SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO.: A-001267-0T1

UNIVERSITY COMMUNICATIONS, INC., d/b/a PEGASUS WEB TECHNOLOGIES and JASON SILBERGLATE, Plaintiffs / Respondents, – vs. – NET ACCESS CORPORATION, Defendant, and KENNETH ELLMAN, Defendant and Real Party in Interest and Indispensable Party / Appellant.	CIVIL ACTION **ON APPEAL FROM:** Superior Court of New Jersey Law Division: Morris County Docket number l-3626-08 **SAT BELOW:** Hon. Robert J. Brennan, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-RESPONDENTS

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PRELIMINARY STATEMENT

Plaintiffs / Respondents University Communications, Inc. and Jason Silverglate submit this brief in opposition to the appeal of Appellant Kenneth Ellman seeking to reverse the decision of the Law Division, Morris County, the Hon. Robert J. Brennan, J.S.C., presiding, granting judgment a directed verdict on a motion made pursuant to R. 4:37-2(b) at the close of defendants' / counterclaimants' case on their counterclaim. The counterclaim was the only matter tried below.

Considering defendant Ellman's submissions on this appeal, any tribunal would be forgiven for despairing of ever identifying either the issues or the record on appeal in this matter. Habituated to a full measure of toleration for non-compliance with procedural and substantive requirements in litigation, this *pro se* party has made no effort to comply with the Rules Governing Appellate Practice as to the form or content of his submissions. His appendix is grossly deficient, incomplete and self-serving. It is larded with deposition transcripts and other material not part of the trial record. Moreover, while actually omitting the opinion below from the Appendix, Appellant has repeatedly misrepresented both its plain content as well as other black-and-white aspects of the trial transcript and record in his submissions.

In contrast to these incoherent, misleading submissions, the actual record below demonstrates that justice was done, at least with respect to Appellant's right to have his claims tried on the merits and in full, in the Law and Chancery Divisions. This circus-like, whose outrages were held in check to the extent possible by the Law Division judge, held followed years of phenomenal judicial tolerance, over the repeated of objection of both defendants below, one a *pro se* party and one a corporation represented by counsel, for both the Rules of Court and explicit judicial orders. The full record below demonstrates that repeated infractions, misrepresentations and contumacious disregard of court orders, neither these parties nor their counsel were ever sanctioned – all so that our courts' policy that, to the extent possible, cases ultimately be heard on the merits" could be effectuated.

Defendants' counterclaims proceeded to trial after only one side, i.e., plaintiffs, saw fit to comply with a court order mandating submission of extensive pretrial submissions. By the date required, plaintiffs submitted their half of this pretrial order, comprising over 50 pages detailing all of plaintiffs' legal and factual positions respecting defendants' counterclaim prior to trial. Defendants submitted nothing, yet were provided a full opportunity to present their counterclaims to a jury.

Given that fully underserved chance to have their case considered on the merits, defendants still were unable to make a prima facie case, as set out in a detailed, extensively sourced and meticulously organized oral opinion read by Judge Robert J. Brennan and the trial transcript.

Of necessity, Respondents submit a Respondents' Appendix to place before the relevant and proper record the Court. As demonstrated therein, and in the legal argument set forth in this memorandum of law, the Law Division's decision was entirely proper and supported by law, and this Court should affirm that decision and dismiss this appeal with costs taxed to Appellant.

PROCEDURAL HISTORY

A brief introduction to this section is necessary. Defendant's "Procedural History" essentially lists eight docket entries, failing to comply with R. 2:6-2, which mandates that the concise procedural history include "a statement of the nature of the proceedings." (Responds will not waste the Court's time by reciting all the other aspects of Appellant's brief and appendix that do not comply with the Court's Rules.)

Respondents therefore submit their own concise procedural history as follows. For the sake of completeness there is some redundancy with respect to those pleadings, papers and orders set

out in Appellant's submission.

The action arose out of a dispute arising from an agreement between Plaintiff University Communications, Inc. ("UCI"), which provides retail Internet Web hosting services, and Net Access Corporation ("NAC"), which at the time provided mainly wholesale Internet connectivity and infrastructure. As set forth more fully below, UCI sought to extract itself from this relationship, which it came to regard as commercially exploitative. UCI could not do so without judicial aid because of the ability NAC had to essentially punitively destroy UCI's growing business by "unplugging" it from the Internet during the transition.

As a result, NAC and its principal, Jason Silverglate – guarantor of the Agreements between NAC and UCI and obligor under a security agreement – filed an Amended Complaint and application for an Order to Show Cause with Temporary Restraints on June 15, 2004. (Pa15). By Order to Show Cause dated June 25, 2004, the Chancery Division, the Hon. Kenneth C. MacKenzie, J.S.C., entered various restraints against defendant NAC. (Pa1). By order of July 9, 2004, defendant Kenneth Ellman, Appellant herein, was joined as defendant and "necessary party," premised on Ellman's claim to have purchased certain rights of defendant NAC relating to the dispute among the parties. (Pa4).

