ARIZONA COURT OF APPEALS

DIVISION ONE

AGRICANN LLC, Plaintiff/Appellee/ Cross-Appellant, v. NATURAL REMEDY PATIENT CENTER LLC, Defendant/Appellant/ Cross-Appellee.	Court of Appeals Division One No. 1 CA-CV 20-0231 Maricopa County Superior Court No. CV2016-001283

DEFENDANT/APPELLANT/CROSS-APPELLEE'S REPLY BRIEF AND CROSS-APPEAL ANSWERING BRIEF

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REPLY BRIEF ON APPEAL

INTRODUCTION

This case is simple. Parties can form an enforceable contract only if they agree on *all material terms*. Think of a "material term" as a dealbreaker—if the parties cannot agree on that term, then the negotiations fall apart and they have no deal.

That's what happened here. The parties tried to negotiate a Breakup Deal. They agreed on the total payment schedule and length of a sublease. They put a pin in those terms by signing the napkin[1] so they could make some progress towards wrapping up what had been a contentious business relationship. But no one contends that the napkin is the full deal. The parties continued to negotiate over other material terms—how to wrap up the Management Contract, what equipment to transfer, a personal guarantee, and interest on the payments. These are not minor terms. They are material. Dealbreakers. No one would do the Breakup Deal without agreeing on how to wrap up the Management Contract. So the deal fell apart.

[1] At trial, both sides referred to it as a "napkin." [11/20/2019 Tr. at 215:20 (APP304) (Burton: "simple napkin"); 11/22/2019 Tr. at 158:5 (APP356) (Zaki: "napkin").]

Without agreement on these material terms, the parties did not form an enforceable contract as a matter of law. The fact that they signed the napkin does not cut it because the napkin does not show that they ever reached agreement on the *remaining* material terms. This is a legal question for the Court.

The damages issue is equally simple. One side cannot get fully paid on a contract without keeping its end of the bargain. If the plaintiff cannot or will not fully perform, then it must turn to one of the recognized types of damages (e.g., expectancy, reliance, restitution). Agricann offered only one theory: Natural Remedy has to pay everything, even though Agricann has not fulfilled its end of the bargain. But Agricann offers zero legal support for that theory, and it violates the fundamental principle that a breach should not make the plaintiff better off than full performance. The lopsided relief the superior court ordered must be reversed.

Either of these issues is independently sufficient for the Court to reverse.

ARGUMENT

I. The Breakup Deal is unenforceable because the parties never reached agreement on all material terms.

The opening brief explained (at 34-47) that the superior court erred by permitting Agricann to enforce the alleged Breakup Deal because the parties never reached any agreement on several of the material terms of *that deal*. They were at best engaged in preliminary negotiations and had agreed on *some*, but not all, of the terms. And although Agricann claims this case turns on factual disputes, rather than legal issues of contract formation, the admissions in its brief undermine that claim. Indeed, Agricann's brief ultimately confirms the decisive issue in this appeal: the parties never agreed on at least one of the Breakup Deal's material terms.

Agricann relies heavily on what it characterizes as the parties' performance under the Breakup Deal after signing the napkin. But part performance requires acts consistent *only* with the alleged contract, and here the parties' performance is consistent with their prior relationship and existing agreements. Agricann therefore cannot use part performance to invent agreement where none occurred. The Court should reverse the superior court's ruling that the parties had an enforceable Breakup Deal.

A. Agricann does not substantively dispute the key legal and factual issues necessary to decide this appeal.

1. This appeal involves contract-formation issues reviewed de novo.

As the opening brief explained (at 30), "[t]he validity and enforceability of a contract is a mixed question of law and fact, which we review *de novo*." *Armiros v. Rohr*, 243 Ariz. 600, 605, ¶ 16 (App. 2018); *accord Buckholtz v. Buckholtz*, 246 Ariz. 126, 129, ¶ 10 (App. 2019) (same).

Moreover, the particular contract formation issues involved in this case are reviewed de novo. "Whether a contract contains all of the essential terms for it to be enforceable is a question of law." *Bandera Cty. v. Hollingsworth*, 419 S.W.3d 639, 645 (Tex. App. 2013); *see also Hill-Shafer P'ship v. Chilson Family Tr.*, 165 Ariz. 469, 476 (1990) ("[A]s a matter of law, there was no mutual assent.").

Furthermore, "[w]hether a given term is 'essential' to a contract is matter of law to be reviewed de novo. . . ." *Liberto v. D.F. Stauffer Biscuit Co., Inc.*, 441 F.3d 318, 324 (5th Cir. 2006). At bottom, whether there was "mutual assent" can be resolved "as a matter of law." *Hill-Shafer*, 165 Ariz. at 476.

Agricann nevertheless claims (at 7) that this case "is factual" with no "legal issue[s] to be resolved as a matter of law." But as the following two

subsections show, Agricann does not seriously dispute the controlling law and the limited facts necessary to resolve this issue. The Court should review *de novo* the contract formation issues raised on appeal.

2. Agricann does not seriously dispute that before a binding contract is formed, the parties must mutually consent to *all material terms*.

"It is well-established that before a binding contract is formed, the parties must mutually consent to *all material terms*." *Hill-Shafer*, 165 Ariz. at 473 (emphasis added). This blackletter law from the Arizona Supreme Court remains valid. *See, e.g.*, *Buckholtz*, 246 Ariz. at 129, ¶ 11 ("[B]efore a binding contract is formed, the parties must mutually consent to all material terms.") (quoting *Hill-Shafer*).

In response, Agricann cites (at 16) *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209 (App. 1983), and *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291 (App. 1993). But these cases did not enforce an alleged contract without a meeting of the minds on material terms, and they cannot overcome the Supreme Court's holding in *Hill-Shafer*, as recently confirmed by *Buckholtz* in 2019.

Although Agricann never disputes the rule that parties must agree to all material terms, it claims (at 10-14) that distinctions exist between this case

and Natural Remedy's authorities. But any such differences do not make the rule less applicable. This general rule applies to *all* contracts, and it is particularly important here given the enormous economic and legal consequences of the alleged Breakup Deal and the other factors noted in the Opening Brief (at 35-38). (*See also* Argument § I.B, below.)

This common-sense rule exists because many negotiations involve "dealbreaker" terms about which the parties must reach agreement or else they have no deal. Permitting courts to enforce alleged agreements when the parties did not agree on these material (dealbreaker) terms violates fundamental contract principles and would require the Court to create material contract terms the parties never agreed to. "The court's function, however, cannot be that of contract maker." *Pyeatte v. Pyeatte*, 135 Ariz. 346, 351 (App. 1982); *see also id.* at 350 ("The agreement lacks a number of other essential terms which prevent it from becoming binding," even though neither side disputed that some agreement had been reached).

Unsurprisingly, the rule is not unique to Arizona:

- *G.D. Holdings, Inc. v. H.D.H. Land & Timber, L.P.*, 407 S.W.3d 856, 861 (Tex. App. 2013) (no enforceable contract when parties "had not agreed in writing about what would happen to the earnest money if the sale did not close" because they "did not have a 'meeting of the minds' *on an essential term of the contract*");

- *Ass'n Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 851 (7th Cir. 2007) ("[E]ven apparently detailed and formal agreements may fail for lack of certainty where they do not manifest mutual assent to *essential obligations* of the parties.");

- *New Econ. Capital, LLC v. New Markets Capital Grp.*, 881 A.2d 1087, 1096 (D.C. 2005) (no enforceable contract without agreement on "*all material terms*");

- *Acad. Chi. Publishers v. Cheever*, 578 N.E. 2d 981, 984 (Ill. 1991) ("[I]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. . . . An enforceable contract must include a meeting of the minds or mutual assent as to the [essential] terms of the contract.");

- *Cent. Props., Inc. v. Robbinson*, 450 So. 2d 277, 280 (Fla. Dist. Ct. App. 1984) ("It is well established . . . that a meeting of the minds of the parties on *all essential elements* is a prerequisite to the existence of an enforceable contract, and where it appears that the parties are continuing to negotiate as to essential terms of an agreement, *there can be no meeting of the minds*."), *modified on other grounds*, 468 So. 2d 986 (Fla. 1985);

- *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 395 A.2d 222, 227 (N.J. Super. Ct. App. Div. 1978) ("An agreement so deficient in the specification of its *essential terms* that the performance by each party cannot be ascertained with reasonable certainty *is not a contract*, and clearly is not an enforceable one.").

(Emphases added.)

3. Agricann does not dispute the key fact in this case: that the alleged Breakup Deal included five terms.

The opening brief also detailed (at 24 & 42-46) the five terms material to the Breakup Deal. Agricann does not dispute that the Breakup Deal

contemplated agreement on all five of these terms. Furthermore, Agricann does not dispute the materiality of several of these terms. The table below summarizes Agricann's position:

Term	Part of the Breakup Deal? (Undisputed)	Contained in napkin? (Undisputed)	Material?
1. Option to acquire sublease after making payments from Nov. 2015 to Nov. 2018	✓	✓	Material (Undisputed)
2. Alter rights/obligations under Management Contract	✓	✗	Material (Undisputed)
3. Equipment	✓	✗	Material (Undisputed)
4. Personal guarantee	✓	✗	Material (Not seriously disputed)
5. Interest penalty	✓	✗	Material (Disputed)

Accepting the key legal rule (i.e., that the parties must agree on all material terms) and Agricann's view of the Breakup Deal (i.e., that it included several material terms) means that (1) Agricann had to prove the parties reached agreement on the material terms *of this deal*, and (2) if they failed to do so,

then the superior court erred by enforcing the Breakup Deal. Accordingly, this appeal involves issues uniquely suited for this Court to resolve.

B. The parties never had a meeting of the minds on all material terms.

The core question is whether Agricann met its burden of proving that the parties agreed to *all* material terms of the alleged Breakup Deal. The opening brief demonstrated that Agricann did not. The napkin omits several material terms, and the record shows that the parties never reached agreement on these missing terms. In response, Agricann invokes platitudes (e.g., parties may intend to create a binding agreement even though some terms are left open), but it never identifies the evidence showing the parties reached *any* agreement on several of the admittedly material terms of the Breakup Deal.

To make this seem like more of a fact question, Agricann notes (at 8) that Sanchez did not testify at trial, and therefore the superior court could draw negative inferences concerning Sanchez's subjective intent. But in Arizona, "mutual assent is based on objective evidence, not on the hidden intent of the parties." *Hill-Shafer*, 165 Ariz. at 474. Sanchez's subjective intent is irrelevant. For the "objective evidence," the Court may rely on the others

in the room when the napkin was signed (Zaki, Burton, and Kazem) and the contemporaneous email correspondence.

1. The napkin omits most of the material terms and is therefore not the same thing as the alleged Breakup Deal.

The opening brief (at 49-52) demonstrated that the napkin said nothing—*zero*—about four of the Breakup Deal's terms. The napkin therefore is not the same thing as the alleged Breakup Deal. Instead, the napkin partially memorialized the only terms the parties had reached at that point: that Natural Remedy could occupy the facility for three years and the price for the full deal. After agreeing on these terms, the parties put a pin in them with the napkin while they continued negotiating the other terms, such as a personal guarantee. As Burton said, the parties "wanted to make sure this was written down and signed before the deal fell apart, so to speak." [11/20/2019 Tr. at 115:14-16.]

But without agreement on the remaining material terms, the napkin ended up as just a way station on a journey to a final Breakup Deal that the parties never reached. If "the agreements are preliminary negotiations," as here, they do not result in a binding contract. Restatement (Second) of Contracts § 27 (1981) (hereafter "Restatement"). The parties "had just started

these talks. . . . [T]here was no definitive document ever signed." [11/22/2019 Tr. at 158:7-8 (APP356).]

