STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SAMUEL J. CAPIZZI,

Plaintiff,

v. Index No.: 810115/2016

BROWN CHIARI LLP
JAMES E. BROWN
DONALD B. CHIARI,

Defendants.

POST-TRIAL BRIEF

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PRELIMINARY STATEMENT

Material facts are essentially undisputed:

Capizzi's initial complaint alleged he was a 20% "equity partner" as of May 24, 2007. Court Exhibit 2. During the Frascogna litigation, Brown, Chiari and Capizzi jointly described their agreement in the same manner under oath. Proposed Findings of Fact (hereinafter "PFF") 5, 9 10, 11. Capizzi specifically testified that Brown and Chiari owned the firm's assets while he and Frascogna were income partners entitled to share the firm's profits as determined by Brown and Chiari. PFF 6, 9, 12.

This sworn testimony occurred more than two years after Frascogna had resigned. Capizzi specifically testified in July 2006 that he had the "same relationship today" with Brown and Chiari as he had prior to Frascogna resigning among numerous other statements expressing that same intention and understanding. PFF 6, 9, 12.

Justice Fahey issued a Memorandum Decision on December 22, 2006 stating that a trial was held "on the single question: Was Plaintiff Frascogna a general partner in the law firm Brown, Chiari, Capizzi and Frascogna, LLP?" Court Exhibit 1. Nowhere within the Memorandum Decision does Justice Fahey indicate that he finds Capizzi to be more than an income partner nor could he given that Capizzi specifically testified concerning his intent to be an income partner only.

Capizzi continued to practice law with Brown and Chiari over the ensuing ten-year period. At 5:00 a.m. on January 8, 2016 Capizzi left a note on the respective desks of Brown and Chiari informing them for the first time ever that he considered himself an owner of the firm, that he had retained counsel, and that he joined a competing firm. Exhibit 110.

Days later, at Brown's request, he and Capizzi met for dinner at Siena restaurant. Brown told Capizzi that Capizzi knew he was not an owner and Capizzi admittedly replied "Fahey said I was" and that Frascogna had been paid a settlement. PFF 21, 22. There was no mention by Capizzi that an agreement had been reached for him to be an owner after Justice Fahey's decision nor was there any mention of the May 2007 filing as Capizzi has alleged in his complaint. Instead he claimed only that "Fahey said I was." Id.

CAPIZZI'S DEPOSTION

During his deposition **in this case**, Capizzi claimed that **he** began to believe that he owned the firm after reading Justice Fahey's decision. PFF 18. Capizzi admitted that he never informed Brown or Chiari of this alleged belief. PFF 19 20; Instead he believed Brown and Chiari knew he owned the law firm because they had read the decision; PFF 20; that Brown and Chiari were not entitled to rely on his prior sworn testimony describing his status even though he admittedly never informed them that he allegedly **began to consider** himself an owner after reading Justice Fahey's decision "many times [when it was issued] and even now." PFF 19, 20; Trial Transcript pg. 649.

Despite having read the decision many times, Capizzi admitted in his deposition that he never informed Brown or Chiari of his alleged belief. Two months after his deposition, Capizzi amended his complaint to allege the existence of an "alternative" agreement. Court Exhibit 2. The new allegations allege he was a "partner" guaranteed to receive 20% of NDI. Id.

In this trial, Capizzi completed his entire direct examination without once testifying he ever discussed ownership with Brown or Chiari. Not until the second day of cross examination did Capizzi assert, for the first time ever, that a conversation allegedly occurred whereby it was agreed that he owned 20% of the firm. PFF 24.

In January 2015, Capizzi emailed his accountant explaining that he was seeking college financial aid. He described his agreement with his partners as follows: "**Really, it's just an agreement to share the profits after we pay expenses"** and that his interest was worth zero. Ten years earlier, he described his agreement with his partners to Justice Fahey stating: **"Really, [I'm compensated] the same way I'm compensated today, out of the net income of the firm, usually at the end of the year."** PFF 67, 68.

The "alternative" claim alleging a guaranteed 20% of NDI has no basis. Capizzi repeatedly testified in 2005 and 2006 that he never had a guaranteed percentage of the profits since he started with Mr. Brown in 1989. PFF 5, 6, 9,12. In fact, a June 30, 2014 memorandum provides that the income distribution is to be based upon an evaluation of contributions to the firm and not a percentage guideline. Exhibit 84. Money left over would be divided 40/40/20. Id.