On July 16, 2004, the Chancery Division issued an opinion

containing detailed findings of facts and conclusions of law on which it based its subsequent entry of a preliminary injunction maintaining these restraints, (Pa6), which was settled by an order dated July 30, 2004. (Pa23). The Answer and Counterclaims of defendants had been filed on July 19, 2004, and sought payment from plaintiffs for amounts allegedly due to Ellman, as successor in interest to NAC on its book account, and to NAC based on various other theories of recovery. (Da37).

The docket contains an extensive list of subsequent motions and orders between 2004 and 2008 which are not germane to this appeal. On October 2, 2008, with the only issues still relevant being the parties' respective damages claims, the action was transferred to the Law Division. (Da13).

On June 12, 2009, the Law Division, the Hon. Dianne M. Wilson, (then) J.S.C., presiding, issued an order granting the amendment of defendants Ellman and NAC to amend their counterclaims, adding a fifth count for breach of contract. At a status conference on June 16, 2009, Judge Wilson ordered the parties to submit detailed pretrial orders per that court's form and pursuant to R. 4:25-1 no later than June 24, 2009. (Da254 – 1T[1]87-6.) On June 24, 2009 plaintiffs submitted their portion of

[1] 1T: Transcript of Hearing before the Hon. Deanne M. Wilson, J.S.C., June 16, 2009, found at Pa211-256.

the pretrial order (Da269 – 2T[2]18-13; paper attached at Pa26). Defendants did not. (Da269 – 2T19-13). At that June 24th conference, the court authorized plaintiffs to submit an amended answer to the counterclaims. (Da278; 2T37-10.) They did this on July 1, 2009 (Pa75.) As amended, the counterclaims were styled as follows *seriatim*:

1. Abuse of Process and Malicious Abuse of Process
2. Legal Process Maliciously Abused
3. Trespass and Intentional Damage to Property
4. Unfair Competition
5. Breach of Contract

The parties were called in for trial September 22, 2009 in the Law Division, Morris County, before the Hon. Robert J. Brennan. At that time Judge Brennan asked whether defendants had ever made their pretrial submissions, and was informed by them that they had not. (3T[3]10-11). They were ordered to so by the next day, September 23, 2009. (3T22-13). Following colloquy with respect to various earlier procedural submissions, the court, on the 22nd of September, granted plaintiffs' motion to voluntarily dismiss, without prejudice, its affirmative claims

[2] 2T: Transcript of Hearing before the Hon. Deanne M. Wilson, J.S.C., June 24, 2009, found at 260A-298A.

[3] 3T: Transcript of Trial before the Hon. Robert J. Brennan, J.S.C., and a Jury, September 22, 2009.

for damages. (3T32-22; 3T49:1). The court also ordered, per stipulation of the parties, that defendants would proceed at trial on their affirmative claims as if they were plaintiffs, and defendants would then have the opportunity to present a defense. (3T33-17; 3T49-7). Prior to the end of that colloquy, and before breaking for lunch with the intention of calling a jury afterward, counsel for plaintiffs requested defendants' witness and exhibit lists, which had not been produced. (3T44-7). Defendants informed the court that they had not served or filed such a list but approximately improvised one orally on the record. (3T46-6). No pretrial statement was ever provided by either defendant.

Opening statements were made on September 23, 2010, leading immediately to an admonishment by the trial court outside the jury's presence to the effect that while in theory counsel for defendant NAC and the *pro se* defendant were prosecuting distinct and separate counterclaims, in their respective opening statement both had addressed the jury in general terms about the "NAC side's" case without distinction (4T[4]44-5):

> THE COURT: Counsel and Mr. Ellman, come up here.
>
> (Sidebar)
>
> THE COURT: We talked about who has what claims yesterday.
>
> You [NAC] have NAC's tort claims.

[4] 4T: Transcript of Trial before the Hon. Robert J. Brennan, J.S.C., and a Jury, September 23, 2009.

> You [Ellman] have their contract claims. Now you opened on it – both of you opened on both. I'm not going to permit it.
>
> MR. LI [Counsel for NAC]: Your Honor –
>
> THE COURT: You represent your client on the claims that you have. You're not both going to try this whole case. Don't think you're going to do that.

(4T44-17.) This issue – of which counsel, and which witness, could put in what evidence, relating to which defendant's case – was an ongoing theme at the trial, and ultimately was related to the main issue raised by this appeal, as will be discussed below.

On September 29, 2009, both defendants rested their respective cases on their counterclaims. (5T[5]201-2; 5T201-7). Defendants made no motion prior to resting rule on any outstanding evidentiary issues, including the movement of any outstanding exhibits into evidence. At that time, plaintiffs moved to dismiss the counterclaims as a matter of law. (5T201-22). The following day, September 20, 2009, Judge Brennan granted the motion from the bench, ordering the third, fourth and fifth counterclaims dismissed with prejudice and first and second dismissed without prejudice, in an extended opinion that filled 37 pages of transcript containing extensive citations to the record and the applicable law. (6T37-13).

[5] 5T: Transcript of Trial before the Hon. Robert J. Brennan, J.S.C., and a Jury, September 29, 2009.