In response, Agricann insists (at 9-10) that the napkin counts as a "Binding Contract Document," not "mere preliminary negotiations." But nothing it says can add terms to the napkin or rewrite the record to pretend that anyone treated the napkin as a binding document.

1. Agricann contends (at 9) that "Natural Remedy frequently appears to ignore that the parties here actually signed a written document." But the sparse napkin cannot show a meeting of the minds on terms that do not appear on it. "The fact that the [document] contains all the essential terms of *a* contract . . . is beside the point. The question is whether the [document] was a sufficient memorandum of *the* contract, if any, which was made by the parties." *Nathan v. Spector*, 281 A.D. 451, 453 (N.Y. App. Div. 1953) (emphases in original). Indeed, this Court has refused to enforce an alleged agreement even when both sides "concede[d] the existence of *an* agreement" because "a sufficient mutual understanding regarding critical provisions of their agreement did not exist." *Pyeatte*, 135 Ariz. at 349-50 (emphasis added).

2. Agricann claims (at 10) that the superior court "thoroughly and correctly addressed" the evidence showing the napkin was nothing but a preliminary negotiation. But the answering brief (at 9-15) cites almost no evidence and none that shows the parties had reached an agreement on the missing material terms when they signed the napkin. Agricann cites (at 15) testimony claiming that Natural Remedy wanted to "modify" the terms of the deal, but the principal supposed change concerned the existence and amount of a personal guarantee, which the parties never agreed to in the first place. (*See* Answering Br. at 15 (citing 11/20/2019 Tr. at 222:8-12; 11/21/2019 Tr. at 74:12-75:19, 78:13-17).)

3. Agricann also puts its own spin (at 15) on the post-napkin emails, where Burton desperately threatens to collect payments supposedly owed under the Management Contract unless the parties sign his proposed contract. But Agricann never explains why it would have had any right to seek payment under the Management Contract if the napkin actually settled that dispute. The emails thus show that Agricann did not believe the parties had made a binding deal. Agricann's post hoc explanation makes no sense. (The emails also confirm that the parties never reached agreement on the

crucial term of how to wrap up the Management Contract. *See* Argument § I.B.2.a below.)

4. In this section, Agricann cites (at 10) only two new legal authorities: *Cleeves v. Everson*, No. CV-14-02183-PHX-ROS, 2015 WL 13122933, at *5-6 (D. Ariz. Apr. 14, 2015), and *Mortensen v. Gust Rosenfeld, PLC*, No. 1 CA-CV 14-0262, 2015 WL 6472368, at *5-6, ¶¶ 22-23 (Ariz. App. Oct. 27, 2015). Both cases found that a breach-of-contract claim survived a motion to dismiss. The cases expressly did not resolve whether the documents in fact created binding contracts: "*We express no opinion* about the scope of obligations, *if any*, arising under the LOI. . . ." *Mortensen*, 2015 WL 6472368, at *6, ¶ 23; *Cleeves*, 2015 WL 13122933, at *6 n.3 (the "complaint makes a *plausible case*") (emphases added).

Agricann also attempts to distinguish the authorities cited in the opening brief. For example, Agricann says (at 14) that *Offerman v. Granada LLC*, 244 Ariz. 148, 150, ¶ 9 (App. 2017), "is distinguishable because it employed a heightened standard of certainty in evaluating an alleged option contract." But the opening brief (at 35-36) cited that statement for the proposition that "[t]he more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement"—which is a direct

quote from Restatement § 33 cmt. c and does not turn on the type of contract. Moreover, Agricann repeatedly describes the Breakup Deal as containing an option component elsewhere in its briefing. (*See, e.g.*, Answering Br. at 24 ("The Breakup Deal entitled Natural Remedy . . . the opportunity for a full assignment of the lease upon full performance . . . .").)

The same goes for the rest. Although Agricann attempts to distinguish them, it never seriously disputes that courts cannot enforce parties' preliminary negotiations when they have not yet had a meeting of the minds on all material terms.

* * *

Fundamentally, if the parties did not reach a meeting of the minds on the material terms, then they did not create a binding contract, *even if* they signed a document containing some of the contemplated terms. (*See* Opening Br. at 34-47.) The napkin and the contemplated Breakup Deal are not the same thing, and signing the napkin did not create a final, binding agreement.

Thus, although Agricann relies repeatedly on the fact that the parties signed the napkin, the signatures don't cut it. They may be evidence of mutual assent as to the terms included on the napkin, but they cannot

substitute for mutual assent on the *omitted* terms. Again, "[t]he fact that the [napkin] contains all the essential terms of *a* contract . . . is beside the point. The question is whether the [napkin] was a sufficient memorandum of *the* contract, if any, which was made by the parties." *Nathan*, 281 A.D. at 453 (emphases in original).

2. Agricann cites no evidence showing the parties ever reached any agreement concerning the terms not found on the napkin.

Having conceded that the Breakup Deal included material terms not on the napkin, Agricann (as the party seeking to enforce the alleged contract) had the burden of proving a meeting of the minds on *all* of the missing material terms. If Agricann failed to meet its burden on even one material term, then the Court must reverse.

(a) The parties failed to reach any agreement concerning at least one of the material terms of the Breakup Deal.

Effect on Management Contract. Agricann does not dispute that wrapping up the Management Contract was a material term of the Breakup Deal. This, after all, is the *most important term* of the Breakup Deal. It is the classic "dealbreaker" term—unless the parties can iron it out, then the deal falls apart. The entire point of the negotiations was to break up the joint

venture and permanently part ways. This is the "breakup" in the Breakup Deal.

Indeed, Agricann apparently agrees that this is the primary explanation for the massive difference between the $7,000/month rent and the $20,000/month + $400,000 payment under the contemplated Breakup Deal. (*Compare* Opening Br. at 44, *with* Answering Br. at 20.) The deal doesn't make sense without this term; no one would pay $1.12 million for a sublease worth $252,000 ($7,000/month for 36 months). This alteration was potentially worth millions of dollars—Agricann claimed at the time that Natural Remedy owed $6.6 million and that the Breakup Deal would wipe that out. [Ex. 162 (APP213).] Without this term, the Breakup Deal doesn't even make sense.

Yet this term is not on the napkin, and Agricann cites no evidence from which the superior court could find that the parties had a meeting of the minds on this term. Agricann's brief (at 20) describes the evidence as "consistent with [its theory], or at least neutral." Decisively, however, that is not evidence that the parties actually *reached agreement*, and had the required *meeting of the minds* on this key term of the Breakup Deal.

Even Agricann is wildly inconsistent about how the Breakup Deal would unwind the Management Contract. Agricann repeatedly insists (e.g., at 20) that the Breakup Deal would operate prospective-only, by extinguishing only the remaining "eight months of [the Management Contract's] two-year term." But its post-napkin emails to Natural Remedy repeatedly confirm that the parties' breakup discussions were intended "to resolve the [outstanding balance] that NRPC owes Agricann." [Ex. 163 at AC006137 (APP214).] For example, four days after the Breakup Deal supposedly took effect, Agricann wrote that "without a settlement in place and not counting sales since August 15th, to date, you and NRPC now owe Agricann $6,614,983.07 . . . ." [Ex. 162 (APP213).] But if the Breakup Deal applied prospectively-only, as Agricann sometimes claims, whether it was "in place" or not would have no bearing on the amounts Natural Remedy owed for past sales.

At the same time, Agricann expressly defends the superior court's ruling of novation, arguing (at 20) that "[t]here is sufficient evidence to support that finding." But a novation extinguishes the parties' rights and obligations under the prior agreement. *See United Sec. Corp. v. Anderson Aviation Sales Co.*, 23 Ariz. App. 273, 275 (1975) (novation involves "an

extinguishment of a previously valid obligation"). A novation would *completely extinguish* any rights Agricann had under the Management Contract, *including past damages*.

These positions cannot be reconciled. The parties' inability to agree on whether the Breakup Deal would discharge all liabilities, or only eight months' worth of prospective liabilities, is an enormous omission and prevents the supposed deal from being enforceable as a matter of law.

Equipment. Agricann also does not dispute that transferring valuable equipment was a material term. Agricann claims (at 24) that the alleged Breakup Deal involved equipment worth $150,000-$200,000, i.e., 13%-18% of the price.

Yet Agricann cites no evidence that the parties ever agreed on how to handle the equipment. The two lines of testimony Agricann cites (at 21) describe Agricann's view of the deal, but do not even purport to contend that Natural Remedy accepted that view or that the parties had a meeting of the minds—i.e., not even Agricann's witnesses testified that Natural Remedy agreed to Agricann's proposal on the equipment. A meeting of the minds requires two minds, not one.

Personal guarantee. At trial, Burton testified that "we would not have accepted anything short of a personal guarantee." [11/22/2019 Tr. at 166:15-16 (APP357).] (I.e., it was material.) Agricann does not disclaim that position on appeal—the answering brief affirmatively claims (at 21) that "Agricann did intend, and believes, that the Breakup Deal payment schedule was personally guaranteed by Sanchez."

The napkin does not include a personal guarantee. Furthermore, Agricann has waived any claim that the parties had a meeting of the minds on this term. Although Agricann continues to claim that Sanchez personally guaranteed the Breakup Deal, Agricann acknowledges (at 21) that the superior court found otherwise—a finding Agricann has not challenged. [IR-141 at 7 (APP129) (PG notation "is nearly meaningless"; "Sanchez always pushed back on the idea of a personal guarantee").]

Agricann claims (at 21) that although this omission "theoretically might give Agricann the option to challenge the agreement, it does not afford Natural Remedy "an escape from the Breakup Deal." But if Agricann "would not have accepted" a deal without a personal guarantee, as Burton admitted [11/22/2019 Tr. at 166:15-26 (APP357)], then disagreement on that term precludes contract formation because the parties never had a meeting

of the minds. The omission doesn't give one side an "option to challenge the agreement"; it undermines the existence of an enforceable contract. A court cannot enforce a supposed contract when it specifically finds that the parties never agreed to a particular term that the plaintiff admits was a dealbreaker at the time (i.e., Agricann "would not have accepted" a deal without the guarantee). Agricann cannot simply walk away from a term that it admits was material during negotiations, just to make this deal enforceable after the fact.

Interest. Agricann's position on interest likewise ignores controlling law. Agricann now claims (at 22) that it "is willing to operate under the Breakup Deal with or without the 1% per day interest term." Its post hoc willingness to accept the omission does not mean that it was not a material term during the parties' negotiations. Agricann understandably wants to jettison the interest penalty now, when the alternative is a completely unenforceable agreement. But Agricann cites no evidence that the parties considered the term to be immaterial *during the negotiations*.

Moreover, Agricann cites no evidence from which the superior court could find that the parties had a meeting of the minds on interest. Agricann says (at 21) only that "Burton *assumed*" that the agreement would include

1%/day interest. A unilateral assumption cannot establish mutual assent. It takes two to tango.

(b) The lack of agreement on one material term is fatal.

