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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D22-2159; 4D22-3155
Consolidated

BERGERON ENVIRONMENTAL AND RECYCLING, LLC, a Florida limited liability company,
Appellant,

v.

LGL RECYCLING LLC a Florida limited liability company, WASTE MANAGEMENT INC. OF FLORIDA, a Florida corporation, ANTHONY LOMANGINO, an individual, CHARLES GUSMANO, an individual, and JOHN CASAGRANDE, an individual,
Appellees.
______________________________/

INITIAL BRIEF OF APPELLANT

On appeal from the Seventeenth Judicial Circuit
in and for Broward County

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STATEMENT OF THE CASE AND FACTS

In 2011, Sun Recycling, LLC ("Sun") and Bergeron Environmental and Recycling, LLC ("Bergeron") formed the Sun/Bergeron Joint Venture ("SBJV") to process waste produced by Broward County municipalities (T144).

A. SBJV Formation and Purpose.

SBJV started when Anthony Lomangino, Sun's principal, and Ron and Lonnie Bergeron decided to end the Broward County waste disposal monopoly controlled by Waste Management Inc. of Florida's ("WMIF") (T112-3;R36497). Ron Bergeron would use his reputation and long-standing business relationships to obtain waste disposal contracts with Broward County municipalities, and Sun would use its "state of the art" facilities and expertise to process and recycle the waste streams (T109;T118-9). Because Sun did not have transportation or disposal facilities, SBJV would outsource these services to third-party providers (PL-002 §3.1,5.6).

The SBJV Agreement (the "JVA") (PL-002) set forth the agreement between Sun and Bergeron (the "Venturers"), each owning 50% of SBJV (¶4.2). The SBJV executed waste disposal contracts, serviced customers, and "allocate[d] between the Venturers all work,

materials and other matters" (¶2.3). The Venturers agreed to use good faith in creating a "Schedule A" for each customer contract, which outlined their respective scopes of work (¶3.1(a)(i)).

The SBJV (the "Venture") was managed by an Administrative Committee, consisting of Ron Bergeron and Lomangino; all actions and decisions were by "unanimous vote" (¶5.1(a) and (c)). Neither Venturer had the authority to take any action by acting alone (¶5.1(c)). Each Venturer was required to perform the work outlined in each Schedule A to each customer contract (¶5.6). If any part of the work was to be performed by a third-party, the outside contract had to be approved by the Administrative Committee and executed by "the Venture" (¶5.6(c)). The JVA prohibited the transfer or assignment of "any interest in the joint accounts" or "any property of any kind employed or used in connection with the Customer Contracts . . . except with the prior written consent of both Venturers, which consent shall not be unreasonably withheld or delayed" (¶7.3).

The Venturers agreed to keep competitive information confidential with an exception only for confidential information used in their own businesses (¶7.4). The Venturers agreed not compete over customer contracts (¶7.5). Sun emphasized it would be adverse

to SBJV when bidding if competitors obtained confidential information, such as SBJV's disposal costs (T153-4;PL-544).

The JVA was effective November 30, 2011.

B. SBJV Ends Waste Management's Monopoly.

SBJV made presentations to municipalities in Broward County. SBJV wanted to obtain contracts first with Miramar and/or Southwest Ranches, and then piggyback those contracts into contracts with other cities (T114;119).

In its presentation to Miramar, Sun's principal spokesperson Philip Medico explained the SBJV would ensure "[o]ur hands are no longer tied and the savings will [inure] to the benefit of the taxpayers of the City of Miramar and potentially to the Broward County citizens and other communities that decide to opt in" (T100;112). Asserting WMIF had been price-gouging the cities for years, Medico lobbied for competition in the waste disposal market (PL-179). SBJV distinguished itself from WMIF by having multiple processing facilities in Broward County (T123-4). SBJV could process, recycle, and divert waste streams from the landfills used by WMIF (PL-970 p.5).

SBJV signed contracts with 25 Broward County municipalities (the "Customer Contracts") representing 30% of the market and creating robust competition in Broward County[1] (T145). Medico announced the Miramar contract to Sun management stating, "We just busted up a 25-year monopoly…that will save taxpayers of Broward hundreds of millions of dollars." (T138;PL-540). The Customer Contracts were effective in 2013 with a 5-year term and renewable every 5 years (T144-5;PL-10;R36487). Lomangino described this as "the largest contract in the history of our company" (T144;PL-50).

In the Customer Contracts, SBJV was the contractor responsible for operations (T140-1). Once the waste reached SBJV-related facilities, SBJV owned the waste (T140-1;143) (PL-175 §3.B.(6)).

SBJV handled approximately 450,000 waste tons per year (PL-473). Once waste came into Sun's processing centers and was weighed, Sun would send an invoice to SBJV for its processing fees (T585-6). Sun was paid a management fee of $500,000 a year to

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[1] Many municipalities required SBJV to commit to achieve the State's 75% recycling goal (PL-10;T115-18).

manage performance (T574;1364). SBJV's profits were a direct function of reducing costs (T745). SBJV bore the contractual risk for any failures to perform (T142;555).

C. Sun Ignores the Terms of the JVA.

Charles Gusmano testified Sun had the unilateral authority to contract on behalf of SBJV, notwithstanding Section 5.1(c) required Administrative Committee approval (T575-8). Gusmano never followed this requirement because "it wouldn't be practical for us, meaning Sun Recycling, to have to run to the Bergeron to make every decision we needed to do handle what we were obligated to perform under the [JVA]" (T576). Gusmano said he did not have to comply with the JVA and could subcontract on behalf of Sun if he wanted (T580-2). According to Gusmano, Sun owned the SBJV waste when it "hit the floor" of a Sun facility (T592). Sun maintained it could do whatever it wanted with the waste, even sell it to WMIF if it wanted (T592).

D. The Asset Purchase Agreement Between Sun and WMIF.

In 2014, Sun began negotiating a sale of certain assets, which included SBJV's revenues, to WMIF. As part of these discussions, Sun gave WMIF SBJV's confidential information on October 30, 2014

(T1094-96;PL-337). On June 24, 2015, Sun gave WMIF the details of SBJV's disposal costs for each Customer Contract and facility (PL-473). WMIF used the confidential information Sun had provided about SBJV's costs and pricing to calculate the value of the SBJV tons to WMIF (PL-715).

In January 2015, WMIF proposed in a draft Asset Purchase Agreement ("APA") that WMIF purchase Sun's assets and the SBJV Customer Contracts for $440 million (PL-349;1.1(k),3.1). However, Lomangino and Ron Bergeron met and agreed Sun would not sell its SBJV interest separately from Bergeron's (T3183-4;PL-646). In February, Sun returned a revised draft APA to WMIF deleting the provisions related to SBJV (PL-462).

WMIF insisted "[t]he JV commitment to SWS ~ has to be in place to do the deal" (PL-485).[2] June 7th, WMIF increased the purchase price to $510 million and reinserted SBJV's Customer Contracts (PL-356). Sun agreed to include SBJV interests in the sale and signed the APA on June 17, 2015 (PL-735). The June APA contemplated the Customer Contracts would all be sold to WMIF and required SBJV to

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[2] The JV commitment meant the revenues generated by the Customer Contracts (PL-735).

enter into disposal agreement with WMIF ("SBJV Subcontract") to perform the services required by the Customer Contracts (PL-735;§1.1(k), 10.6(q)). After the June APA was executed, Sun offered to reduce the purchase price and remove SBJV assets from the deal, but WMIF insisted for the deal to proceed SBJV assets had to remain part of the transaction (PL-636).

On June 17, 2015, Sun notified Bergeron it intended to sell the assets it used in performance of SBJV contracts (T3186;R323). Sun never told Bergeron exactly what those assets were or gave it a copy of the APA. Instead, Sun asked Bergeron to meet and discuss the transaction with WMIF (T2846-47;PL-332). On July 9, 2015, WMIF met with Bergeron to discuss the terms under which he would agree to work with WMIF (*Id*).

On July 20, Bergeron, without having seen the APA, wrote to Sun setting forth his concerns about the effect any sale to WMIF would have on the Customer Contracts and SBJV (T3201-2). Bergeron understood WMIF's proposed SBJV Subcontract would increase the prices of disposing recyclable waste in the renewal period (PL-44). Bergeron advised WMIF and Sun it could not agree because it was not consistent with the existing Customer Contracts

(PL-518; T3194). Bergeron instead proposed a "long-term disposal agreement between [WMIF] and [SBJV] (to include all contract renewal terms)...with competitive favorable rates" (LGL-13 p.3 §ix). As consideration for the disposal agreement and to relieve Bergeron from ongoing disputed financial claims by Sun, Bergeron proposed WMIF and Sun adjust the accounting issues between the Venturers, totaling approximately $6.3 million. WMIF agreed to pay this amount if an overall deal could be made. When WMIF sent back a disposal agreement increasing the customer prices (PL-44), Bergeron rejected it (PL-518).

Although the negotiations with Bergeron and WMIF ceased, WMIF and Sun went forward with the APA. WMIF and Sun amended the APA ("July APA") to eliminate the SBJV Subcontract and the disposal agreement and transferred the economic benefit of the Customer Contracts to WMIF using a subcontract between Sun and WMIF ("Subcontract") (PL-573;PL-245 §1.1(k)). WMIF recognized it could obtain the same economic value from Customer Contracts with a "subcontract" giving WMIF full control over the waste tons and revenues ("The economic benefit associated with these contracts is addressed in the Subcontract between Sun and WMIF")(PL-916).

