SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000218-23

RANDEE K. JENNINGS, individually and derivatively on behalf of GLOBAL NETWORK SOLUTIONS LLC, Plaintiff-Appellant, v. CARL F. SIMMONS, GLOBAL NETWORK SOLUTIONS LLC, RAYMOND FISCHER, JULIAN CAPROW, JOHN DOES 1-5 (said names being fictitious), and ABC CORPORATIONS 1-5 (said entities being fictitious), Defendants-Respondents,	On Appeal from: Superior Court of New Jersey Law Division, Somerset County Docket No. SOM-L-000220-20 **SAT BELOW:** Hon. Robert A. Ballard, Jr., P.J.Cv. Hon. Haekyoung Suh, J.S.C.
GLOBAL NETWORK SOLUTIONS LLC, Counterclaimant/Third Party Plaintiff, v. THE CIRRUS GROUP LLC, Third Party Defendant.	

BRIEF OF PLAINTIFF-APPELLANT, RANDEE K. JENNINGS

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TABLE OF CONTENTS

TABLE OF JUDGMENT, ORDERS AND RULINGS ON APPEAL

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. PRELIMINARY STATEMENT

This matter involves the mistreatment of a minority member of a closely-held limited liability company, Global Network Solutions LLC ("GNS"). The members of GNS include Respondents, Julian Caprow ("Caprow"), Raymond Fischer ("Fischer") and Carl Simmons ("Simmons"), hereinafter (the "Defendants") and Appellant, minority member, Randee K. Jennings, hereinafter (the "Plaintiff" or "Jennings"). GNS was an information technology consulting company for nearly four (4) years and all of GNS' earnings were due to the actions of Plaintiff, who served as the Chief Information Officer.

Plaintiff uncovered that Simmons was attempting to sell GNS' contracts without a membership vote. When she confronted Simmons regarding his misconduct, Simmons physically assaulted her and then he proceeded to exclude her from GNS without paying Plaintiff her salary or distributions. Caprow and Fischer were complicit, subsequently removing Plaintiff's personal belongings and documents from her apartment without permission, and assisted Simmons in excluding Plaintiff from GNS. Caprow and Fischer continued to rubber stamp Simmons' improper financial transactions, receive distributions from GNS to the detriment of Plaintiff, and used GNS funds to pay their own personal debt.

Plaintiff filed the instant action to recover her unpaid wages, annual membership equity distributions, and redeem her 10% equity share from GNS. In

response to Plaintiff's lawsuit, Defendants filed a baseless third-party complaint against Plaintiff's newly formed, single-member limited liability company, The Cirrus Group LLC ("Cirrus"). As a result, Plaintiff was forced to hire counsel for her newly formed company and had to forgo continued legal representation for herself due to the expense of paying for multiple lawyers. Consequently, Plaintiff proceeded *pro se* through to a bench trial and litigated her claims against Defendants while paying for the legal defense of her company. Despite filing counterclaims against Cirrus, Defendants produced no evidence to support these claims at trial, resulting in the counterclaims being dismissed. During the pendency of the legal proceedings, Defendant Simmons died.

The Trial Court conducted a three-day bench trial against the remaining Defendants. Far from providing Plaintiff with a fair day in court, the Trial Court engaged in improper colloquy seeking to narrow Plaintiff's claims, preventing her from pursuing her claims in the middle of the bench trial. The Trial Court further engaged in *ex parte* communication with all defense counsel, to the exclusion of Plaintiff, which had a negative substantive effect on Plaintiff's claims against Defendants, Fischer and Caprow. The Trial Court then found that Plaintiff was an oppressed minority member of GNS, but failed to award Plaintiff the fair value of her interest in GNS or unpaid distributions because there was a lack of expert testimony. Instead of appointing an expert to value Plaintiff's interest, the Trial

Court improperly awarded a *de minimis* value for Plaintiff's 10% stake and ordered the dissolution of GNS. In doing this it failed to appoint a receiver or provide any judicial supervision for the dissolution, leaving the dissolution in Defendants' hands.

On May 28, 2023, Plaintiff timely filed a motion for reconsideration seeking a proper valuation of her interest in GNS. While her reconsideration motion was pending, Defendants Caprow and Fischer dissolved GNS and excluded Plaintiff from the winding up of the company. Plaintiff filed a second motion for reconsideration seeking judicial supervision of the improper dissolution of GNS. Both of Plaintiff's motions were denied. As a result, Plaintiff was wrongfully deprived of her fair value of her stake in GNS and was excluded from GNS as the assets of the Company were wound up.

This appeal challenges the Trial Court's May 8, 2023 Final Judgment following the bench trial, including the improper valuation of Plaintiff's membership interest, the denial of her request for a receiver or special fiscal agent, the dismissal of claims against Defendants Fischer and Caprow and the trial judge's colloquies and *ex parte* conduct.

This appeal also challenges the Trial Court's denial of Plaintiff's first and second motions for reconsideration. Plaintiff seeks a fair opportunity to be heard and a fair value for her interest in GNS, a company she worked tirelessly to build.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The now late Carl Simmons approached Plaintiff, Randee K. Jennings, to serve as the Chief Information Officer for GNS in November 2014. Simmons offered Plaintiff $150,000.00 salary per year and a 10% equity stake in the company. 1T:194:18-24; (Aa526).[1]; (Aa21). Fischer and Caprow each also held 10% shares in equity originally, and Simmons held the remainder. 3T29:21-30:4; (Aa30-Aa31).

While Plaintiff worked to build GNS through legitimate means, and sourced clients to build the company revenues, Simmons operated GNS in unconventional ways. (Aa23); 2T183:5-185:5. Plaintiff was solely responsible for bringing in all revenues during these periods, which she generated from her own preexisting contacts and connections, due to the self-proclaimed inability of Fischer. 2T183:5-21. The Trial Court found that Plaintiff was the sole reason for which GNS was profitable. (Aa22).

Beginning in the Fall of 2014, Simmons rented a residential home located at 15 Charles Road in Bernardsville, New Jersey ("15 Charles Road"). GNS operated out of the finished basement. Plaintiff's living quarters was a separate apartment over the garage. 1T119:9-13. Although Plaintiff resided in Del Ray, Florida, with her husband and family, Simmons insisted that she stay in New Jersey. Defendant Fischer lived at the property for a period of time as well, but was not required to do

[1] "Aa_____" refers to the Appendix filed concurrently herewith by Appellant.

so. (Aa23). Jennings traveled back and forth from New Jersey to Florida. 1T120:1-13.[2]

Plaintiff was solely responsible for GNS' success and profitability as she brought in all clients, which was not her primary role for GNS (Aa22-Aa23). Plaintiff's connections through her previously established network and personal connections aided her in achieving success for GNS.

In late 2017, Plaintiff learned Simmons planned to sell all GNS contracts and residual streams to The Heritage Group and cash out GNS' contracts, without knowledge or approval of Plaintiff, Fischer or Caprow. Plaintiff was concerned that Simmons was acting unilaterally on a decision of major importance and without partner approval and directly confronted Simmons about this improper conduct on December 11, 2017. (Aa26). Plaintiff opposed the plan and threatened to inform Mr. Fischer and Mr. Caprow. (Aa26). When Plaintiff tried to leave the conversation, Simmons grabbed Plaintiff's purse and car keys and prevented her from leaving. (Aa26). When Plaintiff continued to leave the building, Simmons pushed Plaintiff and pinned her to the ground. Plaintiff suffered contusions on her lip, arms, and leg from the physical assault. (Aa26). (Aa504-Aa509). Simmons only had small dime

[2] "1T" denotes the transcript of January 11, 2023; "2T"' will denote the transcript of January 12, 2023; "3T" will denote the transcript of January 13, 2023; and 4T will denote the transcript of July 21, 2023.

sized brush marks on his knees caused by the friction when he held down Plaintiff on the driveway as she attempted to leave. (Aa26). (Aa502-Aa503). After much struggle, Plaintiff freed herself from Simmons' grasp and since Simmons had taken possession of her purse, phone and car keys, she could only grab her computer and escaped from Simmons barefoot, fearing for her safety. Plaintiff never spoke to Simmons again. (Aa26).

When Plaintiff tried to recover her possessions from the property, she discovered her items had been ransacked. Drawers of files and books were missing, jewelry and her suitcase had been gone through and her purse was missing. (Aa27). Following this encounter, Plaintiff was ousted from GNS. Simmons excluded Plaintiff from important conversations, and he discharged her from GNS with a termination agreement that she did not sign. (Aa26-Aa27). Simmons also sent an email, dated December 18, 2017 to GNS employees, with a copy to Fischer and Caprow, regarding Plaintiff's "departure," threatening them with expulsion if they were not loyal to him. (Aa27-Aa28). (Aa521).

Without Plaintiff at GNS, The Heritage Group fired GNS because it became dissatisfied with GNS' lack of progress on their project. (Aa28). A lawsuit ensued over the project which resulted in a settlement of over $1,000,000.00. In the settlement, Heritage agreed to purchase their existing supplier contracts valued at over $1,002,800.00 from GNS, in exchange for the termination of the relationship

with GNS. 2T67:2-68:12. Despite Plaintiff bringing on The Heritage Group as a client, she received none of the settlement. (Aa28). To the contrary, $84,000.00 of the settlement reportedly went to Caprow, which included repayment of an undocumented loan, $45,000.00 reportedly went to Fischer to pay off his personal credit card debt, $40,000.00 reportedly went toward unpaid rent, and some went to legal fees. (Aa28); 2T132:9-133:15. It is disputed where the remainder of the money went.

On February 13, 2020, Plaintiff filed a Complaint, *pro se* against Carl F. Simmons, Member, and Individually and Global Network Solutions LLC t/a GNS LLC for wages with the Wage Collection Section, Division of Wage and Hour Compliance, Department of Labor and Workforce Development. (Aa91). On April 3, 2020, Plaintiff, individually, and derivatively on behalf of GNS, filed an Amended Verified Complaint and Order to Show Cause against GNS members, Carl F. Simmons, Raymond Fischer and Julian Caprow for minority oppression, financial malfeasance, company mismanagement, waste, and theft. (Aa124-Aa439). Plaintiff filed a Second Amended Verified Complaint on April 10, 2020. (Aa440) Judge Robert G. Wilson granted the Order to Show Cause on April 14, 2023. (Aa493).

In her Second Amended Verified Complaint, Plaintiff alleged Defendants breached their fiduciary duties and failed to compensate Plaintiff for her services, which included both wages, annual membership distributions, and equity valuation

during her employment. (Aa440). Plaintiff demanded judgment in the form of equitable relief, including a judgment or order (1) removing or expelling or disassociating Simmons as a member of GNS; (2) requiring all GNS assets and future income and revenue be deposited into the Superior Court Trust Fund pending final disposition of Plaintiff's Complaint; (3) directing an accounting of all GNS operations for the last five years; (4) dissolving GNS pursuant to law and/or equity; and (5) appointing a receiver or special fiscal agent for GNS to effectuate the requested relief. Plaintiff also demanded judgment for compensatory damages, incidental damages, punitive and/or treble damages, costs, attorney's fees, and interest. (Aa440). Defendants countersued Cirrus, Plaintiff's company.

Plaintiff's counsel Kevin J. DiMedio, was relieved as counsel, leaving Plaintiff, Randee K. Jennings, personally to represent herself *pro se*. (Aa501). Plaintiff was required to hire counsel for her company, Third Party Defendant Cirrus, and was unable to afford separate counsel for herself. Defendants, Fischer and Caprow, were represented by counsel.

During the pendency of the litigation, Defendant Simmons died. His Estate was never substituted in as a party. The Court found that Simmons was in fact liable for violating the Minority Oppression statutes, but because he passed away prior to trial those claims of minority suppression were dismissed. (Aa54). All counterclaims were dismissed against Cirrus. (Aa58).

A three (3) day trial ensued on January 11, 2023, January 12, 2023, and January 13, 2023. During the trial, Plaintiff presented her case *pro se* to the best of her abilities. No pretrial conference was held.

A. Trial Court Proceedings

During the three-day bench trial, the Trial Court heard testimony from the following witnesses: Plaintiff, Julian Caprow, and Raymond Fischer. The Trial Court also considered approximately fifty-eight (58) documentary exhibits submitted by Plaintiff and ten (10) exhibits submitted by Defendants. The parts of the bench trial pertinent to this appeal are summarized below.

1. The First Day Of Trial And Relevant Facts

Plaintiff began the bench trial with her opening statement. Instead of allowing Plaintiff to proceed with calling her first witness, the Court questioned Plaintiff about her claims and requested relief immediately following her opening statement, and before Plaintiff had an opportunity to cross-examine any of the Defendants. Even though Plaintiff never mentioned dropping any claims in her opening statement, the Trial Court immediately suggested that she should.

Specifically, the Court stated, "[s]o you're dropping your claim against GNS, essentially, I mean, because there's no money in it. You can't squeeze blood out of a stone." 1T9:13-19. The Plaintiff responded clearly by stating she wanted to preserve these claims because she had not seen and examined the company's bank

accounts, and that she would like to preserve her claims against the remaining partners, Mr. Fischer and Mr. Caprow. 1T8:18-9:19.

Following her opening statement and forceful colloquy with the Court, Plaintiff then testified on direct and was subject to cross-examination. Almost immediately, the Trial Court found fault with the Plaintiff for failing to provide hard copies of her trial exhibits and witness list. 1T15:5-13; 1T18:1-24. However, Plaintiff uploaded her trial exhibits to eCourts prior to the trial and provided copies of exhibits to defense counsel, as instructed by njcourts.gov. https://www.njcourts.gov/self-help/elect-evid-sub; accessed 12/5/23 at 11:49 AM. 1T116:5-8. (Aa532). Nothing in the *pro se* instructions informed Plaintiff that the Court required hard copy exhibit binders for the trial and the Trial Court never informed Plaintiff of the same.

Despite Plaintiff following the rules, and the Court never communicating its need for hard copy exhibits, the Trial Court refused to use Plaintiff's exhibits uploaded onto eCourts, and Plaintiff was immediately unable to proceed with her direct examination as she had prepared. Plaintiff was not permitted to use any electronic exhibits during the first day of trial despite the fact that they were available to the Court and had been provided to defense counsel. In spite of this challenge, Plaintiff proceeded with her direct examination.

Plaintiff first testified about her background. Plaintiff attended the University

of Notre Dame for her undergraduate degree in business (marketing and finance). 1T34:17-19; (Aa510). She received her master's degree in human resource management from Nova University and her PH.D./ABD from NJIT in Business Data Science. (Aa514) and 1T34:17-22.

Jennings has been part of the technology industry since 1985. 1T34:23-25. She had a 30-year career at AT&T and other Fortune 50 Companies and her experience was the cornerstone for GNS. 1T35:3-8. (Aa515). When Plaintiff left AT&T, her title was National Service Delivery Director, and she was making $140,000.00. 1T103:6-17; (Aa515). Following AT&T, she worked at Wholesale Carrier Services ("WCS") for several years, as VP of Operations earning a salary of $150,000.00. 1T103:18-104:7; (Aa515). No evidence was presented at trial that any of the Defendants, including Simmons, had IT credentials, training, or experience. After WCS, she worked at Airband as a National Vice President, Field Operations making $170,000.00 per year. 1T104:3-9; (Aa515). Simmons, recognizing her high value, initially hired Jennings at a company called Secure Path Networks (SPN) where he was employed as CEO to serve as VP of Client Service Delivery at $110,000.00. 1T104:16-22. Later, after a disagreement with the owner. Simmons, Jennings and Fischer left SPN and together with Caprow formed GNS, where she was to utilize her vast IT experience to run the operations team and coordinate its functions related to the Network design while implementing her sales

experience when the sales lead Fischer was unable to generate any sales. 1T35:1-8; (Aa515).

Following her testimony on her extensive experience and qualifications, Plaintiff testified that she became partner in the new venture. 1T34:17-47:8. She was approached by Simmons to form GNS for an agreed salary in the amount of $150,000.00 per year and a 10% stake in equity as a shareholder, which the Trial Court found to be true. (Aa59); 1T93:15-21.

Jennings made the company several millions of dollars over her time at GNS. 1T174:1-10. When Plaintiff discovered self-dealings of Simmons that would adversely affect GNS, she spoke up and challenged his improper conduct at her own peril. T329:8-9. Plaintiff testified in detail about her assault by Simmons and subsequent ouster. 1T6:5-24; 1T65:24-83:11.

