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BENJAMIN M. ZUFFRANIERI
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New York Supreme Court

Appellate Division—Fourth Department

SAMUEL J. CAPIZZI,

Plaintiff-Respondent,

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

Defendants-Appellants.

Docket No.:
CA 19-01828
CA 19-02042

SAMUEL J. CAPIZZI,

Plaintiff-Respondent,

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

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT JAMES E. BROWN

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PRELIMINARY STATEMENT

Defendant-Appellant, James E. Brown ("Brown") submits this brief in support of his appeal from the Decision and Order of the Hon. Timothy J. Walker, J.C.C granted and entered in the Erie County Clerk's Office on September 13, 2019 ("Decision and Order"). The Decision and Order declared that plaintiff Samuel J. Capizzi ("Capizzi") was an equity partner of Brown Chiari LLP ("BCLLP") as of the date of his resignation from the firm on January 8, 2016.

Brown also submits this brief in support of his appeal from the Decision and Order of Justice Walker granted and entered on October 15, 2019 ("Second Decision and Order"). The Second Decision and Order declared, *inter alia*, that Brown Chiari LLP was dissolved, effective January 8, 2016, upon plaintiff's resignation from the firm.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in declaring plaintiff an equity partner of Brown Chiari LLP when he repeatedly affirmed under oath — including in an affidavit, deposition, and trial testimony — that he was not an owner of defendants' law firm and did not intend to be one?

Answer: Yes.

PROCEDURAL HISTORY

Capizzi commenced this action for a declaration of rights and dissolution of BCLLP by summons and complaint dated September 13, 2016. R. ii. Plaintiff is an attorney who formerly worked at BCLLP until he resigned on January 8, 2016. R. 3442. In his resignation letter and again in his complaint, plaintiff contends that he was an equity partner entitled to an accounting and that the partnership should be dissolved. R. 3438. As alternative relief, plaintiff claims to have been undercompensated in 2014 and 2015, contending that he "was a partner who was entitled to 20% of the profits," and that he received less in both those years. R. 3445.

Defendants joined issue on November 11, 2016 denying that plaintiff ever was an equity partner of their law firm or that he had a guaranteed 20% interest in firm profits. R. 3452. While the pleadings contain other claims and

counterclaims, the trial court bifurcated the issues and ordered a trial solely on plaintiff's two claims. R. 6056. A bench trial occurred over 19 staggered days between May 29, 2018 and May 29, 2019. R. 29, 3228. Ultimately, on September 13, 2019, the court "ordered and declared that, as of the date of his resignation from Brown Chiari LLP on January 8, 2016, Plaintiff, Samuel J. Capizzi, was an equity partner in the Brown Chiari LLP law firm." R. 18.

As noted, on October 15, 2019, the court granted plaintiff's post-trial motion for summary judgment seeking a declaration that BCLLP was dissolved, effective January 8, 2016, upon plaintiff's resignation. R. 24-26.

STATEMENT OF FACTS

A. Background

James E. Brown opened his law firm in 1973. In 1989, Brown hired Capizzi directly out of law school. R. 913. Brown trained Capizzi in the practice of law, and mentored him for 28 years. R. 913-14. Capizzi was paid a salary and discretionary bonus. Within 2 to 3 years, in the early 1990's, Capizzi began receiving a K-1 tax form. R. 1627. In approximately 1996, Brown hired Frank Frascogna also paying him a monthly salary, discretionary bonus, and issuing him a K-1. R. 1629-31.

In 1997, Donald P. Chiari ("Chiari") joined the firm and brought approximately 30 personal injury files with him. R. 2725, 2730. When Chiari joined, it was determined that Brown would decide the percentage of net distributable income (NDI) to distribute annually to each of the four lawyers. R. 1646-47.

Chiari had significant success shortly after joining the firm both in terms of results achieved and in generating new business. Consequently, Brown proposed that he and Chiari become equal owners in the firm and share equally in the firm's future, including management responsibilities. R. 2739-41. Thereafter, Chiari became more involved with the overall firm management. R. 2741-42. He and Brown, together, set salaries and discretionary bonuses paid to the attorneys, including Capizzi. R. 2749.

B. Capizzi's Sworn Statements Regarding His Status in 2005 and Beyond — Consistent and Repeated Affirmations He was an Income Partner Who Did Not Own an Interest in the Firm

In 2004, the firm conducted business under the name Brown Chiari Capizzi & Frascogna, LLP. Later, a d/b/a certificate was filed and the firm began doing business simply as "Brown Chiari." R. 5401. In 2004, Frank Frascogna resigned from the law firm and commenced litigation related to his interest ("*Frascogna*"). R. 3395-96. While defending the *Frascogna* matter, Capizzi, Brown, and Chiari testified to the intent and agreement among the three of them

regarding Capizzi's role at the firm. Capizzi testified that Brown and Chiari were the only equity partners, and he shared in the NDI of the firm in an amount determined by Brown and Chiari. R. 5431, 5434, 5485. Brown and Chiari also testified that this was the agreement amongst them. R. 5509, 5601, 5624-25. Capizzi also testified that he, Brown, and Chiari continued to practice under "the same method, model and mode" after Frascogna's departure. R. 999.

In *Frascogna*, the trial court (Hon. Eugene M. Fahey, J.S.C.) analyzed the question of Frascogna's status as an equity partner from the time Frascogna joined the firm in 1997 through the date of his departure on April 21, 2004. R. 3395. Frascogna testified that it was his intent and agreement with the others that he was an equity partner. R. 3396-3405, 3431. Significantly, however, in contrast, when questioned under oath in *Frascogna*, Capizzi volunteered information about his status both before and subsequent to Frascogna's departure. Capizzi's description and statements in this regard are directly relevant to this lawsuit. R. 5434, 5476-77.

Capizzi testified clearly and unequivocally that he had no ownership interest in the firm (R. 5442), and that he shared only in the firm's income: "I'm a partner in the income of the firm. And no matter how many times you want to say it, that's what it is. That's how it works and that's how it works today. So I'm a

partner in the income of the firm, and that's what's being represented." R. 5434. Capizzi made plain the extent of his interest in the firm: "If I decided to leave, I couldn't take firm files with me. I could take my files. That's been clear to me since I joined Jim in 1989." R. 5486; 5481. Capizzi's description of this agreement was confirmed under oath by Brown (R. 5659) and Chiari (R. 5553).

On December 22, 2006, the *Frascogna* Decision was issued deciding a "single question":

> Was Plaintiff Frascogna a general partner in Brown, Chiari, Capizzi and Frascogna, LLP? The Court was not called on to consider any questions relating to the partnership's dissolution, the partnership's value and division of partnership assets which await further proceedings. The Court answers the question in the affirmative. Plaintiff Frascogna was a general partner in the law firm from the partnership's formation in December 1997 and therefore is entitled to an accounting. R. 3396.

Following the decision, Frascogna moved to compel an undertaking and to compel discovery concerning the assets of the partnership. R. 3594. Capizzi retained separate counsel because his interests were different than Brown and Chiari (*i.e.* not an owner) and it would be unfair to him to be compelled to post an undertaking, or be otherwise responsible for any recovery Frascogna might obtain. R. 2814.

In May of 2007, Capizzi, through his separate counsel, made submissions opposing Frascogna's motions. Capizzi emphasized that the *Frascogna* Decision was limited to determining *only* Frascogna's interest stating "Justice Fahey was at pains to make clear, he decided one, and only one, question 'Was Plaintiff Frascogna a general partner in the law firm of Brown, Chiari, Capizzi and Frascogna LLP?" R. 3645. Capizzi's submission further states "It has consistently been the position of the defendants that in the circumstances of this case, and based upon the understandings that were had among the parties to this dispute at the time the firm was established, the plaintiff has no interest in any file that remained at the firm subsequent to his departure…since it has not yet been established that Frascogna has any interest in income generated by the firm subsequent to his date of withdrawal, it is respectfully suggested that a ruling [concerning discovery] on these items should be held in abeyance pending resolution of that issue." R. 3588.[1]

Frascogna was settled prior to any judgment being entered and prior to an appeal being perfected and determined. R. 4028-29.

[1] During the trial of this matter, Justice Walker refused to admit into evidence either the Consent to Change Attorney Form, or any of Capizzi's submissions to Justice Curran (Judge Fahey's successor) in *Frascogna* and only permitted them to be marked as Court Exhibits. R. 2658-65. The court also ruled that defendants' counsel was not permitted to cross-examine Capizzi regarding any of these documents or statements. R. 2662-2665.

C. Brown Chiari LLP Following *Frascogna*

Capizzi's Amended Complaint ("Complaint") alleges that his ownership interest in BCLLP began on May 24, 2007 (R. 3439), which is the same date that the firm filed two documents with the New York State Division of Corporations. Specifically, the firm filed a "Certificate of Withdrawal" for the entity "Brown Chiari, LLP." R. 5410. The firm also filed on that date a "Certificate of Registration" for the entity "Brown Chiari LLP." R. 5408. During trial, Brown explained the purpose of these filings. First, the Brown Chiari, LLP (comma included) registration was associated with Frascogna's involvement with the firm and since he had departed, and the litigation concluded, it was desired to clarify that Frascogna was not associated with the firm. R. 2015-2016. Second, the firm was involved in advertising that did not utilize the comma in the name, so it made sense to simply remove the comma from the name to be consistent with ongoing advertising. *Id*.

