SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

SCOTT EPSTEIN, individually and as a Partner of Cantor, Epstein & Mazzola, LLP, Plaintiff, - against - ROBERT I. CANTOR, ROBERT I. CANTOR PLLC, BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER COLONELLI, P.L., and BOYD RICHARDS NY, LLC, Defendants.	Index No.: 506730/2019 Mot. Seq. No. 10

SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO RENEW AND REARGUE

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Pursuant to the Court's instruction in its Decision and Order, entered on March 21, 2022 ("Reargument Decision"), plaintiff Scott Epstein ("Epstein" or "Plaintiff"), individually and as a partner of Cantor, Epstein & Mazzola, LLP ("CEM" or the "Partnership"), by and through undersigned counsel, respectfully submits this Supplemental Memorandum of Law in Further Support of his Motion to Renew and Reargue, and to Reinstate the Second through Eleventh Causes of Action ("Dismissed Claims") of the Complaint ("Complaint") against defendants.

PRELIMINARY STATEMENT

As this Court is aware, this action arises from a dispute between Epstein and defendant Robert Cantor and Robert I. Cantor, PLLC (collectively, "Cantor"), in which Epstein claims that Cantor, *inter alia*, breached the parties' 1995 written partnership agreement ("Partnership Agreement") and violated his fiduciary obligations to Epstein by, among other things, unilaterally dissolving their law firm Partnership and transferring substantially all of its assets to another law firm (defendant Boyd Richards Parker Colonelli, P.L. a/k/a Boyd Richards NY LLC) and two of its lawyers, defendants Bryan Mazzola and W. Todd Boyd (Complaint, Dkt. 16). The Court initially struck the Dismissed Claims from the Complaint based upon Cantor's argument that Cantor and Epstein were allegedly never partners and that, therefore, Epstein purportedly could not interpose any claims pertaining to a partnership relation ("Dismissal Decision") (Dkt. 157). The Court in the Dismissal Decision ruled that, because partnership losses were allocated to Cantor in the Partnership Agreement, Epstein, as a matter of law, could not have been Cantor's partner, and CEM was never a partnership.

In his Motion to Renew and Reargue, Epstein argued that Cantor, during his deposition in another case, recently made certain admissions that warrant reconsideration of the Court's Dismissal Decision. In particular, Epstein pointed out that Cantor, *under oath*, admitted that:

- he and Epstein were, in fact, partners at CEM (Dkt. 173 at EBT Tr. 292, PDF p.67);[1]
- CEM was, in fact, a partnership (*id.*); and
- had the partnership equity in CEM been sold, Epstein would have received half of the sale proceeds, but *Epstein* allegedly vetoed the deal, thereby confirming that *Epstein*, not only was a partner, but an equity partner with control over the governance of the Partnership (*Id.* at EBT Tr. 107, PDF p. 50).

(collectively, "Cantor's Sworn Admissions"). In addition, another former partner of CEM, non-party Edward Bailey ("Bailey"), came forward and submitted an affidavit confirming that Epstein was an equity partner of CEM, and that Cantor and Epstein were equals within the Partnership, with Epstein often having final say over major decisions (Bailey Aff., Dkt. 174) (Cantor's Sworn Admissions and Bailey's Affidavit shall hereinafter be referred to as the "New Evidence").

In its Reargument Decision, the Court focused, not on the New Evidence, but rather on the law. In particular, the Court, referencing the parties' Partnership Agreement, acknowledged that, "'partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses'" (Reargument Decision at 2-3) (*quoting Congel v. Malfitano*, 31 N.Y.3d 272, 288 (2018). The Court proceeded to explain that it is of no consequence that Epstein and Cantor agreed to allocate losses to the latter, given the existence of a written, executed Partnership Agreement which controls the parties' relationship. *Id*. (*citing Congel*, 31 N.Y.3d at 287-88). On this basis, the Court concluded that it was unnecessary to reach the issue of whether the New Evidence warranted a different result on defendants' original motions to dismiss since, as a matter of law, the Dismissed Claims must be reinstated. *Id*. Stated differently, this Court ruled that it was "clear" that, under New York law, the

[1]Unless otherwise indicated, all exhibits refer to those annexed to the Motion to Renew and Reargue. And, because such were annexed *en masse* under Docket No. 173, we have, for the Court's convenience, cited to such exhibits, not only by reference to the exhibit number, *but also by PDF page number*.

sharing of profits and losses is not an indispensable feature of partnerships if a written partnership agreement among partners sets forth a different arrangement (*Id.*). And given that Epstein and Cantor entered into the written "Partnership Agreement" – which, among other things, repeatedly (*i.e.*, nearly 130 times) described Epstein and Cantor as partners and CEM as a partnership – this Court correctly concluded that the law "warrant[s] reinstating the Dismissed Claims" against defendants (*Id.*).