On September 30, 2009, the Law Division entered a final Order of Disposition. (Da3). The Order on Judgment was entered on October 14, 2009. (Da4.) On November 9, 2009, notices of appeal were filed by both defendants. (Da1, Da9). The deadline for the filing of the brief and appendix on this appeal was extended, ultimately (there were a series of motions for extensions of time, all filed *ex parte*), by Order on Motion dated September 22, 2010, with respect to Appellant Ellman, appearing *pro se*, and with respect only to Docket No. A-001267-09T1. (Pa107).

Respondents have been served or noticed with no such order with respect to the appeal by NAC, Docket No. A-001255-09T1. Nor are defendants aware of a docket entry recording the filing of a motion with respect to an extension of time for NAC's appeal, which is assumed abandoned notwithstanding anything found in or on defendants' submissions. Nonetheless, both Appellants having submitted brief in support of their respective appeals, this submission will address all the arguments contained within without regard to the party presumably making them, if such an abstraction can be applied in this situation.

STATEMENT OF FACTS

Plaintiff UCI is New Jersey corporation whose location, at the time of the filing of the Amended Complaint, was in Parsippany, New Jersey. Plaintiff Silverglate, who at that time was a resident of Franklin Lakes, Silverglate was the president and sole shareholder in UCI. UCI was formed by Silverglate while a student at Rutgers UCI in 1997, and is in the business of Internet Web hosting, i.e., it provides Internet access resources to its clients.

At all relevant times, UCI rented co-location space, defined further herein, for its servers from NAC and purchased Internet Protocol ("IP") user connectivity from NAC. In other words, UCI took the co-location space, IP traffic and IP addresses its secured from NAC and sold them to its customers, in the form of dedicated servers and virtual hosting. UCI thus provided the equipment and services required to host and maintain files for websites and to provide fast Internet connections to those sites. At the time of the filing of the Amended Complaint, UCI had approximately 3,000 wholesale customers. These customers bought their co-location space, IP traffic and IP addresses from UCI wholesale, and then resold them to individuals and small businesses. There were at that same time more than 450,000 individuals and small businesses worldwide that secured Internet

access from UCI's wholesale customers and were therefore indirect customers of UCI.

As determined by the Chancery Division as a factual premise of its grant of a preliminary injunction – none of which was rebutted at trial or otherwise by competent evidence – because of the nature of the services provided by UCI, interruption in the services provided to UCI at the time of the filing of the Amended Complaint would have had severely detrimental effects not only on UCI, but on its direct and indirect customers. Pursuant to its contracts with its customers, an interruption of more than eight hours at the time of the filing of the Amended Complaint would have, Chancery found, resulted in UCI owing substantial financial penalties to its customers, potentially up to a sum of $250,000. In addition, each of the individuals and small businesses who rely on UCI, either directly or indirectly, for Internet access, would have been harmed by such an extended outage. Because Internet "up time" is so critical to the product supplied by UCI, the Court found it reasonable to presume that "UCI customers would have sought service from another source after any interruption, even one as short as several hours."

The Chancery Division also found that it would be difficult, if not impossible, for UCI to replace customers who left after an interruption of service. The customers of web-hosts communicate

frequently over the Internet and exchange information about the reliability of web-hosts. If UCI could not provide service, its reputation as a provider of reliable consistent service would be severely damaged. The damage to its reputation would increase in proportion to the length of the interruption. An interruption of longer than 8 hours would effectively put UCI out of business.

In 2000, Silverglate moved the operations of UCI to basement space leased from NAC at 1719 Route 10, Parsippany, New Jersey ("the Parsippany premises"). In April 2002, UCI's operations were relocated from the basement of NAC's building to the second floor. In addition, UCI's 1500 servers were located in NAC's data center. The April 2002 move doubled the amount of space available to UCI.

During the course of the relationship between UCI and NAC, the parties signed several Network Access Agreements ("Agreements"). By April 2003, UCI began to have difficulty making timely payments to NAC, despite the growth in UCI's business. On November 20, 2003, NAC sent a proposed Security Agreement to Silverglate and insisted that he sign it that day. Silverglate refused to sign the Security Agreement and Personal Guaranty until securing legal counsel to review them. Silverglate and his counsel stayed up until 3:30 a.m. on the evening of November 20-21, 2003 negotiating with NAC. The

Security Agreement and Personal Guaranty granted NAC a security interest in certain property of UCI and provided Silverglate's personal guarantee of up to $250,000 of UCI's obligations to NAC. NAC filed Notice of the Security Interest with the U.C.C. Section of the New Jersey State Department of Treasury.

During 2003-2004, UCI paid NAC through credit cards. In March 2004, NAC advised UCI that it would no longer accept such payments. In March 2004, NAC also advised UCI that it had calculated and intended to recoup "historical interest" of more than $23,000 for late payment on past invoices. The next month, NAC advised UCI that UCI did not meet its creditworthiness standards under Paragraph 2 the Security Agreement and Personal Guaranty and informed UCI that NAC was entitled to terminate service under the Security Agreement and Personal Guaranty because UCI did not meet NAC's "creditworthiness" standards.