Concurrent with the filings, there was no new agreement, or change to the previous agreement, which would change Capizzi's status from an income partner to an equity partner. BCLLP simply continued to operate as it had before. Significantly, Capizzi admitted that he was not involved in in the filings and, indeed, never saw the May 24, 2007 certificate prior to the instant litigation. R. 5453. Capizzi said he recalls no discussion concerning the May 24, 2007

certificate. R. 5452. Conclusive of the fact that the May 24, 2007 filing was unassociated with any agreement for Capizzi to be given an ownership interest in BCLLP is that approximately 10 days later, on June 4, 2007, the New York State Department of Corporation followed up the filing with a "LLC/LLP Request For Information" inquiring who owned the newly registered partnership. R. 5412-14. On June 15, 2007, Chiari completed the form identifying himself and Brown as the only owners of the firm. R. 5412.

Capizzi's testimony, and other evidence in this action, show that his responsibilities and role at BCLLP were not indicative of ownership — but that of an income partner, consistent with the parties' intention and agreement. Capizzi, just like the other non-owner attorneys at the firm, received a list of cases that were assigned to him by owners Brown or Chiari. R. 2247-48; 2891-92. Capizzi had no authority to settle higher value cases without the approval of either Brown or Chiari. R. 2969. Capizzi admitted he was never involved in the year-end meetings held where Brown and Chiari determined attorney and staff bonuses and set salaries for the attorneys and staff the upcoming year. R. 1029-31. Capizzi admitted to never reviewing the firm's books or tax records. *Id.*

By 2014, the dynamics of BCLLP were changing, and that led to discussions concerning changes to the method of dividing the firm's NDI. R.

2091-98. For several years leading up to 2014, the method of dividing NDI utilized as a guideline the percentage received the prior year. R. 4151. In other words, Brown and Chiari's distribution of NDI was guided by the prior year's allocations. In June 2014, there was an agreement to change the method of distributing NDI. The new method and agreement was documented in a memorandum from Chiari dated June 30, 2014. R. 4150-51. It was decided that all three individuals' contributions to the firm would be discussed amongst each other and the profit distributed accordingly. If any undistributed NDI remained thereafter, it would be divided 40/40/20. *Id.* The new compensation structure was agreed to by all. R. 1088. Capizzi acknowledged that his only response to that memorandum, either in writing or verbally was a one sentence communication he wrote nine days later expressing a request to appear in more of the firm's television commercials. R. 1088-89; 4152.

Consistent with the June 2014 compensation memo, at the end of that year, distributions of NDI were made based on each attorney's contribution to the firm. R. 1114-15; 1119. Capizzi admitted that he did not claim at the end of 2014 to be an owner of the firm, or that he must be paid 20% of NDI pursuant to any partnership agreement. R. 1119. Capizzi further admitted that, notwithstanding that he was upset by the substantial decrease in his compensation, he never

communicated to Brown or Chiari any dissatisfaction with the process by which he was evaluated and compensated. R. 1109-10; 1131.

Significantly in January 2015, more than seven years after the date he alleges he became an equity partner, Capizzi described his interest in BCLLP in an email to his accountant inquiring about how to best complete an application for college financial aid. R. 4183. Capizzi inquired "Can I answer 0 [zero] for the law partnership because there is no market for it? I can't sell, mortgage or exchange my interest in the law partnership. *Really, it's just an agreement to share the profits after we pay expenses,* and as we know from the past few years, income is all over the place." *Id*. (emphasis added).

Capizzi's testimony, actions, and statements all evidence his acknowledgment and clear understanding that he was not an equity partner, nor had an ownership interest in BCLLP.

D. Capizzi's Resignation and Positional Pivot

Capizzi has admitted to having undisclosed discussions with William Collins in October 2015 about joining the Collins & Collins firm. R. 828. Capizzi also testified that he was "ninety-nine percent sure" he was leaving the firm to join Collins when he left for a vacation to Italy on December 19, 2015 and that the

"main reason" he did not resign prior to the end of the year is that he wanted to make sure that he got his year-end bonus. R. 1135-36.

On January 8, 2016, Capizzi left a letter stating he was "withdrawing from Brown Chiari LLP" and seeking a full accounting of the partnership. R. 3484. This informed Brown and Chiari for the first time that Capizzi claimed he was an owner of BCLLP and directing communications to his attorney. R. 2034, 2803, 3484. The letter does not reference an alleged agreement in May 2007, nor otherwise identify when Capizzi became an equity partner. R. 3484.

E. The Trial and Decision Below

Capizzi's Amended Complaint in this action carefully defines the "Partnership" at issue as having been created in May 2007 "as evidenced by a certain Certificate of Registration filed with the New York Secretary of State on or about May 24, 2007". R. 3439, ¶ 2. Having defined the "Partnership" in that manner, the complaint further alleges that "Plaintiff, Brown and Chiari each intended to establish and operate the 'Partnership' with a partnership and relation and interest among them as the three lone equity partners." R. 3439, ¶ 7. The Complaint further alleges that "Pursuant to an agreement between the three partners, Plaintiff had a 20% interest in the profits and losses of the Partnership, and Brown and Chiari each had a 40% interest in the profits and losses of the Partnership." R. 3439, ¶ 10.

During his deposition in this case, Capizzi advanced an unpleaded theory and pivoted yet again. He testified that he first began to consider himself an owner of the firm when he read the *Frascogna* Decision in December 2006. R. 5942-43. Capizzi made this assertion despite his clear and unequivocal post-trial submissions in May of 2007 that he was not an equity partner. R. 3645, 3648. Moreover, despite this alleged realization, Capizzi never informed Brown or Chiari of this new belief until he abruptly resigned to join a competitor, and demanded to be compensated for his alleged equity interest in BCLLP. R. 5950; 4793.

Brown and Chiari testified below that they never discussed and Capizzi never once told them after *Frascogna* that he viewed himself an equity partner or owner of the firm — until his resignation on January 8, 2016. R. 2034, 2803.

The Decision below adopts an unpleaded theory and pieces of Capizzi's conflicting stories and, as a result, is internally inconsistent and legally and factually unsupportable. Following Capizzi's theory that he became an owner in the firm created on May 24, 2007, Justice Walker ruled that all of this Frascogna testimony was "irrelevant" because it pertained to a "different law firm". R. 15. Yet, Justice Walker held that Justice Fahey's December 2006 decision finding that Frascogna (*not Capizzi*) was an equity partner of Brown Chiari Capizzi &

Frascogna, LLP (R. 3395-3437) was "controlling" and collateral estoppel as to Capizzi's status in the firm. *Id.* Judge Walker's Decision is devoid of any discussion or analysis of the intent of Brown, Chiari and Capizzi, as to their agreement regarding Capizzi's status as an income partner as expressed during *Frascogna* or, thereafter, including in Capizzi's post-trial submissions.

As discussed below, it is the intent of the individuals involved in a venture that defines a partnership, or other kind of business relationship. Instead, the Decision undertakes an unnecessary and inappropriate analysis of various other factors — referred to as "indicia" — to determine if Capizzi was an equity partner in BCLLP. However, Capizzi's testimony in *Frascogna* made clear that all of the cited indicia (also present during *Frascogna*) reflected nothing more than administrative activities and paperwork he had agreed to sign or handle within the office or for the convenience of Brown, and that those functions were carried out without any interest or expectation that they would make Capizzi an equity partner. R. 5452-60; 5466-68; *see also* R. 967-69.

The intent of Capizzi, Brown and Chiari controls the nature and extent of their business relationships. Capizzi repeatedly express his intent and understanding that he was not an equity partner both during *Frascogna* and after Frascogna's departure. Capizzi's sworn testimony, court submissions, and others

writings, described his true relationship with the firm as it existed in 2005 and 2006. That relationship never changed as Capizzi confirmed to his accountant in 2015, and further in his deposition in this case. Capizzi is bound by his prior testimony, and Brown and Chiari rightfully relied on that testimony — particularly because Capizzi is an attorney and officer of the court. In order to succeed in this action, Capizzi has the burden to prove that there was a change to his relationship with Brown and Chiari; that Brown and Chiari intended and agreed to make him an equity partner in BCLLP. Capizzi failed to meet his burden. Accordingly, this Court should declare that he was not an equity partner in Brown Chiari LLP and reverse the trial court's Decisions and Orders.

STANDARD OF REVIEW ON APPEAL

"It is well settled that, on appeal from a judgment following a bench trial, this Court may independently consider the probative weight of the evidence and the inferences that may be drawn therefrom, and grant the judgment that [it] deem[s] the facts warrant." *Dryden Mut. Ins. Co. v. Goessl*, 117 A.D.3d 1512, 1513 (4th Dep't 2014), *aff'd*, 27 N.Y.3d 1050 (2016). The standard of review on this appeal is thus de novo, and this Court's "scope of review is as broad as that of the trial court." *Capizola v. Vantage Int'l, Ltd.*, 2 A.D.3d 843, 844 (2d Dep't 2003). In conducting its de-novo review, this Court may defer to the trial court's

findings "to the extent based on an assessment of credibility..." *Weiser LLP v. Coopersmith*, 74 A.D.3d 465, 467 (1st Dep't 2010).

