LISA VAN HORN *Plaintiff-Appellant,* v. HARMONY SAND AND GRAVEL, INC., *Defendant-Appellee.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003927-23T4 **On Appeal from Superior Court Warren County Law Division** Hon. Robert A. Ballard, Jr., J.S.C.

Plaintiff/Appellee Lisa Van Horn's Brief in Support of the Appeal

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This case arises out of a March 2, 2000 agreement (the "Agreement") between Lisa Van Horn's father, Earl Richard Smith ("Mr. Smith") and Defendant Harmony Sand & Gravel, Inc. ("Harmony Sand") applicable to a 45-acre property Ms. Van Horn inherited from her father in White Township, New Jersey (the "Property") from which Harmony Sand has been extracting sand and gravel since 1990. Ms. Van Horn contends (a) that the Agreement expired by its terms because it was no longer commercially reasonable to continue mining operations on the Property, and (b) Harmony Sand usurped her rights at the Property by running a fill dirt operation there, through which Harmony Sand sold the right to deposit fill at the Property to third parties and kept hundreds of thousands of dollars that was rightfully hers.

This court interpreted the Agreement in 2015 on the appeal of another case between the same parties. *Van Horn v. Harmony Sand & Gravel, Inc.*, 442 N.J.Super. 333, 122 A.3d 102 (2015). Although the Agreement is titled "Lease," this Court found it was no such thing in that it lacked the characteristics of a lease, did not give Harmony Sand exclusive jurisdiction over and use of the Property, and did not exclude Ms. Van Horn from possession of the Property. Instead, this Court found the Agreement created a profit relationship -- a Profit a Prendre -- that merely permitted Harmony Sand

to extract sand and gravel from the Property until it was no longer commercially reasonable to do so and permitted Ms. Van Horn unfettered possession of her property so long as she did not interfere with Harmony Sand's mining operations there. The Agreement includes no language permitting Harmony Sand to conduct any type of business other than mining sand and gravel at the Property.

Harmony Sand's mining operation at the Property hit its zenith in 2004, extracting over 256,000 tons; thereafter annual production tumbled precipitously. Ever since 2018 Harmony Sand has not produced even the minimum 20,000 tons needed to satisfy the minimum royalties due to Ms. Van Horn of $25,000, so Harmony Sand has had to come out of pocket to pay them. While Harmony Sand claims a few acres remain that could possibly be mined, Harmony Sand's owner, Richard Hummer, admitted at trial that business was so poor over the last six years Harmony Sand could not justify mining them.

The court below conducted a bench trial after which it decided that Harmony Sand had not ceased its mining operations so the Agreement had not ended. The trial court further ruled that, because the Agreement did not specifically prohibit Harmony Sand from operating a business selling third parties the right to deposit fill on the Property and retaining the payments, it had the right to do so and it had not breached the Agreement.

The trial court's rulings are erroneous and contrary to law and should be reversed. In particular, its finding that Harmony Sand properly exercised its discretion to conclude that its mining operations remained commercially reasonable is unsupported by and inconsistent with the relevant and reasonable credible evidence in the record. The trial court also erred as a matter of law in its holding that, because the Agreement did not specifically prohibit Harmony Sand from operating a business selling third parties the right to deposit fill on the Property and to retain the payments it received from third parties, it was permitted to do so.

PROCEDURAL HISTORY

Plaintiff filed a previous Complaint on July 16, 2012 at Docket No. WAR L 288-12 seeking a declaratory judgment that Harmony Sand has no further rights under the Agreement other than its obligation to restore the property. After the court below granted summary judgment in favor of Harmony Sand in that action, Ms. Van Horn appealed to this Court, which reviewed and interpreted the Agreement. It held as follows:

> We are convinced that the Second Agreement clearly created a profit relationship. The Second Agreement never conveyed the right of exclusive possession, **merely the right to extract materials from the property**. Additionally the second Agreement limited the non-interference obligations of the owner to Harmony's conduct of a mining operation. Moreover, the entire agreement was made contingent on Harmony's ability to secure permits, and the Second Agreement was terminable on Harmony's cessation of mining

> operations. **It is evident that the parties intended to convey the right to extract materials rather than anything more.**

[September 10, 2015 Appellate Court Decision, DX-48, pp. 15-16, Appendix ("Appx."), 191a-192a (emphasis added)]. *Van Horn,* 442 NJ Super. at 345.

Plaintiff filed the Complaint [Appx., pp. 4a-43a] in the present action on September 8, 2020 alleging that Harmony Sand breached the Agreement by failing to comply with various specific requirements of the Agreement, sought a finding that Harmony Sand's mining operations had effectively ceased, and that as a result, the Agreement had terminated by its terms except for Harmony Sand's reclamation obligations. On October 23, 2020, Defendant Harmony Sand filed an Answer, Affirmative Defenses and a Counterclaim [Appx., pp. 44a-54a] seeking a declaration by the Court that it had fully complied with the Agreement, had not ceased mining operations and was entitled to continue those operations on the Property. On November 13, 2020, Plaintiff filed an Answer to Defendant's Counterclaim [Appx., pp. 55a-58a].

On April 7, 2021, Plaintiff filed an Amended Complaint [Appx., pp. 59a-98a] adding a claim that Harmony Sand breached the Agreement by permitting third parties to deposit fill on the Property and accepting payment from those third parties and asking for damages in the amount of the payments Harmony Sand received for permitting third parties to deposit fill on the Property. On April 15, 2021, Harmony Sand filed an Answer, Affirmative Defenses and

Counterclaim to Plaintiff's Amended Complaint [Appx., pp. 99a-109a] that, except for its denials of the allegations in Plaintiff's breach of contract claim regarding the deposit of fill on the Property, was identical to its first Answer, Affirmative Defenses and Counterclaim. On April 20, 2021, Plaintiff filed an Answer to Defendant's Counterclaim [Appx., pp. 110a-114a].

A bench trial was originally scheduled for June 20, 2022, but that trial was continued several times due to the lack of available judges. On June 18, 2024, the Honorable Robert A. Ballard, Jr. conducted a bench trial at which Plaintiff, Defendant's President, and Defendant's expert, Ronald Panicucci, testified.[1] At the conclusion of testimony, Judge Ballard requested that the parties submit written summations [Appx., pp. 115a-144a], which counsel submitted on July 8, 2024.

On August 2, 2024, Judge Ballard issued a Decision [Appx., pp. 146a-158a] from the bench denying Plaintiff's requests for relief.[2] On August 12, 2024, final judgment [Appx., p. 145a] was entered in favor of Harmony Sand on Plaintiff's claims and Harmony Sand's counterclaims were dismissed. Plaintiff filed a timely Notice of Appeal [Appx., pp. 159a-168a] on August 12, 2024.

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[1] There is a single trial transcript of the June 18, 2024 Bench Trial (1T) that was filed with this Court on September 18, 2024 [Appx., p. 169a].

[2] The transcript of the Bench Decision is designated as 2T.

STATEMENT OF FACTS

A. Background

Plaintiff-Appellant Lisa Van Horn owns the 45-acre Property, which she inherited from her father. In 1990, Mr. Smith and Defendant-Appellee Harmony Sand entered into an agreement permitting Harmony Sand "to remove available soil materials and aggregates from the premises . . . during the term of this Agreement." The 1990 agreement expired by its terms ten (10) years after its effective date. On March 2, 2000, Mr. Smith and Harmony Sand signed the Agreement that contained many of the same terms as the 1990 agreement but changed the term from ten years to

> an indeterminate period of years and until [Harmony] determines, in its sole discretion, that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it **commercially reasonable** to continue the removal of soil materials and aggregates from [Smith's] properties.

[Agreement, Defendant's Exhibit ("DX") 1, Appx. 170a, ¶1(emphasis added)]. The Agreement also specifically permits Harmony Sand to "erect a screening, washing and crushing processing plant and any other equipment necessary on the site for the purposes of manufacturing saleable sand and gravel and their by-products" [Agreement, DX-1, Appx. 171a, ¶6]. The Agreement also provides that, upon termination of the Agreement, Harmony Sand is required "to reslope all banks and to spread any stockpiled topsoil remaining on said

premises . . . and to "plant suitable coverage on said restored land" [Agreement, DX-1, Appx. 173a, ¶16].

The evidence adduced at trial established that during the first seven years of the Agreement, Harmony Sand extracted and sold over 100,000 tons of sand and gravel each year, and 256,957.77 tons in 2008. [PX-29, Appx. 193a]. Starting in 2009, Harmony Sand's sales dropped precipitously until (beginning in 2018) those sales fell substantially below the 20,000-ton threshold needed to generate the minimum $25,000 royalty payment to Ms. Van Horn required under the Agreement [PX-29, Appx. 193a]. In each of those year, Harmony Sand has had to come out of pocket to pay the minimum amounts to Ms. Van Horn [Trial Transcript ("1T."), pp. 134:24 – 135:3]. Richard Hummer, President and sole owner of Harmony Sand further admitted that he chose to forego mining operations on what he claims are six to eight remaining acres that could be mined because business has been poor for years [1T., pp. 148:19 – 150:4].

In stark contrast to the minimal revenues earned from mining, Mr. Hummer's land-fill business (for which he has no authority under the Agreement), has earned Harmony Sand over $230,000 since it started in June 2020 [1T., pp. 141:4 – 145:5]. Tellingly, even Mr. Hummer had to admit that nothing in the Agreement gives Harmony Sand the authority to sell to third

parties the right to deposit fill on Ms. Van Horn's Property [1T., pp. 140:14 – 145:5, 165:1-4]. Ms. Van Horn also testified that the Agreement did not permit Harmony Sand's business of accepting fill and being paid for it [1T. 68:4-8].[3]

Mr. Hummer attempted to justify his land fill business at the Property as part of Harmony Sand's reclamation efforts, but he necessarily acknowledged that the Agreement only calls for the resloping of all banks "upon termination" of the Agreement, which he asserts has not happened. [1T., pp. 117:24 – 118:14, 119:6:-11;Agreement, ¶16, Appx. 173a]. While Harmony Sand's expert, Mr. Panicucci, testified that Harmony Sand was only required to reslope the banks to a thirty-degree (30°) angle, Mr. Hummer admitted that he was not just resloping the banks--Harmony Sand was filling up the pit with the fill and had made approximately $234,000 doing so [1T., p. 138:15-21, 143:24 – 145:5, 205:11 – 206:2]. Ms. Van Horn also confirmed that Mr. Hummer was not just resloping the banks but was filling in the pit [1T. 68:4-8,].

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[3] Contrary to Judge Ballard's statement in his August 2, 2024 Decision, Ms. Van Horn was never asked whether the Agreement prohibited the import of fill by Harmony Sand, even though in his Summation, Harmony Sand's attorney falsely represented that she had acknowledged that the Agreement did not prohibit it [Defendant's Summation, p. 9, Appx. 140a; 1T., pp. 71:20 – 91:8]. Harmony Sand's expert, Ronald Paniccuci, was asked on direct examination if it did and said yes, but admitted on cross examination that he had never read the Agreement and had no idea whether or not it prohibited Harmony Sand from bringing fill on the property and being paid for it [1T., pp. 200:2-5, 206:3-17].