In light of the above, Agricann cannot escape the legal effect of the authorities cited in the opening brief. For example, Agricann notes (at 16) that Restatement § 33 cmt. a allows for "one or more terms [that] are missing or are left to be agreed upon," and "uncertainty as to incidental or collateral matters." In context, this makes sense but does not help Agricann. The Restatement's principal text cautions against finding contracts with "one or more terms" missing, and then the comment distinguishes between "incidental or collateral matters" and "the essential terms" of a contract." *Id.* at § 33 & cmt. a. The "incidental or collateral matters" may be supplied by, for example, "course of dealing." But if "the essential terms" (or *material terms*) are missing—as in this case—then "there is no contract." *Id.*

In other words, the comment confirms that the superior court erred because "[t]his is not an instance where the material terms have been decided and a few minor points remain to be negotiated." *Cleveland Wrecking Co. v. Hercules Constr. Corp.*, 23 F. Supp. 2d 287, 297 (E.D.N.Y. 1998). Instead, the napkin contains only one out of the five material terms, no

agreement was ever reached on the others, and the omitted terms are so essential that the deal doesn't even make sense without them. It does not even include the "breakup" term—the whole point of the Breakup Deal.

Agricann also tries to distinguish *Hill-Shafer* by saying (at 17) it "was not a 'completeness of terms' case." *Hill-Shafer* stands for several related propositions, all of which are settled law in Arizona and cannot seriously be disputed. Importantly, the Supreme Court refused to enforce a signed, written document because it did not reflect the transaction both sides contemplated. Here, the napkin does not reflect the material terms of the contemplated Breakup Deal.

Agricann also cites *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864), upon which *Hill-Shafer* relies, and claims (at 11-12) that "this is not a Peerless case" because the parties intended the deal to cover "the same facility" and "the same price and payment schedule." That's true, but those are the only terms on which the parties agreed. Both sides agree that the contemplated deal was not limited to those terms, and neither side has tried to enforce a deal limited to those terms. The missing material terms illustrate why the *Hill-Shafer* (and Peerless) principle applies to Agricann's detriment in this case. If Agricann thought it was agreeing to a Breakup Deal that discharged

liabilities going forward and had a personal guarantee, but Natural Remedy thought it was agreeing to a Breakup Deal that discharged *all* liabilities (past and future) and did not include a personal guarantee, then there is no agreement.

Agricann also attempts to distinguish (at 17-18) *Bamford Realty, Inc. v. Toll Bros., Inc.*, No. 1 CA-CV 19-0478, 2020 WL 4007051 (Ariz. App. July 16, 2020) (mem.). Again, Agricann does not seriously dispute that the parties must reach agreement on the material terms before a contract exists, and that the parties' own correspondence can show that they had not yet agreed. Instead, Agricann largely focuses on the fact that *Bamford* did not involve a written document. This case might be simpler if Agricann claimed that the written document (the napkin) itself represented the parties' complete agreement. But instead both sides agree that the contemplated Breakup Deal had to include more terms. The napkin cannot supply the evidence of agreement on the omitted terms. Like in *Bamford*, the parties never reached agreement on those material terms. And like in *Bamford*, the parties' own post-meeting correspondence confirms this.

In sum, because the parties never reached a meeting of the minds on at least one material term, they never formed an enforceable contract.

3. Statute of frauds authorities confirm why no enforceable agreement exists in this case.

Authorities concerning the statute of frauds show by way of analogy why the superior court erred by relying on the napkin as establishing an enforceable contract when it does not contain all material terms. The statute of frauds requires a writing for certain contracts to prevent mischief. In this context, courts sometimes distinguish between (1) the *complete* agreement the parties supposedly reached, and (2) an *incomplete* written document.

Courts will not enforce the *complete* agreement, even if there is a written document with some but not all of the material terms, even with evidence that the parties orally agreed on the missing terms. *See* 10 Samuel Williston & Richard A. Lord, Williston on Contracts § 29:8 (4th ed. 1999) ("[T]he memorandum [here, the napkin] [is] incomplete and . . . the oral agreement contained terms not set forth in the memorandum.") (quoting *Nathan*, 281 A.D. at 454). Said another way, "recovery may not be predicated on oral proof of material terms that are omitted from the written memorandum even though the oral understanding is entirely consistent with the writing." 10 Williston on Contracts § 29:8.

Courts likewise will not enforce an *incomplete* agreement memorialized in a written document because that is not the complete deal the parties intended to make: "[A]lthough the contract appearing in the memorandum seems to be complete on its face, if, in fact, there were additional essential or material terms, the memorandum is insufficient because it must state the essential terms of the oral contract." 10 Williston on Contracts § 29:8.

These rules aim to prevent using the courts to enforce a contract when the parties agreed to only some but not all of the material terms. This rationale applies in spades to this case. The napkin plainly omits most of the terms material to the Breakup Deal. Moreover, there is no evidence that the parties reached even an oral agreement on the missing material terms. This case therefore presents an even stronger case for why a court cannot treat the napkin as a lottery ticket. *Even with a signed, written document*, if the parties "left essential terms open for further negotiation," then "there was no agreement between the parties and hence . . . there [is] nothing to enforce." *Id.* (quoting *Nathan*, 281 A.D. at 454); *see also Dineen v. Sullivan*, 213 P.2d 241, 246 (Mont. 1949) (even though both sides had signed a document, it "cannot be enforced, in law or in equity" because the document "does not contain all the essentials of the oral contract and agreement.").

The fundamental principles from these authorities show why there is no agreement to enforce in this case, even without applying the statute of frauds directly. The Court cannot enforce the napkin itself because *no one* claims that the napkin is the full agreement—no one would agree to pay $1.12 million just for a three-year sublease. The Court cannot enforce the bigger Breakup Deal because the parties never reached agreement on the remaining material terms. No one would do the deal without wrapping up the Management Contract (i.e., the "breakup" in the Breakup Deal), Agricann would not do the deal without a personal guarantee, etc. They were dealbreaker terms, but they aren't on the napkin and the napkin cannot provide the missing evidence of mutual assent on these omitted terms.

4. Two other big-picture points confirm that the parties never reached any agreement concerning the outstanding terms of the Breakup Deal.

First, as noted in the opening brief (at 32-33, 52), Agricann tried to collect over $1 million even though it never fully performed on its obligations under the napkin. Agricann, however, claims (at 9) that it did "perform" by turning over the keys. This badly misses the point. Natural Remedy already occupied the facility under the Management Contract, so turning over the keys gave Natural Remedy nothing it did not already have.

More fundamentally, the promise Agricann admittedly made—"full assignment of the lease rights upon final payment"—formed a core part of the Breakup Deal even under Agricann's theory. (*See*, *e.g.*, Answering Br. at 22, 24 ("full assignment" and "potential to acquire" full lease).) Even Agricann readily admits, "The Breakup Deal entitled Natural Remedy not only to occupancy and control of the facility [but] *the opportunity for a full assignment of the lease upon full performance* . . . ." (Answering Br. at 24; *see also id.* at 25 ("Natural Remedy had the *opportunity* to earn the lease rights to 26th Avenue . . . (*by making all of the payments* under the Breakup Deal.)" (emphases added).)

In Agricann's own words, "full performance" entitles Natural Remedy to "full assignment of the lease" as well as "all of the equipment at the facility." Yet when Natural Remedy stopped paying, Agricann sued to collect the full amount of performance from Natural Remedy even though it kept the lease and equipment. Agricann's have-your-cake-and-eat-it-too theory is what makes this case so extraordinary, and why the above rules designed to prevent fraud matter.

Ignoring this, Agricann cites (at 23) the superior court's explanation about how the lack of lease assignment did not affect Natural Remedy's

occupation and use of the property. (Citing IR-141 at 6 (APP128).) But that also misses the point. Natural Remedy never got the "full assignment" it was supposedly promised. (*See* Opening Br. at 67-69.) As Agricann pointed out, the "full assignment" was valuable because it would give additional rights beyond occupancy—including rights after the three-year sublease ended. (*See* Answering Br. at 22, 24-25 ("inherit the lease rights going forward"; "earn the lease rights to 26th Avenue well beyond that date"; "even longer if it exercised the option to purchase under the lease").) And Natural Remedy's occupation of the property did not change from when it occupied and used the property under the Management Contract. (See Argument § I.C, below.)

Second, at bottom, Agricann expects the Court to believe that the parties settled their disputes about a 28-paragraph Management Contract, in a dispute over millions of dollars, with a fifteen-word napkin that does not even mention the Management Contract or other important terms. (*See* Opening Br. at 47-49.) With alleged agreements this significant, with this many material terms, that would wipe out another written contract, courts demand real evidence that the parties had concluded their negotiations and reached mutual assent as to all material terms. Otherwise parties can try to

take advantage of the situation by asking a court to enforce a half-baked document that was never meant to be a full, binding contract. Agricann had the burden here and it failed to meet the high bar.

C. The parties did not behave as if they had made a deal.

Without any evidence showing the parties ever reached any agreement concerning most of the material terms of the alleged Breakup Deal, Agricann relies heavily on its claim (at 5, 22-28) that the "parties began performing their obligations under the Breakup Deal after they signed it." They did not. Agricann's argument to the contrary cannot create an enforceable agreement when no such agreement exists.

Big picture, the part-performance doctrine is an exception to the statute of frauds, which "excuse[s] the writing requirement when acts of part performance are 'unequivocally referable' to the alleged agreement." *Roe v. Austin*, 246 Ariz. 21, 24, ¶ 9 (App. 2018). Here, Agricann seeks to use part performance to fill in the missing terms of the Breakup Deal because they are not on the napkin and there is no other evidence the parties reached agreement on them. But to do that heavy lifting, the doctrine "requires that any alleged act of part performance be consistent *only* with the existence of a contract and *inconsistent* with other explanations such as ongoing

negotiations or an existing relationship between the parties." *Id.* (emphases added; citation omitted). In other words, "the proponent of an alleged oral contract must show that his acts by themselves can *only* be explained by the existence of the contract he asserts—not that his position on the issue, as compared to the position of the other party, is more persuasive." *Id.* at 25, ¶ 11.

Here, as shown below, Natural Remedy *remained* in the facility, *continued* to pay rent to the landlord, and *continued* making payments to Agricann under the Management Contract. When the Management Contract expired in May 2016, Natural Remedy vacated the facility, consistent with the original Management Contract. (*See* Opening Br. at 23-24.)

Agricann nevertheless claims (at 22-26) that Natural Remedy's occupation of the 26th Avenue facility shows that the parties had a binding Breakup Deal. This makes no sense. Natural Remedy occupied the facility for the entire time, beginning in 2014. That was the whole point of the original Management Contract—Natural Remedy would grow marijuana in that facility. Nothing changed after the parties signed the napkin. To the

contrary, Natural Remedy moved out *right when the Management Contract expired*. (*See* Opening Br. at 23-24.)

The same goes for rent. Natural Remedy routinely "paid all the rent," and "all of the utilities" pre-napkin. [11/21/2019 Tr. at 194:6-8 (APP334); *see also* 11/22/2019 Tr. at 29:11-21 (Natural Remedy paid "total rent" in full, in cash); Ex. 76 at NRPC_000011 ("Rent was paid on Friday by [Natural Remedy]").] Burton even told Zaki, "Rent is due on the 1st of each month and can[]not be late." [Ex. 76 at NRPC_000013.] Again, nothing changed after the napkin.

Second, Agricann claims (at 26-27) that the parties behaved consistent with novation because otherwise Natural Remedy would have continued to make payments under the Management Contract. But the parties *did* behave as if they were still operating under the Management Contract. Burton repeatedly demanded amounts allegedly owed under the Management Contract. [*See, e.g.*, Ex. 162 (APP213) ("Without a settlement in place, and not counting sales since August 15th, to date you and NRPC now owe Agricann $6,614,983.07 . . . .").] If the parties thought that the napkin was a binding novation, then why would Burton demand payment, and why would he claim that the parties had not yet reached a settlement? If that

were true, then Agricann would have had no right to demand payment for anything owed under the Management Contract.

