To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

SCAROLA ELLIS LLP,

Plaintiff-Respondent,

—against—

ELAN PADEH,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The jury awarded Scarola damages under a quasi-contract liability theory despite the existence of an indisputably valid retainer agreement specifying the amount of Scarola's compensation. The law is clear: the retainer agreement defines Scarola's compensation and precludes a quasi-contract claim as a matter of law. And that rule applies with full force to an attorney's fee dispute where, as here, the client exercised his absolute right to settle over his attorney's objection.

Scarola does not—because it cannot—dispute that settled law. Instead, it claims the jury did exactly what the law requires. According to Scarola, the jury "enforced" the contingency-fee agreement by applying its contingency percentage (20.5%) to the value of one non-cash "benefit" that Padeh received in the settlement—namely, avoiding the cost of potential perjury sanctions. The jury, we are told, simply used the unjust enrichment "label" to award those "correctly calculated" contract damages.

The Court cannot affirm on this basis. A jury award cannot rescue a legally deficient claim that should never have gone to the jury in the first place. Scarola's extended defense of the jury's "correct" damages calculation ignores this basic, and fatal, proposition. Moreover, Scarola's argument is indefensible on its own terms. The jury was not "enforcing" the

retainer agreement—it *specifically rejected* Scarola's breach of contract claim. Scarola did not appeal that factual finding, and even if it had, this Court has no power to find a breach of contract in the first instance. Furthermore, causes of action are not mere "labels." They define the theory of liability and the kind of relief that a jury properly may award. Here, the jury awarded damages to Scarola on the theory that equity required Padeh to return "benefits" he received in the settlement. Whatever metric the jury used to calculate those damages, the damages did not and could not "enforce" the contract.

Scarola's remaining efforts to defend the unjust enrichment claim go nowhere. It argues that Padeh waived its argument on appeal by not objecting to the "form" of the verdict sheet. But as Scarola concedes, Padeh expressly argued below that the quasi-contract claims should not have been submitted to the jury. No more was required. Scarola also argues that there is evidence from which the jury could have concluded that Padeh "abandoned" his case. But Padeh's indisputably valid settlement did not cease to be a settlement just because Scarola was unsatisfied with its share, and this Court's precedents would be rendered meaningless if it did. Finally, Scarola's half-hearted argument that it was "effectively discharged" fails because quasi-contract relief is only available for *actual* discharge, and

Scarola was never discharged from representing Padeh in his claim against Corcoran. In addition, the exclusive claim for a discharged attorney is quantum meruit, which the jury rejected here.

The unjust enrichment award cannot stand. If the principle on which the award rests became the law, it would seriously interfere with the client's absolute right to settle, turn the contingency-fee relationship into an unreasonable, risk-free proposition for lawyers, and prioritize the lawyer's economic interest over the client's. Scarola says none of that will happen because the award simply "enforced" the agreement. But the jury awarded Scarola equitable compensation *beyond* the contract price, and by Scarola's own account, easily could have awarded more. Despite Scarola's effort to minimize its impact, the threat that this jury award poses is very real.

Finally, this Court should reverse the judgment on Scarola's breach of contract claim for hourly fees for work on the perjury investigation. Scarola claims that the retainer agreement unambiguously authorizes such charges, but it does not. And to the extent there is any ambiguity, settled canons of construction—which Scarola ignores—require the ambiguity to be resolved as a matter of law in Padeh's favor.

ARGUMENT

I. THE UNJUST ENRICHMENT CAUSE OF ACTION IS LEGALLY DEFICIENT AND SHOULD NOT HAVE GONE TO THE JURY

Scarola's primary theory on appeal is that the judgment should be affirmed because the jury awarded the "correct" damages under the unjust enrichment "label." (*See* Brief For Plaintiff-Respondent ("Pl.'s Br.") at 40, 43). According to Scarola, the "crucial question" is "*not* what theory of liability is employed . . . but rather, *how the damages are calculated*." (*Id.* at 42-43). And in Scarola's view, the jury "correctly calculated" the damages because it awarded Scarola the percentage of the value of the settlement specified in its retainer agreement—the very measure of recovery Padeh claims must control. (*Id.* at 44).

A. An Express Agreement Bars An Unjust Enrichment Claim Covering The Same Subject Matter

The primary reason Scarola's theory fails is that the jury never should have considered the unjust enrichment claim. We demonstrated in our opening brief that under settled and controlling precedent, a quasi-contract cause of action is foreclosed as a matter of law when the subject matter of the claim is governed by an express contract. (*See* Brief For Defendant-Appellant ("Def's Br.") at 26-27); *and see, e.g.*, *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987). That case law is fatal to

the judgment below and requires dismissal of the unjust enrichment claim. Two written retainer agreements govern the subject matter of Scarola's compensation in the underlying case. (Def.'s Br. 34-35). The validity of one of those agreements, the Scarola-Zelma Agreement, was never contested below. (*Id.* at 35 & n.11).[1] Thus, Scarola's quasi-contract claims against Padeh should have been dismissed before this case was ever sent to the jury.[2]

Scarola conspicuously fails even to cite *Clark-Fitzpatrick*, or any of the dozens of cases in the Court of Appeals and this Court standing for the same inescapable proposition. Its entire argument amounts to an effort to save the unjust enrichment claim based on the purported reasonableness of the jury's damages award. But the controlling law that Scarola ignores holds

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[1] Scarola does not contest our showing that this indisputably valid agreement protects Padeh from a quasi-contract claim on the same subject matter even though he was not a party to it. (Def.'s Br. 34-35 & n.10).

