SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2208-20

JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC, Plaintiffs/Respondents, v. GREENBERG FARROW ARCHITECTURAL INCORORPORATED, ESMAIL GHADRDAN and KEITH JOHNSTON, Defendants/Appellants.	**Civil Action** **ON APPEAL FROM THE MONMOUTH COUNTY SUPERIOR COURT** **DOCKET NO. MON-1021-17** **SAT BELOW: HONORABLE OWEN C. McCARTHY, J.S.C.**

BRIEF ON BEHALF OF DEFENDANT/APPELLANT GREENBERG FARROW ARCHITECTURE INCORPORATED

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PRELIMINARY STATEMENT

As a result of the final judgment in this dispute between plaintiff Jaclyn Flor ("*Flor*") and defendant Greenberg Farrow Architecture Inc. ("*Greenberg Farrow*") concerning, in part, whether the parties entered into a valid and enforceable partnership agreement with regard to their interests in plaintiff ENGenuity Infrastructure, LLC ("*ENGenuity*"), Flor has obtained a windfall and Greenberg Farrow has suffered a total forfeiture.

In her lawsuit, Flor, a civil engineer, claimed that she and Greenberg Farrow, a national architecture firm based in Atlanta, Georgia, had entered into a binding partnership agreement whereby Greenberg Farrow agreed to pay 100% of the "operating expenses" of ENGenuity for its first two years in exchange for a 49% membership interest. Greenberg Farrow maintained that it did not enter into a binding contract, as it expressed its intent to be bound only by a subsequent formal agreement, which, despite the parties' negotiations over several months, never came to fruition. Greenberg Farrow further maintained that by its clear terms, the single sentence relied upon by Flor in the one-and-a-half-page offer letter did not impose any two-year "operating expense" payment obligation upon Greenberg Farrow.

Following a jury trial in October 2019, the jury returned a verdict in which it found that the parties had entered into a valid and enforceable contract, and awarded Plaintiffs $904,000 in

damages – which consisted of unpaid salary of $305,000[1] and the compelled payment of the "operating expenses" of $599,000. The trial court denied Defendants' motion for judgment notwithstanding the verdict, finding that there was substantial credible evidence presented to the jury to enable the jury to conclude that the parties entered into a binding partnership contract.

The trial court's refusal to enter summary judgment in favor of Greenberg Farrow or to enter judgment notwithstanding the verdict was in error, as Greenberg Farrow made clear that it intended to be bound only through the formal partnership documents. The parties never reached a meeting of the minds on all essential terms of their relationship as partners in ENGenuity; for this reason, the parties negotiated, unsuccessfully, a comprehensive letter of intent over the course of several months. Moreover, the single sentence relied upon by Plaintiffs in the one-and-a-half-page offer letter did not state that Greenberg Farrow was required to pay 100% of the "operating expenses" of ENGenuity for any specified time period, much less two years.

More egregiously, the trial court found that despite the jury's finding that Greenberg Farrow was essentially required to specifically perform under the partnership agreement through the

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[1] In this appeal, Defendants are not challenging the jury's finding of an enforceable ***employment*** agreement or the award of damages in the amount of $305,000, but are challenging the jury's finding of an enforceable ***partnership*** agreement and resulting damages.

payment of 100% of the "operating expenses" of ENGenuity in the amount of $599,000, the trial court found that Greenberg Farrow was not entitled to anything in return. The trial court erroneously concluded that (a) Flor was not required to mutually perform under the partnership agreement through the delivery of 49% of the membership interests of ENGenuity to Greenberg Farrow, and (b) Greenberg Farrow had "voluntarily abandoned" its interest in any event.

As a result, Flor has obtained a windfall: she keeps 100% of the membership interests of ENGenuity without having to pay anything. Conversely, Greenberg Farrow has suffered a forfeiture: it is forced to pay 100% of the expenses of the company, but does not receive the bargained-for 49% membership interest in return. It is well settled in New Jersey that "*equity abhors a forfeiture.*" Yet the trial court condoned such forfeiture in this case through its erroneous, and logically inconsistent, conclusion that Greenberg Farrow had walked away from its 49% membership interest despite maintaining that it never had a partnership agreement in the first place. This appellate court should reverse the trial court's decision to remedy this miscarriage of justice.

STATEMENT OF FACTS

In August 2015, Greenberg Farrow identified Flor as a potential candidate to serve as a civil engineering project manager. 6T59-14 to 6T60-10.[2] Greenberg Farrow learned that Flor's background as a civil engineer was in municipal engineering, and determined that there might be an opportunity for Flor to start her own public sector division within Greenberg Farrow. 6T60-4 to 6T61-17. For the first 25 to 30 years of its existence, Greenberg Farrow had only one client, Home Depot, and following the economic downturn which began in 2007, Greenberg Farrow determined to diversify its firm and the services it provided. 6T64-18 to 6T65-21. Flor indicated that she was interested in pursuing discussions regarding the potential opportunity. 6T62-1 to 6T62-12.

Flor met with Mr. Nourzad and Mr. Ghadrdan, two principals of Greenberg Farrow, at Greenberg Farrow's office in Red Bank, New Jersey, in March 2016 to discuss a potential relationship. 6T61-11 to 6T61-25. Flor then traveled to Atlanta to meet with the managing principals of Greenberg Farrow on May 2, 2016. 3T69-13 to 3T69-25.

During this meeting, Greenberg Farrow presented two options to Flor: (1) join Greenberg Farrow as an employee and start a

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[2] Defendants shall cite to the trial transcripts as follows: "*1T*" – October 7, 20219; "*2T*" – October 8, 2019; "*3T*" – October 9, 2019; "*4T*" – October 10, 2019; "*5T*" – October 15, 2019; "*6T*" – October 16, 2019; and "*7T*" – October 17, 2019.

division within Greenberg Farrow that would focus on public-sector work; or (2) start a company in which Flor would be the 51% managing member and Greenberg Farrow would be a 49% minority member. 3T70-1 to 3T70-18. Flor informed Johnston that she was interested in hearing more about "option two." 3T71-20 to 3T71-23. According to Flor, Johnston told her that "he'd put together some terms and he'd send them over" to her. 3T71-23 to 3T71-24.

On June 3, 2016, Johnston emailed Flor, with the subject "Preliminary Offer / Agreement Parameters," Greenberg Farrow's "preliminary offer letter." Da122. The "preliminary offer letter" "outline[d] the following basic parameters" of the parties' anticipated business relationship. Ibid. The "preliminary offer letter" further provided that "[i]t is acknowledged by both parties that this is a preliminary agreement and a final, formal partnership and/or operating agreement as outlined above will also commence upon acceptance." Da123.

A. Upon receipt of the offer, Flor engaged counsel to review the letter. 3T81-5 to 3T81-13. By email dated June 6, 2016 from Flor to Johnston, Flor provided a redlined version of the letter with her proposed changes. Da1035.

Thereafter, on June 8, 2016, Johnston emailed a revised version of the June 3, 2016 letter (hereinafter referred to as the "*Letter*"). Da102. In the transmittal email, Johnson stated, "As discussed ***we are viewing this as phase one to commence the process of negotiating binding agreements***. Understanding the sensitivity

of 'taking the leap of faith' we wanted to make the ***employment offer*** as reasonable as possible at this point." Ibid. (emphasis added). Johnston testified that he "was trying to separate the offer letter to the person from the future business entity and how it would be set up and negotiated between [the] parties." 6T76-22 to 6T77-3. Johnston considered the Letter to be "an employment offer" to Flor. 6T77-1 to 6T77-9.

The Letter provided, in its entirety:

> Dear Ms. Flor:
>
> We are very pleased to present the following opportunity to you on behalf of Greenberg Farrow (GF). As discussed, we are prepared to offer you a majority owner partnership in a newly formed professional service Limited Liability Corporation (LLC), name to be determined, that from formation will be certified as a Woman Business Enterprise (WBE, LLC) The purpose of this letter is to formally offer this opportunity to you and ***outline the following basic principles of employment for WBE, LLC with the understanding that certain, additional transactional documents will be executed by and between the parties under separate cover that address the items below***:
>
> 1. You shall be the Principal in the WBE, LLC and at the time of formation own 51% of all membership units issued and outstanding with all voting rights attendant thereto and GF will be a Principal and own 49% of all membership units issued and outstanding with all voting rights attendant thereto.
> 2. You shall receive an annual salary, less withholdings and applicable taxes annualized at $175,000 for a term of two (2) years starting within the earlier of thirty (30) days after acceptance of this offer of employment or July 11, 2016. The salary is guaranteed and unconditional and irrevocable obligation of GF to pay you.[3]

[3] As stated throughout, Defendants are not appealing from the entry of judgment premised on the jury's finding of a valid and enforceable contract of employment.

3. You shall receive a monthly car allowance of $350.00, for a guaranteed term of two (2) years starting within the earlier of thirty (30) days after acceptance of this offer of employment or July 11, 2016.
4. You shall receive four (4) weeks of paid vacation per annum.
5. Upon commencement of employment, GF shall pay you a signing bonus of $5000.00.

In general, and subject to the above, your benefit package will align with current GF benefits as contained in the attached summary. We ask that you understand there may be some necessary "tweaking" to the stated GF benefits ***as the specific partnership documents contemplated herein are prepared and executed.***

GF further acknowledges and agrees to provide the following services and support for the WBE, LLC:

1. GF shall, subject to your approval and consultation, engage New Jersey Legal counsel and/or other professionals to form the WBE, LLC so that it is certified under all applicable state and federal laws, rules, and regulations and secure a domain name and d/b/a at GF's sole expense. Such engagement shall occur within 10 days of your acceptance of this offer.
2. ***GF shall provide initial business unit support to the WBE, LLC, including but not limited to human resource management, payroll, accounting, IT and marketing and all related business administration matters that GF otherwise provides for its employees.***
3. GF shall provide initial professional office space (location to be determined) with associated technical equipment and software necessary for the WBE, LLC to operate as a professional consulting firm.
4. GF shall initially provide the necessary professional liability insurance in accordance with local, state, and federal laws and any RFQs or RFPs that the WBE, LLC and/or GF pursue.