Burton also emailed Zaki repeatedly in February and March 2016 about utilities, rent, etc.—which would make no sense if the parties had a binding novation. [*See, e.g.*, Ex. 125.] And, as discussed below, Natural Remedy continued to make payments under the Management Contract—payments of $3,400, $16,600, and $15,000. [Ex. 89 (APP166).] Ultimately, Natural Remedy paid everything it owed under the Management Contract—$124,117—*without novation*. [*Id.* (APP166); 11/22/2019 at 54:3-55:14 (about $124,000 owed and paid).]

Third, Agricann points (at 27-28) to the payments supposedly made under the Breakup Deal. As an initial matter, Agricann does not dispute that "the mere fact that one party unilaterally undertakes to perform acts under a preliminary agreement is not sufficient, in and of itself, to establish the binding nature of the preliminary agreement." 1 Williston on Contracts § 4:11. Moreover, Natural Remedy did not make any payments under the napkin. After signing the napkin, Natural Remedy paid Agricann $3,400, $16,600, and $15,000—all of which were paid under the Management Contract. [Ex. 89 (APP166).] Agricann contends (at 27 n.8 and 28) that

another $20,000 check exists. But it cites nothing other than the superior court's erroneous ruling. Agricann offers no cancelled check, email, spreadsheet, or anything else to support its claim that a $20,000 check existed. This Court should not rely on Agricann's mere say-so in an appellate brief. *See* ARCAP 13(b)(1), 13(a)(7)(A) (answering brief must cite to the record).

Agricann also cites (at 28) a November 20, 2015 email in which Zaki asked about the agreement to make $20,000 payments. [Ex. 63 at AC006125 (APP147).] Natural Remedy thoroughly explained this email (Opening Br. at 53-54); Agricann offers no response to that explanation. In short, the parties had reached agreement on the payment schedule, just like they had reached agreement on the sublease term. But they were still negotiating the remaining material terms of the contemplated Breakup Deal, as the rest of that email thread confirms. When read in context, the full email thread confirms that neither side thought that they had a binding agreement. Agricann's part-performance theory fails miserably and cannot alter the reality that the parties reached no agreement on the remaining material terms of the Breakup Deal.

For all of these reasons, Agricann has not met its burden of proving that the parties had finished their negotiations and reached a meeting of the minds on all material terms of the alleged Breakup Deal and this Court should find as a matter of law that the parties never formed an enforceable contract.

II. Agricann did not prove any recognized form of damages.

Even if a court could enforce some aspect of the alleged Breakup Deal, the superior court erred by treating the napkin as a sweetheart deal that entitled Agricann to $1.12 million regardless of what happened after its creation. Every first-year law student learns that “a party should not profit more from breach of a contract than its full performance.” (Opening Br. at 57 (citation omitted).) Because of that, a court cannot order one side to fully perform on a contract without ensuring that the other side can and will perform, too.

Yet, as the opening brief explained (at 56-70), that is exactly what happened here: The damages award presupposes the contract had been fully performed when Natural Remedy merely used the facility for several months and never received the valuable lease rights or equipment. In

response, Agricann dodges the central problem with the damages award—that it violates the no-windfall rule governing contract breaches.

A. Agricann does not meaningfully dispute that a court may not order one side to fully perform without requiring the other side to fully perform, too.

The opening brief (at 57-58 & n.6) cited numerous authorities for the "basic tenet of contract law that the aggrieved party will not be placed in a better position than it would have occupied had the contract been fully performed." 11 Joseph M. Perillo, Corbin on Contracts § 55.3 (rev. ed. 2005). Out of necessity, Agricann attempts to limit this principle by claiming (at 29) that *John Munic Enters., Inc. v. Laos*, 235 Ariz. 12, 18, ¶ 19 (App. 2014) "was a collateral source case." But Agricann says nothing about the eight other authorities cited in the opening brief. And really, what is Agricann's position—that a plaintiff *should* be able to collect damages that make it better off than if the contract had been fully performed?

The law, of course, does not permit this lopsided relief. No recognized type of contract damages allows a plaintiff to fully recover on the contract without having to fully perform, as the superior court ordered. The closest analogue to the superior court's relief is one-sided specific performance. Agricann is correct (at 30) that it never *asked* for specific performance, and

that the superior court did not use that label. But the superior court effectively ordered specific performance when it required Natural Remedy to *fully perform* under the napkin instead of requiring Agricann to prove its actual damages.

Regardless of the label, the point is that a court cannot order *one side* to fully perform without ensuring that *the other side* has or will fully perform, too. This rule is well established in the law, and it proves fatal to Agricann's theory. And because Agricann offered no other theory for damages, the judgment must be reversed.

B. Agricann does not meaningfully dispute the relevant facts showing it received a windfall.

On the facts, Agricann does not meaningfully dispute the key points: (1) Natural Remedy occupied the space for only about six months after signing the napkin (Opening Br. at 68; Answering Br. at 32); (2) Natural Remedy never received any lease rights (Opening Br. at 23; Answering Br. at 23-24); (3) Agricann planned to provide such lease rights only "upon completion of the payment schedule" (Answering Br. at 5, 25); (4) Natural Remedy never had any obligation to make any payments to the owner of the

facility, (*see* Opening Br. at 23, 67-68); and (5) Agricann retained title to the valuable equipment.

True, Agricann claims (at 31) that it turned over the equipment. But it cites nothing to support that proposition. *See* ARCAP 13(b)(1), 13(a)(7)(A) (brief must cite "the portions of the record" on which appellee relies).

Agricann also says (at 31) that it "turned over the keys and possession," but that would not entitle Agricann to collect as though Agricann had obtained and transferred the promised lease rights and title to the equipment, particularly when Natural Remedy only briefly occupied the space. In fact, once Agricann lost its lease rights [11/20/2019 Tr. at 119:13 (APP249)], it became impossible for Agricann to perform on the remaining 30 months of the sublease, and impossible for Agricann to transfer the remaining lease rights. Consequently, Agricann could not claim the full remaining payments as damages. *See Sabin v. Rauch*, 76 Ariz. 71, 73 (1953) ("It is plaintiffs' obligation to prove that when the entire purchase price is paid as required by the decree of the court, clear title will result from the confused situation here presented."). If performance by the plaintiff is not possible, then the court may not order the defendant to fully perform.

Instead, the court may only award one of the traditional measures of damages (e.g., expectancy, reliance, restitution). (Opening Br. at 58-59.)

Responding to *Sabin v. Rauch*, Agricann says (at 31) that the opening brief (at 63) got the parties backwards. But the facts come straight from *Sabin*: the "vendor" of land—not the buyer—sued for specific performance. 76 Ariz. at 72. The Supreme Court refused to order specific performance unless the *seller* could show that "he will completely perform." *Id.* at 73. Otherwise, as Corbin explains, the seller would get a windfall if he "should have the money and the land too." 12 Corbin on Contracts § 63.10.

Likewise here, Agricann wants to be fully paid without giving up what it had promised in exchange—the valuable lease rights and title to the equipment "worth in the range of $150,000-$200,000," (Answering Br. at 24). Agricann claims (at 25) that "*conditioned on making the payments* set forth in the Breakup Deal, [Natural Remedy] was going to inherit the lease rights going forward" (i.e., beyond the term of the sublease). (Emphasis added.) But if Agricann cannot convey the lease rights as promised, then it cannot get the full $1.12 million. It's as simple as that.

That is what makes the superior court's relief absurd—it turned the napkin into a guaranteed $1.12 million payment regardless of what Natural Remedy got in return.

C. Although Agricann insists it needed to do nothing other than tally the numbers on the napkin, it offers no legal support for its position.

With neither the law nor the facts on its side, Agricann insists that the superior court could simply add up the remaining payments allegedly owed under the napkin without regard to what actually happened. Agricann essentially argues (at 29-30) that it doesn't have to prove ordinary contract damages or hire a damages expert because the arithmetic is so easy. But this position has no support in the law because it delivers a windfall to Agricann by enforcing one side of the contract without regard to the other side's performance.

Agricann analogizes (at 30) to a "promissory note." But in an ordinary promissory note, one side typically has already fully performed (e.g., a lender has provided cash and the only thing left is the borrower's repayment). If the lender has not fully performed (e.g., by funding only part of the loan), then a court cannot order the borrower to fully pay off the note unless the lender can and will fulfill its remaining obligations, too.

Awarding the full amount of the note without full performance by the borrower would violate the no-windfall rule of contract damages.

Agricann's assertion (at 31-32) that Natural Remedy needed to assert lack of consideration or a counterclaim misses the mark. This is not about consideration or Agricann's breach. Agricann had to prove damages, but didn't. The superior court's remedy violates basic contract law and cannot stand. In a contract for 100 widgets for $100,000 where the buyer breaches, the seller does not get to sue for breach of contract, collect the full $100,000, and keep the widgets. If the seller sues, the buyer does not have to assert any counterclaim to avoid paying the full $100,000. If the plaintiff has not proved both the fact and the measure of damages to a reasonable certainty, then the plaintiff has not proven the claim and the court must enter judgment for the defendant. Agricann got greedy and pursued only one simplistic yet flawed damages theory. Agricann offered no other damages theory or any other evidence that could possibly support a legally permissible damages award.

Ultimately, Agricann's brief cites no cases supporting its damages theory. Precisely zero. The only case citation in the entire section (at 29-32) attempts to distinguish a case cited in the opening brief. Agricann's legal

theory is alluringly simple but ultimately wrong, which presumably explains why the brief offers zero legal support for it. Accordingly, the Court should reverse and remand for entry of judgment in Natural Remedy's favor.

CONCLUSION

The Court should reverse, vacate, and remand.

CROSS-APPEAL ANSWERING BRIEF

CROSS-APPEAL INTRODUCTION

Agricann's cross-appeal is easy to resolve. As an initial matter, even if Agricann were to prevail on all of the issues it raises, the superior court's other rulings are sufficient to affirm the judgment in Natural Remedy's favor on Agricann's claim for breach of the Management Contract. But if the Court does reach the merits, it has at least three independent bases for affirming the 50/50 split under the Management Contract, including contract interpretation, modification, and waiver. On top of these multiple grounds for upholding the parties' 50/50 split, Agricann has not shown that the superior court erred in finding that Agricann failed to meet its burden of proving damages.

At the end of the day, Agricann received all the money it was owed under the Management Contract. Agricann's contemporaneous conduct and communications confirm this, no matter what it says now. The Court should affirm the superior court's judgment on Agricann's claim for breach of the Management Contract.

CROSS-APPEAL ISSUES

1. **Summary affirmance.** Agricann has not appealed all of the superior court's adverse rulings on its breach of contract claim. Because the superior court's uncontested rulings are sufficient to uphold the judgment even if Agricann were to prevail on all of the issues it raises on cross-appeal, should this Court summarily affirm?

2. **Contract interpretation.** The superior court relied on modification and waiver—not contract interpretation—when ruling that the parties agreed to split revenue and expenses 50/50.

   a. May the Court disregard Agricann's commentary on the meaning of "Sales Income" under the Management Contract because it is irrelevant to the outcome of Agricann's cross-appeal?

   b. If the Court does consider the Management Contract, does it provide an alternative basis for affirming the judgment because the only reasonable construction calls for a 50/50 split of revenue and expenses?

3. **Consideration.** The superior court relied on both contract modification and waiver principles when finding that the parties agreed to

split net profits 50/50 based on their course of performance and contemporaneous communications. Agricann challenges modification on appeal, but not waiver. Does Agricann's performance under the modified 50/50 split moot the consideration issue because Agricann waived its right to enforce an 80/20 split?

