MOHAN PATEL a/k/a SIYANI, *individually and as Shareholder, Director and Officer of Ana-Data Consulting, Inc.*, *Plaintiff*, *v.* LAL VAGHJI and ANA-DATA CONSULTING, INC., *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : HUDSON COUNTY DOCKET NO. L-4047-11 Civil Action

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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

When plaintiff Mohan Patel was fired by Ana-Data Consulting, Inc. ("Ana") almost 18 months ago for disloyalty – including setting up a competing firm while under a legal and contractual obligation with Ana not do so – he had not shown up to work for a year. Prior to this outrageous legal action, he had not been heard from since and, in his absence, Ana flourished. This Court should once again show him the door.

Plaintiff is a former employee of defendant Ana. During his tenure, plaintiff became accustomed to dipping into Ana's money for his own purposes, double-billing Ana and its clients, and even – well before he was finally discharged in April of 2010 – began to set up his own competing consultancy. None of this, and certainly no sense of shame, has prevented him not only from presenting himself as a victim of Ana, a company founded and financed entirely by others and in whose offices he has not been seen for over a year and a half. No, plaintiff comes to this Court demanding that Ana essentially be shut down by preliminary injunction and put at his disposal while he has the opportunity to "prove" in this litigation that, notwithstanding either an equitable or legal basis for claiming it, he is no less than a half owner of the firm!

The real purpose of plaintiff's efforts here, of course, is to hamstring the company he abused so selfishly during his tenure and give his present project, evidently struggling without access to the resources – including clients and cash – of Ana. Plaintiff is not entitled to the injunctive relief he seeks in his application for the simple reason that even if he could show a likelihood of success on the merits, which he cannot do, he has adequate remedies available to him at law, for he seeks compensatory damages in the form of monetary relief. It is black-letter law that a claim for money damages is simply not an appropriate basis to ask a court to employ the extraordinary remedies of equity, especially a preliminary injunction. There is no evidence whatsoever that, even if he had some claim on the assets of Ana – which plaintiff manifestly

does not – there is any risk of waste or dissipation of those assets by its founder and sole owner, defendant Lal Vaghji.

Plaintiff cannot show a probability of success on the merits for several reasons. First, in addition to the demonstrably false allegations at the center of his claims – and their falseness and illogic are readily demonstrated by defendants' submissions here – a myriad of material facts are in dispute. Further, plaintiff's claim that he owns equity in Ana is utterly undocumented, has no basis in the parties' conduct nor in any equitable expectation based on facts before the Court (or otherwise), and would in any case be denied by both law and equity due to plaintiff's secret competition with Ana in explicit violation of his employment agreement. Indeed it was plaintiff's usurpation of business opportunities meant for Ana, combined with his competition against defendant and other inappropriate and unlawful conduct that led to his termination from the company. This motion should be terminated in a similar fashion, with prejudice.

STATEMENT OF FACTS[1]

Plaintiff first met defendant Lal Vaghji in 1994, and requested that Mr. Vaghji and his company Ana help him with his job at Merrill Lynch. Vaghji directed Ana to provide consultants to plaintiff's team. Because these consultants worked at all hours, ensuring that plaintiff's deliverables were met, plaintiff advanced in his career.

As Ana grew, plaintiff saw an opportunity not only to benefit from it indirectly, but to latch onto the company's burgeoning success. Plaintiff joined Ana full-time, not – as he claims – in the expectation of equity ownership, for which he "gave up a lucrative $500,000 salary at Merrill Lynch and $400,000 at FTI." See Affidavit of Mohan Patel ("Patel Affidavit") at ¶ 11. Plaintiff's supposed salary from previous employers would not have been a basis for Mr. Vaghji

