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 POST TRIAL MEMORANDUM OF LAW

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Preliminary Statement

When Frascogna disassociated himself from Brown, Chiari, Capizzi and Frascogna in 2004, Brown and Chiari *may* have had a credible argument that they did not understand partnership law, and that they were just "sloppy" when it came to defining their relationship with Frascogna. After Judge Fahey's decision was rendered in December 2006, however, a naiveté defense is nothing short of insane[1]. In no uncertain terms, Judge Fahey told Defendants that they – *along with Capizzi* – were equity partners with Frascogna, *and with each other*. Thus, if Brown and Chiari did not intend to be equity partners with Capizzi after Judge Fahey's decision, they needed to make drastic changes to their relationship. Yet, the changes that occurred only *confirmed and solidified* the parties' status as co-owners of the new law firm that was created in May of 2007.

As discussed below, where, as here, it is undisputed that the parties held themselves out as partners and shared in the profits of the law firm, Defendants bear the burden of proof to establish that Capizzi is <u>*not*</u> an equity partner. But regardless of the burden of proof, when the Court considers the parties' relationship as a whole, as it must, the evidence supporting Capizzi's ownership status is immense. Yet even if it were not, the firm's tax returns *alone* are sufficient proof of Capizzi's status under the doctrine of tax estoppel.

[1] In a quote often attributed to Albert Einstein, "insanity" has been defined as doing the same thing over and over again and expecting a different result.

Argument

I. Settlement Of The *Frascogna* Litigation Had No Effect On Judge Fahey's Memorandum Decision Or Judge Curran's Order

At the conclusion of trial, the Court asked the parties to address the significance of Judge Fahey's memorandum Decision and Judge Curran's Order in light of the subsequent settlement of the *Frascogna v. Brown, Chiari, Capizzi and Frascogna* ("*Frascogna*" or "*Frascogna v. BCCF*") litigation. (3358-61)

The short answer to the Court's question is that the settlement of the *Frascogna v BCCF* litigation had no effect on the Court's Decision and Order because the Decision and Order were never vacated as part of the settlement. As such, the Court's Decision and Order in *Frascogna v BCCF* remain binding on Brown and Chiari, and Defendants are estopped from contesting Capizzi's status as an equity partner in the BCCF firm.

A. Absent Vacatur, A Decision/Order Continue To Have Precedential And Collateral Estoppel Effect.

As evidenced by the fact that a subsequent order was never entered, Judge Fahey's Memorandum Decision and Judge Curran's Order were never vacated. *See also* the Affidavit of Frank Frascogna dated June 26, 2019.

Absent vacatur, a judicial determination continues to have precedential value and collateral estoppel effect, even if the matter is settled. *Allstate Ins. Co. v. Am. Home Assur. Co.*, 43 A.D.3d 113, 122-23 (1st Dept. 2007). In *Allstate*, defendant American Home Assurance ("AHA") attempted to avoid the binding effect of a

United States District Court determination in a subsequent New York State Court proceeding with its reinsurer Allstate, and the trial court (New York County Supreme Court) permitted it to do so.

The First Department reversed. Initially noting that AHA was being "disingenuous" for taking a position in the State court proceeding that was inconsistent with its position in the District Court proceeding [*compare* Chiari's testimony that he was merely an income partner in the *Frascogna v. BCCF* litigation with his testimony in the instant case], the Appellate Division rejected AHA's contention that the District Court determination was "inoperative" because the parties had settled the case post-verdict. The court held:

> ***A settlement does not entail vacatur of a prior decision***. Neither party did anything to eliminate or limit the preclusive effect of the decision. ***The parties neither agreed nor negotiated to seek to have the court vacate the decision as part of their settlement***.

Id. (emphasis added) *citing Mercantile & Gen. Reinsurance Co., PLC v. Colonial Assur. Co.*, 147 Misc.2d 804, 810 (Sup. Ct. N.Y. County 1989) (holding that judgment in prior Western District of New York decision did not result in issue preclusion *because the order was expressly vacated* by the court following settlement); *see also Ruben v. Am. & Foreign Ins. Co.*, 185 A.D.2d 63, 66 (4th Dept. 1992) (holding that verdict could not be used for collateral estoppel *because the verdict was expressly vacated* under CPLR 5015 while an appeal was pending).

Addressing the rationale for its decision, the First Department in *Allstate* reasoned:

> A trial was held, the jury returned a verdict, and the court ruled on the precise question… [in controversy]. The issue was fully litigated and clearly was "not avowedly tentative." ***Defendant was effectively bound by the District Court decision when it negotiated a settlement***…

Id. (citation omitted, emphasis added).

Albeit in a federal context, the issue this Court requested to be briefed is addressed in a 1989 Fordham Law Review article, Henry E. Klingeman, *Settlement Pending Appeal: An Argument for Vacatur*, 58 Fordham L. Rev. 233 (1989). Ultimately expressing support for *allowing* parties to vacate a prior decision as a condition of settlement – i.e., a situation which *did not* occur in the *Frascogna v BCCF* litigation – the author collects and summarizes cases addressing the settlement/vacatur issue, noting that a significant number of courts do not even permit vacatur as a condition of settlement. The author begins his article with this:

> Parties to a federal civil suit may consent to dismiss the case pursuant to a settlement agreement. Because settlement is an option available until final judgment is entered, it may occur while an appeal is pending. When it does, the parties to the case often decide to condition settlement on vacatur of the lower court judgment. Vacatur has the effect of "voiding" a judgment. ***Parties to a settlement agreement seek vacatur for several reasons. For example, vacatur may allow parties to avoid the preclusive effect of the judgment in a future action or it may enable them to avoid the non-legal ramifications of an adverse judgment.***

Id. (citations omitted). Of course, by noting that a vacatur may "avoid the preclusive effect of the judgment in a future action," it goes without saying that a settlement that is *not* conditioned on vacatur – *as here* – retains its preclusive effect.