In December of 2014, a meeting was held between Brown, Chiari and Capizzi regarding the distribution of income. PFF 56. Capizzi presented a list of resolved cases. Id; Exhibit 150. Capizzi indicated that he expected to receive more income, but did not assert that any agreement required him to be paid 20% of the firm's income either at the meeting or anytime thereafter. PFF 57. Capizzi accepted the amount determined. Four months later, in April of 2015, Capizzi emailed Brown expanding on discussions the two of them had at the end of 2014 regarding creating new areas of practice to enhance their compensation. PFF 61, Exhibit 84.

Capizzi admitted at trial that in October 2015 he began having secret meetings with William Collins about joining that practice. PFF 62. Capizzi also admitted that he did not do much work for the firm in 2015, and instead he spent most of his time originating new files that he took to his new firm. PFF 63, 64. Capizzi did not join the year end evaluation meeting and instead went to Italy never informing Brown or Chiari. PFF 65, 66. Capizzi did not attempt to

schedule the meeting prior to departing nor contact Brown or Chiari from Italy inquiring when the meeting would be held. Id. Capizzi admitted he was "99 percent sure" he was quitting prior to departing for Italy, and did not inform Brown or Chiari because he wanted to make sure that he got his distribution for 2015. PFF 65. The firm paid Capizzi $463,179 in total compensation in 2015 far surpassing Capizzi's representation to the government when seeking financial aid that he expected to earn less than $200,000. Exhibit 180.

A.
A PARTNERSHIP AGREEMENT IS LIKE ANY OTHER CONTRACT: THERE MUST BE MUTUAL INTENT

Justice Fahey, writing for the Court of Appeals, discussed the fundamental principal that partners enjoy the freedom to agree on the rules governing their relationship in Congel v. Malfitano, 31 N.Y.3d 272 (2018): "It is well established, however, that the Partnership Law's provisions are, for the most part, default requirements that come into play in the absence of an agreement." (citation omitted). The statutory scheme applies only when there is either not a partnership agreement governing the partnership's affairs, the agreement is silent as to a particular point, or the agreement contains provisions contrary to law**. Where an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law…No particular magic words need be recited, provided that the parties intent is clear**." (emphasis added) Congel, 31 N.Y. 2d at 287, 288.

"The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all agreements." Madawick Contracting Co., v. Travelers Ins. Co., 307 N.Y. 111 (1954). This concept is clearly applicable in the partnership context: "Whenever in an action between two persons alleged to be partners, a partnership is sought to be proven, the decision of

the question depends entirely upon the intention of the parties as legally ascertained…there is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner of the others." Heye v. Tilford, 2 A.D. 346 (1st Dept. 1896), aff'd 154 N.Y. 757 (1897).

B.
THE PARTIES TO THIS CASE DESCRIBED THEIR INTENTIONS AND AGREEMENT UNDER OATH DURING THE FRASCOGNA LITIGATION

The statements by each describing their agreement were given under oath at deposition in December 2005 and at trial in July 2006.

Capizzi clearly testified in 2005 and 2006 that he was an income partner only with no guaranteed specific percentage and that Mr. Brown and Mr. Chiari owned all the assets of the firm. PFF 5, 9, 12. Capizzi specifically testified in July 2006 that his agreement with Brown and Chiari concerning his partnership interest *was the same as it had been prior to Frascogna's resignation two years earlier:*

Q. At the time you had this conversation [with Frascogna about his decision to resign], did you understand Mr. Frascogna to have an ownership interest in the firm?

A. No.

Q. And did you have an ownership interest in the firm?

A. No.

Q. At the time that you had this discussion, did you understand Mr. Frascogna to have an interest in the ongoing cases of the firm after he left?

A. After he left, no.

Q. Why is that?

A. I didn't either.

Q. Because of the relationship you had with Brown and ultimately Chiari?

A. Exactly. ***Same relationship I have today***. Exhibit 157A, Ex. B., pg. 89-90.

C.
THE AGREEMENT DESCRIBED IN THE FRASCOGNA LITIGATION CONCERNING OWNERSHIP REMAINED THE SAME THROUGH THE TIME OF CAPIZZI'S RESIGNATION

The agreement they described in the Frascogna litigation was never changed to grant Capizzi an ownership interest. Capizzi admitted during this case that he, Brown, and Chiari continued to operate the partnership with "the same method, model, and mode" after Frascogna's departure. PFF 8. Capizzi's sworn statements in the Frascogna case reflect his own intent regarding his partnership interest.

The "Frascogna" partnership legally dissolved by operation of law upon Frascogna's resignation. The legal dissolution of the partnership had no effect on the **continuing agreement** amongst Brown, Chiari and Capizzi who practiced under the "same method, model and mode" as per Capizzi's own testimony. Id.