WMIF's counsel, John Tsai, considered how to structure the agreements with Sun without violating the noncompete clause in the JVA (PL-298). Tsai came up with an anti-competitive design. He reasoned if WMIF "let Anthony [Lomangino] keep his interest" in the SBJV, WMIF would not be covered by the noncompete but the Venturers would, and Sun would be prevented from competing with WMIF "by virtue of his 5 year non-compete with us" (PL-298). WMIF decided "Sun will remain as a partner with [Bergeron] in [SBJV] and Sun will subcontract the performance of its obligations, or scope of work, under the JV to us…" (PL-34).

On November 16, 2015, WMIF and Sun executed the Subcontract (PL-445). The Subcontract gave WMIF "exclusive control of the details of the Services" and prohibited any supervision of WMIF's performance. Section 2 closed certain designated processing facilities and rerouted waste volumes to WMIF facilities. Section 2(b) required WMIF to recycle only up to "industry standards," which was lower than the 75% recycling requirements in many of the Customer Contracts (T1596;R10345;10375-405). SBJV remained responsible for any resulting penalties imposed by the Customers (PL-113).

To ensure it was abiding by the JVA, Bergeron filed a Declaratory Judgment action on October 26, 2015 (Case No. 15-018991(R10749)). Bergeron asked the trial court to address the impending sale of Sun assets to WMIF, whether the terms of the sale required Bergeron to give consent, and whether Bergeron's concerns to the sale were well-founded. Sun moved to dismiss, arguing the lawsuit was premature no consent was necessary because no deal had been reached and WMIF needed antitrust regulatory approval (R11044-50). Sun claimed the sale was limited to trucks and equipment, (PL-510) ("The personalty of the backhoes and bulldozers, the things that push the stuff around for recycling, is the only part of the joint venture [] at issue here")(PL-31).

WMIF sought antitrust review of its transaction from the Florida Attorney General's Antitrust Enforcement Agency ("FLAG")(T2158-9). On December 3, 2015, FLAG decided no antitrust enforcement action would be taken upon based on the parties' representations and FLAG's understanding that Sun must consent to at least one renewal of the Customer Customers (until July 2023); Sun must keep its facilities accessible to the SBJV through at least July 2018; the Subcontract does not change the terms of the Customer Contracts

(including pricing); and Sun will not be restricted from its performance of SBJV obligation, nor the solicitation of new customers (PL-193). WMIF and Sun did not honor these conditions.

On December 2, 2015, Sun sent Bergeron a "consent package," which contained a list of Sun's trucks and equipment, and a redacted copy of the Subcontract (PL-31). Sun did not request Bergeron's consent to the Subcontract. Bergeron advised Sun the Subcontract violated the JVA because only the Venture could subcontract (PL-724). The redactions in the Subcontract concealed WMIF's pricing terms, which increased single stream prices in the renewal terms and allowed WMIF to keep any savings achieved by reducing transportation and disposal costs for itself, instead of giving the savings with SBJV (T1210-1). The Subcontract transferred control of the waste tons and ability to generate profits from SBJV to WMIF. Bergeron dismissed its declaratory judgment action (PL-727).

On January 8, 2016, Sun and WMIF closed the transaction (T1203-4;2161). WMIF listed SBJV's Customer Contracts as "Purchased Assets" on the Schedules accompanying this version of the APA. At closing, Sun and all its principals executed non-compete agreements in favor of WMIF (PL-915;PL-145;PL-146). Sun admitted

it had no intention of competing with WMIF: "Sun is absolutely not looking for a blanket carve-out, nor attempting to engage in competition w/WM[IF] post-closing in any manner, including through the JV...")(PL-355).

WMIF and Sun manipulated the terms of the APA in multiple versions to transfer the economic value of the Customer Contracts without making it obvious. WMIF shared versions of the APA listing the Customer Contracts as "Purchased Assets" with its valuation experts and auditors to support the value of its purchase but deleted the Customer Contracts in the version given the antitrust regulators (T2230-4;2242-5;PL-420;PL-735). WMIF "swapped" the schedules after closing, representing the inclusion of the Customer Contracts as "Purchased Assets" representing at trial it was simply a "mistake" (T2229-30;2248-52;PL-916).

The confusing history of the APA is summarized below:

June 17, 2015	PL-735	June APA sold Sun's interest in SBJV and delivered a SBJV Subcontract to WMIF (§1.1(k) and transferred the Customer Contracts to WMIF (§1.1(c)).
July 30, 2015	PL-245	July APA delivered a Subcontract transferring the economic benefit of Sun's interest in SBJV(§1.1(k)) and in the Customer Contracts to WMIF(§1.1(c)).

November 16, 2015	PL-445	WMIF and Sun execute Subcontract.
December 2, 2015	PL-31	Sun sends Bergeron the Consent Package with redacted Subcontract.
December 3, 2015	PL-193	FLAG takes no antitrust action regarding July APA based upon representations SBJV will be allowed to continue to compete and Customer Contracts will be renewed.
January 8, 2016	PL-420 PL-914 PL-145	July APA is amended and closed. The Customer Contracts listed as "Purchased Assets" in the Schedules. Executed assignments assigning the Customer Contracts to WMIF are delivered as part of the closing documents. All Sun's principals sign non-compete agreements. Casagrande signs deceptive Consulting Agreement.
January 21-25, 2016	PL-916 PL-320	After lawsuit began, Tsai instructs Burbott to "swap" the schedules so Customer Contracts no longer appear as "Purchased Assets."
March 2, 2016	PL-420	WMIF gives Deloitte (for valuation of APA) unswapped version of January 8 APA which includes Customer Contracts.
April 18, 2016	PL-444	WMIF gives auditors at Ernst&Young ("E&Y") June APA which transfers the Customer Contracts.

E. Valuation of the Transaction.

WMIF's valuation of the transaction quantifies the damages incurred by Bergeron when its interest in SBJV was wrongfully transferred to WMIF. WMIF hired Deloitte to value the intangible assets being acquired (T2245;PL-420). WMIF gave Deloitte the January 8 APA version, which included the Subcontract and listed the Customer Contracts as "Purchased Assets" (PL-420;T2256-7;2264). Using past revenue, Deloitte valued Sun's intangible assets at $432 million, broken down as $160 million in customer relationships, $18 million in non-competes, $4 million in trade names, and $250 million in goodwill (T1711-13). Deloitte considered the Customer Contracts in valuing the intangible assets purchased by WMIF in the APA (T1710;2250-1). Deloitte's valuation of the deal included SBJV's revenue.

WMIF engaged E&Y to audit WMIF's 2016 financial statements (T2248-9;2258-59). WMIF gave E&Y with the June 17 APA, which included the Customer Contracts (T1708-9;T2249;PL-735). E&Y determined "[a]pproximately 11% of the Target's FY14 collection revenue was generated from customer contracts held by the SBJV" (PL-425). Deloitte and E&Y performed their work long after the APA

closed and after the litigation commenced, but WMIF never provided them with an APA "swapping" out the Customer Contracts as purchased assets (T178;T1851;T2259-60).

WMIF's auditors, E&Y, reviewed the values WMIF had applied to the APA in its financial statements. WMIF explained to E&Y the goodwill attributed to "synergy" "is the focus of the transaction. [Sun] is in the business of everything but landfill. Their disposal cost is $60/ton…whereas our internal rate is $15/ton" (PL-446). This confirmed WMIF could generate higher profit from Customer Contract waste than SBJV, and those profits were how WMIF valued the APA. The value of intangible assets was $432 million based upon $42 million in future annual profits to be obtained from the revenues purchased included the SBJV Revenues (PL-655; PL-431).

Bergeron asserted the JV commitment was worth $44.3 million of the purchase price of the APA (T2366). As a 50% partner in the SBJV, Bergeron was entitled to its share of the purchase price for the SBJV revenues sold to WMIF.

F. Casagrande's Deceptive Consulting Agreement with WMIF.

After the APA closed, SBJV continued to exist but had no control over the disposition of the waste tons nor any supervision

over the activities of WMIF because the Subcontract §8 made WMIF an independent contractor which was not "an agent or representative of…[SBJV]" and had "exclusive control of the details the services performed" (PL-445). Without the ability to direct waste streams, SBJV could not compete with WMIF. To further ensure this result, Lomangino removed himself from SBJV, and Charles Gusmano became an employee of WMIF (PL-38). John Casagrande was placed on the SBJV Administrative Committee, and Casagrande simultaneously entered into a consulting agreement with WMIF (PL-38;PL-145).

The trial court found Casagrande's consulting agreement to be "deceptive" (R36501). Evidencing his disloyalty to SBJV, Casagrande explained to Gusmano WMIF's low bid on a contract with City of Hollywood "[b]ecause it was bid about 2-3 years ago [2013] and we had to keep it from going to that outlaw Sun-Bergeron" (PL-239). Casagrande later assigned the Consulting Agreement to Sun (PL-146; T1993-4). The assignment was signed for Sun/LGL by Charles Gusmano, even though Gusmano was then an employee of WMIF (PL-921;PL-146). The non-compete provisions of the deceptive consulting agreement remained in effect for 545 days until July 7, 2017.