B. The Filing Of A Notice Of Appeal Is Irrelevant

Defendants may persist with the false narrative that they "appealed" Judge Fahey's Decision and Judge Curran's Order (131). Defendants did not "appeal" anything; they filed a *notice* of appeal. An appeal was never perfected, much less decided. As this Court correctly observed: "Lawyers file notices of appeal every day, not because they think necessarily they have a strong argument on appeal, but as a negotiating tool." (871).

The defendant in *Allstate* filed a motion for an interlocutory appeal and a motion for a new trial. The motion for an interlocutory appeal was denied and the motion for a new trial *was pending* when the case settled. It did not matter. Because settlement was not conditioned on vacatur of the verdict, the pending motion was irrelevant. *Id.* at 116.

C. Defendants Are Estopped From Challenging The Findings/Conclusions In The *Frascogna v BCCF* litigation

Because the Decision and Order were never vacated, Defendants are collaterally estopped from challenging issues conclusively determined against them. "Under the doctrine of collateral estoppel, or issue preclusion, a party may not relitigate in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or

not the tribunals or causes of action are the same." *Rozewski v. Trautmann*, 151 A.D.3d 1945 (4th Dept. 2017) (internal citations and quotations omitted). Collateral estoppel applies where "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the prior tribunal in a prior proceeding; and (2) there was a full and fair opportunity to contest the issue in that tribunal." *Id.* at 1945-46.

"[C]ollateral estoppel does not require a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment, but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated." *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 955 (2d Cir. 1964) (internal quotation and citation omitted). "Finality in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Id.*

Defendants are collaterally estopped from denying "material issues" decided in a prior proceeding. *Rozewski*, 151 A.D.3d at 1945-46. In the present dispute, the following material issues were decided:

- Judge Fahey determined that BCCF was a partnership with *four* equity partners – i.e., including Capizzi[2];

[2] Defendants may claim that the Court's determination that Capizzi was also an equity partner was merely *dicta*. It was not. *Capizzi was a named defendant* in the litigation, and the finding against him had significant impact. For example, upon entry of Judge Curran's Order providing for dissolution of the firm, Capizzi became liable for BCCF's debts upon dissolution. *See P*artnership

- Judge Curran ordered that "any denial of Frascogna's status as an equity partner *with* Messrs. Brown, Chiari *and Capizzi* is hereby stricken," and that
- BCCF was dissolved and Frascogna was entitled to an accounting "pursuant to New York partnership law."

Throughout this proceeding, Defendants have oddly disputed each of these determinations *while at the same time* acknowledging that the Decision and Order are valid:

> **COURT**: I want to understand something. Are you seriously debating the enforceability and the legality of Justice Fahey's decision and Judge Curran's judgment dissolving one of those firms?
> **RUPP**: No, I am not, Judge.
> **COURT**: I didn't think so...

(1988)

There can be no legitimate dispute that Judge Fahey concluded and Judge Curran ordered that Capizzi was an equity partner in BCCF. At page 35 of the Decision, Judge Fahey specifically states that the partnership consists of "four partners," and on page two of his Order, Judge Curran ordered that "any denial of Frascogna's status as a general partner *with* Messrs. Brown, Chiari *and Capizzi* in

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Law 67(1) ("The dissolution of the partnership does not of itself discharge the existing liability of any partner."); Partnership Law § 71 (d) ("partners shall contribute, as provided by section forty, subdivision one, the amount necessary to satisfy the liabilities…"). Thus, as a result of the Decision/Order, Capizzi was *personally* obligated to Frascogna for the value of Frascogna's partnership interest, and for other debts of the firm, if any.

BCCF is hereby stricken…" (Emphasis added). This Court has acknowledged this finding many times, including:

> **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*.

(2004, emphasis added).

Defendants refusal to accept that BCCF was dissolved is equally mystifying. On this issue, Judge Curran's Order could not be more clear. Once again, this Court has recognized the obvious:

> **RUPP**: I know starting with opening statements that Your Honor has given us the Firm 1, Firm 2, Firm 3 rubric. *It has been our position all along that this was one firm.*
> **COURT**: And you're incorrect.
> **RUPP**: Judge, it's been our position --
> **COURT**: You heard me say that, on the record, *you're incorrect.*

(1592, emphasis added).

Near the close of trial, Defendants disingenuously attempted to imply that Judge Fahey and Judge Curran did not conclude that Frascogna (and therefore Capizzi) was an *equity* partner, because Judge Curran's Order used the term "general" partner as opposed to owner or equity partner. (3179) If Defendants truly intend to dispute this finding, it would be *beyond* frivolous, because:

- Defendants were well aware Frascogna was claiming to be an owner/equity partner. (3175).

- Judge Fahey explicitly distinguished the term "income partner" from the terms "partner," "general partner" and "equity partner" before concluding that Frascogna was "a partner" and "entitled to an accounting" (at pp. 41-42). By determining that he was entitled to an accounting, Judge Fahey *necessarily determined* Frascogna was an equity partner under New York partnership law.
- Judge Curran's Order stating that Frascogna was a "general" partner also dissolved BCCF and ordered an accounting. Judge Curran therefore *necessarily determined* Frascogna was an equity partner under New York partnership law.
- Finally, Defendants' pretrial memorandum acknowledges *as an "Undisputed Fact"* that "*Judge Fahey issued a Decision determining that Frank Frascogna held an equity interest*." (CtEx9,p7) Defendant Chiari drafted and/or approved the pretrial memorandum (332).

D. Capizzi's Testimony In *Frascogna v. BCCF* Is Not Relevant

Defendants have made no secret of the fact that their defense rests almost entirely upon Capizzi's testimony in *Frascogna v BCCF*. For example, in their pretrial memorandum, Defendants claim "Mr. Capizzi's sworn testimony demonstrates that he never once was or intended to be an equity partner, and that "Defendants contend that Plaintiff's prior testimony is the equivalent of a written agreement and expression of intent…" (CtEx9,p13-14).

