FILED, Clerk of the Appellate Division, November 16, 2021, **A-002208-20**, AMENDED AMENDED

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 SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION, MONMOUTH COUNTY** **DOCKET NO. MON-L-1021-17** **SAT BELOW: HONORABLE OWEN C. McCARTHY, J.S.C.**

REPLY BRIEF AND APPENDIX ON BEHALF OF DEFENDANT/APPELLANT GREENBERG FARROW ARCHITECTURE INCORPORATED

Matthew N. Fiorovanti, Esq. - 027332006
GIORDANO, HALLERAN & CIESLA
A Professional Corporation
125 Half Mile Road, Suite 300
Red Bank, N.J. 07701-6777
(732) 741-3900
mfiorovanti@ghclaw.com

Attorneys for Defendant/Appellant, Greenberg Farrow Architecture Incorporated

MATTHEW N. FIOROVANTI, ESQ.
Of Counsel and On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY APPENDIX TABLE OF CONTENTS iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STATEMENT OF FACTS 3

LEGAL ARGUMENT 3

POINT I 3

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THE COURT-COMPELLED PERFORMANCE OF THE PUTATIVE "PARTNERSHIP AGREEMENT" THROUGH THE PAYMENT OF $599,000 IN "OPERATING EXPENSES" WITHOUT RECEIVING THE BARGAINED-FOR 49% MEMBERSHIP INTEREST IN ENGENUITY RESULTS IN AN INEQUITABLE WINDFALL TO FLOR AND FORFEITURE TO GREENBERG FARROW 3

POINT II 8

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THE JUDGMENT DECLARING THAT GREENBERG FARROW IS EXPELLED AND DISASSOCIATED FROM ENGENUITY WITHOUT PAYMENT FOR ITS MEMBERSHIP INTEREST IS CONTRARY TO THE RULLCA AND ONCE AGAIN RESULTS IN A WINDFALL TO PLAINTIFFS AND A FORFEITURE TO GREENBERG FARROW 8

A. Plaintiffs Fail To Rebut Defendant's Argument That N.J.S.A. 42:2C-47 Provides That a Dissociated Member Retains Economic Rights In Its Membership Interest 8

B. Plaintiffs Fail To Rebut Defendant's Argument That There Is No Legal, Equitable or Factual Basis For The Entry of Judgment Compelling Greenberg Farrow To Forfeit Its 49% Membership Interest 11

i. Plaintiffs Concede That They Never Asserted a Claim For Dissociation Under N.J.S.A. 42:2C-46(a) 11

ii. Plaintiffs Have Failed To Identify Any Evidence To Demonstrate That Greenberg Farrow Knowingly Abandoned Its 49% Membership Interest 13

iii. If Greenberg Farrow Was Dissociated By "Withdrawal" Under N.J.S.A. 42:2C-46(a), It Still Maintains An Economic Interest In ENGenuity 15

POINT III 16

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE PARTIES ENTERED INTO A VALID AND ENFORCEABLE PARTNERSHIP AGREEMENT 16

A. Plaintiffs Ignore Evidence Which Demonstrates That The Parties Intended To Be Bound Only By A Subsequent Formal Partnership Agreement 16

B. Plaintiffs Ignore The Fact That 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 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

All Saints Univ. of Med. Aruba v. Chilana, 2012 WL 6652510 (N.J. Super. Ct. App. Div. Dec. 24, 2012) 10

Fleischer v. James Drug Stores, 1 N.J. 138 (1948) 4

Friedman v. Tappan Development Corp., 22 N.J. 523 (1956) 4

IE Test, LLC v. Carroll, 226 N.J. 166 (2016) 10

Madaio v. McCarthy, 199 N.J. Super. 430 (App. Div. 1985) 4

Ridge-Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149 (1990) 4

Stehr v. Sawyer, 40 N.J. 352 (1963) 4

Trustees First Preservation Church v. Howard Company Jewelers, 22 N.J. Super. 494 (App. Div. 1952) 18

Statutes

N.J.S.A. 42:2C-46(a) .... passim

N.J.S.A. 42:2C-46(e)(1) or (3) 10

N.J.S.A. 42:2C-47 .... 8, 9, 11, 15

N.J.S.A. 46:2C-46(a) 15

Rules

Rule 4:40-2 6

Rule 4:49-1 6

REPLY APPENDIX TABLE OF CONTENTS

Defendants' Brief In Support of Defendants' Motion for Judgment Notwithstanding the Verdict Under Rule 4:40-2 Or, In the Alternative, Motion for New Trial Under Rule 4:49-1 Or, In the Alternative, Motion for Remittitur filed January 17, 2020 ..... 1a

Defendants' Reply Brief In Support of Defendants' Motion for Judgment Notwithstanding the Verdict Under Rule 4:40-2 Or, In the Alternative, Motion for New Trial Under Rule 4:49-1 Or, In the Alternative, Motion for Remittitur filed March 2, 2020[1] 40a

---

[1] These briefs are included within Defendant's Reply Appendix as an exception to the prohibition set forth in Rule 2:6-1(a)(2), since Plaintiffs have asserted in their Opposition Brief that certain issues were not raised before the trial court. These briefs are submitted to rebut such assertion.

PRELIMINARY STATEMENT

In their opposition brief, Plaintiffs avoid confronting the primary argument raised by Defendant in this appeal: as a result of the judgment which compels Greenberg Farrow to perform under the putative "partnership agreement" by paying $599,000 as the operating expenses of ENGenuity, Flor has obtained a windfall by keeping 100% of the membership interests of the company while paying nothing, and Greenberg Farrow has suffered a forfeiture by paying 100% of the operating expenses of ENGenuity while receiving nothing. Plaintiffs' response to this primary argument is buried at page 53 of their 56-page brief, in which Plaintiffs simply (and erroneously) label this unfair, inequitable and unlawful outcome a "myth." On the contrary, the windfall/forfeiture dichotomy resulting from the final judgment is indeed a reality, and an outcome which must be corrected by the Appellate Division.

In opposing this appeal, Plaintiffs have adopted an obvious strategy: simply ignore unfavorable law and inconvenient facts. Plaintiffs have applied this strategy in simply ignoring Defendant's arguments that the final judgment results in a windfall to Flor and a forfeiture to Greenberg Farrow, that "dissociation" of a member of an LLC under the RULLCA does not equate to "forfeiture without consideration," and that the one-and-half-page Letter—which according to Plaintiffs constitutes a binding and enforceable partnership agreement—does not impose any obligation

on Greenberg Farrow to pay the "operating expenses" of ENGenuity for any period of time, much less two years. Plaintiffs' failure to confront these arguments is telling as to the absence of any legitimate response.

Throughout their brief, Plaintiffs circularly rely on the trial court's decisions, in and of themselves, as a basis to uphold those very decisions. Such circular and self-serving reasoning is unavailing. This Court's task is to review the trial court's decisions under the applicable standards of review, and reverse and/or remand if appropriate. As stated in Defendants' initial brief, this Court must perform a de novo review of the trial court's legal conclusions as to the existence of a valid and enforceable partnership agreement and the application of the RULLCA and equitable principles in evaluating the relief awarded under the final judgment. Upon performing such review, for the reasons set forth in Defendants' initial brief and below, this Court should reverse the trial court's entry of judgment in favor of Plaintiffs and against Greenberg Farrow with regard to the $599,000 awarded as damages for breach of contract. In the alternative, this Court should remand this matter and direct the trial court to require Plaintiffs to mutually perform under such "partnership agreement" through the delivery of a 49% membership interest in ENGenuity.

PROCEDURAL HISTORY

Defendant adopts the procedural history set forth in its merits brief.

STATEMENT OF FACTS

Defendant adopts the statement of facts set forth in its merits brief.

LEGAL ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THE COURT-COMPELLED PERFORMANCE OF THE PUTATIVE "PARTNERSHIP AGREEMENT" THROUGH THE PAYMENT OF $599,000 IN "OPERATING EXPENSES" WITHOUT RECEIVING THE BARGAINED-FOR 49% MEMBERSHIP INTEREST IN ENGENUITY RESULTS IN AN INEQUITABLE WINDFALL TO FLOR AND FORFEITURE TO GREENBERG FARROW

In their opposition brief, Plaintiffs completely ignore and fail to respond to Defendant's argument that Plaintiffs requested a judgment compelling Greenberg Farrow to specifically perform its obligations under the "partnership agreement,"[2] and that such equitable remedy of specific performance was inappropriate. More significantly, Plaintiffs completely ignore and fail to respond to Defendant's argument that the judgment requiring Greenberg Farrow to perform under the "partnership agreement" by paying $599,000 in

---

[2] As argued more fully in Point III, infra, there was no such "partnership agreement." Yet even assuming arguendo the existence of such valid contract, the final judgment results in an inequitable outcome which must be corrected.

"operating expenses" requires mutual performance by Plaintiffs through the delivery of 49% of the membership interests of ENGenuity.

Plaintiffs completely ignore and fail to address the well-settled New Jersey law discussed in Defendant's initial brief that provides that "the 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." Db51 (quoting Fleischer v. James Drug Stores, 1 N.J. 138, 149 (1948)). Defendant further relied on the legal principle that "what equity exacts today as a condition of relief is the assurance that the decree [of specific performance], if rendered, will operate without injustice or oppression either to plaintiff *or to defendant*." Db51 (quoting Ridge-Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 155 (1990) (quoting Stehr v. Sawyer, 40 N.J. 352, 357 (1963))). Under the doctrine of mutuality of obligation, "mutual promises must be binding on both parties" unless other consideration is present. Madaio v. McCarthy, 199 N.J. Super. 430, 433 (App. Div. 1985) (quoting Friedman v. Tappan Development Corp., 22 N.J. 523, 533 (1956)).

Plaintiffs completely ignore this legal argument in their opposition brief. Plaintiffs merely shrug off Defendant's entire argument in this argument by labeling it a "myth." Yet the windfall/forfeiture dichotomy which arises from the final judgment

is very real indeed. As a result of the final judgment, Flor receives much more than she originally bargained for, as she gets to keep 100% of the membership interests of ENGenuity without paying a dime. On the other hand, Greenberg Farrow is judicially compelled to pay 100% of the operating expenses of ENGenuity totaling $599,000, yet gets nothing in return, contrary to the terms of the putative "partnership agreement." While Plaintiffs take issue with Defendant's "liberal use of the 'windfall' term through its brief," Pb53, and while Plaintiffs disdainfully label the inequitable outcome a "myth," Plaintiffs do not, and cannot, legitimately maintain that Flor does not walk away with far more than she originally bargained for, and Greenberg Farrow far less. If Greenberg Farrow is compelled to perform under the "partnership agreement" by paying $599,000, then under the well-settled New Jersey law which is completely ignored by Plaintiffs, Plaintiffs too must perform through the delivery of 49% of the membership interests of ENGenuity.

Lastly, Plaintiffs attempt to avoid having to address the primary issue on appeal by suggesting that this "forfeiture" argument is not properly before this Court, as "[a] cursory review of Defendant's opposition to Plaintiff's cross-motion for declaratory relief confirm its equitable relief argument was not raised below." Pb55 n. 14. This is grossly inaccurate.

During the trial, on October 16, 2019, Defendant moved under Rule 4:40-1 for a directed verdict based on the evidence presented, and specifically 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." 7T199-11 to 7T199-19. Defendant further argued that "there has to be a bilateral exchange of consideration" whereby "Greenberg Farrow pays the operating expenses[,] [a]nd in exchange, they get a 49% interest." 7T201-1 to 7T201-18. The trial court denied the application without explanation. 7T202-13 to 7T202-21.

Defendant then raised the "equitable relief" argument again before the trial court in support of its 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. While Plaintiffs have submitted Defendant's Brief In Opposition to Plaintiffs' Cross-Motion dated February 18, 2020, in their Appendix, Plaintiffs conspicuously fail to submit Defendant's Brief In Support of Motion For Judgment Notwithstanding the Verdict dated January 17, 2020, in which Defendant argued that it was entitled to a new trial because the verdict results in a windfall to Plaintiffs unless Greenberg Farrow receives its 49% membership interest in

ENGenuity. Dra1.[3] Plaintiffs also fail to submit Defendants' Reply Brief in which this argument is again presented. Dra40. As stated in Defendant's initial brief, while the trial court denied Defendant's motion, it completely ignored Defendant's 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. Yet it is beyond dispute that Greenberg Farrow raised its "windfall/forfeiture" equitable argument ***twice*** before the trial court. As such, this issue is properly before the Appellate Division.

[3] In Defendants' Brief In Opposition to Plaintiffs' Cross-Motion dated February 18, 2020, Defendants expressly relied on their arguments set forth in their moving brief: "***However, as addressed at length in Greenberg Farrow's Motion***, if the Court determines that Greenberg Farrow is entitled to a 49% ownership interest in ENGenuity due to the verdict, the Court must order that Greenberg Farrow owns that interest at present." Pa32. To suggest that Defendants did not raise this primary equitable argument below is untrue.

POINT II

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THE JUDGMENT DECLARING THAT GREENBERG FARROW IS EXPELLED AND DISASSOCIATED FROM ENGENUITY WITHOUT PAYMENT FOR ITS MEMBERSHIP INTEREST IS CONTRARY TO THE RULLCA AND ONCE AGAIN RESULTS IN A WINDFALL TO PLAINTIFFS AND A FORFEITURE TO GREENBERG FARROW

Once again revealing the absence of any legitimate opposition, Plaintiffs ***completely ignore*** Defendant's argument that the trial judge's declaratory judgment kicking Greenberg Farrow out of ENGenuity without receiving any consideration for its 49% membership interest, while upholding the jury's verdict compelling Greenberg Farrow to pay $599,000 for that very interest, runs afoul of the RULLCA and equitable principles.