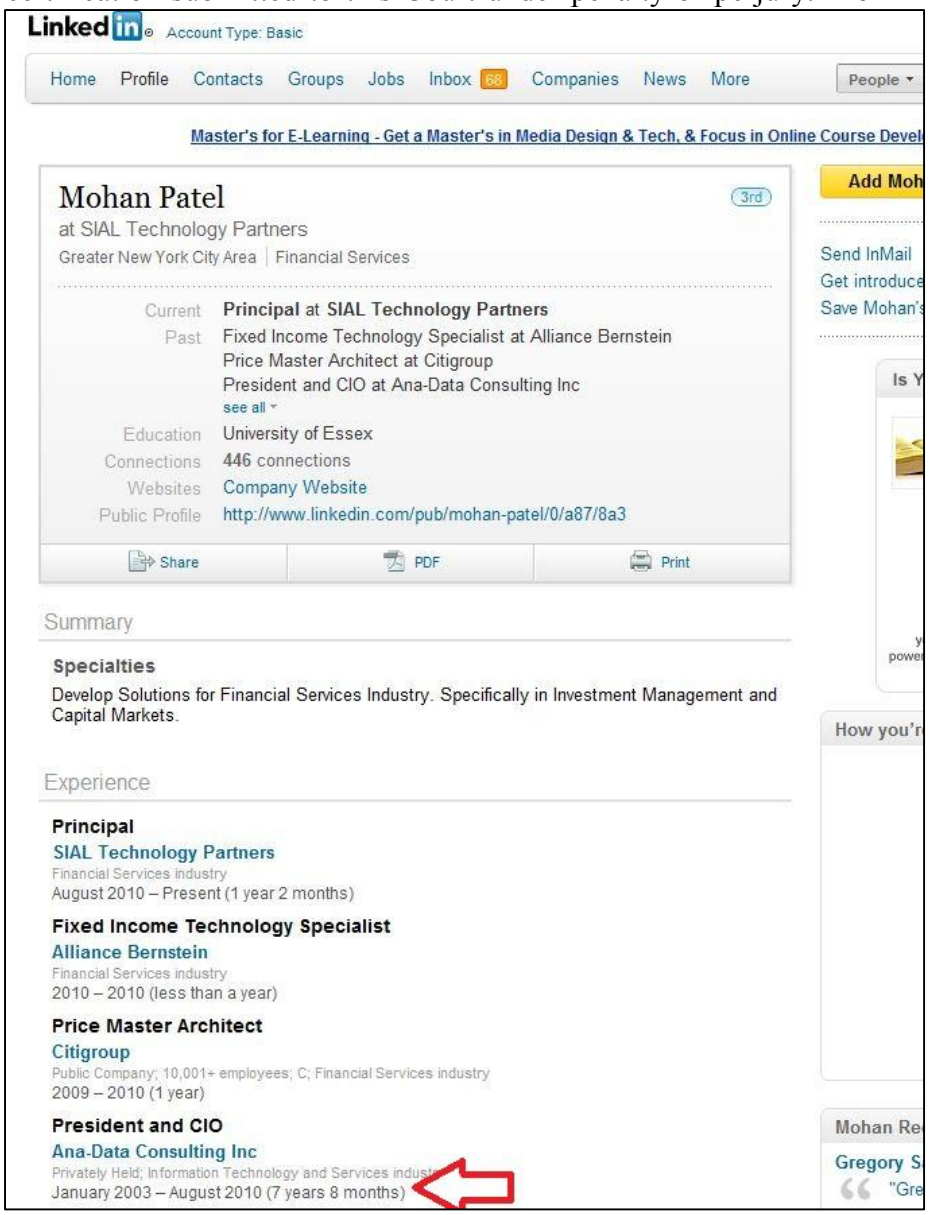
[1] All the facts set forth in the Statement of Facts are taken from the Certification of Lal Vaghji, filed herewith (the "Vaghji Certification").

to hand over half of Ana to him. Moreover, plaintiff did not "give up" his FTI position to join Ana; he was terminated from FTI and freely admitted this to Mr. Vaghji. Plaintiff came to Ana to escape the demands of a grueling corporate bank job for one with the flexible hours and "flexible expenses" – i.e., the "expense account" of consultancy work in which many ordinary personal expenses could be passed onto engagement clients – that he believed Ana offered him. As he said in a 2008 email annexed to the Vaghji Certification as Exhibit "B," it was the non-financial benefits of his situation with Ana that justified the financial sacrifice of leaving banking. "I am already reaping my benefits from ana-data, flexible hours, flexible expenses etc. I put an immense value to this as oppose to earning million bucks from a corp [*sic*] job."