Here, the Decisions and Orders do not turn on or, indeed, even reference credibility determinations. As such, de-novo review applies to the entirety of this appeal. *Id.*

POINT I. BROWN AND CHIARI REASONABLY RELIED ON CAPIZZI'S SWORN TESTIMONY MANIFESTING HIS INTENT AND CONFIRMING HIS STATUS AS A NON-EQUITY PARTNER

A central theme of Capizzi's case, and a criticism expressed by the court below, is that following *Frascogna,* Brown and Chiari should have "proposed a formal, written partnership agreement to clarify and…to better define Capizzi's role […and] legal status." R. 8. This argument and criticism is backwards and ignores clear case law providing that Brown and Chiari, could have and should have, reasonably relied upon Capizzi's multiple sworn statements acknowledging his agreement and affirming his status as a non-equity partner. Capizzi himself recognized this reality when drafting his complaint alleging that he first became an owner of BCLLP on May 24, 2007, rather than claiming he had been an equity partner during periods prior to his testimony in *Frascogna*. R. 3439, ¶ 2. It is Capizzi's sworn statements manifesting his intent and agreement to

practice law as a non-equity partner, and Brown and Chiari's expressions of identical intent and agreement that define the parties' business relationship.

A party claiming that he is an owner or member of a partnership bears the burden of proving such a relationship. *See, e.g., F & K Supply, Inc. v. Willowbrook Dev. Co.*, 304 A.D.2d 918, 920 (3d Dep't 2003). In nearly every reported case in New York concerning law-firm partnership disputes, courts assess a variety of factors, including the parties' intent, management control, capital contributions, and sharing in profits and losses. *See, e.g., Mazur v. Greenberg*, 110 A.D.2d 605 (1st Dep't 1985), *aff'd*, 66 N.Y.2d 927 (1985); *Moses v. Savedoff*, 96 A.D.3d 466 (1st Dep't 2012); *D'Esposito v. Gusrae, Kaplan & Bruno PLLC*, 44 A.D.3d 512 (1st Dep't 2007). However, this case is unique among partnership disputes because prior sworn testimony of the parties' intent and agreement exists.

Where intent has been clearly expressed, there is no need to assess or examine other factors — commonly referred to as "indicia" — to determine the nature of the parties' relationship. Here, there is clear and unequivocal testimony, not only from Brown and Chiari, but from Capizzi himself manifesting his intent to be a non-equity partner of BCLLP. This critical fact is dispositive of plaintiff's entire case. "The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all agreements." *Madawick Contracting*

Co., v. Travelers Ins. Co., 307 N.Y. 111, 119 (1954). This concept is likewise controlling in the partnership context: "Whenever in an action between two persons alleged to be partners, a partnership is sought to be proven, *the decision of the question depends entirely upon the intention of the parties* as legally ascertained . . . there is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner of the others." *Heye v. Tilford*, 2 A.D. 346, 349-50 (1st Dep't 1896), *aff'd*, 154 N.Y. 757 (1897) (emphasis added). Indeed, this Court has recently emphasized that evidence demonstrating the intention of the parties is controlling. *Hammond v. Smith*, 151 A.D.3d 1896, 1900 (4th Dep't 2017) ("In light of the documentary evidence detailed above that the parties never shared the intent to become partners, those two references to a partnership in documents prepared by lay persons do not raise an issue of fact whether the parties in fact entered into a legal partnership.").

The Appellate Division decision in *Heye v. Tilford*, is remarkably similar to this case and is dispositive of Capizzi's claim. 2 A.D. at 349-359, *aff'd* 154 N.Y. 757. *Heye* also examined the effect of prior sworn testimony of intent on a partnership dispute. Specifically, *Heye* involved a partnership dispute between three men: Alexander Lawrence, John Giles, and Francis Marbury. At the time of suit, Lawrence had died, but his heirs claimed that he was "a partner in several

firms which had conducted the business under the name of Lawrence, Giles & Co." *Id.* at 348. Like here, the business had "various names" over the years and a formal written agreement did not exist. Most importantly, just like Capizzi in this case, Lawrence gave sworn testimony years before suit affirming that he "never had any interest" in the partnership. *Id.* at 352.

Notwithstanding his prior testimony, Lawrence's heirs commenced suit relying principally on various partnership indicia. They argued that Lawrence was a partner because he contributed to the capital of the firm, had his own account on the books of the firm, was charged with interest on the balance of his account, and shared annually in the profits of the partnership. *Id.* at 351. The Appellate Division, and subsequently the Court of Appeals, however, rejected plaintiff's theory because Lawrence's intent had been expressed through his prior sworn testimony, and his expressed intent was dispositive:

> Whenever in an action between two persons alleged to be partners, a partnership is sought to be proved, the decision of the question depends entirely upon the intention of the parties as legally ascertained. That does not mean a mere arbitrary intention . . . [U]nless in some manner it is found to be the intention of the parties that they should become partners, then the partnership cannot be said to exist . . . [Indeed,] if by the terms of the contract or by other competent evidence it is made to appear that the parties had no intention of becoming partners between themselves they will be held not to have assumed that relation. *Id.* at 349-50.

In *Heye*, the court determined Lawrence's intent based on prior sworn testimony. Specifically, the court said, "it cannot be disputed that [Lawrence] never regarded himself as a partner, and whenever he was asked about it, so far as appears, denied that the relation existed." *Id*. at 353. In other words, if Lawrence never intended to be an owner, he was not an owner, regardless of whether the other factors or indicia suggested a contrary conclusion. Under the court's decision, Lawrence's testimony was "other competent evidence" equivalent in force to the terms of a contract itself.

A. The Parties to This Case Affirmed and Confirmed Their Intentions and Agreement during the *Frascogna* Litigation

Capizzi described his intentions regarding his relationship and agreement with Brown and Chiari during his testimony in *Frascogna*. While *Frascogna* concerned the timeframe of Frascogna's tenure at the firm (1997 through April 21, 2004), Brown, Chiari and Capizzi continued to practice together uninterrupted after Frascogna resigned. Their deposition and trial testimony was given in 2005 and 2006, and post-trial submissions made in 2007. Their testimony describes not only their agreement during the Frascogna era, but also their *ongoing* mutual agreement and intentions.

During his *Frascogna* deposition, Capizzi clearly described his status at the firm: "I'm a partner in the income of the firm. And no matter how many

times you want to say it, that's what it is. That's how it works and that's how it works today." R. 5434.

Capizzi's expressed his intention and understanding of his status throughout his testimony *Frascogna*, repeatedly affirming he had no equity interest in the firm:

> Q. And when you indicate [in your May 10, 2005 affidavit] that Frascogna was not a partner in the law firm, what do you mean by that?
>
> A. That neither Frank nor I were equity partners or a partner in the assets of that firm.
>
> Q. When you say an equity partner, what do you mean by that?
>
> A. Neither [Frank] nor I owned any part of that firm. We had the right to share in the income of that firm. R. 5433
>
> . . .
>
> Q. Do you know who has ownership of the assets of the firm?
>
> A. That would be Jim and Don. R. 5435.
>
> . . .
>
> Q. And did you have an ownership interest in the firm?
>
> A. No. R. 5442.

As an income partner, Capizzi explained he did not have a guaranteed share in the net distributable income of the firm. Capizzi testified that his compensation was not fixed, but was variable and subject to the discretion of the

two equity partners: Brown and Chiari. R. 5494-95. "We never had a guaranteed share of the 'profits' of the firm or operated pursuant to a written partnership agreement. I understood this was the system . . ." R. 5431.

Capizzi described how, in the early years, his bonus was determined by Brown and then, later, jointly by Brown and Chiari. Capizzi described his compensation during *Frascogna,* as follows: "[I was compensated by the Brown & Mohun firm.] Really the same way I'm compensated today, out of the net income of the firm, usually at the end of the year, there were maybe distributions when the year went out, but mostly at the end of the year" and at the end of the year he would be paid a bonus in an amount determined by Brown. R. 5476-7. Capizzi further testified that the lawyers operated in this fashion for years "[w]orking and sharing income of the firm, net income I guess we would call it." R. 5476-7.

As an income partner Capizzi understood he did not have any equity interest in the firm's assets. During the *Frascogna* trial, Capizzi testified: "If I decided to leave, I couldn't take firm files with me. I could take my files. That's been clear to me since I joined Jim in 1989." R. 5486. Brown's testimony confirmed that the agreement was if someone wanted to leave "you take your files and, you know, I really wish you well and so forth." R. 5649. Capizzi succinctly explained the parties' agreement:

Q. Okay. Would you tell the Court what the deal was between the four individuals?

A. Well, it really is no different from the deal I had with Jim when I joined him. And that is, he had a large number of files. I would work on the files and *we would share in the income that those files generated*. Jim made the decisions about how to run the firm and where the firm was going. And that—that's the deal. If you didn't want the deal, if you wanted to move on, you could certainly move on and take the files with you, but that's not something I ever considered and have not considered. R. 5480.

Chiari confirmed the agreement described by Capizzi and affirmed by Brown: "The deal was to share income, net income at the end of the year based on a variable loosely guideline of a percentage." R. 5531.