Finally, it is important to note that under no circumstances shall you recruit employees of your current employer nor solicit work from your current employer's clientele that may be in violation of any non-compete agreement by which you are currently bound.

> We are very excited about the prospects of what we feel will be a long-term, prosperous relationship. Upon your acceptance of this offer of employment by signature below, GF shall engage local counsel to commence the initial stages of the WBE, LLC formation. GF assumes an outside employment commencement date of July 11, 2016. We are flexible to move the start date as soon as possible at your discretion. ***It is acknowledged by both parties that this offer of employment will be supplemented by the operative documents contemplated to achieve the obligations of GF and WBE, LLC for the successful partnership***. [Da1022-1023].

Importantly, the only reference in the Letter to a two-year obligation was in connection with the payment of two years' salary to Flor. The Letter did not state that Greenberg Farrow agreed or was obligated to pay the "operational expenses" of ENGenuity for two years or for any other specified period of time. In fact, the words "operating expenses" do not appear at all in the Letter. Nor did the Letter specify the precise amount of any capital contributions to be made by the members of ENGenuity, or the precise amount of the "initial business unit support" that Greenberg Farrow would pay, or otherwise reference any specific amount of money to be paid by Greenberg Farrow other than Flor's salary.

Flor signed the Letter on June 10, 2016. Da633-634.

Thereafter, Greenberg Farrow retained counsel to undertake the process of creating the Women Business Enterprise ("*WBE*") and memorializing the relationship between the parties in the corporate entity. 6T85-4 to 6T85-11.

On July 27, 2016, Johnston emailed a Letter of Intent ("*LOI*") to Flor. Da635. The LOI stated:

> In furtherance on my letter to you dated June 3, 2016, this letter sets forth the proposed terms upon which you and Greenberg Farrow will jointly form a new LLC (the "LLC"). The purpose of this letter is to confirm each of our intent so that formal agreements can be prepared. This letter is not intended to be binding upon either of us. [Da636].

Significantly, the LOI focused exclusively on the terms of the parties' relationship in connection with their rights, obligations and interests in the LLC. Da636-639. The LOI provided that the parties and the LLC would enter into an operating agreement detailing the governing terms of the LLC, and described the actions which would require unanimous consent of the members, the circumstances upon which the members could sell their interests in the LLC, the inclusion of a non-solicitation clause, capital contribution requirements, and allocation of net losses and gains. None of the information contained in the LOI was contained in the Letter. Ibid.

Despite claiming that the one-and-a-half-page Letter constituted a binding and enforceable contract with respect to the parties' interests, rights and obligations as members of ENGenuity, Plaintiffs did not assert that the LOI was unnecessary or inappropriate. Instead, after receiving a Microsoft Word version of the LOI on August 4, 2016 (Da1042), Flor sent Greenberg

Farrow her redlined proposed changes to the LOI on August 29, 2016. Da895.

The next day, August 30, 2016, Flor's attorney sent another email to Greenberg Farrow which attached Flor's additional proposed revisions to the LOI. Da1049.

Flor and her attorney met with Greenberg Farrow and its attorney on September 8, 2016, to discuss the 22 items listed in the LOI plus the operating agreement, the management agreement and the grid note that Greenberg Farrow had informed Flor was necessary to form the partnership. 3T14-9 to 3T15-11. At no point during this meeting did Flor or her attorney assert that there was no need to enter into an additional agreement because the Letter constituted a binding and enforceable partnership agreement.

At around this time, it became clear to Greenberg Farrow that the parties were not agreeable on certain key material terms of a potential partnership agreement. Throughout these discussions, Flor demanded that Greenberg Farrow set aside a significant amount of cash, totaling $2 million, for the future expenses of the entity, which Greenberg Farrow did not, and could not, agree to, as an employee-owned business. 6T116-17 to 6T117-4. In addition, Greenberg Farrow would not agree to Flor's demand that she be able to use her own third-party vendors for IT and marketing instead of utilizing Greenberg Farrow's vendors and in-house personnel, and that she be permitted to not utilize Greenberg Farrow's engineers

on projects. 6T117-5 to 6T118-4. Flor also refused to be personally responsible for any capital investment into the entity in order to satisfy the WBE requirements, despite the fact that Greenberg Farrow had offered to loan money to Flor to invest in the company. 6T118-13 to 6T119-22. Flor refused to put any "skin in the game," a decision that would be fatal to any attempt to procure WBE certification.

In light of these fundamental disagreements, on September 9, 2016, Johnston emailed Flor and stated:

> After careful consideration and discussion amongst senior management at Greenberg Farrow, it has been decided to not pursue a minority partnership with the potential WBE entity at this time. The recent negotiations have taken the parties far apart from the original spirit and intent of the partnership. While we feel we have made every effort to put forth a very generous offer and diligently pursue the intent of the partnership, the potential increased risk associated with your counter offer concepts are not prudent pursuits for Greenberg Farrow. You guaranteed salary offer as an employee of Greenberg Farrow is still valid. [Da910].

Nonetheless, throughout September 2016, Flor continued to have discussions with Johnston and Greenberg Farrow regarding the organization of the LLC and the parties' respective rights and obligations. 6T13-19 to 6T14-7. Flor continued to exchange emails with Greenberg Farrow regarding the agreements throughout the month of September 2016. 6T15-21 to 6T15-24; Da1058. Once again, at no point during these discussions did Flor or her attorney state that they would not continue to negotiate because they already had

a binding contract with regard to their interests, rights and obligations in the corporate entity. 6T107-9 to 6T107-15.

On the contrary, while the negotiations continued, Flor expressed her understanding to third parties that the parties' relationship in the corporate entity had not yet been agreed to or formalized and was still the subject of ongoing negotiation. On September 16, 2016, Flor emailed Wells Fargo and stated, in part:

> It was a pleasure speaking with you as well. Attached please find my business plan for 2016-2019. Currently I have investors, however, my investors are asking for 49% equity, plus an administrative fee for back office services, plus unanimous votes for a series of items in the draft operating agreement. Therefore, I am weighing all options and am considering a loan for $500k to do this on my own. The business plan reflects my agreed upon salary with my investors and their administrative fee (fee still being negotiated). If I did this on my own the administrative fee would go away, and my salary would be reduced until we turned a profit. [Da1024].

Ultimately, it became clear to Greenberg Farrow that it would not be able to reach an agreement with Flor. Greenberg Farrow informed Flor on October 3, 2016, that it would not continue with the relationship. 3T225-7 to 3T225-12.

Thereafter, Flor opted to proceed with the business of ENGenuity on her own. 6T32-16 to 6T32-19. At no point did Greenberg Farrow obtain any membership interest in ENGenuity; as such, at no point did Greenberg Farrow assert that it was "abandoning" its non-existent interest in the company.

PROCEDURAL HISTORY

I. Plaintiff's Complaint

On March 13, 2017, Plaintiffs filed their initial complaint in this matter, and on February 13, 2018, Plaintiffs filed an Amended Complaint. Da45.

In the Amended Complaint, Plaintiffs asserted that their action was "for the recovery of monetary damages arising out of Greenberg Farrow's failure and refusal to pay certain contractual debts owed to Jaclyn Flor – obligations that were negotiated for and memorialized in a written contract between Ms. Flor and Greenberg Farrow." Da45. The Amended Complaint contained eight causes of action, including: (1) Breach of Contract against Greenberg Farrow; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing against Greenberg Farrow; (3) Fraudulent Inducement against Ghadrdan and Johnston; (4) Civil Conspiracy against Ghadrdan and Johnston; (5) Estoppel against Greenberg Farrow; (6) Declaratory Judgment of Violation of N.J.S.A. 42:2C-47(b)(3) against Greenberg Farrow; (7) Unjust Enrichment against Greenberg Farrow; (8) Unfair Competition against Greenberg Farrow. Da63-80.

In the Sixth Cause of Action, entitled "Declaratory Judgment for Violation of N.J.S.A. 42:2C-47(b)(3)," Plaintiffs alleged that Greenberg Farrow, by failing and refusing to honor the Agreement, "willfully violated sections 42:2C-46(e) of the New Jersey Revised

Uniform Limited Liability Company Act," and as a result, Plaintiffs demanded a judgment declaring that: "Ms. Flor is the sole lawful rightful owner of all membership interests and attendant voting rights in ENGenuity; Greenberg Farrow shall be immediately expelled as a member or putative member of ENGenuity Infrastructure, LLC, including as to all membership rights, privileges, benefits, and interests in ENGenuity; Greenberg Farrow shall be immediately required to transfer and deliver to Plaintiffs the ENGenuity Infrastructure, LLC name, trademark, website address, or tax identification; and that Defendants shall be required to cooperate with and execute all documents that Plaintiffs may require to achieve dissociation and divestiture of Greenberg Farrow's interest or putative interest in ENGenuity." Da71-72.

Defendants filed its answer to the Amended Complaint on February 22, 2018. Da81.

II. Defendant's Motion for Summary Judgment

Following the discovery period, on December 13, 2018, Plaintiffs filed a motion for summary judgment on a matter of law as to Count One of the Amended Complaint, as well as an order directing the bifurcation at trial as to liability and damages. Da101.

On January 18, 2019, Defendants filed a motion for summary judgment and the dismissal of all claims in the Amended Complaint. Da465.

By order dated April 4, 2019, the court denied Plaintiffs' motion for summary judgment in its entirety. Da624.

