IN THE SUPREME COURT OF THE STATE OF DELAWARE

GORDON SCOTT LEVEY, Plaintiff-Below Appellant, v. BROWNSTONE ASSET MANAGEMENT, LP, BROWNSTONE INVESTMENT PARTNERS, LLC, PINEBANK INVESTMENT PARTNERS, LLC, PINEBANK ASSET MANAGEMENT, LP, DOUGLAS LOWEY OREN COHEN, and BARRET NAYLOR Defendants-Below, Appellees.	: : : : : : : : : : : : : : :	No. 563,2014 On appeal from a judgment and final order of the Court of Chancery in C.A. No. 5714-VCL

OPENING BRIEF OF APPELLANT GORDON SCOTT LEVEY

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TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

Cases

Other authorities

NATURE AND STAGE OF THE PROCEEDINGS

Appellant Gordon Scott Levey filed his Verified Complaint action in the Court of Chancery on on August 12, 2010 against defendants-below/Appellees Brownstone Asset Management, L.P. (subsequently renamed Pinebank Asset Management, LP), Brownstone Investment Partners, LLC (subsequently renamed Pinebank Investment Partners, LLC), Douglas Lowey, Oren Cohen and Barrett Naylor (collectively, "Appellees"). (D.I. 1).

Appellees filed a Motion to Dismiss on October 15, 2010. (D.I. 9). Levey filed an Amended Verified Complaint pursuant to Court of Chancery Rule 15(aaa) on November 24, 2010. (D.I. 15). Appellees filed a Motion to Dismiss the Amended Complaint on December 6, 2012. (D.I. 16). On April 4, 2011, the Court granted in part and denied in part Defendants' Motion to Dismiss. (D.I. 23-25; A-49-64). In accordance with the ruling on the Motion to Dismiss, Levey filed his Second Amended Verified Complaint. (D.I. 44).

On July 30, 2012, Appellees filed a Motion for Summary Judgment. (D.I. 59). On September 27, 2012, the Court granted Defendants' motion. (D.I. 71, 73, 76). Levey appealed to this Court (D.I. 74), which reversed the decision of the Court of Chancery. (D.I. 78). The matter then proceeded to trial on February 4-6, 2014. (D.I. 95-98).

After a trial, the Court of Chancery issued an August 1, 2014 Opinion concluding that the actions of the members of BIP and BAM constituted an implied agreement that Levey could and did withdraw from BAM and BIP, and that this agreement constituted an implied partnership agreement under 6 Del. C. §§ 17-101(12) and 18-101(7), so that the agreement overrode the restrictions on withdrawal of a member prior to dissolution in the absence of such agreements as set in 6 Del. C. §§17-603 and 18-603. The Court of Chancery also held that Levey was not entitled to be paid the value of his interests because he did not present valuation evidence - despite having limited discovery and the claim solely to distributions at the Motion to Dismiss stage of the proceedings. *Levey v. Brownstone Asset Management, LP*, 2014 WL 3811237 (Del. Ch. Aug. 1, 2014); A-49-64 (transcript of hearing and ruling on motion to dismiss).

On August 8, 2014, Levey filed a Motion for Reargument or, in the Alternative, a New Trial. (D.I. 115). The Court of Chancery denied that motion by Order dated October 22, 2014. (D.I. 119). On August 29, 2014, the Court of Chancery issued an opinion setting the rate of interest on the judgment. (D.I. 122). The Court of Chancery entered final judgment on September 3, 2014. (D.I. 124).

Levey filed his Notice of Appeal on October 1, 2014. This is his opening brief.

SUMMARY OF ARGUMENT

1. The Court of Chancery committed legal error by relying on Appellant's feelings for other equity holders, unexpressed at the time, in determining whether a contract implied-in-fact was created, when the statements and actions of the parties at the time of the event did not otherwise lead to such a conclusion, and indeed indicated to the contrary.