In an attempt at dressing his impossible claim of an equity stake in Ana in the garment of credibility, plaintiff asserts that he rose to become "President and Chief Information Officer" of the company from January 2002 until December 2010." Patel Affidavit at ¶ 4. But plaintiff could not have been "Chief Information Officer" – and not because anyone else was better qualified for the job. The reason is that no employee, let alone plaintiff, ever held the title "Chief Information Officer" at Ana. This is not merely a matter of nomenclature: Ana does not have the technological infrastructure which would require such a position. Similarly, plaintiff has never held the title of "president"; Mr. Vaghji has always been the company's president. Plaintiff submits no documentation whatsoever supporting the claim that he was ever president of Ana-Data.

Never satisfied with a small lie, plaintiff has lied large and often in his papers with respect to his former employment. As stated above, plaintiff invented a position ("Chief Information Officer") that never existed; usurped another ("President") held only and exclusively by Mr. Vaghji, the company's founder and sole owner; and in plaintiff's imaginary world, he

held these positions even longer than he was ever employed by Ana in any role at all! The supposed "President and Chief Information Officer" of Ana from January 2002 until December 2010 was not even employed at Ana until January **2003** and was terminated for cause in April, not December, of 2010. Disturbingly, this claim of approximately a year and a half longer a period of employment than existed in reality is one plaintiff seems to have saved only for a certification submitted to this Court under penalty of perjury. For in his own online LinkedIn profile (annexed to Mr. Vaghji's certification as Exhibit "C" and reproduced at left – see bottom entry reading "President and CIO"), plaintiff acknowledges to the whole world that he started at Ana, not in 2002 as testified to in his Certification, but in **2003**, and he exaggerates the end of his tenure by a relatively modest four months, until August 2010, not December 2010 as he claims here under penalty of perjury.



Evidently plaintiff's purpose in claiming employment a year earlier than actually happened is to give a false (perjurious, actually) impression of the "sweat equity" he supposedly earned at Ana, somehow justifying his baseless claims here. And in misstating the date on which he left Ana, he apparently seeks to shorten the inexplicable period of repose before he saw fit to "realize" the wrong done to him and file this action. His dishonesty in making these claims, however, only underscores the fraudulent nature of his legal demands.

Plaintiff claims grandiosely that, once employed by Ana, the company's revenue grew "mainly" as a result of his presence. See Patel Affidavit at ¶ 12. He says nothing, however, to substantiate that claim, and certainly neither documents it nor provides any other form of objective proof to support it. It is false. In fact, Ana succeeded due to the hard work of all the company's employees and because the firm reinvested profits back into the company since 1993, whereas given the first opportunity, plaintiff abused his privileged access to the company's finances to pay for personal automobiles and home renovations and to support his extramarital affairs.

Plaintiff was terminated by Ana in April 2010 due to his wrongful self-dealing and usurpation of Ana's business opportunities, both of which will be more fully described below. Plaintiff had no contact with Ana for the nearly 18 months between his termination and his filing this action. During this time he neither provided professional services nor drew a salary from Ana, let alone a percentage of Ana's profits. Incredibly, however, plaintiff now claims entitlement to an injunction to shut down Ana's operations so he can go back to playing with Ana's treasury and abusing its clients – evidently having discovered that life on the "outside," despite the considerable claims he has made for single-handedly causing Ana's success, is a little less rich than when he had access to prestige, cash-flow and easy living at Ana.

Plaintiff falsely alleges that Mr. Vaghji engaged in "unsavory" withdrawals from Ana's account. See Complaint at ¶ 49; for the Court's convenience, plaintiff's list of "unsavory" transactions is annexed to Mr. Vaghji's certification as Exhibit "D". There is, of course, no legal basis whatsoever for defendants to have to justify a penny in transactions to anyone, much less a disgraced ex-employee. Indeed, defendants have at this time no idea how it is plaintiff came to have access to Ana's banking statements, to which no one with authority to do so ever granted him access. But be that as it may, there is nothing in the least unsavory or unlawful about these transactions, except to the extent they cast a very unflattering light on plaintiff himself.

For indeed, each of the "transfers to Dominican Republic Bank" listed on Exhibit "D" to Mr. Vaghji's certification represents a transfers that actually is rather unsavory: Each was made from Ana's checking account by plaintiff to support plaintiff's mistress and out-of-wedlock child in the Dominican Republic. See emails relating to loans to Plaintiff and disbursements to plaintiff's girlfriend Annie De Los Santos for her expenses in the Dominican Republic, annexed to Mr. Vaghji's certification as Exhibit "E". Naturally, by transferring money directly out of Ana's account instead of making these payments through his own funds, he avoided the scrutiny of his wife and, presumably, tax authorities for these sordid transactions.