[2] The claim should also have been dismissed under the Scarola-Padeh Agreement. Although Scarola mentions in passing that that agreement was at one point challenged by Padeh's duress claim (Pl.'s Br. 49), it does not dispute that, as we have explained, the jury ultimately found the agreement enforceable (Def.'s Br. 35 n.11). At that point, the Scarola-Padeh Agreement became an independent legal barrier to quasi-contract relief. *A. Montilli Plumbing & Heating Corp. v. Valentino*, 90 A.D.3d 961, 962 (2d Dep't 2011) (unjust enrichment award barred after determination by factfinder that contract was valid and enforceable); *Schwartz v. Pierce*, 57 A.D.3d 1348, 1352 (3d Dep't 2008) (same); *see also Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 263 (2d Cir. 1999).

that the "theory of liability" *is* the "crucial question," and that a quasi-contract theory of liability is impermissible when the subject matter of the claim is governed by an express, valid contract. *See Clark-Fitzpatrick*, 70 N.Y.2d at 388-89; *see also Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012) (stating that "an unjust enrichment claim *is not available* where it simply duplicates, or replaces, a conventional contract . . . claim" (emphasis added)).

We also demonstrated that *In re Winkler*, 154 A.D. 532 (1st Dep't 1913), and its progeny, stand for the unwavering proposition that the compensation of a contingency-fee lawyer whose client settles over his objection must be determined by the terms of the retainer agreement, and recovery on a quantum meruit theory is therefore foreclosed as a matter of law. (Def.'s Br. 22-26 (discussing cases)).

Scarola attempts to spin the *Winkler* line of cases as standing for the limited proposition that quasi-contract relief is prohibited only if it is "*more than* the contingency-fee share called for by the parties' contract." (Pl.'s Br. 40). While many of these cases involve the fact pattern of an attorney seeking to increase his compensation through a quasi-contract cause of action, they do not hold that the retainer agreement is merely a cap on

recoverable fees.[3] Instead, the point of these cases is that the retainer agreement *defines* the recovery, and a quasi-contract measure of recovery is prohibited, *whatever the amount*. (*See* Def.'s Br. 22-26).[4]

In fact, Scarola neglects to mention that two of these attorney's fees cases expressly rely on the rule articulated by the Court of Appeals in *Clark-Fitzpatrick*. *See Jontow v. Jontow*, 34 A.D.2d 744, 745 (1st Dep't 1970) (principle that, "[w]here there is an express contract for compensation an action will not lie for *quantum meruit*," is "applicable to the awarding of attorney's fees"); *Jaffe & Asher LLP v. Ross*, No. 125616/02, 2003 WL 25520435 (N.Y. Sup. Ct. Nov. 10, 2003) (applying *Clark-Fitzpatrick* to bar law firm's quasi-contract cause of action), *aff'd*, 6 A.D.3d 357 (1st Dep't 2004). Indeed, all this Court's cases following *Winkler* must be interpreted the same way or they would conflict with *Clark-Fitzpatrick*. (Def.'s Br. 27).

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[3] In any event, this case presents exactly that fact pattern. As we explain below, the jury conclusively determined that Scarola was not entitled to *any* additional compensation under its retainer agreement. Thus, on Scarola's own erroneous reading of this case law, it cannot use a quasi-contract theory of liability to recover "more than" what it was owed under the contract.

[4] To illustrate the point, one of these cases—which Scarola mischaracterizes as prohibiting quasi-contract damages only in excess of the contract price (Pl.'s Br. 41)—in fact holds that quasi-contract theories may not be used to *reduce* the fees that an attorney is entitled to receive under his retainer agreement. *See Murray v. Waring Hat Mfg. Co.*, 142 A.D. 514, 516-17 (2d Dep't 1911) (quantum meruit theory could not be used to reduce attorney's entitlement to a 40% contingency-fee recovery).