Plaintiff was subject to a full day of direct questioning by the Court and cross-examination by Defendants. 1T1:1-214:25. None of the Defendants testified on the first day.

2. The Second Day Of Trial And Relevant Facts

Upon returning to Court the following day, Plaintiff immediately informed the Court that she had obtained hard copies of most of the trial exhibits. While Plaintiff was organizing the hard copy exhibits requested by the Court, the Court called all counsel into her Chambers and excluded Plaintiff. 2T7:13-16; 2T8:10-14.

Following this *ex parte* meeting, the Court came back on the record and subjected Plaintiff to another half-day of re-direct examination by the Court. 2T8:12-127:12. After more than an hour on the stand during the second day of trial, the Court again went through each of Plaintiff's claims and required Plaintiff to state if she intended to dismiss each of the items or not, resulting in a significant shift in Plaintiff's requested relief. 2T88:3-91:16. This interaction occurred before Plaintiff was given any opportunity to call the Defendants to the stand, present them with evidence, and question them.

After this colloquy, the Court broke for lunch and after lunch, Defendant Fischer testified. 2T91:14-19.

Fischer offered no supporting documents for his qualifications. 2T130:4-131:16. Fischer's responsibility was to build sales and generate business, but during his time at GNS he brought in zero clients and thus, generated no revenue. (Aa22). Following Simmons physically assaulting Plaintiff, Fischer removed Plaintiff's personal items from her apartment. 2T135:1-138:8. Fischer also used GNS funds to pay off $45,000.00 of personal credit card debt. Defendant claimed this was a repayment of a loan to GNS but offered no proof to substantiate this position. 2T132:9-133:15; (Aa28a).

Plaintiff then completed her examination of Fischer. Fischer was on the stand for less than two hours, compared to Plaintiff's day and a half examination, largely

conducted by the Court.

3. The Third Day Of Trial And Relevant Facts

The third day of trial consisted of Caprow's testimony and the motion to dismiss Defendants' counterclaims filed by Plaintiff's corporation, Third Party Defendant, Cirrus.

Caprow was the Executive Vice President and Chief Financial Officer of GNS. 3T13:6-8. Caprow stated that his initial membership interest in GNS was 10%, but subsequently, undocumented in paper nor demonstrated via exhibit, Caprow testified that Simmons restructured the Company, making Simmons 82% member and Fischer 18% member. 3T30:7-9. However, contrary to the above, he stated in his deposition that he was **not an employee or owner** of GNS, and admitted to the same when he was confronted about this on the stand. 3T40:21-23. Caprow's deposition testimony was blatantly inconsistent with his trial testimony. 3T40:21-23.

Caprow testified that he worked in finance and has held the position as chief financial officer at a public real estate company listed on the New York Stock Exchange, that he invested monies for clients of Citibank in real estate, and that he also worked for Bears Stearns, but offered no supporting documentation of the same. 3T14:3-9. Caprow offered no supporting documentation for his background or credentials. Caprow explained how he normally prepared the profit and loss

statements (the "P&L") for GNS. 3T122:1-4. When confronted about the P&L statements that he prepared and the requests that were asked of him by Simmons, he agreed that he would do things that seemed "irregular" to him, but that he did them anyway. 3T122:19-123:3. When asked why he continued to comply with financial processes that were irregular, he testified that "it certainly wasn't worth blowing up the company over that issue." 3T123:19-124:22. While Jennings attempted to ask more questions to uncover these irregularities, the Court ordered *pro se* Plaintiff to end her cross and "step down" as requested by opposing counsel. 3T124:8-22.

Caprow was asked by his attorney if he received receipts for Simmons' expenses, such as receipts for the $178,000.00 in travel expenses. Caprow stated that he was not given some receipts, and that the receipts he received were very limited. 3T125:6-22.

Caprow also stated that Simmons did not sign the tax returns, but if he had issues with them, he would have corrected them. He stated "[o]h, yeah. I -- I would, um -- if there were issues -- well, I always discussed with Mr. Simmons the financial statements and the resulting tax returns." When asked to confirm that "no tax returns went out without your [Caprow's] rubber stamp of approval," he replied "[t]o the best of my knowledge, yeah." 3T 42:16-23. When asked by Plaintiff "[h]ow -- so, if you rec-- if GNS received $134,000.00 in the year of 2014, and returned $90,000 to GNS, leaving $44,000.00 as income, how is it that I was paid $49,200?" Caprow

responded with, "I don't recall. Like I said, it was nine years ago, I don't recall." 3T51:8-13.

During Caprow's testimony, he was asked if he was aware that Simmons was using the company's money to pay for personal expenses such as $10,000.00 to $20,000.00 in dental bills and the boarding of his horses' stables through the company's accounts, he stated in the affirmative. 3T40:1-15. He said that he would just "charge it to Mr. Simmons as income." Id. Caprow also stated that he knew that Simmons "would take out small amounts of money, like $200, $400, $500 from an ATM and he said it was for a business expense. That was not material in the scheme of things for the business." 3T40:1-15.

When Plaintiff asked Caprow if he was aware of the Department of Labor Complaints against Mr. Simmons, he stated that he was "generally aware." 3T52:1-5. He also stated that he prepared a deferred compensation report and analysis for the employees who were the basis of these complaints. 3T52:1-53:25.

After stating that part of his role was to prepare the P&L statements, Caprow could not explain why after testimony confirming fees for GNS' client, Binary Tree, were deposited into Simmons' personal account or why they were also on the company's P&L. 3T49:5-20. Caprow stated that casually accounting for funds in one business that may be in another account is normal, that he normally would not have done a lot of different things, and that there were personal expenses on the

books that he normally would not have approved. 3T123:10-25. He stated that normally he would have separated business and personal expenses. 3T123:10-25.

Caprow stated that he loaned the company funds totaling $93,455.65 after interest, which he was reimbursed for following The Heritage Group's settlement with GNS. 3T80:13-18. Although he stated he made this loan and was subsequently paid on said loan via the settlement, Caprow stated there "may be" a promissory note, but admittedly never produced said promissory note. 3T97:21-98:1. Although Plaintiff brought on The Heritage Group, the "only major customer" as described by Caprow, Plaintiff received no part of this settlement. 3T39:20-23. According to Caprow, GNS "basically failed" after The Heritage Group fired them following Plaintiff's departure. 3T39:12-23. When asked about the $1.028 million settlement that The Heritage Group paid to GNS, Caprow confirmed that $587,000.00 of this amount went to GNS, and that the other $262,535.36 went to Norris McLaughlin for legal fees and to repay his loan with interest of $93,455.65, and that there was another $40,000.000 that went to the "Moylan settlement." 2T68:3-12; 3T65:14-65:9. Further, Fischer testified that he used $45,000.00 of the money to pay his personal credit cards. 2T132:9-133:15.

During this same line of questioning Caprow is asked about the P&L statements associated with the $1.028 million dollar settlement. 3T67:10-19. He is asked about the $161,000 in commissions that he received, and if that $161,000 is

included in the $732,070.39, which was on the P&L instead of the $587,000.00. Caprow said that this was included. 3T67:10-19. Later as this line of questioning continues those total receipts for that same year, 2019, amount to $839,000.00. 3T69:7-18. Caprow was asked about the legal fees number which the P&L stated was for $318,570.00, which differed from the lessor number above. 3T70:19-72:3. Caprow's response to questions about these numbers and the settlement payments was that, "But -- but you know, again, you know we're talking about literally thousands of numbers here, and I have to look at more detailed backup to really remember what occurred. Okay?" 3T72:6-15. Neither Caprow nor the documents submitted into evidence fully accounted for the $1.028 million dollar settlement.

On cross, when Caprow is asked about a purported employment contract that was a part of a due diligence package that he prepared to be given to investors, he stated that he does not recall if it was ever given to investors but confirmed that he prepared this package for potential investors to look at. 3T83:24-86:5 He was also asked if he spoke up about his accounting concerns and confirmed that "lots of personal payments were being made from the bank account, and then later, we'd call it income." 3T62:12-23.

Caprow testified that if Plaintiff was a true 10% owner, tax returns filed by GNS were not accurate and that Plaintiff should have received K-1s. (Aa18).

During Plaintiff's re-cross on Caprow, while speaking about improper tax

returns and potential IRS implications, the Court pressured her to finish. 3T119:19-122:21 This is evidenced by the following:

Q Okay. I have two questions and then I'm done.
THE COURT: All right. Ms. Jennings, you keep saying I -- you have -- first you say you have –
MS. JENNINGS: I -- I still --
THE COURT: -- I only have five questions. You're well beyond five questions. Then you said you had -- only had two more questions, you're well beyond those two questions. So, just complete your questions, …okay?
2T120:12-21.

Following Caprow's testimony, Third Party Defendant Cirrus moved to dismiss Defendants' Complaint against it. The Court granted the motion to dismiss, properly finding the allegations of Plaintiff unlawfully competing and interfering with GNS were wholly unsubstantiated. 3T142:2; 3T148:16. The Court stated that "...[w]e waited for the testimony and there was nothing in the testimony to remotely -- giving every possible inference, every favorable inference that is at -- conceivably given -- that one could even have a modicum of speculation that was done improper by The Cirrus Group. And for that reason, I think the case against the third-party complaint against Third Party Defendant Cirrus must be dismissed as a matter of law." 3T142:2-12. Trial concluded on January 13, 2023.

The Trial Court did not render its decision until May 8, 2023.

B. The Trial Court's Findings

Following the three-day trial in January, the Trial Court issued an Opinion and Final Judgment on May 8, 2023. (Aa8). All claims were dismissed by the Court as to Plaintiff's company, and Third-Party Defendant Cirrus. (Aa59). The Trial Court correctly found that Plaintiff owned a 10% interest in GNS and was the subject of minority member oppression. (Aa59). It correctly found that Plaintiff was physically assaulted by member Simmons when she attempted to alert members and clients of Simmons' efforts to sell GNS' contracts without a member vote. (Aa59).

The Trial Court, however, improperly valued Plaintiff's membership interest as *de minimus* and only awarded $11,912 to Plaintiff as earned but unpaid income. (Aa41). This number was based on wages only, and not unpaid member distributions owed to Plaintiff as a fully vested 10% member of GNS. The Court was silent on the status of the unpaid distributions to Plaintiff, which should have been calculated as part of the dissolution process, from which Plaintiff was ultimately excluded. The Court found that it had no reliable means to value her interest, and that Plaintiff did not provide the Court with a reasonable formula to do the same. (Aa41). Further, the Court found that Plaintiff did not utilize cognizable valuation techniques to value GNS shares or provide proof as to the equitable date of the valuation other than the commencement of the lawsuit. (Aa41). The Trial Court found that "[w]ithout an expert report or other reliable means of evaluating GNS, the court finds plaintiff has not proven by a preponderance of the evidence

that she is entitled to $250,000 for her 10% share of GNS." (Aa42). The Court made no effort to determine payment of back annual distributions owed to Plaintiff, which are separate from and not based on corporate share valuation.

In addition, the Trial Court dismissed Plaintiff's claims against Defendants Fischer and Caprow, finding that Plaintiff did not prove a "duty or breach of that duty." (Aa45). This included the Court finding that Plaintiff failed to prove facts as to Fischer and Caprow sufficient to pierce the corporate veil, citing State v. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 501 (1983) (finding that the purpose of piercing the corporate veil "is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise evade the law.") Id. The Court cited this after hearing that Fischer paid his personal credit card bill, and that Caprow was in charge of all tax documents for salaries which he knew were not paid from company accounts in addition to acknowledging Simmons and Fischer used the company funds for personal items like hearing aids, dental work, and boarding horses. 1T49:4-50:24; 2T72:19-73:5; 2T74:8-18; 1T47:13-23.

Finally, the Trial Court also quashed Plaintiff's request to appoint a receiver or special fiscal agent for GNS and instead ordered immediate dissolution within thirty (30) days. (Aa36-Aa37).

On May 28, 2023, Plaintiff filed a motion for reconsideration regarding the Court's improper valuation and failure to appoint a special receiver. Plaintiff also sought reconsideration of claims against Caprow and Fischer for their active roles in damaging GNS, resulting in significant negative profit impacts and its ultimate demise. (Aa66). Plaintiff filed a subsequent motion on June 1, 2023 regarding the return of Plaintiff's GNS email account. (Aa87).

During the pendency of the motions for reconsideration, Defendants Raymond Fischer and Julian Caprow dissolved GNS and withdrew all funds from the GNS accounts. (Aa66). On June 8, 2023, Plaintiff filed another Motion for Reconsideration requesting that the Court require Julian Caprow to provide both Plaintiff and other member, Raymond Fischer, access to specific bank accounts listed, in addition to requiring all three of the individuals above to take part in the winding down of the company. Plaintiff requested that the Court reinstate GNS and require Defendants Fischer and Caprow to return the funds that were withdrawn while Plaintiff's request for a receiver was pending. The motion further requested the Court to amend GNS' Articles of Formation to include the only remaining members in accordance with the Court's ruling, Jennings and Fischer, as only they bore the joint responsibility to dissolve GNS. 4T6:21-9:24.

The Trial Court denied Plaintiff's first motion for reconsideration on June 26, 2023, on the papers. (Aa66). The case was then re-assigned to a new judge for

disposition on the second motion for reconsideration. Oral argument on the second motion for reconsideration was heard on July 21, 2023. The second motion for reconsideration was denied on August 30, 2023. (Aa87).

This appeal was subsequently filed.

III. STANDARD OF REVIEW

A. Plain Error/Clearly Erroneous

When a party does not object to an alleged trial error or otherwise properly preserve the issue for appeal, the Appellate Court may nonetheless consider it if it meets the plain error standard of Rule 2:10-2. State v. Clark, 251 N.J. 266 (2022); State v. Singh, 245 N.J. 1, 13 (2021); State v. Gore, 205 N.J. 363, 383 (2011). The plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result…' " State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)).

The Supreme Court defined the standard to be "…'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

B. De Novo

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes,

or rules is de novo. *See* In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute). In such a case, the reviewing court must adjudicate the controversy in the light of the applicable law in order for a manifest denial of justice be avoided. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010).

The Supreme Court has described the general principle that "the standard of review for mixed questions all depends – on whether answering it entails primarily legal or factual work." U.S. Bank N.A. v. Village at Lakeridge, LLC, 583 U.S. 387, 396 (2018). Mixed questions of law and fact may be reviewed de novo.

IV. ARGUMENT

The Plaintiff appeals the Trial Court's Orders, in part, given significant errors of the Trial Court during the bench trial and subsequent failure to grant reconsideration.

As set forth more fully below, with regard to the May 8, 2023 Final Judgment, Plaintiff appeals the improper *de minimus* valuation of Plaintiff's membership interest and failure to appoint an expert. Further, the Plaintiff appeals the Trial Court's denial of Plaintiff's request for appointment of a receiver or special fiscal agent for GNS. The Plaintiff also appeals the Trial Court's dismissal of claims against Defendants Fischer and Caprow, who failed to fulfill their fiduciary obligations and should have been subject to personal liability. The Plaintiff also

appeals the Trial Court's denial of Plaintiff's first and second motions for reconsideration in their entirety.

Last, Plaintiff highlights concerns related to the Trial Judge's substantive *ex parte* communications in addition to aggressive colloquies during the bench trial which resulted in dismissal of Plaintiff's claims and restriction of Plaintiff's abilities to consult with co-counsel regarding trial strategy.

A. Plaintiff Appeals The Court's May 8, 2023 Final Judgment In Part, And June 26, 2023 Order Denying Plaintiff's Motion For Reconsideration In Its Entirety, Because The Trial Court Improperly Assigned De Minimus Value For Plaintiff's Membership Interest In GNS (Raised Below In May 28, 2023 Motion For Reconsideration (Aa66))

The Trial Court improperly assigned a *de minimus* value to Plaintiff's membership interest in GNS because it failed to appoint an expert in accordance with Borodinsky v. Borodinsky, 162 N.J. Super. 437, 445 (App. Div. 1978) and Torres v. Schripps, Inc., 342 N.J. Super. 419, 436 (App. Div. 2001) when the Trial Court rejected Plaintiff's proposed valuation of her interest.

A trial judge may use any acceptable method to calculate value, however, the court must determine that the method utilized yields the fair value of the business interest. Hughes v. Sego International Ltd., 192 N.J. Super. 60, 68 (App. Div. 1983). "There are few assets whose valuation imposes as difficult, intricate and sophisticated a task as interests in close corporations." Lavene v. Lavene, 148 N.J.