2. The Court of Chancery committed legal error by concluding that there was an implied partnership agreement and LLC operating agreement in the absence of any evidence of conduct by the parties showing a meeting of the minds that they intended to create and be subject to such governance documents.

STATEMENT OF FACTS

The facts are taken from the ruling of the trial court (cited to herein as "Op. at *___). Appellant accepts the findings of fact made by the trial court, but challenges certain inferences and conclusions drawn from those facts.

A. THE BEGINNING: BIG.

Levey met Lowey and Naylor while working at Mabon Nugent & Co., a New York investment firm. Lowey traded bonds, Naylor sold bonds, and Levey provided technical support for the bond trading operation. (Op. at *1).

In 1994, Lowey and Naylor moved to Bear Stearns. There they met Oren Cohen, who was an analyst focusing on high-yield securities. (Op. at *1).

In 1997, Lowey decided to form a new firm that would specialize in trading high-yield bonds. The firm eventually was named Brownstone Investment Group, LLC ("BIG"). (Op. at *1).

Lowey initially formed BIG as a Delaware limited liability company, then talked to Naylor and Levey about joining him. In 1998, they did. The three thought of themselves as partners. No one drafted formal documentation for the firm. (Op. at *2).

Lowey explained at trial that the partners did not prepare formal documentation because they were friends who trusted one another, and they prioritized their

day-to-day jobs over the less compelling details of entity-level paperwork. (Op. at *2).

Naylor received a 20% equity interest in the BIG and Levey received a 10% equity interest. Lowey owned the rest. (Op. at *2).

B. THE HEDGE FUND, BIP AND BAM.

In 2002, Cohen joined Trilogy Capital, LLC, where he managed a hedge fund. Lowey had kept in touch with Cohen, and in late 2003, Lowey and Cohen began discussing forming a hedge fund of their own. (Op. at *2).

In early 2004, Cohen left Trilogy and began working with Lowey to set up the new fund. Lowey and Cohen hired a law firm and a prime broker, worked with counsel to set up the necessary entities, and raised capital from investors. (Op. at *2).

The resulting fund structure involved three entities. First, there was Brownstone Partners Catalyst Fund, the actual hedge fund that owned securities and made trades (the "Hedge Fund"). Second, there was Brownstone Investment Partners LLC ("BIP"). BIP technically managed the Hedge Fund and owned a 20% carried interest in the fund. To ensure that amounts generated by the carried interest would receive favorable tax treatment, it was essential that BIP remain passive and hire an active manager to do the actual managing. Third, there was Brownstone Asset Management, LP ("BAM"). BAM was the entity that the BIP hired to do the active

managing. In return for its services, BAM received a management fee from the Hedge Fund, payable quarterly in advance, equal to 1.5% of assets under management. (Op. at *2).

Lowey and Cohen decided to run the Hedge Fund out of the BIG's offices. This plan enabled Lowey to split his time easily between BIG and the Hedge Fund, and it allowed the Hedge Fund to benefit from BIG's resources, including its trading relationships and technology infrastructure. (Op. at *2).

In the first quarter of 2004, Lowey decided that he needed to offer interests in the fund to Naylor and Levey. Cohen resisted. After discussing matters, Lowey and Cohen agreed that Naylor and Levey would each receive a 2.5% interest. (Op. at *2).

Levey did not like the idea of the Hedge Fund in the first place. He was the Chief Compliance Officer for BIG, and he thought it was risky for a hedge fund and a broker/dealer to operate out of the same office through a single trader. Levey worried that a regulator might think that Lowey had access in his capacity as the principal trader of the Hedge Fund to non-public information in his head about what he was trading in his capacity as the principal trader of BIG. Levey proposed to limit his own involvement to BIG, and he countered that instead of giving him an interest in the new fund, Lowey should increase his share of the equity in BIG to 33%. According to Levey, when Lowey first enticed Naylor and Levey to join BIG, he

promised them each one third of the business, but he later reneged and forced Naylor and Levey to take less. Levey told Lowey to give him what he believed he was originally promised. (Op. at *2).