A. Plaintiffs Fail To Rebut Defendant's Argument That N.J.S.A. 42:2C-47 Provides That a Dissociated Member Retains Economic Rights In Its Membership Interest

Most significantly, Plaintiffs fail to explain how N.J.S.A. 42:2C-47, entitled "*Effect of person's dissociation as member,*" does not entitle Greenberg Farrow to receive economic benefits associated with its membership interest—regardless of the basis of any putative dissociation (i.e., voluntary withdrawal or wrongful conduct). As explained in Defendant's initial brief (Db58-59), N.J.S.A. 42:2C-47 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.
>
> b. A person's dissociation as a member of a limited liability company does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members which the person incurred while a member.
>
> c. 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 its opposition brief, Plaintiffs assert that "Defendant clings to the same vague and misleading position that N.J.S.A. 42:2C-47 provides a statutory 'sword' for Defendant to offset its breach and damages with a reward of a 49% membership interest in ENGenuity." Pb51. Plaintiffs miss the point. Greenberg Farrow, as a dissociated member of ENGenuity, does not seek an "offset" or "reward." Rather, Greenberg Farrow is ***entitled*** to retain its economic rights associated with its 49% membership interest under

the statute. "Dissociation" under the RULLCA does not equate to "forfeiture." "In the wake of a judicial determination disassociating the ... member from 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). "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. (Like all unfavorable law, Plaintiffs completely ignore this critical law in their opposition brief.)

Like the trial court, Plaintiffs do not cite a single case in which a member of an LLC is forced to simply give up its interest without economic consideration. Plaintiffs' failure is understandable: no case or other legal authority exists, since that is not what New Jersey law provides. Whether the trial court concluded that Greenberg Farrow voluntarily withdrew from the company under N.J.S.A. 42:2C-46(a), or that Greenberg Farrow engaged in wrongful conduct under N.J.S.A. 42:2C-46(e)(1) or (3), the end result of "dissociation" does not equate to "expulsion without consideration." Under the plain language of N.J.S.A.

42:2C-47-***completely ignored by Plaintiffs in their brief***—Greenberg Farrow is entitled to consideration in exchange for its 49% membership interest. The trial court's declaratory judgment is therefore contrary to New Jersey law.

B. Plaintiffs Fail To Rebut Defendant's Argument That There Is No Legal, Equitable or Factual Basis For The Entry of Judgment Compelling Greenberg Farrow To Forfeit Its 49% Membership Interest

To avoid the implications of N.J.S.A. 42:2C-47, Plaintiffs maintain that Greenberg Farrow knowingly walked away from its 49% membership interest without seeking any consideration. According to Plaintiffs, "it was abundantly clear from the trial testimony that Defendant's top officers admitted, under oath, that Defendant had terminated its membership and withdrawn completely from ENGenuity by October 2016." Pb39; Pb41 n. 10. Plaintiffs maintain, therefore, that the trial court correctly entered judgment dissociating Greenberg Farrow under N.J.S.A. 42:2C-46(a), without any right to consideration for its 49% membership interest. Plaintiffs' position is legally, equitably and factually unsupportable.

i. Plaintiffs Concede That They Never Asserted a Claim For Dissociation Under N.J.S.A. 42:2C-46(a)

First, Plaintiffs implicitly acknowledge that they did not seek the entry of dissociation under N.J.S.A. 42:2C-46(a) in their pleadings, and only raised such novel claim for the first time ***after*** the trial in connection with post-trial motion practice.

Pb40-41. Plaintiffs attempt to cure this fatal procedural deficiency by suggesting that "[t]he parties had notice of the facts and the relevance of this additional statutory claim that came to light on direct-examination of Defendant's witnesses, and had ample time to further explore and/or test those proofs in Plaintiffs' case-in-chief, Defendant's case-in-chief and in post-trial motions, all of which Defendant endeavored to do." Pb40. Plaintiffs further argue that "Defendant also did not show how its trial proofs in defense to the additional statutory claim under N.J.S.A. 42:2C-46(a) would have been different if Plaintiffs had amended their pleading to add that statutory term." Pb41 n. 10. Plaintiffs' argument in this regard is patently absurd.

Defendant was not placed on notice of any claim for dissociation by "withdrawal" under N.J.S.A. 42:2C-46(a) based on the questions asked during the trial. At no point during the trial did Plaintiffs inform the court or Defendant that Plaintiffs were eliciting testimony in connection with a new claim for dissociation by "withdrawal" under N.J.S.A. 42:2C-46(a). At no point was Defendant placed on actual or constructive notice that Plaintiffs would rely upon the trial testimony in support of a post-trial application for judgment of dissociation by "withdrawal." As such, Defendant had no ability to present any affirmative evidence in defense of such secret claim.

Had Plaintiffs actually pled a claim for dissociation under N.J.S.A. 42:2C-46(a) and expressly taken the position that Greenberg Farrow had provided its "express will to withdraw" from the company, Defendant would have indeed presented different trial proofs. Specifically, Defendant would have confirmed, through the unequivocal testimony of its officers, that while it was Greenberg Farrow's position that no partnership relationship had been consummated between the parties, in the event the court found that such relationship did exist, Greenberg Farrow was certainly not walking away from a 49% membership interest for nothing. To suggest otherwise is non-sensical. Why would any person or entity, after being ordered to pay $599,000 for a 49% membership interest, simply agree to give up that interest for nothing?

ii. Plaintiffs Have Failed To Identify Any Evidence To Demonstrate That Greenberg Farrow Knowingly Abandoned Its 49% Membership Interest

Yet even if this Court concludes that Plaintiffs' un-pled claim for dissociation under N.J.S.A. 42:2C-46(a) was properly considered by the trial court, there was no evidence whatsoever to support the judgment of "abandonment without consideration" entered by the trial court. Like the trial court, Plaintiffs do not, and cannot, point to a single piece of evidence or testimony in which Defendant took the position that (a) it was aware that it possessed a 49% membership interest in ENGenuity, and (b) was knowingly abandoning such interest without seeking any economic or

other consideration in return. (As noted above, why would Greenberg Farrow ever take such absurd position?)

In their brief, Plaintiffs cite Mr. Johnston's testimony in which he agreed with Plaintiffs' counsel that it was "safe for me to assume that as of at least September 9th Greenberg Farrow has terminated its membership interest in [ENGEnuity]." Pb43 (citing 5T156-8 to 5T156-22). Plaintiffs also cite Mr. Ghadrdan's testimony in which he agreed with Plaintiffs' counsel that he "eventually arrived at a point in time whereas the top officer of Greenberg Farrow you made a decision to terminate the relationship." Pb44 (citing 6T69-4 to 6T69-23). Plaintiffs also rely on the stipulation regarding Defendant's comptroller, Edmund Truty, in support of its assertion that "Defendant provided notice to Plaintiffs of its membership termination and withdrawal from all relations with and support for the business of ENGenuity." Pb44-46. Yet neither Mr. Johnston, Mr. Ghadrdan nor Mr. Truty testified that Greenberg Farrow was knowingly abandoning its 49% membership interest (which it did not believe it maintained) for <u>zero</u> consideration. No such testimony or evidence exists in the record. For this reason, neither the trial court nor Plaintiffs cite to any portion of the trial record in which Defendant made a clear, unequivocal and decisive act to relinquish its rights in

ENGenuity. Greenberg Farrow did not waive its rights as a member,[4] and the trial court's declaratory judgment is unsupported by both the facts and the law.

iii. <u>If Greenberg Farrow Was Dissociated By "Withdrawal" Under N.J.S.A. 42:2C-46(a), It Still Maintains An Economic Interest In ENGenuity</u>

At most, the aforementioned testimony of Mr. Johnson and Mr. Ghadrdan would support a finding of dissociation by "withdrawal" under <u>N.J.S.A.</u> 46:2C-46(a) (had that claim actually been asserted). But, as discussed above, such a finding of dissociation by "withdrawal" does not equate to a voluntary abandonment of Defendant's 49% membership interest ***for no consideration.*** Indeed, under <u>N.J.S.A.</u> 46:2C-47, even if the trial court were to find that Greenberg Farrow had "withdrawn," Greenberg Farrow would still retain its economic rights and be entitled to a buyout of its 49% interest. The trial court's judgment declaring that Greenberg Farrow is "expelled and disassociated from ENGenuity not later than effective October 3, 2016, ***and without payment or other***

---

[4] Once again, Plaintiffs accuse Defendant of failing to raise the issue of whether Greenberg Farrow waived its rights in ENGenuity before the trial court. Once again, Plaintiffs' assertion misses the mark. As argued in opposition to Defendant's cross-motion for the entry of declaratory relief, Plaintiff never even asserted a claim under <u>N.J.S.A.</u> 42:2C-46(a) until ***after*** the trial. Pa33-39. The very first time when the trial court entered an order finding that Greenberg Farrow had somehow abandoned its interest in ENGenuity was through the declaratory judgment which is the subject of this appeal.

consideration for the underlying membership interests," Da17, is contrary to both New Jersey law and the facts.

POINT III

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S ASSERTION THAT THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE PARTIES ENTERED INTO A VALID AND ENFORCEABLE PARTNERSHIP AGREEMENT

In their opposition brief, Plaintiffs misconstrue Defendant's argument regarding the existence of a valid and enforceable contract. According to Plaintiffs, "Defendant apparently contends the [Letter] is two things: an enforceable 'employment agreement' and an unenforceable 'partnership agreement.'" Pb32 n. 8. This is an inaccurate recitation of Defendant's position: to be clear, the Letter is one thing only: a valid employment agreement. It is not a "partnership agreement," since the parties evidenced their intention to be bound as partners in ENGenuity only by future agreements. Moreover, 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 a period of two years.

A. Plaintiffs Ignore Evidence Which Demonstrates That The Parties Intended To Be Bound Only By A Subsequent Formal Partnership Agreement

Consistent with their strategy to simply ignore unfavorable facts or arguments, Plaintiffs completely ignore the evidence that

makes clear that the parties did not intend to be bound as partners through the one-and-a-half page Letter:

- Plaintiffs ignore the fact that the transmittal email provided that the Letter was merely "phase one to commence the process of negotiating binding agreements." Da1021.

- Plaintiffs ignore the fact that the first paragraph of the Letter itself states that its purpose 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.

- Plaintiffs ignore the fact that the Letter further states that there would be further modification to the proposed terms "as the specific partnership documents contemplated herein are prepared and executed." Da633.

- Plaintiffs ignore the fact that the last sentence of the Letter states that "[i]t 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.

- Plaintiffs ignore the fact that the parties, through their attorneys, negotiated (unsuccessfully) the terms of a detailed partnership agreement for several months after the Letter.

- Plaintiffs ignore the fact that the Letter did not contain any of the terms typically included in a partnership or operating agreement.

The aforementioned critical evidence which is completely ignored by Plaintiffs demonstrates that the parties did not intend to be bound as partners by the one-and-a-half page Letter, but rather intended to be bound only by a subsequent, traditional partnership or operating agreement. As discussed in Defendant's

initial brief, the facts of this case are similar to those at issue in Trustees First Preservation Church v. Howard Company Jewelers, 22 N.J. Super. 494 (App. Div. 1952) – which, unsurprisingly, is completely ignored by Plaintiffs in their brief. Like the lease proposal in Trustees, the Letter was short, and did not include any of the terms that in "practical experience" are included in operating agreements. Like the lease proposal in Trustees, the Letter "contained limited language indicative of an intent to not be bound thereby." Like the parties in Trustees, the parties, through counsel, negotiated a subsequent, formal partnership agreement after the execution of the Letter. Like the Court in Trustees, this Court should conclude that the trial court erred in finding that the parties had intended to be bound to a partnership relationship by the one-and-a-half page Letter.

B. Plaintiffs Ignore The Fact That 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

In their opposition brief, Plaintiffs assert that "Defendant continues to insist that that the contract cannot be interpreted or understood to mean that 'Greenberg Farrow was obligated to pay 100% of the "operating expenses" of ENGenuity for any specified period of time, much less two years.'" Pb28. In response to Defendant's argument in this regard, the Court should have expected Plaintiffs to identify which specific provision of the one-and-a-

half page Letter imposes such obligation upon Greenberg Farrow. Unsurprisingly, Plaintiffs do not cite <u>any</u> provision of the Letter, for the simple reason that the Letter does not say what Plaintiffs argue it says.

In fact, the <u>only</u> provision of the Letter which in any way touches upon the payment of expenses by Greenberg Farrow is as follows:

> 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].

The words "operating expenses" do not appear anywhere in this provision or anywhere else in the Letter. Furthermore, the <u>only</u> 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, and not with regard to the provision of "initial business unit support" by Greenberg Farrow. Da633. Plaintiffs avoid confronting the plain language of the Letter because it is beyond dispute that Greenberg Farrow did not make a clear and definite promise to pay 100% of the "operating expenses" of ENGenuity for a period of two years.

Rather than confront the plain language of the Letter, Plaintiffs rely on the vague testimony of the witnesses as to what the Letter purportedly says. Plaintiffs cite the testimony of Mr. Johnston and Mr. Ghadrdan, but neither individual testified that

the Letter clearly provided that Greenberg Farrow had agreed to pay 100% of the operating expenses for a period of two years in exchange for a 49% membership interest in ENGenuity. Pb28-29. In any event, it is the plain language of the Letter which controls, and it is beyond dispute that the Letter does not impose any such obligation upon Greenberg Farrow.

CONCLUSION

For the reasons set forth herein and in Defendant's initial brief, the appellate court should reverse the trial court's entry of judgment in favor of Plaintiffs 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.

GIORDANO, HALLERAN & CIESLA
A Professional Corporation
Attorneys for Defendant/Appellant, Greenberg Farrow Architecture Inc.