These cases confirm that the quasi-contract claim in this case should have been dismissed as a matter of law, and the jury should never have even considered it. A damages award based on that legally deficient claim—however calculated—is by definition invalid.[5]

Against the weight of this precedent, Scarola points to two cases that it claims permit quasi-contract liability in the face of a valid retainer agreement. These cases do not and could not stand for that proposition. Instead, they involve situations—such as abandonment, fraud or discharge—that are recognized, narrow exceptions to the general rule. *See Scarola Ellis LLP v. Birnbaum*, No. 0106199/2007, 2008 WL 3847326 (N.Y. Sup. Ct. Aug. 6, 2008) (dismissing quasi-contract claims under abandonment doctrine, and also noting that the purported "settlement" was procured through fraud);[6] *Unger v. Greenhut*, 183 F.2d 381, 382 (2d Cir. 1950)

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[5] Scarola asserts that *Lefkowitz v. Leblang*, 187 N.Y.S. 520 (1st Dep't 1921), permitted a quantum meruit cause of action notwithstanding the existence of a valid retainer agreement. (Pl.'s Br. 41-43). The opinion is clear, however, that the attorney brought a *breach of contract* cause of action, and sought a quantum meruit form of *recovery* as a remedy for the alleged breach. 187 N.Y.S. at 521 (attorney argued that defendants "*violated the [retainer] agreement* by settling the case without his consent" (emphasis added)). And the holding of the case, consistent with all the authorities discussed above, is that the retainer fixed the attorney's compensation, and quasi-contract recovery in the form of quantum meruit was impermissible. *Id.*

[6] The unpublished opinion in *Birnbaum* does not discuss *Clark-Fitzpatrick* or any of the other controlling precedents discussed above. Thus, to the

(permitting quasi-contract claim where attorney was discharged). None of these exceptions applies here. *See infra* Point I.C.2 & I.C.3. Scarola's cases provide zero support for the proposition that an attorney generally may proceed in quasi contract despite the existence of a valid retainer agreement.

B. Scarola's "Correctly Calculated" Damages Theory Is Indefensible

Because Scarola's unjust enrichment claim is legally deficient and should never have gone to the jury in the first place, the jury's purportedly "correct" damages calculation cannot save the judgment below. That is sufficient to reverse. But there are five additional reasons to reject Scarola's "correctly calculated" damages theory on appeal.

1. At core, Scarola's theory is an impermissible attack on the jury verdict rejecting Scarola's breach of contract claim. Scarola surmises that "the jury calculated damages" by "awarding SE its agreed-upon 20.5% contingency *to the penny*" of "specific financial, non-cash benefits Padeh received by ending the case" against Corcoran—namely, the purported "benefit of avoiding for his company a $839,566.37 sanction." (Pl.'s Br. 30-31). But the jury *rejected* the claim that Padeh breached the retainer

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extent it can somehow be read to hold that an attorney dissatisfied with a good-faith settlement may proceed in quasi contract, notwithstanding the existence of a valid retainer agreement, the case is wrongly decided.

agreement by failing to pay Scarola its claimed percentage of those benefits. (R. 855/Tr. 728:12-19; Def.'s Br. 20-21). The jury thus necessarily found that Scarola received everything it was entitled to receive under the contingency-fee agreement when Padeh paid the firm its 20.5% of the $200,000 settlement recovery. Scarola's theory that it should get *additional* compensation pursuant to "its agreed-upon 20.5% contingency" is at war with that factual finding.

Scarola never expressly asks this Court to overturn that finding, nor could it. *See Hecht v. City of New York*, 60 N.Y.2d 57, 63 (1983) (Appellate Division has no jurisdiction to grant affirmative relief to a party who does not cross-appeal). Instead, it studiously avoids mentioning the jury's finding and simply asserts—over and over again—that the jury determined Padeh was obligated to pay Scarola its agreed-upon contingency percentage of the additional "benefits" he received.[7] Of course, the jury expressly made the opposite determination. This Court should not be deceived. To accept Scarola's argument would require the Court impermissibly to *disregard* that

[7] (*See also, e.g.*, Pl.'s Br. 47 (arguing unjust enrichment jury verdict was "proper and should be affirmed" because jury "award[ed] SE its *agreed-upon contingency-fee percentage of benefits* Padeh received for ending the case" (emphasis added))); *id.* at 38 (claiming that jury award for unjust enrichment is "plainly calculated to *enforce the contingency-fee bargain*" (emphasis added))).

determination and substitute its own factual finding that Padeh breached the retainer agreement. But this Court "does not have the power to make new findings of fact in a jury case." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498 (1978).

2. Scarola's argument, if accepted, would make the special verdict in this case—and in any case—pointless. Special verdicts are *premised* on the principle that the theory of liability matters on appeal. Indeed, they are designed to serve a clarifying function so that the appellate court can determine whether the jury's verdict on each cause of action rests on a legally sufficient ground. *See* David D. Siegel, New York Practice §399 (5th ed. June 2013). But under Scarola's mix-and-match approach to appellate review, the Court can simply ignore the jury's stated findings on the verdict sheet and instead decide whether the damages awarded under any cause of action—legally valid or not—seem reasonable. That is not the law.