By order dated April 4, 2019, the court granted Defendants' motion for summary judgment in part, dismissing the Fourth Count for Civil Conspiracy and the Eighth Count for Unfair Competition. Da1.

The trial court issued a letter opinion dated April 4, 2019. Da3.

With regard to the First Count for breach of contract, the trial court found that "a genuine issue of material fact exists whether the parties intended to be bound by the Letter sufficient to render the same a valid contract." Da7.

With regard to the Sixth Count, the trial court incorrectly utilized the word "expel" rather than the word "dissociate" in describing the relief available under N.J.S.A. 42:2C-46(e). Da11-12. After describing the relevant statute and the conduct which triggers the entry of a judgment of dissociation, the trial court found that a factual dispute existed "because it is uncertain at this point whether Defendants engaged in any 'wrongful conduct,'" as the wrongfulness of any such conduct "hinges on whether Defendants were contractually obligated to perform in a certain

manner." Da11-12. The trial court also found that "there is a question of fact whether expulsion is warranted under subsection (e)(3) since neither party has satisfied the requirements of this subsection pursuant to IE Test..." Da12.

III. The Trial

Trial in this matter was held on October 7, 8, 9, 10, 15, 16 and 17, 2019, before Honorable Owen C. McCarthy, J.S.C. The jury was selected on October 7 and 8, and the parties made their opening statements on October 9. Thereafter, Plaintiffs began their case-in-chief, during which they called Flor, Johnston, Ghadrdan and Laura DiTommaso as witnesses on October 9, 10 and 15.

During her cross-examination, Flor testified that she was seeking to recover $599,000 on behalf of ENGenuity, which constituted the "operating expenses" of ENGenuity for 2016, 2017 and 2018, and $305,000 on behalf of herself individually, which constitutes the remaining salary due to her:

> Q. What are you seeking?
>
> A. I'm seeking this – the operating expenses for the initial two years, as well as the salary in the contract.
>
> Q. And so that's, based on your prior testimony, $305,000 –
>
> A. Yes.
>
> Q. -- as to you, under the contract, and $599,000 --
>
> A. Yes.

> Q. -- which is the actual money that ENGenuity had to self-fund after Greenberg Farrow terminated the relationship with that company; is that correct?
>
> A. That is correct. For the initial two years.

[5T34-11 to 5T34-24; see also 6T36-23 to 6T37-3 (Flor testified that she was suing Greenberg Farrow "to pay all the startup costs for this business, and to pay the remainder of [her] salary")].

Flor explained that she was seeking to recover $599,000 in "operating expenses" because the Letter required the payment of such expenses "for that initial two years" – despite the undeniable facts that (1) the Letter makes no mention of the payment of "operating expenses" and (2) the Letter does not provide for any two-year obligation or any other specified timeframe for Greenberg Farrow to provide "initial business unit support" to the WBE. 5T35-23 to 5T36-10; Da627.

During the testimony of Johnston and Ghadrdan, neither witness testified that Greenberg Farrow had elected to "abandon" or "forfeit" or otherwise give up any interest it may have had in ENGenuity for no consideration. Indeed, it was Greenberg Farrow's position, from the inception of the lawsuit throughout the trial, that it never entered into a binding partnership agreement with Plaintiffs, and therefore never possessed any interest in the company.

On October 15, 2019, Plaintiffs rested their case. 5T82-13 to 5T82-16.

Following Plaintiffs' case-in-chief, Ghadrdan and Johnston moved for the dismissal of the fraud claims again them in their individual capacity under Rule 4:37-2(b), which was granted. 5T84-24 to 5T118-5; 5T132-8 to 5T133-3.

Also on October 15, 2019, the trial court inquired as to how it would address Plaintiffs' claim for declaratory relief under the New Jersey Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 et seq. ("*RULLCA*"), and whether the question of the status of Greenberg Farrow's membership interest in ENGenuity was "more of a legal issue" rather than a question to be resolved by the jury. 5T119-2 to 5T120-18. In response, Defendants' counsel argued that "[i]f Greenberg Farrow is going to be forced to fund this business, its ownership interest should be restored," otherwise the outcome would be inequitable and result in a "[f]orfeiture windfall." 5T121-3 to 5T121-9; 5T127-8 to 5T127-14.

Yet the trial court inquired: "But don't the proofs warrant that as a matter of law, I can find that Defendant has ***abandoned*** the partnership?" – despite the fact that the applicable "law", namely the RULLCA, sets forth the circumstances in which a member may be "***dissociated***" from an LLC, an entirely separate and distinct concept from "***abandonment,***" and despite the fact that Greenberg

Farrow's entire theory was that it never had a partnership interest in the company in the first place. 5T135-11 to 5T135-15 (emphasis added). Demonstrating its misunderstanding of the applicable legal and equitable concepts at issue, the trial court stated:

> THE COURT: Well, the – a member shall be ***dissociated*** – if you read the – you know – New Jersey Revised Uniform Liability – Limited Liability Company Act – a member shall be ***dissociated*** by an application – by a company – – the person is ***expelled*** as a member by judicial order. Isn't that the application that is now here in front of me?
>
> ...
>
> I think – candidly, I think based upon the testimony of the Plaintiffs, as well as the principals of the Defendant, I don't see how I reach any conclusion other than the Defendants ***abandon*** -- or the Defendant, Greenberg Farrow, abandon their claim in the LLC. But I don't need to address this now. That issue is not going to go to the jury.
>
> [5T139-21 to 5T140-2; 5T143-7 to 5T143-13 (emphasis added)].

Defendants began their case-in-chief on October 16, 2019 ,and called Flor and Johnston as witnesses. Following the testimony of Johnston, Defendants rested their case. 6T163-19 to 6T163-21.

Thereafter, Defendants moved under Rule 4:40-1 for a directed verdict based on the evidence that had been presented. 6T198-4 to 6T202-21. In pertinent part, Defendants moved to dismiss Plaintiffs' claims seeking to recover the $599,000 in "operating expenses" as "damages." Defendants argued that with regard to Plaintiffs' request that Greenberg Farrow pay the "operating expenses" of ENGenuity as damages, Plaintiffs "want

Greenberg Farrow to perform under the contract. And at its core, that is a claim to compel Greenberg Farrow to specifically perform. That's an equitable remedy." 6T199-11 to 6T199-19. Defendants further argued:

> If the Court or the jury is going to say Greenberg Farrow, do what the contract said you should have done back in 2016; fund this business, there has to a bilateral exchange of consideration.
>
> And the agreement if it is an agreement, is one the one hand, Greenberg Farrow pays the operating expenses. And in exchange, they get a 49 percent interest.
>
> So if the jury or the Court is – finds Greenberg Farrow must pay the operating expenses, there must be that subsequent finding; Greenberg Farrow is a 49 percent member of this company for whatever those consequences may be.
>
> It is just like a real estate date where the chancery division typically finds I'm going to compel the buyer or seller to specifically perform. If it's the buyer, I – they're required to do what they say; Greenberg Farrow should – bring your money to closing. But the seller has to convey title. They don't get to keep the house and the money. So there's a bilateral performance of the consideration here that it's not really the true measure of damages.
>
> [6T201-1 to 6T201-18].

The trial court denied the application without explanation. 6T202-13 to 6T202-21.

Thereafter, the parties made their closing arguments.

On October 17, 2019, Judge McCarthy charged the jury, and following deliberations, the jury reached a verdict as follows:

THE COURT: Okay, so we have a valid verdict.

Question number one, "Have Plaintiffs proven by the preponderance of the credible evidence the existence of a valid and enforceable contract with Defendant Greenberg Farrow Architecture Inc.?"

How did the jury vote?

FOREPERSON: Yes.

THE COURT: And what was the jury's vote?

FOREPERSON: 6-0.

THE COURT: In light of that we proceeded to question number two. "Have Plaintiffs proven by the preponderance of the credible evidence that Plaintiffs complied with the terms of the contract with Defendant Greenberg Farrow Architecture Inc.?"

How did the jury vote?

FOREPERSON: Yes.

THE COURT: And the vote?

FOREPERSON: 6-0.

THE COURT: Question number three, "Have Plaintiffs proven by the preponderance of the credible evidence that Defendant Greenberg Farrow Architecture Inc. breached the contract with Plaintiffs?"

FOREPERSON: Yes.

THE COURT: And what was the vote?

FOREPERSON: 6-0.

THE COURT: We then move to question four, "What sum of money will fairly and adequately compensate Plaintiffs for losses they sustained, if any, as a proximate result of Defendant Greenberg Farrow Architecture Inc.'s breach of contract with the plaintiff?"

What dollar amount was awarded?

FOREPERSON: $904,000.

THE COURT: And what was the jury's vote?

FOREPERSON: 6-0.

THE COURT: Question number five, "Have Plaintiffs proven by a preponderance of the credible evidence that Defendant Greenberg Farrow Architecture breached the implied covenant of good faith and fair dealing?"

FOREPERSON: Yes.

THE COURT: And what was the vote?

FOREPERSON: 6-0.

THE COURT: Question number six, "What sum of money will fairly and adequately compensate Plaintiffs for losses they sustained, if any, as a proximate result of Defendant Greenberg Farrow Architecture Inc.'s breach of the implied covenant of good faith and fair dealing?"

FOREPERSON: $375,000.

THE COURT: And the vote?

FOREPERSON: 6-0.

[7T47-23 to 7T49-25].

The $904,000 awarded as damages for breach of contract comprised of the two separate components sought by Plaintiffs: $305,000 in unpaid salary to Flor, and $599,000 as the "operating expenses" of ENGenuity.

IV. **Post-Trial Motions**

On November 6, 2019, Defendants filed a motion for judgment notwithstanding the verdict under Rule 4:40-2 or, in the alternative, a motion for a new trial under Rule 4:49-1 or, in the alternative, a motion for remittitur. Da1062.