By: */s Matthew N. Fiorovanti*
MATTHEW N. FIOROVANTI

Dated: November 16, 2021

Docs #5392582-v1

GIORDANO, HALLERAN & CIESLA, P.C.
125 Half Mile Road, Suite 300, Red Bank, N.J. 07701
(732) 741-3900
Matthew N. Fiorovanti, Esq. (027332006)
Attorney for Defendant Greenberg Farrow
Architecture Incorporated

JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC, Plaintiffs, v. GREENBERG FARROW ARCHITECTURE INCORPORATED Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-1021-17 Civil Action

DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT UNDER RULE 4:40-2 OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL UNDER RULE 4:49-1 OR, IN THE ALTERNATIVE, MOTION FOR REMITTITUR

In its verdict, the jury ignored the evidence that was presented at trial, ignored the law that it was provided in the jury instructions, created its own legal standards, and instituted its own form of industrial justice. The result of this brand of justice was the jury effectively imposing punitive damages on GreenbergFarrow Architecture Incorporated ("GreenbergFarrow") that exceeded those damages that Plaintiffs expressly sought at trial.

The ramifications of the verdict in this case are extraordinary. If the verdict stands, then all contracting parties in the State of New Jersey who elect to include language in a document demonstrating that it is only a preliminary and nonbinding agreement will be at risk of a later finding that the document is a contract and potentially face liability. This will impede the ability of all parties, from homeowners to major corporations, to freely engage in negotiations without

prematurely binding themselves to a purported contract. The Court should ensure that parties in the State of New Jersey continue to remain free to choose when and how they enter contracts.

The current posture of this case demonstrates the need for the Court to intervene. The jury found that GreenbergFarrow is liable for breach of contract relating to a letter dated June 3, 2016 and signed by Ms. Flor on June 10, 2016, which was Exhibit J-2 at trial (the "Letter"). However, the only evidence that GreenbergFarrow actually gained a benefit is speculative and illusory and bears no relation to the parties' actual bargained-for benefits in the Letter. As it currently stands, Plaintiffs receive all of the benefits under the Letter and GreenbergFarrow gets none of the benefits it was supposed to get under the Letter. Plaintiffs thus purportedly get a 100% ownership interest in the entity, ENGenuity Infrastructure, LLC ("ENGenuity"), and do not have to pay any of the costs associated with starting up this business. Nothing in the Letter or the law in New Jersey permits this absurd result.

The law and evidence in this case are clear. The Court should grant judgment to GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Alternatively, the Court should find that the jury's verdict in this case is a miscarriage of justice and order a full new trial. If the Court does not grant judgment to GreenbergFarrow or order a new trial, it should nonetheless issue a remittitur and reduce the jury's verdict by eliminating the award pertaining to operating costs ($599,000), the amount of Ms. Flor's salary that she was able to mitigate ($51,014.50), and the factually and legally impermissible award for breach of the implied covenant of good faith and fair dealing ($375,000). Finally, if the Court upholds any portion of the award provided in the verdict, the Court should order that GreenbergFarrow is the 49% owner of ENGenuity.

I. BACKGROUND

The relevant facts in this case have been well worn at this juncture and do not require an additional recitation. The jury trial in this matter occurred between October 7th and 17th, 2019. At the close of the evidence, GreenbergFarrow moved for judgment on all of Plaintiffs' claims under Rule 4:40. (See Oct. 16, 2019 Tr., vol. 1 at 198:2–200:24; id., vol. 2 at 201:1–203:5.)

At summary judgment, GreenbergFarrow argued, in relevant part, that Plaintiffs' claim for breach of contract failed as a matter of law because the Letter was only a nonbinding agreement to agree. (See, e.g., Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 8–10.) In their pretrial materials and at the charge conference, GreenbergFarrow requested that the Court give a jury instruction relating to agreements to agree and preliminary agreements during the course of negotiations. (See Defs.' Proposed Jury Instructions at 19.) The Court denied this request and GreenbergFarrow preserved its objection to the omission of this jury instruction. (See, e.g., Oct. 16, 2019 Tr., vol. 1 at 194:15–23.)

At the conclusion of the trial, the jury returned a verdict in favor of Plaintiffs on Plaintiffs' First Cause of Action for breach of contract and Plaintiffs' Second Cause of Action for breach of the implied covenant of good faith and fair dealing. (See Oct. 17, 2019 Tr., vol. 2 at 47:25–48:23, 49:9–16.) In their verdict, the jury awarded Plaintiffs $904,000 on their First Cause of Action and $375,000 on their Second Cause of Action. (Id. at 48:24–49:25.)

II. LEGAL STANDARD

A. Judgment Notwithstanding the Verdict Under Rule 4:40-2

Rule 4:40-2(b) addresses judgments notwithstanding the verdict and states the following, in relevant part:

> If a motion for judgment is denied and the case submitted to the jury, the motion may be renewed in accordance with the procedure prescribed by R. 4:49-1 (new

> trial) within 20 days after the verdict or the jury's discharge. A motion so renewed may include in the alternative a motion for a new trial, and every motion made by a party for a new trial shall be deemed to include, in the alternative, a renewal of any motion for judgment made by that party at the close of the evidence. If the motion is granted on renewal thereof, the court shall nevertheless rule on the motion for a new trial determining whether it should be granted if the judgment is thereafter reversed or vacated.

As stated by the Supreme Court, the standard for judgment notwithstanding the verdict under Rule 4:40-2 is, in "essence," the "same" as the standard governing motions for summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). In particular, like at summary judgment, the inquiry for motions for judgment notwithstanding the verdict is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. (citation omitted). "A jury resolves factual, not legal disputes." Id. at 537. Thus, "[i]f a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party on the issue of liability or damages or both." Id.

B. New Trial Under Rule 4:49-1

Rule 4:49-1 governs motions for new trial and states as follows, in pertinent part:

> A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. . . . The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

The standard governing a motion for new trial is different than that governing a motion for judgment notwithstanding the verdict and "[i]t is clear that [a motion for new trial] may be properly granted although the state of the evidence would not justify the direction of a verdict." Dolson v. Anastasia, 55 N.J. 2, 6 (1969). Unlike in a motion for judgment notwithstanding the verdict, the standard governing a motion for new trial involves the court engaging in a "process of evidence

evaluation," or "weighing." Id. In particular, "in ruling on a motion for new trial, the trial judge takes into account, not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, so-called demeanor evidence, and the intangible feel of the case which he has gained by presiding over the trial." Id. "The whole process is well summed up" as "whether the result strikes the judicial mind as a miscarriage of justice." Id. (citation omitted).

C. Remittitur

Remittitur is "a judicial remedy to correct a grossly disproportionate damages award, which, if left intact, would constitute a miscarriage of justice." Cuevas v. Wentworth Grp., 226 N.J. 480, 487 (2016), modified in part on other grounds by Orientale v. Jennings, 239 N.J. 569 (2019). "A damages award that is so grossly excessive that it shocks the judicial conscience cannot stand, and therefore remittitur allows the parties the option of avoiding the unnecessary expense and delay of a new trial." Id. at 499.

"When a judge declares that a jury's damages award is so grossly excessive . . . that it shocks the judicial conscience, the jury's appraisal of the evidence leading to an erroneous verdict should not be entitled to any deference." Orientale, 239 N.J. at 593 (citation omitted). "That is so because when the jury's damages award is so wrong that the court must grant either a new trial or, alternatively, a remittitur . . . , the court cannot assume that the jury understood its function or the evidence." Id. at 593–94. Correspondingly, "the court should not resolve all factual disputes in favor of one party or the other, or try to follow the faulty reasoning of the jury, or fix the highest or lowest amount a reasonable jury could have awarded without reversal." Id. at 594 (citation omitted).

"In setting the proper amount of [a] . . . remittitur, the trial court must attempt the difficult task of determining the amount that a reasonable jury, properly instructed, would have awarded." Id. (citation omitted). "Setting the figure at an amount a reasonable jury would award -- an amount that favors neither side -- is intended to give the competing parties the greatest incentive to reach agreement." Id. at 575. "In short, in fixing the remittitur . . . , the court must reach a fair damage verdict on the basis of the evidence it saw and heard." Id. at 594 (citation omitted). "The acceptance of a remittitur . . . requires the mutual consent of the parties." Id. at 596.

III. ARGUMENT AND CITATION OF AUTHORITY

A. GreenbergFarrow Is Entitled to Judgment on Plaintiffs' First and Second Causes of Action Because The Letter Was Not a Contract As a Matter of Law

In their First Cause of Action, Plaintiffs allege that the Letter is a contract and that GreenbergFarrow breached this purported 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)). Plaintiffs' First Cause of Action fails as a matter of law under the first element because (1) on its face, the Letter is only a nonbinding agreement to agree and, and (2) there was no consideration exchanged to support the terms of the Letter. The jury's verdict on the First Cause of Action based on the Letter—and, correspondingly, also the jury's verdict on Plaintiffs' Second Cause of Action[1]—is therefore impermissible as a matter of law and GreenbergFarrow is entitled to judgment on this claim.

[1] Once the Court determines that Plaintiffs' breach of contract claim fails because the Letter is not a contract, Plaintiffs' associated claim for breach of the implied covenant of good faith and fair dealing also fails as a matter of law and the Court must accord judgment to GreenbergFarrow on

1. The Letter Is Not a Contract Because There Was No Meeting of the Minds and the Parties were Still in the Process of Negotiations

The Letter cannot be a final and binding contract as a matter of law because it clearly evidences the parties' intention that it is only one part of the parties' negotiations or, in other words, a nonbinding agreement to agree. The Court should award judgment to GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

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."[2] DeVries v. Evening Journal Ass'n, 9 N.J. 117, 119–20 (1952) (collecting cases); 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))). This long-established principal 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

---

this claim. See, e.g., Cumberland Farms, Inc. v. N.J. Dep't of Envtl. Prot., 447 N.J. Super. 423, 443 (App. Div. 2016); Nolan v. Control Data Corp., 243 N.J. Super. 420, 429 (App. Div. 1990).

[2] During trial, the Court ruled that it would not instruct the jury on the established law in New Jersey regarding whether parties have a meeting of the minds when there are ongoing negotiations. This ruling is the subject of a separate basis requiring a new trial, as provided in Section B below.

agree' upon material terms at a future time as an unenforceable indefinite promise," Bressman v. J&J Specialized, LLC, 2013 WL 6331714, at *7 (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, 9 N.J. at 120 (citing Tansey v. Suckoneck, 98 N.J. Eq. 669, 671 (1925)); see, e.g., Ins. Co. of State of Pa. v. Don Siegel Constr., Inc., 2006 WL 1667175, at *3 (App. Div. June 19, 2006) (using this standard to find that the "discussions of [the parties] never ripened into an enforceable contract").

"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, 51 N.J. Super at 38).

This case does not present a close situation where there is a question as to whether the document evidences an intent to be bound. On its face, the Letter repeatedly expresses the parties' intent that it was only a preliminary agreement to agree that explicitly relies on the parties entering into future agreements. In particular, the Letter states that it provides a "formal[] offer" of an "opportunity" to Ms. Flor, but "with the understanding that certain, additional transactional documents will be executed by and between the parties under separate cover that address"

numerous "items," such as the ownership percentages of the new entity, the "annual salary" of Ms. Flor, the "monthly car allowance" of Ms. Flor, "paid vacation" for Ms. Flor, and a "signing bonus" for Ms. Flor. (Ex. J-2 at 1.) In other words, the Letter expressly states that the parties plan on entering into future agreements regarding the precise terms Plaintiffs try to impose on GreenbergFarrow in this case. In addition, the Letter states that "there may be some necessary 'tweaking' to the stated . . . benefits as the specific partnership documents contemplated herein are prepared and executed." (Id.) Finally, the Letter states that "[i]t is acknowledged by both parties that this offer of employment will be supplemented by the operative documents contemplated to achieve the obligations of [GreenbergFarrow] and [the new entity] for the successful partnership." (Id. at 2.) These provisions demonstrate that the intent of the parties, as 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 agreements. This is a classic nonbinding agreement to agree that cannot support Plaintiffs' breach of contract claim as a matter of law.

The Court nonetheless denied Defendants' motion for summary judgment in the Court's Order Granting Summary Judgment (the "Order"). In particular, the Court relied on the Appellate Division's decision in Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369 (App. Div. 1975) on the issue of whether the preliminary Letter "may constitute a valid contract based on a mutual intention to be bound." (Order at 4.) The Court then 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.

(Id. at 4–5 (citations omitted).) The 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. (Id. at 5.)

The Court's discussion of the Berg opinion itself demonstrates why Plaintiffs' breach of contract claim fails as a matter of law. Unlike the document at issue in Berg, the Letter includes 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 seek to impose on GreenbergFarrow would be the subject of those future agreements. Additionally, the terms of the Letter do not "cover[] all of, if not more than, the typical subject matter" of an offer of employment and funding for an entity. The Letter is two pages long and does not include most of the provisions that are common in such agreements, such as the rights of the parties (which was the subject of the subsequent letter of intent negotiations) or whether Ms. Flor would be subject to a non-compete agreement. Indeed, Ms. Flor herself testified that her employment agreement with her previous employer and even her submission to the State for WBE status were far longer than the document she now claims is a binding contract. (Oct. 10, 2019 Tr., vol. 1 at 86:4–21.) Additionally, the factors the Berg court focused on in distinguishing the Trustees decision are, in fact, present in this case. Specifically, the Letter "contain[s] limiting language indicative of an

intent to not be bound thereby" in that the Letter states that its terms will be the subject of future agreements. Further, as the Court noted in the Order, "the subsequent[] . . . LOI differed in many respects from the Letter." (Order at 5.)

In short, the analysis in Berg demonstrates that the Letter at issue in this case is not and cannot be a binding contract. Any finding that the Letter is a contract would rely on an interpretation that cherry picks certain provisions and ignores the actual language of the Letter regarding future agreements. This selective interpretation is impermissible as a matter of law. See, e.g., Quinn v. Quinn, 225 N.J. 34, 45 (2016) ("It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear." (citation omitted)).