Moreover, the $225,000 "transfer to unknown account", also cited at ¶ 49 of Plaintiff's Complaint, was simply a transfer from the company's checking account to its high-yield savings account, as indicated on page 8 of the Chase statement itself. These transfers were made for the entirely rational purpose of maximizing the value to Ana of cash on hand for the medium run. Indeed, $400,000 was transferred to the savings account a few days earlier; it differs in no way whatsoever from the one deemed "unsavory" by plaintiff but, for some reason, plaintiff does not

question this transfer. See page 8 of plaintiff's Exhibit "F", annexed to Mr. Vaghji's certification as Exhibit "F".

To continue debunking plaintiff's list of "unsavory" transactions: the $3,000 check dated May 1, 2008 was paid to Monster.com for advertising purposes. The $15,000 check dated May 8, 2008 was paid to SureTech Services, a firm that provides consulting services to companies such as Ana. The $67,750 transfer on May 30, 2008 – as indicated on plaintiff's exhibit itself – is nothing more than an automatic transfer from Ana's savings account to cover a checking overdraft. See relevant page from plaintiff's exhibit showing May 30, 2008 transfer, annexed to Mr. Vaghji's certification as Exhibit "G".

Finally, the "unidentified check" dated August 28, 2008 was a personal distribution to Mr. Vaghji who, as Ana's 100% owner, is entitled to take profits at his discretion. That is why he formed the business, why he is still dedicated to it and indeed why he got rid of plaintiff, who did neither.

The question of whether plaintiff ever held equity in Ana, or is entitled to an equity share, borders on the comical. Plaintiff's own correspondence confirms that Mr. Vaghji has always been sole owner of Ana. Plaintiff acknowledged this repeatedly in emails, such as those on October 22, 2008 ("Lal is sole owner of AD and has 100 outstanding shares"), January 13, 2009 ("you own the company"), May 18, 2009 ("the company is entirely yours"), July 6, 2009 ("you own the treasury and the company"), and September 14, 2009 ("You legally own the company"), collectively annexed to Mr. Vaghji's certification as Exhibit "H."

If, as plaintiff claims, Ana "barely observed corporate formalities and … was in fact operating as a de-facto partnership" (see Complaint, ¶ 103) – an allegation he neither documents nor supports with specific descriptions of which corporate formalities he presumably found

wanting – plaintiff would have reported his S-Corporation partnership income to the IRS through a Schedule K-1 that Ana would have provided him. But there was never a K-1 and plaintiff is unlikely to have reported K-1 income on his tax returns; indeed he would have no basis for doing so. He never received a partnership distribution or even asked for one. It is undisputed that Ana was and is a corporation, the shares of which are held entirely by Mr. Vaghji.

In fact, even taking plaintiff less than literally and assuming that by "partner" he means a fifty-percent shareholder, the facts do not remotely bear out his claim of ownership. Certainly nothing plaintiff has put before the Court contradicts the obvious conclusion that plaintiff was an employee at all times during his … employment. That status is fully reflected in the Employment Agreement attached as Exhibit "A" to the Complaint and as Exhibit "I" to the Vaghji Cert. The two-page agreement – entitled "**Employment** Agreement" – clearly defines plaintiff's status as an employee. And while the Employment Agreement did, generously, contemplate a future where plaintiff may have been entitled an equity stake, providing in a sentence abounding in adverbs – important ones – that the "Employee shall be entitled to a 50% Equity Stake (Ownership) in the Employer, which shall be contractually be put in place subsequently." (See Plaintiff's Exhibit "A" at ¶ 3.3). There is no timeline describing when "Employee shall be entitled" – a construction obviously contemplating a future event that never occurred. Indeed, no "contract" was ever "subsequently … put in place." No contract for an equity share to plaintiff was executed, drafted, contemplated or earned.

Nor does plaintiff describe any facts consistent with the inference of the existence of such a contract by conduct of any party. Plaintiff has placed before the Court no factual basis – such as extraordinary skills, talent, connections or financial contributions – that would remove his assertion that someone with his track record would be invited to share in half the profits of Ana

from the category of fantasy. And pursuant to the terms of the Employment Agreement, any right plaintiff may ever have earned toward entitlement to an equity stake was a nullity, because a necessary condition had been gravely violated: A contractual form of the duty of loyalty, found at common law even absent a contract and a fundamental component of decency for which plaintiff had no use.