4. **Damages.** Agricann presented only one damages theory at trial, based on an 80/20 split of gross revenues. It never presented a damages theory based on a 50/50 split. The superior court found that Agricann failed to establish breach or reliable proof of damages.

a. Does Agricann's failure to appeal the superior court's "no breach" finding or to present a 50/50 damages theory at trial make it impossible for Agricann to win under a 50/50 theory on appeal?

b. Does Agricann's failure to challenge the superior court's determination that its damages evidence was unreliable likewise prevent Agricann from prevailing under an 80/20 theory?

5. **Penalty payment.** The Management Contract provides for a late payment assessment of 1% interest, accrued daily. Based on delayed

revenue payouts of about $850,000, Agricann sought between $21 million and $30 million in liquidated damages under this clause.

a. Did the superior court correctly hold that this term is an unenforceable penalty, unrelated to the actual or anticipated damages resulting from late payment?

b. Did Agricann waive its right to enforce the 1% late payment assessment by its course of conduct?

CROSS-APPEAL STANDARD OF REVIEW

In this appeal from a bench trial, the Court "defer[s] to a superior court's findings of fact unless clearly erroneous, but . . . review[s] its conclusions of law de novo." *Town of Marana v. Pima Cty.*, 230 Ariz. 142, 152, ¶ 46 (App. 2012). When the superior court's ruling is based on conflicting evidence, this Court will not disturb that ruling by reweighing the evidence, so long as it is supported by substantial evidence. *See CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, 362, 364, ¶¶ 25, 29 (App. 2013). Finally, when reviewing the superior court's findings regarding the sufficiency of Agricann's damages evidence, this Court must "draw[] all inferences from the evidence of the judgment." *See Johnson v. Pankratz*, 196 Ariz. 621, 626, ¶ 20 (App. 2000).

CROSS-APPEAL ARGUMENT SUMMARY

The Court may summarily affirm on Agricann's cross-appeal because even if Agricann were to win all of its arguments on cross-appeal regarding the Management Contract doing so would not change the outcome; the superior court's unchallenged rulings are sufficient to affirm. (Cross-Argument § I.)

If this Court does reach the merits, however, it has multiple grounds for affirming the superior court's judgment on Agricann's claim for breach of the Management Contract, including contract interpretation, modification, and waiver (*see* Cross-Argument §§ II-III). First, as a matter of basic contract interpretation, the only reasonable construction of the Management Contract calls for a 50/50 split of revenues and expenses (Cross-Argument §§ II.B). Even if it did not, however, this Court can affirm the superior court's ruling that the parties agreed to a 50/50 split by their course of performance and contemporaneous communications as a matter of either contract modification (Cross-Argument § III.A) or waiver (Cross-Argument § III.B).

In addition, because Agricann failed to challenge the superior court's no-breach finding, its arguments regarding damages are irrelevant (Cross-

Argument § IV.A.1). Moreover, Agricann never previously disclosed a damages theory under a 50/50 split, so it cannot do so now for the first time on appeal (Cross-Argument § IV.A.2). To top it off, Agricann's arguments regarding the damages evidence fail on the merits under either a 50/50 split or an 80/20 split because Agricann failed to provide any credible evidence establishing damages with reasonable certainty (Cross-Argument §§ IV.A.3, IV.B).

Finally, the superior court correctly determined that the 1% daily fee on late payments is an unenforceable penalty, not a valid liquidated damages clause (Cross-Argument § V.A). And even if it were a valid liquidated damages clause, Agricann waived its right to enforce it (Cross-Argument § V.B).

The Court should affirm on Agricann's cross-appeal from the superior court's judgment on the claim for breach of the Management Contract.

CROSS-APPEAL ARGUMENT

I. This Court may summarily affirm on cross-appeal because the superior court's unchallenged rulings suffice to uphold the judgment on the Management Contract.

Agricann's cross-appeal suffers from a fatal defect: it has not challenged various rulings and findings that are sufficient to affirm. In other

words, even if Agricann succeeds in overturning the rulings it has challenged, that is not enough to revive its claim for breach of the Management Contract.

"On appeal, the appellant has the burden of demonstrating to this court that there was error committed below." *Guard v. Maricopa Cty.*, 14 Ariz. App. 187, 188-89 (1971). "An appellate court must determine whether the judgment, not the reasoning, of the superior court was correct." *Picaso v. Tucson Unified Sch. Dist.*, 217 Ariz. 178, 181, ¶ 9 (2007). So "where a separate and independent ground from the one appealed supports the judgment made below, and is not challenged on appeal, the appellate court must affirm." 5 Am. Jur. 2d Appellate Review § 718; *see also Navajo Nation v. MacDonald*, 180 Ariz. 539, 548 (App. 1994) (failure to challenge on appeal alternative findings that were sufficient to uphold the superior court's judgment required affirmance).

Agricann's cross-appeal turns on how revenues should be split under the Management Contract. There are two possibilities: (1) either the parties had to split revenues 50/50 (by virtue of contract interpretation, contract modification, or contract waiver), or (2) they had to split revenues 80/20 (by virtue of contract interpretation). Regardless of which split is proper,

however, Agricann has not challenged all of the rulings necessary for the Court to reverse on cross-appeal.

1. If the parties had to split revenues 50/50, then Agricann faces two problems. First, the superior court ruled that "[Agricann]'s evidence largely did not show that [Natural Remedy] breached the *modified* [i.e., 50/50] agreement." [IR-141 at 4 (APP126).] Agricann has not challenged this no-breach ruling, and therefore it cannot prevail in its cross-appeal under a 50/50 scenario. In addition, Agricann never raised any damages theory at all regarding a 50/50 split. Instead, Agricann put all of its eggs in the 80/20 basket at trial. It took a calculated risk and offered nothing on a 50/50 split. As explained below (Cross-Argument § IV.A.2), Agricann cannot raise a new damages theory for the first time on appeal. Thus, the superior court's unchallenged rulings on breach and damages under a 50/50 split require the Court to affirm the judgment with respect to the 50/50 split issues; Agricann has made no attempt to demonstrate that all of the rulings necessary to the *judgment* are incorrect. *See Picaso*, 217 Ariz. at 181, ¶ 9.

2. If the parties had to split revenues 80/20, then Agricann runs into another problem. The superior court ruled that Agricann had failed to offer reliable evidence of damages, explaining that (1) "Burton created

[Agricann]'s damages calculation (Trial Ex. 31) but could not explain his methodology persuasively," (2) "That exhibit also had several errors, which Burton conceded," (3) "It is difficult, if not impossible, to reconcile [Agricann]'s current damages calculation with emails from 2015," and (4) "Zaki's testimony was more believable in terms of calculating expenses, what [Agricann] earned under the modified agreement, and payments to [Agricann]." [IR-141 at 4 (APP126).] For Agricann to prevail on an 80/20 theory, Agricann would need to overturn the superior court's findings that its damages evidence was unreliable and error-ridden. But it has not challenged those findings on appeal. *Cf. Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 581 n.1 (App. 2001) (appellant conceded claims by failing to raise on appeal related issues). In fact, Agricann's cross-appeal on damages (at 47-50) addresses only the 50/50 split; Agricann does not defend its damages methodology for an 80/20 split *at all*. Agricann therefore cannot prevail on its cross-appeal under an 80/20 split theory, either.[2]

[2] Without any path to success on the underlying breach of contract claim, Agricann's remaining issue on cross-appeal (regarding liquidated damages) is moot.

In sum, even if Agricann were to prevail on all of the issues it raises on cross-appeal, it still cannot show that the superior court's judgment on its claim for breach of the Management Contract is incorrect. Accordingly, this Court should summarily affirm on Agricann's cross-appeal.

II. Agricann is not entitled to an 80/20 split of gross revenues under the Management Contract.

The first issue on cross-appeal raises whether a provision in the Management Contract "mean[s] 80% of gross sales revenue, rather than 80% of net sales revenue." (Answering Br. at 35.) But the superior court never ruled on this issue of contract interpretation, and Agricann does not ask this Court for any relief on that basis. Instead of directly addressing this textual issue, the superior found the Management Contract "inconsistent" on the gross/net issue [IR-141 at 2 (APP124)], ruling that "[w]hatever the parties' original intent under the Management Contract", in practice they agreed to split net profits 50/50 [IR-141 at 3 (APP125)].

Agricann's first issue therefore does not ask this Court to review *any* ruling of the superior court, and this Court likewise need not reach the issue for the same reasons given by the superior court (*see* § II.A). Moreover, the

Court may affirm because the only reasonable construction of the Management Contract calls for a 50/50 split of net profits (*see* § II.B).

A. The Court does not need to interpret "Sales Income" to resolve the cross-appeal.

Agricann's first listed issue (at 36-37) is whether "Sales Income" under the Agreement "mean[s] 80% of gross sales revenue, rather than 80% of net sales revenue." The superior court found the Management Contract "confusing and inconsistent" and never explicitly interpreted this "inconsistent" text. [IR-141 at 2 (APP124).] Instead, the superior court found that it need not interpret "Sales Income" because the parties in fact had agreed to a 50/50 split of both revenues and expenses. Even Agricann admits (at 37) that "the trial court did not rule on the clarity or interpretation of the Management Contract's provision [regarding] 80% of Sales Income."

For this reason, the issue of whether "net income" means net or gross does not affect the disposition of this appeal. The Court may accordingly disregard Agricann's first issue on cross-appeal.

B. In any event, the only reasonable reading of the Management Contract provides for a 50/50 split.

To the extent this Court does construe the Management Contract, however, doing so confirms that the only reasonable reading of the Contract requires a 50/50 split of revenue and expenses.

"A contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances." *Smith v. Melson, Inc.*, 135 Ariz. 119, 121 (1983). In doing so, the Court must "give words their ordinary meaning and interpret the contract 'so as to make it effective and reasonable.'" *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 599, ¶ 16 (App. 2010) (quoting *Phelps Dodge Corp. v. Brown,* 112 Ariz. 179, 181 (1975)). In addition, "a contract must be construed as a whole and the intentions of the parties thereto must be collected from the entire instrument and not from detached portions." *O'Malley Inv. & Realty Co. v. Trimble*, 5 Ariz. App. 10, 16 (1967).

Under the Management Contract, Natural Remedy promised to provide the necessary licenses and the retail services for medical marijuana sales, while Agricann promised to provide the cultivation facility. With

respect to expenses, the Management Contract provides for an even split in several different ways:

- The parties "agree to split" all "costs associated with the cultivation facility on a fifty-fifty (50/50) basis." [Ex. 1 at NRPC_000142, ¶ 11 (APP138).]
- The parties "agree to each put in fifteen thousand dollars ($15,000) initially to fund the first month of operating expenses." [*Id.* at NRPC_000142, ¶ 12 (APP138).]
- "[B]oth parties" will fund "a separate escrow account for accumulated reserves for tax purposes." [*Id.* at NRPC_000141, ¶ 10 (APP137).]
- The parties "will split costs 50/50 for all future employee DHS cards after the transfer of the initial site and its employees is complete." [*Id.* at NRPC_000142, ¶ 14 (APP138).]
- The parties will create a joint entity to hold the lease rights to the cultivation facility, and that "entity will be solely responsible for collecting rent from [the parties] (under the 50/50 terms agreed to by the parties), and forwarding the rent payments to the owner." [*Id.* at NRPC_000143, ¶ 20 (APP139).]