Nonetheless, the Court, in an abundance of caution, afforded the parties one last opportunity to brief the issue to assist in reconciling the decision in *Congel*, in which the Court of Appeals ruled that the parties are free to enter into any partnership arrangement they wish, including one allocating profits and losses to only one partner, with *Steinbeck v. Gerosa*, 4 NY2d 302, 317 (1958), in which the same Court, *60 years earlier*, seemed to imply that under circumstances in which there is no written partnership agreement, sharing of profits was critical to the Court's determination regarding whether a partnership exists (Reargument Decision at 3).

As reflected below, *Congel* and *Steinbeck* represent the leading cases in two distinct lines of authority pertaining to New York Partnership Law. In particular, where, as here, the parties have a written partnership agreement, *Congel* controls. And a long line of decisions confirms that, once the parties have entered into a written agreement, they can agree to any terms they wish, including the allocation of profits and/or losses to one partner or the other. However, where, unlike here, there is no written partnership agreement, *Steinbeck* controls, in which such instance, the courts divine the existence (or non-existence) of a partnership based upon a series of factors ("Partnership Factors"), one of which – sharing of profits and losses – is regarded as particularly important. Indeed, the key factor in *Steinbeck* was that, unlike here, there was *no written partnership agreement* upon which to base a determination regarding whether a partnership was created. Rather, as shown

in greater detail *infra*, Steinbeck, an author, claimed that certain licensing agreements by which he had licensed his work in exchange for royalties created a "joint venture" with the licencee parties, so that the royalties earned under such agreements were exempt from a New York City tax. Because there was no written and executed partnership agreement therein (but rather a licensing/royalty arrangement), the Court had to rely upon the Partnership Factors to determine whether a joint venture or partnership was created under the facts and circumstances of the transactions at issue, with one such factor being whether Steinbeck and the licensees shared the losses incurred by the licensees in connection with their resale of the licensed work. *Id*.

From the decisions in *Steinberg* and *Congel*, it is plain that the threshold question in the deliberative process of ascertaining whether a partnership relation exists depends upon the presence of a written partnership agreement. If a partnership agreement exists, *Congel* controls; if one does not exist, *Steinbeck* controls. Thus, *Congel* did not overrule *Steinbeck*, but rather clarified it. And because Epstein and Cantor *did* enter into a written Partnership Agreement, the decision by Epstein and Cantor to allocate Partnership losses to the latter in the Partnership Agreement did not invalidate its partnership provisions because, as clearly set forth in *Congel*, the parties were free to allocate profits and losses as they wished. As such, because the Dismissal Decision was predicated upon the premise that partnerships could not exist absent an express agreement to share losses -- which is not the law where, as here, the parties have an executed partnership agreement -- Epstein is entitled to reinstatement of the Dismissed Claims against defendants (Point I, *infra*).

Moreover, the overwhelming evidence in the record leaves no doubt that reinstatement of the Dismissed Claims against defendants would be fully consistent with the Court's interpretation of law in the Reargument Decision. In particular, Epstein and Cantor, after signing the Partnership Agreement in 1995, attesting to their relationship as partners, consistently behaved as partners in

a partnership, by, *inter alia*: filing partnership formation documents with the Secretary of State under Partnership Law provisions which require that all partners of the ensuing partnership qualify as "general partners" ("Partnership Formation Documents") (Dkt. 70); filing partnership tax returns for CEM ("Partnership Tax Returns") (Dkt. 87-89); filing K-1s as general partners ("K-1s") (Dkt. 71); listing and billing themselves out to the public (including especially to clients) as partners ("CEM Website") (Dkt. 75); and readily admitting (under oath) that they were partners and CEM was a "Partnership" (Cantor's Sworn Admissions, Dkt. 173). In addition, the Bailey Affidavit corroborates that the parties were both equity partners (Dkt. 174). And the affidavit of Attorney Brian Isaac, who was hired by Epstein *and* Cantor to draw their Partnership Agreement, has confirmed that the parties intended their arrangement to comprise a Partnership between two equity partners (Dkt. 56). As such, reinstatement of the Dismissed Claims against defendants as a matter of law would be fully consistent with the facts and evidence in the record (Point II, *infra*).

BACKGROUND

For a full recitation of the pertinent factual and procedural history, we respectfully refer the Court to the Affirmation of Michael S. Hiller, dated September 15, 2021 ("Hiller Moving Affirmation") (NYSCEF Doc. No. 172), submitted in support of Epstein's Motion to Renew and Reargue, the exhibits annexed thereto (Dkt. 173), and the Affidavits of Edward Bailey ("Bailey Aff.") (Dkt. 174) and Attorney Brian Isaac (Dkt. 56), all of which are specifically incorporated herein by reference.

ARGUMENT

POINT I

THE COURT IS CORRECT THAT THE COURT OF APPEALS' DECISION IN *CONGEL*, AND NOT *STEINBECK*, CONTROLS HERE AND REQUIRES REINSTATEMENT OF THE DISMISSED CLAIMS AGAINST DEFENDANTS

As reflected *supra*, the Court of Appeals has issued decisions creating two distinct lines of authority with respect to recognizing a partnership under New York law – cases in which the partners had no written partnership agreement, and those in which they did execute such an agreement. A review of the two leading cases - *Steinbeck* and *Congel*, respectively -- is instructive.