Specifically, plaintiff had not "Cease[d] to compete with Employer." See Plaintiff's Exhibit "A" at ¶ 3.3(a). To the contrary, in early 2009, plaintiff ceased something else: coming into work. He did not cease to collect his salary, however. Plaintiff told Ana at this time that he was conducting Ana's business outside the confines of Ana's offices. In fact, Ana learned later that plaintiff was engaged in a scheme to collect two salaries and at the same time defraud his employer – the employer he now asks this Court to believe was really his "partner."

One of Ana's services is to provide technology consultants to financial firms. In order to provide staff to one important client, Citigroup – the world-famous money-center financial institution – Ana must go through one of Citigroup's preferred staffing companies, such as Open Systems. Therefore, Ana is a supplier of talent to Open Systems.

Ana signed an agreement with Open Systems to place one of Ana's consultants at Citigroup, and satisfied all the necessary conditions for doing so, such as securing workman's compensation insurance and obtaining clearance for Ana's consultant with Citigroup. Open Systems charged an 8% commission off the top of Ana's compensation. For example, if Citigroup offered to pay $100/hour for the position in question, Citigroup would pay Open Systems, which would take $8 and remit $92 to Ana. The consultant would provide his time sheets to Open Systems, enabling the company to seek payment from Citigroup and allocate compensation to Ana.

At some point in 2009, plaintiff learned of an opening with Citigroup and approached Open Systems to offer a candidate for the position. Rather than offering to staff the position on behalf of Ana by placing one of Ana's consultants, however, plaintiff went around Ana and sought to fill the position with a candidate in a manner that would not benefit Ana at all – himself.

Open Systems accepted plaintiff's offer, and plaintiff began working full-time at Citigroup. Plaintiff did not attempt to cheat Open Systems, however. He duly submitted his time sheets to Open Systems for his work at Citigroup, and Open Systems deducted the commission pursuant to its agreement with Ana. But per his instructions, Open Systems paid plaintiff, not Ana, directly. See email dated May 6, 2010 from Open Systems confirming Plaintiff's submission of time sheets while still employed at Ana, annexed to Mr. Vaghji's certification as Exhibit "J". Not a penny went to Ana.

Plaintiff not only usurped Ana's business opportunity by taking for himself a position that Ana could have filled using its own consultant, or even plaintiff himself as an Ana consultant: During this entire time, plaintiff was collecting a full-time salary from both Ana and Citigroup (via Open Systems). Plaintiff thereby breached the Employment Agreement, which provides, in relevant part, that

> employee agrees to serve employer and will devote his full time and exclusive attention to, and use his best efforts to advance, the business and welfare of Employer. During the term of this Agreement Employee will not engage in any other employment activities…

Plaintiff's Exhibit "A" at ¶ 2.

This was not plaintiff's only breach of loyalty, ethics and the contractual obligations set forth above. During approximately the same period, and while still collecting (at least one) salary from Ana, plaintiff formed a new company called SIAL Technology Partners LLC

("SIAL"). SIAL competes directly with Ana. Besides setting up a competing company while working for Ana, plaintiff also induced two Ana employees to work for SIAL and at least two of Ana's clients to switch to his firm.

Notwithstanding these underhanded actions – themselves more than a little "unsavory," to use his terminology – plaintiff has by all indications found, after 18 months, that it is easier to enjoy the benefit of one or more income streams while drinking at the trough of someone else's business – i.e., Ana – than to actually succeed in business on the merits, especially when the firm you stole from and manipulated for your benefit is still doing it "better, faster and cheaper."

For this reason, it is a reasonable supposition that, regretting his choice of leaving the good life at Ana, plaintiff seeks a restraining order to remove the life from Ana and thereby what he imagines to be the only obstacle to the success of his new endeavor. As demonstrated below, however – as if the foregoing narrative and the supporting certification were not sufficient ground for the Court to deny the relief sought – there is no legal basis whatsoever for plaintiff to be granted to extraordinary relief he seeks.

LEGAL ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO EMERGENT RELIEF BECAUSE HE HAS FAILED TO DEMONSTRATE IRREPARABLE HARM.

