To Be Argued By:
MARC E. ISSERLES

New York County Clerk's Index No. 113781/09

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

SCAROLA ELLIS LLP,

Plaintiff-Respondent,

—against—

ELAN PADEH,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules and Other Authorities

PRELIMINARY STATEMENT

This is a case about a client who was sued by his contingency-fee lawyer because he settled his case for an amount that his lawyer thought was too low. Elan Padeh settled a case against his former employer for $200,000. One of Padeh's contingency-fee lawyers, the law firm Scarola Ellis LLP ("Scarola"), objected to the settlement. The firm, whose sole right to compensation under two written retainer agreements was a contingency-fee percentage of the settlement, threatened Padeh with a lawsuit if he accepted the settlement. Padeh, on the recommendation of his other attorney, settled anyway and paid Scarola its agreed-upon fee. But Scarola believed it was entitled to more. So it sued Padeh. After three years of litigation, a jury ultimately awarded Scarola damages on the quasi-contract claim that Padeh was somehow "unjustly enriched" by accepting the settlement. In the end, the price Padeh paid for settling his lawsuit over his lawyer's objection was a costly, time-consuming litigation that extinguished his recovery under the settlement, and left him with a judgment requiring him to pay his lawyer hundreds of thousands of dollars.

That judgment should be reversed, and the unjust enrichment claim dismissed. There is nothing unjust about a client settling his case for an amount his lawyer finds unsatisfactory. To the contrary, the law gives the

client an absolute right to settle the case on whatever terms and for whatever reasons the client deems appropriate. And the lawyer is duty-bound to accept the client's settlement decision. For that reason, a century of settled precedent squarely holds that, when a client settles over his contingency-fee attorney's objection, the attorney's compensation is governed exclusively by the terms of the retainer agreement. Quasi-contract relief is foreclosed as a matter of law.

That rule of law could not possibly be otherwise. It is a bedrock principle of contract law that quasi-contract relief is barred when a written agreement covers the same subject matter. Barring such relief also ensures that the lawyer does not improperly interfere with the client's absolute right to settle in order to protect his own economic investment in the litigation. And it prevents the lawyer from turning a contingency-fee arrangement into an unacceptable risk-free proposition—rewarding the lawyer with an unusually high fee if the result is favorable, but permitting recovery of "reasonable" attorney fees in quasi contract where, as here, it is not.

Under this Court's precedents, Scarola's compensation for representing Elan Padeh in his lawsuit must be limited to the amount specified in its written retainer agreements. When Padeh exercised his absolute right to settle the case, Scarola was entitled to its contractually

agreed-upon contingency percentage of that settlement, and no more. Additional quasi-contract relief was unavailable as a matter of law. And that is so regardless of the amount of work Scarola put into the case, and regardless of the value of the settlement as compared to Scarola's prediction of Padeh's likely recovery. Nor is there any merit to Scarola's theory that Padeh somehow "abandoned" the case. Padeh settled his case, he did not abandon it.

The jury also awarded Scarola breach of contract damages for hourly fees that the firm claimed to incur representing Padeh in a sanctions proceeding arising out of closely related third-party claims in the underlying case. Yet it was undisputed that Padeh's claims could not go forward until the sanctions proceeding was resolved. Under the plain terms of Scarola's retainer agreement, in which it agreed to provide all work "necessary or in aid of" Padeh's claims as part of the contingency arrangement, Scarola was not entitled to additional compensation for this work. And to the extent the contract's language is ambiguous, binding precedent requires that it be resolved against the lawyer and in favor of the client. The judgment for breach of contract also should be reversed, and the cause of action dismissed.

QUESTIONS PRESENTED

1. When a client decides to settle his case, and his contingency-fee attorney objects that the settlement is too low, is the attorney's compensation necessarily fixed by the terms of the retainer agreement, such that a quasi-contract cause of action against the client to recover additional compensation is barred?

The court below erroneously answered: No.

2. When a plaintiff's case cannot go forward absent resolution of issues arising out of related third-party claims in the same litigation, does a retainer agreement that fails to expressly carve out work on those issues from the contingency-fee arrangement, and that requires the lawyer to take all steps "necessary or in aid of" the plaintiff's claim, prohibit the lawyer from charging additional hourly fees for that work?

STATEMENT OF FACTS

The evidence at trial below established the following undisputed facts.

A. Elan Padeh Enters Into A Contingency-Fee Agreement With George Zelma And Sues Corcoran

On April 7, 2003, Elan Padeh hired a solo practitioner named George Zelma to represent him "in connection with [his] claim against Corcoran Real Estate." (R. 1805). Padeh had worked for Corcoran as a real estate broker. The gist of his claim was that Corcoran had breached an oral

agreement to pay him a share of the commissions he earned from various real estate developments. (*See* R. 895, at ¶ 41; R. 899, at ¶¶ 72-74; R. 905).

Zelma's retainer with Padeh (the "Zelma-Padeh Agreement") provided that Zelma would be paid a small initial fee, and then principally be compensated by a contingency percentage: 41% of any amount Padeh "recovered by suit, settlement or otherwise" in the Corcoran case. (R. 1805). Zelma believed the case was "likely to yield some significant benefit." (R. 339/Tr. 273:15-22). But he set his contingency percentage very high because the case was also risky: Corcoran denied there was an oral agreement about commissions, and Zelma told Padeh that it was "a tough case to prove." (R. 632/Tr. 525:10-13 (Padeh); R. 313/Tr. 247:7-22 (Zelma); R. 314/Tr. 248:21-24 (Zelma)).

On June 19, 2003, Zelma filed a summons and verified complaint against Corcoran and associated entities, demanding $2.8 million in unpaid commissions. (R. 903; *see also* R. 312/Tr. 246:14-20 (Zelma); R. 609/Tr. 502:4-9 (Padeh)). Justice Ramos denied Corcoran's motion to dismiss the complaint. (R. 319/Tr. 253:4-14 (Zelma); R. 117/Tr. 69:5-13 (Scarola)).

B. Corcoran Brings Related Counterclaims Against Padeh And Virtually Identical Third-Party Claims Against Padeh's Company In A Consolidated Action

Corcoran responded aggressively. It brought counterclaims against Padeh relating to the deals he had brokered for Corcoran, including two of the deals for which he was claiming commissions. (*Compare* R. 1822-23 & 1828, at ¶¶ 19-24, 52-56 (alleging fraud with respect to the 160 Imlay Street development); R. 1825-28 & 1832-34, at ¶¶ 34-51, 70-83 (alleging tortious interference with respect to the Arches/Saint Peter's Church development) *with* R. 898, at ¶¶ 63-65 & R. 905 (claiming shares of commissions with respect to Imlay and the Arches/Saint Peter's Church); *see also* R. 464/Tr. 382:21-25 (Scarola) (conceding that "some of" the counterclaims "would have overlapped" with Padeh's claims)). Corcoran's remaining counterclaims also overlapped with the subject matter of Padeh's complaint, insofar as they alleged that Padeh had misappropriated commissions in the course of his employment with Corcoran. (*See* R. 1820-25, at ¶¶ 10-18, 25-33).[1]

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[1] Padeh's amended complaint created even more overlap with the remaining counterclaims, adding a claim that Padeh was entitled to withhold commissions from one of the same deals from which Corcoran alleged Padeh had misappropriated commissions. (*See* Amended Verified Complaint, *Padeh v. Corcoran Group, Inc.*, Index No. 111192/03 (N.Y.

Simultaneously, Corcoran brought virtually identical claims against Padeh's real estate company, The Developers Group ("TDG"), in a third-party action, which it consolidated with its counterclaims against Padeh personally. (*See* R. 908). Indeed, the third-party complaint against TDG repeated the counterclaims' allegations about Padeh's misconduct almost verbatim. (*Compare* R. 911-25 *with* R. 1819-36; *see also* R. 318/Tr. 252:10-13 (Zelma) (third-party claims were "very similar, if not identical" to counterclaims); R. 504/Tr. 422:9-11 (Scarola) (conceding that third-party claims "were mirror images of the counterclaims" against Padeh); R. 611-13/Tr. 504:15-506:23 (Padeh) (third-party complaint related entirely to projects giving rise to the counterclaims)). The strategy was plainly to exert pressure on Padeh, TDG's founder, majority shareholder, and decision-maker. (R. 613/Tr. 506:20-23 (Padeh); *see also* R. 272/Tr. 206:11-12 (Scarola) (Padeh "had the decision-making authority")). In light of conflicts with TDG employees, Padeh hired another firm to defend the third-party claims. (R. 615/Tr. 508:4-8 (Padeh); *see also* R. 123/Tr. 75:22-25 (Scarola)).