In *Steinbeck*, renowned author John Steinbeck challenged certain taxes imposed by New York City on royalties Steinbeck received from licensing of his literary works. 4 N.Y.2d at 306-07. Among other arguments, Steinbeck claimed that royalties earned from the license agreements with third-party licensees located outside of New York could not be taxed because such royalties were derived from interstate and foreign commerce as part of a joint venture relationship. *Id*. at 316. The Court of Appeals rejected Steinbeck's argument, holding that Steinbeck and his licensees were not partners or joint venturers, and thus the royalties could not be considered to have been earned jointly with the licensees in interstate or foreign commerce. *Id*. at 316-17. According to the Court, the license arrangements bore none of the traditional characteristics of a partnership or joint venture, including the sharing of profits and losses, which the Court, in the absence of an actual, written and executed partnership agreement, deemed an "indispensable element" to a partnership relationship. *Id*.

Again, critical to the outcome in *Steinbeck* was the fact that *there was no written and executed **partnership** agreement between Steinbeck and his licensees*; rather, the parties had entered

into an agreement denominated a license agreement for the payment of royalties. Thus, the Court was required to engage in a factor-driven analysis to determine whether Steinbeck and the licensees, notwithstanding the absence of a written partnership agreement, were partners or joint venturers (Partnership Factors, previously defined). As such, *Steinbeck* stands for the unremarkable proposition that, *absent a written partnership agreement*, courts will consider whether a partnership nonetheless exists based upon traditional *indicia* of partnership, including the sharing of profits and losses and other of the Partnership Factors.

The courts since *Steinbeck* have consistently, over the decades, made clear that the Partnership Factors are relevant to an analysis of whether a partnership exists *only*, as in *Steinbeck*, when the parties do not enter into a *written partnership* agreement. Indeed, the cases supporting this legal precept are legion. The following listing is merely representative and not exhaustive:

- *Delidimitropoulos v. Karantinidis*, 186 A.D.3d 1489, 1490 (2d Dep't. 2020) ("*When there is no written partnership agreement between the parties*, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties. *Factors* to be considered in determining the existence of a partnership include ... sharing of losses, ... joint management and control, [and] contribution of capital ...") (citations omitted, emphasis added);

- *Czernicki v. Lawniczak*, 74 A.D.3d 1121, 1124 (2d Dep't. 2010) ("*When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties*") (*citing Community Capital Bank v. Fischer & Yanowitz*, 47 A.D.3d 667, 668 (2d Dep't. 2008) (same language, emphasis added*)*);

- *Brodsky v. Stadlen*, 138 A.D.2d 662, 663 (2d Dep't. 1988) ("*There is no written partnership agreement as such between the parties. Therefore, we must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties*") (emphasis added);

- *Rosen v. Efros*, 258 A.D.2d 333, 333 (1st Dep't. 1999) (in the absence of a written partnership agreement, the court undertook a Partnership Factor analysis and determined that, even in the absence of an agreement to share profits and losses, the motion for summary judgment was properly denied);

- *Barone v. Barone*, 54 Misc. 3d 1218(A), 54 N.Y.S.3d 609 (Sup. Ct. Queens Co.

2017) ("*Where, as here, there is no written partnership agreement between the parties, a court may find that a partnership exists based on the 'conduct, intention, and relationship between the parties*'") (quotation omitted, emphasis added);

- *D'Amour v. Ohrenstein & Brown, LLP*, 17 Misc. 3d 1130(A) (Sup. Ct. N.Y. Co. 2007) ("*Where, as here, there is no written partnership agreement*, *the question of whether a partnership of co-owners or equity partners exists* – and the question of whether a person is a member of such a partnership – *will be determined based upon the presence or absence of the traditional indicia of a partnership*, including: (1) sharing of profits, (2) sharing of losses, ... (4) joint management and control, ... [and] (8) contribution of capital ...") (emphasis added);

- *Joachim v. Flanzig*, 3 Misc. 3d 371, 378–79 (Sup. Ct. Nassau Co. 2004) ("[w]hether a partnership relationship exists *is determined by the parties' written partnership agreement* or, *if the parties do not have a written agreement*, the intent of the parties as evidenced by objective factors such as sharing in profits and losses, exercising joint control over the business and its property and possessing an ownership interest in the partnership") (emphasis added).

Further, just 10 days ago, the Southern District of New York reinforced this principle, *yet again*, in *Picard v. Sage Realty*, ruling:

> As noted previously, the [parties] did not enter into a partnership agreement. Accordingly, the Court must determine whether a *de facto* partnership existed based on "the conduct, intention, and relationship between the parties."