Significantly, the trial court in this action explicitly found that the parties continued to operate within the same agreement after the *Frascogna* litigation concluded. The Decision states that "Following the settlement of the *Frascogna* Action, Brown, Chiari, and Capizzi largely continued to operate as they had while members of the dissolved firm." R. 8. Indeed, even at trial in this case Capizzi acknowledged his prior testimony that the three — Brown, Chiari and Capizzi — continued to practice together under "the same method, model, and mode" subsequent to Frascogna's departure. R. 999. The testimony of Capizzi and Brown and Chiari in *Frascogna* manifests the clear intent of the parties to this dispute that Capizzi was not an equity partner — either during the *Frascogna* period or thereafter. Rather, there was a continuation of the parties' agreement for

Capizzi to share in the NDI of the firm, at a level determined by Brown and Chiari, and with Brown and Chiari continuing as the firm's owners.

B. Where the Intent of the Parties is Express, There is No Occasion for Reliance on So-Called Indicia

"[U]nless in some manner it is found to be the intention of the parties that they should become partners, then the partnership cannot be said to exist." *Heye*, 2 A.D. at 350. *Heye's* focus on intent has long guided the outcome of partnership disputes in New York, such as the dispute in *Hutchinson v. Birdsong*, 211 A.D. 316, 319 (1st Dep't 1925); *see also Fullam v. Peterson*, 21 N.Y.S.2d 797, 799 (Sup. Ct., N.Y. Cnty. 1940) ("Intention has been held to be a leading test of partnership"); *Madawick*, 307 N.Y. at 119 ("The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all agreements"). In a 2018 Court of Appeals case, Judge Fahey underscored the importance of intent when analyzing partnership disputes: "[W]here an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law...No particular magic words need be recited, provided that the intent is clear." *Congel v. Malfitano*, 31 N.Y.3d 272, 287 (2018).

Conversely, "'[p]ersons cannot be made to assume the relation of partners as between themselves when their purpose is that no partnership shall

exist."" *Heye*, 2 A.D. at 350 (quoting *London Ass. Co. v. Drennen*, 116 U. S. 461, 472 (1886)). Irrespective of various indicia, individuals engaged in a common venture are free to "enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others." *Id.* at 350. As the *Heye* court observed, it must "look at the contract as explained by their own transactions and statements, and ascertain whether it was their intention to become partners, if the intention cannot be conclusively drawn from the terms of the contract which they have made." *Id.* at 350-51.

Here, as in *Heye*, there is no direct or better evidence than Capizzi's own testimony that he is not and never considered himself to be an owner of defendants' law firm. Capizzi's testimony acknowledging this relationship extended beyond Frascogna's departure (*e.g.*, "that's how it works today" (R. 5434)) is the purest demonstration that his relationship with Brown and Chiari remained the same continued subsequent to Frascogna's departure. Just like in *Heye*, Capizzi's prior sworn statements regarding intent control, and it is unnecessary to proceed further to examine indicia. Brown, Chiari, and Capizzi's sworn testimony is conclusive confirmation and record of the parties' agreement as their business relationship. Capizzi is foreclosed from a contrary assertion in this case.

Under these circumstances, Brown and Chiari's conduct in not insisting on a written agreement following the *Frascogna* Decision is entirely understandable. There was no justification to confirm this agreed relationship; Brown, Chiari, and Capizzi were in unison about how their relationship operated and the nature of Capizzi's role and compensation at BCLLP. The evidence established that none of the parties, including Capizzi himself, ever intended for Capizzi to be an owner of the firm. The trial court's criticism and determination to the contrary was in error. The court should not have imposed a relation of equity partnership onto Brown, Chiari, and Capizzi when, as between them, that was not their intention. *Heye*, 2 A.D. at 350 (quoting *London Ass. Co.*, 116 U. S. at 472).

POINT II. UNDER NEW YORK PARTNERSHIP LAW THE INTENT AND AGREEMENT OF THE PARTIES DETERMINES THE RELATIONSHIP

The trial court correctly ruled that "[p]artners enjoy the freedom to agree on the rules governing their relationship. For this reason, 'the Partnership Law's provisions are, for the most part, default requirements that come into play in the absence of an agreement' [*Congel,* 31 N.Y.3d at 287]." R. 16. However, it erred in holding that this only refers to a "written agreement." R. 16. It well-settled that the terms of a partnership agreement can be the product of an oral agreement. *Moses*, 96 A.D.3d at 469; *Prince v. O'Brien*, 234 A.D.2d 12 (2d Dep't 1996); *Lynn v. Corcoran*, 219 A.D.2d 698 (2d Dep't 1995).

The trial court, citing to the holding in *Bianchi v. Midtown Reporting Serv., Inc.*, 103 A.D.3d 12611 (4th Dep't 2013), articulated that principle that "in the absence of a written partnership agreement between the parties, the court must determine whether a partnership existed 'from the conduct, *intention*, and relationship between the parties."' R. 17 (emphasis added). However, despite recognizing parties' intent as one of the factors to be examined, the trial court failed to undertake any examination of the parties' intent in this matter. First, the trial court disregarded Capizzi, Brown, and Chiari's sworn expressions of their intentions during *Frascogna* dismissing them as pertaining to a different law firm, while simultaneously finding that the parties "largely continued to operate as they had while members of the dissolved firm." R. 9. The trial court's approach ignores the practical and legal reality that the departure of a single attorney, even a partner in a firm, does not eradicate and void the agreement between those remaining. Second, the trial court does not make any examination of the parties' intent after *Frascogna*.

The sworn testimony of Capizzi confirms a binding agreement amongst the three, including specifically, that Brown and Chiari were the only equity partners and that Capizzi's was, in fact, an income partner. As the court held in *Heye*, individuals can have an agreement to share in the profits of an enterprise, without becoming equity partners. 2 A.D. at 350. "It is the parties own

transactions and statements that are used to determine whether it was their intention to become partners, in the absence of a written agreement drawn from the terms of the contract which they have made." *Id.* at 350-51.

Capizzi repeatedly affirmed in 2005, 2006, and 2007 that he was an income partner only, with no guaranteed percentage of net income, and that Brown and Chiari determined his compensation and owned all the assets of the firm. R. 5431, 5434, 5485. Moreover, Capizzi specifically testified in December 2005 that his agreement with Brown and Chiari concerning his partnership interest was the same as it had been prior to Frascogna's resignation a year earlier: "I'm a partner in the income of the firm. And no matter how many times you want to say it, that's what it is. That's how it works and that's how it works today. So I'm a partner in the income of the firm, and that's what's being represented." R. 5434.

The three parties to this case — Brown, Chiari and Capizzi — clearly had an agreement governing their relationship. "Where, as here, there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact." *Hammond*, 151 A.D.3d at 1897. An assessment of the parties "conduct, intent and relationship," and particularly, their expressed statements of intent, establishes that Capizzi was not an equity partner of BCLLP.

A. Capizzi Was an Income Partner Consistent with the Expressed Intent of Capizzi, Brown, and Chiari

Under New York's Partnership Law, courts have recognized the distinctions between equity partners and hybrids such as "income" partners in two-tiered law firms. *Mazur*, 110 A.D.2d at 605-606 (holding that lawyer was not an equity partner in law firm despite sharing in profits at fixed rate and holding title of "partner"). The customary indicia of equity partners include profit and loss sharing, control over the partnership affairs, contribution to capital and possession of an ownership interest. *Lynn v. Corcoran*, No. 11425/92 1994 WL 123519 (Sup. Ct. Nassau Cnty. 1994) (citing *MIF Securities Co. v. R.C. Stamm & Co.*, 94 A.D.2d 211, 213 (1st Dep't 1983)).

The absence of any of the foregoing factors, especially loss sharing, militates in favor of a finding that an individual is an income partner rather than an equity partner within the meaning of the partnership law. *Zito v. Fischbein Badillo Wagner & Harding*, 11 Misc. 3d 713, 716 (Sup. Ct. N.Y. Cnty. 2006). Some courts have described income partners as individuals who share in a fixed amount of the partnership's profits in lieu of a salary, but who have no other ownership interest in, or control over, the partnership. *Dwyer v. Nicholson*, 193 A.D.2d 70, 75 (2d Dep't 1993). Here, it is plain from both the parties' expressed intent and agreement that Capizzi was an income partner.

Moreover, when Capizzi testified in *Frascogna* that "I'm a partner in the income of the firm" (R. 5434) and that he did not "have an ownership interest in the firm" (R. 5442), he fully understood what that meant in terms of his status as income partner. Capizzi is an attorney that has practiced for over 20 years, his testimony wasn't simply the confused statements of a lay person unfamiliar with the concepts he was discussing, or the consequences of his statements. *See Diocese of Buffalo v. McCarthy*, 91 A.D.2d 1210, 1219 (4th Dep't 1983) (where defendant was an attorney he was "held to a standard of ordinary prudence that incorporate[d] his training and experience as a lawyer"); *see also November v. Time Inc.*, 13 N.Y.2d 175, 178-179 (1963) (differentiating between expectation for words and sentences uttered by lay people and the "close precision" expected of judges and attorneys). Capizzi was not an owner of BCLLP and said so himself.

