendants argued that "Mr. Kresslein stated very clearly on the record that his opinion for damages" was related to the "trade secrets misappropriation case" and that his opinion "cannot be used" as an opinion regarding the "damages for [Dr. Guan's] case."

Opposing the motion, counsel for Dr. Guan argued that he had produced sufficient evidence of damages by offering Mr. Kresslein's testimony that the "entire value of the company" was $12.5 million as of October 2016. Counsel noted that this opinion was "based on a sale and purchase by a minority shareholder" who did not acquire a "controlling interest in the company."

The circuit court concluded that Mr. Kresslein's expert opinion regarding the overall value of FZata was an adequate basis to award damages. The court acknowledged that Mr. Kresslein had rendered no opinion about the value of Dr. Guan's claimed interest in FZata. The court reasoned, however, that the jury could determine the value of Dr. Guan's claimed interest by calculating a percentage of the total value of FZata. Specifically, the court said that a proper measure of damages was "14 point some percent" of $12.5 million.

The court reasoned that this calculation would be permissible because Mr. Kresslein had used an opposite calculation when he determined the overall value of the company. The court observed that Mr. Kresslein had determined the total value of FZata to be $12.5 million, based on the "contemporaneous purchase of stock" by Sage-angel, which "invested $500,000 to acquire [a] 4 percent interest." The court stated: "And [counsel for the defendants] is right, [Mr. Kresslein] testified that you couldn't do that to come up with -- or he didn't compute . . . Dr. Guan's damages, but the fact of the matter is that [Mr. Kresslein] did exactly what [counsel for Dr. Guan] is doing to calculate damages." The court added: "Even though he said there could be a variance for a minority interest, that's exactly what he did for this 4 percent acquisition of an interest."

The court denied the defendants' renewed motion for judgment at the close of all the evidence. In closing arguments, counsel for Dr. Guan asked the jury to determine the amount of damages based in part on Mr. Kresslein's opinion that the value of FZata was $12.5 million as of October 28, 2016. Counsel asked the jury to award Dr. Guan "14.1 percent of that total $12 and a half million[,]" an amount equal to $1,762,500. The jury awarded compensatory damages of $1,762,500, the exact amount requested. Ultimately, the court denied the defendants' motion for judgment notwithstanding the verdict.

In their appeal, the defendants again contend that there was "no competent evidence supporting the damage calculation" that Dr. Guan relied upon at trial. They argue that the "only witness" to testify about the valuation of FZata "stressed that he could *not* render an opinion on the value of a fractional ownership" interest in the company. They highlight Mr. Kresslein's testimony that he "did not consider" various

"factors that you need to consider" "[w]hen you are calculating a share of the company," because it "wasn't part of [his] engagement" as a valuation analyst. They assert that Mr. Kresslein stated that he "could not opine" about the value of a fractional ownership interest in the company, because forming such an opinion would have "required him to research vesting requirements, the liquidity of shares, . . . and other factors outside his knowledge."

In his brief, Dr. Guan purports to rely on Mr. Kresslein's expert opinion testimony that the overall value of FZata was $12,500,000 as of the date of Dr. Guan's departure from FZata. Dr. Guan argues that this opinion provided a "more than adequate basis for the jury to determine" an amount of damages representing "the 14.1% ownership interest that Dr. Guan was deprived of."

Dr. Guan's argument fails to confront the actual deficiency in the evidence. The jury did receive competent evidence, in the form of Mr. Kresslein's expert opinion testimony, that the total value of FZata was $12,500,000 at the time of Dr. Guan's departure from FZata. Mr. Kresslein did not, however, give an opinion about the value of the claimed 14.1 percent interest in FZata. He did not render an opinion that the value of Dr. Guan's claimed interest was $1,762,500 or some other amount. He certainly did not render an opinion, to a reasonable degree of accounting certainty, that the value of Dr. Guan's claimed interest was $1,762,500.

In short, Mr. Kresslein did not provide any opinion testimony regarding the value of Dr. Guan's claimed ownership interest in FZata. Nor did any other witness render an opinion about that value. At the close of the evidence, therefore, there was no competent

evidence establishing the value of Dr. Guan's claimed interest in FZata.

The remaining question is whether it was proper to allow a jury to fill in the gap in proof left by the expert testimony. May a fact-finder conclude by a preponderance of the evidence that, because an expert opined that the total value of the company was $12.5 million, the value of a 14.1 percent ownership interest is 0.141 times $12.5 million? This factual inference is the one that Dr. Guan asked the jury to make and the one that the court permitted the jury to make.

In our judgment, a fact-finder cannot make this proposed inference. The value of a minority ownership interest in a startup biotechnology company whose shares are not publicly traded is not a matter within the ordinary experience of an average person. It is not a matter of common knowledge that the value of a minority interest in this type of company can be determined by multiplying the ownership percentage by the total value of the company.