The May 24, 2007 certificate does not describe a different agreement. It is a notice to the public and the fact of the filing itself cannot be determined to have altered the agreement that was in place amongst the three individuals. *See*, Weinstein v. Welden, 160 A.D. 554 (1st Dept. 1914).

D.
CAPIZZI'S TRIAL TESTIMONY THAT HE WAS GIVEN AN OWNERSHIP INTEREST IN A CONVERSATION AFTER THE ISSUANCE OF JUSTICE FAHEY'S DECISION IS DIRECTLY CONTRARY TO HIS OWN DEPOSITION TESTIMONY

During the instant trial, Capizzi gave vague testimony regarding a vague discussion he claims occurred with Brown and Chiari shortly after the issuance of Justice Fahey's decision where it was agreed that he would be a 20% owner of the firm and paid a guaranteed 20% of

NDI annually. PFF 24, 25. Capizzi never mentioned this alleged discussion during his entire direct testimony. In fact, **during his deposition in this case**, Capizzi specifically denied that any discussion of his interest in the firm occurred as a result of Justice Fahey's decision. PFF 19, 20. However, during the second day of his cross examination, Capizzi sought to imagine that such a discussion took place:

Q. I didn't ask you what we all knew, I asked you about specific conversations where you were told you were going to be a twenty percent owner of the firm formed by the three of you following Mr. Frascogna's departure?

A. I just said, it was after Judge Fahey's decision of December 22, 2006. I don't remember the exact date.

Q. Do you recall where it took place?

A. In our office.

Q. And who, between Mr. Brown and Mr. Chiari told you now you were going to go from an income partner, which you'd been in Firms 1 and 2, you were going to become an owner and equity partner in the firm?

A. Nobody said it that way.

Q. All right. So your answer was they didn't say it in as many words. So where is it that you came to this belief, as you have expressed to this Court, you were made an owner of the firm as opposed to an income partner?

A. I just told you, in a discussion that we had after Judge Fahey's Decision of December 22nd.

The Court: Let's try it a different way. Tell me the discussion.

The Witness: We have this opinion—excuse me—Decision from Judge Fahey. We got to pay Frank. We got to get together, we have to figure out what we're going to do in the future. This firm's going to be dissolved. In other words, Firm 2 and Firm 1 is going to be dissolved. We're going to go forward with the 20/20/40 (sic) with respect to income and we are now owners as Judge Fahey has indicated.
PFF 25.

The above quoted trial testimony by Capizzi is **stunning** given his deposition testimony in this case to the contrary:

Q. Okay. After the Fahey decision came out did you have any discussions with Jim Brown and Don Chiari about your status?

A. We just continued to work the way we worked before.

Q. Did you tell them you thought, by virtue of Judge Fahey's decision, that you were an equity partner?

A. **No**, and neither did they tell me what they thought I was or was not either. **We never discussed it**. Just continued doing what we were doing. And my role in management increased.

Q. Well, they had your testimony where you said you were not an equity partner?

A. Absolutely.

Q. Okay. But you didn't send them an email or say I wonder if Judge Fahey's Decision makes me a partner, what do you guys think?

A. No.

Q. Did you ask them to memorialize that you were an equity partner at that time?

A. No, neither did they ask—neither did they memorialize that I wasn't.
PFF 19.

Capizzi was specifically asked **at his deposition** the reason why he believes that Brown and Chiari knew that he was an owner and he made no mention of the alleged aforementioned discussion he claimed occurred during his trial testimony. Incredibly, his deposition testimony was that Brown and Chiari should have known he was an owner because they had read Justice Fahey's Decision and continued to operate the business the same way:

Q. Was it your belief that Mr. Brown and Mr. Chiari knew in May and June of 2007 that you were an equity partner?

A. Yes.

Q. And what was your belief that they knew that?

A. Our continued carrying on of the business in the manner it was carried on while it was Brown Chiari Capizzi & Frascogna. The fact that we had changed absolutely nothing other than now I was more involved in the management and now I was more involved in the firm. So we took no steps to undo what Judge Fahey had decided. PFF 20.

Capizzi's testimony that he **began to believe** he owned the firm after multiple readings of Justice Fahey's decision, and that Brown and Chiari should have known he considered himself an owner by reading Justice Fahey's decision without Capizzi ever telling them, is utter nonsense. Capizzi is an attorney who had sworn multiple times in multiple ways to Justice Fahey that he did not own the law firm. Any attorney who testified that they didn't own a law firm, but then truly believed that he later acquired an ownership interest **would document it in some way.** Yet, Capizzi never documented it, and, in fact, admittedly never told Chiari or Brown of his alleged belief until 10 years later when he left a note resigning from the firm demanding money and threatening litigation. Exhibit 110. It is respectfully submitted that the reason Capizzi never told Brown or Chiari of his alleged belief of ownership is because he never truly believed it, and also knew that if he told Brown or Chiari that he owned the firm he would be immediately fired. In fact, Capizzi specifically testified at trial as follows:

Q. Exhibit 155, at page 85, line 2. Referring to that meeting, you were asked: At any time did you tell Mr. Chiari in sum or substance, or Mr. Brown, I'm a twenty percent equity partner in this firm, you can't unilaterally decide to pay me less than twenty percent of the profits? Your answer was: I did not, because I had to continue to work. I didn't have any place to go. Did you give that testimony back on January 11 of 2018, Mr. Capizzi?