B. Judge Ballard's August 2, 2024 Decision

On August 2, 2024, the Honorable Robert A. Ballard, Jr. issued a decision from the bench. Discussing the breach of contract claims, Judge Ballard found that, based on Mr. Panicucci's testimony that there were six acres still to be mined, the mining operations had not ceased [Decision, 2T, p. 17:12-15, Appx. 154a]. Judge Ballard also found that Ms. Van Horn had not proven that Harmony Sand had breached any of its obligations under the provision of the Agreement [Decision, 2T, p. 17:25 – 21:3, Appx. 154a-156a].

Judge Ballard then discussed whether Harmony Sand's import of fill dirt for profit was a breach of the agreement, stating:

> It's not disputed that fill dirt was imported and the reasons were explained. But does this profit agreement read in its entirety, um, prohibit fill dirt importation? Plaintiff herself was asked that question at -- on cross-examination. Can you find in there where it prohibits it, and she said she could not. It's because it does not.

[Decision, 2T, p. 21:9-14, Appx. 156a]. Based on his finding that the Agreement did not specifically prohibit the importation of fill, Judge Ballard concluded that Harmony Sand's paid acceptance of fill on the property did not breach the Agreement [Decision, 2T, p. 22:2-7, Appx. 157a].

Finally, Judge Ballard found that Harmony Sand's mining operations continues and will continue [Decision, 2T, p. 23, Appx. 157a].

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW

The standard of review of a trial court's fact-finding function in an appeal from a bench trial is limited. An appeals court will not disturb the trial court's factual findings unless convinced that those findings are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Griepenberg v. Township of Ocean*, 220 N.J. 239, 254, 105 A.3d 1082 (2015) (quoting *Rova Farms Resort v. Investors Insurance Co. of America*, 65 N.J. 474, 484, 323 A.2d 495 (1974).

An appellate court reviews the trial court's interpretation of the law and the legal consequences that flow from established facts *de novo*. *Accounteks.Net, Inc. v. CKR Law, LLP*, 475 N.J. Super. 493, 503-04, 294 A.3d 1187 (App.Div. 2023) (quoting *Manalapan Realty, LP v. Township Committee of Manalapan*, 140 N.J. 366, 658 A.2d 1230 (1995).

II. THE TRIAL COURT'S FINDING THAT HARMONY SAND HAS NOT CEASED ITS MINING OPERATIONS IS SO MANIFESTLY UNSUPPORTED BY THE EVIDENCE IN THE RECORD AND INCONSISTENT WITH THE TERMS OF THE AGREEMENT AS TO OFFEND THE INTERESTS OF JUSTICE (DECISION, 2T, P. 23, APPX. P. 157A).

Harmony Sand effectively ceased any commercially reasonable mining operations at the Property by 2018 at the latest, thereby ending the Agreement. The Agreement "conveyed …merely the right to extract materials from the property…. [and]was terminable on Harmony's cessation of mining operations." [DX-48, p. 15, Appx., p. 191a]. *Van Horn,* 442 NJ Super. at 345. The undisputed evidence at trial confirmed the amount of sand and gravel Harmony Sand removed from the Property each year from inception of the Profit Agreement in 2000 through 2024. [PX-29, Appx., p. 193a; PX-30, Appx., p. 194a]. The chart (PX-30) also shows the minimal or default level of 20,000 tons per year, established in ¶ 18 of the Agreement, which represents the objectively low production number below which Harmony Sand is penalized. [See DX-1, ¶ 18, Appx., p. 174a]. Only if production above the minimal level of 20,000 tons per year would Harmony Sand avoid having to come out of pocket to pay the minimum guarantee to Ms. Van Horn of $25,000 per year in royalties the Agreement required. Harmony Sand thus had a clear **commercial** incentive to produce at least at that minimal level.

The history of Harmony Sand's production at the Property confirms that consistent annual commercially reasonable production of 20,000 tons is a marker of whether the Property is essentially played out and no further production is justified. At the inception of the Agreement, Harmony was producing five times the minimum or 100,000 tons a year, paying royalties to the Plaintiff of $125,000. By 2004, Harmony Sand's production rocketed to more than 12 ½ times the minimum or over 256,000 tons, generating royalties of $321,197.22 to Ms. Van Horn. Production then declined steadily, back to just above 100,000 tons in 2008, and then to 38,500 tons in 2017. By 2018, production was feeble, never hitting the default minimum of 20,000 again (and often missing that minimum by as much as over 7000 tons). Thus for the last six years. Harmony has had to come out of pocket to pay the required minimum $25,000 annual royalty payments to which Plaintiff was entitled under the Agreement. [PX-29, Appx., p. 193a]. Indeed, Harmony's consistent failure to meet that minimum puts an economic burden on Harmony and confirms it is no longer commercially reasonable to continue mining operations at the Property.

The Court below ignored the undisputed evidence, choosing instead to rely on the unsupported testimony of Harmony Sand's witnesses that there is some undetermined amount of sand and gravel still to be mined at the

Property. But that reliance was manifestly unsupported by the record, and so inconsistent with the terms of the Agreement as to offend the interests of justice. Indeed, Harmony Sand's actions demonstrate its intent to cling to the Property only so it can continue with its new, much more lucrative business--entirely unauthorized and in breach of the Agreement--of selling the rights to others to dump fill dirt on Plaintiff's property and pocketing hundreds of thousands of dollars in revenues that should go to Plaintiff.

The discretion the Agreement provides Harmony Sand to determine whether it is economically reasonable to continue mining operations at the Property provides no cover for the decision below because Harmony Sand's sole discretion is limited under the law. "[D]iscretion is never absolute but must be reasonable and not arbitrary or capricious. *See Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 199 N.J. 1, 13, 970 A.2d 347 (2009). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably depart[s] from established policies or rest[s] on an impermissible basis.'" *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571, 796 A.2d 182 (2002). *Mernick v. McCutchen*, 442 N.J. Super. 196, 204, 121 A.3d 905, 910 (App. Div. 2015).

The objective and undisputed production figures confirm the lack of any commercially reasonable basis for continuing mining operations at Property.

Furthermore, the economic bonanza Harmony Sand continues to reap from its unauthorized fill dirt operation at the Property at Ms. Van Horn's expense confirms that the decision to remain at the Property was not the result of any reasonable exercise of discretion but was an arbitrary and capricious exercise to usurp Plaintiff's rights and unjustly enrich itself by selling rights to third parties to dump fill dirt at the Property. That is why Harmony Sand's owner admitted that, while six to eight acres supposedly remained to be mined, he has made no effort to mine those acres during the past six years because the slow business could not justify it. [1T., pp. 148:19 – 150:4]. Mr. Hummer's admission--ignored by the court below--establishes that, for the past six years, Harmony Sand has determined that conducting its mining operations is not economically feasible, ending its rights under the Agreement.

III. THE COURT ERRED AS A MATTER OF LAW WHEN IT RULED THAT, BECAUSE THE AGREEMENT DID NOT SPECIFICALLY PROHIBIT HARMONY FROM CONDUCTING A BUSINESS SELLING THIRD PARTIES THE RIGHT TO DEPOSIT FILL ON THE PROPERTY, THAT BUSINESS WAS PERMITTED UNDER THE TERMS OF THE AGREEMENT (DECISION, 2T, PP. 21-22, APPX., PP. 156a – 157a)

The Court below found that, because the Agreement did not specifically prohibit Harmony Sand from conducting a business selling third parties the right to deposit fill on Plaintiff's Property, it was permitted to conduct that business. This finding is contrary to the applicable legal standard and

inconsistent with the express terms of the Agreement, as previously interpreted by this Court.

It is a well-established principal of contract interpretation that, if a contract affirmatively grants specific rights, it implies a negation of any other alternative rights. *Expressio unis est exclusio alterius. Gabel v. Manetto*, 177 N.J.Super 460, 464, 427 A.2d 71 (App. Div. 1981). The Agreement specifically grants Harmony Sand the right to remove available soil materials and aggregates from the premises and to erect a screening, washing and crushing processing plan and any other equipment necessary on the site for the purposes of manufacturing saleable sand and gravel and their by-products. These are the only rights the Agreement grants to Harmony Sand, which this Court confirmed that in its September 10, 2015 Opinion: "The Second Agreement never conveyed the right of exclusive possession, merely the right to extract materials from the property. . . . **It is evident that the parties intended to convey the right to extract materials rather than anything more**" [DX-48, p. 15, Appx. 191a (emphasis added)].

The trial court ignored both the rules for the construction of contracts and this Court's prior interpretation of the terms of the Agreement in ruling for Harmony Sand. Indeed, the trial court got the question exactly backwards--it was not whether the Agreement **prohibited** Harmony Sand from conducting a

business selling third parties the right to deposit fill on the Property, but whether the Agreement specifically **permitted** it to do so. Mr. Hummer admitted that the Agreement did not specifically permit Harmony Sand to conduct that business [1T., p.165:1-4]. As a Profit a Prendre, the Agreement narrowly circumscribed what Harmony Sand could do at the Property, and this Court previously confirmed that narrow scope: "**It is evident that the parties intended to convey the right to extract materials rather than anything more.**" [DX-48, p. 15, Appx. 191a (emphasis added)]. The trial court erred as a matter of law in holding that the Agreement permitted Harmony Sand to conduct a business selling third parties the right to deposit fill on the Property and retain the revenues it obtained from such unauthorized activities on Plaintiff's property. Those revenues belonged to Ms. Van Horn, the owner of the Property.

Nor can Harmony Sand's operation of its new fill dirt business be justified under the Agreement as part of its reclamation obligation. Not only is this an erroneous legal interpretation of the Agreement, but there was no factual support for it in the record, even if the Agreement could be read to permit it (which it cannot). Harmony Sand's reclamation obligations begin only upon termination of the Agreement. In addition, both Mr. Hummer and Mr. Panicucci testified that Harmony Sand is only required to reslope the

mining pit to a thirty-degree (30°) angle, yet the testimony at trial established that Harmony Sand is filling in the pit, not just resloping it [1T., p. 138:15-21, 143:24 – 145:5, 205:11 – 206:2].

Nor was there any testimony that could be construed as establishing that Harmony Sand could satisfy its reclamation obligation only by entering into a new business to sell fill rights at the Property and keep the profits. Indeed, there was no testimony that fill was, in fact, necessary to meet any grading or resloping requirements at all. Finally, and even if Harmony's reclamation obligations were ripe now (and not at termination), and he had to import fill to comply with its reclamation obligations, the Profit Agreement would not let him steal Plaintiff's economic rights to profit from having third parties pay to dump their fill in Plaintiff's property. The reclamation obligations in the Agreement obviously benefit Ms. Van Horn by eliminating any burden to her of reclaiming Property after Harmony Sand worked the pit out. The purpose of those obligations could not have been to effectively have Plaintiff pay any part of the costs of Harmony's reclamation obligations, including paying for any necessary fill dirt. By usurping Plaintiff's economic rights to satisfy its own obligations, Harmony Sand breached to terms of the Agreement.

The trial court erred as a matter of law in finding that Harmony Sand was entitled under the Agreement to engage in a business selling third parties

the right to deposit fill on Plaintiff's Property. As a result, this Court must vacate that holding and enter judgment in Plaintiff's favor on her breach of contract claim. The facts and the evidence are clear that Harmony Sand breached the Agreement by engaging in a business other than the mining business permitted by the Agreement, and that Harmony Sand must pay to Plaintiff all of the proceeds it earned from that unauthorized business.