POINT III. CAPIZZI IS JUDICIALLY ESTOPPED FROM CONTRADICTING HIS PRIOR SWORN STATEMENTS TO ADVANCE HIS NEW LITIGATION POSITION

Capizzi's sworn testimony confirms the binding agreement amongst the three that Brown and Chiari were the only equity partners and that Capizzi's status with the firm was that of an income partner. The trial court recognized that Capizzi's prior sworn testimony was inconsistent with the theory he was an equity partner through and including the *Frascogna* era to the present, yet concluded

Capizzi was an equity partner as of the *Frascogna* Decision. R. 8. "Capizzi testified [in *Frascogna*] that he was not a full equity partner; that he was merely an income partner, which is *inconsistent with the position he takes in the instant matter* before this Court." R. 6 (emphasis added).

Capizzi is prohibited from taking a contrary position under the doctrine of judicial estoppel. Judicial estoppel "precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding." *Secured Equities Invs. Inc. v. McFarland*, 300 A.D.2d 1137, 1138 (4th Dep't 2002). "[T]he doctrine is invoked to stop parties from adopting such contrary positions because the judicial system cannot tolerate this 'playing fast and loose with the truth.'" *Kimco of New York v. Devon*, 163 A.D.2d 573, 575 (2d Dep't 1990).

Beyond the doctrine of judicial estoppel, it is well-rooted in New York law that an individual cannot change his prior sworn testimony, that litigants should be able to rely on sworn testimony, and that courts will hold people to their oath. *See Stickney v. Alleca*, 52 A.D.3d 1214, 1215 (4th Dep't 2008); *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (1952); *Betancourt v. City of New York*, 269 A.D.2d 177 (1st Dep't 2000); *Bar Ass'n of Erie Cnty. v. Gelman*, 285 N.Y.S.2d 691 (4th Dep't 1967); *Prunty v. Keltie's Bum Steer*, 163 A.D.2d 595 (2d Dep't

1990). In *Glatzer v. Webster*, the court invoked judicial estoppel to preclude a defendant who had expressly renounced and denied any partnership interests in certain properties during her divorce proceeding from changing her position to later claim a partnership interest to suit her new litigation posture. 934 N.Y.S.2d 33 (Sup. Ct. Kings Cnty. 2011). "The application of judicial estoppel here is essential to avoid a fraud upon the court and mockery of the truth seeking function." *Id.* at *9.

This court's decision in *Gelman* is particularly instructive here because it involved an attorney who attempted to disavow his prior sworn testimony using a court decision as justification for the change. In *Gelman*, the Erie County Bar Association conducted an investigation into an attorney's conduct. 285 N.Y.S.2d at 692. The attorney complied with the investigation by giving testimony and documents. Ultimately, this Court removed the attorney from office and precluded him from practicing law. Gelman then sought to reverse that decision, and disavow his testimony, arguing that he was induced to give it for fear of sanction for not doing so. More specifically, he understood that if he invoked his privilege against self-incrimination, he immediately would be disbarred under a New York case that made its way to the United States Supreme Court: *Cohen v. Hurley*, 366 U.S. 117 (1961). The attorney's understanding turned out to be wrong, however, as the United States Supreme Court eventually overruled the

Cohen decision. Nevertheless, this Court refused to allow Gelman to recant or disavow his prior testimony: "In our opinion the effect of a court decision on the mind of a lawyer is not a form of compulsion which he may later invoke to prevent use of prior testimony or statements which he then seeks to disavow." *Gelman*, 285 N.Y.S.2d at 693.

Capizzi is an officer of the court, called to the bar upon promising to uphold the laws and constitution of the State and the United States. He is held to the highest standard of honesty upon which our judicial system depends. Capizzi's sworn statements in *Frascogna* — expressed repeatedly in an affidavit, in deposition, at trial and affirmed in post-trial motions — that he was an income partner only, precludes him from changing his position to now claim that he was an equity partner, and that it was his intention, and the intention of the others, for him to be an equity partner. The controlling case law, rooted in sound public policy, including principles of substantial justice and basic fairness, prohibits Capizzi from taking a contrary position to suit his current financial interests. The Decision below finding Capizzi to be an equity partner from the *Frascogna* era to the present, effects a violation of these basics principles underlying New York law and is thus in error.

POINT IV. THE TRIAL COURT DECISION IS INTERNALLY INCONSISTENT AND CONTRARY TO CAPIZZI'S PLEADINGS AND THEORY OF THE CASE.

Undoubtedly aware that he could not disavow or contradict his prior testimony, Capizzi's Complaint alleges that his ownership interest in BCLLP began on May 24, 2007. R. 3439. The Complaint does not acknowledge the *Frascogna* litigation, nor court's decision in that case. The Complaint asserts that Capizzi is an equity partner in BCLLP formed as of May 24, 2007. Under Capizzi's pled theory something had to have changed the decades-long business relationship prior to that date. Because he was unable to show that this business relationship chard, Capizzi failed to meet his burden of proving his status at BCLLP had changed to that of an equity interest in BCLLP.

A. Capizzi's First Theory Fails: The Parties' Intentions and Relationship Was Unchanged by the May 2007 New York State Filings

On May 24, 2007, BCLLP filed two documents with the New York State Division of Corporations. Specifically, the firm filed a "Certificate of Withdrawal" for the entity Brown Chiari, LLP (R. 5410) and simultaneously filed a "Certificate of Registration" for the entity Brown Chiari LLP. R. 5408. During trial, Brown explained these filing were intended to accomplish two things. First, the "Brown Chiari, LLP" (comma included) registration was associated with Frascogna's involvement with the firm and since Frascogna had departed, and the

litigation concluded and new filing should be made. R. 2042. Second, the firm's substantial advertising did not utilize the comma in the name, so it made sense to simply remove the comma to be consistent with the firm's advertising. R. 2043. Capizzi admitted that he never saw the May 24, 2007 certificate prior to the instant litigation and recalls no discussion concerning it or any concurrent "new" agreement changing his status to equity party. R. 5952-53.

The fact that the May 24, 2007 filing was not associated with any "new" agreement for Capizzi to own the firm is corroborated and documented by Chiari's contemporaneous writing expressing the intent that he and Brown were the only owners of the firm. Approximately 10 days later, on June 4, 2007, the New York State Department of Corporation followed up the filing with a "LLC/LLP Request For Information" inquiring who owned the newly registered partnership. R. 5412-14. On June 15, 2007, Chiari completed the form identifying himself and Brown as the *only* owners of the firm. R. 5412.

Capizzi, however, initially seized upon the May 24, 2007 Certificate as an opportunity to claim that the filing represented the creation of a "new" law firm that he owned and that the timing of the filing (four months after the *Frascogna* Decision) evidenced Brown and Chiari's intention to confer Capizzi an ownership interest in the "new" firm. R. 3439, ¶ 2. Having defined the

"Partnership" in that manner, the Complaint alleges that "Plaintiff, Brown and Chiari *each intended* to establish and operate the 'Partnership' with a partnership relation and interest among them as the three lone equity partners." R. 3439, ¶ 7 (emphasis added). The Complaint further alleges that "*Pursuant to an agreement between the three partners*, Plaintiff had a 20% interest in the profits and losses of the Partnership, and Brown and Chiari each had a 40% interest in the profits and losses of the Partnership. R. 3440, ¶ 10 (emphasis added). Claiming his ownership interest began with the "new" firm also positioned Capizzi to claim that his testimony in *Frascogna* was irrelevant because it involved the "old" firm. *See, e.g.* R. 67-68. Ironically, May 2007 was the very same month Capizzi made post-trial submissions to Justice Curran in *Frascogna*. R. 3586-3661.

Apparently adopting Capizzi's "new firm" theory, the trial court improperly concluded that the *Frascogna* Decision was controlling and all of Capizzi's sworn testimony in *Frascogna* clearly manifesting his intent was "irrelevant because it pertained to a different law firm." R. 15. Ignoring the prior testimony, the trial court examined what partnership filing was made in Albany and on what date, as if such filings were determinative of the case. R. 63-69. The *Heye* court, however, analyzed and rejected the approach adopted below, specifically noting that the business in that case "continued under various names" over the years. *Heye*, 2 A.D. at 348. Consistently, New York courts have held that

public filings merely are "notice to the public" and "in no way" affect the contract or agreement between or among the parties. *See, e.g.*, *Weinstein v. Welden*, 160 A.D. 554, 556 (1st Dep't 1914). In other words, the public filings are not determinative — instead, it is the agreement of the involved parties — here Brown, Chiari, and Capizzi — that controls. Capizzi affirmed on four separate occasions (in an affirmation on May 10, 2005, deposition on December 7, 2005, trial testimony on July 12, 2006 and in May, 2007 post-trial submissions) regarding the his intent and understanding of the parties' agreement that he was not an owner of BCLLP but, instead, an income partner who enjoyed a share of the firm's profits, at the discretion of Brown and, later, Brown and Chiari.

Even accepting Capizzi's allegation at face value, the issue for trial should have been whether there was an agreement subsequent to *Frascogna*, either on May 24, 2007 or at some other point, which changed Capizzi's status from an income partner — as he testified in *Frascogna* — to that of an equity partner. However, there was no different intent, and no new agreement, nor change to the previous agreement.