A. That's exactly right. SCTT 1107-1108.

Moreover, Justice Fahey obviously did not and could not determine Capizzi to be an owner given Capizzi's testimony he was not an owner and never had any intention of being an owner. Recognizing this, Capizzi's complaint seeks to define the partnership as that established by a May 24, 2007 Certificate of Partnership filed with the State. Framing his complaint in this

manner was a strategic decision to provide Capizzi an opportunity to ostensibly assert that his testimony in the Frascogna case involved a "different legal entity" and therefore was not dispositive of his claim. Capizzi failed to understand that the filing of that certificate had no effect on the agreement regarding ownership that each described the same way under oath during the Frascogna litigation nor of the judicial estoppel effect of his prior testimony.

Indeed, the evidence at trial compels the conclusion that Capizzi was not even aware of the May 24, 2007 certificate at the time he resigned from the firm. It can be safely assumed that an attorney who believed that their ownership interest began upon the filing of a certificate would at some point in time locate the document! Yet, Capizzi admits he first saw the certificate in the context of this litigation. PFF 39.

Although Capizzi testified that he obtained copies of all documents important to him prior to resigning, he admitted to not obtaining of the May 24, 2007 upon which he bases his ownership claim. The reason he did not obtain a copy of it is because he simply had no idea it even existed as demonstrated by the following testimony:

- He never saw the May 24, 2007 certificate prior to the instant litigation. PFF 39.
- He recalls no discussion concerning the May 24, 2007 certificate. Id.
- He assumes he discussed it with Brown or Chiari, but that he does not know when. Id.
- That prior to departing the firm, he obtained copies of all the 2014 memorandums and agreements involving himself, Brown and Chiari and maintained them because "they involved me, and my future interest in the firm, my ability to continue there." (Exhibit 201, pgs. 36-37). However, he admitted he did not obtain a copy of the May 24, 2007 filing relative to Brown Chiari LLP upon which he bases his claim of ownership. Id.
- Even though the resignation note referenced above indicates he had already retained legal counsel, the note itself does not reference the current name of the firm as of May 24, 2007, but rather the predecessor name with the comma included. Exhibit 110.

- At the dinner meeting referenced above, Capizzi did not refer to the May 24, 2007 filing, instead referring to Justice Fahey's decision as the basis of his ownership claim. PFF 21, 22.

- Even as late as 2014, when attempting to obtain money from the bank, Capizzi is still making reference to firm's name including a comma despite his complaint in this case asserting that eight years earlier he had been made an owner in the Brown Chiari LLP (no comma) firm. Exhibit 85.

Perhaps most significantly, Capizzi's email to his accountant in January 2015 describing his partnership interest as "just an agreement to share the profits after we pay expenses" (virtually the same language he used in the Frascogna litigation) is a "smoking gun" admission directly contrary to his assertion that he intended to own the firm. PFF 67, 68; Exhibit 87. Fortunately, defendants were able to obtain this evidence because Capizzi used his office computer to send the email. The admission is so specific and so on-point that Capizzi did not even attempt to offer any alternative explanation concerning its meaning during his direct testimony:

> Q. Why did you say on that memo to your accountant after saying, can I put zero for the market value, that it's really just an agreement to distribute the profits? Why did you say that?
>
> A. Because that's what it is, after we pay expenses of course. That's what I think I wrote there.
>
> Q. And did you say something to that effect or similar in the trial with Mr. Frascogna?
>
> A. Yes. Trial Transcript, 832-833.

In addition to the foregoing, the following rhetorical questions concerning other undisputed facts demonstrate that Capizzi never had an intention to own the law firm:

- Why was he admittedly never involved in the annual end of the year meetings between Mr. Brown and Mr. Chiari when staff and attorney compensation was decided?

- Why did he, just like all the other attorneys at Brown Chiari, receive his case assignments from Brown and Chiari?

- Why did he accept the written reprimand he received from Chiari that he was improperly attempting to offload work he was expected to do to attorney Theresa Walsh?