At the time of the filing of the Amended Complaint, the approximate monthly payments UCI made to NAC included $55,000 for IP traffic bandwidth; $20,000 for co-location fees; and $18,000 per month for power. Following this "creditworthiness" determination, the original Complaint was filed in this matter in April of 2004, but not served. The parties at this time were participating in negotiations but under the threat of immediate disconnection by NAC.

Plaintiffs filed their Amended Complaint and an application for an Order to Show Cause with Temporary Restraints on June 15, 2004.

By Order to Show Cause dated June 25, 2004, the Court ordered that pending the return date set forth below, the defendant [was] temporarily restrained as follows:

- NAC shall not disconnect, reduce, modify or change the facilities and services currently provided to UCI under the April 2003 Agreement.
- NAC shall continue to provide only NAC 8001-type services to UCI. NAC shall not modify the terms of the April 2003 Agreement or increase any rates, costs, charges or fees currently being paid to NAC under the April 2003 Agreement or in connection with the April 2003 Agreement except increases in costs, charges or fees (but not rates) related to increased volume of use by UCI to the extent provided under the April 2003 Agreement.
- NAC shall not interfere with UCI’s removal of UCI's equipment and other tangible and intangible personal property from the premises UCI currently occupies.
- NAC shall use good faith commercially reasonable efforts promptly to assist UCI in integrating the two

separate "Pegasus" uplinks currently used by UCI and to take such other similar steps as UCI reasonably deems necessary to effectuate the orderly transfer of UCI's equipment and other tangible and intangible personal property to its new location.

- NAC shall permit UCI to continue utilization through any carrier or carriers of UCI's choice of any IP addresses that were utilized by, through or on behalf of UCI under the April 2003 Agreement during the term thereof (the "Prior UCI Addresses") and shall not interfere in any way with the use of the Prior UCI Addresses, including, but not limited to: (I) by reassignment of IP address space to any customer; aggregation and/or BGP announcement modifications, (II) by directly or indirectly causing the occurrence of superseding or conflicting BGP Global Routing Table entries; filters and/or access lists, and/or (III) by directly or indirectly causing reduced prioritization or access to and/or from the Prior UCI Addresses,
- provide UCI with a Letter of Authorization (LOA) within seven (7) days of UCI's written request for same to the email address/ticket system (networkffinac.net), and

- permit announcement of the Prior UCI Addresses to any carrier, IP transit or IP peering network.

A subsequent Order dated July 9, 2004 required payment by UCI for services provided by NAC, and expressly stated that UCI was to render a check payable to "Kenneth Ellman" – who now claimed to be the "owner of the Security Agreement" and had moved to be added to this action – but that such payment "is not a waiver of the plaintiffs' position that there has not been a valid sale or assignment to Mr. Ellman of the April 2003 Agreement and Security Agreement between NAC and UCI."

Defendants not only opposed UCI's application, in particular they filed papers to urging that the requested relief, in particular UCI's request for an injunction directing the transfer of IP addresses from NAC to UCI, would wreak havoc on the governance and technological integrity of the Internet. Following a July 14, 2004 hearing, the Chancery Division, in its written opinion dated July 16, 2009, made the following additional findings:

- UCI exercised its contractual right to terminate the Network Access Agreement with NAC as of May 17, 2004 by letter dated May 17, 2004.
- Thereafter, the parties engaged in negotiation over the orderly termination and transition, including the

removal of UCI's equipment from NAC's Network Operations Center and sums due under the Agreement.

- After negotiations broke down, UCI initiated the current litigation based upon breach of contract and breach of the implied covenant of good faith and fair dealing, as well as seeking injunctive relief.
- UCI sought temporary restraints arguing that based upon disputes between the parties regarding the interpretation of the Agreement and amounts due, NAC indicated a willingness to terminate Internet access to UCI.
- Thus, UCI's application for temporary restraints was based upon its concern that NAC would shut down UCI's Internet service upon receipt of or soon after the termination notice.
- UCI argued that NAC had an incentive to interrupt UCI's Internet access and destroy UCI's business because NAC could then immediately pick up the customers lost by UCI.
- Further, UCI stated that Internet access was critical to its business and any interruption would have devastating effects on UCI and its customers, UCI pointed out that even a 16-hour delay would put it out

of business.

- Moreover, UCI explained that it served over 400,000 direct and indirect customers, including small businesses that would be severely damaged if an interruption occurred.
- Additionally, UCI argued that the grant of temporary restraints would impose no potential harm on NAC because it would only be compelled to comply with its contractual obligations in the interim,
- NAC submitted that on or about June 11, 2003, it transferred to Kenneth Ellman the Network Access Agreement and the Security Agreement between NAC and UCI/Jason Silverglate.
- A temporary restraints hearing was scheduled for June 17, 2004, but Ellman delivered a Notice of Removal and the matter was removed to the Federal District Court.
- Plaintiffs filed an Order to Show Cause in the United States District Court on June 22, 2004 seeking a remand. The District Court found that there was no federal question jurisdiction and remanded the matter.
- NAC did not argue that termination of UCI's service would not lead to irreparable harm.
- Rather it argued that the crisis that UCI found itself

in was “of its own making” due to mismanagement and a failure to begin the re-numbering process early enough.

