STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SAMUEL J. CAPIZZI

Plaintiff,

vs. Index No.: 810115/2016

BROWN CHIARI LLP
JAMES E. BROWN
DONALD P. CHIARI

Defendants.

PLAINTIFF'S PROPOSED FINDINGS OF FACT

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PROPOSED FINDINGS OF FACT

1. **12/16/97: Brown, Chiari, Capizzi & Frascogna LLP ("BCCF") established.** (Ex6)
2. **3/19/02: BCCF certifies they are doing business as "Brown Chiari."** (Ex7)
3. **4/21/04: Frascogna withdraws.**
4. **8/18/04: Frascogna bifurcated lawsuit. Phase One is to determine if Frascogna was an equity partner.**
5. **12/29/04: BCCF name amended to Brown Chiari, LLP [with comma] ("BC,LLP").** (Ex8)
6. **June/July 2006: Phase One trial.**
    a. **Brown/Chiari alleged Frascogna was merely an "income partner."**
    b. **Capizzi's prior testimony is not relevant to this dispute.**

DISCUSSION/SUPPORT:

Relying on the advice of counsel selected by Brown/Chiari, Capizzi testified he was an income partner, believing this testimony to be accurate. (Capizzi,643-44)

Defendants repeatedly attempted to mischaracterize Capizzi's testimony *in the BCCF litigation* as an admission *in this litigation*. It is not. Capizzi's testimony in the BCCF proceeding was based on his understanding of partnership law *at the time,* as explained to him by BCCF's attorney. But Sullivan's advice was, as Judge Fahey and this Court recognize, "wrong."

> **COURT**: Look it. It didn't go up on appeal, so that's it. And that old song, whatever it was, whether he thought he was a hobo or the ham sandwich, the Court determined you're a hobo, I'm a ham sandwich. You're stuck with what the Court found --
> **RUPP**: Well Judge --
> **COURT**: -- there. There.
> **RUPP**: Through April of 2004...
> **COURT**: It's disingenuous to argue to this Court though that he was anything but. He could think whatever he wanted. He was legally and factually wrong.

(83-84)

Capizzi's understanding in 2007, *after Judge Fahey's decision*, was obviously much different, and the present dispute must be evaluated in light of the information available to the parties *at the time BCLLP was established on 5/24/07*. Capizzi's conclusions concerning his status *at a different firm and prior to Judge Fahey's decision*, *are simply irrelevant to this lawsuit involving a completely different legal entity*, and serve no purpose other than to explain *why* he said those things *at that time*.

c. Chiari testified he (Chiari) was an income partner.

DISCUSSION/SUPPORT:

When asked when Brown made Chiari his "equal," and "gave up some of his interest in the firm to [Chiari]," Chiari responded by saying "I don't think he gave up an interest in the firm but he gave up percentage points in terms of sharing income." (Ex160,TabA@pp63-64)

When asked if Brown "*ever*" indicated Chiari would be "something other than a partner," Chiari responded [in 2006] "It was *always* our understanding that we were sharing net income based on a percentage…" (Ex160,TabC@p9)

When asked if he would have a continuing interest in BCCF cases if he left, Chiari responded he would not. (Ex160A,TabA@p52)

When asked if he would be responsible if BCCF had "negative net income" – i.e., debts – Chiari responded [in 2006] "I *never* had that understanding." (Ex160A,TabA@p52)

When asked if Brown "*ever*" indicated Chiari would be "something other than a partner" when he joined the firm, Chiari answered he did not consider himself to be an equity partner when he joined the firm, *but then added* "nor do I now" [in 2006]. (Ex160,TabC@p10) [Plaintiff recognizes the Court has provided its understanding of this response (Chiari,3252). When read in conjunction with Chiari's other testimony at the BCCF trial, however, it is respectfully submitted Chiari was telling Judge Fahey he did not consider himself an equity partner *when he testified in 2006*.]

As demonstrated above, during his testimony *in 2006*, Chiari repeatedly testified he "*never*," "*ever*" considered himself anything more than an income partner at BCCF. The significance of such responses was best articulated by this Court:

> **COURT**: …if he answers, I am not now, nor have I ever been a member of the Communist party, that's an all-inclusive, right? That's everything. That's as of even the day you're sitting there.

(Capizzi,975)

It cannot be seriously disputed that Chiari testified he was an income partner at BCCF:

> **COURT**: The decision clearly -- whether you agree with it or not -- says, despite the fact Capizzi swearing up and down he's not a partner, and *I think even Chiari saying up and down he's not an owner, an equity partner*, whatever the words were, Fahey says they are.

(Brown,2004)

In stark contrast to his prior testimony, Chiari testified in this trial he became "equal" with Brown and *was* an owner/equity partner at BCCF starting in 1999/2000 (Chiari,2714,3156-64). Given this irreconcilable inconsistency, only two conclusions are possible – namely, Chiari testified falsely in 2005/2006 in an effort to defeat Frascogna's claim, or he testified falsely in 2018/2019 in an effort to defeat Capizzi's claim. Regardless which is correct, the principle of *falsus in uno, falsus in omnibus* should come to mind as the Court evaluates Chiari's testimony in this case.