- Why was he not permitted to settle higher value cases without the permission of Brown or Chiari?

- Why did he admittedly never access the firm's books or tax filings?

- Why did he not assert his ownership rights to Brown and Chiari when he believed money was wrongfully taken from him at the end of 2014?

- Why did Brown and Chiari insist that Capizzi sign a Confidentiality and Development Agreement in 2015 protecting the proprietary aspects of the firm but not sign one themselves? Exhibit 159.

- Why did he not approach his co-owners prior to resigning and instead wait until he had secured other employment, retain an attorney, and leave a note in the middle of the night?

E.
THE DOCTRINE OF JUDICIAL ESTOPPEL PREVENTS CAPIZZI FROM CLAIMING TO THIS COURT THAT HE OWNS THE LAW FIRM

Ten years after swearing to Justice Fahey that he was an income partner only and that Brown and Chiari were the only owners, Capizzi joined a competitor and filed this lawsuit claiming to be an owner with Brown and Chiari completely contradicting his prior testimony. The well-established doctrine of judicial estoppel firmly prohibits such an abuse of the legal system: "The doctrine of judicial estoppel, also known as the doctrine against inconsistent positions, precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding." Secured Equities Invs., Inc. v. McFarland, 300 A.D. 2d 1137 (4th Dept. 2002). It has been stated "the doctrine rests upon the principle that a litigant should not be permitted to lead a court to find one way and then contend in another judicial proceeding that the same fact should be found otherwise. The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and

regard for the dignity of judicial proceedings…the doctrine is invoked to stop parties from adopting such contrary positions because the judicial system cannot tolerate this 'playing fast and loose with the truth." Kimco of New York, Inc. v. Devon, 163 A.D. 2d 573 (2nd Dept. 1990). *See also*, Karasik v. Bird, 104 A.D. 2d 758 (1st Dept. 1984). ("It is a well settled principal of the law of this state that a party who assumes a certain position in a legal proceeding may not thereafter, *simply because his interests have changed,* assume a contrary position. Invocation of the doctrine is required in such circumstances lest a mockery be made in the search for truth." (emphasis added).

Capizzi took the position that he did not own the firm during the Frascogna litigation in an attempt to defeat Frascogna's claim and now seeks to disavow his prior testimony to support his own claim. Judicial estoppel forecloses Capizzi from now asserting otherwise to this Court. Capizzi does not avoid the applicability of judicial estoppel by tying his ownership claim to the May 24, 2007 certificate. The filing of that certificate had no effect concerning **the agreement** that the three individuals consistently described in their 2005 and 2006 testimony. Capizzi is now asserting a contrary position to this Court "simply because his interests have changed" Karasik, *supra.* Capizzi's conduct represents precisely the type of "playing fast and loose with the truth" that is prohibited by the doctrine of judicial estoppel. Kimco, *supra*.

F.
DOCUMENTS INTRODUCED BY CAPIZZI ALL DEMONSTRATE BY HIS PREVIOUS TESTIMONY THAT THERE WAS NO INTENTION TO CREATE AN OWNERSHIP INTEREST

The Congel decision reiterated that the intention of the parties is the most critical thing for the courts to assess in disputes concerning agreements amongst partners. Congel, *supra*. For this reason, among others, this Court should reject the various documents entered into evidence by Capizzi as allegedly being evidence of an intention for him to own the firm. It is

fundamentally important to recognize that the only reason courts assess so-called "indicia" is to discern intent. Courts do not look at "indicia" activities because the activity itself creates an agreement to own, but rather because in some circumstances it can be viewed as an intention to acknowledge ownership. In this case, it is illogical to construe the so-called indicia as evidencing the parties intention that Capizzi owned the firm given his numerous prior statements denying that those same documents reflected any intention on his or Frascogna's part to own the firm.

Therefore, the so-called "indicia" documents offered by Capizzi actually serve to demonstrate the absence of any intention by the parties for Capizzi to own the firm. Capizzi testified in the Frascogna litigation that those documents were not signed nor entered into in order to create or signify an ownership interest. PFF 14. Capizzi admitted at the instant trial that at the time he denied ownership in the Frascogna case he had the same authority reflected in those documents. Id. His testimony in this regard involved his receipt of a K-1 tax reporting form, his guarantee of the firm's line of credit, his trustee status as concerns the firm's pension plan, himself being described in the 2004 pension plan as an owner, and his possession of a capital account. Id. In this case he has submitted to this Court those same documents (some literally still bearing the old exhibit stickers used in the Frascogna litigation) claiming they were executed because he is an owner of the firm once again violating judicial estoppel principles and making a "mockery in the search for truth." Karasik, *supra*.