On January 17, 2020, Plaintiffs filed a cross-motion seeking an order "directing the expulsion and disassociation of [Greenberg

Farrow] from [ENGenuity] effective October 3, 2016, pursuant to Section 42 of RULLCA." Da1184.

The trial court granted Defendant's motion in part, setting aside only the jury verdict for breach of the implied covenant of good faith and fair dealing. Da15.

In its Statement of Reasons, the trial court concluded that "sufficient credible evidence was presented to the jury through the witnesses and exhibits allowing the jury to conclude a valid and enforceable ***employment*** contract was reached between the parties, which was breached by Greenberg Farrow resulting in damages to the Plaintiffs." Da21 (emphasis added). In rejecting Defendants' arguments that the Letter was merely an "agreement to agree" to be memorialized in later documents, the trial court found that "[t]he additional documents proposed by [the Letter] were intended to supplement the basic terms of ***employment*** set forth in the enumerated paragraphs of the agreement." Da24 (emphasis added).

Critically, while the trial court found that reasonable minds could conclude that a valid and enforceable ***employment*** contract existed between Greenberg Farrow-as-employer and Flor-as-employee, the trial court did not address whether a valid and enforceable ***partnership*** contract existed between Greenberg Farrow-as-member and Flor-as-member of ENGenuity.

The trial court also failed to address Defendants' argument that the damages in the amount of $599,000 awarded for breach of contract were unsupported under the law, and instead simply found that "the jury rejected this mitigation defense and all defenses offered by Greenberg Farrow." Da32. The trial court completely ignored Defendants' arguments that the compelled payment of $599,000 in "operating expenses" was not an appropriate remedy, which resulted in a windfall to Plaintiffs and a forfeiture to Greenberg Farrow in the absence of mutual performance by Plaintiffs through the delivery of a 49% membership interest to Greenberg Farrow.

The trial court also granted Plaintiffs' cross-motion in its entirety, and declared that "Greenberg Farrow is expelled and disassociated from ENGenuity not later than effective October 3, 2016, and without payment or other consideration for the underlying membership interests." Da17. In granting Plaintiffs' cross-motion, the trial court confused and conflated the separate concepts of "***expulsion***", "***dissociation***", "***abandonment***" and "***withdrawal***" of a membership interest of a limited liability company. Despite describing the circumstances upon which a member may be "dissociated" from an LLC under N.J.S.A. 42:2C-46(e), the trial court nonetheless concluded that Greenberg Farrow had "abandoned its minority interest" and "voluntarily dissociat[ed] from ENGenuity." Da36-37. Yet the trial court also

(inconsistently) found that Greenberg Farrow engaged in "pre-termination wrongful conduct warranting expulsion," despite the fact that "expulsion" is not a remedy addressed by N.J.S.A. 42:2C-46. Da38. In other words, the trial court concluded that Greenberg Farrow should be kicked out of the LLC, despite finding that Greenberg Farrow had given up its interest in the LLC. (This inconsistent finding is even more confusing by virtue of the fact that Greenberg Farrow made clear through its defense that it never had an interest in the company in the first place, so there was nothing to "expel" or "abandon.")

Importantly for purposes of this appeal, the trial court rejected Defendants' argument that the "expulsion" of Greenberg Farrow from ENGenuity without payment of any consideration for its 49% membership interest is contrary to New Jersey law. The trial court found that "termination in this case is predicated upon the voluntary withdrawal of the minority member," and as such, Greenberg Farrow is not entitled to any consideration. Da40. In a confusing and inherently conflicting rationale, the trial court stated that "Greenberg Farrow through its action and inaction has led to ***expulsion by withdrawing*** from the LLC within four months of formation." Da41 (emphasis added).

Thus, the trial court held that Greenberg Farrow was properly ordered to pay $599,000 as 100% of the operating expenses of ENGenuity, despite the undeniable facts that (1) the Letter makes

no mention of “operating expenses” and (2) the Letter does not provide for any two-year obligation or other specified time period for Greenberg Farrow to provide “initial business unit support,” but not receive any membership interest or payment in exchange for such membership interest in return. In other words, the trial court ordered Greenberg Farrow to forfeit its 49% membership interest.

V. Final Judgment

Following the parties’ arguments regarding the inclusion and amounts of prejudgment and post-judgment interest, the trial court entered an Amended Order of Judgment on March 22, 2021, entering judgment in favor of Plaintiffs as against Greenberg Farrow in the amount of $981,250.52, with post-judgment interest to accrue *per diem* at the applicable statutory interest rate until the judgment is paid. Da42.

VI. The Appeal

On April 12, 2021, Defendants filed a notice of appeal from the orders dated April 4, 2019 (denying Defendants’ motion for summary judgment), January 29, 2021 (denying Defendants’ motion for judgment notwithstanding verdict or new trial), and March 22, 2021 (final judgment). An amended notice of appeal was filed on April 15, 2021. Da1278.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PARTIES HAD ENTERED INTO A VALID AND ENFORCEABLE PARTNERSHIP AGREEMENT REGARDING THEIR MEMBERSHIP INTERESTS IN ENGENUITY LLC (Da1-2; Da6-7; Da15-16; Da21-27)

In this lawsuit, Plaintiffs alleged, and the jury ultimately agreed, that the one-and-a-half-page Letter created two separate contractual relationships: (1) an ***employment*** contract between Greenberg Farrow-as-employer and Flor-as-employee; and (2) a ***partnership*** contract between Greenberg Farrow-as-partner and Flor-as-partner in ENGenuity LLC. Plaintiffs claimed, and the jury agreed, that Greenberg Farrow had breached ***both*** contracts by: (1) failing to pay $305,000 to Flor as salary due under the employment contract; and (2) failing to pay $599,000 as 100% of the "operating expenses" incurred by ENGenuity for its first two years. The jury awarded a total of $904,000 in damages for "breach of contract."

In this appeal, Defendants do not challenge the jury's conclusion that Greenberg Farrow, as employer, and Flor, as employee, entered into a valid and enforceable ***employment*** agreement pursuant to which Greenberg Farrow agreed to pay Flor $175,000 in annual salary for a period of two years. Rather, Defendants are appealing solely from the trial court's denial of Defendants' motion for summary judgment and motion for judgment notwithstanding verdict on the grounds that the parties never

entered into a binding and enforceable ***partnership*** agreement. Under New Jersey law, based on the undisputed factual record, the parties did not enter into a binding and enforceable partnership contract that addressed their interests, rights and obligations as members of ENGenuity. At most, the parties had reached a non-binding "agreement to agree." The trial court erred in concluding that there was a question of fact that precluded the entry of summary judgment on this claim, and erred in concluding that there was sufficient credible evidence to support the jury's conclusion in this regard. Reversal is warranted.

A. Standard of Review

Under the applicable standards of review, this appellate court applies the summary judgment and JNOV motion standards *de novo* while granting all inferences from the credible factual record in favor of Plaintiffs.

A request for summary judgment, should be granted only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. Summary judgment must be denied if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a

rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. The Appellate Division reviews the denial of summary judgment de novo, using the same standard applied by the trial court. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995); Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003).

A motion for judgment notwithstanding verdict under Rule 4:40-2 is governed by the following evidential standard: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can be reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied..." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004). Where the trial court denies a defendant's motion for judgment notwithstanding the verdict and for a new trial, the appellate court "accepts as true all the evidence supporting [plaintiff] and accord him all legitimate inferences[,]" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441 (2005), bearing in mind that "the trial court's action[s] should not be disturbed unless it clearly and unequivocally appears there was a manifest denial of justice under the law[,]" Dolson v. Anastasia, 55 N.J. 2, 8 (1969) (quoting Hartpence v. Grouleff, 15 N.J. 545, 549 (1954)). The standard the appellate court applies to the review of issues of law, however, is different. Raspa v. Office of Sheriff of County of Gloucester,

191 N.J. 323, 334 (2007). On appeal, "matters of law are subject to a de novo review." Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002) (quoting Balsamides v. Protameen Chem., Inc., 160 N.J. 352, 372 (1999)). Specifically, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Applying these standards of review, this appellate court should conclude that there was no binding and enforceable contract that addressed the parties' interests, rights and obligations as partners of ENGenuity. As such, the appellate court should reverse the jury's verdict for breach of the ***partnership*** contract and the damage award of $599,000.

B. The Parties Did Not Enter Into a Binding and Enforceable Partnership Agreement Pursuant To Which Greenberg Farrow Was Contractually Obligated To Pay The "Operating Expenses" of ENGenuity for Two Years

Because Greenberg Farrow clearly expressed its intention to negotiate and be bound by a formal partnership agreement, and because the parties unsuccessfully negotiated the terms of such formal partnership agreement after the Letter, and because the Letter does not impose any clear and definite obligation upon Greenberg Farrow to pay the "operating expenses" of ENGenuity for any period of time, much less two years, the Letter does not

constitute a valid and enforceable partnership contract under New Jersey law.

i. Greenberg Farrow Expressed Its Intent to Be Bound Only By Subsequent Formal Partnership Agreement

"To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain damages." EnviroFinance Grp., LLC v. Envtl. Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015) (citing Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007)).

Regarding the first element of a breach of contract claim—-whether there was a valid contract—-it has long been the established law in New Jersey "that the essential element to the valid consummation of a contract is a meeting of the minds of the contracting parties and that until there is such a meeting of the minds either party may withdraw and end all negotiations." DeVries v. Evening Journal Ass'n, 9 N.J. 117, 119–20 (1952); see, e.g., Morton v. 4 Orchard Land Tr., 180 N.J. 118, 129–30 (2004) ("A written contract is formed when there is a 'meeting of the minds' between the parties evidenced by a written offer and an unconditional, written acceptance.") (quoting Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 538–39 (1953))).