7. 12/22/06: Judge Fahey's Decision concluding Frascogna was a "partner" [equity partner] in BCCF. (CtEx1@p42)

a. In his Findings of Fact, Judge Fahey states the following documents, among others, "support the existence of a partnership *with four partners*":

i. BCCF tax returns, which identified all four as partners;

ii. **Banking resolutions signed by all four partners authorizing each of the partners to conduct transactions with the bank;**

iii. **BCCF's line of credit, for which all four partners obligated themselves;**

iv. **"Death agreement" providing benefits to each partner's estate upon death.** (CtEx1@p35)

b. **"Particularly" significant to Judge Fahey was Frascogna's "responsibility for obligations and liabilities of the firm."** (CtEx1@p42)

8. **1/22/07: Judge Curran orders Frascogna is an equity partner; that BCCF "is dissolved;" that Frascogna "is entitled to an accounting… in further proceedings before This Court;" and that "…any denial of Mr. Frascogna's status as a general partner with Messrs. Brown, Chiari and Capizzi in [BCCF] is hereby stricken from the Defendants' Answer."** (CtEx5)

DISCUSSION/SUPPORT:

Chiari disingenuously claimed he did not understand the term "general partner" as used in Judge Curran's Order. (Chiari,3179+) Defendants' pretrial memorandum, however, acknowledges *as an "Undisputed Fact*" that "*Judge Fahey issued a Decision determining that Frank Frascogna held an equity interest*." (CtEx9,p7) Chiari approved, and actually drafted, Defendants' pretrial

memorandum (Chiari,332). Chiari was also well aware Frascogna was claiming to be an owner/equity partner. (Chiari,3175)

9. **5/24/07: a completely new legal entity/partnership is registered, Brown Chiari LLP [without comma] ("BCLLP").** (Ex9)

    a. **The 5/24/07 filing was because of Judge Fahey's decision and the dissolution ordered by Judge Curran.** (Chiari,3138-40)

10. **5/29/07: BC,LLP's "status as a registered limited liability partnership" is terminated** (Ex10)

11. **2007: Brown, Chiari and Capizzi collectively settled Frascogna's lawsuit for $400,000** (Capizzi,654-56;Brown,2005-06)

    a. **Capizzi paid 20% of the $400,000 settlement**

DISCUSSION/SUPPORT:

$400,000 came from the BCLLP operating account in 2007 (Chiari,136), thereby reducing Capizzi's 20% share of NDI by $80,000 (Capizzi,655-56).

    b. **Capizzi's interest in BCCF became a capital contribution in BCLLP**

DISCUSSION/SUPPORT:

When Frascogna left BCCF, Frascogna and Capizzi had equal 14% shares (Ex39). As a result of the Decision/Order, BCCF was dissolved and an accounting was ordered to establish dissolution value. Capizzi had been ruled an equity partner by Judge Fahey *and was entitled to a share of the dissolution value equal to Frascogna's*. Frascogna settled for $400,000. Rather than demanding his

dissolution share of the firm, Capizzi "just rolled it into the new firm" (Capizzi,659-61).

c. The Frascogna Decision/Order were not vacated

DISCUSSION/SUPPORT:

As supported by the Frascogna affidavit, and as evidenced by the fact a subsequent order was never filed, the Court's Decision and Order were never vacated as a result of the Frascogna settlement.

12. 1/8/16: Capizzi withdraws from BCLLP

DISCUSSION/SUPPORT:

Capizzi's withdrawal letter (Ex145) contains a typo -- namely, BC,LLP (with comma). (Capizzi,820) In their pretrial memorandum, defendants attach great significance to this typo (CtEx9@pp8,10). At trial, however, it was conclusively established *all three partners* regularly made the same mistake. Brown/Chiari *each* signed numerous documents incorrectly identifying BCLLP as BC,LLP. For example, in BCLLP's tax returns (Exs94-102) and IRS "e-file" authorizations (Ex134), Brown/Chiari *each* declared "under penalties of perjury" they were partners in BC,LLP; *see also* pension documents (Ex51,p50); and loan applications (Ex23).

13. Brown/Chiari were aware Judge Fahey's decision would have precedential and/or estoppel effect.

DISCUSSION/SUPPORT:

Defendants were aware of the significance of the *Frascogna* Decision/Order as evidenced by Chiari's acknowledgement that, moving forward, he intended to not "make the same mistakes [he] made with [Frascogna]," such that "when something would come up that somebody tried to use to show ownership in the past, I would try to correct it." (Chiari,146-148)

14. Despite Chiari's acknowledgement that Judge Fahey's decision would have precedential and/or estoppel effect, no effort was made to change anything relied upon by Judge Fahey.

a. **BCLLP's 2007-2015 tax returns identified Capizzi as one of three partners in the firm and Capizzi received a schedule K-1 with a capital account each year.** (Exs89,94-102)

b. **Brown/Chiari signed banking authorizations representing Capizzi was a "Partner" at BCLLP; that Capizzi was authorized to borrow money, mortgage property, execute notes, sign security agreements, etc., on behalf of BCLLP; and that M&T Bank "may rely conclusively on the signatures [of] any of the Partners…".** (Exs19,21)

c. **Capizzi personally guaranteed BCLLP's line of credit.** (Ex25)

d. **Brown presented Capizzi with a "Death Agreement," referring to Capizzi as a "member" of BCLLP and offering to pay NDI to his estate for 13 years after Capizzi's death.**

DISCUSSION/SUPPORT:

Whereas the BCCF Death Agreement (Ex30) referred to individuals as "partners," the new agreement (Exs31,32,32A) drafted/proposed by Brown (Brown,492) referred to Brown, Chiari and Capizzi as "members" of BCLLP, and whereas the prior agreement called for eight years of payments, the new agreement proposed *13 years* of payments to each "member's" estate following death. It is simply unfathomable Brown would offer to pay 20% of BCLLP's NDI to Capizzi's estate *for 13 years after Capizzi's death* if Capizzi were not an equity partner…

e. **That Capizzi's name is not included in BCLLP is irrelevant.** (Chiari,151-52)

15. Changes occurring after BCLLP was established provide additional, overwhelming support for Capizzi's claims.

a. **Judge Fahey concluded Frascogna was an equity partner despite "his relative lack of say in management decisions." It is beyond dispute Capizzi was actively involved in management at BCLLP.**