Super. 267, 275 (App. Div.), certif. denied., 75 N.J. 28 (1977). The "findings of the trial court are critical as the valuation of closely-held corporations are inherently fact-based" and thus "not an exact science." Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352, 368 (1999).

In Borodinsky, the Appellate Division remanded and vacated provisions of a judgment wherein the trial court ordered distribution of shares in a closely held corporation because the judge did not have sufficient credible evidence to value the business interest. Borodinsky, 162 N.J. Super. at 444. The Appellate Division recognized the difficulty with "evaluating interests in close corporations" but cautioned that "such difficulty must not be equated with impossibility." Id. at 444.

Where a trial court needs additional expert testimony to assist with valuing a business interest, the court is required to appoint an expert in order to make an informed decision regarding valuation. The Borodinsky court reasoned, "The judge should not refrain from appointing his own expert as well, where the parties' proofs do not provide him with sufficient foundation and guidance." . Borodinsky, 162 N.J. Super. at 445. Borodinsky. *See also* Torres v. Schripps, Inc., 342 N.J. Super. 419 (App. Div. 2001).

Even though a trial judge rejects evidence of a party, a trial judge is still required to determine fair value. Torres, 342 N.J. Super at 435. In Torres, the trial judge rejected the defendant's expert opinion on the value of shares in a closely-held

corporation and the plaintiff did not present any expert opinion. The trial judge then assigned a value for the oppressed shareholder's stake based on the value set forth in a prior loan application. Id. The Appellate Division rejected this approach, and vacated and remanded the matter to the trial court. Specifically, the Appellate Division held, the trial court "[w]here the parties fail to present sufficient expert testimony, the trial judge must seek assistance from other sources to aid his decision of fair value" Id. at 436. The case was then remanded with the directive that the "trial judge should appoint an independent appraiser to report to the court on the fair value of the corporation." Id.

Here, the Trial Court should have appointed an independent expert to assist it with valuing GNS. Following Plaintiff's presentation of evidence during a three (3) day trial, the Court found that Plaintiff owned a 10% membership interest in GNS and was an oppressed minority member. (Aa59). The Trial Court then concluded that it had no reliable means to value GNS' shares because Plaintiff did not provide the court with a reasonable formula to do the same or utilize cognizable valuation techniques to value GNS shares. (Aa41). The Trial Court then denied Plaintiff's valuation of $250,000.00 for her 10% interest in GNS based on GNS' financial records, and instead gave a *de minimus* value to GNS, resulting in Plaintiff receiving no value for her membership in GNS and compensation for unearned income only, totaling approximately $11,000.00.

When denying Plaintiff's Motion for Reconsideration, the Trial Court reiterated, "[w]ithout an expert report or other reliable means to valuate GNS, the court found plaintiff had not proven by a preponderance of the evidence that she was entitled to $250,000.00 for her 10% share of GNS." (Aa71).

In the absence of a reliable valuation methodology presented by the Plaintiff, and consistent with Borodinsky and Torres, the Trial Court should have appointed an independent expert to ensure a fair and informed assessment of GNS' value; Id. As a result, the Trial Court's arbitrary attribution of a *de minimis* value to GNS' membership interest, without seeking additional expertise, constitutes reversible error.

The Trial Court's failure to properly value GNS under relevant case law should be reviewed de novo since case law speaks directly to the issue and the Trial Court's failure to act in accordance with well-established case law is a legal issue. Further, the Trial Court's deviation from case law was clear error and prevented Plaintiff from receiving a fair valuation of her membership interests.

Therefore, the Trial Court's May 8, 2023 and June 26, 2023 judgments and orders should be vacated, in part, and remanded with a directive to the Trial Court to appoint an expert to value Plaintiff's membership interest, consistent with Borodinsky and Torres.

B. Plaintiff Appeals The Trial Court's May 8, 2023 Final Judgment And June 26, 2023 Order As To Its

Dismissal Of Claims Against Defendants Fischer And Caprow, As The Court's Credibility Determinations Go Against The Presented Evidence Which Requires The Court To Find Breach Of Fiduciary Duty And Pierce The Corporate Veil. (*Raised Below In Plaintiff's May 28, 2023 Motion For Reconsideration (Aa66*)).

1. Improper Credibility Determinations Were Made By The Trial Court.

The record does not support the Trial Court's credibility determinations.

In instances regarding lower court credibility evaluations, a deferential standard is applied, but "… the rules of court permit a greater scope of appellate review in a non-jury case" and the reviewing court may make new or amended findings of fact in such cases. Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960). If findings are manifestly unsupported or inconsistent with credible evidence, or display a denial of justice, they should not be upheld. Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155, 1963. Appellate review broadens when errors focus on the judge's fact evaluations. *See* Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 179 (App. Div. 2012) (*citing* C.B. Snyder Realty, Inc. v. BMW of N. Amer., 233 N.J. Super. 65, 69, 1989).

Here, given the record, it is clear Caprow's trial testimony and deposition testimony on key facts were inherently inconsistent and this should have weighed heavily against Caprow's credibility. 3T40:21-23. Caprow's deposition and trial testimony revealed inconsistencies in membership interest, admissions of non-

ownership in GNS, and an undisclosed loan without a promissory note. 3T30:8-9, 3T40:21-23, 3T14:3-9. More specifically, Caprow stated that his initial membership interest in GNS was 10%, but subsequently, undocumented in paper nor demonstrated via exhibit, testified that Simmons restructured GNS, making Simmons 82% member and Fischer 18% member. 3T30:8-9. Contrary to the above, Caprow stated in his deposition that he was not an employee or owner of GNS. 3T40:21-23. These are key facts that should have been known to Caprow instead of inconsistently testified to at the bench trial.

Further, Caprow testified about consciously intermingling company funds with personal funds and falsifying documentation about the company for potential investors. This testimony should have undoubtedly weighed against any finding of credibility. 3T83:24-86:5.

Further, Fischer's role at GNS was marked by zero client acquisitions and personal credit card debt repaid by GNS. It was undisputed that Fischer paid his personal credit card debt with GNS funds. 2T132:9; 2T133:1. This unequivocal self-dealing undermines any favorable credibility determination by the Trial Court. The Trial Court's finding that Fischer did not benefit financially from his involvement with GNS has no support in the record.

The Trial Court's determinations on Caprow and Fischer are directly counter to the evidence and testimony displaying their intricate involvement in GNS, its

financial mismanagement and self-dealing to the exclusion of Plaintiff. The Trial Court's credibility determinations regarding Caprow and Fischer are manifestly unsupported or inconsistent with credible evidence.

Therefore, this Court should not give any weight to the Trial Court's credibility findings as to Fischer and Caprow.

2. Caprow And Fischer Breached Their Fiduciary Duty, Engaged In Self-Dealing And Are Personally Liable To Plaintiff.

Plaintiff appeals the Trial Court's May 8, 2023 Final Judgment and June 26, 2023 Order and contests the dismissal of all claims against Defendants Fischer and Caprow, including claims that they violated the New Jersey Revised Uniform Limited Liability Company Act ("NJ RULLCA"), N.J.S.A. 42:2C-1 to -94, and Plaintiff's claim to pierce the corporate veil. (Aa48).

On appeal, this analysis must be made de novo. "[T]o determine whether to pierce the corporate veil, the legal conclusion that it has drawn from the facts found is subject to plenary review." *See* Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 149 (3d Cir. 1988) (finding to the extent the court determined the legal effect of certain transactions or events and whether those events were sufficient under New Jersey law to warrant liability, appellate review is plenary (de novo)).

The duty of care in a member-managed limited liability company is "to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a

knowing violation of law." N.J.S.A. 42:2C-39(c). And although a limited liability company's operating agreement may alter these fiduciary duties, it may not eliminate them. N.J.S.A. 42:2C-11(d)(2), (3).

Insolvency will not protect shareholders from the repercussions of improper activities. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). "To justify holding the principals of a company individually liable, it is not enough to allege that a judgment against the company will be uncollectible; after all, insulating shareholders from liability following corporate enterprise is the primary reason for incorporation." Id. at 472. (internal citations omitted). As the New Jersey Supreme Court explained:

> The limitations placed on a claimant's ability to reach behind a corporate structure are intentional, as the purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law. Hence, to invoke that form of relief, the party seeking an exception to the fundamental principle that a corporation is a separate entity from its principal bears the burden of proving that the court should disregard the corporate entity.

Id. at 472.

The two part rule the Trial Court must follow when deciding whether to pierce the corporate veil, is articulated in Ventron 94 N.J. 473 at 501: (1) the corporate entity must have been an alter ego or mere instrumentality of the individual, and (2)

the owner abused the corporate form to "perpetrate a fraud or injustice, or otherwise to circumvent the law."

It is well established that piercing the corporate veil is not a mechanism for imposing legal liability. Pulaski 195 N.J. at 473. Rather, it is an equitable remedy to cure fundamental unfairness which would result if the corporate form was not discarded. Id. *See also* Sean Wood, LLC v. Hegarty Group, Inc., 422 N.J. Super. 500, 517 (2011) ("Veil piercing is an equitable remedy whereby the court disregards the corporate existence and holds the individual principals liable for the corporations debts.").

The Trial Court correctly found that Plaintiff was an oppressed minority member, and that Simmons was guilty of minority shareholder oppression. However, the Trial Court incorrectly found that these "same findings do not spill over to Mr. Fischer and Mr. Caprow." (Aa54).

In denying Plaintiff's Motion for Reconsideration, the Trial Court reiterated that while Simmons was guilty of minority shareholder oppression, the Trial Court "determined plaintiff failed to present any evidence that GNS was the alter ego of Mr. Fischer or Mr. Caprow, or that their liability was equal to that of Dr. Simmons." (Aa14). The Trial Court was clearly taken aback by Simmons extreme conduct, as it is rare to see a minority shareholder case involving a physical assault by a male majority member against a female minority member. However, the Trial Court erred

by requiring Plaintiff to show that Caprow and Fischer engaged in "equal" misconduct. Caprow and Fischer were complicit, controlled the finances of GNS to their own benefit, and turned a willful blind eye to the wrongful ouster of Plaintiff. This evidence was more than sufficient to show Caprow and Fischer are personally liable.

Caprow controlled GNS finances and willfully ignored Simmons' ouster of Plaintiff. Caprow confirmed that no tax returns went out without his approval and admitted during Plaintiff's cross-examination revealed that he "rubber stamped" all tax returns before distribution. 3T42:16-23; 3T42:16-23. Further, he admitted that he conducted "irregular" transactions on behalf of Simmons, without questioning the same and knowingly provided unexecuted false employment agreements to investors. 3T123:10-25; 3T83:24-86:5. These actions confirm that Caprow was both a member and that he controlled aspects of the business and was complicit with Simmons. 3T83:24-86:5.

Despite this testimonial evidence, the Trial Court, in the Final Judgment, dated May 8, 2023, found Plaintiff's claims against Caprow lacked "hard facts." 3T40:21-23; 3T62:16-23. (Aa17). Caprow's inconsistent testimony, misrepresentations, intermingling of personal and company funds do not support the Trial Court's findings that Simmons was the only bad actor and solely responsible for the ouster of Plaintiff. 3T30:8-9. Caprow's knowing participation in Simmons' personal use

of company funds, rubber-stamping tax returns, and the subsequent improper dissolution of GNS as discussed below, required the Court to find Caprow personally liable under NJ RULLCA and pierce the corporate veil.

Similarly, Fischer had control over GNS and was complicit in ousting Plaintiff. 2T135:1-138:8. Fischer was employed by GNS to engage in business development, despite acquiring no clients. 2T130:9-10; 2T170:8-19. Although Fischer brought no value to GNS, Fischer benefited from GNS through repaying his personal credit card debt via company funds. (Aa28); 2T132:9-133:15. Fischer was the only one with access to said accounts, despite initially denying the same. 2T205:20-206:12. 2T205:12-206:12. Despite this testimony, the Trial Court still found that Fischer did not have access to these accounts. (Aa47). The evidence on the Trial Court's record of Fischer's conduct and his personal credit card debt repaid by GNS directly contradicts the Trial Court's decision finding no personal liability.

Fischer, like Caprow, was complicit in Simmons' ouster of Plaintiff and did not question Simmons' expulsion of Plaintiff. Instead, he moved Plaintiff's personal belongings to the basement after Plaintiff's room was ransacked by Simmons. Fischer put his head in the sand and willfully ignored Simmons wholly improper exclusion of Plaintiff from GNS.

Simmons, Caprow and Fischer all knowingly abused the corporate structure by taking and repaying loans, using or effectuating the use of the Company's funds

for personal use, and drafting false documents for investors and the IRS. All three individuals took affirmative steps to exclude Plaintiff from GNS after Plaintiff spoke up about the financial impropriety of the company. The Trial Court's determination that Fischer and Caprow were not personally liable contradicts clear case law.

Therefore, the Trial Court's findings should be reversed. Alternatively, the matter should be remanded for a new trial.

C. Plaintiff Appeals The Trial Court's May 8, 2023 Final Judgment, June 26, 2023 Order And August 30, 2023 Order, As The Trial Court Improperly Denied Plaintiff's Request To Appoint A Receiver Or Special Fiscal Agent For GNS, As A Neutral Party Should Have Been Required To Monitor The Dissolution By Defendants. (Raised Below In Plaintiff's May 28, 2023 Motion For Reconsideration) (Aa8; Aa66; and Aa87).

Defendants improperly dissolved GNS, violating NJ RULLCA. It is recognized that the Chancery Division has discretion in appointing a receiver or special fiscal agent. *See* Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 365 N.J. Super. 241, 249, 839 A.2d 52 (App. Div. 2003). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017). Because this issue (whether a special receiver should have been appointed), poses issues of law and fact, it should be

reviewed de novo. *See* N.J. Realty Concepts, LLC v. Mavroudis, 435 N.J. Super. 118, 123 (App. Div. 2014)

Under New Jersey law, "oppression has been defined as frustrating a [member's] reasonable expectations" and "is usually directed at a minority [member] personally." Brenner v. Berkowitz, 134 N.J. 488, 506, 634 A.2d 1019 (1993). Thus, where a member's reasonable expectations have been frustrated by other members, the minority member has been oppressed and has a genuine claim for judicial recourse under NJ RULLCA. Under NJ RULLCA, dissolution is an activity carried out by the members of a limited liability company unless there are no members alive to do it. N.J.S.A. 42:2C-37(b)(1)("The management and conduct of the company are vested in the members") and N.J.S.A. 42:2C-49(c) ("if a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company"). As such, a member's expectation to be included in dissolution is reasonable and required by NJ RULLCA.

It is well known that Courts have an inherent power to appoint a special receiver for a corporation on the ground of gross or fraudulent mismanagement by corporate officers, or gross abuse of trust or general dereliction of duty; solvency of the corporation is not a bar to such action. Gillies v. Pappas Brothers, 138 N.J. Eq.

202, 205 (Ch. 1946); Hollander v. Breeze Corporations, Inc., 131 N.J. Eq. 585, 606, 612 (Ch. 1941) (aff'd. 1942).

Here, the Trial Court properly found Plaintiff was an oppressed minority member. As a member of GNS, Plaintiff's expectation to be included in the company's dissolution was reasonable. Plaintiff was denied an opportunity to inspect the books and records of GNS prior to dissolution and was excluded from any role in winding up the company. Instead, while Plaintiff's reconsideration motion was pending, Fischer and Caprow excluded Plaintiff from the dissolution. The Trial Court denied Plaintiff's motion for reconsideration to be included in the dissolution with one sentence: "GNS, not plaintiff, is responsible for completion of the winding up and dissolution of GNS." (Aa85). The Trial Court provided no citations for this exclusionary conclusion. This decision by the Trial Court is wholly unsupported by law and flies in the face of NJ RULLCA which expressly states that members are responsible for the management and activities of a company. *See* N.J.S.A. 42:2C-37(b)(1).

Plaintiff then filed a second motion for reconsideration seeking the Court's intervention to be part of GNS's wind-up. (4T6:21-9:24.) The Trial Court denied her motion for reconsideration without addressing any provisions of NJ RULLCA and improperly categorized Plaintiff's request to be part of the court-ordered dissolution as requesting additional discovery (4T5:7-8). (Aa87.)

As a member of GNS, Plaintiff should not have been excluded from the dissolution of GNS. Plaintiff's request for a receiver and Motions for Reconsideration should have been granted. Therefore, the Trial Court's Orders denying Plaintiff's request for a special receiver should be reversed and the matter remanded with a directive for the Trial Court to appoint a special receiver to review the dissolution of GNS.