CONCLUSION

For all the foregoing reasons, the court should grant the appeal and should direct the trial court to enter judgment in favor of Plaintiff, Lisa Van Horn, declare that the Agreement has terminated, and award her damages equal to the amount Harmony Sand earned selling third parties the right to deposit fill on Plaintiff's Property.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-003927-23T4

LISA VAN HORN,

Plaintiff/Appellant

v.

HARMONY SAND AND GRAVEL, INC.,

Defendant/Respondent

BRIEF OF DEFENDANT/RESPONDENT HARMONY SAND & GRAVEL, INC.

Sat Below:
Superior Court of New Jersey, Law Division,
Civil Part, Warren County
Honorable Robert A. Ballard, Jr., P.J., Civ.

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TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS

TABLE OF CITATIONS

Page

CASES:

RULES, STATUTES & OTHER AUTHORITIES:

I. CONCISE PROCEDURAL HISTORY

On September 4, 2020, Plaintiff/Appellant, Lisa Van Horn, filed the underlying action against Defendant/Respondent, Harmony Sand & Gravel, Inc., alleging breach of contract and seeking a declaratory judgment, injunctive relief and compensatory damages for an alleged breach of a Profit Agreement between the Parties. *Pa4-Pa43.*

On October 23, 2020, Defendant filed an Answer, Affirmative Defenses and Counterclaim in which it denied Plaintiff's allegations and sought damages for itself. *Pa44-Pa54.*

On November 13, 2020, Plaintiff filed an Answer and Affirmative Defenses to the Counterclaim. *Pa55-Pa58.*

The Parties exchanged written discovery – Interrogatories and Requests for Production of Documents – but did not take any depositions. Further, Plaintiff did not produce expert reports in discovery. Defendant did produce an expert witness.

On October 18, 2021, the factual discovery period was closed. *Da1.*

On December 20, 2021, Plaintiff filed a Motion for Summary Judgment wherein she requested the entry of a summary judgment with a declaration: (a) that Defendant cease mining operations as no longer having the right to remove materials from the property; (b) that the Profit Agreement is null and void; (c) that Plaintiff be entitled to full possession of the property; and (d) that Plaintiff is entitled to monetary

damages equal to the amount Defendant received as payment for allowing third parties to deposit reclamation fill on site.

On January 17, 2022, Defendant filed opposition to Plaintiff's Motion for Summary Judgment in which Defendant asserted: (i) it has continually operated its' business in compliance with both the express terms of the Profit Agreement and this Court's prior ruling and has not interfered with Plaintiff's access to, and possession of, her property; (ii) it has not ceased its' mining operations; and (iii) it has paid all royalties required under the Profit Agreement from 1990 through the present.

On January 20, 2022, Defendant filed a Cross-Motion for Summary Judgment in which it requested the entry of a summary judgment with a declaratory judgment directing that: (a) Defendant is the lawful occupier of Plaintiff's property pursuant to the Profit Agreement; (b) Defendant's conduct pursuant to the Parties' Profit Agreement is consistent with this Court's 2015 decision; and (c) Plaintiff, and her officers, agents, owners, employees, servants, workers and independent contractors, are enjoined from interfering with Defendant's rights under the Profit Agreement as interpreted by this Court.

On February 22, 2022, Plaintiff filed a Response to Defendant's Cross-Motion for Summary Judgment.

On March 2, 2022, Defendant filed a Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment in which Defendant asserted that

its' Cross-Motion must be granted: (i) because fencing erected around the perimeter of Defendant's mining operation extends beyond the active gravel pit in order to comply with all applicable mining regulations; and (ii) because such fencing is required under the applicable mining regulations, Plaintiff breached the Profit Agreement, and thereby interfered with Defendant's mining operation, when she consistently requested access to areas within Defendant's enclosed mining operation.

On May 17, 2022, after two rounds of briefing and two oral arguments, the Law Division entered an Order which: (1) denied Plaintiff's Motion for Summary Judgment; (2) denied Defendant's Cross-Motion for Summary Judgment; and (3) "permitted [Plaintiff] to enter and inspect the premises designated as Block 21, Lot 9 located on Foul Rift Road in White Township, Warren County, New Jersey, at any time during normal business hours. Plaintiff shall be permitted to enter on demand and without notice to defendant. Defendant or its agent shall escort plaintiff while she is on the premises, and defendant shall follow all applicable safety regulations while she is present, including, but not limited to, providing to plaintiff any safety information and equipment required by State and federal regulations." *Da2-Da3.*

On June 18, 2024, the Law Division conducted a bench trial where all Parties were able to present their cases. *1T.* After allowing an opportunity for written closing arguments, the Court issued a comprehensive Statement of Reasons from the bench

on August 2, 2024 (*2T3-1 to 2T25-19)*, and entered the Final Judgment on August 12, 2024. *Pa145.*

II. CONCISE COUNTERSTATEMENT OF FACTS

On or about February 6, 1990, Defendant entered into a written "Lease Agreement" with the late Earl Richard Smith, who was the owner of approximately 45.46 acres of land located at 96 Foul Rift Road in White Township, Warren County, New Jersey, and identified as Block 21, Lot 9, on the White Township Tax Map. *Da4-Da13.* The 1990 Agreement permitted Defendant to remove soil and aggregates from the land for the sum of one dollar ($1.00) per ton royalty for all processed materials and gravel removed from the property. *Da4.* The 1990 Agreement was for a period of ten (10) years and expired at the end of February of 2000. *Da4-Da13.* The validity of the 1990 Agreement was never called into question.

On or about March 2, 2000, Defendant and Mr. Smith entered into a second written "Lease Agreement." *Pa13-Pa19.* The 2000 Agreement mirrors the 1990 Agreement in that it allows Defendant to continue to mine and to remove materials from Block 21, Lot 9, and increases the royalty payments to one dollar and twenty-five cents ($1.25) per ton for all processed materials and gravel removed. *Pa13-Pa19.* The 2000 Agreement is to remain in effect until such time Defendant "determines, in its sole discretion, that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it commercially reasonable

to continue the removal of soil materials and aggregates from the Lessor's properties." *Pa13.*

On July 16, 2012, Plaintiff, who inherited the subject property, filed a Complaint against Defendant in the Law Division at docket no. WRN-L-288-12, wherein she sought a declaratory judgment that Defendant did not have any further rights under the March 2, 2000 Agreement which was made between her predecessor-in-title and Defendant; and that would have granted her exclusive possession of the property which is the subject of the Agreement. *Pa21-Pa36.* After the Parties filed Motions for Summary Judgement, Plaintiff appealed the Law Division's 2014 decision which granted a Summary Judgment in Defendant's favor and dismissed Plaintiff's Complaint. *Pa21-Pa36.*

On September 10, 2015, this Court affirmed and published a precedential opinion which granted a summary judgment in Defendant's favor. *Pa21-Pa36.* "Plaintiff Lisa Van Horn appeals from a February 10, 2014 Law Division order granting summary judgment to defendant Harmony Sand & Gravel (Harmony) and dismissing her complaint to eject Harmony from her property. After reviewing the record in light of the applicable law, we affirm the judgment but on different grounds…" *Van Horn v. Harmony Sand & Gravel, Inc.*, 442 N.J. Super. 333, 336 (App. Div. 2015). *Pa21-Pa36.*

In so ruling, this Court stated:

> We are convinced that the Second Agreement clearly created a profit relationship. The Second Agreement never conveyed the right of exclusive possession, merely the right to extract materials from the property. Additionally, the Second Agreement limited the non-interference obligations of the owner to Harmony's conduct of a mining operation. Moreover, the entire agreement was made contingent on Harmony's ability to secure permits, and the Second Agreement was terminable on Harmony's cessation of mining operations. It is evident that the parties intended to convey the right to extract materials rather than anything more. Thus, we find that the Second Agreement conveyed a profit, which has not yet terminated. Accordingly, we affirm the trial court's order dismissing Van Horn's complaint, albeit on different grounds.

Pa35-Pa36.

This Court further held as follows:

1. That "the Second Agreement was neither a lease nor a license." *Pa30.*
2. That "the agreement permitted Smith to interfere with Harmony's possession of the land so long as he did not interfere with their mining operations." *Pa31.*
3. That "[i]n the Second Agreement, Smith conveyed rights and privileges to mine the property that could not be revoked by the landowner, absent a default." *Pa31.*
4. That "the agreement also provided protection to Harmony against interference with its conduct of the mining operation by the landowner for the duration of the agreement, . . ." *Pa31-Pa32.*

5. That "[w]e are clearly convinced that the Second Agreement created a profit relationship." *Pa35*.

6. That "[a] profit is distinct from both a lease and a license, as it conveys a lesser interest than exclusive possession, but still conveys and interest that is 'alienable, assignable, and inheritable,' which distinguishes it from the mere personal privilege of a license." *Pa34*.

7. That "a profit confers a right to remove something of value from the land." *Pa34*.

8. That "[a] profit is closely analogous to an easement." *Pa34*.

9. That "[t]here is no authority for the proposition that the owner of property subject to an easement can simply renounce the easement." *Pa35*.

10. That "the entire agreement was made contingent on Harmony's ability to secure permits, and the Second Agreement was terminable on Harmony's cessation of mining operations." *Pa35*.

11. That "the Second Agreement conveyed a profit, which has not yet terminated." *Pa36*.

The 2000 Profit Agreement states that it is subject to all zoning and licensing approvals by the Township of White, requires Defendant "to operate its business in accordance with all applicable local, state and federal ordinances and regulations dealing with extraction of materials, . . ." and requires Defendant "to obtain all

municipal, county, state and/or agencies' approval and permits necessary to enable lessee to operate a quarrying operation on the subject premises." *Pa15, Pa17.*

The 2000 Profit Agreement states that Defendant is "permitted to remove available soil materials and aggregates from the premises described above for an indeterminate period of years until [it] determine, in its sole discretion, that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it commercially reasonable to continue the removal of soil materials and aggregates from" the property. *Pa13-Pa14.*

The 2000 Profit Agreement states that Defendant is "permitted to erect a screening, washing and crushing processing plant and any other equipment necessary on the site for the purposes of manufacturing saleable sand and gravel and their by-products." *Pa14.*

The 2000 Profit Agreement requires Defendant "to operate its business in accordance with all applicable local, state and federal ordinances and regulations dealing with extraction of materials, . . ." *Pa15.*

The 2000 Profit Agreement requires Defendant "to obtain all necessary permits which may be required for the sand and gravel operation." *Pa16.*

The 2000 Profit Agreement requires Defendant "to reslope all banks and to spread any stockpiled topsoil remaining on said premises" and "said restoration to be complete within one (1) year after termination." *Pa16.* "Restoration of the land

shall be in accordance with the requirements of the Township of White." *Pa16.*

Under the 2000 Profit Agreement, Defendant "guarantees . . . that it will remove sufficient tons from the properties" and pay Plaintiff "a minimum of Twenty-five Thousand Dollars ($25,000) per year; . . ." *Pa17.*

Under the 2000 Profit Agreement, "[i]n the event that [Defendant] fails to remove sufficient materials to require payments to [Plaintiff], as hereinabove set forth, in the total sum of $25,000 per year, [Defendant] shall make up the difference any pay the full sum of $25,000, despite the absence of removal of materials, and the same shall not constitute a breach of this" Agreement. *Pa17.*

From 1990 through the present, Defendant has paid Plaintiff, and her predecessor-in-title, in full under the terms of the Profit Agreement. *Pa193 & Da14-Da164.*

Despite this Court's thoughtful opinion, less than four months later, on January 9, 2016, Plaintiff filed a Notice of Motion to Enforce Litigant's Rights in which she sought an order from the Law Division which would have directed Defendant to provide her a key to the gates surrounding the mining operations. Defendant filed opposition thereto and cross-moved to dismiss the motion as moot and to obtain counsel fees. On March 17, 2016, the Law Division granted Defendant's Cross-Motion, denied Plaintiff's Motion and granted counsel fees in Defendant's favor. *Da165-Da167.* On Plaintiff's appeal, this Court vacated the

award of counsel fees on procedural grounds.