The only witness properly qualified to testify on this subject, Mr. Kresslein, explained that determining the value of a minority ownership interest of such a company is not necessarily "as simple as just . . . taking the whole and multiplying it by a certain percent." He explained that a valuation analyst must consider many other factors, including potential discounts for lack of control. No party or witness questioned or contradicted this testimony. Even absent this testimony, trial courts should be aware that the value of a minority interest in a closely held corporation cannot be determined as a simple percentage of the total value, without considering discounts for lack of marketability and lack of control. *See Turner v. Turner*, 147 Md. App. 350, 373 (2002);

*McNaughton v. McNaughton*, 74 Md. App. 490, 494-95 (1988). *Cf. East Park Ltd. P'ship v. Larkin*, 167 Md. App. 599, 616 (2006) (recognizing that minority discounts and marketability discounts ordinarily must be applied when determining the fair market value of a partnership interest, and stating that those discounts "should be considered, but not necessarily applied," when determining the "fair value" of a withdrawing partner's limited partnership interest).

It is true that the jury was not required to accept all of Mr. Kresslein's testimony. Jurors are "free to accept or reject all or any part of any witness's testimony or the reports of the experts." *Mason v. Lynch*, 151 Md. App. 17, 30 (2003). Jurors may not, however, "assign . . . negative weight to the testimony, inferring that the opposite of that witness's statements is true, without the consideration of any other evidence." *Bereano v. State Ethics Comm'n*, 403 Md. 716, 747 (2008). "The jury's prerogative not to believe certain testimony . . . does not constitute affirmative evidence of the contrary." *VF Corp. v. Wrexham Aviation Corp.*, 350 Md. 693, 711 (1998). In this case, if the jury disbelieved Mr. Kresslein's cross-examination testimony about factors that must be considered when determining the value of a minority ownership interest, their rejection of this part of his testimony would not constitute affirmative evidence of the negation of his testimony. It would not generate affirmative evidence that a valuation analyst *can* determine the value of a minority ownership interest simply by calculating a percentage of the total value of a company, without considering other factors.

The circuit court endorsed the view that the jury could use other features of Mr. Kresslein's testimony to make an inferential leap about the process for valuation of a

minority interest. The court observed that Mr. Kresslein had used simple arithmetic ($500,000 divided by 0.04 equals $12,500,000) to calculate the total value of FZata, based on the sale of a minority share to Sage-angel. The court reasoned that, in light of that information, the jury could conclude that it is appropriate to use a similar calculation ($12,500,000 multiplied by 0.141 equals $1,762,500) to determine the value of a minority interest, based on the total value of FZata. We find this reasoning to be inadequate to satisfy a plaintiff's burden of proving damages with reasonable certainty.

Contrary to the court's suggestion, the calculation proposed by Dr. Guan for the value of a 14.1 percent ownership interest is not "exactly" the same as the calculation that Mr. Kresslein used to determine the total value of FZata. The proposed calculation was the opposite. It is not necessarily true that the process for determining the value of a minority share is simply an inversion of a process for determining the value of the total company based on an acquisition of a minority share. Moreover, it is not necessarily true that the value of a minority share acquired by a venture capital company is directly comparable to the value of an employee's minority share. A properly qualified expert might have been able to say whether the calculation proposed by Dr. Guan would produce a reliable result. At this trial, no one did so.

We do not think that a plaintiff can satisfy the burden of proof by asking a jury to re-configure an expert witness's testimony to generate entirely new conclusions, within the realm of the witness's expertise, which the expert witness was unable to make. Inviting the jury to do so would evade the basic requirement that expert opinion testimony be stated to "'a reasonable degree of probability'" to ensure that the opinion is

not based on speculation or conjecture. *See American Radiology Servs., LLC v. Reiss*, 470 Md. at 581 (quoting *Karl v. Davis*, 100 Md. App. at 53). When an expert witness does not render an opinion on an issue to a reasonable degree of probability, the testimony does not permit a finding in favor of the party who bears the burden of proof on that issue. *See Retina Grp. of Washington, P.C. v. Crosetto*, 237 Md. App. 150, 176 (2018) (holding that expert witness's testimony "was not such as to permit a finding by reasonable jurors" that physician breached standard of care, where expert witness criticized the physician's treatment but "did not testify to a reasonable degree of medical certainty" that physician breached standard of care). In the present case, the jury had no evidentiary basis to conclude that the inference proposed by Dr. Guan had been established to a reasonable degree of certainty or probability. Consequently, the jury could not reasonably adopt that proposed inference by a preponderance of the evidence.

In sum, Dr. Guan failed to produce sufficient evidence to determine the amount of damages with reasonable certainty. The circuit court erred when it denied the defendants' motion for judgment on the issue of compensatory damages.