Sup. Ct. filed July 6, 2004), Ex. A (claiming commissions from Guernsey Street development)).

C. The Scarola Firm Takes Over Padeh's Case Pursuant To A Co-Representation Agreement With Zelma

The newly expanded case was too much for Zelma. (R. 98/Tr. 50:12-17 (Scarola)). Zelma therefore sought the assistance of a law firm he had a prior relationship with: Scarola Ellis LLP.[2] (R. 95/Tr. 47:12-24 (Scarola)). Zelma explained to Scarola's principal, Richard J.J. Scarola, the nature of Padeh's claims against Corcoran, and the fact that the case had grown more complex given Corcoran's counterclaims against Padeh and third-party claims against TDG. (R. 98/Tr. 50:3-11 (Scarola); *see also* R. 460/Tr. 378:15-25 (Scarola)). Notwithstanding these complexities, Scarola "saw the strength in the merits of the case" against Corcoran, and estimated "millions of dollars in commissions" as recovery. (R. 102/Tr. 54:16-21 (Scarola)). The firm therefore agreed to come on as Zelma's co-counsel.

On July 2, 2004, Scarola and Zelma entered into a co-representation agreement, in which they agreed that Scarola would receive up to 50% of Zelma's 41% "of the sum recovered by suit, settlement or otherwise" under the Zelma-Padeh Agreement. (R. 99-100/Tr. 51:26-52:9 (Scarola); R. 125-27/Tr. 77:12-78:5 (Scarola)). The parties memorialized the agreement in an

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[2] That firm, the Plaintiff-Respondent in this action, is now called Scarola Malone & Zubatov LLP.

email, which they considered a binding contract (the "Scarola-Zelma Agreement").[3] (R. 926; R. 459-60/Tr. 377:20-378:8 (Scarola) (his view was that "it was a contract" and "an enforceable contract"); R. 322/Tr. 256:5-12 (Zelma) (agreeing that the email constituted an offer and acceptance of the co-representation terms, and in his view "a binding contract")). Scarola did not challenge the enforceability of the Scarola-Zelma Agreement at any point below. Padeh accepted the agreement on the condition that he pay no additional fees. (R. 320/Tr. 254:15-24).

At that point, Scarola took over the litigation. (R. 128/Tr. 80:16-20). Scarola's representation reflected the firm's conviction that further litigation would produce a better result: It engaged in document discovery, depositions, discovery motions, and damages analysis, and drafted a detailed second amended complaint that "increased the damages amount significantly." (R. 129/Tr. 81:4-20; R. 139-146/Tr. 91:4-98:14; R. 149-52/Tr. 101:3-104:10; R. 382/Tr. 316:5-18). Ultimately, Scarola moved for summary judgment and to dismiss the counterclaims. Justice Ramos denied that motion, as well as Corcoran's cross-motion. (R. 159-61/Tr. 111:11-113:8; R. 464/Tr. 382:12-14).

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[3] The Scarola-Zelma Agreement provided that Scarola would receive a lesser share of the 41% recovery if the case settled before Scarola had done substantial work. (*See* R. 926).

All told, Scarola devoted approximately $800,000 billable hours to the claims and counterclaims from the time it was engaged by Zelma to the conclusion of its representation. (R. 1775; *see also, e.g.*, R. 1653-54, 1658-60, 1734-36, 1738-39, 1749 (billable hours by Scarola devoted to counterclaims); R. 436-37/Tr. 354:26-355:9 (Scarola)). However, Scarola elected not to participate in discovery relating to the counterclaims against Padeh, reasoning that doing so would have been "duplicative" of TDG's defense to the largely identical third-party claims. (R. 464 (Scarola)).

D. Corcoran Accuses Padeh And The TDG Witnesses Of Perjury In A "Flank Attack" On Padeh's Claims

TDG moved for summary judgment on the third-party claims, and Justice Ramos dismissed two of the three. (*See* R. 172/Tr. 124:13-16 (Scarola); R. 958). In November 2005, a trial date on all the remaining claims was set for January 2006. (*See* R. 954)

First, however, a previously postponed deposition of a non-party witness took place with regard to the remaining third-party claim, which involved the Arches deal (R. 957-58)—one of the deals that was the subject of both Padeh's claims and Corcoran's counterclaims. From testimony at that deposition, and additional third-party discovery by Corcoran, Corcoran alleged that TDG witnesses, including Padeh, lied under oath in their depositions about the existence of certain documents relating to the Arches

and other deals at issue in the Corcoran litigation. (*Id.*; R. 960-64). Corcoran obtained an order against TDG and Padeh to show cause why TDG should not be sanctioned for that conduct.

On December 7, 2005, Justice Ramos held a conference on the order to show cause. (R. 955-71). He directed that Corcoran undertake an "investigation" into potential "spoliation of evidence" and/or "perjury" by TDG witnesses, including Padeh and the general counsel of TDG. (R. 968). The Scarola firm did not attend that conference. (R. 955-56; R. 172/Tr. 124:23-25). On December 29, 2005, however, the firm did write a letter disputing the perjury claims with respect to the Arches development. (R. 1546).

Corcoran pressed the perjury issue to the hilt, expanding it to explore possible document destruction issues as well. (*See, e.g.*, R. 180/Tr. 132:12-24 (Scarola); R. 193/Tr. 145:4-7 (Scarola)). The process took a year and a half (R. 1078, at ¶¶ 6-7), forcing Padeh to spend considerable time and money in response (R. 627-28/Tr. 520:26-521:9 (Padeh)). As Richard Scarola testified, Corcoran's strategy was not to discover the truth, but rather to exploit the perjury as a "flank attack" on Padeh's claims against it. (R. 504-05/Tr. 422:25-423:3; R. 223/Tr. 175:15-19). The strategy worked: Justice Ramos "suspended" those claims, putting them "on ice," and denied

Scarola's application to sever them and proceed to trial. (R. 182/Tr. 134:12-20; *see also* R. 216-17/Tr. 168:21-169:10).

E. After Months Of Work On The Perjury Investigation, Scarola Draws Up A New Retainer Agreement

On February 1, 2006, Scarola finally drew up its own retainer agreement for Padeh to sign memorializing the representation (the "Scarola-Padeh Agreement"). (R. 972). The Scarola-Padeh Agreement provided that the firm's "Scope of Services and General Basis for Compensation" was its representation of Padeh "in your effort to collect money due to you from [Corcoran] in a suit pending in the Supreme Court of the State of New York, County of New York, with Index Number 111192/03 (the 'Matter')," and that "we will be compensated pursuant to our agreement with Mr. Zelma to share equally with him in any contingent fee award in this case (on the basis we have agreed previously with Mr. Zelma)." (*Id.*). It further provided that "to the extent you request, or to the extent it is necessary, that we provide services outside of pursuit of your claims in the Matter," Padeh would be billed hourly, "provided that we will not engage in such work except where it is authorized by you or necessary on an emergency basis to protect your interests." (*Id.*). In handwriting, the agreement went on to make clear that

such "outside" services do "not include work addressed to issues necessary or in aid of your claims as plaintiff." (*Id.*).[4]

Padeh claimed at trial that he signed the Scarola-Padeh Agreement because Richard Scarola threatened to withdraw from the litigation if he did not. (*See* R. 622-23/Tr. 515:20-516:4 (Padeh); *see also* R. 328/Tr. 262:14-19 (Zelma)). Richard Scarola disputed this fact. (R. 198-99/Tr. 150:25-151:6). In any event, it was undisputed that the retainer was executed months after it was drawn up, on August 3, 2006 (R. 974), and that Scarola continued to do work on the perjury investigation in the meantime (*see* R. 1783-87). Scarola's billing records show that it devoted approximately 100 hours of work on the perjury issues before the Scarola-Padeh Agreement was signed. (R. 1777-87).

F. The Perjury Investigation Comes To A Head

The perjury investigation proceeded until March 8, 2007, at which point Justice Ramos finally lost patience. He said the case had gotten "out of control," and that "it ought to settle before the 'collateral damage'

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[4] More handwriting at the end of the letter stated: "Upon receipt of $17,000 the week of August 7, 2006, prior time charges outside the scope of plaintiff's case (all of which have been billed to date) will be deemed satisfied and paid in full." (R. 974). The agreement does not identify these "prior time charges."

exceeds the 'value of the case.'" (R. 1054). On May 15, 2005, Corcoran produced a document (the so-called "perjury report"), which formally accused Padeh and other witnesses of perjury and aiding and abetting perjury. (R. 1157). The ultimate accusations related directly to projects giving rise to Padeh's claims against Corcoran: the report itself observed that Padeh "seeks damages in this action tied to the commissions earned from those projects." (R. 1159; *see also id.*, R. 1161 (allegations relating to the Metropolitan, a deal at issue in the counterclaims)). Despite these allegations, Scarola responded on July 24, 2007 by re-filing its letter from December 2006 that disputed only the Arches-related allegations. (R. 1544).