Although they have heretofore not uttered the word "estoppel," Defendants appear to be arguing that Capizzi is estopped from respecting and accepting Judge Fahey's determination and acknowledging that his conclusion in *Frascogna v. BCCF* was incorrect. He is not. As Capizzi explained during trial, his testimony concerning day-to-day activities at the firm (i.e., how his compensation was determined, whether or not he signed banking resolutions, his management responsibilities at the BCCF firm, etc.) was entirely accurate. What was not correct was Capizzi's *legal conclusion* that these activities did not amount to equity partner status. Based on his understanding of partnership law, as conveyed to him by the attorney selected by Jim Brown, Capizzi did not believe he was an equity partner *in that firm*. But, quite simply, he was wrong. Judge Fahey told Capizzi – and Brown and Chiari – that he was wrong. There was no appeal and no vacatur, as discussed above, and Capizzi accepts that determination.

Collateral estoppel does not apply to Capizzi because *Capizzi is not attempting to relitigate Judge Fahey's determination*.[3] As discussed previously, the doctrine of collateral estoppel holds that a party may not *relitigate* in a subsequent action or proceeding *an issue decided against that party*. Unlike Defendants – who *are* attempting to relitigate Judge Fahey's finding that Capizzi was an equity partner because it is devastating to them in this litigation – Capizzi is *not* attempting to relitigate Judge Fahey's determination; Capizzi has accepted Judge Fahey's determination.

More fundamental, however, Capizzi's testimony about his partnership status in *Frascogna v. BCCF* concerned *an entirely different law firm*. Defendant *BCLLP did not even exist when Capizzi testified in 2005 and 2006*. And Capizzi's testimony in *Frascogna v. BCCF* was obviously given prior to Judge Fahey's determination that Capizzi's understanding was not correct. Capizzi's understanding of the factors considered by courts when determining partnership status *after* Judge Fahey's decision was issued, and thus his relationship with Defendants moving forward, was obviously much different.

[3] Judicial estoppel also does not apply with respect to Capizzi because Capizzi did not prevail in the *Frascogna v. BCCF case*. Capizzi was a *defendant* in the *Frascogna v. BCCF case,* and Frascogna prevailed. "Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed." *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436 (2d Dept. 1995) (emphasis added); *see also Tilles Inv. Co. v. Town of Oyster Bay*, 207 A.D.2d 393, 394 (2d Dept. 1994); *One Beacon Ins. Co. v. Espinoza*, 37 A.D.3d 607, 608 (2d Dept. 2007) ("Inasmuch as Espinoza did not obtain a favorable judgment as a result of his 'contrary position' in the personal injury action, the doctrine of judicial estoppel does not apply.")

For all these reasons, including but not limited to the fact that Judge Curran specifically ordered that Defendants are *prohibited* from doing so, Defendants *cannot* deny that Capizzi was an equity partner with BCCF, and it would be "disingenuous" if Defendants were to take a contrary position in their post-trial submission:

> **RUPP**: … Because what we think is going on here is an effort by Mr. Capizzi to fool people into thinking something that we don't even think he believes himself, which is that he was ever, ever an equity partner or an owner of the Brown Chiari firm.
> **COURT**: But he was.
> **RUPP**: Pardon me?
> **COURT**: He was. *According to Fahey and Curran he was*.
> **RUPP**: Well Judge
> **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, emphasis added).

As this Court has clearly recognized, determinations made in the *Frascogna* matter are *binding* on Defendants. The settlement of the *Frascogna* matter does not alter this fact because the Order was never reversed or vacated.

II. Capizzi Is An Equity Partner With A 20% Ownership Share And Is Entitled To An Order Dissolving The Partnership And An Accounting

A. Sharing Of Profits Is *Prima Facie* Evidence Of Partnership, Shifting The Burden Of Proof To Defendants

Partnership law § 10(1) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership."

Although the Court must consider the totality of the parties' relationship, the sharing of profits is *prima facie* evidence of partnership which shifts the burden of proof to Defendants. Partnership Law § 11(4) ("The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business…"); *Frascogna v. BCCF*, 39.

It is undisputed that Capizzi shared in the profits of BCLLP from the day the firm was established in 2007. At all times, the parties had a "deal/agreement" to distribute profits 40/40/20. The parties' 40/40/20 arrangement continued even after the parties agreed to modify their agreement on 6/30/14 in a memo stating, in part, that "…instead of distributing the profit in accordance with prior years, we would instead evaluate each contribution and distribute accordingly," and that any funds not distributed in this manner "would go into a profit pool to be distributed [40/40/20] at the end of the year." (Ex82,Bates738).

Where, as here, partners share in partnership profits, *the burden of proof shifts to Defendants* to demonstrate, based on the parties' relationship as a whole, that Capizzi *was not* an equity partner. *Kirsch v. Leventhal*, 181 A.D.2d 222, 224 (3d Dept. 1992) (citing evidence of "partnership income tax returns, the actual sharing of profits and the parties' holding themselves out to the public as a law partnership," the court held that "the burden shifted to defendant to submit evidentiary proof to create a triable issue of fact on whether a partnership ever came into being."); *Frascogna*, 39 ("in the absence of a written partnership agreement… the filing of partnership income tax returns, the actual sharing of profits and the parties' holding themselves out as a law partnership… amount to a *prima facie* showing that there is a partnership and… the burden of proof them (sic) shifts to the parties opposing the accounting.")