As the Letter provides on its face that it is only an agreement to agree on formal contractual terms in the future, it is not a contract as a matter of law. See, e.g., Moran v. Fifteenth Ward Bldg. & Loan Ass'n, 131 N.J. Eq. 361, 366 (Ch. Div. 1942) ("When parties enter into negotiations and reach a tentative agreement, but do not intend to be bound until a formal contract be executed, they cannot be held to their tentative bargain."); 1 Williston on Contracts § 4:29 (4th ed. 2018) ("[I]f an essential element is reserved for the future agreement of both parties, as a general rule, the promise can give rise to no legal obligation until such future agreement."). The Court should apply the governing standards, find that the Letter is not a binding contract, and grant judgment to GreenbergFarrow on Plaintiffs' breach of contract claim.

Alternatively, if the Court finds that only a portion of the Letter constitutes a binding contract, then it should limit any potential recovery to those definite terms. As Plaintiffs have often stated throughout this litigation, the Letter provides that one portion of its terms is a "guaranteed and unconditional and irrevocable obligation" of GreenbergFarrow to Ms. Flor—namely, the offer of a salary "annualized at $175,000.00 for a term of two (2) years." (Ex. J-2 at 1.) The Letter

further states that Ms. Flor "shall receive a monthly car allowance of $350.00, for a guaranteed term of two (2) years." (Id.) These are the only terms in the Letter that use language similar to "guaranteed," "unconditional," or "irrevocable." (See Ex. J-2.) This language relates solely to the direct payments to Ms. Flor, (id. at 1.), and, at trial, Ms. Flor repeatedly limited Plaintiffs' request for such direct payments to $305,000.

The operating expenses relating to the entity that Plaintiffs requested present a starkly different issue. Conspicuously, the provisions relating to the entity do not use language similar to "guaranteed" or "unconditional." (See Ex. J-2.) Instead, the only language pertaining to these terms is the same conditional language that governs the entirety of the Letter, such as that the Letter is "with the understanding that certain, additional transactional documents will be executed by and between the parties under separate cover that address the items" and that "[i]t is acknowledged by both parties that this offer of employment will be supplemented by the operative documents contemplated to achieve the obligations and [GreenbergFarrow] and [the entity] for the successful partnership." (Id.) The presence of this repeated conditional language and the omission of the language like "guaranteed" that is provided regarding the direct payments to Ms. Flor demonstrates that, even if there was a contract, the purported contract relates solely to the direct payments and not any type of operating expenses or similar obligation relating to the entity. Thus, even if the Court finds that a portion of the Letter constitutes a binding contract, it should limit that finding to the $305,000 in direct payments to Ms. Flor, find that the remainder of the Letter—such as the discussion regarding obligations relating to the entity—is not part of a binding contract, grant judgment to GreenbergFarrow on all payment obligations other than the $305,000 in purported direct payment obligations, or, alternatively, grant a new trial.

2. The Letter Is Not a Contract As a Matter of Law Because There Was No Valid Consideration Exchanged

In addition to a lack of a meeting of the minds, Plaintiffs' First Cause of Action for breach of contract fails as a matter of law due to a lack of adequate consideration. "No contract is enforceable, of course, without the flow of consideration—both sides must 'get something' out of the exchange." Cont'l Bank of Pa. v. Barclay Riding Acad., Inc., 93 N.J. 153, 170 (1983) (citing 1 A. Corbin, Contracts § 110 (1963)). "Consideration is 'a bargained-for exchange of promises or performance that may consist of an act, a forbearance, or the creation, modification, or destruction of a legal relation.'" Sipko v. Koger, Inc., 214 N.J. 364, 380 (2013) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 87 (2002)).

In this case, there was no valid consideration for two reasons. First, the only evidence of consideration was both illusory and speculative. There was no evidence presented at trial that GreenbergFarrow received some type of monetary compensation for purportedly entering into the Letter. Instead, the only evidence adduced at trial on the issue of consideration was provided by Ms. Flor, who testified that GreenbergFarrow purportedly received the benefit of an "education" on the public-sector market in New Jersey and introduction to contacts in that market so they could "diversif[y]." (Oct. 10, 2019 Tr., vol. 1 at 32:22–33:18, 40:12–15.) However, Ms. Flor herself testified that she did not know whether GreenbergFarrow actually entered that market and that she could not answer whether GreenbergFarrow benefitted from the "education." (Id. at 34:7–17, 35:12–14.) Instead, the only evidence on this point was provided by Mr. Johnston and Mr. Ghadrdan, who testified that GreenbergFarrow has not entered the New Jersey public-sector market. (See Oct. 10, 2019 Tr., vol. 1 at 200:4–19; Oct. 16 Tr., vol. 1 at 120:19–21.) Thus, the only evidence of a purported benefit to GreenbergFarrow was Ms. Flor's speculative testimony that GreenbergFarrow received an "education" from which they received no business or financial

benefit. The Court should find that liability on a breach of contract claim based on this type of illusory and speculative evidence of a benefit constitutes a miscarriage of justice and order a new trial.

Second, and importantly, the purported benefits identified by Ms. Flor were *not* what the parties purportedly agreed to in the Letter. It is ultimately irrelevant that Ms. Flor now believes that GreenbergFarrow received some benefit in the form of an "education" or introduction into the New Jersey public-sector market. Under New Jersey contract law, the only benefits that may sustain consideration are those the parties actually bargained for—*i.e.*, the consideration that the parties intended to give or receive, as provided in the document itself. See, e.g., Cont'l Bank of Pa., 93 N.J. at 170 ("Consideration is the price bargained for and paid for a promise." (quoting Friedman v. Tappan Dev. Corp., 22 N.J. 523, 535 (1956))); Friedman, 22 N.J. at 535 ("The question is largely one of intention. . . . If it is bargained for as the exchange for the promise, the promise is not gratuitous."); Am. Handkerchief Corp. v. Frannat Realty Co., 17 N.J. 12, 18 (1954) ("[A]lthough it is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration, it is equally well settled that consideration, no matter how small, must be the price bargained for and paid for a promise." (citations omitted)); Massey v. Del-Valley Corp., 46 N.J. Super. 400, 403 (Ch. Div. 1957) ("Nothing is consideration that is not regarded as such by the parties; or, as it is usually put, consideration is the price bargained for by them." (collecting cases)); 49 N.J. Prac., Contract Formation—Consideration §7:7 (2019) ("[W]hen courts speak of the need for an exchange of valuable consideration what is meant is that the consideration must merely be valuable in the sense that it is something that is bargained for in fact.").

Here, the Letter identifies only one type of potential consideration for GreenbergFarrow—a 49% ownership interest in ENGenuity. (See Ex. J-2.) However, as Ms. Flor herself testified, she owns 100% of ENGenuity and GreenbergFarrow does not possess the 49% ownership interest in this entity. (See Oct. 16, 2019 Tr., vol. 1 at 36:14–21.) As such, according to Ms. Flor, GreenbergFarrow does not possess the consideration of ownership in ENGenuity that was contemplated in the Letter. Absent that consideration, the Letter is unenforceable as a matter of law. See, e.g., Continental Bank of Pa., 93 N.J. at 170. The Court should find that the requirement of consideration is absent in this case and grant judgment to GreenbergFarrow on Plaintiffs' breach of contract claim.

B. GreenbergFarrow Is Entitled to a New Trial Because the Court Failed to Give Proper Jury Instructions Regarding the Requirements for a Breach of Contract Claim

At the conclusion of the trial, the Court declined to give an instruction proffered by GreenbergFarrow relating to the meeting of the minds requirement of contract law and, specifically, the situation where parties are in the course of negotiations and enter into an agreement to agree. (See, e.g., Oct. 16, 2019 Tr., vol. 1 at 177:9–180:6, 194:15–23.) This decision by the Court resulted in jury instructions that were both incomplete and tended to mislead the jury. The Court's decision to omit this instruction constitutes error and requires a full new trial.

New Jersey "law has long recognized the critical importance of accurate and precise instructions to the jury." Washington v. Perez, 219 N.J. 338, 351 (2014). "It is fundamental that '[a]ppropriate and proper charges to a jury are essential for a fair trial.'" Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (quoting New Jersey v. Green, 86 N.J. 281, 287 (1981)). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations." Das v. Thani, 171 N.J. 518, 527 (2002) (quoting New Jersey v. Martin, 119 N.J. 2, 15 (1990)). "A jury is entitled to an explanation of the applicable legal

principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002) (quoting Rendine v. Pantzer, 276 N.J. Super. 398, 431 (App. Div. 1994)); see, e.g., Velazquez, 163 N.J. at 688 ("Jury charges must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them." (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591–92 (1966))).

"[I]n construing a jury charge, a court must examine the charge as a whole, rather than focus on individual errors in isolation." Viscik, 173 N.J. at 18. "[E]rroneous jury instructions constitute reversible error where the jury outcome might have been different had the jury been instructed correctly." Washington, 219 N.J. at 351 (quoting Velazquez, 163 N.J. at 688). Additionally, "an improper jury instruction may require reversal if the instruction tended to confuse or mislead the jury." Wade v. Kessler Inst., 343 N.J. Super. 338, 345 (App. Div. 2001). "Generally, 'erroneous instructions on material points are presumed to be reversible error.'" Washington, 219 N.J. at 351 (quoting McClelland v. Tucker, 273 N.J. Super. 410, 417 (App. Div. 1994)); see, e.g., Romond v. Valiant Home Remodelers, 2007 WL 2362853, at *7 (App. Div. Aug. 21, 2007) ("Where there is a refusal to charge at all on a point that is involved in the case, such refusal is, in itself, an error in law." (quoting New Jersey v. Petre, 35 N.J.L. 64, 68 (1871))).

In this case, the jury instruction likely confused and misled the jury because the Court declined to give the jury the instruction requested by GreenbergFarrow relating to the meeting of the minds requirement of contract formation. Throughout this case, GreenbergFarrow has argued that the Letter is not a binding contract and, instead, was only an agreement to agree to material terms in the future. (See, e.g., Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 8–10.) This

argument was central to GreenbergFarrow's case and one of the dispositive determinations for the jury in this matter. It was therefore of paramount importance that the Court provide a complete and accurate instruction of the law on this issue.

In their pretrial materials and at the charge conference, GreenbergFarrow requested that the Court provide the following instruction relating to agreements to agree:

> "Until there is such a meeting of the minds, either party may withdraw and end all negotiations without creating a binding contract. When parties enter into negotiations and reach a tentative agreement, but do not intend to be bound until a formal contract is executed, they cannot be held to their tentative bargain. In other words, if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until the parties enter into such future agreement. So 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."

(Defs.' Proposed Jury Instrs. at 19.) GreenbergFarrow cited relevant authority demonstrating that this instruction is an accurate statement of the law. (See id n.4–8.) Further, Plaintiffs have never presented any law stating that GreenbergFarrow's proffered jury instruction was an incorrect statement of the law regarding the meeting of the minds requirement of contract formation. The Court nonetheless declined to give this instruction.

The Court's decision to not give this instruction constituted error because the instruction is established and correct law in New Jersey and the legal principles provided in the instruction were not otherwise encompassed within the charge given to the jury. The legal principle that there is no meeting of the minds if parties are still in the process of negotiation as to material terms is fundamental, black-letter contract law in New Jersey provided by the Supreme Court, see, e.g., DeVries v. Evening Journal Ass'n, 9 N.J. 117, 119–20 (1952) (collecting cases), and stated in numerous different ways by New Jersey courts, see, e.g., Morales v. Santiago, 217 N.J. Super. 496, 502 (1987); Bressman v. J&J Specialized, LLC, 2013 WL 6331714, at *7 (App. Div. Dec. 6,

2013) (quoting 1 Williston on Contracts § 4:29 (2007)). It also continues to be relied on by New Jersey courts to this day. For example, the court in Insurance Co. of Pennsylvania v. Don Siegel Construction, Inc. quoted this exact language relating to ongoing negotiations from the DeVries decision and then expressly relied on this standard in finding "that the discussions of [the parties] never ripened into an enforceable contract." 2006 WL 1667175, at *3 (App. Div. June 19, 2006).

Further, New Jersey is far from alone in applying this fundamental principle of contract law relating to agreements to agree, as it is routinely provided in the foremost authorities on contract law. See, e.g., 1 Williston on Contracts § 4:29 (4th ed. 2019) ("[I]f an essential element is reserved for the future agreement of both parties, as a general rule, the promise can give rise to no legal obligation until such future agreement."). This principle is also routinely applied by courts throughout the country. See, e.g., Welsh v. Heritage Homes of Del., Inc., C.A. No. 1901-VCN, 2008 WL 442549, at *9 (Del. Ct. Ch. Feb. 15, 2008) ("Delaware law requires that, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations."); Highland Sewer & Water Auth. v. Forest Hills Mun. Auth., 797 A.2d 385, 390 (Pa. Commw. Ct. 2002) (noting that "[a]n agreement to agree is incapable of enforcement, especially when it is stipulated that the proposed compact shall be mutually agreeable" and finding that the parties did not enter into a binding contract because the document stated, in relevant part and in words that are almost identical to the Letter in this case, "they agreed that they would enter into a[n] . . . agreement that would 'fully detail the relationship between the parties'"); Danton Constr. Corp. v. Bonner, 571 N.Y.S.2d 299, 300 (App. Div. 1991) ("[A]n 'agreement to agree', which leaves material terms of a proposed contract for future negotiation, is unenforceable." (collecting cases)).

Common sense also supports this basic tenet of contract law. Every single day in New Jersey, parties enter into negotiations about various potential business relationships, whether it is individuals purchasing repairs to their homes, companies entering into employment agreements with prospective employees, or businesses purchasing materials or services. Every single one of those individuals or businesses relies on the principle of law that they are not bound to an agreement until all of the terms are agreed upon and that the mere act of negotiations and agreeing on only some, but not all, terms does not bind them. Indeed, this principle of law is the very underpinning that allows something as mundane as advertising to not be considered as a binding contractual offer. Restatement (Second) of Contracts § 33 (1981) ("Incompleteness of terms is one of the principal reasons why advertisements and price quotations are ordinarily not interpreted as offers.").