It was undisputed at trial that Padeh had committed no perjury or other misconduct. (*See* R. 201/Tr. 153:2-10 (Scarola); R. 209/Tr. 161:18-19 (Scarola)). At the time of the perjury investigation, though, that was far from clear. And the personal stakes for Padeh skyrocketed when Justice Ramos scheduled an evidentiary hearing to investigate whether Padeh and the other witnesses had committed perjury. (*See* R. 209-10/Tr. 161:22-162:13 (Scarola); R. 301/Tr. 235:17-23 (Scarola); R. 1629-31, 1633). Justice Ramos intended to refer one of those witnesses, the general counsel of TDG, to the Disciplinary Committee if the accusations were borne out. (R. 429-30/Tr. 347:26-348:16 (Scarola)). Furthermore, Corcoran

substantially decreased the potential value of Padeh's claims by demanding sanctions of nearly $1 million in attorney's fees and costs from TDG and Padeh relating to the perjury investigation. (R. 280/Tr. 214:7-18 (Scarola)). This pressure, of course, had been Corcoran's flank-attack strategy all along. (*See* R. 330/Tr. 264:16-18 (Zelma) ("The third-party complaint that they brought was really intended to just drain Mr. Padeh of all resources and the ability to litigate this.")).

G. Padeh Exercises His Absolute Right To Settle The Corcoran Litigation And Scarola Improperly Threatens To Sue Him

The financial and personal pressure was too much for Padeh. He decided to follow the recommendation of Zelma and the TDG lawyers, and settle the entire litigation for $200,000. (R. 332/Tr. 266:9-12 (Zelma); R. 627-28/Tr. 520:23-521:16). As a result of agreeing to dismiss his claims with prejudice, Corcoran would dismiss the counterclaims and third-party claims, as well as the still-pending order to show cause on the perjury issues. (R. 1644).

At a hearing on October 11, 2007, Padeh testified both in his "individual capacity" and as "CEO and president of TDG" to explain that he was settling because of "the financial stress" imposed by the perjury and document destruction proceeding. (R. 1644-46; R. 355/Tr. 289:4-11 (Zelma); *see also* R. 627/Tr. 520:26 (Padeh) ("This case cost me a fortune,

personally, my company."); R. 1649 ("Elan has been beaten down by the financial pressures of the impending hearing.")). The stress had taken a personal toll on Padeh: "[T]he whole year 2006 I was stressed out and I was sick." (R. 628/Tr. 521:4-5). And settling also spared all the TDG witnesses the continued perjury inquiry.

In light of the approximately $800,000 in billable hours his firm had invested, Richard Scarola's own view was that a $200,000 settlement—from which his firm stood to recover $41,000 under its agreement with Zelma—was too low. But Padeh had an absolute right to settle the case on whatever terms he deemed acceptable, and for whatever reasons. *See* N.Y. R. Prof'l Conduct 1.2(a) ("A lawyer *shall abide* by a client's decision whether to settle a matter." (emphasis added)). Notwithstanding this unambiguous rule, Scarola attempted to convince Padeh not to settle with the overt threat of a subsequent lawsuit by the firm. Richard Scarola made it "clear" to Padeh that what he viewed as "a discounted settlement . . . would give rise to a claim by our firm for damages" in "compensation for the work we have done." (R. 1649). He also inexplicably stated that Zelma "may have a conflict" if Zelma were to, as the law plainly requires, abide by the client's request to settle the case. (*Id.*). Just before the settlement was consummated, Richard Scarola again threatened that "there may be litigation

involving our firm, you and others relating to the compensation for our work in this case." (R. 1904; *see also* R. 423/Tr. 341:2-9 (Scarola) (conceding that his "reaction" was that Padeh would have to "account[] for" Scarola's work if he "dropp[ed] or settl[ed] this case for a low amount"); R. 521-22/Tr. 439:21-440:4 (Scarola "apprised Elan through George" that a low settlement would give rise to "the issues that we're here having a lawsuit about now")).[5]

Notwithstanding these improper threats, and on the advice and recommendation of Zelma and the TDG attorneys, Padeh settled with Corcoran. (R. 627/Tr. 520:23-24 (Padeh)). Zelma recovered his 41% share of the $200,000 recovery ($82,000) under his agreement with Padeh, and Scarola received its 50% percent share of that amount ($41,000) under its agreement with Zelma (R. 332-33/Tr. 266:24-267:7)—an agreement that was, as explained above, memorialized and incorporated into the Scarola-Padeh Agreement. Scarola received exactly what it bargained for in undertaking the joint contingency representation of Padeh in this matter.

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[5] Throughout the trial below, Scarola attempted to label the settlement with words suggesting that Padeh was abandoning the case for nothing. (*See, e.g.*, R. 401/Tr. 335:4-5 ($200,000 "was equivalent to nothing"); *see also* R. 398, 400, 519/Tr. 332:24-25, 334:7-9, 437:15-18 ("abandon," "give up")). The suggestion was false. It was undisputed that, as discussed above, the settlement was a bargained-for exchange of a release for $200,000.

H. Scarola Delivers On Its Threats And Sues Padeh To Recover More Than Its Agreed-Upon Fees

Scarola made good on its improper threats and filed this lawsuit against Padeh on September 30, 2009. In the First Cause Of Action, Scarola alleged that its work "in connection with the Third-Party Complaint"—meaning the perjury investigation—was "outside the scope of Padeh's claims" against Corcoran, and thus allegedly subject to the hourly-fee provision of the Scarola-Padeh Agreement. (R. 15, at ¶ 43). It claimed Padeh breached the Scarola-Padeh Agreement by failing to pay Scarola $62,281.35 in fees that it incurred in connection with the perjury investigation. (R. 15-16, at ¶¶ 43-44).

Scarola also sought to recover significantly more compensation than its contractual 20.5% share of Padeh's $200,000 settlement, which it conceded it was paid in full. (R. 14, at ¶ 38). In particular, Scarola brought three alternative claims for additional compensation: (a) in the Second Cause Of Action, a quantum meruit claim for "the reasonable value of its services" (R. 16, at ¶ 49), which, as discussed above, it valued at over $800,000; (b) in the Third Cause Of Action, a breach of contract claim, alleging that Padeh somehow breached the Scarola-Padeh Agreement "by failing to fully compensate Scarola Ellis LLP for its services" (R. 17, at ¶ 54); and (c) in the Fourth Cause Of Action, an unjust enrichment claim based on Padeh's

alleged benefit "from the services performed by Scarola Ellis LLP" (R. 17-18, at ¶ 57). Scarola defined this alleged benefit not with regard to the value of its services, but with regard to "the value [Padeh] received for dropping his claims," including relief from the possibility of sanctions against him and TDG's general counsel. (*Id.*). Padeh's attorney below brought a counterclaim alleging that the Scarola-Padeh Agreement was procured through duress because Scarola had allegedly threatened to withdraw unless Padeh signed it. (R. 22, at ¶ 27).

The Supreme Court (York, J.) denied Scarola's motion for partial summary judgment on the quantum meruit and unjust enrichment claims, and on the duress counterclaim. Padeh argued that "as a matter of law the written retainer agreements . . . cover all of the work the Plaintiff performed." (R. 30). The Supreme Court agreed, and denied summary judgment on the quantum meruit claim on that ground. (*See id.* (concluding that "[t]hese contracts clearly stated how the Plaintiff was to be paid for his services")). But despite holding that the contracts control Scarola's right to compensation, the court inexplicably permitted the quantum meruit claim to go forward. The court also denied Scarola's summary judgment motion on the unjust enrichment claim, but here too its reasoning was internally inconsistent. On the one hand, the court held that "[t]he Plaintiff's argument

that the Defendant was unjustly enriched by this agreement [*i.e.*, the settlement] is plainly wrong" (R. 31)—presumably because, as the court had already concluded, the written contracts controlled Scarola's compensation. Yet the court nonetheless permitted the claim to proceed, in light of the "fact" that Padeh "settled for a dramatically smaller monetary award than either he or the Plaintiff anticipated in return for other benefits." (*Id.*).

The case proceeded to trial. Before the evidence was submitted to the jury, Padeh made a motion for directed verdict on the unjust enrichment and quantum meruit claims "in view of the fact that there is a contract between Mr. Zelma and the Scarola firm," which at trial both parties "agreed was a binding contract and enforceable." (R. 712-13/Tr. 605:24-606:4; *see also* R. 723-24/Tr. 616:20-617:6 (objection to verdict sheet and jury charge on same ground)). The trial court (Kern, J.) denied that motion. (R. 714/Tr. 607:20).