B. The Court Must Examine The Parties' Relationship As A Whole And Consider All Relevant Factors; No One Factor Is Determinative

The Court must consider the following factors when examining the parties' relationship as a whole:

- Whether there is a sharing of profits as well as a sharing of losses;
- Whether there is joint control and management of the business;
- Whether there is a combination of property, skill and knowledge;
- Statements characterizing the relations as a partnership;

- The intent of the parties (express and implied);
- Whether the individuals hold themselves out as partners; and
- Inclusion of names on the partner certificate [if applicable].

Frascogna, 38-39; (*citing Mariani v. Summers*, 3 Misc. 2d 534 (Sup. Ct. N.Y. Cty. 1944), *aff'd,* 269 A.D. 840 (1st Dept. 1945); *Napoli v. Domnitch*, 34 Misc. 2d 237 (Sup. Ct. Queens Cty. 1962), *modified,* 18 A.D.2d 707 (2d Dept. 1962), *aff'd,* 14 N.Y.2d 508 (1964); *Brodsky v. Stadlen*, 138 A.D.2d 662 (2d Dept. 1988); *Kyle v. Brenton*, 184 A.D.2d 1036 (4th Dept. 1992)).

The Fourth Department has instructed that "[n]o one factor is determinative but, rather, it is necessary to examine the parties' relationship as a whole." *Fasolo v. Scarafile*, 120 A.D.3d 929, 930 (4th Dept. 2014) (internal alterations omitted) (*quoting Kyle*, 184 A.D.2d at 1037).

C. All Relevant Facts/Factors Favor Capizzi

In concluding that Frascogna was an equity partner in BCCF, Judge Fahey relied on the following factors:

- "There is written documentation that Mr. Frascogna was responsible for the firm's obligations";
- "Mr. Frascogna was 'present at the creation' of the partnership";
- "[T]here are no written partnership agreements that Mr. Frascogna was not involved in as a signatory"; and

- "And from its inception, Mr. Frascogna received a large share of the net income of the new partnership."
- Partnership tax returns "identifying the four as partners";
- Corporate Banking Resolutions "where the four partners signed off on broad authority for each of the partners to conduct transactions with the bank";
- A line of credit "for which all four partners obligated themselves"; and
- A "draft of the four partners, the so-called death agreement".

Frascogna, 35, 42 (discussing *Mazur v. Greenberg*, 110 A.D.2d 605 (1st Dept. 1985), *aff'd sub nom*. *Mazur v. Max E. Greenberg, Cantor & Reiss*, 66 N.Y.2d 927 (1985)); *c.f. Shine & Co. LLP v. Natoli*, 89 A.D.3d 523 (1st Dept. 2011)[4]; *D'Esposito v. Gusrae, Kaplan & Bruno PLLC,* 44 A.D.3d 512, 512–13 (1st Dept. 2007) (holding that plaintiff was not a partner because plaintiff was not responsible for firm's losses.)

Although he analyzed and considered all of the relevant factors before reaching his conclusion that Frascogna was an equity partner, Judge Fahey found ***Frascogna's "responsibility for obligations and liabilities of the firm" "particularly" compelling."*** *Id.*

[4] In *Shine,* the court held that the defendant was not a partner, notwithstanding a letter of intent ("LOI") referring to defendant as an "equity partner." In doing so, the court observed that the defendant received a 1099 as opposed to a K-1 and, therefore, the court concluded that his compensation was not derived from profits, and that he was not responsible for losses. *Id*. The court held "[t]he LOI clearly did not provide for defendant to share in plaintiff's profits or losses. Both are essential elements of a partnership agreement, and defendant failed to present any evidence to support his assertion that he would have shared in either profits or losses." *Id*.

In fact, Judge Fahey held: the "only indicia of partner status not going Mr. Frascogna's way" was "his relative lack of say in management decisions," which Judge Fahey held "insufficient to conclude that he was not a partner." *Id.,* 42.

The facts of the present case and the factors relied upon by Judge Fahey stack much higher for Capizzi than for Frascogna.[5] Without repeating each of the facts set forth in Plaintiff's Proposed Findings of Fact, the following chart summarizes the relevant facts/factors in each case:

Factor	***Frascogna***	***Capizzi***
Tax Returns	• Partners receive K-1s w/ capital accounts • K-1s show recourse debt obligations • Returns identify all partners	• <u>*Same, plus*</u>: • '08 return shows Capizzi's 20.19% ownership percentage • '08 to '15 returns: Brown/Chiari state under penalties of perjury that <u>*no one*</u> owns 50%
Bank Records	• Partners personally guarantee LOC • Partners sign resolutions stating *each* has authority to act for the firm • Check signing authority	• <u>*Same, plus*</u>: • M&T mortgage records show Capizzi is "self-employed"
CPA Records / Testimony	• Never told of "profits partners" • Partners treated the same	• <u>*Same, plus*</u>: • CPA letter confirms Capizzi owns 20% of BCLLP • Workpapers identify Capizzi as an owner
Firm Debts	• LOC personal guarantees • Recourse debt obligations on tax returns	• <u>*Same, plus:*</u> • Defendants asserted a counterclaim against Capizzi for a firm debt.

[5] Of course, the scales tip even further in Capizzi's favor when the Court considers the fact that Frascogna prevailed. Before Judge Fahey's decision, Brown and Chiari could plausibly argue that they were unaware that the factors relied upon by Judge Fahey amounted to equity status. After the decision, however, an "ignorance defense" is simply untenable.