DISCUSSION/SUPPORT:

Exhibit 82 conclusively establishes Capizzi's active role in management at BCLLP. Bates#653,673,675,677,680,682,683,684,689,692,693,699,705,713,740 confirm Capizzi was *independently* instructing associate attorneys. Bates#681,690 confirm Brown, Chiari and Capizzi were *equally* responsible for supervising associate attorneys. Bates#715,718,719,747 confirm Capizzi was actively involved with efforts to control firm overhead (line of credit, advertising, etc.). Bates#715,737,742 confirm Capizzi was involved in evaluating associate attorneys. Bates#724,729,730,734,742 confirm Capizzi was involved in hiring decisions. Bates#715,718,719,724,726,729,730,734,737,739,742,743,747 discuss firm administration/management issues (hiring, supervision of associates, case assignment systems, etc.) and involve *only* Brown, Chiari and Capizzi. Bates#748 confirms Capizzi was charged with handling John Elmore's transition from BCLLP. Bates#737 confirms Brown's $2m buyout proposal was made to only Capizzi and Chiari. Bates#747 contains a request by Brown for Capizzi's permission to "sell" a portion of Brown's interest to Scinta.

b. Brown/Chiari represented "under penalties of perjury" they each owned less than 50% of BCLLP.

DISCUSSION/SUPPORT:

In 2008, tax returns contained a question that did not exist previously (Barrett,1246) – namely, "did any individual or estate own, directly or indirectly, an interest of 50% or more in the profit, loss or capital of the partnership?" (Exs95-102, Schedule B(3)(b)). Thereafter, *every* return submitted to the IRS by Brown/Chiari (Ex134) states "under penalties of perjury" that *no one* owned "50% or more." The 2008 return specifically lists Capizzi's ownership at 20.19%. (Ex95) Kasperek testified she witnessed Brown/Chiari reviewing the proposed tax returns every year "with her own eyes." (Kasperek,529-30)

If no partner owns "50% or more," by definition, the partnership must have *at least three* owners/equity partners.

c. BCLLP paid for life insurance insuring Brown, Chiari and Capizzi.

DISCUSSION/SUPPORT:

The "death agreement" at BCCF was created because life insurance was too expensive. (Ex30;Brown,489) Brown proposed a "death agreement" at BCLLP but it was not signed; instead, BCLLP procured life insurance. (Capizzi,1027) Premiums for the policies, insuring the lives of Brown, Chiari and Capizzi *only*, were paid "by the firm" and were "not considered draws." (Kasperek,527)

d. Before 2007, Brown/Chiari met and determined Frascogna's/Capizzi's share of NDI every year. Variability in the percentages continued after Frascogna's departure. When BCLLP was established in 2007, however, there were no more meetings to decide Capizzi's share of the NDI because the Capizzi was an owner and the parties made a "deal/agreement," establishing percentages at 40/40/20.

DISCUSSION/SUPPORT:

At BCCF, there was no agreement and Capizzi was not involved in the Brown/Chiari discussions which determined Capizzi's share of NDI. (Chiari,2766,2770)

Thus, the percentages varied:

> Q You testified that at the previous firm -- so before Judge Fahey's decision, that the percentages of income between you and Sam and Frank and Jim were changed from time to time.
>
> * * *
>
> A They were.
> Q So in those years, '98, up until at least '04, when Frank left, those numbers changed a fair amount, right?
> A They did.

(Chiari,3174)

Variability continued after Frascogna departed. For example, in 2006, Chiari's share of NDI was 43%, Brown's 36% and Capizzi 21% (Chiari,3174;Ex177).

But things changed after Judge Fahey's decision:

QUESTION: Is there a reason why from '07 to '13 that the ordinary business income of the firm was distributed 40/40/20 in each of those years?
ANSWER: Other than the obvious? That we --
QUESTION: What is the obvious?
ANSWER: That's what we -- that's what we designated it to be.
QUESTION: That's what you agreed to?
ANSWER: Yeah, we agreed to it.

(Chiari,3059)

Q …Question, was that your deal with Sam, 40/40/20? Answer, that had been up until we changed the arrangement in '14, I think it was. …Question, so was that true, that was your deal that you -- I'm sorry, that he would get 20 percent up until, as you say …you changed the deal? …Is that what you're saying? Answer, yes. We changed it in 2014. Did I read that correctly?
A Yes.

(Brown,2304;)

SZANYI: I'll reread it again. I don't think he ever participated in any meetings up until two thousand -- and I don't want to get my years wrong, but it would have been -- let's see. It would have been '14. Question, okay. And in the prior years, it was a forgone conclusion he would get 20 percent, right? Answer, he would, yeah. There was nothing to meet about. He would get 20 percent. Did I read that correctly?
WITNESS: Yes, you did.

(Brown,2323-24;)

QUESTION: So what was the purpose of the meeting [2007-2013], if it was pre-determined that it was 40/40/20? Was it simply to say how much it was?
ANSWER: We had to -- Jim and I determined who -- how much to pay the lawyers.
QUESTION: When you say the lawyers, you're excluding Sam from that; am I correct?
ANSWER: I am.

(Chiari,3118-19;)

e. Capizzi was personally responsible for BCLLP debts, beyond the line of credit.

DISCUSSION/SUPPORT:

> Q So, according to the K-1 that your firm prepared based upon information provided by Jim, Don or Kim, Sam had a hundred and twenty-five thousand dollars in recourse liabilities for this partnership at the end of 2015, correct?
> A That's what the form indicates.