2022 WL 1125643, at *29 (S.D.N.Y. Apr. 15, 2022) (*quoting Czernicki,* 74 A.D.3d at 1124, and *citing Brodsky,* 138 A.D.2d at 663 and *In re Fairfield Sentry Ltd.*, 627 B.R. 546, 563 (Bankr. S.D.N.Y. 2021)); see also, *Capizzi v. Brown Chiari LLP*, 194 A.D.3d 1457, 1458 (4th Dep't. 2021) ("*Where, as here, there is no written partnership agreement in place, the provisions of the Partnership Law apply*") (*citing Congel supra*, emphasis added). Thus, it is the law that a review of the Partnership Factors to determine the existence of a partnership is necessary *only in the absence of a written partnership agreement* between the parties.

Defendants' counsel have previously cited cases in which the plaintiffs therein entered into written ***non***-partnership agreements (such as licensing agreements, operating agreements, etc.) or exchanged mere drafts of un-executed partnership agreements, and claimed that, on the basis

thereof, the parties therein were partners -- allegations which, given the absence of written and executed *partnership* agreements, required the courts to consider the Partnership Factors. Defendants cited these cases in a misguided effort to cram the facts herein into the *Steinbeck* framework. However, such cases are completely inapposite because, again, in those cases, the plaintiffs' claims were not based upon executed written partnership agreements, but rather upon *other* types of agreements (*i.e.,* non-partnership agreements)[2] or mere drafts of partnership agreements.[3]

The 2018 Court of Appeals' decision in *Congel* represents a different line of authority in which the cases focus on how to evaluate partnership claims under circumstances in which the parties have an *executed, written* partnership agreement. Specifically, as in the instant case, *Congel* involved an attempt by one partner to dissolve the parties' partnership following the procedures set

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[2] *M.I.F. Sec. Co. v. R.C. Stamm & Co.*, 94 A.D.2d 211 (1st Dep't. 1983) (analysis of assorted factors when the plaintiff claimed an operating agreement was actually a partnership agreement); *Vincent v. Macbeth*, 211 A.D. 110, 112, 206 N.Y.S. 870, 872 (2d Dep't. 1924) (a simple agreement (not denominated a partnership agreement) to develop houses without reference to sharing losses, deemed to be a partnership: "While an agreement to share in the profits and losses as such is not specifically shown, nevertheless the testimony of plaintiff and his witnesses, coupled with the testimony of the defendants, leads to the conclusion that it was the intention of the parties to become partners"); *see also Beckerman v. Sands*, 364 F. Supp. 1197, 1199 (S.D.N.Y. 1973) ("it is noteworthy that the agreements are not designated as partnership agreements and at no time refer to the participants as partners"). In contrast, here, the parties entered into an actual *Partnership* Agreement, which referenced the parties' relationship as "partners" and a "partnership" approximately 130 times.

[3] *Chanler v. Roberts*, 200 A.D.2d 489, 489, 491 (1st Dep't. 1994) (noting that the terms of the parties' partnership "was to be memorialized in a written partnership agreement," but that "negotiations to formalize the partnership were unfruitful" and no written agreement was ever entered into; therefore, absent a written partnership agreement, the Court considered whether the parties agreed to share profits and losses in determining whether they were partners); *Shaw v. Irby*, No. 107215-2003, 2008 WL 1956100, *1 (Sup. Ct. N.Y. Co. April 10, 2008) (the parties negotiated, but never finalized or entered into a written partnership agreement; thus, the Court was forced to consider whether there was "sufficient indicia of such a relationship"); *see also Missan v. Schoenfeld*, 95 A.D.2d 198, 208 (1st Dep't. 1983)(after expiration of written partnership agreement, oral agreement controlled, requiring an analysis of Partnership Factors, including sharing of profits and losses: "In particular, there is an issue of fact as to the terms of the oral partnership agreement, and as to which, if any, of defendant's activities were to be deemed part of the partnership business in which plaintiff would participate").

forth in the New York Partnership Law. *Congel*, 31 N.Y.3d at 279-80. But the written partnership agreement between the partners required dissolution procedures that differed from the Partnership Law. *Id*. The Court, therefore, was forced to determine which dissolution procedures controlled – the procedures in the Partnership Law or those in the written partnership agreement. *Id*. In reaching its determination that the partnership agreement therein controlled, the Court of Appeals, in disregard of statutory provisions to the contrary, explained that, "[i]n the agreement establishing a partnership, the partners can chart their own course," and that "the Partnership Law's provisions are, for the most part, default requirements that come into play in the absence of an agreement." *Id*. at 279-80, 287 (citation, quotation marks, and alterations omitted).

In rendering its decision in *Congel*, the Court of Appeals, *quoting Lanier v. Bowdoin*, a case which is independently relevant (*see infra*), explained:

> The partners of either a general or limited partnership, 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.

Id. at 288 (*quoting Lanier*, 282 N.Y. at 38) (emphasis added). Thus, the Court held that dissolution of the partnership therein could be accomplished only by following the procedures set forth in the written partnership, not the Partnership Law.