The Court declined to give GreenbergFarrow's proffered instruction despite the law supporting this instruction and the lack of any countervailing authority from Plaintiffs. Instead, the only relevant instructions the Court gave regarding the meeting of the minds requirement of contract formation were (1) the descriptions of this requirement in Model Charge 4.10C, and (2) a description of oral contracts based on Model Charge 4.10G. (See Oct. 17, 2019 Tr. at 14:5–11, 16:9–15.) Neither of these charges encompass the legal principles provided in GreenbergFarrow's proffered instruction, such as that an agreement to agree is not a binding contract, or that there is no contract if the parties reserve an essential element for future agreements. Indeed, the Court's decision to only give Model Charge 4.10G exacerbated the error in this case, as that charge addresses the situation where parties *are* bound to an initial agreement, even if there are potentially going to be future agreements memorializing the understanding. Simply put, the Court only

instructed the jury as to when parties will be bound, even with the intent of future agreements, but declined to instruct the jury as to when parties will not be bound in the same situation.

Ultimately, the Court's choice to not give GreenbergFarrow's proffered instruction resulted in jury instructions that omitted law that the jury required to fairly address the legal arguments and evidence presented in this case, and therefore constitutes error. This error requires a full new trial for several different reasons, including that it goes to a dispositive issue in this case, see, e.g., Washington v. Perez, 219 N.J. 338, 351 (2014), it confused or misled the jury, see, e.g., Wade v. Kessler Inst., 343 N.J. Super. 338, 345 (App. Div. 2001), and the jury might have reached a different result if they were properly instructed on the law governing this case, see, e.g., Washington, 219 N.J. at 351. The Court should grant a full new trial and ensure that GreenbergFarrow receives a fair trial with jury instructions that encompass its central legal positions.

C. GreenbergFarrow Is Entitled to a New Trial Because the Jury Impermissibly Heard Evidence that Substantially Prejudiced GreenbergFarrow

The jury in this case repeatedly heard extraordinarily prejudicial evidence relating to the purported intent of Mr. Ghadrdan and Mr. Johnston—two officers of GreenbergFarrow. This evidence never should have been a part of this trial, as the Court should have properly dismissed this claim at the summary judgment stage. The improper inclusion of this evidence at trial substantially prejudiced GreenbergFarrow and constitutes a miscarriage of justice that requires a full new trial.

Plaintiffs pled a claim for fraudulent inducement against the now-dismissed individual defendants in this action: Mr. Ghadrdan and Mr. Johnston. (See Defs.' Mot. for Summ. J., Ex. 1, Attach. D.) At the summary judgment stage, GreenbergFarrow and the individual defendants moved for dismissal of this fraudulent inducement claim on the grounds that, in relevant part, there

was no evidence in the record to support the first two elements of this cause of action—(1) a material representation of a presently existing or past fact, and (2) that was made with knowledge of its falsity. (See Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 15–19.) In particular, Defendants noted that there was no evidence that the individual defendants made any of the purported representations in their individual capacity, rather than as employees or officers of GreenbergFarrow. (Id. at 16–17.)

The Court denied summary judgment on this claim and allowed it to proceed to trial. (Order at 7.) However, in denying this motion, the Court did not address the arguments of GreenbergFarrow and the individual defendants regarding the evidentiary deficiencies pertaining to the first two elements of this claim. (See id. at 6–7.)

The evidence at trial did not change the legal analysis pertaining to this claim. As at summary judgment, there was no evidence at trial supporting the first two elements of this claim—*i.e.*, that the individual defendants made a subject representation in their individual capacity, or that an unidentified representation by the individual defendants in that capacity was made with knowledge of its falsity. Given this continued evidentiary deficiency, GreenbergFarrow and the individual defendants moved for directed verdict on Plaintiffs' fraudulent inducement claim at the close of Plaintiffs' case-in-chief. The Court granted this motion and dismissed Plaintiffs' fraudulent inducement cause of action. (See Oct. 15, 2019 Tr. at 132:8–133:15.) In doing so, the Court noted that its ruling was "based upon the proofs presented -- and it's really elements one and two." (Id. at 133:4–6.)

By the time the Court ruled on this claim after the Plaintiffs' case, the damage had been done. If the Court properly dismissed the fraudulent inducement claim at summary judgment, then Plaintiffs would not have been permitted to introduce testimony evidence regarding the purported

fraudulent intent of any defendant. However, with the fraudulent inducement claim still in the case, the door was open for testimony from Ms. Flor regarding the purported fraudulent intent of the defendants. As merely examples, Ms. Flor testified at length about how "Greenberg Farrow never intended for ENGenuity to be an independent company," (Oct. 9, 2019 Tr., vol. 2 at 203:10–11), that Ms. Flor was "duped" and that she "couldn't understand why anyone would do that[,] [b]ut they did," (id. at 205:10–14), that "they marked up" a version of the letter "in order to entice [Ms. Flor], to make [Ms. Flor] feel comfortable, to put [Ms. Flor] at east to get [Ms. Flor] to sign it, to get [Ms. Flor] to quit [her] job, get [Ms. Flor] to enter into all of these . . . knowing at the time that they had no intention of doing that," (Oct. 10, 2019 Tr., vol. 1 at 31:17–22), that "only after [Ms. Flor] ha[d] already separated, given [her] equity, left [her] company, spoken to all of [her] clients and [Ms. Flor is] up against these deadlines where Engenuity wouldn't have been able to even to even [sic] enter those engineering . . . do they reveal their true intent to [Ms. Flor]," (id. at 31:24–32:4), that "[w]hat they did was they listened to everything that [Ms. Flor] said, that instead of only seeing those as [her] strengths they also saw those as [her] weaknesses, things to be exploited that would have caused [Ms. Flor] to allow them to take control later[,] [a]nd they waited till the last minute," (id. at 32:6–11), and that Ms. Flor had "never been strong armed like that before" and "[i]t was the first time [she] had experienced something like that," (id. at 32:12–14). The errant inclusion of this claim at trial also provided an opening for evidence regarding whether Mr. Ghadrdan purportedly called ENGenuity a "subsidiary," (Oct. 9, 2019 Tr., vol. 1 at 199:21–200:3; Oct. 10, 2019 Tr., vol. 1 at 179:11–14), and whether the letter of intent was drafted before the Letter—thereby purportedly showing ill intent, (see, e.g., Oct. 10, 2019 Tr., vol. 1 at 74:8–15, 173:22–176:1, 184:4–187:18). The sole reason any of this intent evidence was included at trial was the inclusion of the fraudulent inducement claim and its intent requirement.

All of this extensive evidence was extremely prejudicial to GreenbergFarrow, as it had the tendency to elicit a desire in the jury to punish GreenbergFarrow. The potential of this evidence to create this punitive response from the jury is not hypothetical in this case. The verdict, itself, demonstrates the impact of this type of evidence. In particular, Plaintiffs sought $904,000 in this action, yet the jury awarded a total of $1,279,000—*i.e.*, $375,000 *in addition* to the amount Plaintiffs expressly sought—based solely on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (Oct. 17, 2019 Tr. at 48:24–49:25.) In other words, with the inclusion of this evidence at trial, the jury improperly punished GreenbergFarrow by awarding more than Plaintiffs were seeking in a breach of contract action—an action that cannot provide for punitive damages as a matter of law. See, e.g., Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 449 (App. Div. 1976) ("Where the essence of a cause of action is limited to a breach of . . . contract, punitive damages are not appropriate regardless of the nature of the conduct constituting the breach.").

If the Court had properly dismissed Plaintiffs' fraudulent inducement claim at summary judgment, the extensive intent evidence would not have been admissible at trial. Without this evidence in the case, the jury heard a plethora of detrimental and otherwise inadmissible fraudulent intent evidence. The inclusion of this evidence due to a claim that never should have survived to trial constitutes a miscarriage of justice that resulted in the jury electing to punish GreenbergFarrow by awarding more in damages than Plaintiffs sought in this action. The Court should grant a new trial and afford GreenbergFarrow the opportunity to have a fair trial that does not include extraordinarily prejudicial intent evidence based on a now-dismissed claim for fraudulent inducement.

D. GreenbergFarrow Is Entitled to a New Trial Because the Jury Awarded Legally Impermissible Damages to Plaintiffs

At the conclusion of trial, the jury awarded Plaintiffs $904,000 based on their breach of contract claim, and an additional $375,000 based on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. (Oct. 17, 2019 Tr. at 48:24–49:25.) The Court should grant a new trial or order a remittitur based on this verdict amount because the $1,279,000 awarded by the jury is grossly excessive and exceeds the amount requested by Plaintiffs, the $375,000 award for breach of the implied covenant of good faith and fair dealing is improper as a matter of law, and the $904,000 award for the breach of contract claim was not reduced based on Ms. Flor's successful attempts to mitigate the purported harm caused by the breach.

1. The Jury Improperly Awarded a Larger Amount in Damages than Plaintiffs Requested

The damages awarded by the jury demonstrate that the jury disregarded the law and the evidence. There was no ambiguity at trial as to the damages Plaintiffs sought. Ms. Flor expressly testified that Plaintiffs sought exactly two forms of damages: (1) those pertaining to direct payments for Ms. Flor; and (2) those pertaining to the operating expenses of ENGenuity. As to the former category of damages, Ms. Flor repeatedly testified that Plaintiffs sought $305,000, which constitutes "the remainder of [her] salary and those items in the beginning of the [Letter] that included the car loans and sign-on bonus, all those enumerated items in the contract" minus the "$49,000" that GreenbergFarrow "paid [Ms. Flor]." (Oct. 10, 2019 Tr., vol. 1 at 15:1–5; see id. at 17:18–18:7, 36:5–8; Oct. 15, 2019 Tr. at 34:11–17.) As to the latter category of damages, Ms. Flor testified that Plaintiffs sought $599,000 relating to the operating expenses of ENGenuity.[3] (Oct.

[3] Ms. Flor initially testified that Plaintiffs sought $699,000 relating to the operating expenses of ENGenuity. (Oct. 10, 2019 Tr., vol. 1 at 14:12–23, 17:18–18:7.) Ms. Flor later clarified that

15, 2019 Tr. at 33:9–14, 34:11–24.) These two figures combined equal a request from Plaintiffs for $904,000 in total damages.

In its verdict, the jury chose to disregard this testimony as to the damages Plaintiffs actually sought. In particular, the jury awarded Plaintiffs a total of $1,279,000 in damages—*i.e.*, $375,000 more in damages than Plaintiffs sought—based solely on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (Oct. 17, 2019 Tr. at 48:24–49:25.) This verdict of 29% more in damages than the evidence permitted demonstrates that the verdict is grossly excessive and has no relation to the law or the evidence in this case. The Court should find that this unfounded verdict shocks the judicial conscience and grant a new trial in this matter. See, e.g., Henker v. Preybylowski, 216 N.J. Super 513, 517 (App. Div. 1987) (finding that "[a] new trial [was] clearly called for" where "[t]he award . . . was so grossly excessive as to demonstrate prejudice, partiality or passion thereby tainting the verdict entirely").

2. The Jury Improperly Awarded Damages Based on Breach of the Implied Covenant of Good Faith and Fair Dealing in Addition to Damages for Breach of Contract

In its verdict, the jury awarded Plaintiffs $904,000 for their breach of contract claim and, separately, $375,000 for Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. (Oct. 17, 2019 Tr. at 48:24–49:25.) The latter award of $375,000 relating to the claim for breach of the implied covenant of good faith and fair dealing requires a new trial in this matter for four separate reasons.

First, separate damages relating to the claim for breach of the implied covenant of good faith and fair dealing are not permissible under the jury instructions. The jury instructions provide for only one permissible form of damages in this action—compensatory damages. (See Oct. 17,

---

Plaintiffs only sought $599,000 relating to operating expenses. (Oct. 15, 2019 Tr. at 33:9–14, 34:11–24.)

2019 Tr. at 26:2–23.) Plaintiffs limited their request for compensatory damages to $904,000. The jury awarded this amount based on the breach of contract claim. However, the jury then went a step further and awarded an additional and separate $375,000 based on the implied covenant claim. The jury instructions do not provide for a separate form of damages for the implied covenant claim, or otherwise authorize the jury to create its own standard for damages for this claim. In other words, the jury took the law into its own hands and created its own standards. The Court should find that the jury's additional award of $375,000 based on the implied covenant claim is impermissible as a matter of law and grant a new trial in this matter.

Second, the jury's award of $375,000 based on the claim for breach of the implied covenant of good faith and fair dealing is also improper because it has no basis in the record. As noted previously, Plaintiffs requested a total amount of $904,000 in this action. Plaintiffs did not request the additional $375,000 that was awarded by the jury, and nothing in the record provided at trial supports this additional award amount. Thus, just like with its deviation from the jury instructions, the jury decided to create its own standard as to the evidence, ignore the evidence that was actually produced at trial, and award an amount that was not supported by the record. The Court should find that the award was not supported by the evidence at trial and demonstrates prejudice, partiality, or passion that infected the entire verdict. The Court should then grant a new trial.

Third, the jury's separate award based on the implied covenant claim is impermissible as a matter of law because parties cannot recover the same compensatory damages twice for both breach of contract and breach of the implied covenant. As conceded by Plaintiffs in their pretrial materials, "[t]he measure of damages on" a claim for breach of the implied covenant of good faith and fair dealing "is the same as under the breach of contract claim." (Pls.' Pretrial Information Exchange at 40 (citing Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997))). In other words,

"[t]he implied covenant cause of action is not intended to provide a plaintiff with additional damages for the bad faith breach of an express term of a contract." Kurnik v. Cooper Health Sys., 2008 WL 2829963, at *22 (App. Div. July 24, 2008). Nonetheless, that is precisely what occurred in this case. The jury awarded the compensatory damages Plaintiffs requested under the breach of contract claim, and then awarded an additional amount of compensatory damages to Plaintiffs that were not supported by the record based on Plaintiffs' implied covenant claim. The jury thus improperly awarded duplicate compensatory damages. The Court should find that the jury's award was improper as a matter of law and grant a new trial.