Undeterred by her failure to obtain relief at docket no. WRN-L-288-12, Plaintiff once again filed an action against Defendant in the Chancery Division at docket no. WRN-C-16012-16. *Da168.* Upon Defendant's Motion to Dismiss, Plaintiff again was denied relief when she attempted to obtain keys to Defendant's business and to remove it from the subject property on the same grounds raised in 2012. *Da168.*

On September 4, 2020, Plaintiff filed this action in the Law Division against Defendant in which she again presents three claims for relief which were previously raised in the prior actions: (1) a declaration that Defendant has defaulted in its' obligations under the Profit Agreement and that the Profit Agreement is null and void, except for the terms that expressly survive; (2) an order enjoining Defendant from continuing any further mining on the property with the exception of property reclamation; and (3) a request that the Court enter judgment for the damages that Plaintiff purportedly suffered as a result of Defendant allegedly breaching the terms of the Profit Agreement. *Pa4-Pa43, Pa60-Pa82.*

In support of her claims for relief, Plaintiff alleges that Defendant has breached the Profit Agreement in the following respects: (i) by purportedly not providing Plaintiff with "weight/yardage tickets and 'any other pertinent records pertaining to the removal of materials . . . for the purposes of verifying the quantities

of material removed from the site;'" (ii) by purportedly not providing "plaintiff with daily transcripts 'of all materials removed from the site' twice a month;'" (iii) by purportedly "consistently failed to timely make timely payments to plaintiff, which under paragraph 7 are due by 3rd business day of each month for the prior month's material removed;" (iv) by purportedly "not taken reasonable and necessary steps to assure minimum damage to plaintiff's property 'and to prevent any unnecessary and unwanted water to accumulate thereon;'" (v) by purportedly "not cooperated with plaintiff as paragraph 11 requires in designating the 'area of proposed excavations, said designation to be in the best interest of [the parties] and in accordance with the permit issued by White Township. . . ' Instead, it consistently acted unilaterally and without prior discussion with plaintiff;" (vi) by purportedly "not provided for means for control of 'dust which may arise during daily operations' . . . as paragraph 13 requires;" (vii) by purportedly "failed to make the minimum payment of $25,000 per year for 2018 as paragraph 18 requires;" (viii) by purportedly continuing "to interfere with and deny plaintiff possession of her property by, among other things, locking her out, not providing keys, removing personal equipment of hers (such as surveillance cameras) from the property, and erecting barriers to entry at locations around the property;" and (ix) by importing fill dirt which purportedly is not permitted by the Profit Agreement. *Pa62, Pa64.*

This case then proceeded to trial as set forth above.

III. LEGAL ARGUMENTS

A. STANDARD OF APPELLATE REVIEW

Because the Trial Court's decision is factually and legally sound, it should not be disturbed. The Law Division thoughtfully considered the admitted evidence, the controlling law, and the Parties' legal arguments in rendering a decision which was based solely upon the facts in evidence and the law without partiality, prejudice, passion or bias. In New Jersey, the only grounds to disturb a trial judge's reasonable, evidence-based decisions are limited to either where there is an abuse of discretion or where there is a clear error of law.

As to the former standard of review, an abuse of discretion, a reviewing "Court finds an abuse of discretion when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012) (quoting *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 174 (App. Div. 2011)). A trial court's decision "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995). "[A] trial court's evidentiary rulings are 'entitled to

deference absent a showing of an abuse of discretion i.e., there has been a clear error of judgment.'" *State v. Brown*, 170 N.J. 138, 147 (2001) (quoting *State v. Marrero*, 148 N.J. 469, 484 (1997)). A clear error of judgment is found where the judgment is "based on appropriate factors and rationally explained," but "is contrary to the predominant views of others responsible for the administration of criminal justice." *State v. Dalglish*, 86 N.J. 503, 510 (1981). Before deemed a clear error of judgment, the error must be "clearly unreasonable so as to shock the judicial conscience." *State v. Roth*, 95 N.J. 334, 365 (1984). Such an error is one that "could not have been reasonably made upon weighing the relevant factors." *State v. Nwobu*, 139 N.J. 236, 254 (1995). "Under this standard, 'an appellate court should not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" *Hanisko v. Billy Casper Gold Management, Inc.*, 437 N.J. Super. 349, 362 (App. Div. 2014) (quoting *Brown*, 170 N.J. at 147).

As to the latter standard of review, a clear error of law, any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result. *See State v. Bueso*, 225 N.J. 193, 195 (2016). "[A]n appellant faces an especially high hurdle in an appeal from a civil bench trial to establish that the admission of…evidence constitutes 'plain error.'" *N.J. Div. of Child Prot. & Permanency v. J.D.*, 447 N.J. Super. 337, 349 (App. Div.

2016). "The judicial inquiry must consider more than whether a mere mistake occurred." *Minkowitz v. Israeli*, 433 N.J. Super. 111, 150 (App. Div. 2013). Under the plain error standard (in a criminal case), the "defendant has the burden to show that there is an error, that the error is 'clear' or 'obvious,' and that the error has affected 'substantial rights.'" *State v. Chew*, 150 N.J. 30, 82 (1997).

B. THE TRIAL COURT NEITHER ABUSED ITS' DISCRETION NOR COMMITTED A CLEAR ERROR OF LAW

The Law Division's Statement of Reasons and Final Judgment thoroughly and accurately summarizes all of the following: (i) the Parties' claims, defenses and legal positions; (ii) the witnesses' testimony; (iii) the admitted evidence; (iv) a statement of controlling law; (v) how witness credibility was determined; and (vi) the weight and sufficiency given to the testimony and the evidence. In considering all of the preceding, the Trial Court cogently applied the facts in controversy to controlling law and made a sound decision while not abusing its discretion or committing a clear error of law.

To begin with, in its decision, the Trial Court explained how all three of the witnesses' credibility was determined.

As to Lisa Van Horn, the Trial Court found that "her credibility is significantly affected by her unhappiness." *2T15-14 to 2T15-16*. The Trial Court also "found that her testimony had some significant flaws. And I think that was brought about or demonstrated I should say on cross-examination. And as a result of that, I found that

her credibility jaded by her dissatisfaction with what is occurring, um, was lacking." *2T15-20 to 2T15-25.* By way of example of Plaintiff's lack of credibility, the Trial Court found "that the one clear illustration of lack of credibility was that she went through a number of exhibits she prepared to show that the minimums had [not] been paid for certain years and that it was a breach. And then finally admitted on cross that she's received at least $25,000 each year in royalties from when she took over the property. And that affected her credibility significantly." *2T16-3 to 2T16-10.* The Trial Court also found that "by the conclusion of her cross-examination it became evident – and even through her own words she's upset because she could be making the money on the fill that the defendants are making." *2T11-3 to 2T11-6.*

As to Richard Hummer, Jr., the Trial Court found that "Mr. Hummer I think was fairly straightforward." *2T16-11 to 2T16-12.* The Trial Court also found "for the most part his testimony was credible." *2T16-22 to 2T16-23.* The Trial Court further found that when Mr. Hummer "spoke of business being slow as to the reason why the mining operations had slowed considerably, I found that testimony to be credible." *2T16-24 to 2T17-1.*

As to Ronald Panicucci, P.E., the Trial Court found that "it's clear that he has a relationship with the defendant that goes back a number of years. I – but I do not find that that relationship affected his credibility. In other words, his testimony itself was based on facts and documents and a clear – a clear understanding of what's

going on on the property. So I found his testimony actually of the three witnesses to be the most credible." *2T17-5 to 2T17-12.*

Based upon the witnesses' testimony and credibility, the Trial Court also made the following essential findings of fact:

1. That the Trial Court must be guided by this Court's decision in *Van Horn v. Harmony Sand & Gravel, Inc.*, 442 N.J. Super. 333 (App. Div. 2015). *2T4-4 to 2T5-15.*
2. That this Court ruled the Parties' 2000 Agreement created a profit relationship. *2T4-17 to 2T4-19.*
3. That this Court ruled the Profit Agreement did not convey exclusive possession of the property to Defendant. *2T4-19 to 2T4-21.*
4. That this Court ruled the Profit Agreement conveyed to Defendant the right to extract materials from the property. *2T4-19 to 2T4-21.*
5. That this Court ruled the Profit Agreement limited Plaintiff's non-interference obligations to the conduct of Defendant's mining operations. *2T4-22 to 2T4-24.*
6. That this Court ruled the Profit Agreement was contingent upon Defendant's ability to secure all applicable governmental permits. *2T4-25 to T25-1*

7. That this Court ruled the Profit Agreement was terminable upon Defendant's cessation of mining operations. *2T5-2 to 2T5-3.*
8. That this Court ruled the Profit Agreement was not terminated as of the date of this Court's 2015 decision. *2T5-6 to 2T5-7.*
9. That this Court concluded that the Profit Agreement contained five (5) essential terms. *2T6-2 to 2T6-21.*
10. That the first essential term of the Profit Agreement is that "the defendant has a right to mine aggregates on the plaintiff's property." *2T6-2 to 2T6-3.*
11. That the second essential term of the Profit Agreement is "that the defendant must pay plaintiff a royalty in the sum of $1.25 per ton of mined aggregates." *2T6-4 to 2T6-6.*
12. That the third essential term of the Profit Agreement is that "defendant must pay a minimum annual royalty sum of $25,000 regardless of the amount of aggregates mined." *2T6-7 to 2T6-9.*
13. That the fourth essential term of the Profit Agreement is that "defendant has the right to mine aggregates on the property to – for what it says for an indeterminate period of years and until defendant determines in its sole discretion that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it commercially reasonable to

continue the removal of soil – soil materials and aggregates." *2T6-10 to 2T6-17.*

14. That the fifth essential term of the Profit Agreement is that "there's a requirement that defendant must restore and reclaim the property within one year of cessation of mining operations." *2T6-18 to 2T6-21.*

15. That "what's not in dispute is that the mining operations themselves in recent years have slowed down considerably." *2T6-23 to 2T6-25.*

16. That "the defendant has been bringing in fill at – at a profit. And that's really what brings us here to this case." *2T7-1 to 2T7-3.*

17. That Plaintiff "admits that she received – and this is important, on cross is what she admitted that she received at least $25,000 each year in royalties from when she took over from her dad through 2023." *2T10-18 to 2T10-21.*

18. That Plaintiff admitted that the question of access to the property was no longer at issue. *2T10-23 to 2T11-2.*

19. That "by the conclusion of her cross-examination it became evident – and even through her own words she's upset because she could be making the money on the fill that the defendants are making." *2T11-3 to 2T11-6.*

20. That Mr. Hummer said "and this is critical. He explained that the business is slow in terms of the – I guess the former usage of the site or continued

usage of the site which is removing the aggregate and stone. And that's why they're not mining as much. Business in general is slow. And there's still six more acres to mine at the site. The intention is to continue with the mining. Um. He believes it's still viable and feasible until the reserves are depleted." *2T12-17 to 2T13-1.*

21. That Ronald Panicucci, P.E., was qualified and accepted as engineer with expertise in mining. *2T13-12 to 2T13-16.*

22. That "it's clear to this Court that the plaintiff is of the belief that the mining operations have ceased, or should be deemed ceased, and is not happy that Harmony Sand and Gravel continues to make money off the property bringing in fill." *2T14-14 to 2T14-18.*

23. That "the defendants believe that this mining it has not ceased and have not made a determination that it is no longer feasible – economically feasible, and that's their determination to make." *2T14-19 to 2T14-22.*

Then, after judging the witnesses' credibility and making its' finding of facts, the Trial Court appropriately made the following conclusions.