Plaintiff is not entitled to injunctive relief because he has adequate remedies available to him at law. A preliminary injunction should not be issued unless necessary to prevent irreparable harm. *Crowe v. DeGioia*, 90 N.J. 126, 131 (1982). It is axiomatic that harm is considered irreparable only if it cannot be adequately addressed by monetary damages. *Id.*

The moving party on an injunction motion bears the burden of showing irreparable harm. *Judice's Sunshine Pontiac, Inc. v. General Motors Corp.*, 418 F. Supp. 1212, 1219 (D.N.J. 1976). Here, plaintiff seeks monetary relief – back salary and profits. Patel Affidavit at ¶¶ 51-61. The demands that plaintiff be made whole would appropriately be considered at the end of the litigation, in the unlikely event that plaintiff were to prevail, by the payment of money. Thus in *Judice's Sunshine*, *supra*, the Court denied the granting of a preliminary injunction because the plaintiff was able to recover costs and attorneys fees should he prevail in litigation. *Id.* at 1222. The Court reasoned that "the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* The *Judice's Sunshine*'s court's reasoning, well known to every judge in this State, is applicable in this case. Therefore, on this ground alone plaintiff's application should be denied.

II. PLAINTIFF IS NOT ENTITLED TO EMERGENT RELIEF BECAUSE HAS NOT SHOWN A PROBABILITY OF SUCCESS ON THE MERITS.

A. The Material Facts are in Dispute.

Plaintiff has not come close to showing and cannot show a reasonable probability of success on the merits. "The time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." *Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth.*, 399 N.J. Super. 508, 528 (App. Div. 2008) (citations omitted). In particular, "a preliminary injunction should not issue where all material facts are controverted." *Crowe v. De Gioia*, 90 N.J. at 133. "[I]n other words, the movant must clearly and convincingly show that the material facts are not in dispute *Sherman v. Sherman*, 330 N.J. Super. 638, 645 (Ch. Div. 1999).

Far from meeting that standard here, plaintiff has presented the Court with a situation in which every single material fact is controverted. Besides plaintiff's own self-contradictions, Mr. Vaghji disputes essentially all the material facts underlying Plaintiff's claims. For example, Mr. Vaghji disputes plaintiff's claims that Mr. Vaghji made unauthorized withdrawals from the company checking account. Mr. Vaghji contests plaintiff's claims that Mr. Vaghji "failed to transfer ownership to plaintiff, as per the terms of the Agreement" or that plaintiff was ever entitled to such ownership, either contractually, at equity, or even post facto, given the indisputable fact that plaintiff materially breached his employment agreement by double-dipping with an Ana client while collecting his own salary and blatantly competing with, and defrauding Ana. *See* Vaghji Cert. at ¶¶ 23-31.

It should be noted that, since his termination from Ana, Plaintiff has formalized and "legitimized" his competing company, poaching employees and clients from Ana. Vaghji Cert.

at ¶ 31. Such bad faith does not warrant the granting of emergent relief. Therefore, the remaining relief plaintiff seeks – inspection of Ana's financial records and an independent evaluation of the same — should also be denied.

B. Plaintiff Has Made No Showing of Entitlement to Equity in Ana.

Virtually all of plaintiff's claims here fall away upon consideration of the paltry showing he has made in support of his argument that he in an owner of, or should be deemed an owner of, half of Ana-Data, Inc. – especially in light of his burden on a motion for a preliminary injunction. As set forth above, plaintiff, unlike defendant Vaghji, is not a founder of Ana. He never contributed capital to Ana. There is no documentation supporting the convenient interpretation of plaintiff's decision to come to Ana as anything but a job switch, as opposed to the promise of ownership he rashly asks this Court to infer. Nor is there any evidence documenting anything more than a vague "agreement to agree" – at some future date – to award equity to plaintiff, and even then only upon, axiomatically, his performance of all the obligations under his Employment Agreement, which he cynically violated by converting Ana funds and business opportunities to his own benefit and setting up his own competing business while employed by Ana. Nor is there any legal or factual support for the suggestion, unsupported by documentation or specifics, that because Ana's sales increased during the time he was employed by the company, he should own it now. That plaintiff would come into this Court a year and a half after last being seen on Ana's premises – and with good riddance acknowledged by defendants upon his departure – and claim to be the "long-lost owner" of the company he milked while employed is beyond incredible.