(Barrett,1234-35;Ex89) Under IRS guidelines, a "recourse" obligation is an obligation for which the partner is *personally* responsible. (Barrett,1235)

i. Capizzi's obligation for recourse debt, for which Brown/Chiari never agreed to indemnify him, is *inconsistent* with Defendants' contention Capizzi is an income partner.

DISCUSSION/SUPPORT:

> Q …And would [an allocation of ordinary business income on box one of Schedule K-1], Mr. Barrett, be consistent or inconsistent with an agreement that is basically just an agreement to share in profits after expenses?
> A It would be consistent.
> **COURT**: How do you reconcile then the fact that some of these documents reflect a share of liability commensurate with the twenty percent profit sharing, with a recourse obligation of the firm?
> **WITNESS**: I don't.
> **COURT**: They're inconsistent, aren't they, under those IRS guidelines that we just spent the last fifty minutes reviewing?
> **WITNESS**: Would seem to be inconsistent.
> **COURT**: All right. That's what I've been thinking myself.

(Barrett, 1308-09)

Q All right. And if the agreement of the parties was that they would defend, indemnify Mr. Capizzi against any debt, would that have made any difference to you whether it was recourse or non-recourse?
A Yes.

(Barrett,1325)

COURT: But it's your position that Mr. Capizzi signed it, he guaranteed it, and he would be liable, if the line got called?
WITNESS: I think that's the law.

(Chiari,2788-89)

ii. Defendants sued Capizzi for firm debt.

DISCUSSION/SUPPORT:

Q Right. And you've sued Sam Capizzi after he left for a debt of the firm, correct?
A We sued to recover fees that he may recover or has recovered that he agreed to repay to the firm to reduce the line of credit...

* * *

COURT: Cutting through all of that answer, the answer is yeah, they sued for a debt of the firm… That's the way the Court construes that answer.

(Brown,434;CtEx3¶¶178-182)

iii. Defendants concede Capizzi's responsibility for debts is *inconsistent* with Defendants' claim Capizzi was an "income partner."

DISCUSSION/SUPPORT:

Q And you didn't include it in the definition I just asked you now, but in your deposition, when I asked you about an income partner, you told me that an income partner is not responsible for the debts of the firm. Do you remember saying that?
A That's true.

(Chiari,3084)

f. FreedMaxick understood Capizzi was an equity partner/owner.

DISCUSSION/SUPPORT:

BCLLP's principal CPA testified, despite his request for a partnership agreement, Brown/Chiari never explained the partners' relationship, or told him Capizzi was a "profits interest partner" prior to this litigation. (Barrett,1335-36)

FreedMaxick's workpapers refer to Capizzi as an owner (Barrett,1254-56;Ex44).

The CPA primarily responsible for the day-to-day handling of the firm's accounting (Barrett,1263,1266) signed a letter "verifying Sam Capizzi's ownership interest in his law firm," *stating Capizzi is a 20% owner* (Ex85).

BCLLP's tax returns *are not* inconsistent with Capizzi's claim of ownership (Barrett,1266), but *are* inconsistent with "just an agreement to share in profits after expenses" (Barrett,1309).

g. At BCCF, a profit sharing plan treated owners and employees equally. At BCLLP, the plan was changed to favor only Brown, Chiari and Capizzi. (Brand,1387-88,1420-21)

i. 10/30/12: Spina from BPAS made a sales pitch to Brown, Chiari and Capizzi utilizing a PowerPoint presentation identifying Brown, Chiari and Capizzi as "partners," and referred to them as "the employer." (Exs47,48)

ii. **At the 10/30/12 meeting, Spina advised Brown, Chiari and Capizzi that the firm's existing Profit-Sharing Plan ("PSP") was "a poor plan design because the pool for owners is the same pool [as for employees]." Spina proposed modifying the PSP to "benefit the owners." Spina also proposed adding a Cash Balance Plan ("CBP").** (Spina,1802)

iii. **BCLLP accepted Spina's advice and added a CBP soon after the 10/30/12 meeting. A plan document was created (Ex51), along with two "Summary Plan Descriptions" ("SPD") – one "for Owners" and one "for Employees."** (Exs52,53)

1. **ERISA requires the "SPD be provided to those who are covered by the plan."** (Brand,1400-01)
2. ***Only*** **Brown, Chiari and Capizzi were identified by name and included in the "SPD for Owners"** (Ex52)
3. **Kasperek gave the "SDP for Owners" to Brown *and* Chiari, and they never asked that it be changed.** (Ex52;Kasperek,549-50)

DISCUSSION/SUPPORT:

> **COURT**: Did anyone send you an e-mail back or a letter saying you got this wrong, you list owners as these three individuals, and not one of them is an owner or not two of them are owners, did you get anything like that back?
> **WITNESS**: It didn't come to me.
> **COURT**: Did you get a phone call to that effect?
> **WITNESS**: I don't recall.

(Spina,1750)

iv. Kasperek, with Brown's/Chiari's approval, provided BPAS with written confirmation Capizzi was an owner.

DISCUSSION/SUPPORT:

On 12/12/13, Kasperek "uploaded" and emailed an "information request" identifying Brown, Chiari and Capizzi as the three owners of BCLLP. (Kasperek, 536-39;Ex57,Bates#310) Kasperek did not include the ownership percentages:

> Q …You filled out Jim Brown, Don Chiari and Sam Capizzi, and you didn't put in the ownership percentage, correct?
> A Correct.
> Q Did you not know the ownership percentage at that time?
> A I did not.