D. The Trial Court Participated In Improper Colloquies And Substantive *Ex Parte* Communication During Trial (Not Raised Below – Plain Error).

1. The Trial Court Engaged In Improper *Ex Parte* Communications

The Trial Court wrongfully participated in substantive *ex parte* communication by excluding Plaintiff from conversations with Mr. Leiberman and Mr. Grad in chambers.

When an issue is raised for the first time on appeal, a plain error standard applies. As such, it must be established that (1) there was error; and (2) that error was clearly capable of producing an unjust result. Dunbrack 245 N.J. at 544. Here, the Trial Court's wrongful participation in *ex parte* communication was clear error and resulted in Plaintiff's claims being dismissed.

Judges should never participate in substantive *ex parte* communications. Although a judge has great authority, "[t]he exercise of this authority is

circumscribed by the [J]udge's responsibility to act reasonably and within constitutional bounds." State v. Bitzas, 451 N.J. Super. 51, 76 (App. Div. 2017).

If a judge engages in *ex parte* conversations with the parties or outside experts, the adversarial process cannot function properly, and there is greater risk of an incorrect result. In re Kensington Intern. Ltd., 368 F.3d , 289, 309 (3d Cir. 2004); *see also* In re Sch. Asbestos Litig., 977 F.2d 764, 789 (3d Cir. 1992)(stating that *ex parte* contacts are "tolerated of necessity where related to non-merits issues [and] for administrative matters…"). *See also* New Jersey Code of Judicial Conduct 3.8 ("Except as authorized by law or court rule, a judge shall not initiate or consider *ex parte* or other communication concerning a pending or impending proceeding.")

Further, a judge may "**make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard**. Comment to New Jersey Code of Judicial Conduct 3.7 (emphasis added).

Here, the Trial Court excluded Plaintiff from substantive *ex parte* conversations on the second day of the bench trial. Specifically, at the beginning of the second day of trial, the Trial Judge took the bench and immediately requested to see both counsel, Mr. Grad and Mr. Lieberman[3], in chambers, while Plaintiff stayed in the courtroom organizing hard copies of her exhibits. 2T7:13-16. The court

[3] Mr. Leiberman was counsel for Plaintiff's LLC, not Plaintiff personally, and the Court voiced this several times. 2T90:15.

reporter then went off the record. When the Trial Judge returned, she did not put any explanation of what was discussed with counsel on the record. 2T7:13-16; 2T8:10-14. Instead, following this *ex parte* communication the Trial Judge took the bench and stated: "I had an opportunity to speak with counsel in chambers while Ms. Jennings was collating and organizing her exhibits about the status of the case. I think it's a good opportunity, uh, for us to take a break from the litigation component of our trial and then, uh, reevaluate some of our respective positions." 2T8:10-14. The Court was then in recess.

This type of *ex parte* communication is prohibited. Moreover, it clearly implicated Plaintiff's ability as a *pro se* litigant to have her matter fairly heard. Given the communication and immediate recess with direction to "reevaluate some of our respective positions," no reasonable person can doubt that substantive matters were discussed by counsel and the Trial Judge to the exclusion of Plaintiff. This substantive *ex parte* communication should have never occurred, and Plaintiff should have been made aware of the substance of the conversation.

The plain error standard is met, and this Court should find that (1) the Trial Court's substantive *ex parte* conduct was an error; and (2) that error was clearly capable of producing an unjust result.

2. The Court Engaged In Improper Colloquies With Plaintiff.

Not only was *pro se* Plaintiff the victim of *ex parte* communication, but she fell subject to improper pressure from the Trial Judge following this *ex parte* communication which resulted in the dismissal of most of Plaintiff's requested relief.

Specifically, Judge Suh engaged in improper colloquies with Plaintiff by asking her if she wanted to dismiss each of her claims several times. Judge Suh first questioned Plaintiff on the first day of trial following her opening statement, prior to Plaintiff questioning any Defendants. 1T8:1-1T9:19.

The following day during the second day of trial, Judge Suh engaged in a more aggressive colloquy after improper *ex parte* communication with counsel in Chambers that morning. Specifically, the Court questioned Plaintiff on the stand for several hours. Then, prior to Plaintiff having the opportunity to question any of the Defendants, the Trial Court again proceeded to question Plaintiff about her claims in a checklist like manner, repeating many of the questions she asked Plaintiff the day before. 2T88-91. This included probing whether Plaintiff intended to drop claims against the deceased Simmons and questioning her remaining claims. Plaintiff expressed confusion during this process, evident in both the transcript and audio recording, showing she didn't knowingly and intelligently dismiss these claims. 2T88:4-91:15.

During this interaction Plaintiff, is clearly confused by the Court. She is not an attorney, and it is apparent that she was uncertain about the legal jargon used, along with the implications of the interaction between her and the Judge. 2T90:1-25. At one point during this questioning, Plaintiff looked to Mr. Lieberman, the counsel for her company, Third Party Defendant Cirrus, and was immediately berated by the Trial Judge:

> **Court**: Next items is judgment or order dissolving GNS pursuant to law or equity. You still asking for that?
>
> **Plaintiff**: Shouldn't I? I don't, um, Mr. Lieberman?
>
> **Mr. Lieberman**: I can't – I can't – I can't answer that.
>
> **Court**: Mr. Lieberman is not your attorney.
>
> **Plaintiff**: No, I understand.

2T:90:9-16.

The unfortunate result is that Plaintiff was left with far less relief than set forth in her Complaint and for which she later sought under her Motion for Reconsideration. It is clear Plaintiff did not knowingly and intelligently agree with the Court on its dismissal of said relief. 2T88-91.

Not only was *pro se* Plaintiff the victim of *ex parte* communication, impartial pressure to dismiss her requested relief via the judge's colloquies, but Plaintiff was also admonished continuously and rushed through her case. 3T121:12-25. After rebuking Plaintiff on proper trial etiquette and procedure regarding hard-copy exhibits, which was never communicated to Plaintiff or found anywhere in the *pro*

se instructions on eCourts, the Court continuously rushed Plaintiff and pressured her during her testimony, direct examination, and cross examination. 1T9:13-19; 1T15:4-18; 3T121:17-21. As stated above, New Jersey Rules of Judicial Conduct allow for a judge to "make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard." Comment to New Jersey Rules of Judicial Conduct 3.7. Here, the Trial Judge did the opposite.

Given the above improper colloquies and *ex parte* communication by Judge Suh, plain error was made by the Trial Court that resulted in Plaintiff's case to be decided unjustly. Therefore, reversal is warranted.

V. CONCLUSION

For the foregoing reasons, the Court should find that the Trial Court improperly valued Plaintiff's interest in GNS as *de minimus*, dismissed Plaintiff's claims against Fischer and Caprow and prevented Plaintiff from participating in GNS wind-up of GNS. Accordingly, these aspects of the May 8, 2023 Final Judgment, June 26, 2023 and August 30, 2023 Orders denying Plaintiffs' motions for reconsideration should be vacated in part, and this case should be remanded.

Respectfully submitted,
HYLAND LEVIN SHAPIRO LLP

Dated: January 3, 2024

By: 
Megan Knowlton Balne, Esquire
Paige A. Joffe, Esquire

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-00218-23

RANDEE K. JENNINGS, individually and derivatively on behalf of GLOBAL NETWORK SOLUTIONS LLC,

Plaintiff/Appellant

vs.

CARL F. SIMMONS, GLOBAL NETWORK SOLUTIONS LLC, RAYMOND FISCHER, JULIAN CAPROW, JOHN DOES 1-5 (said names being fictitious), and ABC CORPORATIONS 1-5 (said entities being fictitious),

Defendants/Respondents,

GLOBAL NETWORK SOLUTIONS LLC,

Counterclaimant/Third Party Plaintiff,

vs.

THE CIRRUS GROUP LLC,

Third Party Defendant.

On Appeal from
Superior Court of New Jersey
Law Division, Somerset County
Docket No. SOM-L-000220-20

SAT BELOW:
Hon. Robert A. Ballard, Jr.
Hon Haekyoung Suh

APPELLATE BRIEF AND APPENDIX OF DEFENDANTS/RESPONDENTS RAYMOND FISCHER AND JULIAN CAPROW

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TABLE OF CONTENTS

Page

APPENDIX-TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS ON APPEAL

TABLE OF AUTHORITIES

Cases **Page(s)**

Codes and Statutes

Rules

PRELIMINARY STATEMENT

Plaintiff Randee Jennings ("plaintiff") was working with defendants Carl Simmons ("Simmons") and Raymond Fischer ("Fischer") at another employer when she, along with Simmons and Fischer, left to form a small, closely held New Jersey start-up in the telecommunications industry, defendant Global Network Solutions LLC ("GNS"). Defendant Julian Caprow ("Caprow") was brought in from outside the other three parties' original employer, and became a part-time employee/consultant at GNS, remaining in California throughout.

Plaintiff was thus fully aware with whom she was dealing in Simmons when she agreed to allow him to be in charge of this new venture and to be its principal owner. All hoped this brand-new venture would garner business and investors and take off, earning them a lot of money. However, as with many start-ups, these hopes were not realized. Simmons proved to be both dictatorial and incompetent as leader. He also appears to have engaged in many inappropriate acts and practices. Simmons terminated plaintiff after an argument led to a physical altercation. Neither plaintiff, nor any of the defendants, realized their dreams or their desired economic benefits, and the start-up failed.

With Simmons now deceased and the entity, GNS, now defunct, plaintiff seeks to recover what she perceives she was

"due" from this failed start-up enterprise, not from GNS or Simmons, but instead from Caprow and Fischer, as the only parties left standing. She wants to hold Caprow and Fischer responsible for Simmons' failures, excesses, and possible wrongdoings, that she herself, as an asserted GNS officer and owner, could not prevent. The Trial Court, while finding the testimony of all three broadly credible (they were the only witnesses at trial), rejected plaintiff's mere "innuendo and suspicions" regarding Caprow and Fischer, finding that "plaintiff's classification of Mr. Fischer and Mr. Caprow as co-conspirators of Dr. Simmons was wholly unsubstantiated." Pa17-18. The Trial Court thus properly concluded that Fischer and Caprow were not liable to compensate plaintiff for her claimed losses.

PROCEDURAL HISTORY

Plaintiff filed her complaint in this matter on February 13, 2020, against Defendants GNS, Simmons, Fischer and Caprow. Pa91. Plaintiff's Second Amended Verified Complaint was filed on April 10, 2020. Pa440. Plaintiff made claims for: dissolution of GNS; expulsion of Simmons from GNS; unjust enrichment; piercing the corporate veil; breach of fiduciary duty; self-dealing; negligence; waste; tortious interference with plaintiff's economic advantage; tortious interference with plaintiff's prospective economic gain; accounting; appointment

of a custodian and provisional director under the New Jersey Oppressed Minority Statute; and attorneys' fees. Caprow and Fischer filed an Answer on May 27, 2020. Da1. GNS and Simmons filed an amended Answer, including GNS' amended counterclaim against plaintiff for breach of contract and fiduciary duty, tortious interference and unjust enrichment and Third-party Complaint against plaintiff's business entity, The Cirrus Group LLC ("Cirrus"), for tortious interference and unjust enrichment, on August 22, 2020. Da10.

The matter was tried in a bench trial lasting three days, January 11-13, 2023 (1T-3T), at the conclusion of which all claims against Cirrus were dismissed. Cirrus filed a post-trial motion seeking fees from defendants under the Frivolous Litigation Act. Pa59. The Trial Court issued its Final Judgment and Statement of Reasons ("Judgment") on May 8, 2023. Pa8. Plaintiff filed a Motion for Reconsideration on May 28, 2023 ("5/28 motion")(Da27), which resulted in the Court's Order and Statement of Reasons of June 26, 2023 ("6/26 Order"). Pa66. Plaintiff filed a second motion, which the Trial Court considered a partial Motion for Reconsideration, on June 22, 2023 ("6/22 motion"). Da54. The 6/22 motion resulted in the Court's August 30, 2023 Order and Statement of Reasons. Pa87. Plaintiff's Notice of Appeal was filed on September 21, 2023, then amended technically; Cirrus did not appeal. Pa1.

COUNTER-STATEMENT OF FACTS

Simmons, plaintiff and Fischer were employed together at Secure Path Network. In 2014, they formed GNS as a start-up LLC in the technology and telecommunications field. 1T21:8-18. Simmons was given the title of President and CEO; plaintiff was given the title of Senior Vice President and Chief Information Officer; and Fischer was given the title of Senior Vice President of Business Development. 1T22:14-15; 2T130:7-10, 203:25- 204:1; Da57, 68, 69, 74, 77 (reflects Simmons status as CEO and President).

Fischer worked to bring in business from the outside and then worked along with the Technology and Operations Department to manage the projects they had. 2T131:2-11, 137:24-138:17, 142:5-15, 197:1-10. Caprow was brought in from outside this group and given the title of executive vice-president and chief financial officer, though Caprow always worked part-time from California.[1] 3T13:3-11. Caprow maintained the company books, addressed payroll, and provided information for and reviewed tax returns. 3T41:13-42:6. He helped in contract negotiation and strategic planning, but when it came to paying bills and paying employees that was entirely directed by Simmons. 3T88:12-89:8.

[1] During the life of GNS, Caprow was in fact only in New Jersey once or twice. 3T28:21-29:7.

The idea was to secure clients and investors and thereby grow GNS into something in the telecommunications sector that would meet the parties' financial expectations. 3T13:18-24,32:17-33:9. In particular, Simmons told Caprow that Simmons had been in contact with private equity firms with which GNS could become involved and thus have business from various entities that such firms controlled. However, this business did not materialize because Simmons did not follow through. 3T38:21-39:19, 92:3-10.

At the outset, the parties entered into an Operating Agreement for GNS wherein Simmons was to own 15%, plaintiff was to own 10%, Fischer was to own 10%, Caprow was to own 10%, and an investor, David Villano[2], was to own 10%. 1T161:18-162:2; 2T159:14-23, 161:4-13; 3T29:21-30:4. Shortly thereafter, in 2014 or early 2015, Simmons revised the Operating Agreement such that only 45% of the shares were issued and Simmons retained 90% of that interest and Fischer 10% of that interest, which was reflected on GNS' 2014 returns. All of these individuals, including notably plaintiff, agreed to this change. 1T162:3-163:9, 169:21-171:4; 2T159:24-160:23, 161:14-23, 182:2-183:23, 184:24-185:5; 3T30:5-31:3, 91:3-10; 1T37:11-19; Pa30-31. This further cemented Simmons' absolute control over the LLC. See,

[2] He was eventually paid back as a loan instead. 2T162:1-5.

e.g., 3T36:12-19. Caprow was thus not a member of the LLC (2T205:1-8; 3T30:5-31:3) and only worked part-time.

Plaintiff asserts, however, that she was allowed to, and did, buy back in for 10% based on her "foregoing" compensation totaling $200,000. 1T38:21-39:3; Da69. Neither Caprow nor Fischer were ever made aware of this assertion while plaintiff remained at GNS, if it's even true. Apparently, without Caprow's authorization, Simmons had Caprow's name signed electronically to the letter affirming plaintiff's buy-in.[3] 2T182:7-23, 185:6-22; 3T26:8-27:15, 64:10-65:13; Da69. Thus, Caprow did not have a K-1 issued for plaintiff, nor did he treat plaintiff as an owner on the financial books of the LLC, nor did he have a 1099 issued to her for the supposed $200,000 buy-in. 3T26:22-27:15, 35:14-36:1, 65:8-10. Plaintiff never mentioned to Caprow that she did not get a K-1, or that she had made a buy-in deal with Simmons. 3T35:14-19, 65:11-13.

Forms of employment agreement that were similar to each other were prepared for each of plaintiff, Fischer and Caprow. Da66, 72, 75. Fischer's and Caprow's agreements were never executed. 1T26:14-15; 2T155:9-21, 156:17-157:10; 3T33:10-17. The employment agreements were prepared on a pro forma basis as part of a due diligence package to be provided to potential

[3] Caprow even checked his emails from this period of time, but found nothing on this buy-in issue. 3T65:20-66:1.

investors to make clear how GNS would operate should GNS become sufficiently funded. 2T:157-158:16, 193:15-23, 194:21-195:3; 3T32:23-33:9, 33:18-35:13, 85:6-:2; Da78 (due diligence checklist). Fischer and Caprow did not expect any current compensation as reflected in the forms of employment agreement and such compensation could not have been paid in light of GNS' financial circumstances. 2T158:9-15; 3T31:22-32:22, 86:3-15. There was no formal pay arrangement with any of the executives. If there was money available, they would be paid based on individual discussions with Simmons. 3T86:3-15, 87:8-11.