- UCI set out with specificity allegations that NAC abused its discretion under the express terms of the contract thereby breaching the implied covenant of good faith and fair dealing.
- NAC's arguments regarding whether the Plaintiffs' right to restraints pending their renumbering efforts are “unsettled” or would create chaos in the Internet community had, the Court found, little weight.
- UCI adequately demonstrated that irreparable harm would occur or was likely to occur if service were terminated by NAC before the numbering process was complete.
- Interruption of service would harm thousands of UCI customers as well as UCI's business. Such a foreseeable outcome was certainly within the paradigm of irreparable harm as "acts destroying a complainant's business, custom and profits,” given UCI’s unsettled condition at the time.
- Accordingly, the Court found that the balance of hardships under the circumstances mandated the continuation of UCI’s "customer" status in order to minimize the potential harm to NAC inherent in the

continued use of NAC's IP addresses.

The Court’s subsequent Order dated July 30, 2004 provided that those provisions in the Network Access Agreement dated April 30, 2003 and the Security Agreement and Personal Guaranty regarding co-location and costs of co-location, provisions regarding the amount of bandwidth purchased and any other provision in conflict with that Order were to “no longer apply.” The Court’s Order of July 30, 2004 also provided that “Defendant shall cease and desist from making false and defamatory statements about plaintiffs in any public forum, including on the Internet.”

In the interim, Kenneth Ellman arranged and publicized a public auction of the various secured assets owned by UCI but secured by the terms of the Security Agreement and Personal Guaranty, to be held in September, 2004. In an Order dated September 27, 2004, the Court enjoined the auction and restrained defendants from scheduling any further auctions, on the ground that plaintiffs “have raised bona fide questions concerning the Security Agreement” and that therefore a “plenary hearing is necessary. Until then an auction sale is prohibited.” Thereafter, events followed the path set out in the Procedural History, above.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT IN FAVOR OF PLAINTIFFS BECAUSE DEFENDANTS FAILED TO PRESENT EVIDENCE UPON WHICH A REASONABLE JUROR COULD CONCLUDE, OR EVEN INFER, THAT DEFENDANT WAS ENTITLED TO DAMAGES BASED ON THE ALLEGATIONS OF THE COUNTERCLAIMS.

Appellant attempts to argue for reversal of the decision of the Law Division, Morris County merely by mischaracterizing what happened at trial and insisting, without citation to legal authority or principled argument, that the court below should not have granted a directed verdict. This is not the appropriate standard of review, and completely ignores the actual record as well as the extensive and thorough basis of the trial court's decision. As demonstrated below, that decision amply met the standards for the granting of directed verdict at trial under New Jersey Rules of Court, R. 4:37-2(b), and defendant's complete lack of legal argumentation or accurate citation to the record should result in this court's affirmance of that verdict.

a. Applicable Standards of Review

Motions for a directed verdict are authorized under both R. 4:37-2(b) and R. 4:40-1, which provides respectively that a party may make a motion for "involuntary dismissal" or a motion "for judgment" at the close of its adversary's opponent's presentation of its case in chief. Specifically, the Rule governing

involuntary dismissal, R. 4:37-2(b), provides:

> After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

Similarly, the Rule regarding motion for judgment at trial, *R.* 4:40-1, states:

> A motion for judgment, stating specifically the grounds therefore, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent. If the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserved the right to do so. A motion for judgment which is denied is not a waiver of trial by jury even if all parties to the action have so moved.

The standard under each rule is the same, namely, the Court must determine "whether the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of the party opposing the motion." *Dolson v. Anastasia*, 55 N.J. 2, 5 (1969). In other words, "if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." *Id*. See

also, *Bell v. Eastern Beef Co*., 42 N.J. 126, 129 (1964); *Bozza v. Vornado, Inc*., 42 N.J. 355, 357-358 (1964). In making this determination, "the trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Id*. at 5-6.

Noting, however, that "an inference is a deduction or conclusion that can be drawn only from a premise established by the proofs in the case," our Supreme has cautioned that the non-moving party must have presented facts, based on admissible evidence, from which a reasonable inference could be drawn by a jury so as to support a verdict in its favor. *Ferdinand v. Agricultural Insurance Co. of Watertown, N.Y.*, 22 N.J. 482, 488 (1956). Where "there [is] no evidence or inference to be drawn from the proven facts upon which a jury verdict in favor of the [non-moving party] could have been based...any verdict in favor of the [non-moving party] would necessarily have been bottomed solely upon mere conjecture or hypothesis not supported by the evidence..." *Id*. In such cases, the Court stated, a trial judge is justified in entering a judgment for the moving party. *Id.*

An appellate court reviewing the grant of directed verdict applies the same standard, based on the record before it, that governs the trial courts. *Frugis v. Bracigliano*, 177 N.J. 250, 269 (2003). Thus, the standard of appellate review is whether,

accepting the truth of the evidence presented, together with any legitimate inferences that could be drawn therefrom, a reasonable juror could sustain a judgment in favor of the non-moving party. If so, the motion should have been denied and the trial court decision should be reversed. If not, directed verdict was warranted and the trial court's decision must be preserved.