Factor	***Frascogna***	***Capizzi***
Management	• Capizzi and Frascogna are <u>*not*</u> involved	• Capizzi is <u>*actively*</u> involved
Income/ Interests	• Frascogna received a "large share" of the net income (roughly 14%) • NDI percentages vary • Brown/Chiari decide • Capizzi is *not* involved in discussions • No sale discussions	• Capizzi received a large share of the net income (20% from 2007-2013, then 14% and 11% after Defendants' breach) • Parties agree on 40-40-20 (the "deal") • Capizzi actively involved in discussions to partially modify the 40/40/20 "deal" to include evaluations of "each contribution." • Brown offers a "buyout" to Capizzi and Chiari • Brown wants to sell some of his interest to Scinta and seeks Capizzi's/Chiari's approval
Death Agreement/ Proposed Agreement	• Refers to "Partners" • "Share of income" • Eight year payout	• Refers to "Members" • "Share of Equity" • 13 year payout
Life Insurance	• None	• $1m on partners, paid by firm
"Present at creation"	• Frascogna was "present at the creation" of the law firm	• <u>*Same*</u>
Testimony	• Capizzi <u>*believes*</u> *he* is *not* an EP at BCCF • Chiari testifies he *is not* an EP at BCCF	• Capizzi explains/ does not change testimony • Chiari changes testimony and now testifies he *was* an EP at BCCF
Real Estate	• All partners own equally	• <u>*Same*</u>
Capital Contributions	• None by Chiari or Capizzi	• Frascogna $400k settlement taken from BCLLP operating account (Capizzi pays 20%). • Brown, Chiari and Capizzi "roll" BCCF Court ordered dissolution value of BCCF into BCLLP
Student Loan Records	• None	• Capizzi reports under oath he owns 20% of BCLLP

Factor	*Frascogna*	*Capizzi*
Pension Records	• Frascogna, Brown and Capizzi are trustees • Partners and employees treated the same	• Brown, Capizzi and Chiari are trustees • Pension plans modified to favor only Capizzi, Chiari and Brown • Capizzi is identified as an owner on Form 5500 information request approved by Brown/Chiari • Capizzi is identified as an owner on ERISA plan documents given to Brown/Chiari • Capizzi is identified as an owner in numerous emails given to Brown/Chiari • Pension Administrator Spina tells his assistant Casey that Capizzi is an owner following a meeting with Brown

D. Defendants Are Barred By The Doctrine Of Tax-Estoppel From Denying Capizzi Was An Equity Partner

"A party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009); *Amalfi v. 428 Co.,* 153 A.D.3d 1610 (4th Dept. 2017). "[W]hether using the appellation of judicial estoppel, quasi estoppel, or estoppel against inconsistent positions, courts have consistently held that a party is estopped from adopting in court a position contrary to that previously asserted on his or her tax returns." *Zemel v. Horowitz*, 11 Misc. 3d 1058(A) (Sup. Ct. N.Y. Cty. 2006); s*ee also Ginor v. Landsberg*, 159 F.3d 1346 (2d Cir. 1998) (estopping party from claiming that a note

was cancellable at will when it had previously claimed a tax deduction claiming the note was a genuine debt obligation.)

In *Amalfi*, involving an appeal from this Court, a plaintiff alleged defendants improperly sold a commercial building without honoring its agreement to provide plaintiff a right to first refusal to match any "bona fide" offer. Defendants contended that the sale was not a bona fide transaction because the property was bought by, and sold to, an entity controlled by the same person. Relying on tax documents certifying that "the sale was *not* 'between related companies or partners in business,'" the Fourth Department held that the defendants were *estopped* from denying the sale was a bona fide transaction. Relying on the same tax documents, the Fourth Department also held that defendants were estopped from claiming the purchase price included various mortgage assumptions worth over $2 million (a price plaintiff could not match), citing instructions for the tax document requiring assumed mortgages to be included in the "Full Sale Price" and a lower value reported in the tax documents, which plaintiff was indisputably ready, willing, and able to match.

A party is estopped from denying the existence of a partnership where the partnership files tax returns identifying the form of business as a partnership. *Halstead v. C.I.R.*, 296 F.2d 61, 62 (2d Cir. 1961) ("Since the taxpayer represented to the taxing authorities that the form of business he set up was an actual partnership, he may not now disclaim its validity."); *see also Levy v. Levitt,* 3 F. App'x 944, 948

(10th Cir. 2001) (estopping defendant from denying he was a partner based on claiming partnership losses on tax returns, holding "a party holds himself out as a partner if he claims partnership losses on his tax returns.")

As set forth in greater detail in the accompanying Proposed Findings of Fact, Brown/Chiari personally reviewed and signed each of the Partnership's tax returns/e-filing certifications. In doing so, *under penalties of perjury*, Brown/Chiari swore the following facts to be true, thus estopping them from now claiming otherwise:

- Capizzi was identified as one of three partners in the firm, and he received a K-1 with a capital account each year;
- BCLLP's tax returns do not distinguish Capizzi's interests from Brown's/Chiari's, except in 2008 when Capizzi's ownership interest is represented to be 20.19%;
- *No one* owned "50% or more" of the profit, loss or capital of the partnership; thus establishing the partnership must have *at least* three owners; and
- Capizzi's K-1s reflect *recourse* liability, certifying that Capizzi was personally responsible for BCLLP debts.

Finally, significantly, according to the firm's principal CPA, Capizzi's K-1s are *not* consistent with "just an agreement to share in profits after expenses." (1308-09). In other words, the firm's tax returns are *not* consistent with Defendants' claim that Capizzi was merely an "income partner." Because Defendants are estopped from taking a position contrary to what is stated on the tax returns, *this fact alone* requires a finding in Capizzi's favor.