Lowey went back to Cohen and told him they needed to sweeten their offer. After some tense discussions, Lowey and Cohen agreed that Naylor and Levey would each receive a 5% interest, which Levey grudgingly accepted. (Op. at *3).

C. LEVEY FORGOES INCOME IN BAM FOR 2004.

In early 2005, as part of his administrative responsibilities, Levey was working with Brownstone's accountant to prepare the various tax filings necessary for 2004. In March, the accountant provided Levey with a draft tax return that allocated BAM's net income according to the members' equity interests. (Op. at *3).

The accountant's proposed tax treatment, however straightforward, risked inviting regulatory scrutiny from the City of New York. Lowey, Naylor, and Levey had structured their affairs at BIG so that only Lowey filed taxes with the City. Naylor and Levey paid taxes on their respective shares of the income from BIG in the jurisdictions where they lived. If BAM's net income was allocated as the accountant proposed, then each of its owners would receive a Schedule K-1 reflecting income generated in the City of New York. Levey was concerned that New York tax

authorities would question why he and Naylor were filing returns for one Brownstone entity in the City, but not other returns for similarly named entities. (Op. at *3).

To avoid attracting regulatory attention, Levey proposed in an email that BAM's net income for 2004 not be allocated in accordance with the members' equity interests, which the accountant confirmed was permissible. For the partners, the amounts were relatively small, and Levey proposed to have all of BAM's 2004 income allocated to Lowey, who was a resident of New York City and already paying city taxes, and to Cohen, who was not a member of BIG. Lowey then would make it up to Naylor and Levey by paying them slightly more through a different Brownstone entity. Levey's email reflects that this was a one-time fix and that it would be necessary to address the issue in 2005. The Schedule K-1s reflect that BAM's 2004 income was allocated to Lowey and Cohen, as Levey suggested. (Op. at *3).

D. LEVEY RESIGNS FROM BIG.

Levey testified at trial that he became progressively more miserable, and that he came to dislike his partners. He spent much of 2005 reflecting on his situation, and by December, he was thinking seriously about leaving. (Op. at *3).

On the morning of January 26, 2006, Levey told Naylor that he was quitting. Naylor was shocked, and they spoke about Levey's decision at some length. (Op. at *4).

When Lowey arrived at the Brownstone offices, he joined Naylor and Levey. Levey gave Lowey his resignation letter, which included a list of demands concerning BIG. The parties did not introduce the resignation letter into evidence, but the testimony indicates that Levey demanded compensation in return for his equity interest. As the trial court expressly found, "No one appears to have focused on" BIP or BAM. (Op. at *4).

Gordon cut up his corporate charge card and building identification card. He also handed over his office keys. Lowey accepted that Levey was leaving. Lowey gathered the Brownstone employees together and thanked Levey for his service. Levey said goodbye to and shook hands with each of the individual appellees, and everyone wished him well. Shortly after leaving, Levey withdrew his personal investment in the Hedge Fund, and he was sent that amount. (Op. at *4).

Days after Levey resigned, Lowey caused the BIG to sue him in the United States District Court for the Southern District of New York (the "District Court Action"). The complaint alleged that Levey misappropriated trade secrets and sought an injunction to prevent Levey from offering or disclosing Brownstone's trading software to competitors. On February 17, 2006, Levey's counsel deposed Lowey in the District Court Action. Lowey professed during his February 17, 2006 deposition in the District Court Action not to know whether Levey was still a member of BAM.

When asked by counsel to name the entity's members, Lowey responded, "Good question." (Op. at *4).

At some point after that deposition, the individual defendants appear to have decided that Levey no longer was a member of BIG, BIP or BAM, because they stopped making any distributions to him. They also stopped providing him with information about the performance and profitability of the entities. On June 5, 2006, Appellees reported in a Form ADV filing that Levey was no longer a partner in the BAM. (Op. at *4).