G. WMIF Forces the End of the Customer Contracts.

Many of the municipalities feared the transaction giving WMIF control over the transportation, processing and disposal of the waste tons would adversely affect SBJV's ability to perform the Customer Contracts (PL-270;R328-9). On September 23, 2015, Gusmano sent the municipalities a letter drafted by WMIF with a version of the Subcontract and stated the Subcontract will "not change the terms and conditions of the JV's existing contracts with its municipal customers," "will not alter Sun's disposal agreements" and WMIF would perform in a manner meeting SW Ranches "highest expectations" (PL-190).

The Subcontract was later revised because WMIF did not agree to meet the 75% recycling goal required by many of the Customer Contracts or to support renewals on the same terms, conditions and prices (T2074). As a consequence, SBJV incurred hefty financial penalties for not meeting the recycling goals required by the Customer Contracts (R32010).

Southwest Ranches ("SWR") advised Sun it would not agree to deal with WMIF and was puzzled by Sun's suggestion considering Sun lobbied for the Contract based on WMIF's price gouging (PL-179):

> As you are well aware, roughly 2 years ago [Sun] lobbied the Town to seek a change. All Council Members were advised by your group that Waste Management was the enemy, who had been price gouging the Town for years, and that this would be our opportunity to correct the wrong that transpired. As a result, we issued a RFP and [Sun] came in lowest, despite Waste Management's agreement to pay the Town a substantial fee to stay on. Thereafter, numerous cities piggybacked onto our procurement. Now, only 2 years later, [Sun] is coming to the Town to ask us to disregard everything bad you said about Waste and to allow them to take over [Sun's] contract.

SWR objected to the assignment to WMIF because its agreement prohibited assignment without municipality consent (PL-199). Post-closing, SWR sent SBJV a notice of breach and demand to cure stating the "subcontract" violated the SWR's Customer Contract (PL-175) because: (1) SWR had not consented to SBJV's assignment of its responsibilities to WMIF; (2) SWR was not listed as an additional insured on WMIF's insurance policy as required by §11.2; and (3) WMIF did not agree to indemnify SWR under the "subcontract" as required by §12(f) (PL-199;PL-201). SWR's city attorney, Keith Poliakoff, testified about the importance of insurance and indemnity for SWR (T314-5). SWR was the main piggyback Customer Contract for 19 other cities (T294-6).

Speaking on behalf of WMIF, Casagrande rejected SWR's demands and maintained SBJV was not in breach because it was Sun who executed the Subcontract, not SBJV, and it would "seek all available remedies and damages against [SWR] and Bergeron" if SWR did not rescind its notice of breach, copying the City Managers of every Customer (PL-875). SWR described Casagrande's position as "convoluted" and "preposterous" (PL-201). Casagrande invited SWR to terminate the Customer Contract and copied the other municipal customers (PL-202).

To avoid Casagrande's threats of litigation, SWR terminated (PL-209). On June 26, 2018, WMIF soliciting the very same contract from SWR (PL-987).

Recognizing the destructive effect SWR termination would have on the nineteen other municipalities, Bergeron offered to pay the cost of the insurance and bonds the other Customer Contracts required (PL-722). WMIF rejected Bergeron's offer insisting that WMIF did not have to meet SBJV's contractual obligations under the Customer Contracts (PL-280).

During 2017, all the other municipalities also declined to renew the Customer Contracts with SBJV (T4113-14;R10744;10747).

H. Bergeron Files Suit.

This dispute went to a non-jury trial on the following claims (A6):

Count I - Breach of Contract against Sun

Count II - Breach of Contract [Supplemental] against Sun

Count III -Tortious Interference with Contracts Against WMIF

Count IV - Tortious Interference with Contracts against Individual Defendants

Count V - Breach of Fiduciary Duty Against Individual Defendants

Count VI - Breach of Fiduciary Duty Against Sun

Count VII - Aiding and Abetting Breach of Fiduciary Duties

Count VIII - Conspiracy to Tortiously Interfere

Count IX - Conspiracy to Breach Fiduciary Duties

Count X Accounting

Count XI - Wrongful Dissociation

Count XII – Damages

Count XIII - Misappropriation of Trade Secrets

Count XIV – Conversion

The court granted Bergeron leave to add punitive damages in a Sixth Amended Complaint (R32892).

Previously, the court had dismissed the Antitrust Claims with prejudice (R29857-62) and struck Bergeron's demand for jury trial, ordering all issues in the case be tried non-jury (R31706-10), which was held in April 2022.

After trial, the court entered Final Judgment (R36496) finding Bergeron had no right to know the terms of Sun's sale to WMIF; that Bergeron spent "untold hours in discovery and trial questioning the thousands of pages of the APA --- most of which was none of their business" (R36498-9). The court found WMIF blameless because it was merely "doing what all for profit businesses do – attempting to negotiate the purchase of assets to increase shareholder value" (R36500). The court found Casagrande's consulting agreement with WMIF was "deceptive," but caused no harm because it only lasted 67 days (R36501).

The court found Bergeron anticipatorily breached the JVA by withholding consent to the APA unreasonably because it was trying to "extract an economic concession" (R36502), and Bergeron's anticipatory breach barred it from prevailing on its breach of contract

claims. The court found against Bergeron on its tort claims without any discussion of the court's reasoning.

In the Amended Final Judgment (R36543), the court found the sale of Sun's assets used by SBJV to fulfill Customer Contracts had no impact on SBJV's profitability, and the customers suffered no harm because WMIF took over for Sun (R36546). Bergeron's motion for rehearing was denied.

A Second Amended Final Judgment was issued on the Accounting and Dissociation claims (R37038). The court held Bergeron failed to prove it had a right to an accounting but divided the $9.3 million in escrow 50/50 between Sun and Bergeron (R37046). On Bergeron's claim against Sun for dissociation, the court found all the customer contracts were ending in July 2018 so although SBJV may "technically exist," it was dissolved when the customer contracts expired and there can be no claim for dissociation (R37048-9).

SUMMARY OF THE ARGUMENT

Bergeron and Sun created SBJV for the purpose of competing against WMIF in Broward County to 1) end WMIF's monopoly and 2) lower prices. SBJV acquired contracts with many municipalities and Broward County, and achieved both goals. Sun processed waste and recycling, and the contract revenue went to SBJV. SBJV successfully used Sun's facilities and Bergeron's political and environmental clout to lower waste disposal costs in Broward.

After obtaining those contracts, Sun sold its assets as well as SBJV's revenues and Customer Contracts to WMIF and because Sun later subcontracted performance of Sun's SBJV obligations to WMIF without authority or customers' consents. By entering into the APA and Subcontract which sold SBJV assets, Sun breached the JVA. In addition, only SBJV could enter into subcontracts to perform Sun's work.

The trial court's first error was interpreting the JVA to require Bergeron's consent to the APA which sold not only Sun's assets, but also SBJV's revenue. The second error was allowing Sun to subcontract with WMIF in direct contravention of the terms of the JVA. The JVA unambiguously stated only SBJV could subcontract,

and SBJV could only act with unanimous agreement of its Administrative Committee, Anthony Lomangino and Ron Bergeron. The trial court erroneously used the "reasonable consent" provision related to the <u>sale of Sun's assets</u> to expand Sun's rights to allow it to <u>sell SBJV's assets</u>, leading to the erroneous conclusion Bergeron was obligated to consent to the APA. It then failed to apply the terms of the JVA to the Subcontract.

The trial court erred by finding Sun was released from performance under the JVA by Bergeron's anticipatory breach. The anticipatory breach the court found was the refusal to consent to the APA by making financial demands in July 2015. But Bergeron was under no obligation to consent to the APA then at issue because 1) Sun did not reveal the terms of the APA, 2) the APA sold SBJV's assets. Under the express terms of the JVA, Bergeron was not required to consent to the sale of SBJV assets or a SBJV disposal agreement with its competitor WMIF. Because of its faulty conclusion that Bergeron had anticipatorily breached, the court erred by failing to find that Sun had breached the JVA by entering into a Subcontract without Venture approval. The Subcontract reinstated WMIF as the waste disposal provider for 30% of the market SBJV had captured.

The trial court also erred by striking Bergeron's demand for jury trial on its claims against WMIF and the individual Sun employees. Although Bergeron and Sun agreed to waive jury trial in the JVA, that waiver had no application to Bergeron tort claims against WMIF or the employees. The tort claims arose out of relationships between WMIF, Sun and the Individual Employees outside of the JVA. The trial court erroneously used authorities related to arbitration agreements to the jury waiver in the JVA. An agreement to arbitrate is subject to different presumptions than waiver of the constitutional right to a jury trial and those authorities should not have been relied on by the court.

As to facts intertwined between WMIF, Sun and the employees, the trial court should have empaneled a jury to resolve those common factual issues, and then apply those findings to the claims between Bergeron and Sun. The court erroneously ruled the intertwined issues should be decided by the court when the proper ruling was to allow intertwined issues to be decided by a jury.

Even if the court properly held a non-jury trial, its findings on the tort claims against WMIF and the Individual Employees misapplied the law as contained in the Restatement (Second) of Torts

and were not supported by competent substantial evidence. WMIF interfered with the SBJV business relationship by enticing Sun to breach the JVA with millions of dollars added to the sale price if Sun would transfer SBJV's customers and revenues to WMIF.

The evidence showed Sun's employees provided WMIF with trade secret information which allowed WMIF to formulate its bid to buy SBJV assets and that WMIF cooperated with Sun and its employees to work against the best interests of SBJV, thereby breaching their fiduciary duties. The trial court even found the consulting agreement between Casagrande and WMIF, which Sun later took over as the consultant, was "deceitful" but failed to apply that finding to the tort claims brought by Bergeron.