Fourth, the jury improperly awarded damages to Plaintiffs under both the breach of contract and implied covenant claims based on the same conduct. A party cannot recover under both breach of contract and breach of the implied covenant when the claims are based on the same underlying breaches of an agreement. See, e.g., Williams v. MLB Network, Inc., 2019 WL 1222954, at *30 (App. Div. Mar. 14, 2019) (dismissing the implied covenant claim where the plaintiff premised this claim "on the same conduct . . . alleged in the breach of contract claim, for which he has received a favorable jury verdict"); Adesanya v. Novartis Pharm. Corp., Case No. 2:13–cv–5564 (SDW) (SCM), 2017 WL 2443060, at *11 (D.N.J. June 5, 2017) (finding that "[t]he total damages already awarded" to a party relating to the breach of contract claim "adequately compensate [the party] for [the] breach of duty of good faith and fair dealing" where the conduct forming the basis of the implied covenant claim "comports with the conduct that resulted in [the] breach of the [agreements]"). In this case, the conduct underlying Plaintiffs' claims for breach of contract and the implied covenant pertained to the same issue—conduct that purportedly breached the terms of the Letter. (See Oct. 17, 2019 Tr. at 16:24–17:2, 18:24–19:11.) As the conduct that forms the basis of these claims relates to breaches of the Letter, Plaintiffs may not separately recover for both

claims. See, e.g., Wade v. Kessler Inst., 172 N.J. 327, 344 (2002) (noting that an allegation in a pleading was "erroneous[]" in that it "suggest[ed] that in breaching a literal term of the [contract], defendant also could be found separately liable for breaching the implied covenant of good faith and fair dealing when the two asserted breaches basically rest on the same conduct"). The Court should find that the jury's award of an additional amount based on the implied covenant claim was impermissible as a matter of law and grant a new trial.

3. The Jury Failed to Reduce the Damages Award for the Purported Breach of Contract Based on Ms. Flor's Mitigation of Damages

The jury also failed to follow the instructions provided by the Court in another respect—the jury failed to reduce the damages award relating to the breach of contract claim by the amount that Ms. Flor was able to mitigate her damages. This error provides a separate basis to grant a new trial in this matter.

"Mitigation of damages is a concept which takes into account the injured party's acts or failure to act when computing the amount of his recovery." Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 82 (App. Div. 1997) (citing White v. N. Bergen Twp., 77 N.J. 538, 546 (1978)). "It is well settled that injured parties have a duty to take reasonable steps to mitigate damages." McDonald v. Mianecki, 79 N.J. 275, 299 (1979). "Damages will not be recovered to the extent that the injured party could have avoided his losses through reasonable efforts without undue risk, burden or humiliation." New Jersey v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 618 (2006) (citation omitted). "The amount of loss that [a party] could reasonably have avoided by . . . making substitute arrangements . . . is simply subtracted from the amount that would otherwise have been recoverable as damages." Ingraham, 297 N.J. Super. at 83 (quoting Restatement (Second) of Contracts § 350, cmt. b (1981)).

If, as the jury found, the Letter is a binding contract, then the Letter's terms relating to Ms. Flor's "annual salary" of $175,000 ran "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." (Ex. J-2 at 1.) Ms. Flor signed the Letter on June 10, 2016. (Id. at 2.) As such, the two-year salary period commenced thirty days later on July 10, 2016 and concluded on July 10, 2018. (See id. at 1.)

Ms. Flor was, in fact, able to partially mitigate the damages relating to her salary. During trial, Ms. Flor testified that she received a salary relating to her work with ENGenuity of $13,700 in 2017 and $65,000 in 2018. (Oct. 9, 2019 Tr., vol. 2 at 242:21–22; 244:19–23.) As Ms. Flor was able to earn a salary paid for by a source other than GreenbergFarrow during the two-year salary period, any amount of salary she earned during this period must be reduced from the overall damages award as a matter of law. See, e.g., Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 455 (App. Div. 1976) (noting that the doctrine of mitigation "is particularly applicable to an employment contract wherein the discharge of a full-time employee frees him to earn moneys for his personal services" and, "[u]nder such circumstances, his subsequent earnings during the period of the balance of the contract can be considered in reduction of the claimed damages"). In this case, the entire $13,700 salary Ms. Flor earned in 2017 was within the salary period, so the damages amount must be reduced by that amount. As to 2018, there were 365 days in that calendar year and July 10, 2018 (the last day of the salary period) was the 191st day in that calendar year, which means that 52.33% of 2018 had elapsed on July 10, 2018 and, correspondingly, Ms. Flor had earned $34,014.50 of her annual salary of $65,000 by that date ($65,000 x .5233). Like her salary in 2017, the damages in this case must be reduced by the $34,014.50 Ms. Flor earned by the concluding date of the two-year salary period. This results in a total reduction of the damages relating to salary of $51,014.50 ($17,000.00 + $34,014.50).

In her testimony, Ms. Flor stated that the $305,000 Plaintiffs requested relating to direct payments for Ms. Flor included "the remainder of [her] salary and . . . all those enumerated items in the contract" minus the $49,000 GreenbergFarrow "paid [Ms. Flor]." (Oct. 10, 2019 Tr., vol. 1 at 15:1–5.) However, Ms. Flor did not testify and the record does not otherwise reflect that Plaintiffs reduced this $305,000 figure by the $51,014.50 in salary Ms. Flor earned during the two-year salary period provided in the Letter. Once this figure is properly removed from the damages, Plaintiffs' request for direct payments is reduced to $253,985.50 and Plaintiffs' total requested damages of $904,000 are reduced to $852,985.50.

At the conclusion of the trial, the Court instructed the jury on the law relating to mitigation of damages. (See Oct. 17, 2019 at 26:24–28:8.) However, the jury failed to follow this law and did not reduce the damages award by the amount that Ms. Flor was able to mitigate damages relating to her salary. Instead, the jury simply gave Plaintiffs the exact amount they requested of $904,000 on the breach of contract claim (as well as an extra $375,000 that Plaintiffs never requested). The jury's failure to follow the law of mitigation of damages is yet another example of the jury refusing to follow the instructions and, instead, creating their own standards to decide this case. As with the remainder of the verdict, this errant decision by the jury demonstrates that GreenbergFarrow did not receive a fair trial in this matter. The Court should find that the jury erred by not following the law of mitigation of damages and grant a new trial in this matter.

E. GreenbergFarrow Is Entitled to a New Trial Because the Verdict Results in Plaintiffs Receiving a Windfall

The verdict in this matter resulted in the absurd result where Plaintiffs receive far more funds than they, themselves, state are necessary for compensation and Ms. Flor retains full ownership of ENGenuity and GreenbergFarrow gets penalized by paying over $1.2 million dollars

in exchange for nothing. This absurd result is contrary to the law in New Jersey and requires a full new trial.

As noted previously, the jury instructions provided for only one form of potential damages—compensatory damages. (See Oct. 17, 2019 Tr. at 26:2–23.) "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." Id. (citation omitted). "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 (2006) (collecting cases) (emphasis added).

Following the verdict and assuming the Letter is a contract, Plaintiffs are in a far better position now than they would have been if there was no purported breach by GreenbergFarrow. If the terms of the Letter were carried to their conclusion without a purported breach, Ms. Flor would not have been required to pay operating expenses and would have received the direct payments referenced in the Letter. (See Ex. J-2.) However, and importantly, the trade-off for this is that Ms. Flor would own 51% of ENGenuity and GreenbergFarrow would own 49% of this entity. (Id.)

This end result contemplated by the Letter bears no relation to the current situation following the verdict. As it currently stands, Ms. Flor testified that she owns 100% of ENGenuity, (Oct. 16, 2019 Tr., vol. 1 at 36:14–21), Plaintiffs were compensated in the verdict for the entirety of the $904,000 they sought for direct payments for Ms. Flor and operating expenses for

ENGenuity, and Plaintiffs received an additional lump sum of $375,000 that they never sought at trial, (see Oct. 17, 2019 Tr. at 48:24–49:25). In other words, in both money and ownership interest in the entity, Ms. Flor is in a far better position following the verdict than she would have been absent a purported breach of the Letter. This result is blatantly contrary to the law of compensatory damages in New Jersey. Cf. Krzastek v. Glob. Res. Indus. & Power, Inc., 2008 WL 4161662, at *18 (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"). The Court should avoid this improper result and grant a new trial.

This result also has the effect of providing Plaintiffs with a legally impermissible windfall. Most owners of start-up businesses have to provide substantial personal investment into the business with the hope that they will eventually regain those investments through the profits of the enterprise. Ms. Flor will not face that situation here. Ms. Flor provided a personal investment into ENGenuity and, following the verdict, will both have that personal investment paid by GreenbergFarrow while, as Ms. Flor testified, she will get 100% of the ownership interest in the entity. In other words, Ms. Flor will get the windfall of both keeping the start-up funding of the business and ownership of the business—not to mention a $375,000 lump sum on top. 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 a 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"). The Court should grant a new trial and avoid the absurd result produced by the verdict.

F. Plaintiffs' Request for Specific Performance of the Terms Relating to Operating Expenses in the Letter Is Improper as a Matter of Law and, if the Court Allows the Award as to Damages under Plaintiffs' First Cause of Action to Stand, it Must Declare that Defendant is a Member and Part Owner of ENGenuity

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 Ms. 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 GreenbergFarrow to do what the Letter purportedly stated—pay the operating costs of ENGenuity for a period of two years. The damages in this case were thus not traditional compensatory damages, but damages resulting from the specific performance of the Letter. The Court should grant judgment to GreenbergFarrow on Plaintiffs' request for operating expenses, or, in the alternative, grant a new trial. If, however, the Court allows the award of operating expenses to stand, the Court must declare that GreenbergFarrow is the 49% owner of ENGenuity.

1. An Award that Requires GreenbergFarrow to Pay for the Operating Expenses of ENGenuity is a Specific-Performance Remedy

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. "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) (citation omitted). "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 becomes whether Plaintiffs' request for monetary amounts 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) (emphasis in original). 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 Res. 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 are not seeking compensatory damages, such monetary damages for harm they have suffered in the form of lost profits. Instead, Plaintiffs requested that GreenbergFarrow do precisely what was purportedly provided in the Letter—pay the operating costs of ENGenuity. In other words, Plaintiffs sought to compel GreenbergFarrow to fulfill its contractual obligations. Plaintiffs therefore requested a judgment—here, through a jury verdict—compelling GreenbergFarrow to specifically perform its obligations under the Letter.

2. Specific Performance is Improper in this Case

As Plaintiffs requested a form of specific performance in this action, the next issue is whether this relief is proper. The Court should award judgment to GreenbergFarrow on Plaintiffs' request for operating expenses—$599,000—because Plaintiffs had an adequate remedy at law.

"[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) (collecting cases). 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 Ms. 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 Court should therefore grant judgment to GreenbergFarrow on Plaintiffs' request for specific performance of the contract in the form of the payment of operating expenses. Alternatively, if the Court does not grant judgment on this issue, 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 and a new trial is required.

3. If the Court Allows the Award Regarding Operating Expenses to Stand, it Must Declare that Defendant is a Member and Part Owner of ENGenuity

Even if the Court finds that the remedy of specific performance was appropriate in this case and permits any portion of the award relating to operating expenses to stand, the Court must award GreenbergFarrow its bargained-for benefit 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." Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 605 (App. Div. 2005) (citation omitted). 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." Kacirek v. Clifford, 2005 WL 3098929, at *3 (Ch. Div. Nov. 18, 2005); see, e.g., In re Hoffman, 63 N.J. 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." (collecting authorities)); Stamato v. Agamie, 24 N.J. 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, 1 N.J. 138, 149 (1948) ("[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." (citation omitted)). 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. Instead, the remedy forces the buyer to fulfill their obligations under the contract by paying the agreed-upon purchase price for the land.

If the Letter in this case is a contract, its terms provide for a mutuality of obligation for both Ms. Flor and GreenbergFarrow. In particular, GreenbergFarrow purportedly agreed to provide direct payments to Ms. Flor and separately pay certain operating expenses for the entity that became ENGenuity. The Letter also provides that, in exchange for this financial support, GreenbergFarrow will hold a 49% ownership interest in the entity.

The law does not permit Plaintiffs to have their apple and eat it too. Plaintiffs sought to specifically enforce the terms of the Letter and force GreenbergFarrow to make all of the payments

FILED, Clerk of the Appellate Division, November 16, 2021, **A-002208-20**, AMENDED AMENDED

contemplated under the Letter, including those relating to the operating expenses of ENGenuity. If the verdict stands and GreenbergFarrow 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 GreenbergFarrow receives its bargained-for benefit under the Letter—a 49% ownership interest in GreenbergFarrow. Thus, if the Court finds that specific performance is an appropriate remedy in this case and allows the jury's award of operating expenses to stand, it must also force Plaintiffs to fulfill their obligations under the Letter and order that GreenbergFarrow is the 49% owner of ENGenuity.

CONCLUSION

This case presented simple facts that are governed by well-established law in New Jersey. The Letter demonstrates on its face that it is only an agreement to agree and, therefore, not a binding contract. Additionally, there was never any evidence that Mr. Ghadrdan or Mr. Johnston made a fraudulent representation to Plaintiffs in their individual capacity.

Nonetheless, these issues survived summary judgment and went to a jury. After hearing prejudicial evidence about the purported fraudulent intent of the defendants, the jury ignored the law and the facts presented to them and instituted their own form of industrial justice by penalizing GreenbergFarrow and awarding $375,000 more in damages than Plaintiffs requested in a breach of contract action. This verdict is not based in the law of New Jersey or the evidence presented at trial and results in the absurd result that Ms. Flor is in a far better position today than if the terms of the Letter were fulfilled, while at the same time GreenbergFarrow pays over $1.2 million and gets absolutely nothing in return.