3. Scarola's argument is also inherently nonsensical. Scarola claims that an attorney may "recover *on its contingency-fee contract* on theories labeled as quasi-contractual." (Pl.'s Br. 43 (emphasis added)). But the very statement is a contradiction: recovery in quasi-contract is available only in the absence of a valid contract. *See Clark-Fitzpatrick*, 70 N.Y.2d at 388 (holding that "[a] 'quasi contract' only applies in the absence of an

express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment"). Moreover, there is no such thing as a "correctly" calculated damages award divorced from an underlying cause of action. The cause of action dictates what remedies are available and how they are to be calculated. Accordingly, the jury here was instructed to calculate damages based on the particular liability theory associated with each cause of action. (*E.g.*, R. 847/Tr. 720:10-13 ("The basic principle of damages in a contract action is to leave the injured party in as good a position as it would have been if the contract had been fully performed."); R. 848/Tr. 721:14-21 (instructing jury that, "[w]hen one person has obtained money or property from another under such circumstances and in good conscience it should not be retained, the law imposes a duty to repay or return it," and jury may consider "the extent to which defendant has been unjustly enriched")). Thus, when Scarola asserts that the jury "correctly" calculated damages as a contingency percentage of the settlement benefits, the word "correctly" presupposes that Scarola was actually *entitled* to receive those damages on the contract. But as discussed, that is precisely what the jury rejected. Try as it might, Scarola cannot escape the critical importance of the underlying liability theory to the "correctness" of the damages calculation.

4. Moreover, Scarola has nothing more than speculation, based on post hoc arithmetic, that the jury's "intent" was to enforce the contract. (Pl.'s Br. 44). The arithmetic shows nothing. Perhaps the jury thought it harsh that Scarola was not entitled to additional compensation under the retainer agreement (which the jury found), and so used the unjust enrichment cause of action as a compromise vehicle to give Scarola something more. Perhaps it had some other reason, or no reason at all. No one knows. And that is precisely why the question on appeal is whether the award is based on a legally valid cause of action, not whether it looks "correctly" calculated under some other cause of action.[8]

5. Finally, Scarola's theory that it was entitled to recover these "benefits" under the retainer agreement is wrong as a matter of contract law.[9] Thus, even if the breach of contract claim were somehow part of this

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[8] Scarola's cited cases reconciling allegedly inconsistent interrogatories, misitemized damages, and other technically defective verdicts are not relevant. (*See* Pl.'s Br. 44-47). Padeh does not appeal on any of those grounds. The cause of action underlying the award was barred as a matter of law, and *any* damages awarded are legally impermissible. *See supra* Point I.A.

[9] It is also wrong as a matter of unjust enrichment law. Through that otherwise deficient cause of action, Scarola exclusively sought to recover benefits that, by its own account, were conferred on Padeh by third parties, and not directly by Scarola. (Pl.'s Br. 43-44; *see also id.* at 25). Although those benefits undoubtedly "flowed from" Scarola's work on the case, they were conferred by third parties, and thus "cannot be said to be benefits

appeal, this Court would be compelled to reject it. Scarola contracted to receive a contingency share "of the *sum recovered* by suit, settlement or otherwise." (R. 1805 (emphasis added)). But absent an agreement to the contrary, an attorney's contingency percentage of the sum recovered by the client does not include, for example, the value of counterclaims avoided by settling. *Fields v. Leeponis*, 95 A.D.2d 822, 823 (2d Dep't 1983); *Richland v. Bramnick*, 81 N.Y.S.2d 735, 736-37 (N.Y. Sup. Ct. 1948). Similarly, Padeh's avoided sanctions cannot be included in the "sum recovered," because they were not part of what Padeh "actually collected" in the settlement. Laura Hunter Dietz et al., 1B Carmody-Wait 2d §3:500 (attorney's "percentage of the recovery" means "that percentage of the amount collected"); *In re Lahm*, 179 A.D. 757, 760 (1st Dep't 1917) (same), *aff'd*, 223 N.Y. 573 (1918) (per curiam).

Scarola ignores this case law. Instead, it argues that "non-monetary consideration" must be included in the amount "recovered" by the client. (Pl.'s Br. 30-34). To be sure. But the cost of avoided sanctions is not the same thing as "non-monetary consideration"—the latter is actually collected by the client as part of the settlement, the former is not. Scarola does not

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bestowed on defendants for which plaintiffs should have been compensated or to which plaintiffs were entitled." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 121 (1st Dep't 2009).

cite a single case authorizing a contingency-fee recovery based on the value of avoided costs.[10]

C. Scarola's Remaining Arguments Are Without Merit

1. Padeh Specifically Challenged The Quasi-Contract Claims Below

Scarola argues that Padeh is "precluded from raising his present challenge" to the quasi-contract claims because, it asserts, Padeh did not object to the form of the verdict sheet. Specifically, Scarola says that Padeh should have asked for an instruction that the jury could consider the quasi-contract claims only if it first found the Scarola-Padeh Agreement invalid on the ground of duress. (*Id.* at 48). Instead, the verdict sheet presented the quasi-contract claims as alternatives to breach of contract.