"The phrase, meeting of the minds, can properly mean only the agreement reached by the parties as expressed, i.e., their manifested intention, not one secret or undisclosed, which may be wholly at variance with the former." Leitner v. Braen, 51 N.J. Super. 31, 38 (App. Div. 1958) (citing Van Name v. Fed. Deposit Ins. Corp., 130 N.J. Eq. 433, 447 (Ch. 1941))). In other words, when determining whether there was a meeting of the minds, the Court considers "the expressed intent of the parties" and "not . . . the subjective intent of the parties." Pagnani-Braga-Kimmel Urologic Assoc., P.A. v. Chappell, 407 N.J. Super. 21, 28 (Law Div. 2008) (citing Leitner, supra, 51 N.J. Super. at 38).

This long-established principle of law goes to the heart of every single contract in New Jersey and the process by which all parties contract. It is thus unsurprising that it has been similarly stated in numerous other ways, such as that "if the parties intend that their preliminary agreement be subject to the terms of the later contract, they are not bound by their preliminary agreement," Morales v. Santiago, 217 N.J. Super. 496, 502 (1987), or that "the law treats an 'agreement to agree' upon material terms at a future time as an unenforceable indefinite promise," Bressman v. J&J Specialized, LLC, 2013 WL 6331714, at *7 (N.J. Super. Ct. App. Div. Dec. 6, 2013) (quoting 1 *Williston on Contracts* § 4:29 (2007)). Ultimately, "[s]o long as negotiations are pending over matters relating to the contract, and which the

parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed." DeVries, supra, 9 N.J. at 120 (citing Tansey v. Suckoneck, 98 N.J. Eq. 669, 671 (E. & A. 1925)); see, e.g., Ins. Co. of State of Pa. v. Don Siegel Constr., Inc., 2006 WL 1667175, at *3 (N.J. Super. Ct. App. Div. June 19, 2006) (using this standard to find that the "discussions of [the parties] never ripened into an enforceable contract").

This case does not present a close situation where there is a question as to whether the Letter evidences an intent by the parties to be bound in a partnership agreement, as the parties made clear that they intended to be bound by a subsequent, formal partnership agreement.

First, in the email transmitting the Letter to Flor, Johnston, on behalf of Greenberg Farrow, made clear that Greenberg Farrow did not intend to be bound by the one-and-a-half-page Letter to create a binding partnership agreement, as he stated that the Letter was merely "***phase one to commence the process of negotiating binding agreements***." Da1021.

Second, the plain language of the Letter itself is consistent in this regard. In particular, the first paragraph of the Letter specifically provides that the purpose of the letter is to "outline the following basic principles of employment for WBE, LLC ***with the understanding that certain, additional transactional documents***

will be executed by and between the parties under separate cover that address the items below." Da633 (emphasis added). The Letter again made clear that there would be further modification to the proposed terms "***as the specific partnership documents contemplated herein are prepared and executed.***" Ibid. (emphasis added). The very last sentence of the Letter once again made clear Greenberg Farrow's intent to be bound only by subsequent agreements that would memorialize the terms of the parties' partnership in ENGenuity:

> It is acknowledged by both parties that this offer of employment will be supplemented by the operative documents contemplated to achieve the obligations of GF and WBE, LLC for the successful partnership. [Da634].

These provisions demonstrate that the intent of both parties, as unequivocally expressed in their writing, was that the Letter would only be a part of the negotiations outlining the current positions of the parties, but that the actual, binding contractual terms would be provided in future partnership agreements. This is a classic nonbinding "agreement to agree."

Third, the parties actually negotiated, albeit unsuccessfully, the terms of a substantive, detailed partnership agreement after the Letter. Specifically, the parties, through counsel, negotiated and modified the terms of the LOI, which included typical terms that are normally included in an operating agreement. Da636-639. At no time did Flor maintain that these

negotiations were unnecessary since the parties had already entered into a binding and enforceable partnership agreement. At no time did Flor maintain that these negotiations were merely to *amend* the parties' existing, binding partnership agreement. The parties' conduct in engaging counsel and negotiating and revising the LOI over a period of months further demonstrates that the parties did not intend to be bound in a formal partnership by the one-and-a-half-page Letter.

Fourth, the terms included in the LOI, which were to be included in formal partnership agreements, were different than the "terms" included in the Letter regarding the parties' partnership. Critically, the one-and-a-half-page Letter does not even reference any of the standard provisions that are typically included in an operating or partnership agreement, such as: (a) the relations between the members as members and between the members and the company; (b) the activities of the company and the conduct of those activities; (c) the amount of any capital contributions required to be made by the partners; (d) the manner in which the company will be managed, and the rights and obligations of those managers; or (e) the manner in which any net profits or losses will be allocated or distributed. On the other hand, the LOI included these standard provisions.

In denying Defendants' motion for summary judgment for the dismissal of Plaintiffs' breach of contract claim, the trial court

relied on the Appellate Division's decision in Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369 (App. Div. 1975), in finding that there may be a jury question as to whether the preliminary Letter "may constitute a valid contract based on a mutual intention to be bound." Da6. (Notably, the trial court did not distinguish the existence of a valid ***employment*** contract from a valid ***partnership*** contract, and simply treated the Letter as one single "contract" for purposes of its analysis.)

The trial court provided the following discussion regarding the Berg decision:

> [T]he Berg court held the letter, which outlined the essential terms of a contemplated formal commercial lease to follow, constituted a valid contract that the parties intended to be bound by. Intent was determined based upon the following factors: (1) both parties signed the letter; (2) no language in the letter indicated an intent to not be bound thereby; & (3) the terms of the letter covered all of, if not more than, the typical subject matter found in commercial leases, such that no additional terms would have been required in a subsequent formal lease.
>
> The Berg court contrasted the underlying facts against those in Trustees First Preservation Church v. Howard Company Jewelers, 22 N.J. Super. 494 (App. Div. 1952), where the Appellate Division found that the parties did not intend to be bound by their informal letter. The Berg court noted that the Trustees rationale was based primarily on the absence of intent to be bound and the following distinguishable factors: (1) the letter contained limiting language indicative of an intent to not be bound thereby; and (2) a subsequently prepared document differed in many respects from the letter.

Da6-7. The trial court then found that there was a jury question as to whether the terms of the Letter and the subsequent negotiations of the parties indicated an intent to be bound. Da7.

Yet the Letter is distinguishable from the document at issue in Berg in several dispositive respects.

First, unlike the document at issue in Berg, the Letter (along with its transmittal email) included express language demonstrating "an intent to not be bound thereby," including repeated statements that the parties would enter into future agreements and that the very terms Plaintiffs sought to impose on Defendants would be the subject of those future agreements.

Second, the terms of the Letter do not "cover[] all of, if not more than, the typical subject matter" of a typical operating or partnership agreement. As stated above, the one-and-a-half-page Letter does not even reference any of the standard provisions that are typically included in an operating or partnership agreement. The Letter was woefully insufficient to memorialize the parties' rights and obligations as partners in ENGenuity. The only reference to their relationship was the mere fact that Flor would own 51% of the membership interests and Greenberg Farrow would own 49%.

The trial court also found that the Berg court contrasted its facts from those of Trustees First Preservation Church v. Howard Company Jewelers, 22 N.J. Super. 494 (App. Div. 1952), where the

Appellate Division found that the parties did not intend to be bound by a proposal. Da7. The facts of Trustees are more analogous to this case than those of Berg.

In Trustees, a landlord and tenant had prepared a joint proposal for the prospective lease of real property. Id. at 496. The proposal described the term of the lease, the amount of rent, and the specified use of the premises. Ibid. The landlord accepted the proposal and arranged for its attorney to "prepare leases embodying the terms of the proposal." Id. at 497. Thereafter, the landlord transmitted a "proposed lease" to the tenant, which included significantly more terms than included in the proposal. Id. at 497-98. A dispute arose concerning the terms of the proposed lease, and the landlord maintained that a binding agreement existed between the parties. Id. at 498.

The Appellate Division stated that it was "inconceivable that either party intended a binding contract embracing only the terms contained in the proposal." Id. at 499. "The fair import of the language in the proposal that defendant was 'prepared to enter into lease' and to 'take a lease,' considered in light of the circumstances [of the significant amount of rent and lease term], is that defendant was ready to negotiate with respect to the other provisions which are customarily involved in the negotiations of important leaseholds." Ibid. Additionally, the Appellate Division found that the form of the lease prepared by plaintiff

contained provisions not included in the proposal, including terms "which a landlord might deem vital but as to which a tenant might either object completely or insist upon modification." Id. at 498-500. "We cannot so divorce ourselves from practical experience to assume that these provisions are routine, customary, or beyond the realm of differences of view in negotiations respecting important leaseholds." Id. at 500. As such, the Appellate Division concluded that "the parties had not, by virtue of the proposal, agreed upon all of the essential and mutual terms and further negotiations were contemplated by them. And in the circumstances of the case, we believe also that the parties did not intend in any event to be bound until a writing embodying all of the terms including those yet to be negotiated was executed by the parties." Id. at 502.

This case is much closer to Trustees than to Berg. Like the proposal in Trustees, the Letter was short, and did not include any of the terms that in "practical experience" are included in operating agreements. Moreover, like the parties in Trustees, the parties in this case began to negotiate a subsequent, formal partnership agreement *after* the execution of the Letter, evidencing their intent to be bound only by such formal document. Also, like the proposal in Trustees, and unlike the document in Berg, the Letter "contained limiting language indicative of an intent to not be bound thereby."