The Court should grant judgment to GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Alternatively, the Court

should find that the jury's verdict in this case is a miscarriage of justice and order a full new trial. If the Court does not grant judgment to GreenbergFarrow or order a new trial, it should issue a remittitur and reduce the jury's verdict by eliminating the award pertaining to operating costs ($599,000), the amount of Ms. Flor's salary that she was able to mitigate ($51,014.50), and the factually and legally impermissible award for breach of the implied covenant of good faith and fair dealing ($375,000). Finally, if the Court upholds any portion of the specific performance award provided in the verdict, the Court should order that GreenbergFarrow is the 49% owner of ENGenuity.

Respectfully submitted this the 17th day of January, 2020.

By:______________________
Matthew N. Fioravanti, Esq.
GIORDANO, HALLERAN & CIESLA, P.C.
125 Half Mile Road, Suite 300
Red Bank, N.J. 07701
(732) 741-3900

Michael D. Flint, Esq.
Jamie L. Kastler, Esq.
SCHREEDER, WHEELER & FLINT, LLP
1100 Peachtree Street N.E., Suite 800
Atlanta, Georgia 30309
(404) 681-3450

Attorneys for Defendant GreenbergFarrow Architectural Incorporated

GIORDANO, HALLERAN & CIESLA, P.C.
125 Half Mile Road, Suite 300, Red Bank, N.J. 07701
(732) 741-3900
Matthew N. Fiorovanti, Esq. (027332006)
Attorney for Defendant Greenberg Farrow
Architecture Incorporated

JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC, Plaintiffs, v. GREENBERG FARROW ARCHITECTURE INCORPORATED Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-1021-17 Civil Action

DEFENDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT UNDER RULE 4:40-2 OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL UNDER RULE 4:49-1 OR, IN THE ALTERNATIVE, MOTION FOR REMITTITUR

Plaintiffs have employed a consistent approach throughout this litigation. In their summary judgment briefing, Plaintiffs urged the Court to ignore the dispositive authority cited by GreenbergFarrow[1] and relied on irrelevant facts in the hope that the Court would permit legally deficient claims to proceed to trial. In an attempt to distract from these problems and often to simply avoid addressing GreenbergFarrow's arguments altogether, Plaintiffs used colorful and inflammatory language like accusing GreenbergFarrow of "grossly misstat[ing] . . . the controlling law," "accomplish[ing] [a] sleight-of-hand," "riding roughshod on rules of contract interpretation and enforcement," (Pls.' Br. in Opp. to Defs.' Mot. for Summ. J. at 1), "rely[ing] on speculation, conjecture and gross distortions of law," and "baldly insist[ing]" on an argument, (Pls.' Reply In

[1] GreenbergFarrow uses the same defined terms in the instant reply brief as in its initial brief in support of its Motion.

Supp. of Mot. for Summ. J. at 1 & 4.) In response to this approach, GreenbergFarrow "encourage[d] the Court to closely scrutinize the arguments of the parties and the applicable law." (Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. at 1.)

In their opposition to GreenbergFarrow's Motion, Plaintiffs dramatically escalate this strategy and now openly impugn the ethical integrity of defense counsel, such as by asserting that "Defendant's contention . . . smacks of dishonesty," that GreenbergFarrow's argument "screams of a lack of candor with the Court," that the portions of testimony that GreenbergFarrow relies on "are a sham," and that GreenbergFarrow's "tactic borders on the frivolous." (Pls.' Opp. at 9, 10, 23, 25.) The reason for Plaintiffs' unfounded assertions is simple: Plaintiffs seek to distract the Court from GreenbergFarrow's arguments and the authority that is fatal to Plaintiffs' claims.

For example, as to the meeting of the minds requirement for Plaintiffs' breach of contract claim, GreenbergFarrow demonstrated that binding and precedential standards from the Supreme Court mandate a finding that the Letter was only a nonbinding agreement to agree, but Plaintiffs ignore this precedent and ask the Court to avoid and essentially overturn this law from the Supreme Court without citing a single authority in support of this extraordinary proposition. As to the consideration requirement, GreenbergFarrow demonstrated that this element is not met because the record demonstrates that GreenbergFarrow does not have the sole consideration referenced in the Letter—a 49% ownership interest in ENGenuity—and Plaintiffs simply ignore this dispositive fact. As to the evidence of fraudulent intent at the time of the Letter, GreenbergFarrow demonstrated that the record included a slew of extremely prejudicial evidence regarding intent that was only relevant to a now-dismissed fraud claim and Plaintiffs incorrectly assert that this evidence was relevant to the breach of contract and breach of the implied covenant claims with no explanation whatsoever. As to damages, GreenbergFarrow demonstrated that the damages in the

verdict vastly exceed those compensatory damages sought by Plaintiffs and, in response, Plaintiffs ignore that the sole measure of damages at issue in this case is *compensatory* damages and attempt to justify the verdict based on a reference at trial to a $2,000,000 estimate from Ms. Flor—an amount of money that Plaintiffs never spent and that bears no relation whatsoever to compensatory damages. Finally, GreenbergFarrow demonstrated through an extensive and detailed analysis why Plaintiffs seek impermissible specific performance of GreenbergFarrow's purported obligations under the Letter in this case, and Plaintiffs simply refuse to substantively address this argument.

GreenbergFarrow again urges the Court to see past the unfounded inflammatory language of Plaintiffs and to closely scrutinize the arguments of the parties and the applicable law. There is binding and well-established law on each and every issue in this case, and that law requires judgment in favor of GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant. Absent judgment in favor of GreenbergFarrow, the Court should find that the jury's verdict in this case is a miscarriage of justice and order a full new trial. If the Court does not grant judgment to GreenbergFarrow or order a new trial, it should nonetheless issue a remittitur and reduce the jury's verdict by eliminating the award pertaining to operating costs ($599,000), the amount of Ms. Flor's salary that she was able to mitigate ($51,014.50), and the factually and legally impermissible award for breach of the implied covenant of good faith and fair dealing ($375,000). Finally, if the Court upholds any portion of the award provided in the verdict, the Court should order that GreenbergFarrow is the 49% owner of ENGenuity.

A. The Court Should Enter Judgment in Favor of GreenbergFarrow on Plaintiffs' First and Second Causes of Action

1. <u>There Was No Meeting of the Minds</u>

In its opening brief, GreenbergFarrow cited extensive authority demonstrating that, on its face, the Letter is not a contract and instead is only a nonbinding agreement to agree. The

authorities cited by GreenbergFarrow include binding and precedential case law provided by the Supreme Court, which continues to be applied and relied on by New Jersey courts.

In response, Plaintiffs do not cite a single piece of authority demonstrating that the case law and authorities cited by GreenbergFarrow are no longer good law. Indeed, Plaintiffs have not cited any such authority *at any point in this litigation*. Plaintiffs also do not cite a single authority demonstrating how a document like the Letter—which clearly and repeatedly indicates that it is no more than an agreement to agree—is a contract in spite of its terms. In other words, GreenbergFarrow presented an argument that the Letter is not a contract on its face and provided binding authority supporting that argument, while Plaintiffs chose to simply ignore that argument.

It is important to be clear what Plaintiffs ask this Court to do. Plaintiffs request that the Court uphold the verdict finding that the Letter is a contract, even though that interpretation is impermissible as a matter of law based on binding standards from the Supreme Court. In other words, Plaintiffs ask this Court to de facto overrule this precedent from the Supreme Court by finding that it is no longer good law.[2] The law and the language of the Letter are clear. The Court should apply that law and find that the Letter is not a contract as a matter of law.[3]

Rather than addressing the actual language of the Letter—which Plaintiffs continue to ignore—Plaintiffs spend five pages of their brief addressing testimony at trial that they claim supports their interpretation of the Letter. (See Opp. at 7–12.) Of course, Plaintiffs fail to state in

---

[2] Plaintiffs may disagree with the precedent regarding nonbinding agreements to agree, but the solution is not for Plaintiffs to urge this Court to ignore that inconvenient law and de facto overrule the Supreme Court. Instead, Plaintiffs remain free to follow the path of all litigants when they disagree with binding precedent—they can ask the Supreme Court to revisit that established law.

[3] While the Court elected at the summary judgment stage to permit the jury to interpret the Letter, that does not change the fact that it is the role of the Court and not the jury to apply the governing rules of construction and to interpret the Letter. See, e.g., Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div. 2008) ("The interpretation of contracts and their construction are matters of law for the court subject to de novo review.").

their opposition that any evidence beyond the Letter—whether it is other writings or testimony by the parties—is irrelevant in this analysis. Indeed, the sole relevant inquiry is the intent of the parties as expressed in the writing itself. See, e.g., ACE Am. Ins. Co. v. Am. Med. Plumping, Inc., 458 N.J. Super. 535, 539–40 (App. Div. 2019) ("[I]t is not the real intent but the intent expressed or apparent in the writing that controls." (quoting Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956))); Leitner v. Braen, 51 N.J. Super. 31, 38 (App. Div. 1958) ("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." (citation omitted)). It is not just GreenbergFarrow that has long maintained that the basic rule of contractual interpretation that the writing alone determines intent governs in this case. Plaintiffs themselves have repeatedly and explicitly insisted in this litigation that only the language of the Letter is relevant on the issue of whether there was a meeting of the minds and that testimony by the parties and evidence outside of the Letter are irrelevant. (See, e.g., Pls.' Br. in Opp. to Defs.' Mot. for Summ. J. at 11, 15–17; Pls.' Reply In Supp. of Mot. for Summ. J. at 1 & 4.) The Court should follow this established rule of contractual interpretation and find that any evidence outside of the Letter is irrelevant on the issue of whether there was a meeting of the minds.

Finally, GreenbergFarrow also argued in its initial brief that, even if the Court finds that a portion of the Letter constitutes a binding contract, it should limit that finding to the $305,000 in direct payments to Ms. Flor—*i.e.*, the only portion of the Letter that includes language similar to "guaranteed," "unconditional," or "irrevocable." Plaintiffs chose to not address this argument and therefore concede this point. Even if the Court determines that part of the Letter constitutes a binding contract, it should limit that finding to the portion of the Letter relating to direct payments to Ms. Flor, find that the remainder of the Letter—such as the discussion regarding obligations

relating to the entity—is not part of a binding contract, grant judgment to GreenbergFarrow on all payment obligations other than the $305,000 in purported direct payment obligations (subject to reductions for mitigation), or, alternatively, grant a new trial.

2. There Was No Valid Consideration

In their initial brief, GreenbergFarrow raised two arguments as to why the Letter cannot be a contract as a matter of law due to the absence of an exchange of valid consideration. As to the first argument, GreenbergFarrow noted that the sole purported benefits identified by Plaintiffs (an "education" and exposure to contacts in the New Jersey) is *not* what the parties purportedly agreed to in the Letter. Instead, if the Letter is a contract, then its terms clearly provide for one and only one purported benefit to GreenbergFarrow—a 49% ownership interest in ENGenuity. Ms. Flor herself testified that she owns 100% of ENGenuity and that GreenbergFarrow does not possess the 49% ownership interest in the entity. (See Oct. 16, 2019 Tr., vol. 1 at 36:14–21.) GreenbergFarrow thus does not possess the purportedly agreed-upon consideration and, as such, there can be no contract as a matter of law. See, e.g., Cont'l Bank of Pa. v. Barclay Riding Academy, Inc., 93 N.J. 153, 170 (1983) ("Consideration is the price bargained for and paid for a promise." (quoting Friedman v. Tappan Dev. Corp., 22 N.J. 523, 535 (1956))). It is that simple.

In their opposition, Plaintiffs do not cite to a single authority that states that consideration can be something *other* than what the parties actually contracted to exchange. Instead, Plaintiffs rely on case law relating to the nature of permissible consideration and that such can essentially be anything. (Pls.' Opp. at 13–14.) Plaintiffs then encourage the Court to engage in a hypothetical exercise about what type of consideration GreenbergFarrow might have received due to the Letter, such as "look[ing] for office space to lease" with Ms. Flor. (Id. at 15.) Of course, all of the law cited by Plaintiffs and all of the hypothetical benefits to GreenbergFarrow that Plaintiffs describe

FILED, Clerk of the Appellate Division, November 16, 2021, **A-002208-20**, AMENDED AMENDED

are irrelevant for the simple reason that the Letter references only one form of consideration for GreenbergFarrow—ownership in the entity—and not any hypothetical benefits that Plaintiffs now brainstorm.

The law is clear that the only valid consideration is the one that is bargained-for by the parties. Plaintiffs do not cite any evidence that GreenbergFarrow possesses its bargained-for consideration in the Letter of a 49% ownership interest in ENGenuity. The Letter therefore is not a valid contract as a matter of law and the Court should grant judgment in favor of GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant.

Turning to the second argument, GreenbergFarrow noted in its initial brief that the only evidence at trial of any purported benefit that was received by GreenbergFarrow was Ms. Flor's testimony that GreenbergFarrow received an "education" and introduction to contacts in the New Jersey public sector market. This evidence is insufficient as a matter of law because Ms. Flor could not answer whether GreenbergFarrow actually benefitted from this "education," (Oct. 10, 2019 Tr., vol. 1 at 34:7–17, 35:12–14), and Mr. Johnston and Mr. Ghadrdan both testified that GreenbergFarrow has *not* entered the New Jersey public-sector market, (see id. at 200:4–19; Oct. 16, 2019 Tr., vol. 1 at 120:19–21). In short, there is no evidence of an actual benefit to GreenbergFarrow.

Sensing this problem, Plaintiffs list off a series of purported benefits that GreenbergFarrow could potentially have received. (See Pls.' Opp. at 15–16.) This list is remarkable for one central feature—not a single one of the listed items are a benefit to GreenbergFarrow and, instead, the vast majority were benefits to Ms. Flor. (See id.) A benefit to Ms. Flor does not constitute consideration for GreenbergFarrow.