E. LEVEY ASKS TO WITHDRAW.

On January 25, 2007, the day before the one year anniversary of his resignation, Levey gave written notice that he desired to withdraw from BIP and BAM. He contended that upon withdrawal he was entitled to receive payment of his capital account and the cash value of his interests in BIP and BAM. (Op. at *5).

Appellees offered a "perplexing" response. Rather than stating their belief that Levey had withdrawn a year earlier, as they maintained at trial, their counsel sought "additional information in order to assess [Gordon's] 'demands.'" Their counsel then listed eleven different categories of information that he wanted Levey to provide, such as (i) his basis for believing he was a partner, (ii) his basis for believing that, if he was a partner, he could withdraw from the entity, (iii) his basis for believing that

he was entitled to payment of his capital account upon withdrawal, (iv) his basis for believing that he was entitled to the cash value of his interest in the entities upon withdrawal, and (v) the valuation process Levey believed should be used to calculate the value of his interests. (Op. at *5).

F. LEVEY FILES AN ARBITRATION DEMAND.

On February 28, 2007, Levey filed a motion to stay the pending District Court Action and to compel the defendants to submit to arbitration before the National Association of Securities Dealers ("NASD"). The District Court granted Levey's motion on September 17 and closed the case. (Op. at *6).

On February 15, 2008, Levey filed an arbitration demand before FINRA, the successor to NASD, against BIG, BIP, BAM, Lowey, and Naylor. Among other claims, Levey contended that he had sought to withdraw from BIG, BIP and BAM, and that the Appellees had failed to pay him the value of his equity interests in those entities. (Op. at *6).

The arbitration panel held that neither BIP nor BAM was subject to FINRA jurisdiction. The panel dismissed both entities and adjudicated only Levey's claim for the value of his interest in BIG. (Op. at *6).

G. LOWEY AND NAYLOR DEPART.

In 2010, Lowey and Cohen decided to go their separate ways. To effectuate their separation, they agreed that Lowey would exit from BIP and BAM. As compensation for Lowey's interest, they agreed that he would receive a three-year tail, meaning he would receive a certain percentage of distributions in the year he left and lesser percentages in each of the two following years. Naylor, who joined at the same time as Levey and had the same type of interest as Levey left at the same time and received the same treatment. (Op. at *7). Levey was the only one treated differently.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FINDING THAT AN AD HOC AGREEMENT WHICH WAS NOT APPLIED TO MEMBERS OTHER THAN APPELLANT CONSTITUTED THE CREATION OF IMPLIED PARTNERSHIP AND OPERATING AGREEMENTS SO AS TO ELIMINATE HIS EQUITY INTEREST IN THE ABSENCE OF ANY EVIDENCE OF ACTIONS INDICATING AN INTENT TO CREATE SUCH AN OPERATING AGREEMENT APPLICABLE TO ALL PARTIES.

A. QUESTION PRESENTED.

Did the observable facts and statements fail to clearly show an offer, acceptance and meeting of the minds establishing a contract implied-in-fact constituting an implied partnership agreement and LLC operating agreement resulting in Levey being divested of his interests in BIP and BAM? This issue was raised in the PreTrial Order (D.I. 89), in the briefing and was decided by the trial court.

B. SCOPE OF REVIEW.

Where essential facts are not in dispute, the existence of an implied contract is a question of law. *Shapira v. United Medical Service, Inc*., 205 N.E.2d 293, 305 (N.Y. 1965) ("[t]he question of 'implied contract' is often a question of fact, but here the facts are in this aspect of the case undisputed and the decision whether or not there has been an implied contract made out is, on these undisputed facts, a question of law"); *In re Home Protection Bldg. & Loan Ass'n*, 17 A.2d 755, 757 (Pa. Super.

1941) ("[w]here essential facts are not in dispute, the existence of an implied contract is a question of law"). Questions of law are reviewed de novo. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. MERITS OF THE ARGUMENT.