To begin with, the Trial Court found that "there was really no credible evidence on" the issue of "whether the weight and yardage tickets verifying the quantity of the materials removed were not provided to the plaintiff for purpose of verifying." *2T17-25 to 2T18-4.* Therefore, the Trial Court did "not believe that she's

proven by a preponderance of the evidence that the profit agreement was breached with regard to those tickets." *2T18-6 to 2T18-9.*

Second, the Trial Court addressed Plaintiff's claim that the Profit Agreement was breached because Defendant did not provide the daily transcripts twice monthly as required by the Agreement. On that issue, the Trial Court held that "the plaintiff failed to prove that there was a material breach there. Particularly in light of the pattern and practice since apparently 1990 that those, um, transcripts would be provided once per month, as opposed to twice, notwithstanding what the agreement calls for based upon the practice of the parties. It's clear that that breach did not occur there." *2T18-11 to 2T18-17.*

"Third was the untimely royalty payments. Those, um, I need not go any further than the plaintiff's own testimony or admission I should say on cross-examination. And so I do not find that the plaintiff has proven the breach based on the untimely royalty payments." *2T18-20 to 2T18-25.*

Fourth, "was an allegation that the defendant has not taken any reasonable and necessary steps to ensure minimal damage to the plaintiff's property to prevent any unnecessary and unwanted water to accumulate thereon. Um. We heard little other than again some anecdotal evidence from the plaintiff on that about seeing some water. But nothing by the way of credible testimony. Not even expert testimony. Just any corroborating evidence. We – what we did hear was from the defendant's expert,

Mr. Panacucci, who spoke about the water allocation permit from the New Jersey Department of Environmental Protection and no violations thereof. I do not find, by any means, that the plaintiff has proven a breach based upon that allegation." *2T19-1 to 2T19-16.*

Fifth, on Plaintiff's allegation of "failure to cooperate in the designation of an area – of the areas of excavation," the Trial Court found that "plaintiff's own testimony allies [should be belies] this allegation." *2T19-18 to 2T19-25.* In Plaintiff's testimony, "she said she was unaware of the precise location in the pit where mining was taking place. Um. But her testimony was all over the map on this issue. I don't find that she proved by a preponderance of the evidence that the defendant breached the profit agreement by failing to cooperate with her in identifying the precise location of the mining. Quite frankly, um, neither the plaintiff or, apparently her predecessor, her father, ever inquired about that and didn't care, as long as the royalty payments were being made." *2T20-1 to 2T20-10.*

Sixth, on Plaintiff's claim that Defendant was not controlling the dust, the Trial Court found that there was a "paucity of proofs on that." *2T20-11 to 2T20-17.*

Seventh, "was failure to make the minimum royalty payments. Again, um, that was not proven. There's testimony to – to the contrary. Um. There was no credible evidence that the minimum payments weren't made. In fact, the evidence supported to the contrary." *2T20-18 to 2T20-22.*

Eighth, on Plaintiff's claim that she purportedly was being denied access to the property, the Trial Court found that there was no proof of the same. *2T20-23 to 2T21-3.*

Ninth, "the big issue, frankly, of what it comes down to is whether the importation of fill dirt constitutes a breach of the profit agreement. Um. There's – the court has to look not only the agreement, but has to certainly to look at the facts, um, as demonstrated before it. It's not disputed that fill dirt was imported and the reasons were explained. But does this profit agreement read in it [sic] entirety, um, prohibit fill dirt importation? Plaintiff herself was asked that question at – on cross-examination. Can you find in there where it prohibits it, and she said could not. It's because it does not. Um. There's no other witnesses that support the assertion that this fill dirt isn't part of the reclamation that has to be done down the line. And there's been no violations issued by White Township. Um. In short, um, plaintiff has not proven by a preponderance of the evidence – of any credible evidence that the importation of fill dirt constitutes a breach of the profit agreement. There's no question that the defendant had an obligation to reclaim the mined property. Um. That there's really the agreement itself is some – is silent as to how that is to be done. But given that, and the acknowledgment that the agreement doesn't prohibit fill dirt importation, I find on that final allegation of breach that the plaintiff has not proven that beyond, um – or by the preponderance of the evidence." *2T21-4 to 2T22-7.*

As a result of its' conclusions, the Trial Court denied all of Plaintiff's prayers for relief. First, the Trial Court denied Plaintiff's request for a declaratory judgment because this "is not a DJ case." *2T22-8 to 2T22-13*. Second, it rejected Plaintiff's request for injunctive relief "since I'm making a determination that plaintiff hasn't prevailed on the case." *2T22-13 to 2T22-25*. Third, the Trial Court denied Plaintiff's request for compensatory damages "in light of the fact that the cause of action hasn't been proven." *2T22-25 to 2T23-3*. Fourth, the Trial Court held that "the underlying case not being proven there's no basis for a specific performance." *2T23-4 to 2T23-7*.

As set forth herein, there are no grounds to disturb the Law Division's decision that, based upon the trial evidence, there is no proof that the Profit Agreement has been breached by Defendant and that it remains in full force and effect.

C. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF DID NOT PROVE DEFENDANT BREACHED THE PROFIT AGREEMENT (*2T3-1 to 2T25-19*)

Defendant contends that the evidence at trial overwhelmingly demonstrated that Plaintiff did not prove that Defendant breached the Parties' Profit Agreement.

To establish a claim for a breach of contract, a party must prove four elements:

> first, that "[t]he parties entered into a contract containing certain terms"; second, that "plaintiff[s] did what the contract required [them] to do"; third, that "defendant[s] did not do what the contract required [them] to do[,]" defined as a "breach of the contract"; and fourth, that "defendant[s'] breach, or failure to do what the contract

required, caused a loss to the plaintiff[s]."

Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016). "Each element must be proven by a preponderance of the evidence." *Id.* (citing *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 169 (2006)). "To establish its contract claim against the defendant, plaintiff must prove that: 1. The parties entered into a contract containing certain terms. 2. The plaintiff did what the contract required the plaintiff to do. 3. The defendant did not do what the contract required the defendant to do. This failure is called a breach of the contract. 4. The defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff." *New Jersey Model Civil Jury Charge 4.10A.*

In New Jersey, the Supreme Court has held that a breach is material "if it 'goes to the essence of the contract.'" *Roach v. BM Monitoring, LLC*, 228 N.J. 163, 174 (2017) (citing *Ross Sys. v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 341 (1961)). To establish a material breach, the Courts have adopted Section 241 of the *Restatement (Second) of Contracts*. *See* e.g., *Roach*, 228 N.J. at 174-75. Accordingly, this Court must consider:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances

> including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts, § 241 (AM. LAW INST. 1981).

In this case, the Law Division properly found that Plaintiff did not prove by a preponderance of evidence that Defendant breached the Profit Agreement.

The "'preponderance of the evidence' means that amount of evidence that causes you [the factfinder] to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you [the factfinder] that the allegation is more likely true than not true. If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue." *New Jersey Model Civil Jury Charge 1.12*.

The Trial Court thoughtfully considered each of the nine (9) breach allegations set forth in Plaintiff's Complaint and found that she failed to meet her burden of proving by a preponderance of evidence that Defendant breached the Profit Agreement.

A. ***Weight/Yardage Tickets Verifying Quantities of Materials Removed***:

Plaintiff alleges that Defendant has not provided her with "weight/yardage tickets and 'any other pertinent records pertaining to the removal of

materials . . . for the purposes of verifying the quantities of material removed from the site.'" *Pa62*. On this allegation, Plaintiff did not offer any credible evidence whatsoever. To the contrary, she offered mere speculation that trucks allegedly have exited the site with mined aggregates without driving over the scales. In support of this baseless allegation, Plaintiff offered a few photographs of random trucks ("P-37") which did not support her testimony. *1T53-16 to 1T56-9*. Further, Defendant testified that every truck exiting the site must, and in fact does, cross weight scales. *1T156-10 to 1T156-12*. In support of his testimony, Defendant offered a pre-printed quintuple weight ticket and explained its' use which this Court accepted into evidence. *Da169. 1T119-12 to 1T121-17 and 1T216-7 to 1T216-12*. Based upon the preceding and upon the totality of the evidence at trial, the Trial Court properly held Plaintiff did not prove by a preponderance of evidence that Defendant breached the Profit Agreement by purportedly failing to provide documentation to verify the quantity of materials removed from the site. As the Trial Court stated, "there was really no credible evidence on" the issue of "whether the weight and yardage tickets verifying the quantity of the materials removed were not provided to the plaintiff for purpose of verifying." *2T17-25 to 2T18-4*. Therefore, the Trial Court did "not believe that she's proven by a

preponderance of the evidence that the profit agreement was breached with regard to those tickets." *2T18-6 to 2T18-9.* Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

B. ***Daily Transcripts Twice Monthly***: Plaintiff alleges that Defendant has not provided "plaintiff with daily transcripts 'of all materials removed from the site' twice a month.'" *Pa62.* On this allegation, Plaintiff did not offer any evidence at all. To the contrary, she did not contest the undisputed evidence of record that she has followed the modified procedure that her predecessor-in-title (her father), who entered into the Profit Agreement, and Defendant have engaged-in since the 1990 Agreement which preceded the March 2, 2000 Profit Agreement, *to wit*, that transcripts of materials removed, and the subsequent royalty payments, would be provided by Defendant only once per month. Defendant confirmed the same in his testimony. *1T121-18 to 1T122-13.* On this allegation, "the plaintiff failed to prove that there was a material breach there. Particularly in light of the pattern and practice since apparently 1990 that those, um, transcripts would be provided once per month, as opposed to twice, notwithstanding what the agreement calls for based upon the practice of the parties. It's clear that that breach did not occur there." *2T18-11 to 2T18-17.*

Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

C. ***Untimely Royalty Payments***: Plaintiff alleges that Defendant has "consistently failed to timely make timely [sic] payments to plaintiff, which under paragraph 7 are due by 3rd business day of each month for the prior month's material removed." *Pa62.* On this allegation, Plaintiff failed to prove a material breach of the Profit Agreement as the Law Division stated. "Third was the untimely royalty payments. Those, um, I need not go any further than the plaintiff's own testimony or admission I should say on cross-examination. And so I do not find that the plaintiff has proven the breach based on the untimely royalty payments." *2T18-20 to 2T18-25.* Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