G.
NEITHER BROWN NOR CHIARI EVER INTENDED TO MAKE CAPIZZI AN OWNER OF THE FIRM

Capizzi's complaint alleges that "Plaintiff, Brown and Chiari each intended to establish and operate the Partnership with a partnership relation and interest among the three of them as

the three lone equity partners." Court Exhibit 2. As set forth above, the evidence at trial establishes that Capizzi never even intended to own the firm.

Capizzi's resignation letter to Brown and Chiari alluding to ownership for the first time ever was left in the office at 5 a.m before anyone would be there and indicates he had already retained counsel. Exhibit 110. Capizzi never approached Brown or Chiari to tell them he was thinking of leaving, and instead secretly obtained other employment with a competing firm and left a note. All of this is curious behavior by Capizzi *given his claim that Brown and Chiari intended and agreed that he owned the firm*. It certainly is not consistent with the fiduciary duty he owed to Brown and Chiari presuming he truly believed himself to be an owner.

Capizzi's original claim made at the Siena restaurant was that Justice Fahey made him an owner. Sometime thereafter, Capizzi came to learn that a Certificate of Partnership had been filed on May 24, 2007 and sought to shift his claim to allege that the filing established his ownership. Postured in this new manner, he claimed to vaguely recall an undocumented conversation or conversations on unknown dates wherein Brown and Chiari **gave him** a percentage of their law firm. Certainly if Brown or Chiari intended to make Capizzi an owner during that time Capizzi would have at least obtained a copy of the May 24, 2007 certificate (particularly because he had recently denied ownership under oath during the Frascogna litigation.) Yet, Capizzi admittedly did not obtain the certificate despite testifying that he obtained copies of all the 2014 memorandums and agreements involving himself, Brown and Chiari prior to resigning and maintained them because "they involved me, and my future interest in the firm..." PFF 39.

Capizzi's concocted litigation strategy connecting his ownership claim to the filing of the May 24, 2007 certificate is further exposed by Chiari's certification to New York State made

three weeks after the May 24, 2007 certificate was filed. Exhibit 141. The State Department of Taxation and Finance responded to the May 24, 2007 filing requesting the identification of the owners of the Partnership. Mr. Chiari responded on June 15, 2007 indicating Brown and Chiari as the only owners. Id. Therefore, Capizzi wants this Court to believe that Brown and Chiari intended to give Capizzi an ownership interest on May 24, 2007 and then intended to take it away three weeks later! Although the document was provided in discovery, Capizzi's counsel repeatedly attempted to keep it out of the record.

H.
ATTEMPTS TO MANUFACTURE EVIDENCE

Capizzi's attempt to manufacture evidence to support his assertion that Justice Fahey's decision caused Brown and Chiari to increase Capizzi's percentage of NDI was entirely disproven at trial. The Court will recall Capizzi's counsel's repeated statements to Mr. Brown during cross examination that "something changed" after Justice Fahey's decision because Capizzi then began to receive 20% of NDI for the first time. However, defendants indisputably proved through documentary evidence that Capizzi first received 20% of NDI in 2005 (one year prior to the decision) and received a check constituting a 20% distribution in 2006 two days prior to the issuance of the decision. PFF 27.

Similarly, Capizzi's counsel's claim that the firm's tax returns are inconsistent with Brown and Chiari's equal ownership was also disproven at trial. He focused on a specific question on the return: ["Did any individual or estate own directly or indirectly an interest of 50% or more in the profit, loss or capital of the partnership?"] Exhibit 95; Trial Transcript pg. 1245. Capizzi's counsel asked the firm's accountant, Mr. Barrett, whether that question was answered yes or no on the tax return and Mr. Barrett testified that the tax return indicated "no". Id. Capizzi's counsel chose not to ask Mr. Barrett whether the "no" response was consistent with

Brown and Chiari each owning 50% of the firm thereby seeking to imply that the tax returns are inconsistent with 50/50 ownership. Trial Transcript pgs. 1245-49.

Capizzi's counsel attempted to make the same false implication when cross-examining Mr. Brown:

Q. And it's your position you owned fifty percent of everything when Sam was there?

A. I owned fifty percent of everything when Sam was there.

Q. Despite the fact that your tax returns said otherwise?

Mr. Rupp: Objection Your Honor…

(Whereupon the above requested question was reread by the reporter)

A. I don't know that the tax returns said otherwise.

Mr. Szany: Your Honor, I have no questions for this witness at this time. Trial Transcript 512-13.