As the Letter provides on its face that it is only an agreement to agree on formal contractual terms in the future, and as the parties engaged in negotiations of a formal partnership agreement *after* the execution of the Letter, the Letter is not a contract as a matter of law.

ii. The Letter Does Not Contain Any Clear and Definite Term Imposing Any Obligation Upon Greenberg Farrow To Pay 100% of the "Operating Expenses" of ENGenuity for Two Years

Moreover, the Letter does not contain any clear and definite terms which set forth Greenberg Farrow's obligations as a partner of Flor and member of ENGenuity.

It is well-settled that "[t]he contract proved must be clear, definite, and certain, both as to its terms and its subject-matter." Cooper v. Carlisle, 17 N.J. Eq. 525, 530 (E. & A. 1866). A contract must be sufficiently definite so that the parties bound by its terms can perform their tasks with reasonable certainty. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992).

Here, the Letter does not say what Plaintiffs claimed and what the jury ultimately found – namely, that Greenberg Farrow was obligated to pay 100% of the "operating expenses" of ENGenuity for any specified period of time, much less two years. In fact, the words "operating expenses" do not appear in the Letter. Furthermore, the only reference to any two-year obligation on the

part of Greenberg Farrow is with regard to the payment of Flor's annual salary of $175,000:

> You shall receive an annual salary, less withholdings and applicable taxes annualized at $175,000 for a term of two (2) years starting within the earlier of thirty (30) days after acceptance of this offer of employment or July 11, 2016. The salary is guaranteed and unconditional and irrevocable obligation of GF to pay you. [Da633].

Plaintiffs relied upon a single sentence in the one-and-a-half-page Letter as the basis for its claim that Greenberg Farrow was obligated to pay ENGenuity "damages" in the amount of $599,000, as 100% of the "operating expenses" incurred by the company during its first two years:

> ***GF shall provide initial business unit support to the WBE, LLC, including but not limited to human resource management, payroll, accounting, IT and marketing and all related business administration matters that GF otherwise provides for its employees.*** [Da633 (emphasis added)].

It is frankly difficult to comprehend how this provision could be interpreted to impose an obligation upon Greenberg Farrow to pay 100% of ENGenuity's operating expenses for two years, much less constitute credible evidence to support the jury's verdict. This sentence requires Greenberg Farrow to "provide initial business unit support;" it does not require Greenberg Farrow to actually pay any money. For example, with regard to "marketing," Greenberg Farrow could utilize its own internal marketing department and personnel to provide "support" to Greenberg Farrow,

as opposed to pay any third-party vendor. Nor does this sentence require Greenberg Farrow to make any payments, or provide any "support," for any specified period of time. It certainly does not state that Greenberg Farrow must make any payments or provide any support for two years. The only reference to any time period is the word "initial." This vague reference can hardly constitute a "clear and definite" term which creates a binding and enforceable contract.

Simply stated, the Letter does not come anywhere close to stating what Plaintiffs alleged, and what the jury ultimately found. There is no obligation on the part of Greenberg Farrow to pay anything, let alone pay 100% of the operating expenses of ENGenuity for a period of two years.

POINT II

THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS TO SEEK TO RECOVER THE PAYMENT OF THE OPERATING EXPENSES OF ENGENUITY IN THE AMOUNT OF $599,000 AS COMPENSATORY DAMAGES WITHOUT BILATERAL PERFORMANCE BY PLAINTIFFS (Da15-16; Da30-32)

In the event the appellate court does not find that the trial court erred in finding that there was a question of fact or credible factual evidence as to whether the Letter constituted a binding and enforceable ***partnership agreement***, the appellate court should conclude that the trial court erred in allowing Plaintiffs to seek to recover the $599,000 in "operating expenses" of

ENGenuity for the putative breach of this agreement. The compelled payment of such "operating expenses" does not constitute an award of compensatory damages, but rather constitutes the remedy of specific performance, for which there must be mutual performance by ENGenuity through the delivery of 49% of the membership interests of the company. As a result of the judgment in this case, Flor has obtained a windfall and Greenberg Farrow has suffered a forfeiture: Flor gets 100% of the membership interests of the company while paying nothing, and Greenberg Farrow pays 100% of the operating expenses while receiving nothing. The judgment is untenable under New Jersey law.

A. The Payment of "Operating Expenses" Is Not An Appropriate Form of Compensatory Damages

The jury instructions provided for only one form of potential damages—-compensatory damages. 7T26-2 to 7T26-23. "Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." Pickett v. Lloyd's, 131 N.J. 457, 474 (1993) (citing Donovan v. Bachstadt, 91 N.J. 434, 444-45 (1982)). "Compensatory damages are designed to put the injured party in as good a position as he would have had if performance had been rendered as promised." Ibid. "Compensatory damages should be in an amount reasonably within the contemplation of the parties at the time the contract was formed and sufficient to put the injured party in *the same position* it

would have enjoyed if the breaching party had performed, *no better* position and no worse." New Jersey v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 617 (App. Div. 2006) (emphasis added).

As a result of the judgment, which includes an award of the $599,000 in "operating expenses" of ENGenuity, Plaintiffs are in a far better position now than they would have been if there was no purported breach by Greenberg Farrow. If the terms of the Letter—assuming *arguendo* it is a contract which required Greenberg Farrow to pay 100% of the "operating expenses" in exchange for a 49% membership interest of the company--were carried to their conclusion without a purported breach, Flor would not have been required to pay operating expenses, which would have been paid by Greenberg Farrow. However, and importantly, the trade-off for this is that Flor would own 51% of ENGenuity and Greenberg Farrow would own 49% of this entity. However, as a result of the judgment, Flor gets much more than she bargained for: she gets $599,000 ***and*** she gets to keep 100% of the membership interests of the company. In other words, Flor is in a far better position following the verdict than she would have been absent a purported breach of the "contract." This result is blatantly contrary to the law of compensatory damages in New Jersey. Cf. Krzastek v. Global Resource Indus. & Power, Inc., 2008 WL 4161662, at *18 (N.J. Super. Ct. App. Div. Sept. 11, 2008) (finding that the trial court erred in its award of damages by providing "dual awards [that] had the

effect of putting plaintiff in a better position than he otherwise would have enjoyed").

B. Compelling the Payment of "Operating Expenses" Is An Equitable Remedy of Specific Performance Which Requires Mutuality of Obligations

Plaintiffs had numerous options as to those types of remedies they could seek in this case. Plaintiffs could have pursued traditional forms of compensatory damages for lost profits or business opportunities. Plaintiffs could have similarly pursued damages relating to Flor's lost opportunities due to her use of personal savings to fund ENGenuity.

Plaintiffs chose none of those options. Instead, Plaintiffs requested that the jury force Greenberg Farrow to do what the "contract" purportedly required it to do: pay 100% of the operating costs of ENGenuity for a period of two years.[4] The damages in this case were thus not traditional compensatory damages, but damages resulting from the specific performance of the "contract." The trial court erred in refusing to grant judgment to Greenberg Farrow on Plaintiffs' claim for the payment of these operating expenses, or, in the alternative, in failing to grant a new trial.

i. An Award that Requires Greenberg Farrow to Pay 100% of the Operating Expenses of ENGenuity is a Specific-Performance Remedy

[4] As discussed in Point I(B)(ii), the Letter says nothing of the sort.

As an initial matter, it is important to clarify precisely the type of remedy that Plaintiffs sought in this case when they requested that the jury award them $599,000 relating to the operating expenses of ENGenuity for breach of the putative partnership agreement. "Judicial remedies upon breach of contract fall into three general categories: restitution, compensatory damages and performance." Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co., 191 N.J. 1, 12 (2007). "Compensatory damages put the innocent party into the position he or she would have achieved had the contract been completed." Id. at 12–13. "Performance makes the non-breaching party whole by requiring the breaching party to fulfill his or her obligation under the agreement." Id. at 13.

The question then becomes whether Plaintiffs' request for the payment of operating expenses in this case constitute compensatory damages, or a request for specific performance. It is important to note that a request for monies can be either. As stated by the Supreme Court of the United States, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" Bowen v. Massachusetts, 487 U.S. 879, 893 (1988). Indeed, "cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—

and an equitable action for specific relief—which may include an order providing . . . for the recovery of specific property *or monies*." Id. (citation omitted). The following discussion from Judge Bork aptly describes this intersection between monetary relief and specific performance:

> The term 'money damages' . . . normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' Id. Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. See, e.g., First National State Bank v. Commonwealth Federal Savings & Loan Association, 610 F.2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); Crouch v. Crouch, 566 F.2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to future installments); Joyce v. Davis, 539 F.2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).

Id. at 895 (quoting Md. Dep't of Human Resources v. Dep't of Health & Human Servs., 763 F.2d 1441, (D.C. Cir. 1985) (Bork, J.); see, e.g., Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 Ala. L. Rev. 119, 157 (2006) ("If the plaintiff has a contract with the defendant under which the defendant's original obligation is to pay the plaintiff money, the monetary remedy should be considered specific relief. The plaintiff gets the original thing to which it is entitled under the contract—the payment of money.").

In this case, Plaintiffs did not seek compensatory damages, such as monetary damages for harm they suffered in the form of lost profits. Instead, Plaintiffs requested that Greenberg Farrow do precisely what was purportedly provided in the "contract": pay 100% of the operating costs of ENGenuity. In other words, Plaintiffs sought to compel Greenberg Farrow to fulfill its contractual obligations. Plaintiffs therefore requested a judgment—-here, through a jury verdict-—compelling Greenberg Farrow to specifically perform its obligations under the "contract."

ii. Specific Performance is Improper in this Case

Because Plaintiffs had an adequate remedy at law, the equitable remedy of specific performance was inappropriate, and the appellate court should reverse the trial court's refusal to grant judgment to Greenberg Farrow on Plaintiffs' claim for the payment of 100% of the operating expenses as recoverable damages.