The evidence also proved WMIF converted the revenues owned by SBJV. The Subcontract transferred exclusive control of all SBJV operations to WMIF and that control allowed WMIF to misappropriate the revenue owned by SBJV. The trial court ignored the evidence presented to come to a contrary conclusion.

The trial court erred by dismissing Bergeron's antitrust claim based on lack of standing. The allegations of the Second Amended Complaint supported Bergeron's standing as a competitor.

Finally, the court's denial of an accounting and its ruling against Bergeron on the dissociation claim were contrary to law and the evidence. Bergeron and Sun had a partnership, so Bergeron is entitled to an accounting and proved the dissociation claim.

The Final Judgments must all be reversed, the antitrust claim restored, and this case remanded with instructions to vacate all Final Judgments and the matter set for a jury trial.

STANDARDS OF REVIEW

The standard of review applicable to the trial court’s interpretation of a contract is *de novo*. *Per Jonas Ingvar Gustafsson v. Aid Auto Brokers, Inc.*, 212 So.3d 405, 407 (Fla. 4th DCA 2017). Where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*. *Jasser v. Saadeh*, 91 So.3d 883, 884 (Fla. 4th DCA 2012). Which party bears the burden of proof is reviewed *de novo*. *Chrzuszcz v. Wells Fargo Bank, N.A.*, 250 So.3d 776, 768 (Fla. 1st DCA 2018).

When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. *Id*. On appeal from a bench trial, the trial judge’s findings of fact are clothed with a presumption of correctness, *Lougas v. Sophia Enterprises, Inc.*, 117 So.3d 839, 841 (Fla. 4th DCA 2013), however, the trial court erroneously struck Bergeron’s demand for jury trial in a misapplication of equitable estoppel.

ARGUMENT

POINT I

THE TRIAL COURT 1) FAILED TO ENFORCE THE JVA TERMS AS WRITTEN WHICH ALLOWED SUN TO BREACH THE JVA AND 2) THE TRIAL COURT MISAPPLIED THE LAW ON ANTICIPATORY REPUDIATION.

The trial court made a legal error by rewriting the JVA to require "both parties to consent on major issues" and consent "shall not be unreasonably withheld." From that starting point the court made a series of errors, both legal and evidentiary, resulting in the erroneous conclusion Sun did not breach the JVA because Bergeron breached first; the so-called "anticipatory breach." Those conclusions have no support in the text of the JVA, the evidence, or the proceedings in the trial court.

The JVA does not state the parties must "consent on major issue," nor does it provide Bergeron must give "consent reasonably" to whatever Sun proposed. Section 5.1(a) of the JVA states the "Venture" is managed by the Administrative Committee of two people, Ronald Bergeron and Anthony Lomangino. Section 5.1(c) states all decisions by the Administrative Committee "shall be by unanimous vote" of Bergeron and Lomangino. There is no "reasonable consent"

provision connected with the actions of the Administrative Committee. The agreement must be unanimous, and there is no provision for one partner to force the other partner to agree to SBJV action. If they don't both agree, then SBJV cannot take action.

The "reasonable consent" language in the JVA relates to either Sun's sale of Sun's assets or Bergeron's sale of Bergeron's assets. Section 7.3 "No Assignment" states that no interest of the Venturers in money "or property of any kind employed or used in connection with Customer Contracts may be assigned" except with the other partner's consent, "which consent shall not be unreasonably withheld or delayed." That meant Sun needed Bergeron's consent for the sale of equipment used to serve SBJV's customers.

In the Final Judgment, the trial court found Bergeron knew in 2014 "they were going to sell assets" ("they" meaning Sun). The court was vague about whose assets Sun proposed to sell, whether the assets were owned by Sun or owned by SBJV, and from other statements in the Final Judgment, it is clear the trial court never knew what assets were being sold. As is explained below, the assets Sun proposed to sell in the APA included SBJV's assets – Customer Contracts and revenue. Even if reasonable consent applied to the

APA, it could never be used to force Bergeron to agree to the sale of SBJV assets because the plain text of the JVA requires unanimous consent for decisions on behalf of SBJV. Bergeron had the absolute right to refuse to sell WMIF SBJV's Customer Contracts and revenue.

The court then made remarkable statement that although "[Bergeron] did not know the particulars of the sale, [] in the Court's opinion [Bergeron] did not have the right to know the particulars of the [APA]," only the "right to question the impact of the APA on the JV contracts and nothing else." The court found "no competent substantial evidence to support" a theory the Sun/WMIF transaction included SBJV's Customer Contracts.

But there are important pieces of evidence which contradict the court's decision: 1) Bergeron was never allowed to see the APA so it couldn't know to what it was agreeing, and 2) the evidence was undisputed that every version of the APA exchanged between Sun and WMIF included the sale of <u>SBJV's Customer Contracts and revenue</u>. The trial court reached its erroneous conclusion because it found 1) Bergeron had a duty to consent to the APA but no right to see it, and because 2) the court accepted Sun's and WMIF's testimony through various employees that the inclusion of SBJV Customer

Contracts as "assets sold" in all versions of the APA was a "mistake" or "accident," which they corrected by swapping out schedules after the transaction closed on January 8, 2016 (R36499). It was unbelievable, deceitful testimony the trial court should have rejected.

And then there is the obvious problem of timing. The trial court found Bergeron anticipatorily breached the JVA in July 2015 through letters by Ron Bergeron (LGL-13;PL-518). That finding is hopelessly contrary to the evidence that on November 18, 2015, four months after Bergeron allegedly breached the JVA by refusing consent, counsel for Sun (Mrachek) argued Bergeron had no standing for a declaratory judgment action asking for a ruling on whether Bergeron had to consent to the APA, because there was nothing to consent to (R4249):

> "We are going to seek consent once we know what we're going to seek consent to. If you read the complaint this matter is not ripe by any version of any caselaw including the caselaw they provided to you…We're going to seek consent. We're going to seek it when and if we get DOJ approval. If DOJ denies approval, we're not seeking consent, obviously."

He also argued "has no right ever to see the contract" between Sun and WMIF because the only impact on SBJV was "personalty of the backhoes and the bulldozers, the things that push stuff around

for recycling" (R4250). As was explained above, that statement was false. The "Consent Package," which contained only a heavily redacted Subcontract, was not even sent to Bergeron until December 2, 2015.

Sun knew that the JVA did not allow it to sell SBJV assets without Venture approval and acknowledged to WMIF, "It has always been Sun's intent to seek Bergeron's consent but also our understanding that WM[IF] would close over [even without] that consent. Finally, the closing of the transaction absent Bergeron's consent or settlement with Sun's JV (choose your disparaging adjective and insert here) partner does not increase WM's risk one whit, as you are fully indemnified therefor")(PL-249).

On this evidence, there was absolutely no basis for the trial court's finding that Bergeron anticipatorily breached the JVA in July 2015. By Sun's own admission and representations to the court, no consent was needed in July 2015 because no agreement had been reached and wouldn't be reached until a few weeks before the transaction closed in January 2016.

A. The Court Misapplied the Law When It Held Bergeron Anticipatorily Repudiated the JVA on July 20, 2015.

The trial court misapplied the law on anticipatory repudiation, because (1) Bergeron had no contractual obligation to agree to the undisclosed terms of the June APA; (2) the July 20 Letter did not evince an unequivocal intention to refuse performance of the JVA; and (3) Sun had already breached the JVA by disclosing its trade secrets to WMIF.

Anticipatory repudiation occurs when (1) before the time for a party's performance is due, (2) a party evinces an intention to refuse performance in the future using distinct, unequivocal, and absolute words. *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461 (Fla. 3d 1980). A letter post-dating a breach of contract by one party cannot be used to prove the anticipatory breach of the other party. *U.S. Dev., Ltd. v. Jones College*, 973 So.2d 594, 595-96 (Fla 3d DCA 2008); *Cf Sirkin v. Hutchcraft*, 507 So.2d 765, 766 (Fla. 2d DCA l987)(finding that buyer anticipatorily repudiated real estate contract when it unequivocally stated that it did not want the property); *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 4 So.2d 705, 706 (Fla. 4th DCA 1985)(finding seller anticipatorily breached contract for sale of

condominium by refusing to allow buyer opportunity to obtain financing and refusing to close).

First, Bergeron's July 20 Letter was not anticipatory repudiation because it had no contractual duty to consent to the undisclosed APA. The trial court incorrectly found Bergeron's attempt "to extract an economic concession" was "unreasonable as a matter of law" (R36503). The June APA did not require "reasonable consent" under ¶7.3(a) of the JVA. It sold Customer Contracts (by WMIF's own admission) and required SBJV to execute a SBJV-Subcontract with WMIF giving WMIF the right to dispose of the waste and control the revenues from Customer Contracts. It would have destroyed SBJV. Bergeron would be justified withholding consent to the June APA or imposing any financial conditions he wanted to a transaction requiring SBJV approval. *See Munoz Hnos, S.A. v. Editorial Televisa lntem, S.A.*, 121 So.3d 100, 104 (Fla. 3d DCA 2013)("[W]ithholding consent to an assignment may be reasonable if consenting to the assignment would destroy or adversely affect an existing contract").