Here plaintiffs moved for a directed verdict at the close of defendants' "joint" affirmative case. The trial court granted the motion because, as set forth in its meticulously detailed opinion, defendants failed to elicit admissible evidence upon which a jury of reasonable persons could find they had proved any of their claims.

Appellant has submitted an appendix full of material not admitted at trial, or in many cases documents – such as deposition testimony – not even marked for identification, such as may be the case regarding exhibits whose evidentiary status is in dispute. All such material, of course, should be stricken from the appellate record. *Curry v. Curry*, A-2612-07T3, 2009 WL 112677 (App. Div., Jan. 20, 2009) ("Because these documents were not moved into evidence, they will not be considered on appeal except to the extent that the parties testified about them and the documents themselves are stricken from the record"), *citing*, *State v. Harvey,* 151 N.J. 117, 201-02 (1997), *cert. denied,* 528 U.S. 1085 (2000). *See also*, *Ryans v. Lowell*, 197 N.J. Super. 266

(N.J. Super. Ct. App. Div. 1984) (the ‘evidence’ that plaintiff's counsel refers to was nothing more than a report which was objected to by defense counsel and was never entered into evidence and is not a part of the record”).

Taking plaintiff's last point first, the “evidence” that plaintiff's counsel refers to was nothing more than a report which was objected to by defense counsel and was never entered into evidence and is not a part of the record. *R.* 2:5-4.

But despite this surfeit of extraneous and inappropriate material he has, in his brief, made no effort at all to address the trial court’s dismissal of four of the five dismissed counts and, regarding the fifth, has fallen far short of demonstrating what basis this Court could have to reverse the grant of a directed verdict.

b. The court below correctly determined that defendants failed to prove the amount due under their contractual counterclaim.

Appellant’s brief is premised entirely on a contention that the trial court erred with respect to a key evidentiary decision as to the fifth claim – the “book account” claim, or breach of contract. (Db7-9). Specifically, Appellant disputes the trial court’s ruling, in its decision on the directed verdict, that because the invoices that were to serve as the primary proof of the amount due on this claim had not been admitted into evidence,

there was not enough evidence on this claim to go to the jury. *Id*.

An abuse of discretion standard applies to these decisions, and the trial judge's decision is granted substantial deference on evidentiary rulings. "[A] trial judge's decisions about the admission or exclusion of evidence are discretionary." *Benevenga v. Digregorio,* 325 N.J. Super. 27, 32 (App. Div.), *certif. denied,* 163 *N.J.* 79 (2000). "[W]hether to admit evidence of value in a condemnation case is 'liberally entrusted to the sound discretion of the trial judge.'" *State, by Comm'r of Transp. v. Caoili,* 262 N.J. Super. 591, 595 (App. Div.), *aff'd,* 135 *N.J.* 252 (1994). Thus, such exercises of discretion "are entitled to respectful review under an abuse of discretion standard." *Serenity Contracting Group, Inc. v. Borough of Fort Lee,* 306 N.J. Super. 151, 157 (App. Div.), *certif. denied,* 153 *N.J.* 214 (1998). Here Appellant has made no showing whatsoever that there is any basis to depart from this rule.

Appellant does not appear to claim that the invoices in question should have been admitted into evidence, and that the trial court applied the wrong legal standard, or misapplied the law, in excluding them. Rather, he insists, contrary to the record and the trial court's decision, that they were actually admitted into evidence. Even this is within the judge's realm of discretion, however:

> Generally, the trial judge is vested with broad discretion in evidentiary matters as well as matters affecting the conduct and proceedings in a trial. *See State v. E.B.,* 348 *N.J. Super.* 336 (App. Div.), *certif. denied,* 174 *N.J.* 192 (2002). . . . *N.J.R.E.* 611 charges the trial judge with broad discretion "over the mode and order of interrogating witnesses and presenting evidence."

Barber v. Shop-Rite of Englewood & Associates, Inc., 393 N.J. Super. 292, 298 (App. Div. 2007).

There is no dispute that, when first proffered, the court did not admit these documents into evidence. These were invoices issued by Appellant Ellman and bearing the legend "duplicates," because they were supposed duplicates of the original invoices rendered by NAC to UCI but "re-issued" by Ellman under his own name after he supposedly purchased the right to collect on them. rendered by NAC to UCI but "re-issued" by Ellman under his own name after he supposedly purchased the right to collect on them. (Da199, Da202-210).

As set forth in the transcript, the foundation for admission of these invoices was to be testimony of the bookkeeper for NAC, regarding the invoices submitted by Appellant Ellman as purported successor in interest to NAC, which formed the basis of his "book account" claim:

> Q: The records that you maintain, will please explain what those records are?
>
> A: It is the billing records and accounting records for . . . Pegasus Technology [UCI].