When questioned at trial regarding any "new" agreement at the time of the filings, Capizzi abandoned the theory he advanced at deposition that he "never discussed" the issue of ownership with either Brown or Chiari after

Frascogna (R. 5950-1) and instead attempted to conjure vague discussions of a new agreement:

> Q: Mr. Capizzi, is it your contention in this case that when the form that formed Firm 3 [i.e. defined by the trial court to mean Brown Chiari LLP (no comma) version of the firm reflected by the May 24, 2007 filing] was filed in Albany on May 24, 2007, you sat down with Jim Brown and Don Chiari on that day and negotiated the terms of a new agreement?
>
> A: Not that day.
>
> Q: Okay. Do you agree that you had an agreement with them on the distribution of income and your status as a partner after Mr. Frascogna left [in 2004] for the three years and one month that you operated as a firm of three?
>
> A: We did.
>
> Q: And did some, Mr. Capizzi, if not all of the terms of that agreement carry over beyond the filing of the May 24, 2007 Certificate of Registration?
>
> A: No.
>
> Q: Well, if you didn't renegotiate them on May 24, 2007, how did you know what you were going to receive as a draw check in June of 2007?
>
> A: We had talked about it but I don't know when. We talked about doing 40/40/20 as being the deal.
>
> Q: And when did you have that conversation?
>
> A: That's what I can't tell you.
>
> Q: Did you flush out any of the other terms of your agreement with Brown and Chiari on or around May 24 of 2007, such as whether you would own the desks and equipment and computers?

A: My recollection is that we hashed out 40/40/20, that was the deal, that was the firm, that was the share of the income, and that's the portion of the firm that we owned—excuse me, owned.

Q: Owned, or that was the share of the income, Capizzi?

A: Both.

Q: And when did you have that conversation?

A: I cannot tell you. I don't recall. R. 956-57.

In subsequent testimony on cross examination, Capizzi claimed there were "several meetings" where he was told by Brown and Chiari that he was a 20 percent owner of the firm. R. 989-90. That testimony, however, similar to his deposition, was accompanied by statements that possession by the parties of the *Frascogna* Decision meant "we all knew" that Capizzi was an owner. *Id.* When questioned as to whether Brown or Chiari told him he would own the firm he admitted "nobody said it that way" and then modified his prior answer of "several meetings" where it was discussed to "a discussion" that occurred at an unspecified time following the *Frascogna* Decision. R. 990-91. On further cross examination, Capizzi reverted back to having had discussions "many times" with Brown and Chiari where he told them he was an owner of the law firm. R. 1040. Immediately following that statement, he was confronted with his contrary January 2018 deposition testimony where he conceded that ownership was "never discussed" and "neither did they tell me that they thought I was or was not [an owner] either." R.

1040-41. Capizzi offered no explanation to justify this substantial change in testimony.

Upon hearing Capizzi's testimony claiming Brown and Chiari told him he was a 20 percent owner of the firm following *Frascogna*, the trial judge immediately asked Brown and Chiari if that was the agreement. Both testified that it was not. R. 993-96. Specifically, Brown testified, "[an agreement for] sharing the profits, yes. And there was no mention of ownership of anything. That was pure fantasy." R. 995.

The trial court did not accept Capizzi's belated pivot and changed testimony. The Decision makes no reference to any such new agreement or discussion among the three. In sum, Capizzi failed to prove that he, Brown and Chiari had a "new" agreement after *Frascogna*, in May 2007, or any time before his resignation, making him an equity partner. The clear and express agreement that Capizzi was an income partner was simply never altered.

B. Capizzi's Second Theory Fails: The *Frascogna* Decision Did Not Determine Capizzi's Interest and Capizzi Publically Acknowledged that Fact in Court Filings

At deposition in this case, Capizzi advanced a new and different theory supporting his claims of equity partnership: he was an equity partner by virtue of the *Frascogna* Decision *not* through any express agreement with Brown

and Chiari. R. 5941-43. This theory, too, is unsupported — and is, indeed, contradicted by the facts in this case.

The *Frascogna* Decision was issued on December 22, 2006. The court emphasized the limited nature of the decision: "A trial was held [on certain dates] on the single question: Was *plaintiff Frascogna* a general partner in the law firm Brown, Chiari, Capizzi and Frascogna, LLP? . . . The Court answers the question in the affirmative. *Plaintiff Frascogna* was a general partner in the law firm from the partnership's formation in December 1997 and therefore is entitled to an accounting." R. 3396 (emphasis added). Following that decision, Frascogna's counsel made motions for an undertaking or bond and to compel discovery. R. 3594. Consistent with Capizzi's understanding and position that he was not an owner — even after the *Frascogna* Decision, Capizzi decided to retain separate counsel going forward. It was determined that he had different interests than Brown and Chiari (*i.e.* not an equity partner), and it would not be fair for Capizzi to potentially be compelled to post an undertaking. R. 2814. Capizzi's post-trial submissions, filed by his personal counsel in May 2007, reflected Capizzi's understanding of the scope of the *Frascogna* Decision. Capizzi emphasized that the decision was limited to determining *only Frascogna's interest* stating "Justice Fahey was at pains to make clear, he decided one, and only one,

question 'Was Plaintiff Frascogna a general partner in the law firm of Brown, Chiari, Capizzi and Frascogna LLP?" R. 3645.

Some twelve years later, however, Capizzi's interests had changed and during deposition in this case, Capizzi testified that he first began to consider himself an owner when he read the *Frascogna* Decision issued on December 22, 2006. R. 5943. Here, Capizzi's deposition testimony not only contradicts his contemporaneous actions and statements in 2006, but also demonstrates the absurdity of his argument.

Q. And did you testify as to whether you considered yourself an owner of the firm in the Frascogna case?

A. I did.

Q. And what was your testimony in that regard?

A. Based on what I knew at the time and the information I had I was not an owner.

Q. Is it your testimony now that you believe that you were an owner of that firm?

A. I believe Judge Fahey determined that I was. And it was a partnership, and we were equity partners. My legal conclusion was wrong.

Q. You thought you were giving a legal conclusion when you testified in that case?

A. My conclusion, whether you want to say it's legal or not, was mistaken. The judge ruled against us. R. 5941-2.

Q. So when was it in your mind you concluded that you were in fact a partner in the Brown, Chiari, Capizzi, Frascogna firm?

A. *The decision came out in December 2006*. And that would be it.

Q. *And that was the day you concluded that you were a partner in the firm?*

A. *Equity partner, yes*. R. 5942-3 (emphasis added).

. . .

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

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

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

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

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

A. Absolutely. R. 5950-51.

. . .

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

A. No, neither did they ask—neither did they memorialize I wasn't. R. 5950-51.

. . .

Q. Did you ever tell Brown or Chiari that you thought your conclusion given in your testimony in the Frascogna case was mistaken?

A. No, it was pretty evident by Judge Fahey's decision. R. 5960.

. . .

Q. Okay. And did any time after you gave that testimony did you disavow it?

. . .

A. No.

Q. Did you take any steps whatsoever, conversations, memos, emails, in any respect to indicate to Brown and Chiari that you now considered yourself to be an equity partner in the firm?

A. There was no reason to disavow my prior testimony. R. 5966-67.

Capizzi further testified that that Brown and Chiari *should have known* he was an owner not because they had agreed as such, but rather because of the *Frascogna* Decision:

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

A. Yes.

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

A. Our continued carrying on of the business in the manner it was carried on while it was Brown, Chiari, Capizzi & Frascogna. The fact that we had changed absolutely nothing other than now I was more involved in management, and now I was more involved in the firm. So we took no steps to undo what Judge Fahey had decided. R. 5963.

Given Capizzi's undisputed testimony that there was no express agreement subsequent to *Frascogna* changing his status, it should have been obvious to the court below that Capizzi's central allegation that "Plaintiff, Brown and Chiari each *intended* to establish and operate the Partnership with a partnership

relation and interest among them as the three lone equity partners" never occurred and was factually and legally unsupported. R. 3439 (emphasis added). Capizzi made no statements to the *Frascogna* court, or to Brown and Chiari, that the *Frascogna* Decision made Capizzi an equity partner, or otherwise changed his agreement with Brown and Chiari regarding his status in BCLLP. R. 3645; 993-96; 5950-51; 5966-67. As noted, the trial court explicitly observed "Following the settlement of the *Frascogna* Action, Brown, Chiari, and Capizzi largely continued to operate as they had while members of the dissolved firm." R. 8. Under these circumstances, Capizzi failed to meet his burden to establish that he is an owner of Brown Chiari LLP under either theory. Judicial estoppel prohibits Capizzi alleging he was an owner at the time of Frascogna's departure, and there is no supporting evidence for his claim of a "new" agreement was created thereafter as a result of their silence and the three continuing to deal with each other in the same manner as they had for many years. There is simply no proof of new or different intent, nor a new or different agreement. The undisputed facts establish Capizzi continued as an income partner.

C. The Trial Court's Decision Failed to Correctly Analyze Either Theory and Instead, Reached an Inconsistent Hybrid Determination.