Levey resigned from employment from BIG[1] on January 26, 2006, and one-year later offered to sell back his equity ownership in BIP and BAM, which offer was never accepted and instead was ignored. Moreover, Appellees did not give him the value of his interests as required by 6 Del. C. §18-604.

As Levey's demand for consideration in exchange for withdrawal was ignored and there was no further action on the issue prior to litigation, Levey's position is that he remains a 5% owner each of of BIP and BIM (and their successors). This position is consistent with 6 Del. C. §§17-603 and 18-603, which provide that unless a partnership agreement or limited liability company agreement, respectively, provides otherwise, a limited partner or member may not resign from the entity prior to the dissolution and winding up of the entity.

As demonstrated below, the trial court erred by relying on Levey's subjective attitude toward the other equity owners in determining whether there was an implied

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[1] Levey was employed by BIG (Op. at *2-3), and not by BIP or BAM.

contract, as that determination must be based solely on observed conduct and statements, not on unexpressed feelings. The trial court further erred in finding an implied contract as the facts found did not establish acceptance of the proffered terms or any meeting of the minds, particularly as to the creation of a partnership agreement and LLC operating agreement.

1. <u>The Applicable Law.</u>

A contract implied-in-fact is one inferred from the conduct of the parties, though not expressed in words. The parties' intent and mutual assent to an implied-in-fact contract are proved through conduct rather than words. *Capital Management Co. v. Brown*, 813 A.2d 1094, 1098 (Del. 2002).

It is elementary that, for there to be an agreement, express or implied, there must be an offer, acceptance and consideration. *Speakman v. Price*, 80 A. 627, 630 (Del. Super. 1911).[2] The offer and acceptance must not be ambiguous. *City of El*

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[2] The trial court did not determine the quantum of evidence necessary to provie an implied-in-fact contract. An oral contract must be proved by clear and convincing evidence. *McCloskey v. McCloskey*, 2014 WL 4364469 at *10 (Del. Ch. Sept. 3, 2014). There is no reason to subject an implied contract, which is based on less certain and more subjective evidence, to a lesser standard of proof. *E.g., Yiannis, Inc. v. Madison Two Associates,* 1996 WL 680239 at *6 (N.D. Ill. Nov. 21, 1996), *aff'd sub nom. Karazanos v. Madison Two Associates*, 147 F.3d 624 (7th Cir. 1998) ("the party asserting the existence of an implied contract must show unequivocal conduct evidencing an offer, acceptance, consideration, and definite contract terms"); *Webb* (continued...)

Centro v. U.S., 922 F.2d 816, 820 (Fed. Cir.1990). There must be a meeting of the minds. In the context of a contract implied-in fact, in determining whether these elements exist, courts consider the outward and objective manifestations of assent, as opposed to the parties' undisclosed and subjective intentions. *See Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1070 (Del. 1977); *The Chase Manhattan Bank v. Iridium Africa Corp.*, 239 F.Supp.2d 402, 408 (D. Del. 2002), *report adopted,* 294 F.Supp.2d 634 (D. Del. 2003). *See also Stewart Title Guar. Co. v. Mims*, 405 S.W.3d 319, 339 (Tex. App. 2013) (for an implied-in-fact contract, "[t]he determination of a meeting of the minds is based on the objective standard of what the parties said and did, not on their subjective states of mind").

Whether an implied-in-fact contract arises depends on whether the representations or conduct create a reasonable expectation of contractual rights. The reasonableness of expectations is measured by just how definite, specific, or explicit the representation or conduct relied upon has been. *Orion Technical Resources, LLC v. Los Alamos Nat. Sec., LLC*, 287 P.3d 967, 972 (N.M. 2012).

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[2](...continued)
Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp., 617 N.W.2d 67, 75 (Minn. 2000) ("[t]he agreement necessary to form a contract...may be implied from circumstances that clearly and unequivocally indicate the intention of the parties to enter into a contract"); *Kellum v. Browning's Adm'r*, 21 S.W.2d 459, 464 (Ky. App. 1929) ("[an implied-in-fact contract] requires stricter proof...than to establish ordinary contracts...").