In quoting and following its previous decision in *Lanier*, the Court of Appeals left no doubt that, once the parties prepare and execute a written partnership agreement, including, in particular, with respect to the allocation of profits and losses, it controls, irrespective of the Partnership Factors which, in this context, are irrelevant. In this regard, *Lanier* is equally instructive. Specifically, in *Lanier*, the plaintiff, who was a special partner of a dissolved partnership, claimed that he was exempted from sharing in the partnership's losses and that the sole solvent general partner was

responsible for reimbursing the plaintiff for his capital contribution. *Lanier*, 282 N.Y. at 37-38. In support of his claim, the plaintiff relied on certain provisions of the Partnership Law. *Id*. The Court, however, determined that the Partnership Law "ha[d] no bearing upon the issue to be here decided" because *partners in a partnership "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.*" *Id.* at 38, emphasis added. And in that case (as in *Congel*), the parties had entered into a written partnership agreement that "furnishe[d] a complete and legal scheme for distribution of assets and participation in profits and losses as between the partners and must control." *Id*.

In other words, the Court of Appeals in *Congel* followed its previous decision in *Lanier* (which focused on the allocation of profits and losses), and concluded that, because the parties in *Congel* had entered into a written partnership agreement, it controlled, irrespective of the provisions of New York Partnership Law. These circumstances place the decisions in *Congel* and *Lanier* outside the *Steinbeck* framework and its progeny – in which no written partnership agreements existed.

The cases issued after *Congel* have repeatedly reinforced this legal precept -- specifically that, where the parties have entered into a written partnership agreement, it controls, irrespective of the Partnership Law or the Partnership Factors. The following listing of cases is representative, not exhaustive:

- *Zohar v. Larock*, 185 A.D.3d 987, 991 (2d Dep't. 2020) ("while New York's Partnership Law provides certain default provisions where a partnership agreement is silent, *where the agreement clearly sets forth the terms between the partners, it is the agreement that governs*"(*citing Congel supra*, emphasis added)**;**
- *Wiener v. Weissman*, 164 A.D.3d 1162, 1163 (1st Dep't. 2018) ("'*New York's* Partnership Law creates default provisions that fill gaps in partnership agreements, *but where the agreement clearly states the means by which a partnership will*

dissolve, or other aspects of partnership dissolution, it is the agreement that governs'") (*quoting Congel*, 31 N.Y.3d at 279) (emphasis added);

- *Cole v. Macklowe*, 99 A.D.3d 595, 595 (1st Dep't. 2012) ("Like parties to any contract, partners may fix their partnership rights and duties by agreement. Accordingly, *when the agreement between partners is clear, complete and unambiguous, it should be enforced according to its terms*") (emphasis added);

- *Silverman v. Caplin*, 150 A.D.2d 673, 673 (2d Dep't. 1989) (where "it is evident that a written partnership agreement is a complete expression of the parties' intention, *the language of the partnership agreement controls and will not be questioned. The clear and unambiguous terms of the partnership agreement mandate the finding, as a matter of law, that the parties' relationship was in fact a partnership*") (citations omitted, emphasis added).

As the foregoing also reflects, because it involved completely different legal concepts and factual circumstances than *Steinbeck*, the Court of Appeals in *Congel* did not overrule or contradict *Steinbeck*. In fact, *Steinbeck* was not even mentioned in *Congel*. Rather, *Congel* merely restated and reaffirmed a distinct legal principal, established in cases such as *Lanier*, which pre-dates *Steinbeck* – specifically, that partners are free to dictate the terms of their partnership in a written partnership agreement (including with respect to allocating profits and losses) and, when they do, the partnership agreement controls the partners' rights and obligations, regardless of the Partnership Law or other traditional concepts of partnerships.

Shortly before we filed this brief, we received the briefs for the Cantor and non-Cantor Defendants (Dkt. 223-24). In particular, counsel for defendants continue their mis-citation of cases and misinterpretation of the case law, by continuing to argue that, even in the presence of a written partnership agreement, there can be no partnership absent covenants to share profits and losses. **In other words, according to opposing counsel, New Yorkers are *barred* from entering into a partnership unless they agree to share profits and losses**. Not surprisingly, none of the cases defendants' counsel cites actually stands for that proposition. Instead, opposing counsel, once again, solely relies upon cases involving alleged *oral* partnership contracts or written ***non-***partnership

agreements that the plaintiffs therein claimed comprised partnership arrangements. *See, e.g.*, *Saibou v. Alaliedu*, 187 A.D.3d 810 (2d Dep't. 2020) (claims based upon alleged oral partnership agreement, which required analysis of the Partnership Factors); *Shionogi Inc. v. Andrix Labs, LLC,* 187 A.D.3d 422 (1st Dep't. 2020) (claims of an alleged joint venture relationship based upon a manufacturing and supply agreement, not a partnership agreement).

Defendants' counsel also cites *Velez v. Mitchell*, 2021 WL 1089935 (Sup. Ct. N.Y. Co. March 21, 2021) for the proposition that an "agreement to share profits and losses is [sic] indispensable ingredient of [sic] contract of partnership" (Cantor Br. 5). In fact, however, the Court in *Velez* actually construed the law precisely as we have. In this regard, the Court in *Velez* ruled:

> *When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties*." *Fasolo v. Scarafile*, 120 A.D.3d 929, 930 4th Dep't. 2014). *Where a party alleges the existence of an oral partnership, that party "bears the burden of proving the indicia of such a relationship*." *F & K Supply, Inc. v. Willowbrook Dev. Co.*, 304 A.D.2d 918, 920 (3d Dep't. 2003).