The jury reached a mixed special verdict as follows: (1) the Scarola-Padeh Agreement was valid and not entered into under duress (R. 854/Tr. 727:15-21); (2) Padeh breached the Scarola-Padeh Agreement by failing to pay Scarola "for services rendered in connection with work on perjury issues" (R. 854-55/Tr. 727:22-728:3); (3) the damages for that breach were $62,290.35 (R. 855/Tr. 728:4-11); (4) Padeh did not breach the

Scarola-Padeh Agreement "by failing to account for the full value of the benefits received when he ended his case against the Corcoran Group" (R. 855/Tr. 728:12-19); (5) Scarola was not entitled to recover the reasonable value of its services in quantum meruit (R. 855/Tr. 728:20-25); (6) Padeh was "unjustly enriched as a result of the services rendered" by Scarola (R. 855-56/Tr. 728:26-729:6); (7) the damages in unjust enrichment were $172,113.36 (R. 856/Tr. 729:7-10). (*See also* R. 1912-13). On December 27, 2012, judgment was entered against Padeh for a total of $346,960.79, including interest and costs. (R. 5).

Padeh timely appealed. (R. 3).

ARGUMENT

I. SCAROLA'S UNJUST ENRICHMENT CLAIM IS BARRED AND ITS COMPENSATION MUST BE LIMITED TO THE CONTINGENCY FEE SET FORTH IN ITS RETAINER AGREEMENTS

Scarola received $41,000 representing Padeh in the case against Corcoran, its contingency share of the $200,000 settlement. That was the share Scarola expressly agreed to be paid in its written agreements with Zelma and Padeh. Nonetheless, the jury awarded Scarola $172,113.36 *for the very same representation* on the theory that Padeh was somehow "unjustly enriched" when he exercised his absolute right to settle the Corcoran litigation.

That judgment is contrary to law, and the unjust enrichment claim should be dismissed. A century of settled precedent prohibits a contingency-fee attorney from recovering in quasi contract more than the share of a client's settlement set forth in the retainer agreement. As explained below, any other rule would contravene multiple settled legal principles. Because two indisputably valid and enforceable written contingency-fee agreements cover the subject matter of Scarola's fees for representing Padeh in the Corcoran case, Scarola's share of Padeh's settlement must be determined exclusively by those agreements, and the law does not permit it to recover additional compensation in quasi contract.

A. This Court Has Repeatedly Held That The Compensation Of A Contingency-Fee Lawyer Whose Client Settles Over His Objection Is Determined Exclusively By The Retainer Agreement

For over a century, New York courts have consistently held that a contingency lawyer whose client settles over his objection cannot recover more compensation than his retainer provides. The settled rule is that

> [s]ettlement by a client without the attorney's consent is not a breach of the contract of retainer and leaves its provisions as to the amount of compensation controlling, so that where a suit is settled for a small sum without the consent of the attorney, the attorney cannot for that reason recover upon a quantum meruit but is confined in his or her recovery to the terms of the contract of retainer.

7 N.Y. Jur. 2d *Attorneys at Law* § 274; *id.* (contingency-fee attorney is *not* entitled to recover the reasonable value of his services when greater than the contingency percentage of settlement).

Thus, in *In re Winkler*, 154 A.D. 532 (1st Dep't 1913), the client settled his case over his contingency-fee attorney's objection for approximately $2,000 in cash and property. *Id.* at 533. The lawyer's agreed-upon share of that recovery was $625. *See id.* at 534. A referee held below that the attorney, notwithstanding his contingency-fee agreement, "was entitled to recover upon a *quantum meruit*" theory an amount of $1,200—"the value of [his] services"—because the client "settled the action without his knowledge or consent." *Id.* at 533. This Court reversed. It held that the attorney was limited to his percentage of the $2,000 settlement under his contingency-fee agreement—*i.e.*, $625, or approximately half the value of his services. *Id.* at 534. The Court held that the client did not breach the agreement by settling over his lawyer's objection, and that the "stipulated method of computing the compensation to be paid the attorney for his services *must control*, even though the suit is settled without his consent." *Id.* (emphasis added).

This basic principle has been reaffirmed in numerous cases. For example, in *Lefkowitz v. Leblang*, 187 N.Y.S. 520 (1st Dep't 1921), this

Court again rejected an attorney's claim to be "entitled to be paid the reasonable value of his services" because his client settled without his consent. *Id.* at 521. It was by then "well established" that a client may settle under his retainer agreement irrespective of his lawyer's consent, and thus the attorney was "entitled only to a recovery of one-third of the amount of such settlement," as provided for in his contingency-fee agreement. *Id.*; *see also In re Levy*, 249 N.Y. 168, 169-70 (1928) (where client settled for only $2,000 after a judgment in his favor for $12,500, contingency-fee lawyer restricted to his contractual share of the lower settlement amount because his right to recovery, "whether before or after judgment, is subject to the right of the client to settle in good faith"); *Murray v. Waring Hat Mfg. Co.*, 142 A.D. 514, 517 (2d Dep't 1911) (holding that attorney's retainer agreement conclusively determined compensation); *Neu v. Brooklyn Heights R.R. Co.*, 113 A.D. 446, 447 (2d Dep't 1906) (per curiam) (same).

Recently, this Court upheld the dismissal on summary judgment of claims strikingly similar to the ones brought in this case. In *Jaffe & Asher LLP v. Ross*, No. 125616/02, 2003 WL 25520435 (N.Y. Sup. Ct. Nov. 10, 2003), a law firm brought quantum meruit and unjust enrichment claims (among others) seeking compensation for "the fair and reasonable value" of its services in prosecuting a contingency-fee case. The firm had "drafted an

amended complaint, conducted discovery, worked . . . to develop [the client's] damages, and made and defended against several motions." But the client "instructed [the firm] to settle the case" after the case was ready for trial, and did so "for personal and family reasons." *See also supra* pp. 9, 15-16. Even though the law firm expected that the client "would recover millions of dollars in damages," the case was settled for $350,000 and modest non-cash compensation. The Supreme Court dismissed the quasi-contract causes of action and held that the law firm's recovery must be limited to its contingency-fee share of the settlement amount. This Court affirmed that ruling. *See* 6 A.D.3d 357, 357 (1st Dep't 2004).

Indeed, the law is so clear in this context that this Court has *sanctioned* a contingency-fee attorney for claiming more than his bargained-for share of the client's settlement. In *In re Spellman*, 4 A.D.2d 215 (1st Dep't 1957) (per curiam), this Court suspended a contingency-fee lawyer from practice for one year for retaining approximately twice his agreed-upon share of a settlement. *Id.* at 216-17. The evidence reflected that "the difficulties [the attorney] encountered in the course of the litigation were far greater than he had anticipated," and "he was constrained to settle a case he had started with high hopes for what he contends was a fraction of its value," even after "appeals to this court and the Court of Appeals." This Court

dismissed these as "the ordinary hazards of litigation." Even though "[o]n the basis of the work performed, [the attorney's] services might have been worth more than that afforded him under the contingent fee arrangement," this Court held that the agreement controlled. *Id.* at 216.

B. The *Winkler* Rule Rests Upon Well-Settled Legal Principles

The rule limiting a contingency attorney to the share of a settlement set forth in the retainer agreement—recognized by this Court in *Winkler* and its progeny—rests upon principles so well established that it is inconceivable the law could be otherwise.

First, the *Winkler* rule is a particular application of the general contract-law principle that it is "impermissible" for a party to a contract to seek quasi-contract damages where a "valid written agreement . . . clearly covers the dispute between the parties." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987); *see also, e.g.*, *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012) (same); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (same); *Miller v. Doniger*, 272 A.D.2d 73, 74 (1st Dep't 2000) (when a plaintiff's "unjust enrichment claim is premised on the same subject matter as is contained in . . . written contracts," it is "properly dismissed").

This Court has explained that this bedrock principle is "applicable to the awarding of attorney's fees" and mandates that the attorney's compensation be defined exclusively by the written retainer agreement. *Jontow v. Jontow*, 34 A.D.2d 744, 745 (1st Dep't 1970); *id.* at 744-45 ("In view of the fact that there was a written agreement between [co-counsel] to divide their fee equally, and the fact that [trial counsel] did perform services for the plaintiff, it was error for the trial court to set the fees in question on a *quantum meruit* basis."); *Ross*, 2003 WL 25520435 (limiting law firm's compensation to amount set forth in its retainer agreement in part based on the "well established" rule "that where . . . a valid and enforceable written contract exists governing the subject matter sued upon, recovery in quantum meruit or unjust enrichment for events arising out of the same subject matter is precluded"). To permit an attorney to recover in quasi contract despite the existence of a valid, written retainer agreement covering the subject matter of the attorney's compensation would flout this fundamental contract law principle and binding Court of Appeals precedent.