There can be no implied contract where the facts are inconsistent with its existence. *Soley v. Wasserman*, 823 F.Supp.2d 221, 230 (S.D.N.Y. 2011).

Finally, courts will not construe a contract as resulting in a forfeiture unless the contract cannot be construed any other way. *Garrett v. Brown*, 1986 WL 6708 at *8 (Del. Ch. June 13, 1986) ("[f]orfeitures are not favored and contracts will be construed to avoid such a result"); *REO Indus., Inc. v. Natural Gas Pipeline Co. of Am.*, 932 F.2d 447, 454 (5th Cir.1991) (Texas law)).

2. <u>The Holding of the Trial Court.</u>

The Court of Chancery held as follows:

> The critical factual issue in the case is whether Gordon withdrew from the [BIP] and [BAM] on *January 26, 2006.*
>
> * * *
>
> The evidence established that Gordon withdrew from the [BIP] and [BAM] on *January 26, 2006.*
>
> * * *
>
> Although there was conflicting evidence at trial about what occurred on *January 26, 2006*, an objective viewer would regard Gordon as having severed all of his ties with the defendants and the Brownstone financial services boutique. He turned in his keys and took the dramatic step of cutting up his corporate charge card and building identification card. The other principals of the firm and its employees gathered together and said goodbye. He walked out the door, never to return. Effectuating a complete separation

> necessarily included withdrawing from all of the entities in which he was a member. Consistent with an effort to sever all ties, Gordon withdrew his personal funds that were invested in the Hedge Fund.
>
> * * *
>
> the bottom line was that Gordon wanted to leave a business that was making him unhappy. Given his professed antipathy towards the business and his partners, it is not credible that he wanted to maintain a relationship with them through [BIP] and [BAM].
>
> * * *
>
> the evidence established that Gordon withdrew from the entities on *January 26, 2006*. Through his conduct, he manifested an intent to withdraw, and through their conduct, the defendants manifested their acceptance of his withdrawal. Their implied agreement that Gordon had withdrawn modified the default provisions in the Acts that otherwise prevent a limited partner or member from withdrawing before dissolution and winding up.

(Op. at *8, 10, italics added).

3. The Facts Found by the Trial Court Do Not Support a Conclusion of an Implied Agreement.

It is undisputed that at the time of Levey's resignation from employment with BIG, there was no discussion of his equity ownership in BIP or BAM. (Op. at *4). It is also undisputed that one year later Levey made a written offer of withdrawal expressly subject to conditions, and that no one ever accepted that offer, with or

without conditions, and litigation ensued. (Op. at *5-6). As such, it is clear that there was no express agreement, written or oral, by which Levey renounced his equity interest in BIP or BAM.

Notwithstanding this, the trial court concluded that there was an implied contract which resulted in Levey forfeiting his equity interest in BIP and BAM upon his resignation from BIG. From Levey's termination of employment with BIG, and his subjective (and then-unexpressed) attitude about his partners, the trial court concluded that Levey "necessarily" elected to forsake his economic stake in BIP and BAM, even though BIP and BAM continued to hold his capital investment, and neither side sought to change that status until much later. Such a conclusion, however, does not "necessarily" (or even probably) result.

In coming to its conclusion, the trial court relied, in large measure, on Levey's subjective feelings, or "antipathy", toward other equity owners. There was no finding that such attitude was communicated to the others by word or deed, or that the feeling was reciprocated. The weight that the trial court gave to this consideration, which was not found to have been expressed to the others as a matter of fact and is not a proper consideration as a matter of law, tainted the analysis to Levey's prejudice.

When one removes that subjective consideration, the remaining evidence as of January 26, 2006, as found by the trial court, is that (i) Levey resigned his employment with BIG, (ii) he made demands for compensation for his interest in BIG, (iii) he cut up his company charge card and building identification cards, and (iv) none of the parties focused on BIP or BAM. Those actions, of themselves, do not reasonably permit an inference that Levey was withdrawing from or abandoning his equity interest in BIP and BAM. His desire to separate himself physically from the individuals does not equate to a desire to give up a property interest with a potentially lucrative revenue stream.