D. ***Prevention of Unnecessary and Unwanted Accumulation of Water:*** Plaintiff alleges that Defendant purportedly has "not taken reasonable and necessary steps to assure minimum damage to plaintiff's property 'and to prevent any unnecessary and unwanted water to accumulate thereon.'" *Pa63.* On this allegation, Plaintiff did not offer any credible evidence whatsoever. To the contrary, she simply offered her unqualified and uneducated opinion that water has accumulated on the property without

any further specifics. *1T44-17 to 1T47-11*. For example, she did not offer any of the following to support this claim – pictures of the accumulation of water on the property; expert testimony regarding the appropriate accumulation of water at a gravel pit; proof that the water accumulation is in violation of the Township mining permit and/or the state and federal regulations; or corroborating witness testimony. *1T30-13 to 1T97-18.* Further, Plaintiff's unsubstantiated claim was contradicted by both Defendant and its' engineering expert who gave testimony that the use of water is necessary in mining activities; that Defendant has a water allocation permit from the New Jersey Department of Environmental Protection ("NJDEP"); that Defendant utilizes water in accordance with the terms of the NJDEP permit; and that Defendant has never received complaints regarding the accumulation of water on site from third parties including governmental agencies with jurisdiction over the mining activities. *1T123-19 to 1T125-25 and 1T193-10 to 1T196-11*. Based upon the preceding and upon the totality of the evidence at trial, Plaintiff did not prove by a preponderance of evidence that Defendant breached the Profit Agreement by purportedly allowing the accumulation of unnecessary and unwanted water. As the Trial Court stated, there "was an allegation that the defendant has not taken any reasonable and necessary steps to ensure

minimal damage to the plaintiff's property to prevent any unnecessary and unwanted water to accumulate thereon. Um. We heard little other than again some anecdotal evidence from the plaintiff on that about seeing some water. But nothing by the way of credible testimony. Not even expert testimony. Just any corroborating evidence. We – what we did hear was from the defendant's expert, Mr. Panacucci, who spoke about the water allocation permit from the New Jersey Department of Environmental Protection and no violations thereof. I do not find, by any means, that the plaintiff has proven a breach based upon that allegation." *2T19-1 to 2T19-16.* Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

E. ***Failure to Cooperate in Designation of Area of Excavations:*** Plaintiff alleges that Defendant purportedly has "not cooperated with plaintiff as paragraph 11 requires in designating the 'area of proposed excavations, said designation to be in the best interest of [the parties] and in accordance with the permit issued by White Township. . . ' Instead, it consistently acted unilaterally and without prior discussion with plaintiff." *Pa63.* On this allegation, Plaintiff failed to prove any breach of the Profit Agreement. Her testimony, essentially, was that she is unaware of the precise location in the pit where mining is taking place. *1T40-19 to 1T40-21.* However, this

incredible testimony was belied by: (a) her testimony that she has been on site on repeated occasions to observe the mining; *1T85-24 to 1T86-7;* (b) Defendant's testimony that Plaintiff often enters the site via her truck and drives around to view the active mining operations; *1T85-24 to 1T86-7*; (c) the absence of testimony from Plaintiff that she has communicated, or attempted to communicate, with Defendant regarding her view of where the mining should take place (no emails to Defendant directly, no letters from her attorney to Defendant or its' counsel, no efforts to engage Defendant on site); *1T86-11 to 1T86-25;* (d) the fact that, as set forth in Mr. Panicucci's testimony, Defendant's annual mining application, which is submitted to White Township, provides details on the portions of the property that have been mined, have been reclaimed and the are scheduled to be mined in the upcoming year; *1T190-16 to 1T192-13;* and (e) that Plaintiff has access to the mining applications, not only as a party-in-interest, but as part of the public record. Based upon the preceding and upon the totality of the evidence at trial, Plaintiff did not prove by a preponderance of evidence that Defendant breached the Profit Agreement by purportedly not cooperating with her in identifying the precise location of the mining. As the Trial Court stated, "she said she was unaware of the precise location in the pit where mining was taking place. Um. But her

testimony was all over the map on this issue. I don't find that she proved by a preponderance of the evidence that the defendant breached the profit agreement by failing to cooperate with her in identifying the precise location of the mining. Quite frankly, um, neither the plaintiff or, apparently her predecessor, her father, ever inquired about that and didn't care, as long as the royalty payments were being made." *2T20-1 to 2T20-10.* Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

F. ***Failure to Control Dust:*** Plaintiff alleges that Defendant purportedly has "not provided for means for control of 'dust which may arise during daily operations' . . . as paragraph 13 requires." *Pa63.* On this allegation, Plaintiff did not offer any credible evidence whatsoever. To the contrary, she simply offered her unqualified and uneducated opinion that dust control measures are not in place. *1T77-6 to 1T78-3.* For example, she did not offer any of the following to support this claim – pictures of the accumulation of excessive dust on the property; expert testimony regarding the appropriate control of dust at a gravel pit; proof that the dust, which is necessarily produced at this mining operation, is in violation of the Township mining permit or the state and federal regulations; or corroborating witness testimony. Further, Plaintiff's unsubstantiated claim

was contradicted by both Defendant and its' expert who gave testimony that dust is a natural by-product of mining activities; that Defendant has a permit from the NJDEP which addresses dust; that Defendant utilizes water daily in its operations to control dust in accordance with the terms of the NJDEP permit and federal regulations; and that Defendant has never received complaints regarding the improper control of dust on site from third parties including governmental agencies with jurisdiction over the mining activities. *1T193-10 to 1T197-11.* As the Law Division stated, there was a "paucity of proofs" that Defendant breached the Profit Agreement by purportedly not providing means to control dust on site. *2T20-11 to 2T20-17.* Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

G. ***Failure to Make Minimum Royalty Payments:*** Plaintiff alleges that Defendant purportedly "failed to make the minimum payment of $25,000 per year for 2018 as paragraph 18 requires." *Pa63.* On this allegation, Plaintiff did not offer any credible evidence. To the contrary, this allegation is patently false. Plaintiff admitted that she has received monthly royalty payments in the sum of no less than $25,000.00, per annum. *1T78-4 to 1T79-2.* Further, Defendant's testimony and Exhibits "D-4" through "D-18" in evidence illustrate the patent falsity of this claim. *1T108-4 to 1T109-*

18. Based upon the preceding, the Trial Court correctly stated on the issue of "failure to make the minimum royalty payments. Again, um, that was not proven. There's testimony to – to the contrary. Um. There was no credible evidence that the minimum payments weren't made. In fact, the evidence supported to the contrary." *2T20-18 to 2T20-22*. Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

H. ***Interference with Access to Property:*** Plaintiff alleges that Defendant purportedly continues "to interfere with and deny plaintiff possession of her property by, among other things, locking her out, not providing keys, removing personal equipment of hers (such as surveillance cameras) from the property, and erecting barriers to entry at locations around the property." *Pa63*. At trial, the Law Division properly ruled that this allegation has been completely mooted by its' May 17, 2022 Order which was marked as Exhibit "D-48." *1T215-22 & Da3-Da4*. Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

I. ***Importation of Fill Dirt***: Plaintiff alleges that Defendant purportedly is prohibited by the Profit Agreement from importing fill dirt as part of its' contractual obligation to reclaim the property. *Pa64*. On this allegation,

Plaintiff did not offer any credible evidence whatsoever. To the contrary, all of the following is true: (a) that there is nothing in the Profit Agreement's language that prohibits the importation of fill dirt; *Pa13-Pa19;* (b) that Defendant is obligated – contractually and by township ordinance - to reclaim the mined property; *Pa13-Pa19;* (c) that the Profit Agreement does not provide any explanation, let alone an exclusive explanation, for the manner in which Defendant is required to meet its' reclamation obligations; *Pa13-Pa19;* and (d) that Plaintiff simply is unhappy that Defendant may be profiting from the importation of the fill dirt. *1T89-13 to 1T89-19.* Further, on cross-examination Plaintiff was given all the time she needed to read this Court's prior decision and then admitted, after reading the same while the Trial Court remained on the record, that the decision does not support her allegations. *1T80-4 to 1T81-18.* Similarly, she did not offer any witness testimony to support an assertion that the importation of fill dirt as part of pit reclamation is not part of the industry standard. Plaintiff also did not offer any evidence that the importation of fill dirt is prohibited by local, state and/or federal regulations or by White Township's Zoning Ordinances and the annual mining license. In short, Plaintiff offered nothing but a bare argument from

her counsel that the importation of fill dirt as part of Defendant's reclamation obligation purportedly violates the Profit Agreement.

Based upon the preceding and upon the totality of the evidence at trial, the Trial Court properly identified "the big issue, frankly, of what it comes down to is whether the importation of fill dirt constitutes a breach of the profit agreement. Um. There's – the court has to look not only the agreement, but has to certainly to look at the facts, um, as demonstrated before it. It's not disputed that fill dirt was imported and the reasons were explained. But does this profit agreement read in it [sic] entirety, um, prohibit fill dirt importation? Plaintiff herself was asked that question at – on cross-examination. Can you find in there where it prohibits it, and she said could not. It's because it does not. Um. There's no other witnesses that support the assertion that this fill dirt isn't part of the reclamation that has to be done down the line. And there's been no violations issued by White Township. Um. In short, um, plaintiff has not proven by a preponderance of the evidence – of any credible evidence that the importation of fill dirt constitutes a breach of the profit agreement. There's no question that the defendant had an obligation to reclaim the mined property. Um. That there's really the agreement itself is some – is silent as to how that is to be done. But given that, and the acknowledgment that the

agreement doesn't prohibit fill dirt importation, I find on that final allegation of breach that the plaintiff has not proven that beyond, um – or by the preponderance of the evidence." *2T21-4 to 2T22-7.*

The Trial Court's decision is correct and is based upon the Profit Agreement. Not only does the Profit Agreement not prohibit Defendant from either importing fill or receiving compensation for the fill, but the importation of material is also consistent with Defendant's post-mining restoration obligation.

Paragraph 16 states:

> Upon termination of this Lease, Lessee agrees to reslope all banks and to spread any stockpiled topsoil remaining on said premises. In addition thereto, Lessee agrees to plant suitable coverage on said restored land; provided, however that nothing hereunder shall obligate the Lessee for the restoration of any conditions created by the Lessee or by former operations similar to Lessee's. Said restoration to be complete within one (1) year after termination. This clause shall survive termination. Restoration of the land shall be in accordance with the requirements of the Township of White.

Pa16.

This Court, previously, held that the parties to the Profit Agreement "[i]ntended to convey the right to extract materials rather than anything more." Van Horn, 442 N.J. Super. at 345. As part of its' right to remove soil materials, Defendant is legally bound to reclaim the land – both by the terms of the Profit Agreement and as a condition of White Township's issuance of the mining license. *Pa13-Pa19.*

Contrary to Plaintiff's assertion, Defendant has not engaged in any other type of business. Instead, it has been re-sloping excavated areas within the mining site while working to reclaim the land as it conducts its' mining operation. By permitting third parties to deposit topsoil at the mining site, Defendant has acted in conformance with paragraph 16 of the Profit Agreement.