Second, Bergeron did not anticipatorily repudiate because it remained willing to perform and never stopped performing. The discussion above outlines the timing of Bergeron's action seeking

declaratory relief and Sun's attorney's statement to the court that there was no agreement requiring consent (PL-723;T2649-50). Bergeron dismissed the declaratory judgment action based on that representation.

Bergeron continued to perform its duties even after Sun subcontracted with WMIF to perform the Customer Contracts (PL-724). Among other duties, Bergeron continued to sign SBJV checks (PL-323;PL-720). Although Bergeron protested that the Subcontract violated the JVA, Bergeron continued to work with Sun. Accordingly, Bergeron's actions did not evince a distinct, unequivocal, and absolute refusal of performance.

Third, Sun breached the JVA prior to Bergeron's July 20 Letter. Sun previously shared SBJV's trade secrets with WMIF in violation of JVA ¶7.4 (PL-715;PL-581-A;PL-473). Sun used this information to negotiate the purchase price of the APA (T1370-1). Therefore, the July 20 Letter (LGL-13), which post-dated Sun's material breach cannot serve as a basis for anticipatory repudiation. *See U.S. Dev., Ltd.,* 973 So.2d at 595-96 ("Because the constructive eviction and breach of contract occurred prior to the date of the letters, they were not relevant to the counterclaim for anticipatory breach"). Because Sun

breached the JVA prior to any alleged breach by Bergeron, there could be no anticipatory repudiation by Bergeron.

B. The Subcontract Was a Breach of the JVA.

By entering into the Subcontract with WMIF, Sun breached the JVA. Sun had no authority to enter into the Subcontract, and Bergeron had no obligation to consent to the unauthorized Subcontract. The JVA did not allow Sun to enter into those agreements.

Section 5.6(c) requires each Venturer to perform its own work or, if someone other than the Venturer was performing the work, then "the Venture shall enter into a contract with a third party, and the Project Manager shall be responsible for supervising the third party's performance." Sun as an individual Venturer had no authority to enter into a subcontract for the performance of its work. Only SBJV could subcontract, and SBJV could only act through the Administrative Committee by unanimous agreement.

Section 5.6(a) confirmed that "[e]xcept as otherwise agreed by the Venturers, it is the intent of the Venturers that all the Services under each Customer Contract will be performed by the Venturers." SBJV Section 5.1(e) specifically reinforced that neither partner nor

designee acting alone could take any action or decision for the SBJV or bind the SBJV in any manner. Section 5.1(b) designated the Administrative Committee to act "with full authority" in any matter "in connection with or relating to…any Customer Contract." Therefore, under the plain language, the individual Venturer had no authority to bind the SBJV to a subcontract to have a third party perform its work related to the Customer Contracts.

The only JVA provision applying when one Venturer wished to act independently was the assignment provisions in Section 7.3. It stated no interest of the Venturers in money or property "employed or used in connection with the Customer Contracts" may be assigned without the other party's written consent "which consent shall not be unreasonably withheld or delayed." This simply meant Sun needed Bergeron's consent for the sale of its own equipment used to serve the SBJV's customers, not that Bergeron's consent was required for the sale of the Venture's assets or revenues.

"It is a fundamental rule of contract interpretation that a contract which is clear, complete, and unambiguous does not require judicial construction." *GEICO Indem. Co. v. Walker*, 319 So.3d 661, 665 (Fla. 4th DCA 2021). If the language used in a contract is plain

and unambiguous, a court must interpret it in accordance with the plain meaning of the language used and give effect to the contract as written. *State Farm Mutual Auto Ins. Co.v. Menendez*, 70 So.3d 566, 569-70 (Fla. 2011). Accordingly, it is clear from the plain language of the JVA that Sun breached the JVA by agreeing to a Subcontract without the Venture's approval.

The Subcontract violated both the Customer Contracts and the JVA. The Customer Contracts required SBJV to be fully responsible for all aspects of performance. As Sun was not the contractor, it had no right to assign or subcontract the Customer Contracts[3]. Contrary to the requirement of Section 8 of the JVA, the Subcontract gave WMIF "exclusive control of the details of the Services" and prohibited any supervision of its performance (PL-445). As the operational partner of SBJV, Sun improperly abdicated its contractual duty when it transferred its obligations and responsibilities under the Customer Contracts to WMIF.

The Subcontract also required WMIF to recycle only to the lower "industry standards" instead of Broward County's 75% recycling

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[3] It was clear to SWR that the practical effect of the Sun Subcontract was to assign the SBJV Customer Contract to WMIF (PL-199;201).

requirement (T1596). It also closed certain processing facilities designated in Customer Contracts and rerouted waste to WMIF facilities (PL-445-§2;T1596). The Subcontract did not require WMIF to provide insurance to the municipalities. (PL-445-§5,7). Thus, the Subcontract gave WMIF the full economic benefit of the Customer Contracts without having to meet performance responsibilities.

Bergeron lost the value of the revenues and the ability to profit from the Customer Contracts because of the Subcontract. It further lost the goodwill inherent in the Customer Contracts when the customers failed to renew and incurred financial penalties from WMIF's failure to meet the contractual recycling goals.

Because there was no anticipatory breach by Bergeron, the trial court should have held Sun liable for breach of contract for executing the Subcontract with WMIF.

POINT II

BERGERON WAS ENTITLED TO A JURY TRIAL.

The Florida Constitution guarantees that "the right of trial by jury shall be secure to all and remain inviolate." Florida Constitution, Section 22. "Questions as to the right to a jury trial should be

resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." *Hollywood, Inc. v. Cty. of Hollywood*, 321 So.2d 65, 71 (Fla. 1975). The right to a jury trial "shall be preserved . . . inviolate," and a court's discretion "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Borgh v. Gentry*, 953 F. 2d 1309 (11th Cir. 1992).

A party may waive its right to a jury trial only if the waiver is entered knowingly, voluntarily, and intelligently. *Amquip Crane Rental, LLC v. Vercon Const. Mgmt., Inc.*, 60 So.3d 536, 540 (Fla. 4th DCA 2011). Because of the historical importance of this constitutional right, "any seeming curtailment ... should be scrutinized with the utmost care." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 564 (1990). "'Courts must indulge every reasonable presumption against waiver.'" *Burns v. Lawther,* 53 F.3d 1237, 1240 (11th Cir.1995).

The JVA contained a jury trial waiver, which covers the contract claims. But the trial court erroneously applied the waiver to claims Bergeron brought against non-signatories. Equitable estoppel may

not be used as a vehicle to circumvent the required knowing and voluntary waiver standard.

A. The Trial Court Misapplied the Jury Waiver.

1. As to WMIF.

The language of the jury waiver between Sun and Bergeron covered only "litigation based hereunder or arising out of, under or in connection with" the JVA. The waiver should have been applied only to the contract claims between the signatories. Only parties to a contract can enforce a contractual jury waiver. *See Med. Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (1st Cir. 2002)("a contractual waiver binds only the parties who sign the contract"). The tort claims were separate and distinct from the contract dispute and were also brought against non-signatories. Bergeron was entitled to a jury trial on the tort claims based on the plain language of the JVA.

The trial court relied on *Jackson v. Shakespeare Found., Inc.*, 108 So.3d 587, 593 (Fla. 2013), an arbitration decision, for support. Applying arbitration cases to jury waivers was improper. "[T]here is a presumption in favor of enforcing arbitration clauses and against enforcing jury waivers…And indeed, courts applying equitable estoppel to arbitration agreements have explicitly relied on the

presumption in favor of arbitration." *Quinn Const., Inc. v. Skanska USA Bldg., Inc.*, 2010 WL 4909587 at *7 (E.D. Penn. Nov. 30, 2010). "This history of precedential decisions suggests there are strong reasons why arbitration agreements and jury waivers should not be analogized in all contexts." *Adelphia Recovery Trust v. Bank of Am., N.A.*, 2009 WL 2031855 at *7 (S.D. N.Y. Jul 8, 2009).

Decisions such as *Shetty v. Palm Beach Radiation Oncology Assoc.*, 915 So.2d 1233, 1234 (Fla. 4th DCA 2005), relied on by WMIF, are based on arbitration being a favored means of dispute resolution, whereas waiver of jury trial is subject to the exact opposite presumption. *Roe v. Amica Mut. Ins. Co.*, 533 So.2d 279, 281 (Fla.1988). There is a presumption against the waiver of the right to a jury trial because it is a constitutional right. *See Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); *Forbes v. Chapin*, 917 So.2d 948, 951 (Fla. 4th DCA 2005). Waiver of the right to jury trial must be narrowly interpreted.

Bergeron's tort claims against WMIF did not arise out of the performance of the JVA, but instead involved WMIF's status as an interloper, deceptive hiring of the SBJV's personnel, the misuse of Bergeron's trade secrets and misappropriation of SBJV assets. *See*

Bailey, 705 F. 3d at 1321. ("A claim "relates to" a contract only when "the dispute arises as a fairly direct result of the performance of contractual duties"). WMIF derived no benefit from the JVA, was not an agent of Sun and did not share an identity with Sun. *See Interface Kanner, LLC v. JP Morgan Chase Bank, N.A.*, 704 F. 3d 927, 932 (11th Cir. 2013)("[O]nly a party to a contract or an intended third party beneficiary may sue to enforce the terms of a contract").