(Kasperek,603)

The document was approved by Brown or Chiari. (Kasperek449-50)

v. After the CBP was implemented, Brown, Chiari and Capizzi received more favorable contributions to the CBP than all others at the firm. (Brand,1405)

vi. Spina's advice to change the firm's PSP to favor owners was accepted and implemented in 2015. (Brand,1407)

vii. **After the change to the PSP was made, Brown, Chiari and Capizzi received more favorable contributions to the PSP than all others at the firm.** (Brand,1413-14)

viii. **Trustees are irrelevant.**

DISCUSSION/SUPPORT:

Defendants claim Capizzi is relying on the fact he was a trustee from 2007 to 2010 (Brand,1384) "as some sort of indicia" of ownership. (Chiari,148) They are wrong; Capizzi has *never* attempted to rely on this to support his claims. "Anyone" can be a trustee (Brand,1418), so it would be fruitless for Capizzi to rely on this. By the same token, it is irrelevant that Brown and Chiari were trustees on the pension plan(s) from 2010-2015.

ix. **BPAS was told Capizzi was an owner, and BPAS employees confirmed Capizzi was an owner, in writing, to Brown/Chiari.**

DISCUSSION/SUPPORT:

Capizzi testified during the meeting on 10/30/12, Spina asked who owned the firm. (Capizzi,715-16) Spina does not deny this. (Spina,1777-78). The question makes sense because this was an initial meeting and a TPA like Spina may need this information depending on the type of plan selected. (Spina,1815,26-27) Brown responded and identified Brown, Chiari and Capizzi as owners. (Capizzi,715-16) Despite being recalled as a witness and spending *four days* on the stand answering

questions posed by Rupp, *Brown never denied telling Spina that Capizzi was one of the owners*.

Immediately following the 10/30/12 meeting, Spina exchanged emails with BCLLP's investment manager, Munich, referring to Capizzi as "Attorney-owner" and a "Principal" (with a capital "P" which, from Spina's prior employment, indicated ownership). (Spina,1793-99;Ex54).

Spina ultimately transitioned BCLLP to his "very sharp/conscientious" employee Casey (Spina,1781) and *told her Brown, Chiari and Capizzi were owners of BCLLP*. (Ex124p123;Spina,1782-1784).

Spina did not learn Brown/Chiari disputed Capizzi's ownership until after Capizzi left the firm. (Spina,1812-13)

After Casey took over, numerous emails were exchanged between BPAS and Kasperek. In these, Casey referred to Capizzi as "owner" because that was what Spina told her. (Kasperek,536,541;Ex124p123;Exs56,60,61,65) Kasperek spoke with Brown/Chiari about these emails and, "more likely than not," printed copies for them. (Kasperek,542) Kasperek was never told to respond and tell Casey/BPAS that Capizzi was not an owner, and she never did. (Kasperek,543-45)

BPAS's workpapers identify Capizzi as an owner. (Brand,1412;Exs64,64A)

16. The 6/30/14 memorandum is evidence of Capizzi's ownership.

DISCUSSION/SUPPORT:

Chiari's 6/30/14 memorandum discussing a change to the parties' prior agreement for sharing NDI (Ex82,Bates#737-38) states "this method seems to have been agreed upon." If, as Defendants now claim, Capizzi was not an owner, Defendants would not have needed Capizzi's agreement. In fact, if Capizzi were not an owner, he would not have been invited to the meeting at all, and Brown/Chiari most certainly would not have conditioned their own distributions on Capizzi's evaluations...

> Q -- you're telling the Court that you expected Sam Capizzi, who you say is a non-owner in your law firm, to evaluate you and Jim Brown, both of whom you say are owners of the law firm; is that -- what I understand, correct?
> A That was our agreement on the compensation.

(Chiari,3072)

17. Defendants breached the 6/30/14 agreement.

a. The 6/30/14 agreement was breached in 2014.

DISCUSSION/SUPPORT:

The 2014 "evaluation" was a sham. The memorandum required the parties to "*evaluate each contribution*" by each of the three partner "when [Chiari] made a determination that there was enough cash to distribute." Because Chiari never advised anyone "there was enough cash to distribute," and never solicited evaluations from anyone prior to December 30 or 31 (Capizzi,782), however, Capizzi expected the entire distribution to made "by percentage" as set forth in the

memo ("if after evaluation, there are funds not distributed, then those funds would go into a profit pool to be distributed percentage at the end of the year").

But, on December 30 or 31, Chiari "buzzed" Capizzi, saying he wanted to have a meeting that day or the next. (Capizzi,783-84) At his meeting, Chiari presented Capizzi with a *predetermined* share of the firm's NDI. "[T]there was no discussion. There was no debate. There was no give and take." (Capizzi,785-86) And there was certainly no evaluation of "each contribution" as the parties had agreed.

According to Brown, who attended by phone, the meeting may have lasted only five minutes, or less (Brown,450). Capizzi concurs; testifying the meeting lasted only "minutes" before Chiari "dictated" what Capizzi would receive. (Capizzi,786)

That Chiari *came to the meeting* with the NDI already allocated is beyond dispute:

> **COURT:** …Don, you walked in with a piece of paper that had a number for you, a number for Jim, and a number for Sam, correct?
> **WITNESS:** Correct.

(Chiari,3077)

> **QUESTION:** You came into this meeting with a proposal, as you've just explained?
> **ANSWER:** Yes.
> **QUESTION:** And is it -- am I understanding you correctly, that that's, ultimately, what you distributed, what you had proposed?
> **ANSWER:** It was accepted.