"[S]pecific performance is a discretionary remedy resting on equitable principles and requiring the court to appraise the respective conduct and situation of the parties." Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990). "The remedy of specific performance can be invoked to address a breach of an enforceable agreement when money damages are not adequate to protect the expectation interest of the injured party and an order requiring performance of the contract will not result

in inequity to the offending party, reward the recipient for unfair dealing or conflict with public policy." Houseman v. Dare, 405 N.J. Super. 538, 542 (2009). Specific performance is also "invokable" where "it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law." Fleischer v. James Drug Stores, 1 N.J. 138, 146-147 (1948).

In this case, specific performance is improper because Plaintiffs had an adequate remedy at law, such as by seeking lost profits damages or lost opportunities relating to Flor's expenditure of her personal savings. Further, those figures were certainly ascertainable. As Plaintiffs had an adequate remedy at law, specific performance was an improper remedy. See, e.g., Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 389 (1974) ("The principle underlying the specific performance remedy is equity's jurisdiction to grant relief where the damage remedy at law is inadequate."). The appellate court should therefore grant judgment to Greenberg Farrow on Plaintiffs' request for specific performance of the contract in the form of the payment of 100% of the operating expenses. Alternatively, the appellate court should order a new trial as the jury's verdict is both factually and legally incorrect because it does not reflect the nature of the specific performance relief sought by Plaintiffs in this action.

iii. <u>If the Appellate Court Allows the Judgment Requiring Payment of 100% of the Operating Expenses to Stand, It Must Declare that Greenberg Farrow is a 49% Member of ENGenuity</u>

If this court finds that the remedy of specific performance was appropriate in this case and permits any portion of the award relating to the compelled payment of operating expenses to stand, this court must award Greenberg Farrow its bargained-for benefit in exchange for the payment of those operating expenses—-specifically, a 49% ownership interest in ENGenuity.

Specific performance of bilateral contracts is not a one-way street. Indeed, "it is frequently said that a party seeking specific performance must show that he or she was ready, desirous, prompt and eager to perform as required by the contract on the date specific." <u>Marioni v. 94 Broadway, Inc.</u>, 374 <u>N.J. Super.</u> 588, 605 (2005). In other words, a "[p]laintiff cannot request specific performance on his terms only" and "he must be willing to accept the terms of the contract he wants specifically enforced." <u>Kacirek v. Clifford</u>, 2005 WL 3098929, at *3 (N.J. Super. Ct. Ch. Div. Nov. 18, 2005); <u>see</u>, <u>e.g.</u>, <u>In re Hoffman</u>, 63 <u>N.J.</u> 69, 81 (1973) ("[I]t is well established that one who has either broken a promise in some material respect or is unable substantially to perform his own obligations under an agreement cannot get a decree for specific performance."); <u>Stamato v. Agamie</u>, 24 <u>N.J.</u> 309, 316 (1957) ("[T]he general rule is that he who seeks performance of a

contract for the conveyance of land must show himself ready, desirous, prompt, and eager to perform the contract on his part." (collecting cases)); Fleischer, supra, 1 N.J. at 149 ("[T]he rule of mutuality of remedy is satisfied if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation."). Ultimately, "[w]hat equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff *or to defendant*." Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 155 (1990) (emphasis added) (quoting Stehr v. Sawyer, 40 N.J. 352, 357 (1963)).

A classic example of this mutuality of obligation concept at work is the sale of real property. If two parties contract for the sale of land and the seller later breaches the contract by withdrawing from the sale, the buyer's specific-performance remedy is not to enforce the contract ***and*** receive the land for free. Specific performance cannot result in a one-sided windfall. Instead, the remedy forces the buyer to fulfill its obligations under the contract by paying the purchase price for the land, so that both parties perform as required.

If the Letter in this case is a contract, and if the contract required Greenberg Farrow to pay 100% of the operating expenses for two years in exchange for a 49% membership interest in

ENGenuity, there must be mutuality of performance of both parties' obligations. The law does not permit Plaintiffs to have their cake and eat it too. Plaintiffs sought to specifically enforce the terms of the "contract" and force Greenberg Farrow to pay 100% of the operating expenses of ENGenuity. If the verdict stands and Greenberg Farrow must pay Plaintiffs for these operating expenses, Plaintiffs must themselves be "ready, desirous, prompt and eager to perform as required by the contract" and ensure that Greenberg Farrow receives its bargained-for benefit under the Letter—a 49% ownership interest in Greenberg Farrow. The final judgment does not so provide, and this court should reverse.

C. The Judgment Results in a Windfall to Plaintiffs and a Forfeiture to Greenberg Farrow

If the judgment stands and Plaintiffs do not perform as required under the "contract" by delivering a 49% membership interest in Greenberg Farrow, Plaintiffs will obtain a legally impermissible windfall, and Greenberg Farrow will suffer a forfeiture.

As a result of the judgment, Flor will own 100% of the membership interests of the company without having to make any financial investment. In other words, Flor will get the windfall of both keeping the start-up funding of the business and the business itself. This type of windfall is improper as a matter of law. See, e.g., Correa v. Maggiore, 196 N.J. Super. 273, 283–84

(1984) (finding that the verdict resulted in a clear miscarriage of justice where the plaintiff would receive the windfall of both ownership of a property and an additional sum of money, thus resulting in the plaintiff being "placed in a pecuniary position far better than that for which she bargained").

Conversely, Greenberg Farrow will suffer a forfeiture, as it will be judicially forced to give up its 49% membership interest in ENGenuity, after being judicially compelled to pay $599,000 for that very interest. "[E]quity abhors a forfeiture." Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 182 (1985). Yet as a result of the judgment, Greenberg Farrow will suffer such grossly inequitable forfeiture.

The appellate court should reverse the trial court's denial of Defendants' motion for judgment notwithstanding verdict and/or a new trial and avoid the absurd and grossly inequitable result produced by the verdict.

POINT III

THE TRIAL COURT ERRED IN ENTERING DECLARATORY JUDGMENT EXPELLING GREENBERG FARROW AS A MEMBER OF ENGENUITY LLC WITHOUT PAYMENT OF ANY CONSIDERATION (Da17-18; Da34-41)

Along similar lines, the trial court erred in entering judgment declaring that Greenberg Farrow "is expelled and disassociated from ENGenuity not later than effective October 3, 2016, and without payment or other consideration for the underlying

membership interest." Da18. The trial court's decision is contrary to the RULLCA, and once again results in a windfall to Plaintiffs and forfeiture to Greenberg Farrow. The appellate court should reverse.

A. Standard of Review

The scope of the appellate court's review of a judgment entered in a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The appellate court will not "disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid.; see also Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (stating appellant review should focus on whether there is substantial evidential support for the trial judge's findings and conclusions). On the other hand, this court's review of a trial judge's legal conclusions is de novo, as "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Applying this standard to the trial court's decision to kick Greenberg Farrow out of ENGenuity for zero consideration after

upholding the jury’s verdict requirement Greenberg Farrow to pay $599,000 for that very interest, this court should reverse.

B. **Greenberg Farrow Cannot Be “Expelled” From ENGenuity Without Receiving Economic Consideration In Exchange for Its Membership Interest Under the RULLCA**

Following the verdict, and in response to Defendants’ motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, Plaintiffs cross-moved under N.J.S.A. 42:2C-46(a) and (e)(1) and (3) for an order of “expulsion” of Greenberg Farrow without payment of other consideration. In other words, Plaintiffs sought a court-sanctioned forfeiture of Greenberg Farrow’s interest. The trial court confusingly and simultaneously found that Greenberg Farrow is “expelled” from ENGenuity – meaning that the Greenberg Farrow’s interest was forcibly taken away for nothing in return – and that Greenberg Farrow had “abandoned” its interest – meaning that Greenberg Farrow was willfully giving up its interest for free. The trial court’s inherently inconsistent findings are contrary to applicable law and unsupported in the record. This appellate court should reverse the entry of judgment “expelling and dissociating” Greenberg Farrow as a member of ENGenuity without payment or other consideration.

i. Plaintiffs' Request for Relief Under N.J.S.A. 42:2C-46(a) Was Not Properly Before the Court

As a procedural matter, because Plaintiffs never cited N.J.S.A. 42:2C-46(a)[5] as the basis for such purported relief in its complaint and never raised this subsection during the trial, Plaintiffs were not entitled to rely on such subsection for its post-verdict cross-motion for the extraordinary "remedy" of "expulsion."

Rule 4:9-2 "authorizes amendments of pleadings at trial in order to conform to the evidence," Aly v. Garcia, 333 N.J. Super. 195, 202 (App. Div. 2000). Here, however, Plaintiffs never attempted to amend their pleadings to include N.J.S.A. 42:2C-46(a) as a basis for relief. As a result, Greenberg Farrow had no notice that Plaintiffs were seeking relief under this subsection and was therefore severely prejudiced in its inability to defend against such unasserted claim. Absent such amendment, the trial court could not rely on N.J.S.A. 42:2C-46(a) as the basis for the entry of judgment. See, e.g., Bainhauer v. Manoukian, 215 N.J. Super. 9, 45 (App. Div. 1987) (concluding "that the trial court erred in permitting the complaint to be amended at the close of the proofs to add" a new basis for a claim where the defendant "did not have

[5] N.J.S.A. 42:2C-46(a) provides that person is dissociated as a member from a limited liability company when "[t]he company has notice of the person's express will to withdraw, but, if the person specified a withdrawal date later than the date the company had notice, on that later date."

an adequate opportunity to meet the charge since he could not have known until after the proofs were closed that the alleged [new basis] was to be a part of the cause of action”); Skripek v. Bergamo, 200 N.J. Super. 620, 629 (App. Div. 1985) (declining to consider the plaintiff’s new claim where that legal theory “was not pleaded by plaintiff in her complaint, was not included as an issue in the pretrial order,” “was not tried before the jury,” and was not raised as an amendment to the pleadings by the plaintiff “during trial”).