Reference to the JVA in Bergeron's claims did not mean the tort claims related to or arose out of the contract. At a minimum, the trial court should have conducted a bifurcated trial, first trying the case involving the nonparties to a jury, then holding a bench trial as to the contracting parties accepting the jury's factual findings to avoid inconsistent results. *See Di Sorbo v. Am. Van Lines, Inc.*, 48 Fla. L. Weekly D73 (Fla. 4th DCA Jan. 4, 2023); *Marlette v. Carullo*, 347 So.3d 556, 559 (Fla. 2d DCA 2022).

2. As to Individual Employees.

Nor can the individuals claim the benefit of the jury waiver as agents of Sun. Lomangino removed himself from the SBJV acknowledging that his relationship with WMIF had created a conflict (PL-38;PL-915). Gusmano also resigned from the SBJV

Administrative Committee, became an employee of WMIF and signed a non-compete. *Id.* Casagrande was acting as an undisclosed WMIF consultant to WMIF (PL-145). The Individual Defendants repudiated their agency relationship with Sun in favor of WMIF when they became employed by WMIF. Accordingly, the Individual Defendants are not properly subject to the jury waiver.

To find an enforceable jury waiver, this Court would have to conclude that Bergeron anticipated its JV partner might conspire with a third party to destroy SBJV by selling the economic benefit of the Customer Contracts, giving control of SBJV revenues to a third party, allowing the competitor to benefit from SBJV's confidential information, allowing the competitor to employ SBJV's personnel as "consultants" and transferring the right to perform the Customer Contracts to the competitor. Plainly, such conduct was far beyond any claim of non-performance of the contract to which the jury waiver was intended to apply. When executing the JVA, Bergeron could not have foreseen that its main competitor would act tortiously to destroy the SBJV and did not agree to waive his right to a jury trial on that issue. With respect to its non-contractual claims, Bergeron is not estopped from asserting its constitutional right to a jury trial.

3. As to Sun/LGL.

The court incorrectly held a non-jury trial on Bergeron's tort claims. Like the tort claims against other defendants, the tort claims against Sun were separate and distinct from the contract dispute. The language of the jury waiver covered only "litigation based hereunder or arising out of, under or in connection with" the JVA (PL-002).

The proper procedure when both jury and non-jury issues are involved to ensure consistency in the factual findings is "for the trial court to first proceed with the jury trial, and then to apply the jury's factual findings to determine whether [Plaintiff] has established entitlement to [his] equitable claims." *Marlette v. Carullo*, 347 So.3d 556, 559 (Fla. 2d DCA 2022). *DiSorbo v. Am. Van Lines, Inc.*, 48 Fla. L. Weekly D73 (Fla. 4th DCA Jan. 4, 2023). Additionally, because Sun repudiated its relationship with Bergeron/SBJV through the deceptive consulting agreement, it had no right to claim the benefits of the JVA jury waiver.

POINT III

THE TRIAL COURT'S FINDING IN FAVOR OF SUN, WMIF AND THE INDIVIDUAL EMPLOYEES ON ALL TORT CLAIMS WAS LEGAL ERROR AND NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE:

A. THE TRIAL COURT MISAPPLIED THE LAW AND IGNORED EVIDENCE WHICH PROVED WMIF TORTIOUSLY INTERFERED WITH BERGERON'S JVA BY ADDING $70 MILLION TO ENTICE SUN TO INCLUDE SBJV'S REVENUE IN THE APA.

B. THE EVIDENCE PROVED WMIF AIDED AND ABETTED THE BREACH OF FIDUCIARY DUTIES BY SUN AND THE INDIVIDUAL EMPLOYEES BY ENTERING INTO CONSULTING AGREEMENTS AND EMPLOYING THE INDIVIDUALS TO WORK AGAINST SBJV AND BERGERON.

C. THE EVIDENCE PROVED SUN AND THE INDIVIDUAL EMPLOYEES SHARED SBJV TRADE SECRETS WITH WMIF WHICH ALLOWED WMIF TO TAKE OVER SBJV'S BUSINESS.

D. THE EVIDENCE PROVED DEFENDANTS CONVERTED SBJV ASSETS.

Point III presents interrelated law and evidence which combined to prove a variety of torts committed by WMIF, Sun and the Individual Employees. These factual issues should be decided by a jury, but this Court should resolve the legal issues for guidance on remand.

The tortious conduct began with misappropriation of trade secrets. Sun employees began the process by violating their fiduciary duties to SBJV by providing trade secret information to WMIF, such as the waste volume generated, costs, contract prices, revenue and profits. WMIF used that trade secret information to determine its offering price for Sun. This conduct proved misappropriation of trade secret claims, breach of fiduciary duty claims, and aiding and abetting breach of fiduciary duties.

When Sun informed WMIF it would not include the JV Commitment SBJV revenue and Customer Contracts in the deal, WMIF increased its offer by $70 million to induce Sun to include the Customer Contracts and SBJV revenue in the deal, concocted the Subcontract to accomplish the takeover, and Sun agreed. Refusing to deal without the JV Commitment and Increasing the offer as enticement to breach the JVA and offering the Subcontract was tortious interference by WMIF.

After the APA closed, WMIF aided and abetted breaches of fiduciary duties again, and Sun employees breached their fiduciary duties again, by entering into a consulting agreement, first by Casagrande and then by Sun. The consulting agreement made

Casagrande and all Sun employees double agents, a status they used to share SBJV information with WMIF, and work against SBJV to encourage SBJV Customers to terminate or not renew their contracts.

Because these rulings were based on a misapplication of the law and a lack of competent substantial evidence, they must be reversed.

A. WMIF Tortiously Interfered with the JVA.

The elements of tortious interference are: (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damages resulting from the breach of the relationship. *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So.2d 1105 (Fla. 4th DCA 2000).

The trial court relied on *Martin Petroleum* to decide "Sun was predisposed as to the alleged breach," meaning WMIF did not tortiously interfere because (1) "Sun was predisposed to sell its assets . . . before Waste made any offers to Sun" and (2) "Sun approached Waste about the transaction" (R36504-5). That conclusion was legally incorrect.

In *Martin Petroleum*, the alleged tortfeasor offered a business opportunity with its standard pricing arrangements to the breaching party. Unlike WMIF, it did not use the breaching party's confidential information to present a more lucrative offer, nor did it refuse to complete the transaction unless an existing contract was breached. *Fiberglass Coatings* involved an employee who had already breached a non-compete, which was not the case with Sun.

The trial court missed the meaning of "inducing" contained in the Restatement comment (h): "inducing refers to the situations in which A causes B to choose one course of conduct rather than another. Inducement operates on the mind of the person induced…The essential thing is the intent to cause the result." It is a causation issue. The trial court also missed the application of comment l to the Restatement to the facts of this case. A party who refuses to deal to cause another party to breach its contract with a third is liable for tortious interference. Rest. (2d) Torts §766, cmt. *l*, illustration 2. Comment l states:

> A refusal to deal is one means by which a person may induce another to commit a breach of his contract with a third person. . . if A, instead of merely refusing to deal with B and leaving B to make his own decision on what to do about it, goes further and uses his own

> refusal to deal or the threat of it as a means of affirmative inducement, compulsion or pressure to make B break his contract with C, he may be acting improperly and subject to liability. . .

Here, WMIF refused to buy Sun's assets for $440 million, but would buy Sun's assets plus SBJV's customer contracts for $510 million. WMIF refused to go forward with the transaction unless the value of the SBJV assets were transferred to WMIF. When Sun originally approached WMIF, Sun was not predisposed to sell any interest in the SBJV. When WMIF sent Sun a draft APA which included the SBJV interest (PL-346), Sun refused the offer and returned the draft that eliminated the SBJV interest (T3183-4;PL-646;PL-462). WMIF insisted SBJV's assets be included (PL-356). WMIF executives emailed internally "[t]he JV commitment to SWS ~ has to be in place to do the deal." and "[w]hen do we/should we buy out the JV ~ I think as long as we do so before the next Broward ILA bid" – when the waste contracts would be rebid" (PL-485).

Sun wanted to sell its assets and was even willing to reduce the price to make that happen but was instead induced to violate the JVA to achieve the asset sale on terms demanded by WMIF. WMIF wrote Sun "an obvious and critical component of the transaction is the

value that has been built through the volumes in the SWS portfolio, as well as the JV" (PL-636). Sun responded it had not advised Bergeron that it signed the APA and was willing to remove the SBJV "economic interest" off the purchase price (*Id*). WMIF refused: "[W]e do not want to consider taking any 'economic interest' of the JV off the deal."

The sequence of events fits squarely into the Restatement examples. *See also Uptown Heights Assoc. Ltd. P'ship v. Seafirst Corp.*, 320 Or. 638, 652-53 (1995)(finding that Bank's refusal to deal with borrower unless it removed its joint venture partner would constitute tortious conduct); *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 205 F. Supp. 324, 335-337 (D.N.J. 2002)(finding that secret sales agreement concealing that contract requirements would not be assumed in the sale supported tortious interference). Offering Sun a "better bargain" for SBJV assets than its current contract with Bergeron constituted further evidence of a wrongful inducement for Sun to breach the JVA. *See* Rest. (2d) Torts, comment *m*.

The trial court failed to consider the substantial evidence of WMIF's wrongful interference with SBJV, including its refusal to complete the transaction unless SBJV's assets were included, its

increase in the purchase price when Sun resisted including those assets, the secrecy surrounding the terms of the APA, WMIF's misuse of SBJV's trade secrets and its insistence upon an indemnity from Sun for any liability it might incur. Consequently, the trial court's decision is not supported by competent substantial evidence.