Despite the observation and conclusion that the parties continued in the same manner after *Frascogna*, the trial court erroneously ruled that all of

Capizzi's sworn testimony in *Frascogna* manifesting intent to be "irrelevant, because it pertained to a different law firm." R. 15. Inexplicably, however, the court then held that Judge Fahey's decision in *Frascogna*—solely about that "different" firm—"applied equally to Capizzi," and was conclusive. "Fahey Decision [] is controlling" and collateral estoppel prevents defendants from disputing the *Frascogna* Decision's determination in this case. R. 15. The Decision below is internally inconsistent: the testimony in *Frascogna* concerns a different law firm for evidentiary purposes, but the *Frascogna* Decision controls the legal determination of the partnership interests in the "new" firm. That conclusion makes no sense.

Second, it misapplied to New York Partnership law to find that Capizzi was an equity partner in the so-called "new" firm, despite finding that "following the settlement of the *Frascogna* Action, Brown, Chiari, and Capizzi largely continued to operate as they had while members of the dissolved firm" — a firm in which Capizzi acknowledged he was solely an income partner. R. 8. Brown and Chiari both testified that they never, at any point, told Capizzi that they were making him, or even considering making him, an owner or equity partner of the firm. R. 1861, 1879, 2751. At trial, Capizzi claimed that in the aftermath of Judge Fahey's decision, the three men agreed to "go forward with the 20/20/40 (sic) with respect to income." R 992. This only confirmed that there was no

"new" agreement because they already had been making discretionary year-end distributions in those same percentages (20/40/40) for two full years before this purported conversation. R. 5736, 5906-5925. *See* Point IV. A *supra.*

Simply stated, Capizzi failed to meet his burden to establish that he is an owner of Brown Chiari LLP under either theory. Judicial estoppel prohibits Capizzi alleging he was an owner as of Frascogna's departure and there is no evidence supporting his claim of a "new" agreement subsequent to *Frascogna*.

POINT V. THE *FRASCOGNA* DECISION IS NOT COLLATERAL ESTOPPEL BECAUSE NO JUDGMENT WAS ENTERED AND IT DID NOT DETERMINE CAPIZZI'S INTERESTS

Despite Capizzi's Complaint alleging that he was an equity partner of the Brown Chiari LLP May 2007 partnership, the trial court ruled that the *Frascogna* Decision determined Capizzi to be an equity partner, and that collateral estoppel prevents defendants from denying that was Capizzi's status. However, entry of a judgment is necessary to invoke collateral estoppel, and no such judgment was entered in *Frascogna*. The Court of Appeals has explained "it is only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, *or as*

evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue." *Bannon v. Bannon*, 270 N.Y. 484, 489-90 (1936); *see also*, *Peterson v. Forkey*, 50 A.D.2d 774, 775 (1st Dep't 1975) ("Both the doctrines of res judicata and collateral estoppel have as their prerequisites the entry of a judgment"); *Ruben v. Am. & Foreign Ins. Co.*, 185 A.D.2d 63, 65 (4th Dep't 1992) ("No collateral estoppel effect can be given to the jury findings because a decision or verdict upon which no formal judgment has been entered has no conclusive character and is ineffective as a bar to subsequent proceedings.").

Justice Curran's post-trial order in *Frascogna* is also not a judgment. Justice Curran made clear that such was the case by specifically crossing off the words "and judgment" on the order and initialing it. R. 3498. Moreover, even if the *Frascogna* Decision or Justice Curran's order was a judgment, it would not be a "final judgment" because it was subject to appeal and was under appeal when the case was settled. "A judicial decision can constitute a conclusive adjudication of a question of law or fact only when rendered in a proceeding in which the court had jurisdiction to render an irrevocable and final decision upon such question." *Bannon*, 270 N.Y. at 490.

Moreover, it is well-established that res judicata and collateral estoppel principles are not triggered when a case is settled after a verdict but before

judgment is entered: "The settlement of the previous case prior to the entry of judgment operated to finalize the action without regard to the validity of the original claim, and the action was accordingly considered, in contemplation of law, as if it had never been begun." *Yonkers Fur Dressing Co., v. Royal Ins. Co.*, 247 N.Y. 435, 444 (1928). Therefore, *while the underlying testimony adduced at the trial of the first action may be utilized in litigating and even determining the second action*, the doctrines of res judicata and collateral estoppel may not." *Peterson*, 50 A.D.2d at 775 (emphasis added).

Apart from the absence of a final judgment, the notion that Judge Fahey found that the firm "was an equity partnership with four equity partners, one whom included Capizzi" and that collateral estoppel applies (R. 15) must be rejected. Capizzi's status in the firm was never litigated in *Frascogna*, which involved only the issue of Frascogna's interests. Significantly, unlike Frascogna who testified clearly as to his intent to become and be an equity partner (R. 3431), Capizzi's testimony as to his own intent and agreement *denies* any intention to be an equity partner. Indeed, Justice Fahey specifically said, "the Court finds that both men [Chiari and Frascogna] fully intended to have a partner status at the new firm and that in order to placate them at the beginning Mr. Brown made them partners, in the way New York law means partners." R. 3431.

This Court has recently reiterated that "collateral estoppel applies only if (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." *Rozeweski v. Trautmann*, 151 A.D.3d 1945, 1945 (4th Dept. 2017). Neither of these occurred as concerns Capizzi's interests in the *Frascogna* litigation. *See, e.g., Color by Pergament, Inc. v. O'Henry's Film Works, Inc.*, 278 A.D.2d 92, 94 (1st Dep't 2000) (rejecting collateral-estoppel defense and holding "[f]or an issue to have been actually litigated, 'it must have been properly raised by the pleadings or otherwise placed in issue. . .'"). Further, under New York law, Judge Fahey could not grant relief that a party did not ask for, and thus could not determine Capizzi to be an equity partner. *See, e.g., Vogt Mfg. Corp. v. Brockway*, 29 A.D.2d 1046, 1046 (4th Dep't 1968) (modifying judgment to remove all awards that were not specifically asked for by way of a complaint). In *Frascogna*, Capizzi did not ask to be found an owner. Indeed, to the contrary, he consistently denied under oath that he was an owner, and refuted any assertion to the contrary. *See* Point I. A *supra*. Simply put, there was no determination, let alone a final judgment in *Frascogna*, that Capizzi was an equity partner in the firm.

POINT VI. PARTNERSHIP INDICIA ARE ONLY EXAMINED IN LIEU OF, OR AS A SUBSTITUTE FOR, EXPRESS INTENT, OR AS A BASIS FOR A THIRD-PARTY HOLDING A PERSON LIABLE FOR REPRESENTING HIMSELF AS A "PARTNER"

Here, Brown, Chiari, and Capizzi all testified that Brown and Chiari were the owners of the firm and that Capizzi shared in the profits. "[W]here an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law...No particular magic words need be recited, provided that the intent is clear." *Congel*, 31 N.Y.3d at 287. Because there is sworn testimony manifesting intent, any secondary indicators — so-called partnership "indicia" — are, and should be subordinated to the parties' agreement. Indeed, this case is unique because there is prior sworn testimony that is absent in many (if not all) typical partnership disputes. Stated another way, an examination of indicia is only necessary when intent cannot be determined and examination is needed to ascertain the parties' agreement. Plaintiff's strategy below was to introduce various documents prepared by third-parties that in some way or another refer to Capizzi as a "partner" or "owner" of defendants' firm. This was an unnecessary distraction to the singular issue of what was their intent and agreement.

Heye readily distinguished the difference between a third party claiming a partnership exists, and an alleged partner claiming a partnership exists:

> [I]t must be recollected that the same rules do not apply which are invoked where a third person claims that those engaged in a joint adventure are liable as partners. Individuals may be charged as partners as to third persons, by voluntarily and knowingly sharing in the profits of the business, or holding themselves out as partners, and thus inducing a credit on the faith of the supposed partnership. Such a liability may be created as to third persons by an equitable estoppel. But when it is sought to be established on a footing of contract of partnership between the parties, an agreement must be shown, and it will not be implied from the joint ownership of property, nor will the relation arise by operation of law. This distinction is well settled, and must be carefully borne in mind whenever the question arises as to the existence of a partnership.

Heye, 2 A.D. at 349. Thus, where, as here, an individual is claiming partnership, the partnership relationship must be established by an agreement of the parties, not implied from circumstances. And in determining an agreement, *intent* reigns supreme. *Id.*

Similarly, in *Hammond v. Smith*, this Court held that how a document labels a person or relationship does not determine a partnership analysis. 151 A.D.3d at 1900. Indeed, "calling an organization a partnership does not make it one." *Id.* (citations omitted). Yet, the trial court here ignored the parties' expressed intent and, instead, cited "bank, pension, and tax documents" as the first reason why plaintiff purportedly was an equity partner of defendants' law firm on the date of his resignation. R. 18.

A. Indicia of Ownership, including Capizzi's Activities at the Firm, are Not Determinative, and Did Not Modify the Parties' Express Agreement

The examination of indicia cannot lead to a conclusion *contrary* to the parties' agreement determined and manifested by the express intent. Discerning the parties' intent through the assessment of "indicia" was unnecessary and unwarranted where Brown, Chiari, and Capizzi's clearly expressed their intent and agreement that Capizzi shared in the income of the firm, and Brown and Chiari were the owners. *See* Point I, A *supra*. Moreover, Capizzi each expressly testified in the *Frascogna* matter that such "indicia" were not reflective of his intent and agreement with Brown and Chiari and that those activities were meaningless as it concerns the question of ownership. R. 5452-60; 5466-68. Capizzi specifically testified that his involvement in certain activities reflecting "indicia" were done for "convenience" and did not reflect an ownership interest in the firm. R. 5453-55; 5467-68.