The defendants contend that, if this Court concludes that Dr. Guan produced sufficient evidence of liability for breach of contract but failed to produce sufficient evidence to award compensatory damages, then Dr. Guan should be entitled to recover nominal damages only. The defendants assert that, in that event, this Court should modify the judgment to reflect an award of $1.00 in favor of Dr. Guan. In support of that position, the defendants cite *Aisbem Associates, Ltd. v. Rill*, 264 Md. 272 (1972). In that case, the Court modified a judgment to award $1.00 of nominal damages, upon

concluding that the plaintiff had established the defendants' liability but failed to prove the amount of compensatory damages with reasonable certainty. *Id.* at 280-81.

In his brief, Dr. Guan did not expressly address the possibility that this Court might uphold a finding of liability but conclude that he failed to produce sufficient evidence for an award of compensatory damages. Accordingly, we see no reason to conclude that the remedy employed in *Aisbem Associates, Ltd. v. Rill*, is not the proper remedy. We will direct that judgment be entered against Dr. Yang and in favor of Dr. Guan in the amount of $1 on the count for fraud.

In addition to compensatory damages, the jury awarded $100,000 of punitive damages. Because this award of punitive damages was predicated on liability for fraud (rather than breach of contract), the court imposed the obligation to pay punitive damages on Dr. Yang alone. Neither party has expressly addressed how the resolution of this appeal might affect the award of punitive damages.

As a general rule, "a necessary condition for the recovery of punitive damages is an underlying award of compensatory damages." *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 639 (2005). "More specifically, 'there must be a compensatory damages award foundation for each count of a complaint that provides a basis for punitive damages.'" *Id.* (quoting *Caldor, Inc. v. Bowen*, 330 Md. 632, 662 (1975)). This Court has further explained:

> [A]n award of "nominal compensatory damages" will support an award of punitive damages. Nominal compensatory damages are damages awarded when a compensable injury has been proven but it is impossible to calculate the actual loss that has been suffered. In that situation, the plaintiff has sustained actual harm. By contrast, an award of nominal damages that is

> not compensatory, *i.e.*, is made only upon a finding of a "technical invasion" of the plaintiff's rights, when "in fact, no compensable injury was proved," will not support an award of punitive damages.

*Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. at 639-40 (quoting *Shell Oil Co. v. Parker*, 265 Md. 631, 644 (1972)).

In the present case, an award of nominal damages would not be "compensatory." Dr. Guan's only theory of compensatory damages was that the proper measure of damages was the value of a 14.1 percent ownership interest in FZata. No party or witness suggested that it would be impossible for a properly qualified expert to determine the value of his claimed interest. Rather, Dr. Guan simply failed to produce competent evidence of that value at trial.

Under these circumstances, because Dr. Guan failed to prove that he sustained a compensable injury, the jury could not have properly made an award of punitive damages.[27] If the trial court had granted the defendants' motion for judgment on the issue of compensatory damages, the court could not have submitted the issue of punitive damages to the jury. *See Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. at 642-44. Accordingly, we must reverse the award of punitive damages because it is not founded on an award of compensatory damages.

[27] Dr. Guan did not object to an instruction that directed the jury to consider an award of punitive damages only if it awarded compensatory damages. The instruction stated: "If you find for the plaintiff, Dr. Guan, and award damages to compensate for the injuries or losses he suffered, you may go on to consider whether to make an award for punitive damages against Dr. Yang."

## CONCLUSION

For the reasons stated in this opinion, we have determined that the contract that Dr. Guan sought to enforce was too vague and indefinite to be enforceable. As a result, the evidence was insufficient to find any defendant liable for breach of contract. Because the breach-of-contract count was the only basis for requiring FZata and Dr. Feng to pay compensatory damages, those two defendants have no obligation to pay damages.

Next, we have determined that the defendants failed to establish that Dr. Yang is entitled to judgment in her favor on the claim for fraud. Consequently, the defendants have advanced no basis to disturb the jury's finding that Dr. Yang committed fraud.

Finally, we have determined that Dr. Guan produced insufficient evidence to support an award of compensatory damages for either breach of contract or fraud. The judgment is reversed to the extent that it obligates Dr. Yang to pay compensatory damages in the amount of $1,762,500. Because the award of punitive damages depends upon an award of compensatory damages, the judgment is also reversed to the extent that it obligates Dr. Yang to pay punitive damages in the amount of $100,000. Dr. Guan is entitled to nominal damages in the amount of $1, based on the finding of liability for fraud.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED FOR ENTRY OF JUDGMENT IN DEFENDANTS' FAVOR ON COUNT I (BREACH OF CONTRACT) AND ENTRY OF JUDGMENT IN FAVOR OF DR. GUAN AND AGAINST DR. YANG IN THE AMOUNT OF $1.00 ON COUNT III (FRAUD). COSTS TO BE PAID ONE-**

**THIRD BY APPELLANTS AND TWO-THIRDS BY APPELLEE.**