While plaintiff's form of employment agreement she put into evidence was unsigned (Da66), plaintiff asserted that her agreement had, in fact, been signed. 1T110:24-111:3. Fischer and Caprow testified they were unaware of this fact, even if it were true. 2T196:12-26; 3T86:3-15, 87:8-11. Plaintiff asserted she negotiated the agreement with Simmons, who was the person she answered to at GNS. 1T111:6-10. However, as the trial Court noted, even if this agreement were valid and binding, despite GNS' clear lack of wherewithal to meet its terms, it only provided for compensation for a portion of 2014 (Pa20), as GNS was only formed in 2014 and it explicitly stated that compensation for 2015 and beyond "will be mutually agreed upon annually as part of the GNS Strategic Planning process in Q4." Pa38; Da66, 68.

GNS was unable to generate hoped for business. Fischer, who was involved with business generation and sales, was unable to close on any contracts or obtain any business from his contacts or leads. 2T169:14-171:1. A Simmons contact or lead led to one contract in 2014 (Binary Tree) and plaintiff's contact led to the other 3 clients, including GNS' principal client, the Heritage Group ("Heritage"). 2T183:9-184:12. Plaintiff, Caprow and Fischer all sought to have Simmons expand the customer base, but Simmons refused, making GNS too dependent on Heritage. 3T39:12-23.

Simmons was in total control of GNS and managed or mismanaged the LLC as he saw fit, without anyone having the ability to object. He decided what checks were written and when, and how the business was run. 2T179:5-15; 3T58:9-17. Plaintiff was aware of Simmons' bad faith acts toward her and others by 2015. 1T47:9-11; 2T82:20-23. Fischer and Caprow advised plaintiff that they could not control Simmons or stop him from doing whatever he was doing. 1T62:21-25; 2T44:9-11, 84:8-10.

Simmons, Fischer and plaintiff (but not Caprow) all lived in a house in Bernardsville that GNS rented for the business as well,[4] as Simmons insisted that plaintiff live in Bernardsville despite the fact that her principal residence was

[4] The total monthly rent was $6,500 payable to the landlord, David Moylan. 2T51:10-13

in Florida. 1T64:14-65:23, 120:4-24; 2T50:23-51:2, 133:16-134:8. The utilities were in plaintiff's name and she at times paid the bills, but she paid no rent. 1T156:2-1; 2T50:1-13. Simmons also demanded that plaintiff, Fischer, and Caprow not be paid through a payroll company, but that Simmons be allowed access to the others' accounts to deposit funds, which plaintiff, in fact, allowed. 1T50:25-52:22; 2T30:17-31:16.

Simmons operated GNS in an unorthodox manner, though one not uncommon in small businesses, where personal expenses, including principally Simmons' and plaintiff's, were paid from GNS funds and then Caprow would seek to pick them up as income for the individual in question on GNS' books. (At times, Caprow would go over with Simmons the items that were not clear.) 2T162:10-163:1; 3T21:12-22:15, 40:2-15, 62:5-64:5, 123:8-25. Caprow complained about this comingling, but did not believe this was "worth blowing up the company over." 3T124:8-18. Plaintiff also confronted Simmons many times about his using GNS money starting in 2016, but without result. 1T161:4-17. By way of example of these practices, GNS paid homeowner's association fees and electric bills for plaintiff's home in Florida, and horse stable fees for plaintiff, which was recorded as income to plaintiff. 3T24:6-26:7. Fischer did not have access to GNS accounts and did not observe Simmons mishandling funds. 2T164:24-165:19. Yet, Fischer did express concerns to Simmons

about how GNS funds were handled, but he received no substantive response. 2T166:1-167:2. Fischer was not aware of any other type of mishandling of funds by Simmons. 2T162:2-7.

Caprow sought to identify such income attributable to GNS personnel by payment of that person's expenses and to attribute it properly to the appropriate individual to the best of his ability. 3T40:2-15. He was advised by Simmons how to book, as income or otherwise, money that bank account statements showed Simmons took out of GNS accounts and, at times, also paid over to plaintiff or Fischer. Caprow sought further supporting information from Simmons as to how to book these amounts, but was not provided with such support. 3T94:8-97:11. Caprow also sought to obtain support for items to be booked as business expenses, but Simmons mostly did not provide same. 3T125:6-126:5.

Simmons also hired the limited number of other employees as W-2 employees, but advised Caprow that they were consultants and thus they were to be issued 1099s, not W-2s. Simmons made, and communicated, the decisions regarding how employees were characterized and paid and what they were paid. 1T61:19-25, 159:3-23, 160:5-12; 3T29:13-17; Da82 (employee list). Employees later sought additional money that they said they were owed as if they were classified as employees resulting in a New Jersey Department of Labor ("DOL") award, which yielded

additional compensation for employees in 2020. 1T62:6-13; 3T54:1-11. Simmons dealt with these claims entirely, and only told Caprow about them after the fact. 3T52:1-18, 73:13-14.

In December 2017, a dispute between Simmons and plaintiff over Heritage came to a head, resulting in a physical altercation between plaintiff and Simmons in the Bernardsville house. 1T63:1-4, 66:10-15, 74:5-11. After the police were called, it was plaintiff who was arrested. 1T75:4-16. Simmons then terminated plaintiff. 1T85:16-86:17; 2T203:13-18. Plaintiff asserted that when she returned to retrieve her belongings in early 2018, items had been removed from her apartment. 2T52:18-53:6. However, Fischer was not involved in this incident except that, after Fischer was no longer living at the Bernardsville house, at Simmons' request Fischer moved two boxes which were sitting near the open door in plaintiff's space to the basement space used by GNS, because Simmons said they were too heavy for him to move. Simmons had advised Fischer that the contents of those boxes were all GNS materials, which is what Fischer saw when he looked at the binders on top of the first box. 2T52:25-53:1, 135:1-137:8, 168:2-169:13. Caprow had no involvement or contemporaneous knowledge of this incident, as he was based in California.

During the period of her employment, plaintiff, Simmons, Fischer and Caprow were paid compensation as follows,

including payments made for plaintiff's benefit in 2014 and 2015:

	2014	2015	2016	2017
Carl Simmons	0	$12,970.27	$21,379.34	$67,718.64
Randee Jennings	**$3,000**	**$19,786.34**	**$82,160.28**	**$63,760.06**
Ray Fischer	0	$36,284.03	$54,900	$66,500
Julian Caprow	0	0	$30,000	$65,000

Da82; 3T14:13-15:23, 17:4-6, 43:6-44:10. No evidence was presented that anyone received owner/member distributions of any kind from GNS beyond their compensation for services rendered. See, e.g., Da82. (payments all noted under consulting expenses). Plaintiff was, in fact, the highest paid employee from 2014-2017. 3T20:19-23. Plaintiff also had the benefit of rent-free housing and food at the Bernardsville house. 3T:21-6-8. The evidence further disclosed that after plaintiff was terminated in December 2017 (1T85:16-86:17; 2T203:13-18), Fischer and Caprow were compensated reasonably for their continuing services from 2018 to 2020: Caprow received only $24,000 in 2018; and Fischer received a total of $163,530 for 2018 through 2020. Da82. No evidence was presented suggesting that Fischer or Caprow were compensated excessively, or excessively compared with plaintiff. In fact, during Fischer's employment at GNS until 2018, he spent down all his savings and investments to live on because of his lack of compensation. 2T131:17-132:8.

Fischer also allowed Simmons to use Fischer's personal credit card for GNS expenses, which ran up a bill of $45,000 including interest. 2T132:9-133:7. Caprow had over time also loaned GNS between $84,000 and $85,000, which, with interest, came to $93,455.65; a Promissory Note was executed by Simmons for GNS for these amounts. 3T79:2-80:5, 107:2-7, 107:14-20, 110:1-112:4, 117:5-24; Da84.

Plaintiff alleged she agreed to a salary reduction of a total of $200,000 over 2014 and 2015 in exchange for her 10% interest in GNS. 1T38:21-39:3; Da69. There is no evidence to suggest that her interest ever had any value. Plaintiff submitted no evidence of value. The only GNS financial books and records in evidence, the profit and loss statement, evidenced substantial net losses for the 2014 through 2020 period. Pa41-42; Da82.

In August 2018, the remaining employees left GNS because they had not been paid. 2T190:3-190:21. Shortly thereafter, Heritage terminated its agreement with GNS. 2T192:19-22. In February 2019, GNS pursued its claim against Heritage. 1T90:16-17. By this time, GNS had no ongoing business except this one claim. 3T57:14-18. Simmons negotiated and agreed upon a settlement. 3T69:1-2. The settlement proceeds of $1,028,000 were deposited initially in GNS counsel's account. From the settlement, GNS satisfied its attorneys' fees, a

settlement in another matter, the outstanding debt to Fischer and Caprow discussed above,[5] and outstanding amounts found due to the former employees in the DOL matter, among other expenses. 2T133:2-15; 3T25:17-20, 27:21-28:13, 65:14-67:9, 72:1-10, 72:10-73:13, 80:6-81:19, 107:2-7, 117:15-16. As part of the deal, Heritage purchased back the contracts that GNS was servicing for Heritage (eliminating any future income stream to GNS). 1T90:18-22. The remaining relationships GNS had were also terminated. 2T146:12-21; Da70, 71(Telarus and Intelisys letters). Simmons and Fischer tried, but were unable, to generate significant new business. 2T177:1-179:3, 206:16-22.

In Spring 2022, in the midst of this action, Simmons died. 2T203:22-204:09.

In the end, there were no employees, no revenue stream, and ultimately no assets, as only Simmons and Fischer, and then only Fischer, were left; there were no assets, or cash, of value. 2T204:18-206:15; see also, Da59[6]. Plaintiff conceded that she did not believe there were significant funds in GNS as of the time of the trial. 2T89:6-8. Plaintiff admitted that GNS is defunct with no assets. 1T8:3-4. Plaintiff did not seek to name Simmons' estate as a defendant. Pa9,72 n.1.

[5] Later on, Caprow made additional advances. 3T118:1-2.
[6] Plaintiff did not substantively dispute before the Trial Court counsel's factual assertions in this letter memorandum regarding the then current status of GNS and its assets.

In the end, Caprow, who was not an owner and had no contract with GNS, had no real relationship with GNS as it really did no business and there were no customers; Caprow helped out doing some financial work into early 2021, but at some point GNS ran out of money so it did not even file tax returns. 2T205:1-8; 3T91:21-92:3, 92:18-93:2.

ARGUMENT

I. THE STANDARDS OF REVIEW

On the appeal of the Judgment rendered by the Trial Court after a bench trial, particularly, as here, where a substantial part of the evidence was based on testimony, this Court should apply a deferential standard to review of the Trial Court's factfinding and conclusions:

> …[W]e apply a deferential standard here because the trial court determined the validity of the retainer agreement by taking the testimony of the parties and by making credibility and factual findings…. "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.' " ….That is so because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand…. We may not overturn the trial court's factfindings unless we conclude that those findings are "manifestly unsupported" by the "reasonably credible evidence" in the record….

Balducci v. Cige, 240 N.J. 574, 594-595 (2020)(citations omitted); see Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974)(citations omitted)("'…[W]e do not disturb the

factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interest of justice….'").

The Trial Court's denial of the two motions for reconsideration are to be reviewed under the even more deferential standard of abuse of discretion. See, e.g., Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) ("We review the trial court's denial of plaintiff's motion for reconsideration for abuse of discretion.")[7]

II. PLAINTIFF'S APPEAL SHOULD BE REJECTED AS IT WAS FILED OUT OF TIME, AS WAS PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION

Plaintiff's appeal should be rejected as it was not timely filed, except as to plaintiff's second motion for reconsideration. The appeal of that denial must also be rejected, since, as the Trial Court found, the second reconsideration motion itself was not timely filed in the Trial Court.

The Trial Court issued its Judgment on May 8, 2023.[8] Thereafter, plaintiff filed her 5/28 motion for reconsideration

[7] The standards for "plain error" and its applicability will be discussed in the further body of the Brief where applicable.
[8] The only issue left open by the Judgment was the Trial Court's directive that plaintiff's former counsel, DiMedio Law, file a Certification of Services within fourteen days of the Judgment. Pa9. A Certification filed by plaintiff on May 22, 2023 was

of the Judgment. Notably, as part of that motion, plaintiff, not third-party Defendant Cirrus, sought reconsideration of the Court's denial of Cirrus' request for fees under the Frivolous Litigation Act.[9] Da28. Plaintiff's 5/28 motion was denied on June 26, 2023. Pa66. Prior to that determination, on June 22, plaintiff filed another motion, which, with regard to the Judgment, only sought to revisit the Judgment's directive that GNS be dissolved ("June 22 motion"). Da54. On August 30, 2023, the Trial Court denied the 6/22 motion, finding, among other things, that the Motion had not been timely filed. Pa87 Plaintiff's appeal of the Judgment and the Orders on the motions for reconsideration was initially filed on September 21, 2023. Pa1

An appeal of a final judgment must be filed within 45 days of its entry. R. 2:4-1(a). That time-period is tolled during the pendency of a *timely* filed motion for reconsideration. R. 2:4-3(c). Thus, in the instant matter, plaintiff, having filed a timely reconsideration motion of the

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rejected by the Trial Court as being non-conforming on May 25, 2023. Da63. This matter was not addressed in plaintiff's 5/28 motion for reconsideration. Da28 Plaintiff made no further filing on this issue, which was thus moot.

[9] Fees had been denied because "[t]he Cirrus Group incurred legal fees to defend against legitimate claims brought by GNS." Pa65. There is also no evidence of record that, as plaintiff suggests (Pb2), plaintiff was "forced" to proceed pro se because Cirrus had to have counsel. For example, presumably, they could have had the same counsel.

May 8 Judgment on May 28, 2023 (20 days later), plaintiff had the remaining 25 days of the original appeal period to file her appeal of the Judgment after her 5/28 motion was denied. Thus, plaintiff's time to file her Notice of Appeal of the Judgment expired on July 21, 2023, 25 days after the 5/28 motion was denied by the 6/26 Order.[10] The appeal of the Judgment should be dismissed because it was filed on September 21, 2023, which was 62 days out of time.

Even if plaintiff's 6/22 motion to revisit the portion of the Judgment dissolving GNS (Da54) were considered a Motion for Reconsideration under R.2:4-3(c) allowing for the tolling of time, it would not help plaintiff here. As the Trial Court recognized (Pa90), this 6/22 motion itself was filed out of time, having been filed on June 22, 2023, 45 days after the Judgment. A motion for reconsideration must be filed within 20 days of the Judgment. R. 4:49-2. Only a **timely** Reconsideration Motion tolls the time for appeal. Further, while the Order on this 6/22 motion was entered on August 30, 2023, less than 45 days from the date plaintiff filed the Notice of Appeal, the appeal of the August 30, 2023 Order as well must be rejected since the underlying 6/22 motion was clearly filed out of time.

[10] For good cause, the period may be extended, only upon motion, for a maximum of 30 days, if the notice of appeal is filed within those 30 days. R. 2:4-4(a). Here, no such motion was made.

Finally, the appeal of the 6/26 Order denying the original 5/22 motion for reconsideration is also not timely, as plaintiff's notice of appeal was not filed until September 21, 2023, 87 days later, far beyond plaintiff's 45 days for appeal. Thus, plaintiff's entire appeal should be dismissed as clearly untimely.[11]

III. THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFF HAD NOT PROVEN HER CLAIMS AGAINST FISCHER AND CAPROW

A. Plaintiff Has Presented No Basis To Attack The Trial Court's Finding That Both Fischer And Caprow's Testimony Was Credible

"Appellate courts should defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (N.J. 1999). Moreover, in a case incorrectly cited by plaintiff on this point (Pb29), the Court found in Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 179 (App. Div. 2012), "the scope of appellate review is expanded when the alleged error on appeal focuses on the trial judge's evaluations of fact, **rather than his or her findings of credibility**." (Emphasis added.) Here,

[11] As the Trial Court further noted plaintiff's other purported post-judgment motions for discovery and equitable relief were clearly baseless and untimely, having been filed after a Final Judgment (Pa81-82,85-86), and thus do not provide a basis to extend any of these deadlines.

plaintiff's efforts to attack the Trial Court's credibility findings are based in little more than plaintiff's disagreement with those findings amid manufactured, alleged inconsistencies.