(Chiari,3079)

Defendants will no doubt attempt to attach great significance to the handwritten list of verdicts and settlements Capizzi presented *after* receiving Chiari's decision. (Capizzi,1084;Ex150) As Capizzi explained, he had this document with him simply because he "grabbed [his] notes" after getting the unexpected call from Chiari (Capizzi,784), and it was in the folder of emails and memos Capizzi brought with him to every partnership meeting during 2014. (Capizzi,784-785). Capizzi intended to incorporate the 2014 information from this document into a formal evaluation submission if/when Chiari advised him "there was enough cash to distribute." (Capizzi,1087) Without question, the document is not an "evaluation" at all; it contains only case names and numbers. The document contains no discussion whatsoever of the "standards" Brown/Chiari acknowledge are required for a meaningful evaluation, including "the difficulty and complexity of the file," "the revenue produced," "the length of time a file is being worked on," "contribution(s) to development of office in general," etc. (Brown,2434-2435;Chiari,2892-93;Ex82,Bates716-17)

The 2014 year-end meeting was also a sham because Chiari was going to accept nothing less than $1.5 million (53.86% of the firm's entire NDI; Ex154). Chiari's $1.5m "floor" is not what the parties agreed to in the June 30 memo; is not memorialized in any memoranda or email (Ex82); and Capizzi never agreed to it (Capizzi,785-786,789). In fact, prior to this lawsuit, Capizzi was completely unaware Chiari had bestowed upon himself a "floor" of $1.5m. (Capizzi,789)

Near the end of trial, Chiari claimed his work on the *Schwartz* case warranted his $1.5m+ share of the NDI, claiming he and Mike Drumm submitted a "60 or 70 page," "80-paragraph" affidavit in support of a fee application in this case that settled for "close to $5,000,000," and touting that he was able to resolve the case by the end of 2014 (Chiari,2930,2969). Chiari's penchant for exaggeration/self-adulation became clear on cross-examination, however, when it was established that: the case settled for $4m (not $5m); Chiari/Drumm submitted a five paragraph (not 80) 44 page (not 60 or 70) affidavit; the case took *14 and ½* years to resolve; *the Court served Chiari with a 90-day demand to resume prosecution*; in fact, the case lingered so long *the client died* after Chiari had been supervising the case for more than eight years (Chiari,3217-20).

b. The 6/30/14 agreement was breached in 2015.

DISCUSSION/SUPPORT:

> There were no evaluations at all in 2015...
>
> Q Is it correct for the 2015 year you did not get Sam's evaluation of you?
> A I did not.
> Q It's also true for 2015 you did not get Sam's evaluation of Jim?
> A He wasn't there.
> Q Can you answer that yes or no?
> A Yes. No, I did not. Nor did Jim.

(Chiari,3023-24)

> Q …And Sam came up -- Sam's name came up, and I said -- I was a little -- I was mad about it. I was mad he was in Italy -- I was mad that he was in Italy. I was mad that I wasn't informed of it, and I said, well, he's certainly not getting more than last year. I did say that.
>
> * * *
>
> Q So what we just read, am I correct, that's all you can remember saying at the meeting about Sam in 2015?
>
> * * *
>
> A That's all I can remember.

(Chiari,3123-24)

> **QUESTION: …**Did Jim say anything at that end-of-year meeting in 2015, in terms of an evaluation of Sam?
> **ANSWER:** He was always reluctant to criticize Sam, so I'm sure that the same thing happened on this conversation, I just don't remember it.
> **QUESTION:** Nothing that you can remember, is that fair -- that he said about Sam?
> **ANSWER:** Nothing that I can remember.

(Chiari,3126)

Parenthetically, Chiari's excuse for not including Capizzi in the 2015 "meeting" is disingenuous. Although in Italy visiting his son who was studying abroad, Capizzi was in contact with the office (Exs107,108), and could have easily participated by telephone, just as Brown/Chiari did in 2014 *and* 2105 (Chiari,3043-44).

c. The 6/30/14 memo is ambiguous.

DISCUSSION/SUPPORT:

Chiari's memo admits the parties' agreement "was a little confusing." Nevertheless, he confirmed the parties agreed, at a minimum, to "*evaluate each contribution*" by each of the three partners.

The memo states evaluations would take place when "there was enough cash to distribute," and "after that evaluation," any money not distributed would be distributed by percentage (40/40/20) "at the end of the year." Capizzi understood this to mean evaluations would take place *during the year* if/when there were sufficient funds for "special" distributions. (Capizzi,763-64)

The memo is silent on how the proposed distributions would be arrived at and approved. Capizzi understood/expected the partners to professionally discuss "each contribution," before *agreeing* on new allocations. In the absence of consensus, Capizzi understood NDI would continue to be distributed 40/40/20. (Capizzi,765)

Chiari agrees the memo does not give Chiari, or even Brown/Chiari, the power to allocate NDI if the parties disagreed:

> **SZANYI**: There's nothing in this memo that says when we do get together, when we do this evaluation, it has to be unanimous, or two out of three can vote, or -- or one out of three can decide? It doesn't say anything like that at all; is that fair?
>
> * * *
>
> **WITNESS:** It doesn't say that.
> **SZANYI**:
> Q And it certainly doesn't say that the managing partner can decide that, right?
> A It does not say that.

(Chiari,3128)

It is undisputed the June 30 memo *modified* the parties' prior *agreement* to distribute *all* of the firm's NDI 40/40/20:

> **SZANYI:** And Don, the reason that you were memorializing this new method of compensation is because it was a change to the agreement that you had with Sam that we just went through, where it was previously 40/40/20; that's why you were memorializing it, correct?
> **WITNESS:** Yes.

(Chiari 3070-71)

Thus, if the Court finds the memo ambiguous and/or that Capizzi's understanding of what was required – i.e., actual evaluations and agreement on distributions -- to be reasonable, the NDI in 2014 and 2015 must be reallocated 40/40/20.

d. Capizzi is owed $160,199.40 plus interest from January 1, 2015, and $343,668.60 plus interest from January 1, 2016. (Ex154)

18. No one from BCLLP was called to dispute Capizzi's claims.

DISCUSSION/SUPPORT:

Defendants did not call a single BCLLP witness. Aside from the parties, the *only* BCLLP witness was Chiari's romantic partner Kasperek, who was called *by Plaintiff*. Kasperek's testimony supported Capizzi [she completed the pension document (Ex57,Bates#310) identifying Capizzi as an owner, she exchanged emails with BPAS wherein Capizzi was characterized as an owner, she provided the SPD for Owners to Brown/Chiari, etc.].