E. Intent Can Be Shown Expressly Or Implicitly

1. A Partnership May Exist Notwithstanding Partners' Statements Or Beliefs

As stated previously, intent is but one factor for this Court to consider when evaluating this dispute, and intent may be ***express or implied***. *Bianchi v. Midtown Reporting Serv., Inc.*, 103 A.D.3d 1261, 1261–62 (4th Dept. 2013); *Griffith Energy, Inc. v. Evans*, 85 A.D.3d 1564, 1565 (4th Dept. 2011); *Goldberg v. Goldberg*, 276 A.D. 1084 (2d Dept. 1950) ("parties may create a partnership evidenced by their statements, oral or written, or by their conduct…")

In fact, in a contested proceeding like this, parties' actions are clearly *more* important than words. The idiom "actions speak louder than words" comes to mind. As defined by the Cambridge Dictionary, it means "*what you do is more important than what you say, because the things you do show your true intentions and feelings*."[6] The "things" that occurred here are especially significant because they occurred *after* Judge Fahey's decision educating Defendants on the factors Courts consider when deciding partnership disputes. And the Court need look no further than Chiari's testimony to see that Defendants *were* aware of the significance of Judge Fahey's decision moving forward. Specifically, Chiari acknowledged under oath that, after Judge Fahey's decision, he was well aware that he needed to not "make the same mistakes [he] made with [Frascogna]" if he were to expect a different result in the future. (146-148)

[6] https://dictionary.cambridge.org/us/dictionary/english/actions-speak-louder-than-words#cald4-1-1-1 (emphasis added)

Considering the element of intent in the *Frascogna v. BCCF* case, Judge Fahey found that Capizzi, Chiari and Brown *were equity partners with each other* in BCCF, *even though they each denied an intention to be partners with each other*. His decision was based on the parties' relationship as a whole, and intent was implied from their conduct. Significantly, Judge Fahey reached this conclusion without determining that any of them testified untruthfully. Rather, they may have simply been incorrect in their legal conclusions.

Judge Fahey's determination is consistent with numerous decisions finding partnerships notwithstanding a partner's denial. For example, in *Griffith Energy, Inc.*, a defendant denied the existence of a partnership in order to avoid liability. Noting that intent can be *implied*, the Fourth Department held that "[w]ith respect to the first factor to be considered in determining whether a partnership existed, i.e., the intent of defendant and her husband, the evidence presented at trial included their tax returns and bankruptcy filings." 85 A.D.3d at 1565. In other words, the Court focused on the defendant's *conduct*, as opposed to what they said.

Like the defendant in *Griffith Energy*, Brown and Chiari deny that they intended to be co-owners with Capizzi. Surely it comes as no surprise to the Court that defendants facing a liability finding would take such a position. If Capizzi were truly not an equity partner, however, would Defendants have not taken at least *some actions* consistent with what they claim to be their intentions? Having just endured a trial and significant legal fees fighting Frascogna – *and losing* – would Defendants

have not used Judge Fahey's decision as a roadmap and made significant changes if they truly wanted to avoid a similar situation with Capizzi? The answer, of course, is obvious.

Yet, *everything* Brown/Chiari did *after* receiving Judge Fahey's decision and *after* establishing BCLLP on May 24, 2007 *served only to confirm Capizzi's status as an equity partner in the firm*. This is clearly demonstrated by the chart above. Two examples, however, are especially indicative of Defendants' intent. First, in 2011, Brown presented Capizzi with a "death agreement," referring to Capizzi as a "member" of BCLLP, referring to Capizzi's "share of equity" in the firm, and proposing to distribute NDI to Capizzi's estate *for 13 years after Capizzi's death*. Respectfully, it is simply unfathomable that Defendants would make such a proposal to any person who is not an equity partner/owner. Second, Chiari's June 30, 2014 memo confirming an agreement regarding the distribution of NDI is clear evidence that Defendants considered Capizzi to be an equity partner. That Capizzi was part of this agreement at all, and the fact that Brown/Chiari agreed that their own share of the firm's income *was going to be determined by Capizzi's evaluation of them* is indisputable evidence that he was an equity partner. Stated differently, what rational equity partner would agree to allow a non-equity employee to determine his share of the firm's NDI?

Capizzi's actions, on the other hand, were entirely consistent with his testimony that is an owner of the firm. Most glaring, of course, is Capizzi's continued willingness to *personally guarantee* the firm's line of credit, and his willingness to pay significant income tax on "phantom income." (796-97) Respectfully, what rational person would agree to personally guarantee *millions of dollars of debts* for a business, and to *pay taxes on income he did not receive*, if he were not an owner? Capizzi's representations of ownership to M&T Bank on his mortgage application, and especially to his son's colleges on financial aid applications, are also clear expressions of intent. Again, what rational person would provide information on a college aid application *that would reduce the chances of securing financial aid*, if it were not true?

2. Consent And Express Intent Are Not Required

In their pretrial memorandum, Defendants argued that partnerships cannot exist in the absence of express agreement and consent between the parties. Because reply memoranda will not be permitted, and because we anticipate a similar argument in their post-trial memoranda, Plaintiff will address this here.

In their pretrial memorandum, Defendants cite to Partnership Law § 40(7), which provides that "No person can become a member of a partnership without the consent of all the partners." (CtEx9@2) But this section of the partnership law *only* applies when someone joins a *pre-existing* partnership. Capizzi did not join a pre-existing partnership; BCLLP was established in 2007 and Capizzi,

Brown and Chiari were partners *ab initio*. As demonstrated previously, Defendants refusal to acknowledge that Judge Fahey and Judge Curran *dissolved* BCCF, and that a completely new firm was established on May 24, 2007, is simply disingenuous.

A partnership is the *default* status of "an association of two or more persons to carry on as co-owners a business for profit." Partnership Law § 10(1). In part, this is to both protect third parties dealing with partnerships as well as to protect partners who may not be versed in the intricacies of Partnership Law. As numerous courts have found, and as Judge Fahey concluded in *Frascogna v. BCCF*, a partnership may therefore exist in the absence of express intent or consent.