For example, plaintiff cites no basis to attack Fischer's credibility except by saying that he paid his personal credit card from GNS assets. Pb21,30. Of course, if that were true, it would not undermine Fischer's credibility, and that is not what he testified. His testimony was that he allowed his personal credit card to be used to pay GNS expenses and then was reimbursed for that credit card debt. 2T132:9-133:7. In fact, he testified that he largely exhausted his savings due to lack of compensation from GNS. 2T131:17-132:8.

As to Caprow, plaintiff alleges that his credibility should be questioned because Caprow's trial testimony differed from his deposition testimony. His actual deposition testimony was not presented at trial, or used on cross-examination, so it is not clear from the Trial Court record how his testimony differed. No such alleged difference was called to the attention of the Trial Court. As plaintiff notes, Caprow did state at trial that at his deposition he testified he was **not** an owner or employee of GNS. 3T40:21-23. This was consistent with his trial testimony that he was not an owner and that technically he was not an employee, but a consultant. See, e.g., 3T30:5-31:3; 3T40:24-41:10; 3T78:1-22. Plaintiff also suggests that there was

an inconsistency with deposition testimony about loans Caprow made to GNS, but she does not provide a relevant citation to the record. Again, this alleged inconsistency was not presented at trial. Caprow did truthfully testify about loans he made to GNS, which were eventually paid back with interest. See, e.g., 3T79:2-18. Moreover, even if this were not the case, "a witness who gives a prior inconsistent statement may well be believed by the factfinder when he testifies in court", and such a funding is still entitled to deference. New Jersey Div. of Child Protection and Permanency v. B.O., 438 N.J. Super. 373, 384 (App. Div. 2014).

Plaintiff also suggested that Caprow's credibility was undermined by supposed testimony "about consciously intermingling company funds with personal funds and falsifying documentation about the company for potential investors", citing 3T83:24-86:5. However, the testimony cited does not state the former, which Caprow did not do, and actually contradicts the latter, as Caprow tried to explain to Cirrus' counsel at trial how **pro forma** employment agreements were used in due diligence packages.

In sum, plaintiff has offered no basis whatsoever to attack the Court's strong credibility findings in favor Caprow and Fischer. Their testimony should be accepted as credible evidence.

B. The Trial Court Properly Found That Plaintiff Did Not Prove Her Claims Against Fischer And Caprow For Breach Of Fiduciary Duty

A fiduciary duty only arises out of the existence of a fiduciary relationship. It is undisputed that Caprow was not a member of the LLC, GNS. See, e.g., 1T162:3-163:9, 169:21-171:4; Pb 22; Da52. He was merely a part-time, remote "employee" or consultant. Thus, Caprow bore no fiduciary duty either to plaintiff or to GNS. See, Shah v. Shroff, 2023 N.J. Super. Unpub. LEXIS 527, *20 (Law Div. 2023)(if a party was not a member of the LLC, no fiduciary duty arises).

Further, as the Trial Court found (Pa42-44), plaintiff has not proven a breach by Fischer, or by Caprow, for that matter, even if Caprow were subject to a such a duty:

> …Mr. Fischer was not a signatory to the GNS account. Thus, Mr. Fischer was not in any position to stop Dr. Simmons. Dr. Simmons controlled the finances of GNS alone, and only he is responsible for GNS' demise.
>
> Mr. Caprow's role as Chief Financial Officer was extremely limited….
>
> …Absent credible proof that Mr. Fischer and Mr. Caprow intentionally failed to act in the face of a known duty to act and enriched themselves, plaintiff's claims for breach of fiduciary duty, self-dealing, and waste against Mr. Fischer and Mr. Caprow are dismissed with prejudice.

While Fischer was a member, he had no access to or knowledge concerning GNS accounts. 2T164:24-165:19. Simmons, as the majority member, was in full control both practically and legally. Moreover, plaintiff misses the fact that GNS is not a

New Jersey LLC, but a Delaware LLC.[12] Under N.J.S.A. 42:2C-57, the "internal affairs" of a foreign LLC are governed by the laws of the state under which it was formed. 6 Del.C. §18-402 provides that "the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling…" Here it is beyond dispute that Simmons owned an over 50% interest in GNS, so his decisions were controlling under Delaware law, and as a matter of fact. See, e.g.,1T162:3-163:9, 169:21-171:4.[13]

The repetitive, often incorrect (see, e.g., Section III.A. above) citations to the record that plaintiff asserts simply do not back up her breach of fiduciary duty claim. Pb34-

[12] Plaintiff submitted with her papers filed on her second purported motion for reconsideration, filed on June 22, 2023, a then contemporaneous "New Jersey Department of the Treasury, Division of Revenue and Enterprise Services, Business Records Services" report stating that GNS was a Delaware LLC. Da56. GNS is also referenced in this way in the Promissory Note to Caprow admitted in evidence. Da84. Alternatively, in accordance with a report from the Delaware Department of State: Division of Corporations (Da65), this Court may take judicial notice of the specific fact that GNS is a Delaware domestic LLC. N.J.Evid.R. 201(a)(3) & (d), 202(b). See also, Da61.

[13] This would be true even if Caprow had remained a 10% member and plaintiff is viewed as being a 10% member. Simmons had at least a 40% membership interest under any possible view of the evidence. Pa30-31.

35. For example, Caprow did not "rubber stamp" tax returns, as plaintiff suggests (Pb34), but reviewed the returns prepared by the accountants and discussed them with Simmons. 3T42:2-23. Both Caprow and Fischer[14] did what they could to try rein in Simmons, but were unsuccessful. See, e.g., 3T124:8-18; 2T164:24-165:19; 2T166:1-167:2. Caprow sought to account for expenses as best he could, considering Simmons' unorthodox operating methods, but was often stonewalled. See, e.g., 3T21:12-22:15, 40:2-15, 62:5-64:5, 123:8-25; 3T94:8-97:11; 3T125:6-126:5.

Neither Fischer, nor Caprow (a part-time, remote "employee"), had the ability to stop Simmons from doing what he pleased, as Simmons was in de facto and de jure absolute control of GNS. See, e.g., 2T179:5-15; 3T36:12-19, 58:9-17; 1T62:21-25; 2T44:9-11, 84:8-10. Fischer and Caprow advised plaintiff they could not control Simmons or stop him from doing whatever he was doing. 1T62:21-25; 2T44:9-11, 84:8-10. Plaintiff seeks to impose fiduciary liability on Fischer and Caprow for failing to stop Simmons' actions that she herself, as a member and the source of GNS' principal business, knew about (1T47:9-11; 2T82:20-23), but

[14] Fischer's moving of 2 boxes apparently containing GNS materials from plaintiff's apartment at Simmons' request, certainly does not make Fischer "complicit in ousting plaintiff" (Pb35), as plaintiff suggests. See, e.g., Pa 49; 2T135:1-137:8, 168:2-169:13. Fischer also was not, as plaintiff suggests (Pb 35, the "only one with access to [company] accounts". 2T205:20-206:7

obviously did not have the power to stop. The Court below properly rejected such baseless claims.[15]

C. Plaintiff Has Not Proven Her Claim to Pierce the Corporate Veil to Assert a Claim Against Fischer or Caprow

It is undisputed that Simmons was the majority owner of GNS and in control of all of the LLC GNS's operations. Thus, there is no basis to pierce the corporate veil to find Fischer or Caprow liable for the actions of the LLC with respect to plaintiff. The Trial Court found, among other things (Pa47):

> The record is devoid of any facts establishing that defendants Fischer and Caprow were indistinguishable from GNS. Mr. Fischer had no access to the bank accounts or finances of GNS. Mr. Caprow was the Chief Financial Officer of GNS in name only; Dr. Simmons controlled GNS….
>
> There was no proof that GNS was the alter ego of Mr. Fischer or Mr. Caprow, or that their liability was equal to that of Dr. Simmons. Nor did plaintiff present any credible evidence that Mr. Fischer and Mr. Caprow abused the privilege of incorporation by using GNS to engage in unlawful practices to perpetrate a fraud or injustice….

---

[15] Plaintiff also may assert claims for "self-dealing" and "waste" which do not give rise to an independent cause of action and are otherwise addressed in this section of Caprow and Fischer's Brief. Similarly, even though N.J.S.A. 42:2C (New Jersey Uniform Limited Liability Act) is not directly applicable to this Delaware LLC (see Section III.B., fn. 12), for the reasons already discussed, plaintiff has failed to show that Caprow or Fischer engaged in gross negligence or recklessness that would otherwise be in violation of N.J.S.A. 42:2C-39(c), as plaintiff has asserted. Moreover, this statute applies to members; plaintiff has admitted that the evidence establishes that Caprow was not a member.

In the context of a corporate shareholder and its subsidiary, the Court in Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006), certif. denied, 189 N.J. 429 (2007) (citations omitted)(emphasis added), described the requirements in order to pierce the corporate veil as follows:

> For example, in order to warrant piercing the corporate veil of a parent corporation, a party must establish two elements: **1) that the subsidiary was dominated by the parent corporation, and 2) that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law**….In determining whether the first element has been satisfied, courts consider whether "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent."…See Interfaith, supra, 215 F. Supp. 2d at 497 ("veil-piercing is proper when a subsidiary is an alter ego or instrumentality of the parent corporation")….

See also, State, Dept. Of Environmental Protection v. Ventron, 94 N.J. 473, 501 (1983) (cited by plaintiff).

Here, there was no evidence whatsoever that GNS was dominated by anyone other than Simmons, or that anyone other than Simmons was in any way its alter ego. Nor was there any evidence that Caprow or Fischer used, or even could have used, GNS to perpetrate a fraud or injustice. The Trial Court's rejection of plaintiff's claim to pierce the corporate veil to hold Fischer and Caprow liable should be rejected.

D. Plaintiff Has No Basis For A Claim Against Fischer Or Caprow Asserting That Plaintiff Is An Oppressed Minority Shareholder

GNS is a Delaware LLC. See, fn. 12, supra. Delaware does not have an oppressed minority shareholder statute, nor does it recognize such an independent cause of action. See, e.g., Lidya Holdings Inc. v. Eksin, 2022 Del. Ch. LEXIS 22, *6-7 (Ch. 2022). Thus, there is no basis for asserting this cause of action here. However, even if New Jersey law were applied, it references oppressive actions **by those in control of the entity** toward a minority owner, which here relates only to Simmons' actions toward plaintiff, not Fischer's or Caprow's. N.J.S.A. 14A:12-7(1)(c)(In a close corporation, relief may be available when "the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees."); Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. 141, 155 (Law Div. 1979), aff'd, 173 N.J. Super. 559 (App. Div.), certif. denied, 85 N.J. 112 (1980); Pa53. Moreover, there is no basis to apply oppressed minority shareholder relief as to an admittedly defunct entity. 1T8:3-4; 2T89:6-8.

In sum, the Trial Court properly dismissed all of plaintiff's claims against Caprow and Fischer.[16]

IV. THE TRIAL COURT PROPERLY GRANTED AND DENIED VARIOUS EQUITABLE RELIEF AS TO GNS

Plaintiff asserts that Caprow and Fischer "improperly dissolved GNS". Pb36. The Trial Court ordered GNS dissolved, and did not agree to appoint a receiver or a fiscal agent or direct funds to be deposited into court. This is exactly what plaintiff requested, so she cannot now complain. Plaintiff, in fact, withdrew her claim to appoint a receiver and for GNS funds to be deposited in Court, and continued to seek dissolution. 2T88:14-89:25, 2T90:9-25.

In any case, no purpose would have been served by the appointment of a receiver as it was conceded that GNS was defunct. 1T8:3-6; 2T89:6-12. A custodial or statutory receiver is generally appointed for functioning businesses. See, e.g., Ravin, Sarasohn, Cook, Baumgarten, Fisch. & Rosen, P.C. v Lowenstein Sandler, P.C., 365 N.J. Super. 241 (App. Div. 2003)

---

[16] Other of plaintiff's claims against Caprow and Fischer that may have been part of plaintiff's pleadings below, but that were not argued in plaintiff's Brief to this Court, are waived. See, e.g., State v. Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd, 240 N.J. 56 (2019); 539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. Partnership, 406 N.J. Super. 242, 272 n.10 (App. Div.), certif. denied, 199 N.J. 541 (2009)("Although their notice of cross-appeal set forth additional portions of the final judgment from which plaintiffs were seeking review, those claims have not been briefed and are therefore deemed abandoned.")

(cited by plaintiff); Gillies v. Pappas Brothers, 138 N.J.Eq. 202 (Ch. 1946)(cited by plaintiff)

Moreover, such an appointment is to be made sparingly, only, in essence, as a last resort. Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., supra, 365 N.J. Super. at 249. The Trial Court sensibly did not appoint a receiver, and instead, ordered the defunct entity dissolved.[17]

Caprow and Fischer are constrained to point out, however, that plaintiff twice states as a fact that Fischer and Caprow "dissolved GNS and withdrew all funds from the GNS accounts", while plaintiff's motion for reconsideration was pending. Pb22, 38. Plaintiff cites the Trial Court's Opinion on reconsideration as support for this assertion, but it provides none. See, generally, Pa66. In fact, these assertions completely lack factual support in the record, and Fischer and Caprow did not dissolve GNS. See, Da56; see also, Da59a. Even if dissolution had occurred, plaintiff did not seek a stay of the Trial Court's original Judgment, so dissolution would not have been inappropriate.

[17] Plaintiff did not pursue on appeal her Trial Court claim for an accounting, and thus the claim is waived and abandoned. See fn. 16 above.

V. THE TRIAL COURT'S ACTIONS DURING TRIAL DO NOT PROVIDE A BASIS TO ATTACK ITS JUDGMENT

A. The Trial Court's Conference With Counsel In Chambers Does Not Provide Plaintiff With A Proper Basis To Attack The Judgment

At the outset of the second day of trial, the Judge apparently had a conversation in Chambers with defendants' counsel and counsel for third-party defendant Cirrus that plaintiff did not attend, while plaintiff was organizing some of her exhibits. 2T7:13-8:14. Plaintiff is the sole owner and sole employee of Cirrus and, in fact, retained Cirrus' counsel. 1T95:7-16, 105:1-24, 107:25-108:22, 109:14-22; Pb2, 8. As plaintiff admits, no one objected to that conference at that time or at any time thereafter during the trial or subsequent to the trial, or suggested that the Court should disclose further on the record what occurred.

Moreover, contrary to plaintiff's bald assertion (Pb39), there is no evidence that that brief conference had any effect on the trial or resulted in dismissal of any of plaintiff's claims. In fact, this conference was not ex parte in the traditional sense at all, as Cirrus' counsel, who was fully aligned with plaintiff's interests, was present. It strains the bounds of credulity that, had anything occurred at the conference that was inimical to plaintiff's interests, Cirrus' counsel would not have informed plaintiff and/or raised

an issue on the record. In fact, after the conference in Chambers the Court directed a short break in the proceedings. 2T8:15-22. During this break, Cirrus' counsel had the opportunity to advise plaintiff what occurred before the trial proceeded. Such communications would have been privileged as plaintiff was Cirrus' sole member.

In general, in order to raise an issue on appeal, a party must have raised an objection to the Trial Court. R. 1:7-5; R. 2:10-2. One purpose of this rule is to allow the Trial Court to ameliorate any possible error during the trial. See, Bradford v Kupper Associates, 283 N.J. Super. 556, 573-574 App. Div. 1995), certif. denied, 144 N.J. 586 (1996)("[t]he absence of objection suggests that trial counsel perceived no error or prejudice, and, in any event, prevented the trial judge from remedying any possible confusion in a timely manner.") The "plain error" doctrine, cited by plaintiff, creates an exception to this general rule when there is a clear error and the error is "clearly capable of producing an unjust result". R. 2:10-2; Pb39. "The mere possibility of an unjust result is not enough." State v. Funderberg, 225 N.J. 66, 79 (2016). "Relief [from a not objected to error] under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999)

Here, under the factual circumstances detailed above, it is unclear whether the Judge's brief conversation with counsel, including counsel for plaintiff's one employee, one owner entity, at the outset of the second day of a three-day trial, was error. However, even if this Court were to view having conducted this conference as error, no evidence has been presented and there is no evidence that this conference was "clearly capable of producing an unjust result." This Court should reject plaintiff's effort, without any further legal or factual support, to throw out the well-supported and well-reasoned result of this three-day trial because of this brief conference.