BCLLP had 30 employees when Capizzi withdrew (Kasperek,516); yet not one disputed Capizzi's equity status.

19. Capizzi's co-ownership of the real estate where BCLLP's offices were located supports Capizzi's claims.

DISCUSSION/SUPPORT:

If Capizzi were not a co-owner of the law firm, why would Brown/Chiari want him to own one-third of the real estate? It would make no sense.

20. Brown/Chiari *never* identified Capizzi as an "income partner" on *any* document at *any* time. (Brown,2355-56;Chiari,3098)

21. Capizzi's ownership interest is 20%.

DISCUSSION/SUPPORT:

As noted previously, from day one, the parties' "deal/agreement" was 40/40/20. The 40/40/20 agreement remained in place even after the 6/20/14 memo (Chiari,349), and the fact that the parties' shares of NDI fluctuated in 2014 and 2015 *did not* affect the parties' ownership interests (Brown,2335-36).

Capizzi's 20% interest is confirmed by BCLLP's K-1s, which continued allocating recourse liabilities 40/40/20 in 2014 and 2015 (Exs88,89,90)

22. Defendants' evidence does not defeat, and in most cases supports, Capizzi's claims.

DISCUSSION/SUPPORT:

The Court has stated that it will not accept reply papers. Capizzi therefore submits the following proposed facts relative to evidence Defendants have or may rely upon.

a. Capizzi is not a "profits interest partner," but he would still be entitled to share in undistributed profits.

DISCUSSION/SUPPORT:

Defendants' CPA provided considerable support for Capizzi's claim of ownership. According to Barrett, there can be three types of partners from an accounting standpoint – a guaranteed payment partner, a profits interest partner ("PIP") and a capital interest partner ("CIP"): "Yes. I think there are other labels out there that can be applied, but those are basically the categories." (Barrett,1273-74) Capizzi is clearly not a guaranteed payment partner. (Barrett,1347).

A PIP *is* an equity partner "to the extent of undistributed profits." The distinction is the CIP has a claim on "all assets of the firm," whereas a PIP has a claim "on the profits, undistributed profits." (Barrett,1224,1337). Barrett cited a "Revenue Procedure" stating a PIP is "*the owner of the partnership interest* from the date of its grant." (Barrett,1339-40; Ex161).

Here, because we are dealing with a law firm owning no real property or other significant hard assets, the only assets requiring valuation are the cases existing when Capizzi withdrew from the partnership – i.e., *undistributed profits*. According to Barrett, a PIP *is entitled to share in undistributed profits* upon "a realization event," like a liquidation sale. (Barrett,1228) Barrett claimed unfamiliarity with judicial dissolutions (Barrett,1228-29,1324), but the result is the

same. A judicial dissolution/valuation is clearly a "realization event" – i.e., the "event" when a withdrawing partner "realizes" the value of his partnership interest.

That said, there is no evidence to support a claim Capizzi was a PIP as opposed to a CIP. No one told Barrett Capizzi was a PIP (Barrett,1336), and BCLLP's tax returns do not distinguish Capizzi's interest from Brown's/Chiari's. The firm's tax returns are consistent with Capizzi's claims (Barrett,1266), and *inconsistent with "just an agreement to share in profits after expenses"* (Barrett,1309).

b. Capizzi had no obligation to declare/pay taxes on his interest in BCLLP in 2007.

DISCUSSION/SUPPORT:

During Barrett's testimony, Defendants' counsel attempted to establish that Capizzi is not a CIP because his K-1 does not reflect a "guaranteed payment" and he did not declare/pay taxes on his interest in BCLLP in 2007. (Barrett,1298-1308)

There are several problems with this argument. Initially, as the Court correctly noted, there was never a valuation done for Firm 1, 2 or 3, so nothing was reported for Brown, Chiari *or* Capizzi (Barrett,1349)

Second, no tax is due for a brand new entity with little or no value (Barrett,1348-49). Judge Fahey ruled Brown/Chiari *and* Capizzi were owners/equity partners *from the beginning in 1997*. Thus, to the extent the accounting/reporting was carried over from one firm to the next, *as it was*, there would be nothing to report.

Finally, if Chiari's testimony at this trial is to be credited (*but see* PFoF #6c, *supra*), Chiari was given an interest in BCCF by Brown in 1999/2000, including an interest in cases generated by Brown *before* Chiari allegedly became an equity partner. (Chiari,3164). According to Barrett, this should have resulted in a taxable event for Chiari (Barrett,1349-50), but Chiari admits (Chiari,3164) he did not pay taxes on this interest he allegedly acquired.

c. Capizzi's FAFSA supports Capizzi's claims.

DISCUSSION/SUPPORT:

In their overzealous quest to subpoena Capizzi's sons' college aid applications, Defendants boldly asserted "these records will reveal that Mr. Capizzi denied ownership of the law firm." (Dkt#111) When the records were produced, however, *the complete opposite was true*. In his FAFSA application, *submitted long before Capizzi decided to leave BCLLP*, Capizzi stated under oath that he owned 20% of BCLLP (Ex180,Tab1B)

d. Capizzi's mortgage application is consistent with Capizzi's claims.