This is frivolous. The principal basis for Padeh's argument that the claims should not go to the jury was the *Scarola-Zelma* Agreement—not the Scarola-Padeh Agreement. And Padeh's legal argument under the Scarola-Zelma Agreement, the validity of which has never been contested, was that

[10] Scarola points to *Ross*, but that court merely observed that the law firm there was seeking to recover at trial a contingent percentage of several "non-cash" components of the settlement, including the value of a withdrawn counterclaim. 2003 WL 25520435; (Pl.'s Br. 33). The Court did not hold that a contingency-fee lawyer is entitled to a percentage of the value of a withdrawn counterclaim. Indeed, there is no indication that the court in *Ross* considered, or was asked to consider, that question or the authorities we cite above resolving the question against the attorney.

the quasi-contract claims should not be on the verdict sheet at all.

Indeed, Padeh made that exact argument for dismissal below, and referenced that exact argument in the conference on the verdict sheet. (Def.'s Br. 20; R. 723/Tr. 616:20-724/Tr. 617:6). Yet the court below rejected the argument. Having unsuccessfully asked the court to dismiss the quasi-contract claims outright under the indisputably valid contract, it would have been futile to object *again* that the form of the verdict sheet improperly instructed the jury that the quasi-contract claims were permissible alternative theories of recovery. Scarola cites no authority requiring Padeh to do more, and the C.P.L.R. do not require it. *See* N.Y. C.P.L.R. 4017 (providing that "[f]ormal exceptions . . . are unnecessary" and requiring only that a party "make known . . . his objection to the action of the court"); *id.* 5501(a)(3) (providing for review of "any ruling to which the appellant objected" and "any charge to the jury . . . to which he objected"); *Freyer v. Gangi*, 42 A.D.2d 832, 833 (4th Dep't 1973) (challenge preserved where parties "had made every reasonable effort to have the court correct its [error] and were entitled to conclude that any further effort by them would be futile").[11] The argument was preserved.

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[11] Scarola cites *Sam v. Town of Rotterdam*, 248 A.D.2d 850 (3d Dep't 1998), for the uncontroversial principle that an issue must be "first raised" below. (Pl.'s Br. 49-50). Padeh raised the issue below.

2. Scarola Cannot Avoid A Valid Settlement By Calling It An "Abandonment"

Scarola peppers its brief with the notion that "the jury could have concluded" based on the evidence that Padeh "abandon[ed]" his case, thus entitling Scarola to "quasi-contractual recovery." (Pl.'s Br. 50-51; *see also id.* at 6, 24-25, 31 n.8, 39-40, 40 n.8). Crucially, however, Scarola never says—because it cannot say—that the settlement Padeh entered into was somehow legally invalid or not binding. To the contrary, Padeh, TDG and Corcoran released their claims against each other in good faith, and Padeh got $200,000 of real money, among other benefits, from the settlement. (Def.'s Br. 15-17, 38-39).

Scarola does not contest that the dividing line is between abandonment and settlement, as this Court has expressly recognized. *See In re Spellman*, 4 A.D.2d 215, 217 (1st Dep't 1957); *Ross*, 2003 WL 25520435; (Def.'s Br. 39). And as we explained, we are not aware of a single New York case that has permitted a lawyer to proceed in quasi contract against his client in the face of a valid settlement agreement. (Def.'s Br. 40). Scarola identifies no such case.

Scarola nonetheless insists that the question whether a concededly valid settlement agreement constitutes an "abandonment" is a question of fact. And it says that the testimony about the predicted value of the case

against Corcoran as compared to the settlement amount is sufficient evidence to permit a finding of abandonment "within the meaning of the caselaw." But again, it cites no case law. (Pl.'s Br. 51).[12]

In fact, the case law is squarely to the contrary. This Court has consistently limited attorneys to recovery under their contingency-fee agreements no matter how low the settlement, no matter how much money and time the lawyer has spent on the case, and no matter what lofty expectations the lawyer might have had of a payout. *Spellman*, 4 A.D.2d at 216-17 (rejecting attorney's claim to twice his contingency amount, even where "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"); *Winkler*, 154 A.D. at 533-34 (where suit with "alleged value of upwards of $8,000" settled for approximately $2,000, attorney's

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[12] Scarola also impugns Padeh for settling his case for personal and financial reasons, including being stressed and sick, unconnected with the merits of the case. (Pl.'s Br. 51-52). This cannot count as abandonment. Settlements can and do occur for emotional reasons, or to spare the costs of litigating a frivolous case. *See Ross*, 2003 WL 25520435 (restricting law firm to contingency share of settlement the client entered into for "personal and family reasons," and where the client's explicit instruction was to settle "regardless of the amount recovered") *aff'd*, 6 A.D.3d at 357; *and see, e.g.*, Robert L. Haig, 3 New York Practice Series, Commercial Litigation in N.Y. State Courts § 34:2 (3d ed.); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 340-41 (E.D.N.Y. 2010).

recovery restricted to $625, or half the value of his services); *Ross*, 2003 WL 25520435 (law firm that worked on case it valued in the "millions of dollars" up to trial restricted to contingency share of $350,000 settlement); *see also In re Levy*, 249 N.Y. 168, 169-70 (1928) (lawyer restricted to contingency-fee share of $2,000 settlement following a judgment of $12,500); (Def.'s Br. 23-25, 39-40).