> Q: Do you have invoices that were rendered to that company? . . .
>
> MR. COLEMAN: I have an objection, Your Honor. I don't have a copy of that document, and I never got a document list, exhibit list, and at this point we have, I think, a best evidence issue, because the witness is being asked simply to read the contents of the documents rather than give us the opportunity to –
>
> THE COURT: Are you reading? Have you been reading?
>
> THE WITNESS: No, I – I know –
>
> THE COURT: I don't think she's reading. That was not my impression, and we haven't had any documentary evidence yet, so let's take is as . . . it comes.

(4T47-10 – 4T49-19). In fact, at this juncture defendant Ellman had been permitted, over plaintiffs' objection, to utilize in his case documents which indeed had not been pre-marked, contrary to the court's own order; had not been identified in advance either in the mandated pretrial order or in an exhibit list, thus depriving plaintiffs of the opportunity to either review them and prepare an appropriate cross-examination or move *in limine* to exclude them or even to ascertain if they were ever produced in discovery.

In fact, these documents were not produced in discovery, despite Appellant's representation to the contrary.[6] (4T51-19).

[6] Defendant Ellman's disingenuousness on this point can be seen in the following exchange. Among the documents sought to be admitted at this point was a statement marked DE-1 for identification, which was a summary and statement of the invoices owed and interest accrued. No proper foundation for the admission of this summary was laid down, and, to the

This fact is hinted at in the question quoted above, "Do you have invoices that were rendered to that company?" There was, of course, no reason the witness should have "had" any documents with her unless and until they are given to her on the stand. That these invoices had, in fact, been recently "generated" by the witness herself, and could not have been produced in discovery – which has closed years earlier – is clearly established by the phrasing of another question a short time later:

> Q: Did you bring documents with you –
>
> A: Yes.
>
> Q: – to court today? Did I ask you to bring those

---

contrary, defendant sought to move it into evidence along with the individual invoices.

No copy of these documents was even provided during the testimony itself to adversary counsel, which Ellman attempted to use as a tactical advantage, claiming that plaintiffs had no right to make an objection to a document they had not examined! The colloquy proceeded as follows:

> MR. COLEMAN: The statement also is not – was not produced in discovery. We've never seen it. So I would object on that ground as well.
>
> MR. ELLMAN: I don't know how Mr. Coleman can say that unless he's examined the statement.
>
> Did you carefully examine it?
>
> MR. COLEMAN: Yes, in fact, both the testimony and my examination demonstrate it's dated August 30th, 2009.

(4T: 61-3).

documents?

A: Yes. . . .

Q: These documents that you brought with you today, are they documents that you maintain in the regular course of business?

(4T49-22 – 50-19). Somewhat flummoxed by defendant's complete disregard of every order and requirement respecting the marking, production and pretrial disclosure of documentary evidence, and constantly concerned that the pro se party be given every opportunity to make his case, the court disregarded these fundamental procedures meant to ensure fairness, a lack of surprise at trial and order in the courtroom. The result was extended testimony and, as demonstrated on this appeal, a considerable amount of controversy concerning whether or not documents which should not even have been allowed on the witness stand were ever moved and accepted into evidence.

Appellant baldly states that when he "asked" a second time to have the invoices moved into evidence, "The Court then allowed the invoices into evidence." (Db7). The citation is to 4T95-9, in which the following colloquy takes place following the testimony from the witness, Ms. Lopez:

THE COURT: You're tendering the invoices and the statement that Ms. Lopez reviewed in her direct – offering them into evidence. Is that correct, Mr. Ellman?

MR. ELLMAN: That's correct, Your Honor.

> THE COURT: All right.
> Is there any objection to those evidence – to those items going in?
>
> MR. COLEMAN: Yeah, my original objection. Foundation.
>
> THE COURT: Foundation in terms of what?
>
> MR. COLEMAN: That there's no – as of now, no testimony that Mr. Ellman is entitled to invoice my client for anything. She testified that these are invoices from Ellman to University Communications. Ellman –
>
> THE COURT: Right. Well, subject to that foundation which, perhaps, will come in, subject to that, the invoices and the statement will be accepted into evidence, but that foundation – Ms. Lopez may not be the witness to offer that testimony.

(4T94-12 – 95-7). Appellant then asserts that this "foundation" was, in fact, ultimately established, by citing to the Court's statements to Ellman that he had "proved his prima facie case." (Db8). But the necessary foundation was, in fact, never established, and this is why the court ruled, properly, that the documents were not ultimately admitted into evidence. As it said in its bench ruling:

> The invoices were not offered into evidence. They were marked for identification. There was a discussion about having – they may have been, I can't specifically recall, there was a lot of confusion about exhibits and documents because the defendants did not, as they were – as they should have done, pre-marked their exhibits. I wouldn't permit exhibits to be marked in the presence of the jury. We did get these marked for identification.
>
> There – there may have been a discussion about a later offering of these documents, these invoices, into evidence, but that never happened.