The trial court did not apply the correct legal standard, a legal error which is reviewable *de novo*.

B. WMIF Tortiously Interfered with the Customer Contracts.

WMIF also interfered with SBJV's Customer Contracts because it was intent on making sure SBJV could not compete. WMIF made it impossible for SBJV to perform Customer Contracts. The trial court failed to consider evidence WMIF had also tortiously interfered with Customer Contracts.

WMIF had to persuade the Florida Attorney General's Antitrust Enforcement Agency ("FLAG") the transaction would not have an anti-competitive effect. FLAG approved the transaction based upon WMIF's representations that the SBJV would remain able to compete and that its Customer Contracts would be honored. FLAG determined that the transaction would not be subject to antitrust enforcement action if certain conditions were met. WMIF failed to

honor those conditions and executed non-compete agreements that were never disclosed to FLAG.

WMIF insisted below that SBJV was still responsible for the performance of the Customer Contracts. WMIF drafted letters on Sun's stationary for Gusmano to send to SBJV customers falsely assuring the municipalities the Subcontract would "not change the terms and conditions of the JV's existing contracts with its municipal customers."

WMIF controlled the Customer Contracts, owned the processing equipment, used its own disposal facilities and had complete control over the disposition of the waste without any supervision by SBJV. The Subcontract allowed WMIF to ignore the contract specifications, apply "industry standards" and use WMIF's landfills for the waste. WMIF did not meet the recycling requirements, causing SBJV to incur substantial financial penalties. Despite the concerns of the customers, WMIF refused to provide insurance. Plainly SBJV no longer had the ability to perform Customer Contracts and no ability to compete as FLAG had been assured.

The trial court missed the extent and significance of WMIF's interference with Customer Contracts. Although it found WMIF's

correspondence with the Customer Cities to be inappropriate (R365544), it ignored that the correspondence precipitated termination of 19 Customer Contracts. While the trial court noted the large penalties incurred by the SBJV for failing to meet the contractual recycling goals (R36545), the trial court failed to observe these penalties directly resulted from WMIF's performance of the Subcontract which violated Customer Contracts.

C. Sun and the Individual Defendants Breached Their Fiduciary Duties to the SBJV.

Breach of fiduciary duty requires the existence of a fiduciary duty and the breach of that duty such that it is the proximate cause of the plaintiff's damages. *Taubenfeld v. Lasko*, 324 So.3d 529, 537-38 (Fla. 4th DCA 2021). Partners have a fiduciary duty to "deal with each other in utmost good faith, fairness and honesty." *Sheridan Healthcorp, Inc. v. Amko*, 993 So.2d 167, 171 (Fla. 4th DCA 2008). "[Fiduciaries] bear the burden of demonstrating that they acted fairly and in good faith." *Bove v. PBW Stock Exchange, Inc.*, 382 So.2d 450, 453 (Fla. 2d DCA 1980). Sun and the Individual Defendants owed a fiduciary duty to SBJV.

Plainly, Sun did not act in good faith. Sun improperly disclosed confidential information to WMIF, destroyed the economic viability of

the SBJV through the APA and Subcontract, concealed its deceptive actions from Bergeron and manipulated the closing documents to hide information from Bergeron and the regulators.

Similarly, Lomangino, Gusmano and Casagrande violated their fiduciary duties to the SBJV. Although principals of Sun, they executed non-compete agreements in favor of WMIF, abandoning their obligation to act for the benefit of the SBJV (PL-915;PL-145;PL-146). Lomangino orchestrated the APA for his personal profit to the detriment of the SBJV. Anthony Lomangino and Charles Gusmano positioned themselves "on the same side" as WMIF, SBJV's competitor (PL-703). Anthony Lomangino invited WMIF to discuss with him "what we [WMIF] want out of it [the JV]" (PL-636). Gusmano sent deceptive letters to Customers falsely stating the Subcontract would not adversely affect the performance of the Customer Contracts.

Casagrande's conduct was perhaps the most egregious. As WMIF's paid consultant, Casagrande integrated SBJV's business into WMIF, closed facilities used by the Joint Venture at WMIF's direction, and threatened to sue SWR rather than satisfy that Town's basic request for loss protection from WMIF (PL-38). Although the trial

court found Casagrande's consulting agreement with WMIF deceptive, (R36543), it inexplicably found that it resulted in no damage to Bergeron.

The trial court erred by finding that these Individual Defendants had not breached their fiduciary duty to the SBJV.

D. The Independent Tort Doctrine Does Not Bar Tort Claims.

The trial court was incorrect in its alternative conclusion the independent tort doctrine bars Bergeron's tort claims against Sun and the Individual Employees. While the economic loss rule generally prevents a plaintiff from recovering in tort for a contract dispute unless the tort is independent of any breach of contract, wrongful conduct claims which are independent of any contract dispute may be prosecuted. *See Alex Hofrichter, P.A. v. Zuckerman & Venditti, P.A.*, 710 So.2d 127, 128 (Fla. 3d DCA 1998)("In this case, the claim is that by intentional misconduct, [defendant] embezzled or converted partnership property to his personal use. This is more than a claim for a simple breach of contract."); *Burke v. Napieracz*, 674 So.2d 756 (Fla. 1st DCA 1996)(allowing conversion and civil theft claims where defendant took money entrusted for its personal use notwithstanding a contract arrangement).

Bergeron's breach of fiduciary duty claims against Sun are far broader than its contract claims. Here, Sun and the Individual Defendants did not simply fail to perform a contractual duty, they converted SBJV's assets. Sun and its principals developed and consummated a scheme to convert SBJV's assets and transfer those assets to the competitor WMIF. Sun's actions were not in performance of some contractual obligation under the JVA; those actions were undertaken to subvert SBJV's rights and Bergeron's rights as a co-venturer. Sun has no safe harbor under the "independent tort doctrine" and may be liable for torts committed.

E. The Trial Court Should Have Found All Defendants Liable for the Misappropriation of the SBJV's Trade Secrets.

Sun and its principals shared information with WMIF about SBJV's revenues, pricing, contracts, and tonnage volumes without Bergeron's knowledge (PL-473;PL-715;PL-250;T604). Sun and its principals violated the Florida Uniform Trade Secrets Act ("FUTSA") Fla. Stat. §688.002 by disclosing this information to WMIF. By receiving and using this information to determine the price it would pay Sun for the SBJV assets, WMIF also violated the Florida Uniform Trade Secrets Act ("FUTSA") Fla. Stat. §688.002.

Under Section 688.002, "Misappropriation" means:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; *or*
>
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> * * *
>
> 2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:
>
> * * *
>
> b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

The evidence established (1) WMIF acquired trade secrets through improper means (through Sun's and its principals' breaches of their fiduciary duties to the SBJV); (2) Sun's principals disclosed the trade secrets to WMIF knowing they had a fiduciary duty to the SBJV to maintain their secrecy, and (3) Sun's principals disclosed the trade secrets knowing they owed a duty to Bergeron to maintain their secrecy.

The trial court should have found Appellees liable for misappropriation of trade secrets even though some information was

publicly available. A unique combination, compilation or integration of that information, which adds value to the information, also may qualify as a trade secret. *See Mapei Corp. v. J.M. Field Mktg., Inc*, 295 So.3d 1193 (Fla. 4th DCA 2020) (finding that a unique compilation of commercially sensitive information, whether or not it includes public information, is entitled to trade secret protection). SBJV tonnage and pricing information was a distinct and commercially advantageous compilation of data and therefore met the definition of a trade secret (PL-259).

The trial court also erred by finding that this information was no longer protected because the SBJV voluntarily disclosed the information to WMIF, waiving trade secret protection. Sun disclosed the information to WMIF, not Bergeron. Bergeron even remarked at his July 9, 2015 meeting with WMIF he was shocked WMIF had SBJV's proprietary information (T3188-9).

The trial court's finding "[i]f any Trade Secrets were disclosed, such disclosure was incidental and did not cause harm or damage to BERI" (R36514) is without any evidentiary support. WMIF used SBJV proprietary tonnage, revenue, cost, and pricing information to negotiate and structure the asset sale's purchase price (T1857-8;

T1862;PL-473;PL-581A-B). Three WMIF employees and Casagrande confirmed it treated its similar information as a trade secret (T2151;1632-3;1742). Bergeron was damaged because WMIF's use of SBJV trade secrets was instrumental in calculating the price that WMIF was willing to pay for SBJV's assets in the APA, which deprived Bergeron of its financial interests in the SBJV.

F. Appellees Wrongfully Converted SBJV's Intangible Assets.

Bergeron should have prevailed on its claim for conversion of its intangible interest in SBJV (R36509-10).

Conversion is dominion wrongfully asserted over another's property inconsistent with ownership. *Taubenfeld v. Lasko*, 324 So.3d 529, 541 (Fla. 4th DCA 2021). The improper transfer of intangible interests in a business is properly subject to a conversion claim. *Id*. at 542; *see Perlman v. Feldmann*, 219 F.2d 173, 178 (2d Cir. 1955)(holding dominant stockholder that sold controlling stock accountable to minority stockholders when price represented payment for right to control distribution).