Velez, 2021 WL 1089935, at *2. Then, immediately after reinforcing these principles in *Velez* – that, only in the absence of a written partnership agreement will the courts review the Partnership Factors to divine the parties' intent -- the Court in *Velez* went through the Partnership Factors and cited *Steinbeck*. *Id*. at *3. Why? Because *Velez* did not involve a written partnership agreement, but rather an alleged oral agreement. *Id*. ("Here, the Complaint alleges 'Plaintiff and Defendants in October of 2009 had an oral agreement to partner to form the Ultimate Rap League.' *Id*. at *3 (citation omitted). Thus, the *Velez* decision explained the distinction between written and oral partnership agreements, and made clear that the former must be enforced as written, whereas the latter (oral agreements) require an analysis of the Partnership Factors. In short, *Velez* doesn't support defendants; it supports Epstein.

Both counsel separately cite *Obra Pia Ltd. v. Seagrape Investors LLC*, 2020 WL 5751195 (S.D.N.Y. Sept. 25, 2020) as having ruled that there was no partnership therein because there was "no provision made for sharing profits and losses" (Cantor Br. 5); however, *Obra*, which both opposing counsel strangely mis-identify as "*Oberia,*" is completely irrelevant because, as the court plainly noted therein: "Plaintiffs do not, however, actually plead that they were in a partnership or joint venture with Defendants." *Obra,* 2020 WL 5751195, at *12, *app. dismissed* (2d Cir. 2021).[4] Furthermore, while an assortment of joint venture and partnership agreements were mentioned in *Obra*, the Court therein pointedly noted that the plaintiffs did not sue for breach of such agreements; instead the plaintiffs' cause of action therein invoked various other "agreements into which the parties entered, such as the CSA [a credit and security agreement] and the Subordination Agreement" -- neither of which was claimed to constitute a partnership agreement. *Id*. Thus, defendants' counsel have vainly resorted to citing non-partnership cases in which the plaintiff never even claimed to have formed a partnership or anything close to it.[5]

If that weren't bad enough, opposing counsel then cites *Toretto v. Donnelly Fin. Sols., Inc.*, 2022 WL 348412 (S.D.N.Y. Feb. 24, 2022) (Cantor Br. 5) -- a <u>*class-action*</u> case, in which the plaintiffs alleged that two defendants were jointly and vicariously liable for each other because,

[4]In addition to mis-identifying *Obra* as *Oberia*, defendants' counsel failed to include the subsequent history of the case.

[5]Defendants' citation of *Travelers Prop. & Cas. Co. v. Harleyville Ins. Co.*, 67 Misc. 3d 1227(A) (Sup. Ct. N.Y. Co. 2020) is similarly puzzling, insofar as that case didn't involve a partnership at all, but rather was an insurance coverage action based upon a claimed joint venture. In any event, in issuing its ruling therein, the Court expressly relied upon *Kaufman v. Torkan*, 51 A.D.3d 977, 978-79 (2d Dep't. 2008), in which the Second Department was addressing an alleged <u>*oral*</u> agreement that the parties plainly never reached: "By contrast, according to Torkan, the discussion at the meeting centered around the purchase and development of a property in Belize, which he characterized as a 'complete waste of time.' He denied that there was any agreement reached between him or Kaufman, or that they even discussed the subject property or the Chelsea property." Thus, once again, defendants' counsel is relying upon the line of authority that pertains to non-partnership agreements and oral agreements, neither of which is relevant to the issues herein.

according to the plaintiffs therein, the particular defendants in question in that case must have been "partners" because they had informally referred to each other as such. *Toretto*, 2022 WL 348412 at *2. Given the existence of, *inter alia*, the written Partnership Agreement, K-1s to Epstein, Partnership Formation Documents listing Epstein as a general partner, the Isaac Affidavit confirming that the parties intended to form a partnership, the Bailey Affidavit confirming that Epstein was an equity partner, Cantor's Sworn Admissions, the name of the law firm ("Cantor & Epstein, LLP"), the website, the billing of clients, and countless other exhibits and evidence, there is no doubt -- none -- that the instant case is not based merely upon Cantor and Epstein referring to each other as partners.

More importantly, the Court in *Toretto* hastened to point out that:

> Although the [Second Amended Complaint] alleges that [Defendants] are legal partners, the SAC does not allege that the partnership results from any express contract, let alone the specific agreement filed by Defendants.