Capizzi's counsel again avoided asking any question that would address the reason why the answer "no" is consistent with 50/50 ownership of the firm. However, the firm's accountant, under questioning by Mr. Rupp, addressed the substance of the issue. Mr. Barrett explained that the question did not ask about ownership of the firm, but instead merely asked if any individual owned 50% or more of the "profits" "loss" or "capital." Trial Transcript 1285-89. Mr. Barrett explained that the tax returns did not reflect any individual owning 50% or more of those categories noting that the term "capital" means the sum of the capital accounts which were reflected on the returns as negative. Id. As such, defendants entirely refuted Capizzi's attempt to imply that the firm's tax return is inconsistent with Brown and Chiari's equal ownership of the firm. Id. Simply put, the question on the tax returns does not seek information on ownership of

the firm itself but whether anyone owns 50% or more of the noted categories. This must have been known to Mr. Szanyi since he decided to not ask Mr. Barrett for an explanation.

Additional direct evidence that Brown and Chiari only intended themselves to own the firm (and of Capizzi's understanding that he did not own the firm) is that Capizzi obtained separate counsel when Frascogna moved to compel Brown, Chiari and Capizzi to purchase a bond. Court Exhibits 12, 13, 14. Capizzi did not even attempt to refute Chiari's testimony that the reason this occurred is because Brown, Chiari and Capizzi discussed that it would be unfair for Capizzi to purchase a bond and expose his assets given that he was not an owner of the firm. PFF 31-33. Capizzi separately opposed the motion telling Justice Curran in a written submission that Judge Fahey decided **only the issue of whether Frascogna was a general partner** and that Frascogna had no interest in any files remaining at the firm after his resignation because of "the understandings that were had among the parties to this dispute at the time the firm was established." Id. Capizzi obtained separate counsel and made those statements in April and May of 2007.

Capizzi supported Brown and Chiari's description of their relationship during the Frascogna trial wherein their intentions and actions were discussed and explained. Thoughts and/or opinions by third parties are irrelevant and cannot therefore support Capizzi's current position. Hammond v. Smith, 151 A.D. 3d 1896 (4th Dept. 2017) (holding: "in light of the documentary evidence detailed above that the parties never shared the intent to become partners, those two references to a partnership in documents prepared by lay persons do not raise an issue of fact whether the parties in fact entered into a legal partnership.") *See also*, Heye v. Tilford, 2 A.D. 346 (1st Dept. 1896), *aff'd* 154 N.Y. 757 (1897) (rejecting the claim of an estate

representative that the decedent was an owner of a partnership **because the decedent had testified in a prior proceeding that he was not an owner**); Congel, *supra*.

I.
CAPIZZI'S "ALTERNATIVE" CLAIM OF AN AGREEMENT THAT HE WOULD RECEIVE A GUARANTEED 20% SHARE OF NET DISTRIBUTABLE INCOME SHOULD BE REJECTED

Capizzi amended his complaint two months after admitting in his deposition that he never told Brown or Chiari that he considered himself an owner of the firm. Court Exhibit 2. His Amended Complaint alleges that Brown and Chiari agreed to pay him 20% of NDI "in the alternative" to Capizzi's initial claim that Brown and Chiari agreed he owned the firm. Id.

Capizzi's decision to allege an agreement different from the one he initially asserted after his deposition occurred is very telling. Capizzi's deposition testimony that he began to believe he owned the firm because of Justice Fahey's decision, but that he never discussed it with Brown or Chiari, obviously presented a significant problem for Capizzi. Recognizing this, Capizzi amended his complaint to make the "alternative" claim of a 20% guarantee. Then, at trial, Capizzi attempted to support the alternative claim by asserting (falsely) that the **first year** he received 20% of NDI was in 2007 (i.e. the first year following the issuance of Justice Fahey's decision.) In this way, Capizzi positioned himself to argue that Brown and Chiari's payment of 20% commencing the first year after Judge Fahey's decision demonstrated Brown and Chiari's intention to guarantee Capizzi 20% because of Justice Fahey's decision.

The documentary evidence at trial, however, irrefutably demonstrated that Capizzi first received 20% of NDI in 2005 (one year prior to the decision) and received a check constituting a 20% distribution in 2006 two days prior to the issuance of the decision. PFF 27. Capizzi's ruse was entirely disproven at trial. Neither Brown nor Chiari ever intended to alter their longstanding agreement with Capizzi because of Justice Fahey's decision or otherwise.