With respect to revenue, the Management Contract provides:

- Natural Remedy will pay Agricann for management expenses (including rent, security, and agricultural services) out of Sales Income. [*Id.* at NRPC_000141, ¶ 6 (APP137).]
- Sales Income means money received from selling marijuana grown by Agricann in the cultivation facility. [*Id.* (APP137).]
- Agricann must submit invoices for all management expenses to Natural Remedy, with the invoices not to exceed 80% of Sales Income. [*Id.* at NRPC_000141, ¶ 7 (APP137).]

- Income shall be distributed "on a pro rata basis . . . ." [*Id.* (APP137).]

In nearly every respect, the arrangement described in the Management Contract reflects a 50/50 partnership between Natural Remedy and Agricann. The parties contributed equal amounts to cover the initial funding and escrow account. Expenses were split evenly, but if Agricann paid for an expense directly, Natural Remedy would reimburse it out of Sales Income (which would reduce Sales Income and result in a 50/50 split). Otherwise, Sales Income was split "pro rata."

The only exception to the Management Contract's 50/50 nature is a solitary parenthetical that attempts to describe the "pro rata" distribution of Sales Income to mean "80% of all gross sales from both the retail and wholesale operations shall be paid to [Agricann], and 20% shall be retained by [Natural Remedy]." [Ex. 1 at NRPC_000141, ¶ 7 (APP137).] This "description" of the pro rata distribution cannot be harmonized with the plain text or the rest of the Management Contract, however. *See O'Malley*, 5 Ariz. App. at 16 ("It is well established that a contract must be construed as a whole and the intentions of the parties thereto must be collected from the entire instrument and *not from detached portions*." (emphasis added)).

For one thing, pro rata means "[p]roportionately; according to an exact rate, measure, or interest." *Pro Rata*, Black's Law Dictionary (11th ed. 2019). But nowhere in the Management Contract does Agricann agree or promise to contribute 80% of *anything*, whether it be money, time, labor, or expertise.

In addition, this description conflicts with the definition of Sales Income itself. Sales Income means "all income received from third-party ADHS-approved medical marijuana dispensaries by [Natural Remedy] for medical marijuana grown at the Cultivation Facility, plus the value of and [sic] all medical marijuana grown at the Cultivation Facility that is acquired by [Natural Remedy] for retail sale at its Dispensary," [Ex. 1 at NRPC_000141, ¶ 6 (APP137)]—in other words, money received for sales of marijuana grown by Agricann at the cultivation facility, [*id.* (APP137)]. It does *not* include revenue from sales of marijuana purchased from other suppliers. [*See id.*] But under this "description" of the pro rata distribution, Agricann would be entitled to "80% of *all gross sales*," even if Natural Remedy sold marijuana it bought from another supplier. [*Id.* at ¶ 7 (APP137) (emphasis added).]

The more reasonable interpretation is that the parties meant the parenthetical to illustrate the 80% cap on expense invoices described in the

prior sentence, but erroneously wrote "i.e." instead of "e.g." [*See id.* (APP137) ("All invoices submitted by [Agricann] to [Natural Remedy] shall not exceed eighty percent (80%) of the Sales Income received by [Natural Remedy]. All distributions of Sales Income shall be on a pro rata basis (i.e. 80% of all gross sales from both the retail and wholesale operations shall be paid to [Agricann], and 20% shall be retained by [Natural Remedy]).").]

This reading reasonably harmonizes the apparent conflicts in Paragraph 7, without rendering meaningless the Management Contract's other terms—like the Sales Income definition and the 50/50 split of expenses. *See U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 259 (App. 1985) (Courts must "adopt a construction of a contract which will harmonize all of its parts, and apparently conflicting parts must be reconciled, if possible, by any reasonable interpretation."); *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 476, ¶ 45 (App. 2010) ("Our reading of one provision of a contract must not render a related provision meaningless.").

Moreover, "courts must avoid an interpretation of a contract that leads to an absurd result." *Roe*, 246 Ariz. at 27, ¶ 17. And reading "pro rata distribution" to mean an 80/20 split of gross sales under the Management Contract does just that. Paying 50% of expenses while receiving only 20% of

the *gross* revenue simply does not work as a business model. The following hypothetical (based on Agricann's calculation of revenue and expenses in Trial Exhibit 31)[3] shows how Agricann's reading would play out in practice:

	Joint venture totals	**Agricann share (80% revenue split)**	**Natural Remedy share (20% revenue split)**
Revenues	$1,070,836.98	$855,889.55	$214,947.43
Expenses (50/50 split)	$734,141.18	$367,070.59	$367,070.59
Profit	$336,695.80	$488,818.96	($152,123.16)
Final percentage of net profit	–	150%	(50%)

Under Agricann's theory, Natural Remedy effectively would be guaranteed to lose money. This isn't just a bad business deal; it's an unbelievable one. "A contract should be read in light of the parties' intentions as reflected by their language and in view of all the

[3] The total sales revenue over 15 months comes directly from Agricann's spreadsheet. Total expenses include the four months' worth of expenses included in Agricann's spreadsheet plus an average of those expenses ($46,000/month) multiplied by 11 (the number of months for which expenses were omitted in Agricann's calculation). [*See* 11/22/2019 Tr. at 19:10-20:18 (Zaki testimony re expense calculation methodology).]

circumstances." *Melson*, 135 Ariz. at 121. Natural Remedy had a coveted ADHS license and its own established retail marijuana business before it ever met Agricann. It brought extremely valuable assets to the table, so why would Natural Remedy agree to such facially unfavorable and unsustainable terms?

Finally, Agricann's reading of the Management Contract directly conflicts with the parties' course of performance. The superior court found that over the entire period, "the parties *never followed*" an 80/20 split of gross revenue. [IR-141 at 2 (APP124) (emphasis added).] Instead, the parties always split *net profits* 50/50. [*See, e.g.*, *id.* (APP124).]

For all of these reasons, the Management Contract must be construed to provide for a 50/50 split of both expenses and revenue, i.e., net profits. That interpretation comports with both the nature of the agreement and the parties' post-contract actions.

III. The superior court correctly found that the parties agreed to split net profits 50/50.

In its cross-appeal (at 38-47), Agricann urges this Court to reject the superior court's determination that the parties intended to split net profits 50/50 on the grounds that any modification to the 80/20 gross split

discussed in the Management Contract lacked consideration. But the Court does not need to reach this question to resolve the appeal because the superior court's ruling may be affirmed on at least two other independent bases (in addition to contract interpretation, *see* Cross-Argument § II.B, above). *See Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300, ¶ 12 (App. 2011) (appellate court may affirm on any basis supported by the record); *see also Mattison v. Johnston*, 152 Ariz. 109, 113 (App. 1986) ("[W]e will affirm the trial court when it reaches the correct conclusion even if it does so for an incorrect reason.").

First, this Court may summarily affirm because Agricann cannot challenge the modification as lacking consideration after it has already performed under the modified agreement. Alternatively, the Court may affirm the superior court's ruling on waiver grounds, regardless of modification.

A. Having performed under a 50/50 split, Agricann cannot now raise lack of consideration as a defense to the modification.

Basic contract law provides that "a contract, although not enforceable at its inception because of lack of consideration, may nevertheless become valid and binding to the extent that it has been performed." 17 C.J.S.

Contracts § 118. In other words, "[i]f one makes an executory contract which lacks consideration, he or she may avoid it when called on for performance, but if one executes the contract by performance he or she cannot undo his or her voluntary act." *Id.* (citing *Rubenstein v. Sela*, 137 Ariz. 563, 564 (App. 1983)).

The rule is common-sense.[4] "Presence or absence of consideration . . . is material only as going to the enforceability of the purported agreement. Once the agreement has been executed, lack of consideration is beside the point . . . ." *Dale Sys., Inc. v. Am. Fixtures, Inc.*, 243 N.Y.S.2d 753, 756 (N.Y. Civ. Ct. 1963); *accord*, *Malcoff v. Coyier*, 14 Ariz. App. 524, 526 (1971) (enforceable contracts require "consideration or a mutuality of obligation; that its terms be sufficiently clear so that one can state with certainty the

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[4] It is also consistent with the general trend away from requiring new or additional consideration for contract modifications. *See, e.g.*, A.R.S. § 47-2209(A) ("An agreement modifying a contract [for the sale of goods] needs no consideration to be binding."); 2 Corbin on Contracts § 7.6 ("The enactment of statutes that have abolished the pre-existing duty rule as to the modification of contracts has also demonstrated the dissatisfaction with the older approach to modifications."); *see also id.* § 7.5 ("The pre-existing duty rule has done more than any of the other rules of the consideration doctrine to cast discredit on the whole doctrine of consideration. After a period of slow erosion, the rule is now in the process of decay and disintegration.").

obligation involved. If the terms are ambiguous and uncertain there is no contract *unless by the performance of the parties it is shown and indicated* that there was a meeting of the minds and a mutual understanding of agreement." (emphasis added)).

Consideration thus becomes an issue in situations only when the party disputing that a modification or contract exists has not undertaken performance under the modified agreement. *See, e.g.*, *Pleasant v. Ariz. Storage & Distrib.*, 34 Ariz. 68 (1928) (rejecting plaintiff's alleged modification for lack of consideration where defendant never acted in accordance with the asserted modification). But when the record reflects performance consistent with the modification or agreement, the function served by the consideration requirement has been met. *See e.g.*, *Cook v. Cook*, 142 Ariz. 573, 578 (1984) (upholding modification where "the record here show[ed] that" the parties exchanged mutual promises to commingle funds and hold property as equal owners); *Malcoff*, 14 Ariz. App. at 526 ("There is sufficient evidence of plaintiff's performance, coupled with defendants' actions, to support all the essentials of the contract claimed by the plaintiff.").

This case falls squarely into the latter category. Agricann repeatedly and explicitly admitted that it performed in accordance with the parties'

"agreement to split the Net Profits" 50/50. [*See, e.g.*, Ex. 78 at NRPC_000029 (APP152) (Burton email noting "our agreement to split the Net Profits"); *see also* Ex. 82 at NRPC_000071 (APP163) (Burton email confirming that, "with each sale, have the agreed-upon split put into Agricann's bank account . . . , and [Natural Remedy] *retain the other half*"); Ex. 143 at AC004060 (APP211) (Burton email describing "the normal 50/50 split").] Burton himself conceded that the parties *never* performed under an 80/20 split of revenues. [11/20/2019 Tr. at 193:5-22 (APP289); *see also* 11/21/2019 Tr. at 64:13-16 ("So we acquiesced, we accommodated them, we compromised, and from that point forward, we started on this understanding that it was going to be kind of a 50/50 split . . . .").] And unlike the plaintiff in *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016, 1020 (8th Cir. 1991), who continued to demand payment consistent with the unmodified agreement, Agricann accepted payment under a 50/50 split without complaint. [11/21/2019 Tr. at 216:4-5 (APP341).]

"While lack of consideration is a valid defense in an action to enforce a contract, the courts will not undo a contract that has already been performed." *Rubenstein*, 137 Ariz. at 564. Having performed in accordance

with a 50/50 split for almost a year, Agricann cannot now undo the parties' agreement to that split by claiming lack of consideration.

B. Alternatively, Agricann waived its right to an 80/20 split by accepting lesser performance.

1. The superior court relied on both modification and waiver to find a 50/50 split.

On cross-appeal, Agricann focuses exclusively on the doctrine of modification to challenge the superior court's determination that the parties agreed to split net profits 50/50. But the superior court relied on both modification and waiver to reach that conclusion. [IR-141 at 2-3 (APP124-25).] Specifically, the superior court found that the parties never followed an 80/20 split and always followed a 50/50 split of net profits. [*Id.* at 2 (APP124).] It then cited both the law of modification and the law of waiver to conclude that the parties had agreed to a 50/50 split. [*Id.* at 3 (APP125).] Waiver thus provides an independent, alternative basis for affirming the parties' agreement to split net profits 50/50. *See Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, ¶ 8 (App. 2006) (appellate court may affirm on any basis supported by the record).