B. The Trial Court's Interactions With Plaintiff During The Trial Do Not Provide A Basis To Attack The Trial Court's Judgment

Plaintiff's desperation then leads her to suggest that the Judgment should be reversed due to the manner of the Trial Court's questioning of the defendant and the reasonable limits that the Trial Court placed on plaintiff's cross-examination. Again, plaintiff concedes that no objection was raised below, so, if any of this amounted to error, it would have to be plain error, and thus "clearly capable of producing an unjust result", to be cognizable by this Court. In light of the latitude granted to the Court to control the trial process and witness examination, plaintiff has pointed to no error on the Trial

Court's part, no less "plain error". If the actions of this Court were determined to be plain error, every Judge in a trial with a pro se party would be hamstrung in conducting such a trial.

N.J.Evid.R. 611(a) and (b) gives the Trial Court substantial latitude in controlling the conduct of witness examination at trial:

> **(a) Control by Court; Purposes.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to:
>
> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment.
>
> **(b) Scope of Cross-examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The court may allow inquiry into additional matters as if on direct examination.

The Trial Court's role was further elucidated in Capparelli v. Lopatin, 459 N.J. Super. 584, 609-10 (App. Div. 2019):

> "[C]ontrol[ling] and manag[ing] the introduction of testimony" is within the discretion of the trial court, Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 107, 777 A.2d 1002 (App. Div. 2001), and "[its] decision ... [is] conclusive unless clearly erroneous as a matter of law." Bosze v. Metro. Life Ins. Co., 1 N.J. 5, 10, 61 A.2d 499 (1948). Here, we are satisfied the judge did not abuse his discretion.

As to the broad discretion accorded the Trial Court specifically regarding the scope of cross-examination, State v. Adames, 409

N.J. Super. 40, 61 (App. Div.), certif. denied, 200 N.J. 504 (2009) (citation omitted), finds:

> "[O]rdinarily, the scope of cross-examination of a witness rests in the discretion of the trial judge. An appellate court will not interfere with the exercise of such discretion unless clear error and prejudice are shown."

Here, there is no evidence that the Trial Court abused its substantial discretion, no less that it did so to the degree necessary to be deemed "plain error". By way of example, plaintiff objects to the Trial Court terminating her re-cross examination of Caprow. Pb33-34; 3T121:12-25. In fact, after Caprow's direct examination went from 3T12 to 40, plaintiff's cross-examination went from 3T41 to 82, followed by cross-examination by Cirrus' counsel (who was clearly fully aligned with plaintiff), which included much questioning that had nothing to do with Cirrus. Then after re-direct that went from 3T103 to 122, plaintiff was allowed re-cross from 3T114 to 124. Even after the point about which plaintiff complains where the Trial Court tried to limit plaintiff's questioning, plaintiff was still permitted to ask a number of questions. 3T121:12-124:22.[18]

[18] Curiously, plaintiff also attacks the Trial Court for asking plaintiff if she was dropping her claim against GNS after plaintiff had stated that GNS was defunct and without assets, even though the Court simply accepted plaintiff's response that she was not dropping that claim. 1T8:3-9:20.

Similarly, plaintiff complains about the Trial Court's questioning of plaintiff, even though plaintiff, as a pro se party, testified largely by her own narrative from the witness stand. The Trial Court's broad discretion to question plaintiff is, however, clear. N.J.Evid.R. 614 provides as follows in this regard:

> **(a) Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
>
> **(b) Examining.** The court may examine a witness regardless of who calls the witness.
>
> **(c) Objections.** A party may object to the court's calling or examining a witness.

In fact, as found by the Court in State v. Medina, 349 N.J. Super. 108, 130-31 (App. Div.), certif. denied, 174 N.J. 193 (2002)(citations omitted), the Court has substantial discretion to question witnesses, and has not just the power, but the duty to do so when appropriate:

> The parameters of judicial intervention in the conduct of a trial are well settled. Our courts have long rejected the "arbitrary and artificial methods of the pure adversary system of litigation which regards the lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed."… The intervention of a trial judge in the questioning of a witness is both a power and a duty, and forms part of the judiciary's general obligation to ensure a fair trial "conducted in [an] orderly and expeditious manner." …Trial judges are vested with the authority to propound questions to qualify a witness's testimony and to elicit material facts on their own initiative and within their sound discretion….

By way of example of the baseless nature of plaintiff's attack, plaintiff complains that the Court questioned plaintiff on the stand for several hours at the outset of testimony on the second trial day. Pb42. However, what plaintiff fails to disclose is that questioning was principally an effort to go through the exhibits that plaintiff sought to admit into evidence, which were not fully available on the first day of trial, in order to assist plaintiff in establishing a basis for their admission. 2T11-81. Notwithstanding the bitterness of plaintiff's complaints about the Trial Court's treatment of these exhibits (Pb43-44), plaintiff suffered no evidentiary consequence from not having copies of some of her exhibits on the first trial day and was allowed to seek their admission on the second trial day. 1T:7-8; 2T18;2-25. The balance of plaintiff's complaint here concerns the Court's questioning of plaintiff as to whether she was continuing to pursue certain claims—-not an unreasonable question of a pro se party, as she was thus also acting as her own counsel. As noted above, when plaintiff said she was not dropping a claim, the Court accepted that answer. See, e.g., 1T8:3-9:20.

Again, the plaintiff admits that she raised no objection to any of this questioning in the Trial Court. Neither did Cirrus. Thus, the standard for this Court's consideration of these matters is one of plain error. Far from there being plain

error here (as discussed above in Section V.A.), plaintiff has presented no evidence that the Trial Court committed any error at all. Plaintiff's attack on the Trial Court's questioning of plaintiff should thus be rejected.

VI. THE COURT'S FAILURE TO APPOINT AN EXPERT IS NOT A BASIS FOR REVERSAL

Plaintiff had the burden to prove the value of her interest in GNS to the extent it was an element of her damages claim. As the Trial Court noted, plaintiff made no effort to meet that burden, and the Court thus could not properly value plaintiff's interest in GNS. Pa41-42. Relying on Borodinsky v. Borodinsky, 162 N.J.Super. 437 (1978) and Torres v Schripps, Inc., 342 N.J.Super. 419 (App. Div. 2001), plaintiff now argues that under the circumstances here, in the absence of evidence from plaintiff, the Trial Court was required to appoint an expert to value plaintiff's interest in GNS. Caprow and Fischer respectfully submit that those decisions only direct the Court to appoint an expert in the circumstances of those cases, which do not apply here.

Moreover, contrary to plaintiff's arguments on this appeal, plaintiff never requested below, either at trial or on reconsideration, that the Court should appoint an expert. Thus, even if the Trial Court should have appointed an expert, the

failure to do so could only be a basis for appeal if it constituted plain error, which it clearly does not.

Further, in the circumstances here, because there is no basis for any claim against Fischer or Caprow, the Trial Court's failure to determine this potential element of damages is harmless error in any case, which should be disregarded on appeal.

A. Under The Circumstances Here, The Trial Court Was Not Required To Appoint An Expert To Value GNS

Plaintiff relies on Borodinsky to suggest that under these circumstances the Court had an obligation to appoint an expert to value GNS or plaintiff's interest. However, Borodinsky is inapposite in this regard. The Court's ruling arises from the fact that, absent a valuation in that divorce action, equitable distribution of one party's business interest would have placed the divorced spouses in business together. Id. at 445-446. As the Court noted upon review:

> It seems almost doctrinal that the elimination of the source of strife and friction is to be sought by the judge in devising the scheme of distribution, and the financial affairs of the parties should be separated as far as possible. If the parties cannot get along as husband and wife, it is not likely they will get along as business partners.

Id. at 443. The ruling in that case was entirely based in its divorce context.

In Bowen v. Bowen, 96 N.J. 36, 43 (1984)(footnote omitted), the Court relied on Borodinsky and made clear that its holding on valuation was required by the particular circumstances that inhere in distribution of ongoing business assets between spouses in the context of divorce:

> Each of these problems poses a potential "source of strife and friction" that should be eliminated. Borodinsky, 162 N.J. Super. at 443. We hold that a court faced with what it considers inadequate proofs of value must nonetheless eliminate the sources of continuing disquiet between the parties. It must therefore resolve the question of value in the divorce proceedings. If need be, it can marshall additional proofs to enable it to fix a value for the disputed asset.

The interests involved here in this business dispute between certain owners of a defunct business are entirely different.

While Torres clearly falls closer to the mark in addressing the issues in this case, it still does not apply here to require the Trial Court to appoint an expert, because Torres was based on the statutory requirements of the New Jersey Oppressed Minority Shareholder Statute. Torres, supra, 342 N.J.Super. at 433-436. Here, however, first, GNS is a Delaware LLC, so that statute is inapplicable. Second, if the statute were applied, clearly only Simmons was guilty of oppression and, since he was deceased and his estate was never made a defendant, that claim was properly dismissed. Pa9,54,72 n.1

B. Any Error In The Trial Court's Failure To Appoint An Expert Was Not Plain Error And Should Be Disregarded On This Appeal

Even if the Trial Court's failure to appoint an expert was an error, it was not a "plain error" that should lead to reversal. As noted above, at no point did plaintiff object below to the fact that the Court did not seek to appoint an expert. Contrary to plaintiff's assertion, plaintiff did not raise the Trial Court's failure to appoint an expert in her first motion for reconsideration, which plaintiff failed to even include in her Appendix. Da28. The Trial Court was given no opportunity to correct this asserted error. Thus, this alleged error is only cognizable on appeal if it is "clearly capable of producing an unjust result". See, Section V.A., supra. Here, there is **no** basis to assert that the failure to appoint an expert produced an unjust result because the Trial Court properly found that plaintiff had not proven her claims against defendants Caprow and Fischer, and plaintiff never joined Simmons' estate as a party. Damages against Caprow and Fischer were irrelevant if there was no liability. GNS is indisputably defunct. No unjust result came of this alleged error.[19] This Court should thus not

[19] Even if this Court somehow determines that plaintiff did raise this objection below, this Court still should reject plaintiff's argument. If the failure to appoint an expert was, in fact, error, it was, for the reasons stated above, certainly "harmless error" that was not "'clearly capable of producing an unjust result.'" See, e.g., Boland v. Dolan, 140 N.J. 174, 190 (1995).

reverse the Trial Court's decision because it failed to appoint an expert.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTIONS FOR RECONSIDERATION

R. 4:49-2 provides in relevant part that a "motion [for reconsideration] shall state **with specificity** the basis on which it is made, **including a statement** of the matters or controlling decisions which counsel believes the court overlooked or as to which it erred…." (Emphasis added.)

Moreover, the party seeking reconsideration **must satisfy a high bar before** the Court should even engage in the reconsideration process:

> "…[A] litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, **before** the Court should engage in the actual reconsideration process."

Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2009)(citation omitted); see, Morey v. Borough of Wildcrest, 18 N.J. Tax 335, 341 (App. Div. 1999), certif. denied, 163 N.J. 80 (2000).

The Trial Court also quoted (Pa75-76) the substantial law significantly limiting the circumstances under which reconsideration is permitted:

> Reconsideration should be limited to those cases which either "'(1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of

> probative, competent evidence.'" Castano v. Augustine, 475 N.J. Super. 71, 78 (App. Div. 2023) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (internal citation omitted). The "magnitude of the error cited must be a 'game-changer'" to warrant reconsideration. Ibid. (quoting Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010)). "Reconsideration cannot be used to expand the record and reargue a motion. Reconsideration is only to point out 'the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.'" Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) (quoting R. 4:49-2). Our law is clear that "the purpose of R. 4:49-2 is not to re-argue the motion that has already been heard for the purpose of taking the proverbial second bite of the apple." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). Indeed, our courts have cautioned that litigants are not permitted to file motions for reconsideration merely because they are dissatisfied with the court's decision. Dennehy v. East Windsor Regional Bd. of Educ., 469 N.J. Super. 357, 362 (App. Div. 2021) (citing Palombi, supra, 414 N.J. Super. at 288).
>
> …But "[f]iling a motion for reconsideration does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying [trial]." Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015) (citing Cummings, supra, 295 N.J. Super. at 384).

Plaintiff has not identified to this Court any specific way in which plaintiff's motions for reconsideration met these high bars or in which the Trial Court abused its discretion in denying these motions. See Section I. Thus, this Court should affirm the denial of these motions.

CONCLUSION

As a result of the foregoing, Caprow and Fischer respectfully request this Court reject plaintiff's appeal as

being out of time. If this Honorable Court decides to consider the merits of the appeal, this Court should still reject it and affirm the well-reasoned and well-supported decisions of the Trial Court. They were properly premised on the Trial Court's consideration of the documentary and testimonial evidence, and on the assessment of the testimony of plaintiff, Caprow and Fischer at a three-day bench trial.

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By: *s/ Robert S. Raymar*
Robert S. Raymar
A Member of the Firm

Dated: February 1, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000218-23

RANDEE K. JENNINGS, individually and derivatively on behalf of GLOBAL NETWORK SOLUTIONS LLC, Plaintiff-Appellant, v. CARL F. SIMMONS, GLOBAL NETWORK SOLUTIONS LLC, RAYMOND FISCHER, JULIAN CAPROW, JOHN DOES 1-5 (said names being fictitious), and ABC CORPORATIONS 1-5 (said entities being fictitious), Defendants-Respondents, GLOBAL NETWORK SOLUTIONS LLC, Counterclaimant/Third Party Plaintiff, v. THE CIRRUS GROUP LLC, Third Party Defendant.	ON APPEAL FROM: Superior Court of New Jersey Law Division, Somerset County Docket No. SOM-L-000220-20 **SAT BELOW:** Hon. Robert A. Ballard, Jr., P.J.Cv. Hon. Haekyoung Suh, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT, RANDEE K. JENNINGS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

The Appellant incorporates her procedural history, statement of facts, and standards of review sections from her Appellant Brief herein by reference. Plaintiff also incorporates the arguments set forth in her Appellant Brief as if set forth at full herein. Plaintiff will address certain points of Respondents in this Reply. [1]

II. ARGUMENT

A. Plaintiff's Notice Of Appeal Was Timely.

Plaintiff's Notice of Appeal was timely because the Trial Court's judgment was not final until August 30, 2023. To be ripe for an appeal, a final judgment must resolve all claims for all parties, including rendered decisions and finality of all post judgment motions. Weed v. Casie Enterprise, 279 N.J. Super. 517, 527 (App. Div. 1995). A final order is "no longer final as to all issues and all parties" when issues are still pending before the court. Id. at 527. See also Hudson v. Hudson, 36 N.J. 549, 553 (1962) (finding that "[o]ur rules…prohibit direct appeal unless final judgment has been entered disposing of all issues as to all parties.").

In Weed, the Appellate Court held that a final order must resolve all claims for all parties. Weed, 279 N.J. Super. at 527. On November 17, 1993, a jury

[1] Respondents' brief is hereafter referred to as ("Rb"); Respondents' appendix is hereafter referred to as ("Ra"); and Appellant's Appendix is hereafter referred to as ("Aa").

verdict and court order was entered. Id. at 526. Subsequently, the defendant filed a motion for fees. Id. at 527. On December 17, 1993, the Court heard arguments and ruled on the motion. Id. Plaintiffs filed a cross-motion which was decided on January 4, 1994. Id. On January 19, 1994, plaintiffs filed a notice of appeal 63 days after the court's order. Id. The Appellate Court reasoned that the final order was no longer final when the defendant filed its motion for fees. Id. The Court held that the plaintiffs' appeal was timely because all claims for all parties were resolved in the last order dated January 4, 1994. Id.

Similar to Weed, the May 8, 2023 Order was not final because, as Respondents admit, there were outstanding issues pending before the Trial Court. Rb16 at footnote 8; Ra63a.[2] On May 28, 2023, Jennings submitted her motion which included a response to the Court's May 25, 2023 notice, which addressed outstanding issues regarding dissolution and accounting concerns. Ra27a-50a. Therefore, the May 8, 2023 Order was not final.

Since the May 8, 2023 Order was not final, Jennings' June 22, 2023 motion was timely. On June 14, 2023 Jennings received notice that GNS' New Jersey Entity status was cancelled and withdrawn by Fischer on June 13, 2023. Ra61a. On June 22, 2023, she filed a motion in response to this withdrawal

[2] The Court entered a deficiency notice due to nonconformance leaving the issue unresolved. Ra63a.

since she was a 10% member of GNS, as the Trial Court's May 8, 2023 Order reflects. Aa35. She was not included even though she was a member and should have been involved in the dissolution and accounting of GNS. Aa35; Ra54-55a; see N.J.S.A. 42:2C-37(b)(1) ("The management and conduct of the company are vested in the members."); see also N.J.S.A. 42:2C-49(c) ("if a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company.").