The appellate court should reverse the entry of judgment on the grounds that the trial court improperly considered subsection (a) of Section 42:2C-46 as a basis for the requested forfeiture. See, e.g., Natsis v. Township of Weehawken, 2010 WL 3075565, at *3 (N.J. Super. Ct. App. Div. Aug. 6, 2010).

ii. Plaintiffs Are Not Entitled to the Judgment of “Expulsion” Under N.J.S.A 42:2C-46(e)(1) or (e)(3)

As stated above, the only statutory bases of Plaintiffs’ request for the draconian and extraordinary remedy of “***expulsion without consideration***” were N.J.S.A. 42:2C-42(e)(1) and (e)(3).

The problem with Plaintiffs’ application in this regard is that neither subsection allows for “expulsion without consideration.” There is no statutory authority for a judicially-decreed forfeiture of membership interests. Rather, the RULLCA provides for a judicial decree of “***dissociation***,” which is not the

same as "***expulsion without consideration***." The trial court repeatedly confused and conflated these separate concepts, which is fatal to the trial court's entry of judgment in favor of Plaintiffs in this regard.

Section 42:2C-46(e) states the following, in relevant part:

> A person is dissociated as a member from a limited liability company when:
>
> . . .
>
> e. On application by the company, the person is expelled as a member by judicial order because the person:
>
> (1) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;
>
> ...
>
> (3) has engaged, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member.

N.J.S.A. 42:2C-47, entitled "*Effect of person's dissociation as member*," provides:

> a. When a person is dissociated as a member of a limited liability company:
>
> (1) the person's right to participate as a member in the management and conduct of the company's activities terminates;
>
> (2) if the company is member-managed, the person's fiduciary duties as a member end with regard to matters arising and events occurring after the person's dissociation; and

> (3) subject to section 44 and Article 10 (sections 73 through 87 of this act), any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee.

The RULLCA does not provide that when a member is "dissociated" he ***forfeits*** his membership interest in the company. On the contrary, N.J.S.A. 42:2C-47(c) provides:

> A court that expels a member from a company pursuant to subsection e. of section 46 of this act may order the sale of the interests held by such person immediately before dissociation to either the company or to any other persons who are parties to the action if the court determines, in its discretion, that such an order is required by any other law, rule or regulation, or that such an order would be fair and equitable to all parties under all of the circumstances of the case.

"In the wake of a judicial determination disassociating the . . . member form the [entity], that member's interest is immediately limited to the rights of an assignee of a member's limited liability interest . . . ." IE Test, LLC v. Carroll, 226 N.J. 166, 179 (2016). In other words, "[a] member's dissociation from an [entity] pursuant to the statute does not cause the member to 'sell' or 'give up' economic rights involuntarily in the [entity]." All Saints Univ. of Med. Aruba v. Chilana, 2012 WL 6652510, at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012). Instead, "the member suffers through dissociation the loss of his or her management rights, ***but is entitled to retain an interest in the LLC as an assignee***." Ibid. (emphasis added). Indeed, even if a member resigns or withdraws from the entity—such as under Section

42:2C-46(a)—he still retains "the rights of an economic interest holder" in the entity. N.J.S.A. 42:2C-1, cmt.

In short, even if the trial court "dissociates" Greenberg Farrow from ENGenuity under the RULLCA, that does not mean that Greenberg Farrow hands over its 49% interest in the company for nothing. Rather, under the plain language of the statute, and as found by the New Jersey Supreme Court, Greenberg Farrow retains its 49% economic interest in ENGenuity. This includes all of the benefits of that interest, such as "allocation of income, gain, loss, deduction, or credit." Chilana, supra, 2012 WL 6652510, at *12 (addressing the predecessor statutory scheme to the RULLCA); see, e.g., IE Test, supra, 226 N.J. at 182 (noting that the statute does not "permit the . . . members to expel a member to avoid sharing the [entity's] profits with that member").

Here, the trial court erroneously concluded that Greenberg Farrow had to forfeit its membership interest for nothing in return. There is no legal authority, whether in the RULLCA or under the case law, that permits such an inequitable and grossly unfair outcome. Neither Plaintiffs nor the trial court cited any statutory section, case, or other legal authority in support of the extraordinary proposition that an owner of a company can be forced to give up his interest for no consideration. This failure is understandable in light of the well-settled maxim that "equity abhors a forfeiture." Dunkin' Donuts of Am., Inc., supra, 100

N.J. at 182. Yet that is precisely what the court ordered in this case. The trial court's judgment has resulted in a ***compelled forfeiture*** of Greenberg Farrow's membership interests in ENGenuity. Reversal is warranted.

C. There Is No Legal or Factual Basis To Support the Trial Court's Finding of a "Voluntary Abandonment" of Greenberg Farrow's 49% Interest In ENGenuity

Confusingly, although Plaintiffs sought the forfeiture remedy of "expulsion without consideration" based on Greenberg Farrow's allegedly wrongful conduct under subsections (e)(1) and (e)(3), the trial court found that Greenberg Farrow had "abandoned its minority interest" and "voluntarily dissociated from ENGenuity." Da36-37. Even more confusingly, the trial court concluded that Greenberg Farrow's "action and inaction has led to ***expulsion by withdrawing*** from the LLC..." Da41 (emphasis added). The trial court's conclusion that Greenberg Farrow had "abandoned" its membership interest in ENGenuity is unsupported by any legal authority, and is contrary to the factual record.

As a matter of law, there is no such thing as "voluntary abandonment" of a member's interest in an LLC. Neither Plaintiffs nor the trial court cite a single statute, case, treatise or other legal authority in support of the proposition of "abandonment." Neither Plaintiffs nor the trial court discussed the legal standard or factors which the trial court should apply to determine whether such "abandonment" had occurred. There is no such thing as

"voluntary abandonment" as found by the trial court. As such, there is no legal basis to support the trial court's finding that Greenberg Farrow had somehow voluntarily given up its membership interests in ENGenuity.

The only law cited by Plaintiffs that is any way related to the non-existent concept of "abandonment without consideration" is their reference to N.J.S.A. 42:2C-46(a), which as discussed above, was only raised for the first time after the trial in Plaintiffs' post-verdict cross-motion. Yet even if the court finds that Plaintiffs' application could rely on such subsection, this statutory provision does not provide for "abandonment without consideration." Rather, that subsection provides for the "dissociation" in the event a member gives notice of his "express will to withdraw." In such event, the "withdrawn" member has the rights of a dissociated member under N.J.S.A. 42:2C-47, including all economic interests attendant to such interest. It does not mean, as the trial court erroneously found, that you simply walk away with nothing.

Similar to the "abandonment" theory relied upon by the trial court is the doctrine of waiver. "It is fundamental that waiver involves the intentional relinquishment of a known right and, thus, it must be shown that the party charged with waiver knew of his or her legal rights and deliberately intended to relinquish them." Petrillo v. Bachenberg, 263 N.J. Super. 472, 479-80 (App. Div.

1993) (citing Shebar v. Sanyo Business Sys. Corp., 111 N.J. 276, 291 (1988)). Waiver must be evidenced by a "clear, unequivocal and decisive act from which an intention to relinquish the right can be based." Id. at 480 (citing County Chevrolet v. North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). Waiver implies an election by the party to dispense with something of value or to forego some advantage which that party might have demanded and insisted upon. Ibid. As found in Petrillo, in order to find waiver, the court must consider the party's "subjective intent," as opposed to determining whether the party's conduct would cause an objective observer to believe that she was giving up her contractual rights. Petrillo, supra, 263 N.J. Super. at 480.

The trial court did not discuss whether Greenberg Farrow knowingly and intentionally gave up its interest in ENGenuity for nothing. The trial court did not address whether Greenberg Farrow made a "clear, unequivocal and decisive act" to relinquish its rights in ENGenuity. The trial court did not consider Greenberg Farrow's subjective intent in determining whether it knowingly waived any right to an interest in ENGenuity. Simply stated, the trial court did not apply any legal standard or factors to conclude that Greenberg Farrow had simply walked away from its interest in the company.

The trial court's failure to address these critical facts is understandable, since there was no proof that Greenberg Farrow knowingly and intentionally relinquished its rights in ENGenuity. As discussed throughout this brief, it was Greenberg Farrow's consistent position, from the inception of this lawsuit through the jury verdict (and beyond), that it never entered into a partnership agreement with Flor, and therefore never held any ownership interest in ENGenuity. In its opinion, the trial court stated that "[a]s confirmed in the testimony of the senior management of the Defendant, Greenberg Farrow voluntarily ignored ENGenuity for more than three years at the time of trial." Da40. That is because for the entirety of those three years, Greenberg Farrow did not believe that it had entered into a partnership agreement with Flor. That was the very reason for the lawsuit in the first place. It was only upon the entry of the jury's verdict finding an enforceable contract and the entry of judgment requiring Greenberg Farrow to pay $599,000 when Greenberg Farrow took the position that it was entitled to the mutual performance by Flor through the delivery of a 49% membership interest in the company. Essentially, the trial court reasoned that because Greenberg Farrow did not agree with Plaintiff's claims, it is liable on such claims. Such reasoning is illogical.

CONCLUSION

For the reasons set forth herein, the appellate court should reverse the trial court's entry of judgment in favor of Plaintiff and against Greenberg Farrow with regard to the $599,000 awarded as damages for breach of contract. In the alternative, the appellate court should remand this matter and direct the trial judge to require Plaintiffs to mutually perform under such "contract" through the delivery of a 49% membership interest in ENGenuity.

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Dated: August 18, 2021

Docs #5178875-v1