Defendants' pretrial memorandum claimed a 123 year old decision, *Heye v. Tilford*, 2 A.D. 346, 352 (1st Dept. 1896), *aff'd,* 154 N.Y. 757 (1897) is dispositive here. To the extent *Heye* stands for the proposition that express intent alone is decisive and controlling, it is clearly not good law in this judicial district. In fact, in a decision issued just one year later, our own Fourth Department stated:

> T. Parsons, in his work on Partnership (page 6), defines a partnership to be "the combination by two or more persons of capital or labor or skill for the purpose of business for their common benefit." Mere words of agreement do not necessarily create or destroy an arrangement that the law asserts is a co–partnership. Partnerships may be formed, "*not only by express agreement, but may grow out of transactions or relations in which the word 'partnership' is not uttered*. If there is such a joinder of interests and action as the law considers as the equivalent of partnership, or, rather, such as it regards as constituting a partnership, it will give to the persons engaged in it all the rights, and lay upon them all the responsibilities, * * * which belong to partnerships." T. Pars. Partn. (2d Ed.) 9. ...[I]t is said that where persons entering into a joint business enterprise contract to do

> all that in law is necessary to constitute a partnership, they are a partnership inter se, <u>*though they did not expressly intend to create such a relationship*</u>. Whether two or more persons associating in business are partners, as between themselves, depends upon their intentions, as legally ascertained.

Evans v. Warner, 20 A.D. 230, 235 (4th Dept. 1897) (emphasis added, internal citations omitted).

More recently -- 115 years more recently -- the Fourth Department stated "*[n]o one factor [including intent] is determinative but, rather, it is necessary to examine the parties' relationship as a whole*." *Fasolo*, 120 A.D.3d at 930 (emphasis added); *see also Bianchi*, 103 A.D.3d at 1261–62, and *Griffith Energy, Inc.*, 85 A.D.3d at 1565, two additional Fourth Department cases holding that intent may be express <u>*or implied*</u>.

Defendants' pretrial memorandum falsely states that *Hammond v. Smith,* 151 A.D.3d 1896, 1899 (4th Dept. 2017), stands for the proposition that the "chief focus of the Court is to determine the intent of the parties." (CtEx9,p12) This is a complete fabrication of the holding in *Hammond*. Nowhere in the decision does the Court state – or even imply – that the parties' intent must be a trial court's "chief focus." Rather, the Fourth Department in *Hammond*, citing *Fasolo*, addressed and analyzed <u>*all*</u> the factors relied upon by Judge Fahey in *Frascogna v BCCF*. Indeed, to the extent that the *Hammond* court found one factor more important than any other, the court specifically noted that the sharing of losses is "an essential element of any partnership agreement." *Id.* But even assuming *arguendo* that intent is to be

elevated above all else, Capizzi would still prevail here, given the parties' *conduct* as evidence of their *implied intent*, as discussed previously.

McGrath v. Krieger, relied upon heavily by Defendants in their pretrial memorandum, actually supports a finding of partnership based upon the evidence at this trial. 1980 U.S. Dist. Lexis 11498 (S.D.N.Y. 1980). There, citing New York Partnership Law § 11(4), the court started its analysis by noting that "[*t]he most important factor is [the] receipt by a person of a share of the profits* of a business which is *prima facie* evidence that he is a partner in the business." *Id*. at *13. The court then noted that *intent "... may be implied from the parties' conduct and attendant circumstances at the time of the alleged agreement and during the later course of dealings*." *Id.* at *14 (emphasis added). "That is to say, '[*partnerships] may be formed, not only by express agreement, but may grow out of transactions or relations in which the word 'partnership' is not uttered*." *Id.* at *15 (emphasis added, *citing Saward v Saward,* 119 Misc. 676 (Sup. Ct. N.Y. Cty. 1922), aff'd 214 A.D. 715 (1st Dept. 1925) [notably, the court in *Saward* relied on the Fourth Department's decision in *Evans*, 20 A.D. 230, discussed above]).

III. Capizzi Is Entitled To 20% Of The Firm's NDI in 2014 and 2015

A party may seek dissolution and an accounting as well as a breach of contract claim concerning an agreement to share profits. *Bereck v. Meyer*, 222 A.D.2d 243 (1st Dept. 1995) (dismissing claim for accounting, but holding that "issues of fact were raised as to whether there was an agreement to compensate

plaintiff, through a percentage of the profits or otherwise.") These claims may be asserted in the alternative, as in *Bereck*, or in addition to dissolution and accounting.

To be clear, it is Capizzi's contention that the evidence presented at trial *overwhelmingly* established his status as an owner/ equity partner and that he is entitled to an Order dissolving BCLLP and ordering an accounting. *In addition*, the evidence presented at trial *overwhelmingly* established that Brown and Chiari breached the parties' June 30, 2014 agreement and that Capizzi is entitled to the remainder of his 20% interest in 2014 and 2015.

The elements of a cause of action for a breach of contract are "(1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806 (2d Dept. 2011). "In determining whether the parties intended to enter a contract, and the nature of the contract's material terms, we look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." *Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 448–49 (2016). Contracts implied-in-fact "are evidenced by the acts of the parties and not by their verbal or written words -- true contracts which rest upon an implied promise in fact." *Miller v. Schloss*, 218 N.Y. 400, 406 (1916).

A. The Parties Agreed To Modify The Previously Agreed Upon 40/40/20 Distribution Of NDI *Only* If Certain Conditions Were Met

It is undisputed that the June 30 memo agreement was a modification of the parties' prior agreement. Under this new agreement, the three partners agreed to "*evaluate each contribution*" by each of the partners "when [Chiari] made a determination that there was enough cash to distribute." The parties further agreed that any profits not distributed "*after that evaluation*" would be distributed "by percentage at the end of the year." (Ex82,Bates738)

B. The Conditions Precedent For Departure From The Fixed Percentages Were Never Met

As described in detail in Plaintiff's Proposed Findings of Fact, it cannot be seriously disputed that the procedures set forth in the June 30 memo were never followed. Initially, Chiari never advised anyone "there was enough cash to distribute," and never solicited evaluations from anyone at any time.