Second, *Winkler*'s rule is necessary to protect the client's "absolute" right to "make an honest settlement of his cause of action . . . without regard to the wishes of his attorney." *Levy*, 249 N.Y. at 170-71. The rules of professional misconduct, with the support of this Court and every leading

authority on the subject, vest the decision whether to settle, and for what amount, squarely and exclusively with the client. *See* N.Y. R. Prof'l Conduct 1.2(a) ("A lawyer *shall abide* by a client's decision whether to settle a matter." (emphasis added)).[6] A quasi-contract lawsuit premised on a lawyer's dissatisfaction with the client's settlement decision is, by definition, inconsistent with that right. It would permit the attorney to achieve after the fact precisely what the law forbids him to do before the settlement is reached: interfere with the client's settlement decision. That is why this Court has repeatedly pointed to the client's absolute right to settle the case as a principal justification for *Winkler*'s rule. *See Lefkowitz*, 187 N.Y.S. at 521 (noting that client's absolute right to settle was "well established," in support of holding limiting attorney to fee set forth in retainer agreement and prohibiting quasi-contract recovery); *Winkler*, 154 A.D. at 534 (because "a settlement by the client without the attorney's consent is not a breach of the agreement of retainer," the retainer's

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[6] *See also, e.g.*, *Knipe v. Wheelehan*, 160 N.Y.S. 1012, 1012 (1st Dep't 1916) ("It is well settled that the cause of action is the client's and that he may settle it whenever and for such amount as is satisfactory to him." (citing *Andrewes v. Haas*, 214 N.Y. 255 (1915))); Restatement (Third) of Law Governing Lawyers § 22 (2000) (listing as the first of the set of decisions "reserved to the client": "whether and on what terms to settle a claim"); Charles W. Wolfram, *Modern Legal Ethics* § 4.6.2 (1986) ("the decision whether or not to settle is for the client to make").

"stipulated method of computing the compensation . . . must control"); *see also Ross*, 2003 WL 25520435 (dismissing quasi-contract claims based on "well settled law in New York that a client has exclusive control over the subject matter of his litigation, and may at any time before judgment compromise, settle or adjust his claims out of court, even without his attorney's intervention, knowledge, or consent, notwithstanding any contingency fee arrangement he might have with his attorney"), *aff'd*, 6 A.D.3d at 357.

Indeed, the prospect of subsequent quasi-contract liability would impermissibly interfere with the client's settlement decision even at the time it is made. Although Padeh settled his claims over his attorney's objections, other clients might well have rejected the settlement simply to avoid a dispute with their lawyer and the potential for staggering liability. Recognizing such a cause of action would therefore "alter[] and economically chill[] the client's unbridled prerogative" to settle the case, and for that reason would violate New York's public policy governing the attorney-client relationship.[7] *In re Cooperman*, 83 N.Y.2d 465, 473 (1994)

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[7] Such interference with the client's right to settle would be unacceptable for the additional reason that it would lead inevitably to fewer settlements. This Court has recognized that "the strong policy of our courts [is] to encourage the settlement of disputes." *Childs v. Levitt*, 151 A.D.2d 318, 319 (1st Dep't

(holding that nonrefundable retainer agreements violate public policy governing the attorney-client relationship because they chill client's absolute right "to walk away from the lawyer"); *see also Demov, Morris, Levin & Shein v. Glantz*, 444 N.Y.2d 553, 557 (1981) (it is "well established . . . that a cause of action will not be cognizable in the courts of this State when it is violative of strong public policy").[8]

1989); *see also In re Snyder*, 190 N.Y. 66, 71 (1907) (holding settlement veto provision in retainer agreement unenforceable because of the "public concern that such contracts would prove added obstacles to that quieting of disputes and to that adjustment and settlement of litigation which always has been and always should be favored by the acts of legislatures, the decisions of courts, and the expressions of public opinion").

[8] For similar reasons, courts and bar associations have concluded that "convertible" fee agreements—under which a contingency-fee arrangement converts to an hourly fee if the client accepts a settlement the lawyer does not like—violate public policy. *See, e.g.*, *Compton v. Kittleson*, 171 P.3d 172, 178, 180 (Alaska 2007) (concluding that the economic "pressure inherent in convertible fee agreements makes them unacceptable"); Wis. State Bar Prof'l Ethics Comm., Formal Op. E-82-5 (1982) (rejecting such provisions because the client "would face the choice of a lawyer's bill he cannot afford and a lawsuit which he or she doesn't want to pursue"); Neb. State Bar Ass'n Lawyers' Advisory Comm., Formal Op. 95-1 (1995) (such agreements "unduly restrict[] the client's ability to accept settlement offers"); David D. Dodge, *Don't Impair Your Client's Right to Settle*, Ariz. Att'y, October 2010, at 16 (collecting authorities condemning "the pressure upon the client that is inherent in any fee arrangement that changes a contingent fee to an hourly fee if the client elects to settle for an amount that the lawyer thinks is inadequate for any reason, but *especially if the lawyer simply believes he didn't get as much of a fee as he would have liked*" (emphasis added)).

Third, *Winkler*'s rule ensures that the contingency-fee arrangement remains reasonable. *See Gair v. Peck*, 6 N.Y.2d 97, 105-06 (1959) (although "contingent fee contracts" are no longer "outlawed" as they once were, "the courts have continued to exercise a wary supervision over them . . . as to their reasonableness"). The reason why courts permit unusually high contingency-fee rewards, often far in excess of an attorney's normal hourly rate, is that the lawyer agrees ahead of time to assume the risk that he will recover only a low amount, or indeed nothing at all. *See Belzer v. Bollea*, 150 Misc. 2d 925, 928 (N.Y. Sup. Ct. 1990) (large awards permitted only "because the attorney takes the risk of recovering" little or even "nothing at all"); Formal Op. E–82–5, *supra* n.13 ("The large attorney's fees which are generated by the contingent fee can only be justified because of the risks the lawyers must bear of not making an adequate recovery to cover his or her time in certain cases."). "The client's desire to accept a less than satisfactory settlement offer is an inherent part of th[e] [contingency-fee] risk." Formal Op. E–82–5; Dodge, *supra* n.8 at 16 (same). But if the lawyer can ensure "adequate" compensation through a quasi-contract cause of action if the settlement is low, "the risk which justifies the contingency fee" is effectively "removed." *Belzer*, 150 Misc. 2d at 928. "To suggest a lawyer can have it both ways"—reaping the windfall

of a recovery exceeding hourly rates if the client accepts a high settlement, but preserving the right to recover reasonable compensation if the settlement is low—is "not acceptable." Formal Op. E–82–5; *see also* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 30 (1989) (noting prevailing view that "for a contingent fee to be valid, there must be an actual contingency, which means a realistic risk of nonrecovery"). *Winkler*'s rule limiting the attorney to the share of the settlement specified in the retainer agreement places the risk of a low contingency-fee recovery where it belongs—with the lawyer.[9]

Finally, *Winkler*'s rule is necessary to prevent lawyers from improperly placing their own economic interests over their client's. Attorneys must "deal fairly, honestly and with undivided loyalty" to their clients, "honoring the clients' interests over the lawyer's." *Cooperman*, 83

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[9] Indeed, the rule that a contingency-fee lawyer's share of the settlement is defined by the retainer agreement protects lawyers too: it ensures that clients may not refuse to pay the agreed-upon share of a high settlement on the ground that the lawyer's effort and time were minimal. *See Murray*, 142 A.D. at 516 (rejecting reduction of attorney's compensation from agreed-upon share of settlement based upon reasonable value of attorney's services in light of retainer agreement); *see also* Charles Silver, *A Restitutionary Theory Of Attorneys' Fees In Class Actions*, 76 Cornell L. Rev. 656, 703 (1991) ("Neither an attorney nor a client has a claim of unjust enrichment, whatever the attorney's effective hourly rate may turn out to be in a given case, because both freely assume the risks associated with contingent percentage fees."). Scarola's theory of the case, if accepted, would create a one-way assumption of risk in which the client alone stands to lose.

N.Y.2d at 472; *see also* N.Y. R. of Prof'l Conduct 1.7(a) (prohibiting representation if "the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests").