In this case, the Law Division's finding that Plaintiff had not proven a breach of the Profit Agreement by the importation of fill dirt is consistent with governing law. In *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118 (2014), the Supreme Court held: "Courts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Accordingly, if the provision of a contract is "'plain and capable of legal construction, the language alone must determine the agreement's force and effect.'" *CSFB 2001-CP-4 Princeton Park Corporate Ctr., LLC v. SB Rental I, LLC*, 410 N.J. Super. 114, 120 (App. Div. 2009) (quoting *FDIC v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995)). *See also Twp. of White v. Castle Ridge Development Corp.*, 419 N.J. Super. 68, 74-75 (App. Div. 2001). Furthermore, when the terms of a contract are unambiguous, it is the court's duty to enforce the contract as it is written and not to create a better agreement. *SB Rental I, LLC*, 410 N.J. Super. at 120.

In her brief, Plaintiff reiterates a two-fold argument, which she made at trial,

that Defendant purportedly breached the Profit Agreement because: (1) in her subjective view, it is no longer commercially reasonable for Defendant to mine aggregates from the property; and (2) the Agreement does not expressly authorize the importation of fill dirt. As to the former argument, Plaintiff's subject belief is irrelevant. As to the latter argument, the Trial Court thoughtfully considered the evidence that Plaintiff presented at trial and found that she had not proven her contention.

To begin with the former argument, Plaintiff argues that, in her view, it is no longer commercially reasonable for Defendant to mine the property. Specifically, she argues that the "objective and undisputed production figures confirm the lack of any commercially reasonable basis for continuing mining operations at Property." *Pb13*. However, Plaintiff's argument is flawed for the following reasons.

First, Plaintiff's subjective opinion of the commercial feasibility of Defendant's mining operations, which she characterizes as an "objective" position, is irrelevant. The Profit Agreement grants Defendant the exclusive right to decide whether mining the property is commercially reasonable. The Agreement states Defendant is "permitted to remove available soil materials and aggregates from the premises described above for an indeterminate period of years until [Defendant] determine, **in its sole discretion**, that sufficient aggregate materials cannot be removed in a manner and/or in such amounts as to make it commercially reasonable

to continue the removal of soil materials and aggregates from" the property. (emphasis added). *Pa13*. Therefore, Plaintiff's subjective view of the commercial feasibility of the mining operations is of no consequence because the express language of the Parties' Agreement grants the sole discretion to make that decision to Defendant.

Second, Plaintiff's argument that Defendant's "sole discretion is limited under the law," *Pb13*, is legally incorrect. In arguing that Defendant's contractual discretion is purportedly limited by law, Plaintiff cites to three cases which are inapplicable – *Circus Liquors, Inc. v. Governing Body of Middletown Township*, 199 N.J. 1 (2009) (dealing with executive agency discretionary powers as a matter of law); *Flagg v. Essex County Prosecutor*, 171 N.J. 561 (2002) (dealing with law enforcement agencies' discretion to seek a waiver of statutory forfeiture of public employment in a criminal prosecution); and *Mernick v. McCutchen*, 442 N.J. Super. 196 (App. Div. 2015) (addressing appellate review of a trial court's evidentiary rulings under an abuse of discretion standard). Plaintiff has not cited any law in support of her claim that discretion which is bargained for in a private agreement is limited by the law. To the contrary, Plaintiff improperly has cited to cases which support the black letter law that governmental discretionary decisions are subject to an abuse of discretion standard upon appellate review. Therefore, because Plaintiff has not offered any law to support her bald claim that private party discretion is

limited under the law, this Court should reject her argument.

Third, Plaintiff's self-serving characterization of its' subject view of the commercial feasibility of the property as an objective view is contradicted by the trial evidence. If Plaintiff sought to prove at trial that Defendant's sole discretion to continue to mine the property was somehow objectively unreasonable or outlandish, then Plaintiff should have offered evidence to support that claim. At trial, Plaintiff did not offer any expert opinion testimony to argue that the mining of the property is no longer commercially feasible. For instance, Plaintiff could have offered engineering expertise and/or financial expertise in support of an argument that the mining of this property (given its' condition) by this company (given its' size and production history) is not objectively commercially feasible. Plaintiff did not engage in any expert discovery, did not retain any experts, did not depose Defendant's expert and did not do anything beyond rely upon her own testimony and the historic proof of the royalty payments to argue that Defendant's sole discretion to determine that the mining of the property is somehow objectively unreasonable. Even if Plaintiff had produced evidence to support an objectivity argument, it would have failed because under the Profit Agreement, "[i]n the event that [Defendant] fails to remove sufficient materials to require payments to [Plaintiff], as hereinabove set forth, in the total sum of $25,000 per year, [Defendant] shall make up the difference any pay the full sum of $25,000, despite the absence of removal of materials, **and the same shall**

not constitute a breach of this" Agreement. (emphasis added). *Pa17*. Perhaps Plaintiff offered very limited trial evidence in support of its' argument that it purportedly is not objectively reasonable for Defendant to continue to mine the property because she knew that the Agreement expressly states that Defendant is not in breach of the Agreement as long as Plaintiff is paid at least $25,000.00 per annum, regardless of whether the royalty payment comes directly mined aggregates or from Defendant's pocket.

For the preceding reasons, Plaintiff's subjective opinion of the commercial feasibility of Defendant's mining operations is irrelevant.

As to the latter argument, *to wit*, that Defendant is prohibited from importing fill dirt because the Profit Agreement does not expressly state that the importation is permissible, Plaintiff's position was considered by the Trial Court and properly rejected based upon the evidence produced at trial. In her brief, Plaintiff phrases the question as "whether the Agreement specifically permitted" Defendant to import fill dirt and stated that the Trial Court improperly considered whether importation was prohibited by the Agreement. *Pb15-16*. Plaintiff contends that Defendant was required to receive Plaintiff's permission before it received fill dirt. However, Defendant never agreed to be precluded from such activity as part of its' reclamation obligation in the Profit Agreement. If Plaintiff's predecessor-in-title wanted compensation for imported dirt, then he could have bargained for it. Instead, all that

the property owner wanted, and the White Township mining ordinance requires, is that the property be reclaimed upon the cessation of mining. On this issue, the Trial Court considered all of the evidence presented and the Parties' arguments. The Trial Court also acknowledged that the Agreement neither expressly permitted nor expressly prohibited Defendant from importing fill dirt as part of its' mining of the property. The Trial Court accurately and succinctly stated that "the big issue, frankly, of what it comes down to is whether the importation of fill dirt constitutes a breach of the profit agreement. Um. There's – the court has to look not only the agreement, but has to certainly to look at the facts, um, as demonstrated before it. It's not disputed that fill dirt was imported and the reasons were explained. But does this profit agreement read in it [sic] entirety, um, prohibit fill dirt importation? Plaintiff herself was asked that question at – on cross-examination. Can you find in there where it prohibits it, and she said could not. It's because it does not. Um. There's no other witnesses that support the assertion that this fill dirt isn't part of the reclamation that has to be done down the line. And there's been no violations issued by White Township. Um. In short, um, plaintiff has not proven by a preponderance of the evidence – of any credible evidence that the importation of fill dirt constitutes a breach of the profit agreement. There's no question that the defendant had an obligation to reclaim the mined property. Um. That there's really the agreement itself is some – is silent as to how that is to be done. But given that, and the

acknowledgment that the agreement doesn't prohibit fill dirt importation, I find on that final allegation of breach that the plaintiff has not proven that beyond, um – or by the preponderance of the evidence." *Pa156-Pa157.*

In short, the Law Division's decision on this issue was logical and was based upon: (i) this Court's prior decision in this controversy; (ii) a plain reading of the Profit Agreement; (iii) the proffered trial evidence; and (iv) application of controlling law. Accordingly, there are no grounds for this Court to disturb the Law Division's decision on this allegation.

Because the Trial Court did not abuse its discretion in its' application of the facts of this case to controlling law, and because it did not commit a clear error of law, the Trial Court properly found that Defendant did not breach the Profit Agreement and dismissed Plaintiff's Complaint.

D. THE TRIAL COURT PROPERTY FOUND PLAINTIFF IS NOT ENTITLED TO A DECLARATORY JUDGMENT *(2T22-8 to 2T22-13)*

The Trial Court properly concluded that Plaintiff is not entitled to a declaratory judgment because she did not prove her claims. In the absence of meeting its' burden of proof in a civil action, a party is not entitled to any relief. The Trial Court also property found that the case was not a declaratory judgment case. *2T22-8 to 2T22-13.*

New Jersey's Declaratory Judgment Act states, in pertinent part:

> All courts of record in this state shall, within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed; and no action or proceeding shall be open to objection on the ground that a declaratory judgment is demanded.

N.J.S. 2A:16-52. "[T]he Declaratory Judgment Act . . . empowers the courts to declare rights, status and other legal relations 'to afford litigants relief from uncertainty and insecurity.'" *Matter of Association of Trial Lawyers of America*, 228 N.J. Super. 180, 183 (App. Div. 1988).

In this case, because Plaintiff did not prove by a preponderance of evidence that there is any uncertainty with regard to the Parties' rights and obligations under the Profit Agreement, she was not entitled to any remedy including a declaratory judgment.

Because the Trial Court did not abuse its discretion in its' application of the facts of this case to controlling law, and because it did not commit a clear error of law, the Trial Court properly dismissed Plaintiff's request for declaratory relief.

E. THE TRIAL COURT PROPERTY PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF *(2T22-13 to 2T22-25)*

The Trial Court properly concluded that Plaintiff is not entitled to injunctive relief because she did not prove her claims. In the absence of meeting its' burden of proof in a civil action, a party is not entitled to any relief.

An "injunction is primarily a preventive remedy intended to afford relief against future acts or conduct which are against equity and good conscience . . .

rather than to remedy what is past and done or to punish for wrongs already committed." *Devine v. Devine*, 20 N.J. Super. 522, 527 (Ch. Div. 1952) (citing *Soc'y for Establishing Useful Mfrs. V. Morris Canal Banking Co.*, 1 N.J. Eq. 157, 191 (Ch. 1830)). "A permanent injunction requires proof that the applicant's legal right to such relief has been established and that the injunction is necessary to prevent a continuing, irreparable injury." *Verna v. Links at Valleybrook Neighborhood Ass'n.*, 371 N.J. Super. 77, 89 (App. Div. 2004).

Injunctive relief is a remedy to redress a legal injury where a party first has to prove that it has been injured. In this case, because Plaintiff has not proven by a preponderance of evidence that Defendant breached the Profit Agreement, she is not entitled to any remedy including any injunctive relief.

Because the Trial Court did not abuse its discretion in its' application of the facts of this case to controlling law, and because it did not commit a clear error of law, the Trial Court properly dismissed Plaintiff's request for injunctive relief.

F. THE TRIAL COURT PROPERLY FOUND PLAINTIFF IS NOT ENTITLED TO COMPENSATORY DAMAGES (*2T22-25 to 2T23-3*)

The Trial Court properly concluded that Plaintiff is not entitled to compensatory damages because she did not prove her claims. In the absence of meeting its' burden of proof in a civil action, a party is not entitled to any relief.

"Compensatory damages for breach of contract are designed under the law to place the injured party in as good a monetary position as he/she would have enjoyed

if the contract had been performed as promised. What that position is depends upon what the parties reasonably expected at the time they made the contract. The defendant is not liable for a loss that the parties did not have reason to foresee as a probable result of any breach. While the loss must be a reasonably certain consequence of the breach, the exact amount of the loss need not be certain." *New Jersey Model Civil Jury Charge 8.45*.