Modification and waiver are analogous but distinct doctrines. Although both doctrines effect changes to parties' existing contract rights

and obligations, "[w]aiver of the right to enforce an agreed term is accomplished unilaterally while a modification or addition of a contract term requires agreement." *Angus Med. Co. v. Dig. Equip. Corp.*, 173 Ariz. 159, 164 (App. 1992). "Unlike a modification of a contract," a unilateral waiver "*need not be supported by consideration*." 13 Williston on Contracts § 39:14 (emphasis added).

Despite Agricann's exclusive focus on modification, Agricann implicitly acknowledges that waiver fits this case better. As Agricann notes (at 45-46), Natural Remedy's main affirmative defense to Agricann's claim for breach of the Management Contract was waiver by conduct, not modification. [*See also* IR-113 (Joint Pretrial Statement Pt. 2), Ex. 5, at 3.] And the superior court explicitly cited the law of waiver when finding that the parties' course of performance showed that they agreed to a 50/50 split of net profits. [IR-141 at 3 (APP125).] Consequently, waiver provides yet another independent basis for this Court to affirm the 50/50 split.

2. The superior court properly concluded that Agricann waived any right to an 80/20 split.

As the superior court correctly observed, "a party to a contract may waive the other's duty to perform" by "conduct that is inconsistent with an

intent to assert the right." [*Id.* (APP125).] In other words, "when a party to a contract permits the breaching party to perform, he waives the breach." *Indep. Nat'l Bank v. Westmoor Elec., Inc.*, 164 Ariz. 567, 573 (App. 1990). Once a party has waived a contractual right, it "may not thereafter seek judicial enforcement of the contract with regard to the waived performance and loses any right to damages for the failure to perform." 13 Williston on Contracts § 39:15.

Whether Agricann's conduct constituted a waiver is a question of fact. *Concannon v. Yewell*, 16 Ariz. App. 320, 321-22 (1972) ("Waiver need not be expressed but may be inferred from conduct and is therefore a question of fact to be determined by the trial court."). Consequently, this Court must affirm if there is "*any* reasonable basis" for finding waiver on this record. *Id.* (emphasis added).

Ample evidence supports affirming that Agricann knowingly accepted Natural Remedy's performance under a 50/50 split of net profits. [IR-141 at 2-3 (APP124-25).] In contemporaneous emails, Agricann's representatives explicitly noted "our agreement to split the Net Profits." [Ex. 78 at NRPC_000029 (APP152); *see also* Ex. 82 at NRPC_000071 (APP163) (confirming that, "with each sale, have the agreed-upon split put into

Agricann's bank account . . ., and [Natural Remedy] *retain the other half*").] Indeed, Agricann demanded that "[a]ll sales must be split and paid 50/50 between NRPC and Agricann within 5 days of sale." [Ex. 135 at AC002407 (APP208); *see also* Ex. 143 at AC004060 (APP211) (referencing "the normal 50/50 split").] Burton himself conceded that the parties never performed under an 80/20 split of gross revenue. [11/21/2019 Tr. at 193:5-22 (APP286).] And Zaki, whom the superior court found to be a competent witness regarding the parties' post-contact conduct, [IR-141 at 2 (APP124)], testified the parties *always* shared "a 50/50 split on all of the net." [11/21/2019 Tr. at 187:16 (APP327).] Indeed, despite the various emails from Zaki to Burton documenting a 50/50 split of net profits, Burton "never sent [Zaki] an email saying, no, this is not right." [*See* 11/21/2019 Tr. at 216:2-5 (APP341).]

To the contrary, Burton testified that Agricann waived its right to claim an 80/20 split: "So we acquiesced, we accommodated them, we compromised, and from that point forward, we started on this understanding that it was going to be kind of a 50/50 split . . . ." [11/21/2019 at 64:13-16.] The superior court thus had no choice but to find that "[b]y accepting performance known to be deficient, [Agricann] has waived the

right to reject the contract on the basis of that performance." [IR-141 at 3 (APP125).]

In sum, Agricann cannot void the modification based on a lack of consideration because it proceeded to perform in accordance with that modification. Furthermore, even if the parties failed to formally modify the Management Contract, Agricann's post-contract conduct confirms that Agricann waived its right to enforce an 80/20 split of gross revenues. The superior court's ruling should be affirmed.

IV. Agricann did not and cannot prove damages.

As explained above (Cross-Appeal Argument § I), Agricann's cross-appeal on damages is futile because Agricann has not appealed sufficient rulings to reverse the judgment.

A. Agricann cannot prevail on a 50/50 split theory.

On a 50/50 split, Agricann's cross-appeal has three problems: (1) Agricann has not challenged the superior court's finding that Agricann failed to prove breach, and (2) Agricann never offered any damages theory based on a 50/50 split at trial, and (3) its new theories on appeal are not sufficient to reverse.

1. Agricann is stuck with the superior court's ruling that it never proved breach of a 50/50 split.

Agricann had to prove breach as a required element of its claim. *See Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 96, ¶ 16 (2013) ("To bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract, its breach and the resulting damages." (citation omitted)). But the superior court found that "[Agricann]'s evidence largely did not show that [Natural Remedy] breached the *modified* [i.e., 50/50] agreement." [IR-141 at 4 (APP126).] Agricann has not appealed this finding, so it is stuck with the no-breach ruling. This Court should affirm on this basis alone.

2. Having gone all-in on an 80/20 theory at trial, Agricann cannot now claim damages based on a 50/50 split.

At trial, a party may present alternative damages theories based on different types of liability or other factors. Each party must make a tactical decision at trial about whether to present alternative damages theories. But once that decision has been made, the party is stuck with it. If a party raises a new damages theory on appeal, the appellate court should not consider it because the party "did not pursue this theory at trial." *Kaufman v. Langhofer*,

223 Ariz. 249, 254, ¶ 21 (App. 2009) (refusing to consider "value to owner" damages theory not raised below).

This situation arises when a plaintiff loses on a particular theory of liability or type of damages and then tries to salvage some kind of victory, albeit a smaller one, on appeal. But a party's tactical decisions at trial have consequences. A "deliberate strategy to adhere to a single damages theory ha[s] the effect of winnowing out from the case any argument about damages based on a" different damages theory. *Promega Corp. v. Life Techs. Corp.*, 875 F.3d 651, 662 (Fed. Cir. 2017). This principle follows from the settled law that appellate courts "generally do not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26 (App. 2000).

Here, the superior court found that "[Agricann] built its case on being entitled to 80% of revenue." [IR-141 at 4 (APP126).] Agricann put all of its eggs in the 80/20 basket and offered no damages theory at all for a 50/50 split. Strategically, perhaps this made sense (akin to the defense that offers only a liability theory and no lower damages theory). But a plaintiff must live with its "strategic decisions in the initial trial concerning what evidence

and arguments to advance in support of his theory of damages." *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1347 (Fed. Cir. 2001).

Ignoring that rule, Agricann now introduces (at 47-50) three new ways to calculate damages on a 50/50 split, none of which were presented to the superior court. Agricann asks this Court to reverse the superior court based on these new theories, even though they were never presented to the superior court. But "[h]aving failed to raise the [50/50] damage theory at trial, [Agricann] may not raise it here." *Kaufman*, 223 Ariz. at 254, ¶ 21.

Agricann apparently recognizes this problem, and admits in a footnote (at 50 n.15) that "the exact calculation is not the job of this Court." It tries to salvage the waiver by relying on evidence presented at trial, claiming (at 49) that "[t]hese calculations *derive* directly from evidence admitted at trial." (Emphasis added.) But Agricann unquestionably did not disclose these theories to Natural Remedy under Ariz. R. Civ. P. 26.1, and did not offer them to the superior court.

It is not the job of this Court *or the superior court* to sift through bits and pieces of evidence to concoct a damages theory. Agricann had the burden of doing that, and it failed to offer any 50/50 theory at trial. The question isn't whether the record contains evidence that can be sliced up and

assembled to create a damages theory. The question is whether Agricann properly disclosed this damages theory to Natural Remedy and presented the damages theory to the superior court. Agricann contends (at 50 n.15) that "[t]he actual calculation should be a subject for the trial court on remand." But this Court should not reverse the superior court on a theory that was never presented to that court. This is a court of review, not of first view.

This tactic of trying to pluck numbers from a spreadsheet to come up with a new damages theory on the fly echoes Agricann's tactics at trial. The superior court admonished Agricann then for attempting to present new, undisclosed theories: "THE COURT: You have a new damages calculation. So, of course, under 26.1, you are obligated to provide a calculation of your damages throughout the process. . . . [W]e're now in the middle of trial and you're trying to input a new damages calculation." [11/21/2019 Tr. at 10:9-16.] When it became clear that Agricann's damages spreadsheet (Exhibit 31) had fallen apart, Burton suggested that he could "create a revised [damages] sheet," or "You [the judge] could do it yourself if you want." [11/22/2019 Tr. at 168:3-8.] The Court rejected that proposal: "Am I now your damages expert?" [*Id.* at 168:10-11.]

This tactic didn't fly then, and it shouldn't fly now. At trial, Agricann took a calculated risk and went all-in on an 80/20 theory. Having done so, it cannot now ask the Court to reverse based on damages theories never presented below.

3. Agricann's new damages theories are not sufficient to reverse.

Unsurprisingly, Agricann's new theories invented on appeal also lack merit. To win on its claim for breach of the Management Contract, Agricann had to prove, with at least reasonable certainty, both the fact and amount of damages. *See, e.g.*, *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521 (1968); *Walter v. F.J. Simmons & Others*, 169 Ariz. 229, 236 (App. 1991). "[D]amages that are speculative, remote or uncertain may not form the basis of a judgment." *Coury Bros.*, 103 Ariz. at 521. Agricann failed in both respects.

To start, Agricann never showed the fact of damages in the first place. "Proof of the fact of damages must be of a higher order than proof of the amount of damages." *Id*. Zaki testified that Natural Remedy paid Agricann everything it was owed under the Management Contract. [11/22/2019 Tr. at 54:3-55:14.] And the superior court found that "Zaki's testimony was

more believable in terms of calculating expenses, what [Agricann] earned under the modified agreement, and payments to [Agricann]." [IR-141 at 4 (APP126).] Notably, Agricann does not challenge that credibility determination on cross-appeal. Instead, Agricann contends (at 47) that Natural Remedy "never really disputed" it still owed Agricann money. But Zaki's credible testimony directly refutes that claim. [11/22/2019 Tr. at 54:3-55:14.] Agricann thus failed to prove even the fact of damages.

Moreover, even assuming that Agricann could prove the fact of damages, it cannot prove the amount with reasonable certainty. *See Walter*, 169 Ariz. at 236 ("the burden clearly is on the plaintiff to prove the amount of his damages 'with reasonable certainty.'" (citation omitted)). "[T]he plaintiff in every case should supply some reasonable basis for computing the amount of damage and must do so with such precision as, from the nature of his claim and the available evidence, is possible." *Gilmore v. Cohen*, 95 Ariz. 34, 36 (1963). The damages sought by Agricann here—management expenses equal to a percentage of monthly sales—should be easily and precisely quantifiable. But Agricann *still* has not come up with a final damages number. On cross-appeal, Agricann offers (at 49-50) three different possible damages numbers:

- $98,288.70, based on "Total Revenue Net of Expense and Payments Actually Made";[5]
- $84,343.72, based on defense witness testimony regarding "cash available";[6] OR
- $476,553, based on Natural Remedy's income forecast spreadsheets.[7]

Not one of these numbers is reasonably certain, however. The first number is neither credible nor reliable because it is based on the same flawed spreadsheet (Trial Exhibit 31) prepared and used by Burton in an attempt to prove damages under an 80/20 split.