Further, the Certificate of Withdrawal filed by Fischer relied expressly and exclusively upon the Trial Court's May 8, 2023 Order, which was under reconsideration at the time Fischer filed the Certificate of Withdrawal for GNS with the State. It was impossible for Plaintiff to file her June 22, 2023 Motion to Reinstate GNS, challenging Defendant Fischer's filing of the Certificate of Withdrawal, within twenty days of the May 8, 2023 Order because Fischer's challenged conduct *did not occur* until June 13, 2023. Fischer's conduct in filing the Certificate of Withdrawal occurred while Plaintiff's Motion for Reconsideration was pending and created another open issue before the Court, which Plaintiff properly raised in her June 22, 2023 Motion to Reinstate GNS.

The August 30, 2023 Order was the final order because it resolved all issues for all parties. The Court ruled on Jennings' May 28, 2023, motion on June 26, 2023, and her June 22, 2023 motion on August 30, 2023. Aa66; Aa87.

It was not until August 30, 2023 that all issues were resolved for all parties. As a result, the case was not ripe for appeal until August 30, 2023. Aa87. Jennings had forty-five (45) days from the final order to file her appeal. Twenty-three (23) days later, on September 22, 2023, Jennings submitted her Notice of Appeal, which was amended on September 29, 2023. Aa1. Therefore, Jennings' Notice of Appeal was timely because all claims were resolved in the Order entered August 30, 2023.

In Weed, the Court found that an appeal filed nearly two months following the Court's judgment was proper, as the post judgment motions left issues unresolved. Weed, 279 N.J. Super. at 527. Here, Jennings' motions following the May 8th Order mirror the additional filings in Weed, and their treatment should as well. Id. The docket and filings in the present case display why the May 8, 2023 Order "was no longer final as to all issues and all parties…." Id. Like in Weed, when the Appellate Court used the date of the last order to calculate the time to appeal, this court must apply the same analysis here. The August 30, 2023 Order was the last Order since it addressed all parties' issues pending before the Court. Therefore, Plaintiff's Notice of Appeal was timely because the Trial Court's judgment was not final until August 30, 2023.

B. New Jersey Law Applies And Respondents Waived Any Arguments As To The Applicability Of RULLCA And New Jersey Law When They Did Not Object To The Trial Court Applying The Same.

Respondents wrongfully and untimely assert that Delaware law should apply to this case. In evaluating GNS, the Trial Court properly applied New Jersey's Revised Uniform Limited Liability Company Act ("RULLCA"). Further, any opposition to RULLCA's applicability to GNS were waived when Respondents failed to object to its application and failed to file an appeal.

The New Jersey Supreme Court has held that the law of the state chosen by the parties should not apply when the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice. Instructional Sys. v. Comput. Curriculum Corp., 130 N.J. 324, 327 (1992). Further, the Appellate Court sharpened this point in SKS Holdings LLC v. Kaplan, finding that when "… parties' transactions have no connection to Delaware, that state's laws should not apply." Nos. A-4606-19, A-4626-19, 2023 N.J. Super. Unpub. LEXIS 682, at *14 (App. Div. May 5, 2023).[3] In SKS Holdings, the Court found that a Delaware limited liability company functioning and doing business in New Jersey was not required to honor a Delaware choice of law provision in an operating agreement if there was no substantial relationship to the State where it was organized. Id. This

[3] SKS Holdings LLC v. Kaplan, Nos. A-4606-19, A-4626-19, 2023 N.J. Super. Unpub. LEXIS 682 (App. Div. May 5, 2023).. A copy of this unpublished opinion is attached to this brief and Appellant is unaware of any contrary opinions. R. 1:36-3.

Appellate Court rejected the *per se* application of the "internal affairs" doctrine in which courts apply the law of the state where a business was organized to internal disputes without regard to the other principles that often govern choices about which state's law applies to a lawsuit. Id.

When a limited liability company conducts business in New Jersey and has its principal place of business in New Jersey, New Jersey law should apply. Here, GNS functioned entirely in the State of New Jersey. GNS had no connection to its formation state of Delaware. Consequently, New Jersey law was properly applied to GNS.

Second, Respondents waived any dispute as to the application of New Jersey law when Respondents failed to make any objection to the Trial Court's RULLCA application and failed to timely appeal the Trial Court's application of New Jersey law to this dispute. This Court should not consider this new issue that was not properly raised below or presented on appeal when the opportunity was available. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also Oyoloa v. Xing Lan Liu, 431 N.J. Super. 493, 501 (App. Div. 2013). Therefore, New Jersey law applies to this corporate dispute and Respondents' late-blooming argument that Delaware law applies should be rejected.

C. Caprow And Fischer Owed A Fiduciary Duty To Plaintiff And Continued To Breach Their Fiduciary Duty By Excluding Plaintiff From The Dissolution Of GNS.

Caprow and Fischer abdicated their responsibilities as Chief Financial Officer and member respectively, to wrongfully oust Plaintiff and prevent Plaintiff from participating as a member in GNS. Caprow and Fischer failed to act as fiduciaries by turning a blind eye to Simmons and then excluded Plaintiff from the dissolution of GNS.

Under New Jersey law, an officer, member, or employee in control has the duty to not act unfairly, or oppressively towards other members. N.J.S.A. 14A:10A-1, *et seq*. This includes exclusion from management decisions regarding business operations and not receiving expected and appropriate distributions of dividends or profits. Id. The need for this protection "can be attributed, at least in part, to the fact that traditional principles of corporate law were often unsuccessful at curbing abuses of power by majority interests in closely held corporations." Walensky v. Jonathan Royce Intern., Inc., 264 N.J. Super. 276, 281 (App. Div. 1993). "[A] court of equity is always concerned with substance and not merely form, and thus, it will go behind the corporate form where necessary to do justice." Id. at 283.

Actions of officers, such as a Chief Financial Officer like Caprow, and members like Fischer, fall within the Oppressed Minority Shareholder Statute. Respondents themselves cite the Oppressed Minority Shareholder Statute and concede this statute applies to "officers or directors" who have acted

oppressively toward a minority member. Rb27. The Respondents have not appealed the Trial Court's finding that the Oppressed Minority Shareholder Statute applies in this case and that Plaintiff was an oppressed minority shareholder under this statute. The Respondents' argument that Fischer and Caprow did not owe a fiduciary duty to Plaintiff should be soundly rejected.

The record shows that Respondents actively participated in oppressing Jennings and treating her unfairly, even after the Trial Court held that she was a minority member. Aa59. Jennings' unfair treatment and suppression is displayed through Fischer's removal of Jennings' belongings and documents without question, taking excess distributions, and complete failure in business development. Aa27; 2T130:9-138:8; 2T170:8-19; 2T205:20-206:12. Fischer failed to generate a single dollar of sales for GNS during his multi-year employment and yet Fischer admittedly received a portion of GNS's million-dollar settlement, some of which was used to pay off his personal credit card.

Respondents, for the first time, call Caprow a "part-time employee/consultant" while ignoring his actual title which was Executive Vice President and Chief Financial Officer ("CFO") of GNS. 3T13:6-8. This is a blatant attempt to shield him from the implicit fiduciary duties which arise from an officer's role. Caprow should have been familiar with these duties and responsibilities, as he previously served as "an executive vice-president, [CFO]

of a New York Stock Exchange Company." 3T37:1-7. Here, Caprow was not a "part-time consultant," but an officer of GNS. Indeed, the Trial Court found that Caprow served as "Executive Vice President and Chief Financial Officer." Aa16. In fact, this is not the first time a false narrative was presented to the Court on this issue. During Caprow's deposition, he stated that he was not an employee or owner of GNS, and admitted to making this false statement when he was asked about this on the stand at trial. 3T40:21-23.

Caprow oversaw the preparation of all of GNS' tax documents and stated that Simmons did not sign the tax returns, but if he had issues with them, he would have corrected them. 3T41:7-17, 42:16-23. Caprow failed to fulfill his fiduciary duties to Plaintiff by manipulating GNS's books, turning a blind eye to Simmons, enabling intermingling of funds, and taking distributions. 3T42:16-23; 3T42:16-23; 3T83:24-86:5; 3T123:10-25.

Together, Fischer and Caprow enabled Simmons to use GNS like his personal piggy bank and wrongfully oust Plaintiff when she confronted Simmons about his troubling conduct. Caprow and Fischer supported Simmons' conduct against Plaintiff and GNS until Simmons died during the course of this litigation. Following Simmons' death, Caprow and Fischer changed their strategy and hid behind Simmons' egregious conduct to mask their own misdeeds. However, even following Simmons' death, Caprow and Fischer

continued to oust Plaintiff after the Trial Court found that Plaintiff was a ten percent (10%) member of GNS.

Specifically, Caprow and Fischer excluded Plaintiff from the dissolution process. While Plaintiff's Motion for Reconsideration was pending seeking to appoint a receiver for the dissolution of GNS, Fischer, an admitted four percent (4%) member, unilaterally filed a Certificate of Withdrawal with the State of New Jersey. Fischer relied on the Court's May 8, 2023 Order and failed to disclose to the State that the May 8, 2023 Order was being challenged and a receiver was requested by Plaintiff. Fischer and Caprow did not inform Plaintiff that they took steps to withdraw GNS as a New Jersey limited liability company and excluded Plaintiff completely from the dissolution process. Caprow has yet to provide access to GNS's bank accounts despite Plaintiff's status as a 10% member of the company. These continued acts of oppression fly in the face of Caprow and Fischer's fiduciary duties.

The Trial Court did not analyze or consider Plaintiff's claims against Fischer and Caprow as a 10% member. The Trial Court's June 26, 2023 Order and Opinion did not account for Plaintiff's legal right as a member to oversee and participate in the dissolution of GNS. The Trial Court's August 30, 2023 Order and Opinion mischaracterized Plaintiff's Motion to Reinstate GNS incorrectly as a motion for reconsideration, addressed none of the arguments

raised by Plaintiff in her paper or at oral argument, and applied a boilerplate reconsideration standard when Plaintiff was seeking injunctive relief. The Trial Court wholly failed to address Fischer and Caprow's conduct in excluding Plaintiff from the dissolution of GNS. Therefore, the Trial Court's Orders as to Fischer and Caprow should be reversed.

D. Respondents' Emphasis On Plaintiff's Earnings Ignores That Plaintiff Received No Membership Distributions, Caprow Failed To Report Plaintiff's Income On GNS's Taxes And Caprow And Fischer Excluded Plaintiff From GNS's Million Dollar Settlement.

Respondents argue that Plaintiff received a high salary until her ouster in 2018 and as a result, should have no claim of damages against GNS, Fischer or Caprow. This argument is unsupported by the record and should be rejected. First, Plaintiff was found to be a 10% member of GNS. However, Plaintiff received no membership distributions. Second, the record is clear that Caprow did not report Plaintiff's earnings on GNS's taxes. See Aa18. Third, Caprow and Fischer ignore the windfall million-dollar settlement received by GNS from Plaintiff's client, Heritage Group, that was never distributed in any part to Plaintiff and which Caprow was unable to offer a full account for at trial.

The Heritage Settlement purchased contracts Plaintiff originated for GNS. It was more money than GNS had ever realized and was received in one lump sum following Plaintiff's wrongful ouster. Despite being the sole source of GNS' income, and a 10% member, Plaintiff was not included in the distribution

of these funds and received no payout whatsoever. Caprow and Fischer were unable to offer any complete accounting for these funds at trial. Then Caprow and Fischer excluded Plaintiff from the dissolution of GNS and prevented Plaintiff from accessing GNS's bank accounts to confirm where the settlement proceeds were distributed.

None of this was addressed by the Trial Court. Plaintiff's share of this settlement as a 10% member of GNS should have been calculated by the Trial Court and reconciled during the dissolution process. Instead, the Trial Court failed to value Plaintiff's interest and then Defendants Fischer and Caprow excluded Plaintiff from dissolution. Therefore, reversal is warranted.

E. Torres and Balsamides Apply And The Trial Court Improperly Valued Plaintiff's Interest In GNS By Failing To Appoint An Expert.

The Trial Court erred in assigning a *de minimus* value to Jennings' ownership interest without an expert, as required under clear case law. In Torres, the Trial Judge rejected the defendant's expert opinion on the value of shares in a closely-held corporation and then, without plaintiff providing an expert, assigned a value for the oppressed shareholder's stake based on the value set forth in a prior loan application. Torres v. Schripps, Inc., 342 N.J. Super. 419, 436 (App. Div. 2001). The Appellate Division rejected this approach, and vacated and remanded the matter to the Trial Court with the directive that the "trial judge should appoint an independent appraiser to report to the court on the

fair value of the corporation." Id. Specifically, the Appellate Division held, "[w]here the parties fail to present sufficient expert testimony, the trial judge must seek assistance from other sources to aid his decision of fair value." Id. at 436. (emphasis added). This holding is in line with the New Jersey Supreme Court's prior opinion in Balsamides v. Protameen Chemicals, Inc.,) which Respondents completely ignore. 160 N.J. 352, 368 (1999)("findings of the Trial Court are critical as the valuation of closely-held corporations are inherently fact-based" and "not an exact science.")

Torres is controlling law that is directly applicable to this case and requires remand. Id. Respondents fail to assert why Torres does not apply to the instant case, and instead seek to apply case law that deals with parent corporations and subsidiaries, which is clearly distinguishable from the instant matter. See Rb26. Here, the Trial Court admitted that it did not have enough information to value GNS and required an expert. Aa41-42. Despite this, the Trial Court somehow determined Jennings' membership interest was de minimus. Aa41. This alone displays how the Trial Court gravely erred in not abiding by clear precedent which required it to appoint an independent expert to assess Jennings' membership interest of GNS. This Court should follow Torres and remand the matter with a directive for the Trial Court to appoint an expert.

F. The Trial Court's *Ex Parte* Communications Alone Warrant A New Trial.

The law is clear that *ex parte* communication is prohibited and inherently unfair causing disfunction to the adversarial process. In re Kensington Intern. Ltd., 368 F.3d , 289, 309 (3d Cir. 2004). In their brief, Respondents conspicuously cite no law supporting their contention that *ex parte* communications are permissible. They fail to rebut Plaintiff's legal citations because they cannot.

This Court should reject Respondents' unsuccessful attempt to downplay the significance of the *ex parte* communication that occurred on the second day of the bench trial in this case. It is undisputed that no individual who is involved in the present appeal was in the Judge's chambers when this *ex parte* conduct occurred. Respondents have new counsel and Plaintiff was excluded during this conference. Respondents' assertion that nothing that was said in chambers which could materially impact Jennings' case is entirely conjecture. The record is clear that following this *ex parte* communication, Judge Suh encouraged the parties to "re-evaluate some of our respective positions" and then went through each of Jennings' claims pressuring her to dismiss each. 2T8:10-14; 88:3-91:16.

Further, Respondents assertion that the presence of Mr. Lieberman, counsel for Third-Party Defendant Cirrus Group, during the *ex parte* meeting render the communications inconsequential is specious. Importantly, following the *ex parte* communication, the Trial Court pressured Plaintiff on dismissal of her claims and Plaintiff asked to speak to Mr. Lieberman and was rebuked:

> **Court**: Next items is judgment or order dissolving GNS pursuant to law or equity. You still asking for that?
> **Plaintiff**: Shouldn't I? I don't, um, Mr. Lieberman?
> **Mr. Lieberman**: I can't – I can't – I can't answer that.
> **Court**: Mr. Lieberman is not your attorney.

2T:90:9-15. Respondents ignore that the Trial Court staunchly prohibited Plaintiff from consulting with Mr. Lieberman. It is clear the Trial Court engaged in improper *ex parte* communication which substantively impacted Plaintiff's claims. This constitutes plain error and warrants reversal.

III. CONCLUSION

For the foregoing reasons, the Court should find that the Trial Court improperly valued Plaintiff's interest in GNS as *de minimus*, dismissed Plaintiff's claims against Fischer and Caprow and prevented Plaintiff from participating in the dissolution of GNS. Accordingly, these aspects of the May 8, 2023 Final Judgment, June 26, 2023 and August 30, 2023 Orders should be vacated in part, and this case should be remanded. Plaintiff preserves any arguments and claims not explicitly addressed in her briefings.

Respectfully submitted,
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