Ultimately, Scarola offers no objective basis for deciding how low a settlement must be before crossing the line into "abandonment." There is none. And that is precisely why there must be a bright line between settlement and abandonment for this Court's settlement precedents to have any meaning. If a lawyer objects to the client's decision to settle the case for an amount the lawyer deems too low, how is the client supposed to know whether he is exercising his "absolute right" to settle, or whether he will instead be dragged into court, as here, for "abandoning" the case and "cheat[ing] his contingency-fee attorney?" (Pl.'s Br. 39). The specter of litigation over whether a settlement value is "too low" would place unacceptable coercive pressure on the client's absolute right to settle, and thus violate New York's public policy governing the attorney-client relationship. *See In re Cooperman*, 83 N.Y.2d 465, 472-73 (1994); *infra*

Point I.D.[13]

Finally, as we have explained, quantum meruit is the exclusive cause of action for an abandonment case. There is no precedent for an attorney in an abandonment context to seek damages from his client under an unjust enrichment cause of action, which—unlike quantum meruit—is not restricted to the reasonable value of the services. (Def.'s Br. 38-39 n.13). In addition, while Scarola acknowledges that an abandonment cause of action is "based on the reasonable hourly value of [the attorney's] services" (Pl.'s Br. 50), it elsewhere in its brief expressly disavows that its unjust enrichment claim sought that relief (*id.* at 43-44). By Scarola's own logic, then, the unjust enrichment award cannot be affirmed on an "abandonment" theory.

Scarola's only response is to say that the proven value of its services under its quantum meruit claim was more than the award it is asking this Court to affirm. (*See id.* at 52 n.9). This is of no moment. The jury *rejected* Scarola's quantum meruit claim, and Scarola cannot defend the unjust

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[13] Scarola objects that this would permit the client to settle a $1 million case for one dollar. (Pl.'s Br. 51). But the client's right to settle is "absolute," *Levy*, 249 N.Y. at 170, not "near-absolute" (Pl.'s Br. 39). In any event, the question whether a settlement can be so nominal as to not count as a legitimate settlement is not presented here. The settlement here was for $200,000—real money on any account.

enrichment award on that different legal theory. *See supra* Point I.B.1. Unjust enrichment is simply the wrong cause of action for Scarola's deficient "abandonment" theory.

3. Scarola Cannot Defend The Unjust Enrichment Verdict On The Ground It Was "Effectively" Discharged

In its final grasp at quasi-contract recovery, Scarola asserts that it was "effectively" discharged by Padeh before the litigation settled. (Pl.'s Br. 52). But Scarola cannot defend the unjust enrichment claim on this basis. A discharged attorney has no claim to a contingent percentage of the recovery—which is what Scarola claims the jury awarded it below—absent a new agreement by the client. *See, e.g.*, *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 457-58 (1989); *Reubenbaum v. B. & H. Express, Inc.*, 6 A.D.2d 47, 48 (1st Dep't 1958). And absent such an agreement, quantum meruit is the *exclusive* remedy for a discharged attorney to bring against his former client. *King v. Fox*, 7 N.Y.3d 181, 192 (2006); 7 N.Y. Jur. 2d *Attorneys at Law* §269. But the jury found *against* Scarola on quantum meruit, and Scarola did not cross-appeal. Thus, this Court has no power to conclude that Padeh is liable under a quantum meruit cause of action. *See supra* Point I.B.1.

Even if quantum meruit were somehow before this Court, Scarola's "effective[]" discharge theory fails. There is no such thing as "effective[]"

discharge. Scarola's own cited authority requires "an unmistakable purpose to sever relations." *Costello v. Burskin*, 58 A.D.2d 573, 577 (2d Dep't 1977) (citation omitted); (*see also* Pl.'s Br. 53 (citing *Costello*)). And Scarola cites no evidence of an "unmistakable purpose."[14]

Principally, it relies upon a one-sentence email from Padeh saying he did not want to pay two lawyers. (*See* R. 1639). But Richard Scarola's response and Zelma's reply demonstrate, as Scarola concedes in its brief, that the subject matter of that purported "discharge" was expressly limited to Scarola's work on the perjury investigation. (*See* Pl.'s Br. 22; *see also* R. 1650; R. 389/Tr. 323:20-390/Tr. 324:3 (Richard Scarola testifying that Scarola was "no longer going to be acting as Elan's attorneys *on the perjury stuff*" (emphasis added))). In fact, Richard Scarola denied that Padeh ever told him that he was "not his lawyer" and "did not want [Scarola] representing him." (R. 540/Tr. 458:8-13; *see also* R. 540/Tr. 458:18-19 (testifying that "we were never fired," and distinguishing email exchange about the perjury work)). Given Scarola's insistence then and now that the perjury investigation was unrelated to and outside the scope of the contingency-fee representation, *see infra* Point II, Scarola cannot seriously

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[14] For that reason, *Unger v. Greenhut*, where it was stipulated that the client discharged the lawyer, has no bearing here. *See id.* 183 F.2d at 382.

maintain that this sideshow over which lawyer would handle that investigation somehow terminated the entire attorney-client relationship.