If the law permitted lawyers to sue in quasi contract just because they find a settlement unprofitable, even when the settlement is in the client's interest, it would perversely enshrine in a common law cause of action what is really an irreconcilable conflict of interest. *See* Brickman, 37 UCLA L. Rev. at 47-49 (collecting sources documenting conflicts of interest when a client's settlement diverges from attorney's profit interest). Put differently, it would effectively impose a duty on the client to reject a settlement he wanted *solely to ensure* that his lawyer is satisfied with his pay. But the Court of Appeals long ago made clear that a contingency-fee agreement "does not make it the client's duty to . . . increase the lawyer's profit." *Andrewes v. Haas*, 214 N.Y. 255, 258 (1915) (Cardozo, J.); *see also Compton*, 171 P.3d at 177 (no cases involving attorney vetoes of client settlements "consider it relevant to inquire into how clients' choices might affect the economic interests of their attorneys"); *see also Dagny Mgmt. Corp. v. Oppenheim & Meltzer*, 199 A.D.2d 711, 711-13 (3d Dep't 1993) (misconduct for contingency-fee attorneys, believing a proposed settlement

by the client without their participation to "consist[] of more than the sum of money disclosed," to delay the settlement in an attempt to investigate and protect their fee). *Winkler*'s rule avoids this impermissible conflict of interest by ensuring that the lawyer's economic interest in the litigation must yield to the client's absolute right to settle the case.

C. Under *Winkler*, Scarola's Compensation Is Governed Exclusively By The Terms Of Its Retainer Agreements

Applying the rule of *Winkler* to this case, it is crystal clear that the unjust enrichment award is contrary to law, and the claim must be dismissed.

First, if this Court were to affirm, it would be validating a jury award in quasi contract despite the existence of *two* written agreements—the Scarola-Zelma Agreement and the Scarola-Padeh Agreement—that govern the subject matter of Scarola's compensation for this representation.[10] That is, of course, the very same subject matter covered by Scarola's unjust

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[10] Contrary to Scarola's argument below (*see* R. 713/Tr. 606:20-24), it is irrelevant that Padeh was not himself a party to the Scarola-Zelma Agreement. *See Vitale v. Steinberg*, 307 A.D.2d 107, 111 (1st Dep't 2003) ("[A]n express contract governing the subject matter of plaintiff's claims . . . bars the unjust enrichment cause of action as against the individual defendants, notwithstanding the fact that they were not signatories to that agreement." (citations omitted)); *Bellino Schwartz Padob Adver., Inc. v. Solaris Mktg. Grp., Inc.*, 222 A.D.2d 313, 313 (1st Dep't 1995) (same); *Feigen v. Advance Capital Mgmt. Corp.*, 150 A.D.2d 281, 283 (1st Dep't 1989) (same) (citing *Julien J. Studley, Inc. v. N.Y. News, Inc.*, 70 N.Y.2d 628 (1987)).

enrichment claim. (R. 17, at ¶ 57 (alleging that "Padeh benefitted from the services performed by Scarola Ellis LLP in connection with Padeh's claims in the Complaint for which it has not been wholly compensated")). Because these indisputably valid written retainer agreements cover the subject matter of Scarola's unjust enrichment claim, it was "impermissible" for Scarola to seek further "damages in an action sounding in quasi contract." *Clark-Fitzpatrick*, 70 N.Y. 2d at 389; *see also Jontow*, 34 A.D.2d at 745.[11] Thus, even without *Winkler*, Court of Appeals precedent would mandate reversal and dismissal of the unjust enrichment claim.

The unjust enrichment award also should be dismissed because it is contrary to the well-settled law and public policy vesting the decision whether to settle exclusively with the client, and prohibiting the lawyer from interfering with that decision. *See supra* Points I.A & I.B. The judgment below is, by definition, an interference with Padeh's absolute right to settle his case for $200,000. Indeed, the judgment utterly eviscerated that settlement decision: it left Padeh with a liability to Scarola that far exceeded the value of the settlement he decided to take.

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[11] The validity of the Scarola-Zelma Agreement was never disputed below. *See supra* pp. 8-9. Although Padeh's duress counterclaim initially created a dispute about the validity of the Scarola-Padeh Agreement, the jury ultimately found that the Scarola-Padeh Agreement was enforceable. (*See* R. 854-55/Tr. 727:15-728:11; R. 1912-13).

Moreover, instead of "abid[ing]" by Padeh's settlement decision, as the law and rules of professional responsibility require, Scarola here *expressly threatened* Padeh with a lawsuit to force him not to accept Corcoran's settlement offer. (R. 1649; *see also* R. 1904); *and see supra* pp. 16-17.[12] The quasi-contract claims in this case were designed from inception to impermissibly coerce Padeh to reject a settlement that he wanted to accept, but which his attorneys considered inadequate. That is precisely why the law cannot and does not recognize them. *See Cooperman*, 83 N.Y.2d at 472. Nor could the law possibly reward Scarola—with an unjust enrichment cause of action premised on "equity and good conscience," *Corsello*, 18 N.Y.3d at 790—for abandoning its duty of loyalty and placing its own economic interests ahead of Padeh's interest in settling. *See Cooperman*, 83 N.Y.2d at 472; N.Y. R. of Prof'l Conduct 1.7(a).

Finally, the judgment below improperly relieved Scarola of the inherent risks that make contingency-fee agreements acceptable in the first

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[12] Such threats are inconsistent with the ethical conduct that is required of attorneys. *See* N.Y. R. of Prof'l Conduct 1.2(a) ("A lawyer *shall abide* by a client's decision whether to settle a matter." (emphasis added)); *see also Compton*, 171 P.3d at 178 (although a lawyer may seek to influence a client's settlement decision, "*she cannot use this form of economic coercion to force the issue*." (emphasis added) (quoting 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 8.15 (3d ed. Supp. 2003))).

place. When Scarola agreed to represent Padeh in this matter, it assumed the risk that Padeh might exercise his absolute right to settle for a low amount, yielding a correspondingly low contingency fee. When that assumed risk materialized, it was unacceptable for Scarola to claim that it was somehow "unjust" for it to bear the associated costs. To the contrary, *Winkler* and its progeny make clear that it would be unfair to do anything *other* than limit Scarola to its agreed-upon share of the recovery.

In sum, if this Court were to let the judgment below stand, it would be giving official judicial sanction to a quasi-contract cause of action that (1) violates this Court's well-settled *Winkler* rule; (2) is foreclosed by basic contract law as consistently articulated by the Court of Appeals; (3) authorizes an attorney to impermissibly interfere with his client's settlement decision, and indeed overtly threaten the client with a lawsuit if he does not comply; (4) turns the contingency-fee arrangement into an unfair, risk-free proposition that maximizes the lawyer's potential compensation regardless of outcome; and (5) allows a lawyer to abdicate his duty of loyalty and place his own economic interests in the litigation ahead of his client's interest in settling the case. This avalanche of disturbing results compels the conclusion that the unjust enrichment award must be reversed and the claim dismissed.

D. Scarola's "Abandonment" Argument Is Meritless

At trial, Scarola attempted to avoid the automatic bar of its quasi-contract claims by repeatedly calling Padeh's settlement an "abandonment" of the case. (R. 398/Tr. 332:24-26; R. 400/Tr. 334:7-9; *see also* R. 519/Tr. 437:15-18). To be sure, *Winkler*'s rule foreclosing quasi-contract relief does not apply when the client abandons or discontinues his case, rather than settles it. *See Andrewes*, 214 N.Y. at 259 ("When the defendants abandoned the action, they became liable to the plaintiff for the value of the services then rendered. That is the measure of their liability and of his right."); *Mahan v. Mahan*, 213 A.D.2d 458, 461 (2d Dep't 1995) (same). But here Padeh plainly *settled* his case—he did not abandon it.[13] And

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[13] Moreover, the cases permitting an attorney to pursue a quasi-contract remedy in cases of abandonment do so under a quantum meruit cause of action—not unjust enrichment. For good reason. "[T]he measure of recovery for a quantum meruit claim generally is *limited* to the reasonable value of the services rendered." *Davis v. CornerStone Tel. Co.*, 25 Misc. 3d 1071, 1073 (N.Y. Sup. Ct. 2009) (emphasis added) (citations omitted), *aff'd*, 78 A.D.3d 1263 (1st Dep't 2010); *see also Demov*, 53 N.Y.2d at 557 (same). But the measure of recovery for an unjust enrichment claim extends to any "benefits bestowed on defendants for which plaintiffs should have been compensated." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 121 (1st Dep't 1998); *see also* W. Keeton et al., Prosser & Keeton on Law of Torts (5th ed.), at § 94. Here, the jury was impermissibly permitted to award Scarola the value of "benefits" allegedly received by Padeh that are simply not cognizable under quantum meruit. Put another way, even if Scarola's abandonment theory had merit (and it does not), Scarola would not be

Scarola never *once* challenged, nor was there any basis to challenge, the validity or enforceability of Padeh's settlement agreement with Corcoran.

