SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

SCOTT EPSTEIN, individually and as a partner of Cantor Epstein & Mazzola, LLP,

Plaintiff,

Index No. 506730/19

Motion Seq. No. 10

-against-

ROBERT I. CANTOR and ROBERT I. CANTOR PLLC, BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER COLONELLI, P.L., AND BOYD RICHARDS NY, LLC

Defendants.

RESPONSE OF CANTOR DEFENDANTS TO THE MARCH 14, 2022 DECISION & ORDER

In a decision and order dated March 14, 2022, this Court has asked for briefs "reconciling Court of Appeals precedent as to the indispensability [to the formation of a partnership of] profit and loss sharing." The need for such reconciliation presupposes that the 2018 decision of the Court of Appeals in Congel v. Malfitano, 31 N.Y.3d 272 (2018) either contradicts or overturns *sub silentio* the 1958 decision of the Court of Appeals in Steinbeck v. Gerosa, 4

N.Y.2d 302 (1958), which holds that the sharing of profits and losses is "[a]n indispensable essential of a contract of partnership" (4 N.Y.2d at 317). As we show below, the rule in Steinbeck unquestionably remains the established law in New York.

The passage in Congel that has given rise to the Court's question is a direct quotation from a much earlier decision of the Court of Appeals in Lanier v. Bowdoin, 282 N.Y. 32 (1939), which announced the rule that partners, as between themselves, may include in the partnership articles ". . . any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters. If complete, as between the partners the agreement so made controls". 282 N.Y. at 38. The holding in Steinbeck – - that the sharing of profits and losses is "[a]n indispensable essential of a contract of partnership" – - was rendered twenty years after the Court had decided Lanier.

In Lanier, the defendant had a 27.04% equity stake in the partnership. He was the only solvent partner and the question was whether he should be required to pay the plaintiff's entire capital contribution as per certain provisions of the Partnership Law, 282 N.Y. at 37, even though the partnership agreement provided that the partnership's

debts and losses would be borne by the partners in proportion to their respective interests in the partnership's net profits. 282 N.Y. at 38. The Court of Appeals ruled that the agreement took precedence over the statute because partners, as between themselves, may include in the partnership articles ". . . any agreement they wish concerning the sharing of profits and losses, . . . and other matters. If complete, as between the partners the agreement so made controls". 282 N.Y. at 38.

In Congel, the defendant had a 3.02% equity stake in the partnership. Defendant had caused the dissolution of the partnership contending that he was entitled to do so under the provisions of the Partnership Law. The Court of Appeals held that because the partnership agreement set out the methods of dissolving the partnership, which defendant had not complied with, the partnership agreement's terms controlled. 31 N.Y.3d at 287.

By this motion, Epstein conjures up conflict between Congel and Steinbeck by asserting that because partners may make "any agreement concerning the sharing of profits and losses", that must include partners making an agreement for no sharing of profits and losses. Therefore, according to Epstein, the indispensability of sharing profits and losses has been abrogated by the decision in Congel v. Malfitano.

But in Congel, as in Lanier, the parties were indisputably partners and the rule expressed in these cases presupposed the existence of a partnership. Neither of those two partnership agreements, unlike the one involved in this case, provided for no sharing of profits and losses. Accordingly, neither decision necessitated a determination, like the one required here, about whether a partnership had been formed. Rather, in both cases the issue was whether the terms of the two partnership agreements would have priority over potentially conflicting provisions of the Partnership Law. Epstein is trying to harness a rule that applies as between parties who concededly are partners and apply it to a dispute in which the very issue is whether a partnership had been created.

That Congel has not abrogated the black letter law of Steinbeck is borne out by numerous recent decisions. Not a single court since the Congel decision has viewed Congel as having overturned the long-standing rule that for the creation of a partnership relationship giving rise to a fiduciary obligation sharing of profits and losses is an indispensable element. The continued vitality of this principle is affirmed in the following cases, all of which were decided after Congel v. Malfitano: Saibou v. Alaliedu, 187 A.D.3d 810 (2d Dept. 2020) (no agreement as to sharing of

profits and losses -- no partnership formed); Shionogi Inc. v. Andrx Labs, LLC, 187 A.D.3d 422 (1st Dept. 2020) (no agreement as to sharing of losses – no joint venture formed); Toretto v. Donnelley Fin. Sols. Inc., 2022 WL 348412, *7 (S.D.N.Y. 2/24/22) (no agreement as to sharing of profits and losses -- no partnership formed); Oberia Pia Ltd. v. Seagrape Investors, LLC, 2020 WL 5751195, *12 (S.D.N.Y. 9/25/2020) (no provision made for sharing of profits and losses -- no partnership shown); Velez v. Mitchell, 2021 N.Y. Slip Op. 30898[U], 5 (Sup Ct, N.Y. County, 2021) (agreement to share in profits and losses is indispensable essential of contract of partnership); Travelers Property Casualty Co. of America v. Harleysville Insurance Co. of New York, 67 Misc. 3d 1227(A) (Sup. Ct., N.Y. Co., 2020) (essential elements of partnership include sharing of profits and losses).

In sum, parties are indeed free to make whatever agreement they wish concerning the sharing of profits and losses. They may even make an agreement, like the one in suit, in which one person provides all the capital, receives all the profits and bears all the losses and the other party receives no profits and bears none of the losses. But if

they make such an agreement, they have not formed a partnership, they have merely formed a commercial contract[1].

No reconciliation of Court of Appeals precedent is required because the principles are not in conflict. Courts will enforce a complete contract as written. But a complete contract that does not provide for sharing of profits and losses is not a partnership, no matter what it is called. Accordingly, this Court should deny Epstein's motion for renewal or reargument, because the agreement between Epstein and Cantor, which did not provide for sharing of profits and losses, is not a partnership.

Dated: New York, New York
April 25, 2022

Respectfully submitted,

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[1] It is well-established that calling a contractual relationship a partnership or calling someone a partner, even an "equity partner", doesn't establish the relationship as a partnership. Shine & Co, LLP v. Natoli, 89 A.D.3d 523 (1st Dept. 2011); Kyle v. Ford, 184 A.D.2d 1036, 1037 (4th Dept. 1992); Brodsky v. Stadlen, 138 A.D.2d 662, 663 (2d Dept. 1988). For this reason, Cantor's deposition testimony that Epstein was a non-equity partner (Epstein Exhibit 5, 291/14, 291/19, 292/19, 293/11) has no legal significance whatsoever. Calling Epstein a partner did not make him one.