Scarola is left for its discharge theory with the hollow claim that it was discharged because Padeh settled the case without Scarola's participation, which allegedly prevented Scarola from "completing its work." (Pl.'s Br. 52-53). But the principle that a client may settle the case over the objection of his attorney without breaching the retainer agreement, and without subjecting himself to quasi-contract liability, necessarily entails that the client has the right to settle the case without informing or consulting with his attorney. This Court made that clear in *Winkler*. *See* 154 A.D. at 533. If Scarola were right that settling over the attorney's objection amounts to a discharge because it prevents the attorney from "completing its work," the discharge exception to *Winkler* would swallow the rule.

D. Upholding The Jury's Quasi-Contract Award Will Interfere With The Client's Absolute Right To Settle And The Public Policy Governing The Attorney-Client Relationship

As we demonstrated, the rule barring a contingency-fee attorney from suing his client in quasi contract when the client settles over the lawyer's objection is an essential part of the attorney-client relationship. The rule prohibits lawyers from using such a lawsuit to interfere with, and impermissibly chill, their clients' absolute right to settle the case for any amount. It ensures contingency-fee attorneys bear the risk of non-recovery in exchange for the possibility of extraordinary recovery far in excess of hourly rates—a prerequisite for making the contingency-fee arrangement reasonable. And it prevents attorneys from putting their own profit interest over the interest of their clients. (*See* Def.'s Br. 27-34). If this Court were to affirm the unjust enrichment award below, it would give official sanction to a cause of action that has never before been recognized in this State, and which will seriously interfere with these critical features of the attorney-client relationship.

Scarola says that none of that will happen because the jury merely "enforce[d] the contingency-fee bargain." (Pl.'s Br. 38). But as we explained, the jury found that Scarola was fully compensated under the terms of the retainer agreement, and awarded an *additional* $172,113.36 to

Scarola under an equitable, "unjust enrichment" theory. This is exactly the problem: a quasi-contract cause of action permits a jury to penalize the client, beyond his contractual obligation to his attorney, simply for exercising his absolute right to settle over his attorney's objection.

Nor can it help that the jury here awarded Scarola a "comparatively small portion" of the "benefits" that it sought. (*Id.*). Scarola concedes that the jury would have been entitled to award, as unjust enrichment damages, its contingency percentage of "millions in non-cash benefits" that Padeh allegedly received in the settlement. (*Id.*). And it also stood to recover approximately $800,000 for the reasonable value of its services as quantum meruit damages. (*Id.* at 52 n.9). That the jury ultimately awarded less, and rejected the quantum meruit claim, is no answer. The problem is the *threat* of quasi-contract liability over and above the fees specified in the retainer agreement.

If this Court were to affirm the judgment below, every contingency-fee client in New York must worry about the prospect of staggering quasi-contract liability if, like Padeh, he exercises his absolute right to settle over his attorney's objection. And contingency-fee attorneys will undoubtedly leap at the chance to enter into arrangements in which they stand to recover

enormous fees as a percentage of the recovery, but can always fall back on a quasi-contract lawsuit if the contingency percentage turns out to be too low.

The Court can avoid these alarming consequences by applying the law and limiting Scarola to the percentage of the settlement proceeds specified in the retainer agreement—no more and no less.

II. THE FIRST CAUSE OF ACTION SHOULD BE DISMISSED

As we explained, the plain language of the Scarola-Padeh Agreement bars Scarola's claim that Padeh was required to pay additional legal fees for the perjury investigation work. Specifically, Scarola agreed to be paid by contingency fee for its representation of Padeh in his "effort to collect" in the Corcoran "Matter." Under New York law, that language *must* be interpreted to cover all steps "necessary" to advancing Padeh's claim—including the perjury investigation—because there is no clear and express language carving out the perjury investigation for separate payment. (*See* Def.'s Br. 42-45).

To the contrary, the separate hourly rate for work "outside of pursuit of [Padeh's] claims in the Matter" as set forth in the agreement "does *not* include work addressed to issues *necessary or in aid* of [Padeh's] claims as plaintiff." (R. 972 (emphasis added)). Scarola's work on the perjury investigation was "necessary or in aid of" Padeh's claims for the simple and

uncontested reason that Justice Ramos would not let Padeh pursue those claims unless and until the investigation was resolved. The First Cause Of Action for breach of contract must therefore be dismissed.