Therefore, if this Court is inclined to examine various indicia, the only relevant factors are the ones that changed from the time of Capizzi's testimony in *Frascogna* to the filing of his Complaint. As observed by the court below, however, following *Frascogna*, Brown, Chiari, and Capizzi largely continued to operate as they always had. R. 8. In reaching a contrary legal conclusion, however, the trial court — erroneously — examined and cited a variety of indicia,

but substantially all of those same factors were present in 2005 and 2006. For example, the trial court cited the fact that Capizzi had bank-signing authority (R. 8); he had that same authority in 2005 and 2006. R. 1022. Capizzi co-signed for a loan on behalf of the firm (R. 9), just he had in 2005 and 2006. R. 722. The trial court cited the fact that Capizzi was involved with the firm's insurance (R. 9), same as in 2005 and 2006. R. 1012-13. Capizzi received a K-1 (R. 8); just as he had since 1992. R. 947. The trial court noted that Capizzi is listed as a trustee of the benefit plan (R. 10); same as 2005 and 2006. R. 968. Simply put, there was no discussion, let alone a change to the parties' agreement, following *Frascogna*, that made Capizzi an owner in the firm.

Moreover, even the trial court's examination of indicia specifically recognized that "facts exist which do not favor a finding that Capizzi was an equity partner." R. 18. The Decision cited multiple facts supporting a determination that Capizzi was *not* an equity partner, including the June 15, 2014 "LLC/LLP Request For Information" form identifying only Chiari and Brown as owners. R. 13. The trial court also cited the limits of Capizzi's alleged management role, specifically that Capizzi was not involved in year-end meetings where Brown and Chiari determined attorney and staff compensation, he was not informed of the compensation decisions in advance of the rest of the attorneys and staff, and he did not review the firm's tax or financial records. R. 13-14. Further, Capizzi did not

have the authority or autonomy of an "owner", he received all of his case assignments from Brown and Chiari and lacked authority to settle all significant cases without Brown and Chiari's approval. R. 14.

While an examination of indicia was unnecessary and erroneous to determine the parties' intent, relationship, and agreement; when examined *de novo* the evidence shows Capizzi did not meet his burden of proving he was an equity partner.

B. The Partnership's Tax Returns Are Not Inconsistent With Capizzi's Status as an Income Partner, Let Alone Conclusive of an Equity Interest

The trial court's decision focused on the firm's tax returns, above all other indicia, and held that Brown and Chiari are precluded by "the doctrine of tax estoppel" from disputing Capizzi's claim to be an equity partner. R. 17-18. The Decision states that "Capizzi was identified as one of three partners in the firm, and he received a K-1 with a capital count each year." R. 18. The Decision ignores, however, that Capizzi began to receive a K-1 in approximately 1992, and had been receiving them for over a decade when he testified in *Frascogna* that he was not an owner. Moreover, Brown and Chiari (and Capizzi) considered Capizzi to be an income partner, so there was nothing misleading or unlawful about Capizzi's receiving a K-1.

The Decision states that the tax returns indicate "No one owned at least fifty percent (50%) or more of the profit, loss or capital of the partnership; thus establishing the partnership must have at least three owners." However, that observation is inconsistent with the testimony and misapprehends the issue. The question on the tax return reads: "Did any individual or estate own directly or indirectly an interest of 50% or more in the profit, loss or capital of the partnership?" R. 1272; 4532. The firm's accountant explained that the question did *not* ask about ownership of the firm, but instead merely asked if any individual owned 50% or more of the "profits" "loss" or "capital." R. 1312-16. The accountant explained that the tax returns did not reflect any individual owning 50% or more of those categories noting that the term "capital" means the sum of the capital accounts which were reflected on the returns as negative. *Id*. Therefore, the firm's tax return did not reflect percentages of the ownership of the firm. Defendants thus refuted Capizzi's contention that the firm's tax return is inconsistent with Brown and Chiari's equal ownership of the firm. *Id.* The reference to recourse liability is limited to the line of credit used to fund cash disbursements for cases. However, Capizzi had no real economic risk because Brown, personally, had pledged over a $1M in liquid collateral to secure this obligation. R. 4128.

Unlike the Decision below, courts determining partnership interests routinely reject tax filings as being conclusive evidence of an equity interest. *See*, *D'Esposito*, 44 A.D.3d at 512-13 (holding that plaintiff "was never a true equity member of the firm…notwithstanding that plaintiff was called a partner and listed as such on Martindale Hubbell, on the firm's letterhead and tax return, and he received distributions of profit from the firm at a fixed rate."); *Matter of Bhanji v. Baluch*, 99 A.D.3d 587, 587 (1st Dep't 2012) ("Petitioner has failed to establish that she is a 50% owner in Flytime . . . Flytime's federal tax return for the year 2000, which indicated she was a 50% owner of the corporation was insufficient, without more, to satisfy petitioner's burden, since corporate and individual tax returns, even when filed with government agencies, are not in and of themselves determinative."); *accord Dundes v. Fuerisch*, 13 Misc. 3d 1223(A), at *11 (Sup. Ct. N.Y. Cnty. 2006) (holding tax documents are merely some proof, and not conclusive of ownership).

Most recently, in *Barrison v. D'Amato & Lynch, LLP*, the court rejected similar claims by an attorney that partnership tax filings evidenced his ownership interest. 2019 NY Slip Op. 30905(U) (Sup. Ct., N.Y. Cnty. 2019). While "[p]plaintiff points to various tax documents [as allegedly demonstrating his ownership] specifically the K-1's that the firm filed with the IRS, identifying the plaintiff as a 'general partner' and indicating that he had a capital account. . . ", the

court held that that "[p]laintiff fail[ed] to establish that he was an equity partner as a matter of law." *Id*. at **11. The court further said:

> Despite being a seasoned attorney, plaintiff admitted that he never made any inquiries regarding the terms of his partnership. Plaintiff knew that D'Amato and Lynch Jr. ran the firm and that he: had no control over the firm's policies, was not involved in hiring decisions and was never asked to make a capital contribution to the firm or share in its losses; yet plaintiff never asked what sort of partner he was and whether he had an equity interest in the firm. The K-1's were the plaintiff's sole basis for believing he was a partner with an ownership interest. However, plaintiff's reliance on the K-1's is particularly unreasonable because he states that he was taxed as a partner and given a K-1 starting in 1990, when he joined the firm as of counsel. *Having failed to make any inquiries, despite indications that he was not an equity partner, plaintiff's reliance on the K-1's was unreasonable as a matter of law*. *Id.* at **17 (emphasis added).

The court cited to multiple authority holding that the plaintiff, like Capizzi here, had an obligation to inquire concerning whether he held an equity interest.

The proof at trial on this same point was undisputed: Capizzi began to receive a K-1 in the early 1990's, but unlike the plaintiff in *Barrison*, never claimed that he relied upon the receipt of K-1's to mean that he was an equity partner. Indeed, Capizzi had been receiving K-1's for more than a decade when he testified in *Frascogna* and he did not hold an equity interest. Capizzi is also a

"seasoned attorney" who, despite having participated in the multi-year *Frascogna* litigation, never inquired whether he held an equity interest. Since "nothing had changed" after *Frascogna*, Capizzi had an obligation to inquire whether he held an equity interest and confirm that interest with the others.

Capizzi never made inquiry of Brown or Chiari after *Frascogna*, or at any time prior to his departure. It wasn't until he decided to resign that he first asserted an equity interest. However, Capizzi cannot disavow this prior testimony, simply because being an income partner no longer suits his financial interests. His clear expression of intent and agreement cannot be conveniently ignored. Should the Court desire to examine indicia or other evidence, it should look no further than Capizzi's January 30, 2015 email to his accountant summarizing his agreement with Brown and Chiari: "Really, it's just an agreement to distribute the profits after we pay expenses. . ." R. 5422. This email confirms the simple fact that nothing fundamentally changed in the ten years after Capizzi's testimony in *Frascogna*. Capizzi was an income partner earning a substantial sum in a successful firm — who became dissatisfied and ultimately decided to leave.

CONCLUSION

The Decision and Order is internally inconsistent and is legally and factually unsupportable as it judicially imposes a partnership contrary to the prior sworn testimony, express intent and agreement of the three involved parties; adopts

an unpleaded theory; and finds "controlling" a conclusion of law not presented to, nor determined by *Frascogna* and, indeed, contrary to Capizzi's assertion of the scope of the *Frascogna* Decision. Based on the foregoing, Defendant Brown respectfully request that this Court reverse the trial court's Decisions and Orders, declare that Capizzi was not an equity partner of BCLLP and dismiss his claim for an accounting. Additionally, Brown requests that the order dissolving BCLLP be vacated.

Dated: May 26, 2020

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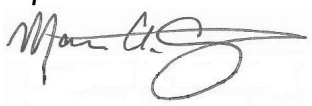

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