In 2014, Chiari simply called Capizzi to an impromptu "meeting" and presented Capizzi with a *predetermined* share of the firm's NDI. No evaluations were exchanged and the parties certainly did not "evaluate each contribution" as required. During the 2014 event, Chiari also unilaterally advised Capizzi that he was taking the first $1.5 million of the firm's NDI, representing 53.86% of the firm's entire NDI (Ex154). This $1.5m "floor" is not what the parties agreed to in the June 30 memo. In fact, it is not discussed or memorialized in *any* memoranda or emails. As acknowledged by both Brown and Chiari, the parties had a "deal/agreement" to

share NDI 40/40/20 from the start of the firm in 2007. That "deal/agreement" could only be modified by a subsequent agreement, as evidenced by the June 30 memo, wherein Chiari states that "this method seems to have been agreed upon." Clearly, Capizzi never agreed that Chiari could simply "take" the first $1.5 million in NDI, and the fact that he did is a clear breach of the parties' agreements.

What occurred at the end of 2015 was perhaps even more egregious. Brown and Chiari made no effort to include Capizzi in a year-end evaluation meeting, falsely claiming that Capizzi must not have been interested because he travelled to visit his son studying in Italy. But the evidence at trial clearly established that Capizzi remained in communication with his assistant while in Italy, and he could have easily been contacted to participate by telephone. In fact, *Brown and Chiari communicated with each other at these purported year-end meetings by telephone in 2014* ***and*** *2015*. Equally important, Defendants have admitted that they did not evaluate Capizzi, and Capizzi did not evaluate them, in 2015. This is a clear breach of the June 30 memo which requires the parties to "evaluate each contribution" and to distribute NDI "by percentage" (40/40/20) "after that evaluation." Where, as here, there is no evaluation, the NDI *must* be distributed 40/40/20.

C. Ambiguities In The June 30 Memo Must Be Construed Against Defendants

Chiari drafted the June 30 memo, stating that the new method of evaluation "was a little confusing," even to him. Nevertheless, he confirmed the parties agreed, at a minimum, to "*evaluate each contribution*" by each of the three partners "at a time when [Chiari] made a determination that there was enough cash to distribute."

Aside from these statements, however, the memo completely fails to address the specifics of the new procedure. For example, it does not set forth any notice requirement for a meeting to be held when "there is enough cash to distribute," it does not describe the type of evaluation contemplated, or the factors to be considered, and it does not state how the new allocations will be determined or agreed upon. Without question, however, the memo left the parties' ownership interests in place by noting that any profits not distributed pursuant to evaluation would continue to be distributed "by percentage," which, according to the memo's author, means "40/40/20." (349: "Q. And when you say to be distributed by percentage at the end of the year, you meant 40/40/20? A. Yes")

Capizzi interpreted the June 30 memo to require at least *some* notice when there was "enough cash to distribute," so the partners could prepare detailed evaluations of "each [other's] contribution." It was also Capizzi's understanding that this would be a *cooperative* process, whereby they would get together and *agree* on new allocations. In the absence of consensus, if Chiari failed to tell him "there is

enough cash to distribute," or if the evaluations never took place, Capizzi naturally understood the NDI would continue to be distributed 40/40/20 "at the end of the year," as set forth in the memo.

Defendants obviously have a different view of the agreement, believing they can ignore the memo's requirement to "evaluate each contribution" and simply dictate what Capizzi should receive. But the memo does not say that and, to the extent that the memo is unclear, Capizzi's understanding must control, as "[i]t has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it." *151 W. Assocs. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 734 (1984); *Graff v. Billet*, 64 N.Y.2d 899, 902 (1985) ("If there is any doubt or uncertainty as to the meaning of the disputed language in [an] agreement, all ambiguity must be resolved against the [party] who prepared it.")

Conclusion

Defendants flood television and radio with advertisements touting their legal acumen, claiming they are "rated at the highest level for ability and ethics." Given such outstanding legal talents, Defendants surely possessed the minimal skills necessary to differentiate equity and non-equity partners in their own law firm; especially where, as here, Judge Fahey had already educated them on the specific factors that Courts rely upon to distinguish owners from employees.

Using Judge Fahey's decision as a roadmap, a simple telephone call to the firm's CPA to change a K-1 to a W-2, another call to the bank to cancel personal guarantees and banking resolutions and, perhaps, a handwritten one page agreement, would do the trick. Easily.

But Defendants chose to do none of those things. In fact, they did *just the opposite*. At every opportunity, they *confirmed* that Capizzi was their equity partner. A brand new pension plan favoring Capizzi, Brown and Chiari over all others. Check. A "death agreement" offering to pay Capizzi's estate a share of the firm's profits for 13 years after his death. Check. Paying for life insurance insuring only Capizzi, Chiari and Brown. Check. Signing tax returns "under penalties of perjury" certifying that no one owns "50% or more" of the firm. Check. Approving the firm's pension administrator's request for information identifying Capizzi as one of the firm's three owners. Check. And, just for good measure, asserting a counterclaim against him for a partnership debt after he withdraws from the firm. Check.

So why did such highly esteemed attorneys, with more than 60 years of combined legal experience, change *nothing* that Judge Fahey relied upon? And why did they take all of these *additional* actions that only cemented Capizzi's status as an equity partner? The answer is obvious. They treated Capizzi like an equity partner *because he was an equity partner*. They knew it, and they knew he would leave if

anything changed, just as he did when Brown checked out and Chiari crowned himself dictator in 2014 and 2015.

The evidence supporting Capizzi's ownership claim, and Defendants' breach of the June 30 agreement, is quite literally overwhelming; especially where, as here, Defendants bear the burden of proving that Capizzi *is not* an owner.

Dated: July 25, 2019

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CERTIFICATION

I hereby certify that, excluding the Section IA-C briefing requested by the Court, and excluding the caption, table of contents, table of authorities, and signature block, the foregoing document contains 6,598 words, including footnotes, and is in compliance with the 7,000 word limit set by the Court.

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