As we have explained, the case law makes clear that in the event of settlement, a quasi-contract remedy is unavailable as a matter of law. *See supra* Point I.A; *see also Spellman*, 4 A.D.2d at 217 (expressly distinguishing settlement, where quasi-contract relief is foreclosed, from abandonment, where it is permitted); *Ross*, 2003 WL 25520435 ("When the client *discontinues* his action for naught, he must compensate his attorney for the value of the services he rendered. Otherwise, the attorney's right to compensation . . . is strictly limited by the agreement of retainer, and a recovery [in] *quantum meruit* for more than the agreed-upon amount or contingency percentage cannot be had."). Richard Scarola's references at trial to "abandonment" therefore misleadingly (and no doubt deliberately) conflated two different concepts governed by two different legal rules.

A settlement does not cease to be a settlement merely because a contingency-fee lawyer—in light of the amount of work he put into the case or the recovery he predicted at the outset—is dissatisfied with the settlement value. Were that possible, this Court's settlement precedents would be

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entitled to relief under an unjust enrichment cause of action—the *only* quasi-contract cause of action it prevailed upon below.

rendered meaningless. Indeed, we are not aware of a single New York case that has *ever* applied the "abandonment" doctrine and permitted quasi-contract relief in the face of a legally valid settlement agreement. Padeh's concededly valid settlement agreement bars Scarola from pursuing any kind of quasi-contract relief.

II. THE FIRST CAUSE OF ACTION SHOULD ALSO BE DISMISSED AS A MATTER OF LAW

In the First Cause Of Action, Scarola claimed that Padeh breached the Scarola-Padeh Agreement by failing to pay it an hourly rate for representing Padeh in connection with Corcoran's perjury claim. (R. 15-16, at ¶¶ 42-44). The jury agreed, and awarded damages to Scarola accordingly. (R. 854-55/Tr. 727:22-728:11; R. 1912-13). This breach of contract claim is also barred as a matter of law and should be dismissed. Under binding precedent, contingency-fee agreements must *expressly* carve out legal work that is not to be compensated by the contingency fee. There was no such express carve-out in the Scarola-Padeh Agreement, and Scarola was therefore not entitled to an hourly fee as a matter of law.

In the Scarola-Padeh Agreement, Scarola explicitly undertook to represent Padeh "in [his] effort to collect money due to [him] from Corcoran Group, Inc., et al." in the Corcoran lawsuit, defined as the "Matter." The agreement provides that Scarola would be compensated for this

representation as follows: "[i]t is expressly understood and agreed that we will be compensated pursuant to our agreement with Mr. Zelma to share equally with him in any contingent fee award in this case." (R. 972). Apart from Scarola's general compensation for work on the Corcoran matter, the agreement also provides that the client was responsible to pay expenses, and that he would be charged an hourly rate for authorized services "outside of pursuit of your claims in the Matter." (*Id.*). A handwritten addendum to the latter sentence expressly provides that such "outside" services "do[] *not* include work addressed to issues necessary or in aid of [Padeh's] claims as plaintiff." (*Id.* (emphasis added)).

Interpretation of a contract is a legal matter for the court. *805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451 (1983). "Retainer contracts between attorney and client, as a matter of public policy, are of special interest and concern to the courts." *In re Estate of Schanzer*, 7 A.D.2d 275, 278 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 972 (1960); *Cooperman*, 83 N.Y.2d at 472 (same). For that reason, courts "give particular scrutiny to fee arrangements between attorneys and clients." *Shaw v. Mfrs. Hanover Trust Co.*, 68 N.Y.2d 172, 176 (1986) (construing contingency-fee agreement). Moreover, "contracts between attorney and client made," as here, "after the relation has been established are construed most strongly

against the attorney." 7 N.Y. Jur. 2d *Attorneys at Law* § 249 (citing *In re Howell*, 215 N.Y. 466 (1915)).

Applying these standards, New York courts routinely hold, in the absence of clear and express language to the contrary, that "the compensation fixed for conducting or defending the interests of the client in certain litigation covers *all the necessary steps* in advancing the suit or defense." Laura Hunter Dietz et al., 1B Carmody-Wait 2d § 3:540 (collecting cases) (emphasis added); *see also* 7 N.Y. Jur. 2d *Attorneys at Law* § 234 (same).

Thus, in *Darrin v. Clay*, 143 A.D. 937 (2d Dep't 1911), the court held that an attorney's representation of a client in a foreclosure proceeding "included compensation for services rendered in [a corresponding] action to restrain the foreclosure." *Id.* at 937. The court reasoned as follows:

> The plaintiff could not foreclose the mortgage with his proceeding blocked by the injunction suit, and to earn his alleged agreed compensation of forty per cent he was burdened with the necessity of removing the impediment. As such action was the only remedy for defeating the foreclosure, its resistance by plaintiff would be necessarily involved in any undertaking to foreclose the mortgage.

Id. at 937-38.

Courts have applied the same principle to construe retainer agreements, in the absence of clear language to the contrary, to embrace work on a variety of matters that are necessary for the plaintiff to secure the

recovery that is the ultimate object of the representation. *See, e.g.*, *Ellis v. Mitchell*, 193 Misc. 956, 958 (N.Y. Sup. Ct. 1948) ("[A] client retaining an attorney on a contingent basis, in the absence of clear and express language to the contrary, contemplates that the percentage fixed is to constitute payment for whatever services may be necessary to obtain collection of any judgment which may be recovered, whether the services be in connection with an appeal taken from the judgment or in connection with efforts to collect the judgment, or both."), *aff'd*, 275 A.D. 767 (1st Dep't 1949); *Mrozinski v. Marinello*, 46 Misc. 2d 637, 639 (N.Y. Sup. Ct. 1965) (lawyer denied quantum meruit fee where "[t]he retainer was not limited to proceeding with a case to judgment; and it is certainly lacking in clear provision that the only services to be performed in return for the contingency fees were confined to trial and securing an uncollected judgment"); *Richland v. Bramnick*, 81 N.Y.S.2d 735, 737 (N.Y. Sup. Ct. 1948) (denying contingency-fee attorney's claim to additional compensation for defending against counterclaim because "it is clear that when an attorney agrees to take a contingent retainer of this type, *he obligates himself to handle all contingencies that may arise in the proceeding*" (emphasis added)); *Race v. Harris*, 246 A.D. 367, 371 (3d Dep't 1936) (where retainer agreement provided that lawyer "was to take all steps necessary to protect [the client's]

rights" in the administration of her husband's estate, and to "secure for her all property he could from the estate," additional work to obtain exemption for certain property was necessarily covered by retainer agreement (emphasis omitted)); *see also Maiullo v. Genematas*, 16 Mich. App. 231, 233-34 & n.1, 167 N.W.2d 849, 851 (Ct. App. 1969) (per curiam) (holding that "if [attorneys] expected to be compensated [beyond a contingency fee] for achieving the relinquishment of . . . potential counterclaims, such purpose should have been spelled out with particularity" and collecting cases).

Under these authorities, the contingency-fee provisions of the Scarola-Padeh Agreement necessarily govern Scarola's compensation for its work on Corcoran's perjury claim. Scarola expressly and unequivocally agreed to be compensated by a contingency fee for representing Padeh "in [his] effort to collect money due to [him]" in the Corcoran matter. There can be no serious question that the perjury investigation was part of that "effort." In Scarola's own words, the investigation was initiated as a "flank attack" to defeat Padeh's claims. *See supra* pp. 11-12. Moreover, Padeh could not continue to pursue his claims, and thus potentially obtain the recovery from Corcoran that was the object of the representation, without first resolving issues arising in the perjury investigation. As Richard Scarola himself put it, the

judge put Padeh's claims "on ice" until the perjury investigation was resolved. *See id.*

Because the perjury investigation was a "necessary step" in Padeh's effort to recover from Corcoran, and an "impediment" that had to be removed in order for Padeh to prevail, the contingency-fee provision of the retainer agreement necessarily covers Scarola's work on that investigation. *See* 1B Carmody-Wait 2d § 3:540; *Darrin*, 143 A.D. at 937-38. Indeed, the agreement tracks this well-settled law by expressly providing that the contingency-fee arrangement covers all "work addressed to issues *necessary or in aid of* [Padeh's] claims as plaintiff." (R. 972 (emphasis added)). Given that unambiguous language, it is not reasonable to read the retainer agreement to require Padeh to pay additional hourly fees for Scarola's work on the perjury investigation.