The Court of Chancery went on to state that:

> The record indicates that Gordon demanded a significant monetary payment for his interest in Brownstone. At trial, Gordon suggested that his demand focused on [BIG] and did not encompass [BIP] and [BAM], but he did not introduce his resignation letter, which might have provided more persuasive evidence of so specific a demand. Given the context, it makes more sense that Gordon was demanding a substantial payment for his interests in all of the Brownstone entities.

(Op. at *9).

The conclusion that the demand also related to Levey's equity interests in BIP and BAM is inconsistent with its finding that, at that meeting, "[n]o one appears to have focused on BIP or BAM." None of the defendants testified that the demand letter related to BIP and/or BAM, or even that they believed it to be such.

The trial court's conclusion does not rise above speculation, and appears to again be the result of considering Levey's then-unexpressed attitude toward the others, rather than by objective conduct of the parties at the time.

The trial court's conclusion also ignores the fact that a party who has intended to form a contract which resulted in the abandonment of his equity interest would not be seeking to sell it back one year later.

4. The Rejection of Levey's Terms is Inconsistent with Acceptance.

Even if this Court were to agree with the Court of Chancery that Levey intended to include BIP and BAM in his resignation on January 26, 2006, Levey included a list of demands, including compensation. (Op. at *4: "[w]hen Lowey arrived at the Brownstone offices, he joined Naylor and Gordon. Gordon gave Lowey his resignation letter, which included a list of demands concerning [BIG]"). Nothing in the record indicates that those demands were met. The rejection of the terms of that proposal negates the idea that there was a meeting of the minds on the terms of any withdrawal. *See Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 705 S.E.2d 757, 769 (N.C. App. 2011) (there was no implied agreement permitting withdrawal from a PLLC where there was no written operating agreement as members did not accept proposed terms).

5. There Is No Evidence Showing Mutual Assent to the Creation of a Partnership Agreement and an Operating Agreement.

To override Sections 17-603 and 18-603, the trial court deemed the actions of the parties to be the creation of an "implied operating agreement" for each of BIP and BAM. At the time, there was no operating agreement for either entity. Nonetheless, the Court of Chancery determined that, because Levey had expressed "antipathy" toward other equity holders at trial (and, again, there is no evidence or finding suggesting that he expressed that antipathy before then) which led him to resign from employment with BIG, and because he cut up his company credit card and building identification card (neither of which are necessary or relevant to retaining an equity interest), this created an operating agreement by implication which overrode the provisions of Sections 17-603 and 18-603.

There is nothing in the trial court's findings showing that the parties intended to create an operating agreement which would govern the conduct of the members of the entities going forward. A partnership or operating agreement would not apply just to this specific circumstance, but would thereafter govern the rights of all members from then on. As such, there should be clear evidence that all of the members of the entities agreed to its terms and intended to be bound. There is no such evidence. As such, even if this Court were to find that the objective evidence of conduct

demonstrated a contract by implication, the trial court erred when it concluded that the parties created an operating agreement by implication, and so the provisions of Sections 17-603 and 18-603 control.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the Court of Chancery that there was a contract implied-in-fact that resulted in Appellant withdrawing from BIP and BAM, and hold that Appellant retains his equity interest in those entities, and remand this action to the Court of Chancery for further proceedings consistent therewith.[3]

Respectfully submitted,

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Dated: November 10, 2014

[3] The Court of Chancery stated that "Gordon did not present any evidence of the fair value of his interests as of that date. He therefore failed to meet his burden of proof and is not entitled to any amounts beyond the value of his capital accounts." (Op. at *11). However, the Court of Chancery, in ruling on the motion to dismiss, previously barred such evidence. (A-62-63). Levey reserves the right to raise this issue before the Court of Chancery upon remand.