Ultimately, as to the second argument, the only evidence of a purported benefit to GreenbergFarrow was Ms. Flor's speculative testimony that GreenbergFarrow received an "education" and Ms. Flor herself was unable to state whether this actually benefitted GreenbergFarrow. The Court should find that liability on a breach of contract claim based on this type of illusory and speculative evidence of a benefit constitutes a miscarriage of justice and order a new trial.

B. The Court Should Grant A New Trial Due to the Failure to Give Proper Jury Instructions Regarding the Requirements for a Breach of Contract Claim

In its initial brief, GreenbergFarrow demonstrated how the failure to give GreenbergFarrow's proffered jury instruction regarding the meeting of the minds element required a new trial in this case. Yet again, Plaintiffs do not cite to a single authority stating that the law proffered by GreenbergFarrow is not accurate and binding precedent. Instead, Plaintiffs offer essentially three arguments.

First, Plaintiffs contend—without any explanation at all—that GreenbergFarrow's proffered jury instruction "was encompassed in charge 4.10(G)." (Pls.' Opp. at 19.) Unsurprisingly, Plaintiffs provide no explanation or support for this argument. Further, GreenbergFarrow demonstrated in detail in its initial brief how its proffered instruction was not encompassed in the final jury instructions and how those jury instructions actively misled the jury by only telling them when parties will be bound when they anticipate future agreements, rather than also telling the jury when parties will *not* be bound in the same situation.

Second, Plaintiffs invoke the presumption of propriety that attaches to a court's reliance on model jury charges. Of course, Plaintiffs fail to note that the Model Civil Jury Charges are *not* intended to provide comprehensive charges in all cases. Instead, as noted by the Model Civil Jury Charge Committee:

> The Model Civil Jury Charges are a framework for building a set of jury instructions. Each case turns on unique facts and trial courts and litigants must tailor the Model Civil Jury Charges to conform to the facts and circumstances being tried. . . . [T]he Model Civil Jury Charge Committee reminds trial judges and litigants that the Model Civil Jury Charges are merely the starting point of the process of constructing an appropriate charge that adequately explains the law to the jury in the context of the material facts of the case being tried.

Model Civil Jury Charges, General Information at 1. Further, "the presumption of propriety that attaches to a trial court's reliance on the model jury charge does not apply" where "the jury charge given . . . was used in a context different from the specific purpose for which the charge was adopted." Estate of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 596 (2015).

Here, the terms of the Letter directly implicated a jury charge regarding whether there is a meeting of the minds when a document evidences an intent that it is only an agreement to agree. This specific legal issue was also central to GreenbergFarrow's arguments regarding the Letter throughout this case. Nonetheless, despite the importance of this legal issue to the facts and law applicable to this case, the Court declined to give a jury instruction that tracked binding precedential statements on this issue. The ramifications of the Court's decision were profound, as it stripped GreenbergFarrow of its central argument in this case and prevented the jury from hearing valid precedent that was directly implicated by the language of the Letter. The failure to give GreenbergFarrow's proffered instruction constitutes a clear miscarriage of justice and requires a new trial.

Finally, Plaintiffs argue that the proffered instruction "would set an impossible evidentiary milestone to reach." (Pls.' Opp. at 18.) But that is the entire point—the proffered instruction was an accurate statement of the relevant law in New Jersey and Plaintiffs cannot satisfy that legal standard in this case.

C. The Court Should Grant A New Trial Because the Jury Impermissibly Heard Evidence that Substantially Prejudiced GreenbergFarrow

GreenbergFarrow next argued in its initial brief that a new trial is required because the jury heard severely prejudicial evidence due to the inclusion of the fraudulent inducement claim at trial, as this opened the door to evidence regarding purported fraudulent intent at the time of the execution of the Letter. Plaintiffs offer four general responses to this argument, none of which have merit.

First, Plaintiffs note that the Court gave a jury instruction noting that the individual defendants were dismissed. (Pls.' Opp. at 22.) This instruction is irrelevant, as it did not address the prejudicial evidence that came into the trial due to the inclusion of the fraudulent inducement claim. (See id.)

Second, Plaintiffs claim that GreenbergFarrow "mischaracterize[s]" the testimony regarding this now-defunct claim. Again, GreenbergFarrow urges the Court to scrutinize the relevant record and arguments and it will find that this assertion lacks merit.

Third, Plaintiffs argue that a portion of this evidence regarding this claim was elicited during questioning by GreenbergFarrow's counsel. Plaintiffs miss the point—it does not matter how the evidence came in; it matters that the claim was still in the case at all, which provided the opening for this severely prejudicial evidence in the first instance. GreenbergFarrow had no choice but to elicit some testimony on this issue to again demonstrate that this claim failed as a matter of law. Such would not have been necessary and no evidence whatsoever regarding this claim would have been included at trial if it was properly eliminated prior to trial.

Finally, Plaintiffs also argue that this prejudicial intent evidence also supports Plaintiffs' claims for breach of contract and breach of the implied covenant. Unsurprisingly, Plaintiffs offer no explanation or discussion regarding this assertion. The law regarding Plaintiffs' breach of

contract and breach of the implied covenant claims is clear, and neither requires evidence regarding purported fraudulent intent at the time of the execution of the relevant document.[4] See, e.g., Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005); EnviroFinance Grp., LLC v. Envtl. Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015).

In short, throughout this litigation, there has never been any evidentiary basis for the fraudulent inducement claim against Mr. Ghadrdan or Mr. Johnston. Nonetheless, despite GreenbergFarrow moving for summary judgment for this very reason, this claim survived to trial and provided an opening for a substantial amount of severely prejudicial testimony regarding the purported bad faith of GreenbergFarrow before or at the time of the execution of the Letter. The Court should grant a new trial and afford GreenbergFarrow the opportunity for a fair trial without severely prejudicial evidence relating to the now-dismissed fraudulent inducement claim.

D. The Court Should Grant A New Trial Because the Jury Awarded Legally Impermissible Damages to Plaintiffs[5]

1. The Jury Improperly Awarded a Larger Amount in Damages Than Plaintiffs Requested

In its opening brief, GreenbergFarrow argued that a new trial was required because the jury awarded Plaintiffs $375,000 (or 29%) more than Plaintiffs requested. Plaintiffs do not dispute this fact. Instead, Plaintiffs argue that the jury's verdict was permissible because there was limited

---

[4] While a claim for breach of the implied covenant requires evidence of bad faith, the relevant time period for that evidence under this claim is *after* the contract was executed—*i.e.*, evidence of bad faith in the performance of a contract. See, e.g., Brunswick, 182 N.J. at 225. The prejudicial evidence that was introduced into this trial due to the errant inclusion of the fraudulent inducement claim pertained to the purported bad faith of GreenbergFarrow before or at the time of the execution of the Letter and had no bearing whatsoever on the separate claim for breach of the implied covenant.

[5] In their opposition, Plaintiffs provide an incorrect statement of the applicable standard for remittiturs in both their legal standard and "Point VI" sections. GreenbergFarrow directs the Court to the standards provided by the Supreme Court in Orientale v. Jennings, 239 N.J. 569 (2019).

evidence in the record regarding Ms. Flor's estimates that ENGenuity's operations may require $2,000,000 for the first two years. (Pls.' Opp. at 28–29.) Plaintiffs' argument misses the mark. There was only one basis for damages provided in the jury instructions—compensatory damages, *i.e.*, compensation for what Plaintiffs actually spent. (See Oct. 17, 2019 Tr. at 26:2–23.) The sole evidence relating to the funds that Ms. Flor and ENGenuity actually spent on operational costs during those two years reflected that they only spent $599,000. Plaintiffs do not cite and there is no evidence in the record that Plaintiffs spent $2,000,000 in operational costs during that time, so those initial estimates from Ms. Flor are irrelevant.

2. The Jury Improperly Awarded Damages Based on Breach of the Implied Covenant in Addition to Damages for Breach of Contract

In its initial brief, GreenbergFarrow raised four separate arguments as to why a new trial is required due to the jury improperly awarding damages for both the claim for breach of contract and, separately, for the claim for breach of the implied covenant. First, GreenbergFarrow argued that separate damages for these two claims was not permissible under the jury instructions, which only provided for compensatory damages. Plaintiffs chose not to respond to this argument and therefore concede it.

Second, GreenbergFarrow argued that the $375,000 award for breach of the implied covenant has no basis in the record. Plaintiffs did not directly respond to this argument and appear to instead rely on their errant reference to the $2,000,000 estimate from Ms. Flor of costs that the Plaintiffs never actually spent. As stated above, this argument lacks merit.

Third, GreenbergFarrow noted that the damage award constituted a double recovery of compensatory damages under the two claims. Plaintiffs chose not to respond to this argument and, bizarrely, instead argued that parties may recover damages for a claim for breach of the implied covenant. That is not the issue here. It is irrelevant whether parties may recover damages for breach

of the implied covenant. Instead, the issue here is that the jury awarded a double and redundant recovery for the two claims. Plaintiffs fail to cite to any authority authorizing this double recovery in this case, so their argument fails.[6]

Finally, GreenbergFarrow argued that the jury improperly awarded damages to Plaintiffs under both the breach of contract and breach of the implied covenant claims based on the same conduct. Plaintiffs chose not to respond to this argument and therefore concede it.

3. The Jury Failed to Reduce the Damages Award for the Purported Breach of Contract Based on Ms. Flor's Mitigation of Damages

In its initial brief, GreenbergFarrow demonstrated that a new trial is required because the jury failed to reduce the damages award based on the salary Ms. Flor received during the two-year period following the Letter—a reduction of $51,014.50. Plaintiffs chose not to respond to this argument. Instead, Plaintiffs admit that Ms. Flor was, in fact, successful in mitigating her damages. (See Pls.' Opp. at 33–34.) The Court should grant a new trial due to the jury's failure to follow the jury instructions.

E. The Court Should Grant a New Trial Because Plaintiffs Impermissibly Received a Windfall from the Verdict

In its initial brief, GreenbergFarrow noted that the verdict vastly exceeds the sole permissible basis of damages provided in the jury instructions (compensatory damages) in that Ms. Flor is reimbursed for all of the operational expenses referenced under the Letter *and* receives all direct payments referenced in the Letter *and* obtains a 100% ownership interest in ENGenuity—even though the Letter provides that her ownership interest would only be 51%. GreenbergFarrow also noted that this result constitutes an impermissible windfall. In their opposition, Plaintiffs chose

[6] Plaintiffs curiously allocate two pages of their opposition to an argument regarding liability for breach of the implied covenant. (See Pls.' Opp. at 30–31.) This argument is irrelevant here, as GreenbergFarrow's contention in this section related to *damages* and *not liability*.

not to address the fact that the verdict results in an outcome that vastly exceeds the limits of compensatory damages. Plaintiffs also provide no substantive argument as to how this outcome does not constitute an impermissible windfall. Plaintiffs therefore concede these issues and the Court should grant a new trial to avoid these absurd outcomes.

F. The Court Should Grant Judgment to GreenbergFarrow on Plaintiffs' Request for Specific Performance

In its initial brief, GreenbergFarrow provided a detailed analysis demonstrating how Plaintiffs' monetary request in this case constituted an improper request for specific performance of the terms of the Letter. Curiously, Plaintiffs chose not to substantively respond to this argument at all. Instead, Plaintiffs assert that they did not plead specific performance—an argument that rings hollow when the monetary damages they explicitly sought constitute specific performance. Plaintiffs also contend that GreenbergFarrow did not raise this argument as an affirmative defense, but fail to cite to any authority stating that this argument has to be preserved as an affirmative defense. In short, Plaintiffs yet again fail to provide any substantive argument on this issue and therefore concede it.

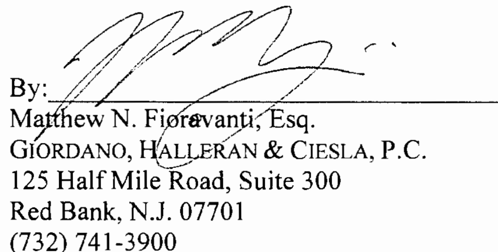
CONCLUSION

The themes in the arguments of the parties are now clear. GreenbergFarrow has offered detailed analyses and binding precedential law supporting its arguments and demonstrating that the Letter cannot be a contract as a matter of law. Plaintiffs have failed to provide any law stating that the precedential standards provided by GreenbergFarrow are no longer good law. Plaintiffs also often choose to simply ignore GreenbergFarrow's arguments. Instead, Plaintiffs resort to inflammatory statements impugning the ethical integrity of defense counsel in an attempt to distract the Court from the law and the facts that apply in this case. GreenbergFarrow requests that

the Court closely scrutinize the arguments of the parties and the applicable law. It will then see that Plaintiffs' arguments and tactics ring hollow.

The Court should grant judgment to GreenbergFarrow on Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Alternatively, the Court should find that the jury's verdict in this case is a miscarriage of justice and order a full new trial. If the Court does not grant judgment to GreenbergFarrow or order a new trial, it should issue a remittitur and reduce the jury's verdict by eliminating the award pertaining to operating costs ($599,000), the amount of Ms. Flor's salary that she was able to mitigate ($51,014.50), and the factually and legally impermissible award for breach of the implied covenant of good faith and fair dealing ($375,000). Finally, if the Court upholds any portion of the specific performance award provided in the verdict, the Court should order that GreenbergFarrow is the 49% owner of ENGenuity.

Respectfully submitted this the 2nd day of March, 2020.



By:______________________
Matthew N. Fioravanti, Esq.
GIORDANO, HALLERAN & CIESLA, P.C.
125 Half Mile Road, Suite 300
Red Bank, N.J. 07701
(732) 741-3900

Michael D. Flint, Esq.
Jamie L. Kastler, Esq.
SCHREEDER, WHEELER & FLINT, LLP
1100 Peachtree Street N.E., Suite 800
Atlanta, Georgia 30309
(404) 681-3450

Attorneys for Defendant GreenbergFarrow Architectural Incorporated