The cases unsurprisingly demonstrate judicial impatience with claims such as these. Though typically the case citations to principles of equity come at the end of the legal argument, here, in light of the egregious conduct of the plaintiff, this selection rejecting a similar claim in

Flores v. Murray, A-0145-06T5, 2007 WL 3034512 (N.J. Super. Ct. App. Div. Oct. 19, 2007) – omitting the internal quotes and citations – makes an appropriate entrée:

> Defendant asserts that, because he ran the "company for seven months with outstanding financial results for all of them," it was inequitable for him to forfeit his equity and his interest in the undistributed profits. Equity regards that as done which ought to be done. Applying principles of fairness and justice, a judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law. One who seeks the intervention of a court of equity must do equity. A suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings. In simple parlance, it merely gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit. Equitable intervention to set aside his forfeiture of ownership or allow him to recover undistributed profits was not warranted given defendant's adverse conduct. His contentions to the contrary lack sufficient merit to warrant further discussion in a written opinion.

Plaintiff's claims here are similar entitled to short shrift. For one thing, it is axiomatic that an employee's claimed right to stock options or stock cannot be better than his right to recovery under a contract that he has breached. See, e.g., *Moses v. Corning Inc.*, 105 F. App'x. 363 (3d Cir. 2004). Moreover, plaintiff's claim to rights as a "partner' can be determined by this Court, not only preliminarily, but based on the complaint finally, to be deficient as a matter of law:

> The question as presented to this court is one of law and not one of fact. The facts are really not in dispute. The contest concerns the inferences of law to be drawn from the facts ..." *Fenwick v. Unemployment Comp. Comm'n*, 133 N.J.L. 295 (E. & A.1945). [Where an] alleged partnership agreement does not meet the legal criteria required by New Jersey common law [. . . t] he lack of a valid partnership agreement renders any material disputes of facts related to the specifics of the partnership agreement moot.
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> Under New Jersey's Uniform Partnership Law, a partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." N.J.S.A. 42:1-6. A partnership is created when "persons join together their money, goods, labor or skill for the purpose of carrying on a trade, profession, or business, wand and where there is a community of interest in the profits or losses." *Farris v. Farris Engineering Corp*., *et al*., 7 N.J. 487 (1951). The burden of establishing a valid partnership exists falls onto the party that is alleging it. *Fenwick v. Unemployment Comp. Comm'n* 133 N.J.L. at 300. New Jersey courts have applied the factors laid out in *Fenwick v. Unemployment Comp. Comm'n* in

> order to determine whether a partnership agreement is valid. 133 N.J.L. at 297-99, 44 A.2d 172; see also *Eagan v. Gory*, 2009 U.S. Dist. LEXIS 14628 1, 17, 2009 WL 483851 (D.N.J. Feb. 24, 2009). These factors include the intent of the parties, right to share in profits, obligation to share in losses, ownership and control of the partnership property and business, community of power in administration and reservation, language of the agreement, conduct of the parties toward third persons and the rights of the parties on dissolution. *Fenwick* 133 N.J.L. at 297-99, 44 A.2d 172.

Aequus Technologies, LLC v. gh, LLC, CIV.03-5139(WHW), 2009 WL 2526697 (D.N.J. Aug. 17, 2009). Clearly there is, as a matter of law, no partnership alleged here; there is certainly no basis to find that the plaintiff is likely to succeed in proving the existence of one for purposes of this motion.

Finally, nothing in the Employment Agreement, properly considered as a whole, can support the assertion that it is meant to award equity to plaintiff. "In construing a contract a court must not focus on an isolated phrase but should read the contract as a whole as well as considering the surrounding circumstances." *Joseph Hilton & Associates, Inc. v. Evans,* 201 N.J.Super. 156, 171 (App. Div.1985). Additionally, the conduct of the parties after execution of the contract is entitled to great weight in determining its meaning; "an agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose." *Wheatly v. Sook Suh*, 217 N.J. Super. 233, 239-40 (App. Div. 1987). Moreover, a subsidiary provision should not be interpreted in such a manner as to conflict with the obvious or dominant purpose of the contract. *Newark Publishers' Assn. v. Newark Typographical Union*, 22 N.J. 419, 426 (1956).