The Subcontract transferred exclusive control of all SBJV operations to WMIF (PL-445,§8), and control allowed WMIF to misappropriate the associated revenue owned by SBJV. WMIF paid

Sun a premium for the intangible benefits WMIF derived from its control of the waste, which represented a financial windfall to Sun. *See Fla. Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 46 F.Supp. 2d 1276, 1285 (M.D. Fla. 1999)("A joint venturer may not acquire property for himself to the exclusion of his co-venturer, and if he acquires it, he holds it as constructive trustee with a duty to account to his associates"). Through the APA, Sun converted intangible assets belonging to SBJV to WMIF.

The trial court's finding "SUN did not sale [sic] any intangible assets belonging to the JV" is clearly erroneous, and conflicts with its finding "[t]he JV contracts were a small part of a half-billion-dollar APA" (R36510;36545). WMIF admitted, and the record evidence demonstrated, Sun transferred the economic benefit of the Customer Contracts, an asset belonging SBJV, to WMIF through the APA.

POINT IV

THE TRIAL COURT MISAPPLIED THE LAW TO FIND AGAINST BERGERON ON ITS CLAIM FOR WRONGFUL DISSOCIATION.

"A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the

dissociation." Section 620.8602(3), Florida Statutes, *Horizon/CMS Healthcare Corp. v. Southern Oaks Health Care, Inc.*, 732 So.2d 1156, 60 (Fla. 5th DCA 1999). Damages are determined "as of the date of dissociation." *R4 Properties v. Riffice*, 2014 WL 4724860 at *4-5 (D. Conn. Sep. 23, 2014).

The trial court's ruling Sun did not wrongfully dissociate relied on its findings that Sun did not breach the JVA or its fiduciary duties to Bergeron (R37047-8). SBJV "was formed for a specific undertaking – bringing competition to the Broward County municipal solid waste market." Sun abandoned that purpose and disassociated when it sold SBJV assets to WMIF (R37047).

The trial court's ruling that this claim should have been brought for adjudication before SBJV was dissolved is incorrect. Nothing prevented the trial court from determining damages as of the date of dissociation. *R4 Properties*, 2014 WL 4724860 at *4-5.

POINT V

BERGERON WAS ENTITLED TO AN ACCOUNTING.

The trial court erred by holding "Bergeron failed to prove, by greater weight of the evidence, their [sic] right to a claim for

Accounting" (R37045). Bergeron was entitled to an accounting as a matter of law. Because this involved an issue of law it is a *de novo* review.

"Every partner is entitled to an accounting of partnership affairs in the proper case. . .. The fiduciary relationship inherent in partnerships is sufficient to invoke the jurisdiction of equity for the purpose of compelling an accounting." *Boyd v. Walker*, 251 So.2d 332, 334 (Fla. 3d DCA 1971).

In the absence of an accounting, the trial court's division of the SBJV revenues made no sense (SR153).[4] The trial court originally divided the escrow equally based upon the 50/50 interests of the Venturers (SR140-1). The court then vacated its ruling and awarded Sun a larger share of the escrow based on a proffer of meeting minutes evincing negotiations of the Schedule A, even though the court found that Schedule A "was never legally formalized" (R36543;PL-550). No competent evidence supported the court's decision.

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[4] SR refers to the record in Case No. 4D22-3155

POINT VI

THE TRIAL COURT'S FINDING THAT BERGERON SUFFERED NO DAMAGES IS CLEARLY ERRONEOUS AND CONTRADICTS ITS OWN FINDINGS.

The trial court's conclusion Bergeron suffered no damages is wrong because the court did not assess the value of the JV Commitment transferred to WMIF. The trial court focused only on Bergeron's lost profits proffer (R36543)(T2366-7).

The JV Commitment represented the economic benefit of Customer Contracts transferred to WMIF. The trial court found "[t]he JV contracts were a small part of a half-billion-dollar APA" and then contradicted itself by finding "[T]he JV contracts were NOT part of the APA sale between Sun and Waste" (R36545;36546). Whether the Customer Contracts themselves were transferred was beside the point, because it was undisputed the APA transferred the economic benefit of the Customer Contracts, through the Subcontract (PL-573;PL-916)

The vast majority of the half-billion-dollar purchase price, **$432 million**, was paid for intangible assets, which included the JV Commitment (T2254). As E&Y, WMIF's auditor, wrote "Approximately 11% of the Target's FY14 Collection revenue was generated from

customer contracts held by SBJV" (PL-425; T2308-9;1708-9;1785-8;1851-5). This number was used to determine whether WMIF paid Sun fair value for the intangible assets, including the JV Commitment (*Id.*)(T1857-8;1862).

Only Bergeron presenting experts on Fair Value of Intangible Assets, standard auditing and accounting principles and mergers and acquisitions at trial. That expert testimony showed WMIF paid Sun **$44.3 million** to acquire JV Commitment (T2366). The testimony was corroborated by WMIF's valuation analysts, Deloitte, and its auditors, E&Y (T2308-9;PL-595;T1639-43;1708-9;1782-3;1851-3;2838-9;2243-6).

Although this testimony was unrebutted, the trial court made no findings on what the JV Commitment was worth. Because the JV Commitment was not Sun's to sell, the disaggregated purchase price of $44.3 million attributed by Bergeron's experts to these intangible assets was a component of Bergeron's damages.

POINT VII

THE TRIAL COURT ERRED BY DISMISSING BERGERON'S ANTITRUST CLAIM BECAUSE BERGERON HAD STANDING AS A COMPETITOR.

The order dismissing Bergeron's should be reversed because the trial court failed to accept all well pleaded facts and related inferences as true. *MYD Marine Distributor, Inc. v. International Paint Ltd.*, 76 So.3d 42, 46 (Fla. 4th DCA 2011). A dismissal for failure to state a cause of action is reviewed *de novo. Id.*

Bergeron sued for: (1) monopolization of four waste markets in Broward County; (2) conspiracy to monopolize; and (3) conspiracy to restrain trade and competition (R3184). The trial court ruled Bergeron had no standing to bring antitrust claims because "the joint venture, not Plaintiff, is the competitor that took specific affirmative steps to enter the relevant markets at issue" (R29863).

Contrary to the trial court's ruling, Bergeron established its antitrust standing because (1) its antitrust injury resulted in its exclusion from competition in the relevant markets (R29311-55) and (2) it properly alleged its status as an efficient enforcer of the antitrust laws. *Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1305 (11th Cir. 2010) (excluded competitor had antitrust

standing). Bergeron, as a joint venture partner, took steps to enter the relevant markets at issue (and did as a market participant). *Geneva Pharm. Tech. Corp. v. Barr Labs Inc.*, 386 F.3d 485, 512-14 (2d Cir. 2004) (joint venture partner had independent standing to sue for antitrust violations).

The court erred further by finding "the damages alleged in the antitrust counts stem from Sun's breaches of the joint venture agreement." Bergeron's claims against WMIF for monopolizing the waste disposal market and causing damages to it as a direct competitor are separate and district from its claims against WMIF for tortious interference with the SBJV relationship. *cf. Okeelanta Power Ltd. P'ship v. Florida Power & Light Co.*, 766 So.2d 264, 267 (Fla. 4th DCA 2000)(declining to find antitrust claim where parties were in a contractual relationship and damages stemmed from breach of contract not from a competitive injury). To the contrary, Bergeron claimed lost future profits from its exclusion as a competitor in the markets. *Palmyra Park* at 1305 (competitor's damages for lost profits did not risk duplicative recoveries). Bergeron properly alleged a causal antitrust injury.

Per se antitrust violations were pled with direct evidence in the Fifth Amended Complaint, including: (1) an internal analysis by WMIF as to how the transaction could be structured to reduce competition; (2) the December 3, 2015 Sun and WMIF emails vowing that the SBJV would not be free to compete notwithstanding FLAG's requirement that the SBJV be free to compete; (3) the Subcontract's terms providing for WMIF's exclusive control of its performance of the SBJV's work without Bergeron's permission; and (4) the Casagrande/Sun consulting and non-competition agreement which was ultimately determined to be deceptive.

It was clear from the evidence adduced at trial that WMIF knew that the APA would restrict competition. WMIF manipulated its language and designed various non-compete arrangements to restore its Broward County monopoly without revealing its true intention of putting the SBJV out of business. A WMIF internal memorandum carefully analyzed the provisions of the Customer Contracts, the non-compete in the JVA, and the prospective non-compete between Sun and WMIF to restrict the SBJV's ability to compete with WMIF (PL-298)("[I]f WM becomes partners in [SBJV], WM cannot go after the JV's existing Customer Contract. If we let Anthony [Lomangino] keep

the interest, we aren't covered by the non-compete, but Bergeron is and can't go after such JV Customer Contracts individually because he remains a partner in the JV. Lastly if Anthony keeps the nominal equity interest in the JV, Anthony would be precluded from competition (even through the JV, at least as to new opportunities) by virtue of his 5 year non-compete with us.") Sun and its principals executed non-compete agreements in favor of WMIF (PL-915;PL-145;PL-146).

Accepting the antitrust allegations as true, Appellee's alleged conduct gave WMIF monopoly power in Broward County through unlawful restraints on trade. Those allegations were proven at trial.

CONCLUSION

The Final Judgments must all be reversed, and this case remanded with instructions to vacate all Final Judgments, enter directed verdict in favor of Bergeron on Counts I and II for Breach of Contract against Sun, reinstate the Antitrust claim, and schedule all remaining issues for jury trial.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached service list by email and the Florida Courts E-Filing Portal on June 25, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), Appellant hereby certifies the type size and style of the Initial Brief of Appellant is Bookman Old Style 14pt and that the word count is 12,986.

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SERVICE LIST

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