Even had she prevailed at trial, Plaintiff did not offer any evidence to support a compensatory damages claim including all of the following: (a) a quantum of damages incurred; (b) non-party lay witness or expert witness testimony to support a claim for compensatory damages; and/or (c) any documents, items, things, calculations, reports, estimates, worksheets, financial documents or tangible items which Plaintiff might proffer to support a claim for compensatory damages.

Because the Trial Court did not abuse its discretion in its' application of the facts of this case to controlling law, and because it did not commit a clear error of law, this Court must affirm the Law Division's holding that Plaintiff is not entitled to compensatory damages.

G. THE TRIAL COURT PROPERLY FOUND PLAINTIFF IS NOT ENTITLED TO SPECIFIC PERFORMANCE (*2T23-4 to 2T23-7*)

The Trial Court properly concluded Plaintiff was not entitled to a specific performance because Plaintiff has failed to prove that Defendant breached the Profit

Agreement. In the absence of meeting its' burden of proof in a civil action, a party is not entitled to any relief.

Nonetheless, were this Court to reverse the Trial Court and to conclude that Defendant did breach the Profit Agreement, then Plaintiff is not entitled to specific performance because Plaintiff has failed to prove that compensatory damages are inadequate to address its' purported loss.

In New Jersey, specific performance is an equitable remedy that is "appropriate when relief at law, money damages, provides inadequate compensation for the breach of an agreement." *Ciba-Geigy Corp. v. Liberty Mut. Ins. Co.*, 149 N.J. 278, 294 (1997). "The remedy of specific performance can be invoked to address a breach of an enforceable agreement when money damages are not adequate to protect the expectation interest of the injured party and an order requiring performance of the contract will not result in inequity to the offending party, reward the recipient for unfair dealing or conflict with public policy." *Houseman v. Dare*, 405 N.J. Super. 538, 542 (App. Div. 2009). The inadequacy of money damages depends on "the nature of the injury or [] the right affected." *Crowe v. De Gioia*, 90 N.J. 126, 133 (1982). "Specific performance is a remedy within the sound discretion of the court, and should not be granted unless the right thereto is clear and conclusively established. The complainant has the burden of proof in establishing [his] right to specific performance..." *Kelleher v. Bragg*, 96 N.J. Eq. 25, 28 (1924).

Further, at trial, Plaintiff failed to produce any evidence that even suggested that compensatory damages would be an inadequate remedy had she prevailed at trial. For instance, Plaintiff did not offer any of the following testimony or evidence: (i) that her claims are unique; (ii) the reasons that she believes her claims are unique; (iii) that she has invested an inordinate amount of time and/or resources in this controversy such that compensatory damages would be inadequate and that anything other than specific performance would be inequitable. In short, Plaintiff did not offer anything to support the uniqueness of her claims that would compel the Trial Court to grant specific performance were this Court to reverse and conclude that Defendant breached the Parties' Profit Agreement.

IV. CONCLUSION

For all of the reasons stated herein, Defendant, Harmony Sand & Gravel, Inc., respectfully request that this Court affirm the Law Division's August 12, 2024 Final Judgment dismissing Plaintiff's Complaint.

Respectfully submitted,

WILHELM & ROEMERSMA, P.C.
Scott M. Wilhelm
SCOTT M. WILHELM, ESQ.

LISA VAN HORN *Plaintiff-Appellant,* v. HARMONY SAND AND GRAVEL, INC., *Defendant-Appellee.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003927-23T4 **On Appeal from Superior Court Warren County Law Division** Hon. Robert A. Ballard, Jr., J.S.C.

Plaintiff/Appellee Lisa Van Horn's Reply Brief in Support of the Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In an attempt to distract this Court from the issues actually raised on appeal, Appellee/Defendant Harmony Sand and Gravel, Inc. ("Harmony Sand") spends pages presenting an overview of the trial court's decision and discussing how the trial court reached its decision on each of the issues raised below. In fact, only two portions of the trial court's decision were raised in this appeal: 1) whether Harmony Sand had in fact ceased its mining operations on the Property in light of its owner's admission that they had extracted only *de minimus* amounts of material over the past six (6) years because business was slow and in light of the reasonableness standard imposed on its discretion by the well-recognized covenant of good faith and fair dealing; and 2) whether the trial court erred as a matter of law in ruling that Harmony Sand had the right to operate a business on the Property accepting fill and being paid for it because the Agreement did not specifically prohibit that business when it should have determined whether the Agreement specifically permitted Harmony Sand to operate that separate business.

When it did address those specific issues, as discussed at length below, Harmony Sand attempted to impose on this Court a more narrow scope of review than provided for civil (as opposed to criminal) decisions; ignored the well-established rule that, because all contracts have an implied covenant of

good faith and fair dealing, its discretion in determining whether or not it has ceased mining operations on the property is subject to a reasonableness standard; and argued that its reclamation obligation in the Agreement permits it to steal Ms. Van Horn's business opportunity and operate a separate business of allowing third parties to deposit fill on the Property and accepting payments from those third parties because that separate business is not specifically prohibited by the Agreement.

As discussed below, Ms. Van Horn has clearly shown that any reasonable individual would recognize that Harmony's owner admitted that they had ceased mining operations by deciding to extract only *de minimus* amounts of sand and gravel for the past six (6) years because business is slow. It is also clear that the Agreement only permits Harmony Sand to conduct a sand and gravel business on the Property and nothing more, so it has breached the Agreement and has been unjustly enriched by stealing Ms. Van Horn's business opportunity and operating a separate business permitting third parties to deposit fill on the Property and accepting hundreds of thousands of dollars in payment from those third parties.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW ESPOUSED BY APPELLEE IS IMPROPERLY NARROW.

Harmony Sand urges this Court to adopt a standard of review that would only permit it to overturn the trial court's findings of facts and conclusions of law if it finds that those findings and conclusions are made without rational explanation or clearly produce a manifestly unjust result. Nowhere in its argument does Harmony Sand cite a single case involving this Court's review of a judge's determinations after a bench trial. Instead it quotes from cases reviewing a trial court's discretion in ruling on the admissibility of evidence, reviewing a criminal prosecutor's discretion in refusing to refer a defendant's charges to a pretrial intervention program, reviewing the trial court's discretion in refusing to open a default judgment, reviewing an arbitrator's decision, and reviewing the trial court's discretion in determining what a reasonable fee is in a fee-shifting case.

In fact, this Court's scope of review is clearly stated in Ms. Van Horn's initial Brief, namely permitting the reversal of the trial court's factual findings if they are unsupported by or inconsistent with the competent, relevant and reasonably credible evidence [*Griepenberg v. Township of Ocean*, 220 N.J. 239, 254, 105 A.3d 1082 (2015) (quoting *Rova Farms Resort v. Investors*

Insurance Co. of America, 65 N.J. 474, 484, 323 A.2d 495 (1974)] and permitting this Court to review the trial court's conclusions of law *de novo* [*Accounteks.Net, Inc. v. CKR Law, LLP*, 475 N.J. Super. 493, 503-04, 294 A.3d 1187 (App.Div. 2023) (quoting *Manalapan Realty, LP v. Township Committee of Manalapan*, 140 N.J. 366, 658 A.2d 1230 (1995)].

II. THE COVENANT OF GOOD FAITH AND FAIR DEALING IMPLIED IN ALL NEW JERSEY CONTRACTS LIMITS DISCRETION GRANTED BY THAT CONTRACT TO A STANDARD OF REASONABLENESS.

Harmony Sand argues that Ms. Van Horn's contention that its "sole discretion" under the Agreement is limited by a reasonableness requirement is legally incorrect because Ms. Van Horn's opening brief only cited to cases involving limitations on governmental discretion. In making this argument Harmony Sand ignores the long-established principle that contracts in New Jersey have an implied covenant of good faith and fair dealing which in turn imposes a reasonableness requirement on a party's exercise of its discretion.

A covenant of good faith and fair dealing is implied in every contract in New Jersey and implied covenants are as effective components of an agreement as those that are express. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244, 773 A.2d 1121 (2001). In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of the

contract. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 421, 690 A.2d 575 (1997). Where a contract vests one party with discretion, that party "must exercise discretion reasonably and with proper motive," not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. *Wilson*, *supra.*, 168 N.J. at 247.

In light of this reasonableness requirement, the evidence in the record, including Mr. Hummer's admission that Harmony Sand has conducted virtually no mining operations on the Property in the past six (6) years because business has been slow, clearly confirms that Harmony Sand has ceased mining operations and must vacate the Property except for fulfilling any reclamation requirement it has not already fulfilled.

III. Defendant Is Required To Bear The Financial Burden Of Its Reclamation Obligations Under The Agreement And Defendant Cannot Satisfy Those Obligations By Stealing A Business Opportunity From Plaintiff.

Harmony Sand completely ignores the legal standard discussed in Ms. Van Horn's opening brief that, if a contract affirmatively grants specific rights, it implies a negation of any other alternative rights. *Expressio unis est exclusio alterius. Gabel v. Manetto*, 177 N.J.Super 460, 464, 427 A.2d 71 (App. Div. 1981). It also ignores the express language in this Court's September 10, 2015 Opinion: "The Second Agreement never conveyed the right of exclusive possession, merely the right to extract materials from the

property. . . . **It is evident that the parties intended to convey the right to extract materials rather than anything more**" [DX-48, p. 15, Appx. 191a (emphasis added)].

As expected, Harmony Sand asserts that its import of fill is necessary to fulfill its reclamation obligations under the Agreement. However, the Agreement requires only that Harmony Sand "reslope all banks and . . . spread any stockpiled topsoil remaining on said premises." The uncontested evidence at trial shows that Harmony Sand is not just resloping the banks but is filling in the mining pit [1T., pp. 68:4-8, 138:15-21, 143:24 – 145:5, 205:11 – 206:2].

More importantly, the Agreement requires Harmony Sand to bear the financial burden of reclaiming the mining site. Instead, Harmony Sand is using its alleged reclamation efforts as a money-making enterprise, receiving hundreds of thousands of dollars from the parties it has permitted to deposit fill on the Property. The use of the Property for a depository for fill is a business opportunity belonging to Ms. Van Horn, the Property's owner, not to Harmony Sand. By ruling that Harmony Sand is permitted to operate a fill business on Ms. Van Horn's property and is further permitted to retain the proceeds from that business, the trial court has in effect sanctioned Harmony Sand's theft of that business opportunity from Ms. Van Horn, something not permitted by the Agreement. This ruling and the conclusion of law that

Harmony Sand's operation of the fill business on Ms. Van Horn's property is permitted because it is not specifically prohibited, are clear material errors of law which this Court must reverse.

CONCLUSION

Despite its arguments to the contrary, the evidence clearly established that Harmony Sand has ceased its mining operations and has only remained on the Property so it can steal Ms. Van Horn's business opportunity by operating a fill business at a substantial profit. For all the foregoing reasons and the reasons set forth in Ms. Van Horn's initial Brief, the court should grant the appeal and should direct the trial court to enter judgment in favor of Plaintiff, Lisa Van Horn, declare that the Agreement has terminated, and award her damages equal to the amount Harmony Sand earned selling third parties the right to deposit fill on Plaintiff's Property.

Respectfully submitted,

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