J.
THE METHOD OF COMPENSATION AGREED TO IN JUNE 2014 WAS IN EFFECT AT THE TIME OF CAPIZZI'S DEPARTURE

The method of distribution established in June 2014 did not change the fundamental agreement that Brown had with Capizzi since he was hired in 1989 that the amount of compensation was to be determined by Brown, and later, by Brown and Chiari. PFF 51. However, Capizzi was now to be involved in the evaluation process. Brown and Chiari retained the ability to determine his compensation because "the agreement that [Capizzi and I reached] many, many, years ago, provided that I could determine the amount to be distributed, and to whom at the end of the year, and subsequently, after Don had been with me for a period of time, it changed to Don and myself. [That arrangement was] Sam's testimony in the Frascogna case, it was Sam's testimony in 2005, in 2006 when the Frascogna firm didn't even exist, and it's been the practice ever since, it was always that way." Id.

Chiari also testified that he and Brown retained the ability to determine Capizzi's income irrespective of the change in the method of distribution. Trial Transcript 2913. Chiari further testified concerning how the change in the method of distribution accomplished two things from his perspective: First, the evaluation of relative contributions would allow time Brown spent away from the office to be considered in terms of his distribution. Second, Chiari explained that he believed Capizzi had been overcompensated in prior years and that the evaluation process would require Capizzi to justify the amount of his compensation. Trial Transcript 2285, 2923-2924.

As such, the 2014 change did not modify the fundamental agreement that had been in place with Capizzi for more than twenty-five years.

Capizzi now asserts that the distribution was not "fair." Regarding the 2014 meeting, Capizzi attended and presented Chiari with a list of cases that had been resolved; a discussion occured and a distribution was made. Capizzi, although unhappy with the amount of money, **accepted the money and continued to work at the firm**. PFF 56-57.

Capizzi's testimony regarding his conduct in 2015 makes it truly remarkable that he now claims he was wrongfully deprived of money once again. Capizzi admitted to doing very little work for the firm that year because he was busy trying to originate files he took to his new firm. PFF 63-64. Shockingly, Capizzi admitted that he was "99 percent sure" he was leaving the firm to join a competitor when he went to Italy in late December and that the only reason he waited until the new year to resign was that he wanted to make sure he got his annual bonus check! PFF 65. Capizzi admittedly made no effort to have the evaluation meeting occur before his departure and made no effort while overseas to contact Brown or Chiari for the purpose of holding the evaluation meeting. PFF 66. It is respectfully submitted that Capizzi intentionally avoided participating in the meeting because it would have required him to pretend that he had not decided to leave the firm. An award to Capizzi for 2015 would be without any legal basis and would reward his underhanded conduct toward Brown and Chiari.

K.
JUSTICE FAHEY'S MEMORANDUM DECISION WAS NOT A FINAL JUDGMENT

Justice Fahey's Memorandum Decision was not a judgment and was under appeal when the matter was settled. "A Decision or verdict upon which no formal judgment has been entered has no conclusive character and is ineffective as a bar to subsequent proceedings. Findings of fact and conclusions of law are not res judicata unless followed by a judgment based thereon relevant to the issues." Carmody-Wait, New York Practice Vol. 7, Sec. 204. Obviously,

however, sworn testimony is still sworn testimony and is binding for purposes of judicial estoppel.

The Court of Appeals has explained "it is only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, *or as evidence*, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue." (emphasis added) Bannon v. Bannon, 270 N.Y. 484 (1936). *See also*, Ruben v. Am. & Foreign Ins. Co., 185 A.D.2d 63 (4th Dept. 1992) ("No collateral estoppel effect can be given to the jury findings because a decision or verdict upon which no formal judgment has been entered has no conclusive character and is ineffective as a bar to subsequent proceedings.")

Justice Curran's order is not a judgment. Justice Curran made clear that his order was not a judgment by specifically crossing off the words "and judgment" on the order and initialing it. Court Exhibit 5. Even if it were a judgment, it would not be a "final judgment" because it was subject to appeal and was under appeal when the case was settled. "A judicial decision can constitute a conclusive adjudication of a question of law or fact only when rendered in a proceeding in which the court had jurisdiction to render *an irrevocable and final decision* upon such question." (emphasis added). Bannon, 270 N.Y at 490.

Moreover, it is well-established that res judicata and collateral estoppel principles are not triggered when a case is settled after a verdict but before judgment is entered: "The settlement of the previous case prior to the entry of judgment operated to finalize the action without regard to the validity of the original claim, and the action was accordingly considered, in contemplation of law, as if it had never been begun (Yonkers Fur Dressing Co., v. Royal Ins. Co., 247 NY 435,

444). Therefore, while the underlying testimony adduced at the trial of the first action may be utilized in litigating and even determining the second action, the doctrines of res judicata and collateral estoppel may not." Peterson v. Forkey, 50 A.D. 2d 774, 775 (1st Dept. 1975).

CONCLUSION

For these reasons, it is respectfully urged that this Court find the Plaintiff's claims to be without merit and that they be dismissed.

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