Certainly nothing plaintiff has put before the Court contradicts the obvious conclusion that plaintiff was an employee at all times during his employment. That status is fully reflected in the Employment Agreement attached as Exhibit "A" to the Complaint. The two-page agreement – entitled "**Employment** Agreement" – clearly defines plaintiff's status as an

employee. Except for ¶3.3, discussed specifically below, absolutely every provision in the Employment Agreement is consistent with it being nothing but an "Employment Agreement" – not a partnership agreement or anything but an agreement between an employer, in this case Ana, and an employee, in this case plaintiff. Perhaps the best example of this is ¶ 1.1, which provides for a three-month initial review period "at which the progress of **the employee**'s efforts with the job responsibilities will be assessed". (Emphasis added). Partners, of course, do not "review" or "assess" each other; they are not called "employees"; and certainly one partner is not reviewed or assessed to the exclusion of the other partner or partners. While ¶ 3.3 of the Employment Agreement states that the "Employee shall be entitled to a 50% Equity Stake (Ownership) in the Employer, which shall be contractually be put in place subsequently." (See Plaintiff's Exhibit "A") this never happened, was never demanded, and clearly, at best, contemplates a future agreement under terms to be determined. There is no way to read the Employment Contract as a grant of stock or a partnership agreement. And it is not either.

C. Mr. Vaghji's Actions Do Not Constitute Shareholder Oppression.

Plaintiff claims that the defendants breached a fiduciary duty to plaintiff by failing to pay plaintiff's compensation. Of course, there was no breach here because there was and is no fiduciary duty running to an employee such as plaintiff.

Even if he had been a shareholder of Ana, however, plaintiff has not been oppressed. In determining whether shareholder oppression is present, courts must determine the minority shareholder's reasonable expectations of his or her role in the corporation, including non-monetary expectations. *Brenner v. Berkowitz*, 134 N.J. 488, 509 (1993). The New Jersey courts have reasoned that a minority shareholder's expectations must be "balanced against the corporation's ability to exercise its business judgment and run its business efficiently." *Muellenberg v. Bikon Corp.*, 143 N.J. 168, 179 (1996).

The facts before the Court on this application are entirely consistent with a finding that Mr. Vaghji's actions are justifiable under the business judgment rule, which "instructs that a decision made by a board of directors pertaining to the manner in which the corporate affairs are to be conducted should not be tampered with by the judiciary so long as the decision is one within the power delegated to the directors and there is no showing of bad faith." *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super 141, 141 (Law Div. 1979). In *Exadaktilos*, the Court held that the controlling shareholder's actions of discharging a minority shareholder from a corporation did not amount to shareholder oppression. *Id*. at 156. In that case, the minority shareholder was found to have "failed to get along with employees, causing the loss of key personnel, that he quit on more than one occasion, without reason or notice, and that he was not compatible with the other principals." *Id*. at 155. The Court concluded that plaintiff's discharge was due to his "unsatisfactory performance." *Id*. The Court reasoned that "the promise of employment was honored, the opportunity being lost to plaintiff through no fault of defendants." *Id*. at 156. Notably, the Court relied on the fact that "the parties' expectation that plaintiff would at some point participate in management was likewise thwarted by plaintiff's failure to satisfy the condition precedent to participate, i.e., that he learn the business." *Id*.

In the instant case, plaintiff fails to provide anything but empty demands to participation in management or ownership. He was diverting company funds to fuel his extra-marital affair in the Dominican Republic. Vaghji Cert. at ¶¶ 13-17. This was an added and unnecessary expense on the company that could have been eliminated by plaintiff spending his own money on such trivialities. Rather than working for the best interest of Ana, Plaintiff spent inordinate amounts of time in the Dominican Republic attending to his girlfriend and out-of-wedlock child. He perpetrated a fraud on the company by collecting his Ana salary while simultaneously working

full-time for Citigroup. He diverted funds meant for Ana to his own personal account. See Vaghji Cert. at ¶¶ 23-31.

Mr. Vaghji's actions were conducted in good faith, as they were taken in order to run the business efficiently. Indeed, it would have been mismanagement to maintain plaintiff on the payroll given plaintiff's actions. For these reasons, a preliminary injunction and temporary and permanent restraints could not possibly be based on the actions of defendants here, even if, contrary to law, plaintiff had any standing to challenge them.

CONCLUSION

For the foregoing reasons, plaintiff's application for an Order to Show Cause seeking a preliminary injunction, with temporary and permanent restraints, should be denied in its entirety.

Respectfully submitted,

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