Furthermore, and fatally for the judgment below, the contract contains no "clear and express language to the contrary." *Ellis*, 193 Misc. at 958. The provision authorizing hourly fees for "outside" services does not specifically carve out the perjury work from Scarola's general compensation. And as explained, the contract expressly states that "outside" services do "*not* include work addressed to issues necessary or in aid of [Padeh's] claims as plaintiff." (R. 972 (emphasis added)). Had Scarola

wanted to ensure that its services with respect to the perjury inquiry were excluded from the contingency-fee arrangement, it could easily have done so with express language in the retainer. *Cf. Richland*, 81 N.Y.S.2d at 737 ("It is a simple matter for the attorney to provide in the retainer for the possibility of having to defend a claim against his client."); *Maiullo*, 16 Mich. App. at 233-34, 167 N.W.2d at 851 ("[I]f the plaintiffs expected to be compensated for achieving the relinquishment of such potential counterclaims, such purpose should have been spelled out with particularity."). Indeed, Scarola had every opportunity to include that language, because the Scarola-Padeh Agreement was signed months *after* the perjury inquiry had gotten under way. *See supra* pp. 11-13. Absent such a carve-out, the contingency-fee provisions must be construed to encompass Scarola's work on the perjury inquiry.

The fact that the dispute in question was a perjury claim in a sanctions proceeding, and arguably not foreseeable at the outset of the representation, does not change the result. If an unforeseen sanctions dispute had arisen in discovery on one of Padeh's affirmative claims, there is no question that such work would have been within the scope of Scarola's contingency-fee compensation. *See Hamilton v. Ford Motor Co.*, 636 F.2d 745, 746-48 (D.C. Cir. 1980) (holding that law firm was "contractually obligated" under

its retainer agreement, which provided that firm would "represent [the client] against whomsoever may be liable in [her] claim for damages," to undertake services "relating to abuses of the discovery process," including sanctions proceedings). A perjury investigation is simply one of the many unanticipated "vicissitudes of the case" that a contingency-fee attorney must deal with under a contingency-fee arrangement. *Corcoran v. Geo. Kellogg Struc. Co.*, 179 A.D. 396, 399 (4th Dep't 1917) (contingency-fee attorney's "contract rights" to compensation "[are] not only subject to the client's control of the case but also to the vicissitudes of the case"); *Spellman*, 4 A.D.2d at 216 (contingency-fee attorney's ultimate compensation is subject to "the ordinary hazards of litigation").

Nor does it matter that the perjury investigation arose from the third-party claims. Scarola did not argue—and could not have argued—that work on Corcoran's counterclaims was beyond the scope of the contingency-fee arrangement in the retainer agreement. *See Richland*, 81 N.Y.S.2d at 737. Indeed, it was undisputed that Scarola undertook to work on the counterclaims against Padeh as part of the contingency-fee arrangement. *See supra* pp. 9-10. But the third-party claims here were mirror images of the counterclaims. *See supra* pp. 6-7. Indeed, Richard Scarola testified that the reason the firm did not do its own work on the discovery relating to the

counterclaims was so as not to be "duplicative" of TDG's work against the third-party claims. (R. 464/Tr. 382:9-19 ("[W]hatever there was there was a nominal sub part of what [TDG] was dealing with and there was really nothing [else] to do.")). In these circumstances, there is no rational way to distinguish between work on the counterclaims and the third-party claims for purposes of defining the scope of the contingency-fee representation. Because the contingency-fee provision concededly covered work on the counterclaims, it must be read cover the third-party claims as well.

In any event, representation in the perjury investigation was squarely within the scope of Scarola's contingency-fee provision because Padeh's claims could not go forward unless and until the perjury investigation was resolved. As explained above, where work on a collateral matter is necessary for the plaintiff to obtain relief, a retainer agreement covering representation of a plaintiff's claim necessarily extends to such work. *See Darrin*, 143 A.D. at 937-38; *Ellis*, 193 Misc. at 958; *Richland*, 81 N.Y.S.2d at 737. That must especially be so where, as here, the agreement expressly states that the lawyer will represent the client on a contingency basis for all work "necessary or in aid of" that claim.

Finally, to the extent this Court were to conclude that the retainer agreement's provision for hourly fees "outside of pursuit of your claims in

the Matter" creates an ambiguity about Scarola's compensation for work on the perjury investigation, that ambiguity must be resolved in favor of Padeh as a matter of law. That is the approach mandated by the Court of Appeals. *See Shaw*, 68 N.Y.2d at 176 (observing that "[t]he importance of an attorney's clear agreement with a client as to the essential terms of representation cannot be overstated;" thus, "[w]hile, in the law generally, equivocal contracts will be construed against the drafters," that principle applies with particular force in the context of retainer agreement drafted by attorneys); *see also Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210, 213 (1968) ("Unquestionably, it is the law of this State that an agreement between a client and his attorney will be construed most favorably for the client."); *In re Raymond*, 214 A.D. 622, 625 (1st Dep't 1925) ("Having been drawn by [the attorney], any ambiguity [about the scope of the retainer] must necessarily be resolved against him.").

The Court in *Shaw* construed a retainer agreement that "speaks only of prosecuting or adjusting a claim for damages," with no mention of appeal. 68 N.Y.2d at 177. The Court determined that that language could reasonably be read to include or to exclude work on appeal, and held that, where two competing interpretations of a retainer agreement are reasonable, "*[i]n such event* the law requires that an agreement between client and

attorney be construed most favorably for the client." *Id.* (emphasis added). Accordingly, "the mandated interpretation" in *Shaw* was determined by the reasonable interpretation advanced by the client. *Id.*; *accord Trief v. Elghanayan*, 251 A.D.2d 123, 123 (1st Dep't 1998) (holding that law firm was entitled to no recovery when the principal effect of settlement was that "the status quo ante was restored" and that, "insofar as that part of the parties' retainer agreement providing that plaintiffs' fee was to be '12 ½% of any recovery, whether in cash, property or property interest' is ambiguous, it must be interpreted against plaintiff law firm, the retainer agreement's drafter, and in favor of defendant"); *Samuels v. Simpson*, 144 A.D. 466, 469 (1st Dep't 1911) ("An attorney ought to have his agreements with his clients so plain as not to require construction, and even though the client has independent advice, we think that doubtful clauses are to be construed most strongly against the attorney."), *aff'd*, 207 N.Y. 643 (1912) (per curiam).

Similarly here, if the Scarola-Padeh Agreement were ambiguous on the question whether the contingency-fee arrangement covered Scarola's work on the perjury investigation, the mandated interpretation must be the reasonable interpretation advanced by Padeh, *i.e.*, that Scarola's compensation for the perjury work was covered by the contingency-fee

arrangement. The judgment on the First Cause Of Action must therefore be reversed and the claim dismissed.

CONCLUSION

For the reasons set forth above, the judgment on the First and Fourth Causes Of Action should be reversed, and those causes of actions should be dismissed.

Dated: August 20, 2013

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

SCAROLA ELLIS LLP,

Plaintiff-Respondent,

Index No. 113781/09

-against-

CIVIL APPEAL PRE-ARGUMENT STATEMENT

ELAN PADEH,

Defendant-Appellant.

----------X

1. Title of action:

   Scarola Ellis LLP v. Elan Padeh

2. There has been no change in the title of the action.

3. Individual name, law firm name, address, and telephone number of counsel for each appellant:

   Leland Stuart Beck, Esq.
   Beck & Strauss, P.L.L.C.
   50 Charles Lindbergh Boulevard, Suite 205
   Uniondale, New York 11553
   (516) 228-8383

4. Individual name, law firm name, address, and telephone number of counsel for each respondent:

   Alexander Zubatov, Esq.
   Scarola Malone & Zubatov, LLP
   1700 Broadway, 41st Floor
   New York, NY 10019
   (212) 757-0007

5. Court and County from which appeal is taken:

   Supreme Court, New York.

6. Appeal is from a Judgment entered on December 27, 2012.

7. There is no related action or proceeding now pending in any Court of this or any other jurisdiction.

8. The nature and object of the cause(s) of action or the special proceeding:

   Breach of Contract and unjust enrichment. Plaintiff sought money damages.

9. Result reached in the court or administrative body below:

   The jury found that Appellant accounted to Respondent for the full value of benefits received when he ended his case against the Corcoran Group. The jury also found that the Appellant was unjustly enriched in the amount of $172,113.36. The jury awarded Respondent $62,290.35 for additional hourly charges for services.

10. Grounds for seeking reversal, annulment, or modification:

    Respondent did not make a prima facie case for liability or damages for unjust enrichment or hourly fees. Also, the amount of damages awarded to Respondent were speculative and excessive.

11. There is no additional appeal in this action.

Dated: January 3, 2013

Appellant Counsel

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