In response, Scarola contends that it was entitled to hourly fees for this work under the unambiguous language of the agreement. (Pl.'s Br. 58 ("Simply stated, there is no ambiguity.")). But it fails to identify the requisite clear and express language—which it implicitly concedes is the legal standard—to that effect. Scarola harps on the words "as plaintiff" in the phrase "necessary or in aid of [Padeh's] claims as plaintiff," arguing that the perjury investigation was "not part of Padeh's claims as plaintiff." (*Id.* at 56). And it argues that this "as plaintiff" language is what distinguishes this case from the cases cited in our opening brief. (*Id.* at 57-58). The question, however, is what Scarola was obligated to do as a necessary consequence of agreeing to represent Padeh "as plaintiff." And the words "necessary or in aid of," which track New York law, clearly indicate that Scarola was obligated to assist Padeh even in contexts in which he was not acting as a "plaintiff," but which were nonetheless necessary to vindicate his claim "as plaintiff."

That is why, as we pointed out, courts have found that contingency-fee agreements that lack a clear and express provision to the contrary

obligate the attorney to, among other things, prosecute appeals, initiate supplementary proceedings to collect or enforce a judgment, or defend a counterclaim. (Def.'s Br. 42-44). Scarola concedes, as it must, that these tasks are all encompassed by a typical contingency representation agreement, and do not justify additional hourly charges. But none of those tasks involve work for the client "as plaintiff"—an appeal is brought by an "appellant," a supplementary enforcement proceeding is prosecuted by a "petitioner" or "judgment-creditor," and counterclaims are asserted against a "counterclaim-defendant." Scarola tries to distinguish these tasks as "efforts to win" (Pl.'s Br. 57), but that is equally true of Scarola's work on the perjury investigation.[15] The question is whether the task is "necessary or in aid" of vindicating the client's claim as plaintiff—not whether the work itself involves the client in the formal role of "plaintiff."

Nor can Scarola demonstrate an unambiguous intent to exclude the perjury work from the contingency arrangement based on the handwritten note at the end of the Scarola-Padeh Agreement. The note merely says that

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[15] As discussed above, Scarola does not dispute that its work on the counterclaims was covered by the contingency arrangement. Nor does Scarola dispute that the subject matter of the claims, counterclaims, and third-party claims overlapped substantially. (*See* Def.'s Br. 6-7; Pl.'s Br. 13). Thus, there is no merit to Scarola's suggestion that the perjury investigation was "unrelated" to Padeh's claims merely because it "arose from and pertained to the third-party claims." (Pl.'s Br. 55).

"prior time charges outside the scope of plaintiff's case" would be deemed satisfied upon receipt of $17,000 on a certain date. (R. 974). The subject matter of the "prior time charges" is not identified anywhere in the four corners of the document. And so that language cannot support Scarola's contention that the agreement is unambiguous.[16]

Scarola points to extrinsic evidence in an effort to show that "the jury resolved any theoretical issue" of interpretation "based on the full record." (Pl.'s Br. 58; *see also id.* at 55-57). But on Scarola's own account, this issue was not for the jury to "resolve" because the contract is unambiguous. When that is so, the interpretation of the contract is a question of law for the Court alone to decide, looking only within the "four corners" of the contract. *Bethlehem Steel Co. v. Turner Const. Co.*, 2 N.Y.2d 456, 460 (1957); *see also 805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451 (1983). As a consequence, the extrinsic "evidence" cited by Scarola "may not be considered on appeal." *Bethlehem Steel*, 2 N.Y.2d at 460; *see also W.W.W.*

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[16] Scarola asserts that this payment somehow reflects Padeh's "acknowledged consent to hourly billing" on the perjury work under the "'partial payment' doctrine." (Pl.'s Br. 57). But the doctrine Scarola relies on involves a "separate agreement" from the underlying contract, which is actionable under a separate cause of action for an "account stated." *W.R. Haughton Training Stables, Inc. v. Miriam Farms, Inc.*, 118 A.D.2d 639, 639 (2d Dep't 1986). Scarola cannot prevail on a cause of action it did not bring below under an agreement it did not allege below.

Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.").

Moreover, even if this Court disagrees and finds the retainer agreement to be ambiguous, then the conclusive interpretation *must* be the reasonable one advanced by Padeh as the client, *without reference* to extrinsic evidence. That is the clear holding of the Court of Appeals and this Court—where the attorney fails to draft an unambiguous retainer agreement, "the mandated interpretation" is the reasonable interpretation advanced by the client. (Def.'s Br. 48-50). Scarola ignores these cases too, and implicitly concedes that the judgment on this cause of action must be reversed if the contract is ambiguous. Because the contract is at the very least ambiguous, the judgment cannot stand.

CONCLUSION

For the reasons set forth above and in Padeh's opening brief, the judgment on the First and Fourth Causes Of Action should be reversed, and those causes of action dismissed.

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Respectfully submitted,

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