DISCUSSION/SUPPORT:

Defendants subpoenaed Capizzi's mortgage broker, Zaleski, presumably because the "self-employed" box on the front page of Capizzi's refinancing application is not "checked" and/or because the "net worth" of his law firm is not listed among his "assets." Because of M&T's relationship with BCLLP, however, *before* Capizzi signed the application, M&T *already knew* Capizzi was self-employed,

and was authorized to sign checks for the firm (Zaleski,1940-42;Ex166,Bates#405) And, because Capizzi was refinancing with significant equity in his home, M&T did not need all of the information on the application. In fact, Zaleski didn't ask and/or paraphrased the application questions during his *phone interview* with Capizzi. For example, Zaleski *would not have asked* Capizzi for the "net worth of businesses owned," even though this question appears on the application. (Zaleski,1957-60)

e. The NYS Tax Department Request for Information has no probative value.

DISCUSSION/SUPPORT:

Defendants attach great significance to this partially completed document (Ex141), and repeatedly attempted -- ultimately unsuccessfully -- to convince the Court the document was filed with NYS. Defendants' pretrial memorandum goes so far as to *falsely* claim, *twice*, that this is an "Undisputed Fact." (CtEx9,pp7,8) It is not undisputed, as Defendants were well aware when they filed this memorandum.

The evidence at trial overwhelmingly established the document was *not* sent to NYS. Defendants admit the document is incomplete. (Chiari,2832,3099,3141) It required the firm to list *all owners, partners **and** officers*. Defendants admit "Sam *was always a partner* from '07 until the day he left." (Chiari,3142) Thus, if the form had been properly completed, Capizzi's name would have been on it.

As for mailing, Chiari admitted he did not mail it; rather, he gave the incomplete document to Kasperek. (Chiari,2832-2833) Kasperek does not recognize the document and has no memory of mailing it. (Kasperek,557) *If* Kasperek had completed the document, however, *she no doubt would have included Capizzi as an owner as she had done on the pension documents requesting the same information* (Ex57,Bates#310).

Finally, *Plaintiff* subpoenaed records from the NYS Tax Department, expecting to find the document filed *with Capizzi's name added*. The agency responded, and produced records prior to 2007, but this document was not among the records produced. (Brown,2042)

Ultimately, the Court ruled: "…it comes in for a limited purpose. What's the limited purpose? He [partially] filled it out and intended to send it." (Chiari,2829)

f. Capizzi's 1/30/15 email supports Capizzi's claims.

DISCUSSION/SUPPORT:

Defendants repeatedly point to this email (Ex87), claiming it shows Capizzi was an income partner at BCLLP. It does not. Defendants focus *solely* on the sentence reading "Really, it's just an agreement to distribute the profits after we pay expenses," and ignore the previous sentences which read "*First I am asked if I am self-employed, and they define that as owning a business as sole proprietor or partnership, so I think that has to be a yes. Then I am asked for the approximate market value of the business or actually my part of it. Can I answer "0" for the law*

partnership because there is no market for it? I can't sell, mortgage or exchange my interest in the law partnership."

Capizzi's analysis was completely correct. The parties did "agree" to distribute NDI, and that "really" was the extent of the parties' agreement on NDI until and unless someone left and dissolved the firm. In fact, Chiari *said the exact same thing* in 2006 at a time when, in this litigation at least, he claims to have been an equity partner:

> Q …Jim, is there any difference in what Don Chiari said in 2006 from what Sam Capizzi said in 2014 (sic)?
>
> * * *
>
> **COURT:** The Court finds, no. There is no difference.

(Brown,2504-06)

Capizzi's suggestion the firm had "0" *market* value (as opposed to *dissolution* value) is also entirely accurate. There is no "market" for a minority interest in a law firm.

g. Brown/Chiari understood Capizzi considered himself an equity partner.

DISCUSSION/SUPPORT:

Defendants disingenuously contend Capizzi never communicated to them that he considered himself an equity partner. [*See* Rupp's 6/4/19 letter to Court regarding Capizzi's deposition testimony; also Defendants' pretrial memorandum (CtEx9@p7)]. No doubt, defendants' post-trial submissions will repeat this theme

ad nauseam. Capizzi denies this, testifying he told Brown/Chiari he considered himself an equity partner "many times" (Capizzi,1013).

When Defendants quote Capizzi's deposition testimony (Ex201), the Court is cautioned to consider Capizzi's answers in light of the specific questions asked. For example, in testimony quoted by Rupp in his 6/4/19 correspondence, the question asks about conversations at a specific point in time -- namely, "after the Fahey decision came out." Recognizing his initial question was temporally limited, Rupp subsequently asked Capizzi if he had "*ever*, *at any time* before [he] departed… told Brown and Chiari that he considered himself "an equity partner, member or owner of the firm," and Capizzi responded "we had many discussions…" (Ex201@p58).

The "deal/agreement" to share NDI 40/40/20 also strongly suggests such discussions took place. How else could the parties have changed the previous procedure, whereby Capizzi's share of the NDI was "variable" and set annually by Brown/Chiari, to the new 40/40/20 "deal/agreement" they initiated in 2007? Stated differently, there could not be a "deal/agreement" without a meeting, and there would be no reason for Brown/Chiari to make a "deal/agreement" with Capizzi, *guaranteeing* him 20% of the firm's NDI, unless he was an equity partner.

But this entire issue is a red herring. As supported by the accompanying memorandum, it matters not whether Capizzi *told* Brown/Chiari that he considered himself an equity partner. Intent is *implied* from the parties' conduct/course of dealings; and actions speak louder than words.

Dated: July 25, 2019

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CERTIFICATION

I hereby certify that, excluding the caption, table of contents and signature block, the foregoing document contains 7,000 words, and is in compliance with the 7,000 word limit set by the Court.

/s/ *Kevin A. Szanyi*
Kevin A. Szanyi