Toretto, 2022 WL 348412, at *5. Thus, *yet again*, defendants' counsel is asking this Court to rely upon case law pertaining to alleged *oral* agreements, not written partnership agreements.[6]

Meanwhile, counsel for the non-Cantor defendants essentially double down on their "misinterpretation" of the law, completely mis-citing *Grand Pacific Finance Corp. v. 97-111 Hale, LLC*, 123 A.D.3d 764, 767 (2d Dep't. 2014), which involved a plaintiff seeking to establish the

[6]That *Toretto* was based upon an analysis focusing on an alleged *oral* agreement explains why the Court, in rendering its decision therein, cited *Ardis Health, LLC v. Nankivell*, 2012 WL 5290326, at *2 (S.D.N.Y. Oct. 23, 2012); in *Ardis*, the plaintiff also relied upon "an oral partnership agreement" (*id*.). And notably, the Court in *Ardis* then cited other cases which also involved alleged oral agreements. *See e.g., Latture v. Smith*, 1 A.D.3d 408, 766 N.Y.S.2d 906, 906–07 (2d Dep't. 2003) (cited by *Ardis* as "finding that plaintiff failed to set forth a legally cognizable cause of action based on an *oral* partnership agreement when he 'failed to plead a mutual promise or undertaking to share the burden of the losses of the alleged enterprise, an indispensable element of a partnership or joint venture'"); and *Poon v. Roomorama*, LLC, 2009 WL 3762115, at *4 (S.D.N.Y. Nov. 10, 2009) (in which the court therein observed that the "Plaintiff does not allege that Defendants entered into a written contract").

existence of a partnership based upon *operating agreements*, which, as the Court is aware, are executed to create *limited liability companies*, *not partnerships*. Consequently, the Court ruled therein that "the written operating agreements submitted in support of the motions demonstrated an intent to form a limited liability company, not a partnership." *Id*. In short, *Grand Pacific* is no different from the decision in *M.I.F.*, which as shown *supra*, is also completely inapposite.[7]

It is indeed remarkable that defendants' counsel seeks to rely upon the above-referenced mishmash of inapplicable case law, involving class actions, disputes over operating agreements, insurance coverage issues and the like, without even addressing the decisions in which the courts ruled that: (i) parties are permitted to chart their own course in creating partnership agreements, which must be enforced as written; (ii) such partnership agreements may include any allocation of profits and losses that the parties so choose; and (iii) *only* in the absence of a written and executed partnership agreement will the courts attempt to divine the parties' intent through analysis of the Partnership Factors. *See e.g., Delidimitropoulos,* 186 A.D.3d at 1490 (2d Dep't.); *Zohar,* 185 A.D.3d at 991 (2d Dep't.); *Wiener,* 164 A.D.3d at 1163; *Cole,* 99 A.D.3d at 595; *Czernicki*, 74 A.D.3d at 1124 (2d Dep't.); *Brodsky*, 138 A.D.2d at 663 (2d Dep't.); *Rosen,* 258 A.D.2d at 333; *Joachim,* 3 Misc. 3d 371, 378–79; *Capizzi,* 194 A.D.3d at 1458; *Picard,* 2022 WL 1125643, at *29 (citation omitted). Each of the foregoing cases is directly on point, and three, having been decided

[7]The non-Cantor Defendants also cite *Shine & Co., LLP v Natoli*, 89 A.D.3d 523 (1st Dep't. 2011) for the same proposition. However, there was no partnership agreement between the parties in *Shine*; and, in any event, the plaintiff therein was informed prior to his entry into the accounting practice in question that he would always receive a 1099 (*i.e.*, he would be treated as an independent contractor) instead of a K-1, which the Court regarded as critical to divining the parties' intent. *Id*. at 523. Here, Epstein entered into a Partnership Agreement; the Partnership filed Partnership Tax Returns and was registered with the New York Secretary of State as a limited liability partnership, with Epstein identified as a general partner thereof; and Epstein always received K-1s. Thus, *Shine* does not apply either (and if it does, it supports Epstein).

by the Second Department, constitute controlling authority.[8]

* * * * * * * *

In summary, as the Court in its Reargument Decision implicitly held, *Steinbeck* and its line of cases have absolutely no bearing on this case. Rather, this case is controlled by *Lanier*, *Congel*, and similar cases holding that, when partners enter into a written partnership agreement, that agreement controls and establishes the existence of the partnership without consideration of traditional *indicia* of partnership such as the sharing of profits and losses. Accordingly, because Epstein and Cantor entered into a written Partnership Agreement by which they intended to create a Partnership between them, the Court was correct in its Reargument Decision that controlling case law requires the reinstatement of the Dismissed Claims against defendants.

POINT II

CANTOR'S SWORN ADMISSIONS AND THE BAILEY AFFIDAVIT, COUPLED WITH THE OTHER OVERWHELMING EVIDENCE OF THE PARTIES' INTENTION TO CREATE A PARTNERSHIP, CONFIRM THAT THE COURT'S INTERPRETATION OF THE CASE LAW IN THE REARGUMENT DECISION IS CORRECT AND FULLY CONSISTENT WITH THE FACTS IN THE RECORD

As demonstrated in Plaintiff's Motion to Renew, Cantor, after the Dismissal Decision, made three Sworn Admissions which are utterly fatal to his position in this case that the parties were supposedly never partners. In particular, Cantor swore under oath that:

- "CEM was a partnership" (Cantor's Dep. EBT Tr. 292, Ex. 5, PDF p. 67 Dkt. 173);
- Epstein was, in fact, his "partner" (*id*. EBT Tr. 291, PDF p. 66)
- he and Epstein had once received an offer of $1.75 Million (from Mazzola and

[8]Defendants' attorneys assert that *Congel* and *Lanier* are inapplicable because, in those cases, the Court presupposed that the parties were sharing profits and losses. Such an interpretation would be compelling had the Court actually rendered such a ruling in either case; it didn't. Defense counsel, evidently desperate to avoid discovery herein, are attempting to insert language and rulings into Court of Appeals decisions that just aren't there.

then-CEM colleague and now "partner" of Boyd, Gary Ehrlich) to purchase "the *full equity* of [CEM] in return for payments to [Cantor] *and Epstein*," but that "*Epstein* rejected this offer," thereby reflecting Cantor's acknowledgment that Epstein had an equity interest to sell and the power to prevent a sale of the Partnership (*id*. EBT Tr. 107, PDF p. 50); and most importantly,

- had the proposed sale of the Partnership Equity been consummated, Epstein would have been entitled to half of the proceeds (*id*.).

(collectively, Cantor's Sworn Admissions, previously defined)

Cantor's Sworn Admissions: (i) flatly contradicted his prior affidavit submitted in support of his motion to dismiss, in which he falsely swore under oath to this Court that "CEM was never a partnership" and that "Epstein and [Cantor] were never partners" (Cantor Aff. ¶3, Dkt. 24); and (ii) completely controverted this Court's findings (evidently based upon Cantor's denial of a partnership relation) in the Dismissal Decision.

As reflected in Epstein's Motion to Renew and Reargue, Cantor's Sworn Admissions that Epstein *was, in fact, a partner* are binding and conclusive evidence that Epstein was a partner as a matter of law. *See, e.g.*, *Foley v. Kaplan*, 162 A.D.2d 155, 156 (1st Dep't. 1990). Moreover, in his Affidavit, non-party, former CEM partner Bailey confirmed that "[t]here is no doubt – none – that Epstein was a partner of [CEM]" (Bailey Aff. ¶¶5-7, NYSCEF Doc. No. 174). And it bears emphasis that Brian Isaac, the lawyer who was hired by both Cantor and Epstein to draft the Partnership Agreement, confirmed that it was the parties' intention to create a partnership between them -- an intention which Mr. Isaac incorporated into the Partnership Agreement (Dkt. 56).

Cantor's Sworn Admissions and the Bailey and Isaac Affidavits leave no doubt that Epstein *was* a partner of CEM and, accordingly, that reinstatement of the Dismissed Claims upon reargument (based upon the law), fully aligns with the (now) uncontested facts in the record that Cantor and Epstein were partners.

Furthermore, Cantor's Sworn Admissions and the Bailey and Isaac Affidavits are further

reinforced and corroborated by the following other *overwhelming* corroborative evidence in the record that Cantor and Epstein were both partners of CEM:

- Cantor signed and filed the Partnership Formation Documents with the New York State Secretary of State, identifying his relationship with Epstein as a "partnership" and the name of the Partnership as "Cantor & *Epstein* LLP" (Dkt. 70);
- the Partnership Formation Documents state that CEM was formed as a partnership pursuant to §121-1500(a) of the Partnership Law – a provision under which limited liability partnerships are created *without any limited partners*, meaning that, as a matter of law, Epstein was a general partner of CEM (*id.*);
- the parties entered into a Partnership Agreement that identified Epstein as a partner and the relationship as a partnership nearly 130 times (Dkt. 116);
- the Partnership Agreement recites that Epstein contributed virtually the entirety of the Partnership's good will in the form of a client base (*id*. ¶5.2);
- in the Partnership Agreement, Epstein is vested with final authority on the staffing of cases for his clients (*id*. ¶7.5), which generated over 90% of CEM's revenue (Dkt. 85);
- CEM issued Form K-1s to Epstein every year for 20 years on which Epstein always was consistently identified to the federal and state governments as a "general partner" of CEM (Dkt. 173, Ex. 8);
- Epstein personally guaranteed CEM's Lease and as such, assumed the obligation for CEM's losses and debt (Dkt. 173, PDF p. 170); and
- Epstein was always identified on the CEM website as a "Partner" of CEM (Dkt. 63), precisely the same way Cantor was identified on the CEM website.

(collectively, the "Other Evidence of Partnership").

* * * * * * * *

Cantor's Sworn Admissions, the Bailey and Isaac Affidavits, and the Other Evidence of Partnership confirm that the Court's ruling in the Reargument Decision is spot on – that the parties were certainly partners and CEM was unquestionably a partnership. As such, the Dismissed Claims against defendants should be promptly reinstated; and the parties should be directed to proceed with discovery forthwith, insofar as defendants, having obtained dismissal under CPLR 3211, never

submitted to document production, deposition or any other disclosure herein.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth here, Epstein is entitled to an Order granting renewal and/or reargument, and reinstating the Dismissed Claims against defendants.

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Respectfully submitted,

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