(6T3615 – 371). Appellant believes the foundation objection was militated, and the evidence thus "came in" by itself, because the trial court accepted, as prima facie evidence, his supposed proof of payment for his claimed interest in the NAC book account. This is a long way from saying, however, that the evidentiary foundation for these invoices, as a legitimate record of the book account between NAC and UCI – an obligation supposedly purchased by Ellman – was ever established.

In fact, plaintiffs' pretrial submission addressed these issues. In that paper, plaintiffs put the court and parties on notice of the issues that ended up resulting in this appeal, and should not be penalized now for their having been ignored by an appellant that made a point of non-disclosure of proof and non-compliance with procedural rules. In the section reading, "**ISSUES AND EVIDENCE PROBLEMS,**" plaintiffs wrote as follows:

i) Defendants' extensive non-disclosure and failure to make discovery in this matter is set out, *inter alia*, in plaintiffs' motions made on December, 2005 and renewed in September 2006 for sanction, based on defendants' refusal to make discovery. These motions were based on defendants' failure to produce documents pursuant not only to duly served discovery notices, including a Notice to Produce Documents served on defendants dated October

13, 2004 but explicit court orders. The Court reserved opinion and ultimately dismissed the counterclaims and defenses pursuant to the transcript entered into the record by Judge McKenzie and read in court by Judge Langlois. No written order was issued and ultimately Judge Langlois vacated her previous ruling based on Judge McKenzie's findings, refused to sanction defendants and, without explanation, ordered an end to further discovery despite defendants' non-compliance with Judge McKenzie's order. Plaintiffs therefore will move or object, as appropriate, for an order prohibiting defendants from supporting or opposing the related claims or defenses, or prohibiting the introduction of such matters in evidence, pursuant to R. 4:23-2(b)(2).

ii) The amounts alleged by defendants to be due for services rendered are claimed to be based on various invoices. Neither the original invoices nor true copies of invoices containing all the new charges, nor other supporting documentation as to the legitimacy of the charges shown on the ersatz invoices ("duplicate invoices") created by defendants after issue was joined in this Court, have ever been produced, despite repeated demands for the same. Late production of the same, if they exist, should be prohibited pursuant to R. 4:23-

2(b)(2).

iii) These "duplicate invoices," actually rendered, as indicated on their face, by Kenneth Ellman to UCI and purporting to be charges for charges by UCI incurred prior to Ellman's fraudulent "purchase" of the Network Agreements and the Security Agreement and Personal Guaranty are inadmissible under the standards set out in, and the cases interpreting, Evid. R. 1002, 1003, 1004 and 1006, *inter alia*.

iv) These invoices are also irrelevant and inadmissible under the cases applying Evid. R. 402 based on a lack of foundation, to wit, the legal incoherence of the claim that by virtue of his "purchase" of the Network Agreements and the Security Agreement and Personal Guaranty, Ellman not only was assigned the right to stand in the shoes of NAC for purposes of prosecution of an action for collection on amounts due thereunder, but had the right to render new invoices, including by the addition of new charges, for services actually rendered, or alleged to have been rendered, by NAC.

v) The invoices also appear to be inadmissible under Evid. R. 602.

(Pa66).

Not one of these issues was addressed by trial by defendant,

who was well aware of them, having despite being exempted by the court from making a like submission was served with plaintiffs' half of the pretrial order months prior to trial. Plaintiffs also, by virtue of this filing by plaintiffs, made the court well aware of all plaintiffs' objections.

In light of all this, as well as the wide scope of discretion granted to a trial judge to both make evidentiary rulings and to manage the trial, and the equities implicated by a full review of the record herein, plaintiffs submit that defendants have fallen far short of establishing a basis for reversal of the ruling of the Law Division, Morris County.

c. Appellant has failed to set forth any basis for reversing the ruling of the trial court directing a verdict for plaintiffs on the counterclaims.

Appellant's brief presents no principled or logical basis, much less any legal analysis, as a basis for reversal of the trial court's dismissal of counts one through four of the counterclaim. For this reason, and because the opinion of the court below so thoroughly lays out the record and legal bases for the directed verdict ruling, there is no reason for plaintiffs to analyze why those rulings should be affirmed.

CONCLUSION

For the foregoing reasons, Plaintiffs / Respondents

University Communications, Inc. and Jason Silverglate pray that this Court dismiss the appeal of Appellant Kenneth Ellman and affirm the decision of the Law Division, Morris County, and award Respondents their costs of appeal and such other relief as the Court deems just and fit.

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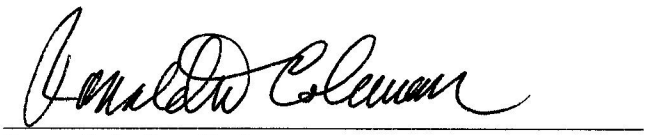
Dated: November 19, 2010

CERTIFICATION OF SERVICE

I hereby certify that November 19, 2010, I caused this Brief and Appendix of Respondents to be served on all counsel and parties of record by overnight courier (Federal Express.)



Ronald D. Coleman