Trial Exhibit 31 is a "Google Doc" that Burton created using one of Natural Remedy's sales reports as a template. Burton testified that as he got sales and expense information, he would "cut and paste that into here and just reformat it to accommodate the addition." [11/20/2019 Tr. at 120:10-16 (APP250).] But Burton himself could not explain how he calculated the numbers shown in Exhibit 31. For example, when asked to explain how he

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[5] (Cross-Opening Br. at 49.)

[6] Calculated by dividing $168,687.43 in "cash available" in half. (*See* Cross-Opening Br. at 50.)

[7] Calculated by multiplying $43,323 (the portion of projected net monthly income allegedly owed Agricann, *see* Cross-Opening Br. at 50) by 11 months (the period for which Agricann now claims it can recover under the 50/50 split, *see id.* at 48).

calculated the 1% interest late fee (a simple formula: amount owed × 0.01 × number of days late), Burton couldn't do it: Q. "So you should be able to reach that number by multiplying 855 time[s] .01 times the number of days, correct? / A. No. It would be times the number of days, I think—I think, I'm not sure. I'm not a mathematician. I got help on this, so I don't know exactly how—I don't know if that's the right formula or not. I would have to think about it, so." [11/21/2019 Tr. at 240:9-20.]

Nor could Burton explain the multiple discrepancies between the numbers in Trial Exhibit 31 and Agricann's other documents. For example, in a November 19, 2015 email, Burton claimed Natural Remedy owed Agricann $6,614,983.07 to date. [Ex. 162 (APP213).] At trial, Burton admitted that amount was too high because it included compound instead of simple interest. [11/21/2019 Tr. at 43:11-44:9.] Yet Trial Exhibit 31 indicates that Natural Remedy owed Agricann an *even higher* amount ($9,976,844.75) at that time. [Ex. 31 at 4 (APP145); 11/21/2019 Tr. at 44:6-22.] On top of these omissions and discrepancies, Burton admitted that Trial Exhibit 31 failed to account for payments made by Natural Remedy to Agricann, [11/22/2019 Tr. at 182:18-183:7; *id.* at 17:10-13], and that it included sales that should not have been included based on the alleged promissory note, [11/21/2019 Tr.

at 9:18-12:23]. The superior court thus correctly found that this spreadsheet was not sufficiently credible or reliable to prove damages [*see* IR-141 at 4 (APP126)], and Agricann has not challenged that ruling on appeal.

The second damages number misrepresents the testimony and takes it out of context. Agricann claims (at 50) that Zaki testified that there was $168,687 in "cash available," half of which ($85,000) should go to Agricann. In context, however, Zaki was adding up everything owed to Agricann (including $85,000 in one year), which added up to $124,000 in total, and then comparing that to the total payments to Agricann of $124,117. [11/22/2019 Tr. at 54:15-55:14.][8] In other words, Zaki's testimony shows that Agricann was fully paid, including the $85,000 owed in 2015. Testimony showing that Agricann was fully paid cannot possibly support Agricann's claim of damages.

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[8] Agricann suggests (at 49-50) that Natural Remedy paid it only $63,500 under the Management Contract, but its only support for that claim is Burton's testimony confirming that Agricann was "claiming that [Natural Remedy] made payments to [it] of $63,560" in Trial Exhibit 31. [11/20/2019 Tr. at 237:16-18.] In contrast to Burton's bald assertion, Zaki's testimony and contemporaneous business records squarely establish that Natural Remedy paid Agricann $124,117 under the Management Contract. [11/22/2019 Tr. at 54:15-55:14; *see also* IR-141 at 4 (APP126) ("Zaki's testimony was more believable in terms of . . . payments to [Agricann].").]

As for the third damages number, it relies on data that is almost by definition speculative—projected forecasts of future marijuana production and sales, assuming full production capacity. Even if forecasts could serve as a reasonable approximation of actual damages in some instances, such as a prospective lost-profits case, this case was never tried on such a theory. In this case, there are records of what was paid and what was owed, so it makes no sense to rely on projections. And to top it off, it is undisputed that the parties never hit the production numbers indicated in this forecast. [11/21/2019 Tr. at 189:25-190:3 (APP329-30) (Zaki testimony) ("Q. To your recollection, were there any months in which 50 pounds was grown in that facility? / A. No. . . .").] Thus, Agricann's damages number based on the forecast is not only speculative, but proven inaccurate.

B. Agricann likewise cannot prevail on an 80/20 split theory.

If the Court relies on an 80/20 split, then this Court must also affirm on damages. Agricann tried to present evidence of damages on an 80/20 split in the superior court, but that court ruled that Agricann failed to offer reliable evidence of damages and Agricann has not even tried to defend its 80/20 damages evidence on appeal.

In particular, the superior court explained that (1) "Burton created [Agricann]'s damages calculation (Trial Ex. 31) but could not explain his methodology persuasively," (2) "That exhibit also had several errors, which Burton conceded," (3) "It is difficult, if not impossible, to reconcile [Agricann]'s current damages calculation with emails from 2015," and (4) "Zaki's testimony was more believable in terms of calculating expenses, what [Agricann] earned under the modified agreement, and payments to [Agricann]." [IR-141 at 4 (APP126).]

Agricann has not challenged any of those findings. In other words, Agricann's cross-appeal does not defend its 80/20-based damages theories at all. The relevant section of the cross-appeal opening brief (at 47-50) addresses only 50/50 issues.

At trial, Agricann went all-in on the 80/20 damages theories. On cross-appeal, Agricann has gone all-in on its new 50/50 damages theories. This set of decisions seals its fate. Because Agricann has not challenged the rulings on the lack of reliable damages evidence, it cannot prevail on its cross-appeal and this Court must affirm.

V. The superior court correctly refused to enforce the Management Contract's 1% daily penalty on late payments.

A. The 1% daily assessment is an unenforceable penalty unrelated to actual damages.

Although parties may contract for a liquidated damages provision, the amount must be "reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy." A.R.S. § 47-2718(A). A stipulated damages clause is unenforceable as a penalty "if the difficulty of proof of loss is slight and either no loss occurs or the stipulated sum is grossly disproportionate to the loss." *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena*, *LLC*, 242 Ariz. 108, 111, ¶ 14 (2017); *see also* A.R.S. § 47-2718(A) ("A term fixing unreasonably large liquidated damages is void as a penalty.").

In this case, the superior court concluded that the 1% daily assessment on late profit disbursements under the Management Contract constituted an unenforceable penalty under *Dobson Bay* because (1) the 1% assessment did not reasonably approximate either the loss contemplated at the time of contract or the loss that actually resulted; (2) no evidence indicated that

damages would be difficult to prove; and (3) Burton admitted the clause was a penalty for non-payment. [IR-141 at 4 (APP126).]

Agricann attempts (at 51-54) to distinguish the facts of *Dobson Bay* to argue that the 1% assessment is enforceable. But even accepting all of Agricann's contentions as true, the key question remains whether the 1% assessment reasonably approximates the anticipated or actual damages flowing from late payment of profits to Agricann. And Agricann does not dispute that there was no "evidence that the 1% assessment somehow compensated it for the lost use of money, increased expenses, etc." [IR-141 at 4 (APP126).]

To the contrary, the evidence allowed the superior court to find that the 1% assessment is grossly disproportionate to Agricann's alleged damages. For alleged late payments totaling $855,889.55, Agricann claims it is owed between $21 million and $30 million in liquidated damages under

the 1% daily assessment.[9] It is facially unreasonable to claim that late payment of less than $900,000 in profits caused or was expected to cause *at least* $21 million in damages. Rather, the 1% daily late fee "assesses against a defaulting party an excessive monetary charge unrelated to actual harm." *Penalty Clause*, Black's Law Dictionary (11th ed. 2019).

None of Agricann's authorities suggest otherwise. A delay in cutting a profits check under the Management Contract differs in terms of both risk and difficulty of proof from the delayed payments in the cases Agricann cites. For example, a delay in distributing profits to Agricann does not involve the same risk or internal costs as a late loan payment would pose to a bank. *Cf. Metlife Capital Fin. Corp. v. Wash. Ave. Assoc.*, 732 A.2d 493, 496 (N.J. 1999) (late charges and default interest rates "represented an estimate of the internal costs of administering late payments" and "losses resulting

[9] Agricann initially claimed that it was entitled to $30 million in liquidated damages. [11/20/2019 Tr. at 243:14-18 (APP312).] But Burton later testified that he erred in his initial calculation and Agricann was instead entitled to $21 million. [11/22/2019 Tr. at 175:10-24.] Burton could not explain the underlying math for either calculation, however. [*See, e.g.*, 11/20/2019 Tr. at 239:6-241:23; 11/22/2019 Tr. at 199:17-202:4.] The true total that Agricann is seeking to recover as liquidated damages remains unclear.

from increased administrative costs, lost investment opportunities, the need for appraisals and environmental studies"). Agricann is not in the business of money lending and does not claim that it has any administrative costs for "administering" late payments, nor that the late payments deprived it of other investment opportunities or sufficient capital.

Nor does Agricann contend that its damages from late profits payments would be difficult to prove. *Cf. Larson-Hegstrom & Assoc., Inc. v. Jeffries*, 145 Ariz. 329, 334 (App. 1985) (upholding a liquidated damages clause in listing agreement because "the basis for determining the compensation—the lost opportunity to market under the terms of the agency—is 'difficult of accurate estimation'" (citation omitted)).

To top it off, Agricann does not dispute that Burton "admitted [the 1% assessment] was a penalty for non-payment." [IR-141 at 4 (APP126).] The Court can affirm on this basis alone.

In short, none of Agricann's arguments for enforcing the 1% daily late payment penalty address the superior court's findings or the key questions under *Dobson Bay*. This Court should affirm.

B. Agricann waived its right to enforce the 1% daily assessment after the fact.

Finally, even if the Court disagrees that the 1% daily assessment is an unenforceable penalty under *Dobson Bay*, it should affirm because Agricann waived its right to enforce this provision by failing to demand compliance during the contract's performance.

As discussed in depth in Cross-Argument § III.B.2, above, a party waives its right to enforce a contract right after the fact if it knowingly accepts deficient performance. *See, e.g.*, *Indep. Nat'l Bank*, 164 Ariz. at 573 ("when a party to a contract permits the breaching party to perform, he waives the breach"). And during the parties' performance, Agricann never sought to enforce the 1% daily assessment under the Management Contract. [*See, e.g.*, 11/20/2019 Tr. at 172:16-18 ("Q. Or the payment of a fine in the event of a violation, that was not enforced, correct? / A. Right."); *id.* at 193:23-25 (APP286) ("Q. You also never received payment of one percent interest from [Natural Remedy]? / A. That is correct.").] Consequently, Agricann has waived its right to demand strict compliance with that provision now.

ARCAP 21 REQUEST FOR ATTORNEYS' FEES

Natural Remedy requests its cross-appeal attorneys' fees under A.R.S. § 12-341.01. As explained in the opening brief (at 70), the Court's remand should also instruct the superior court to reconsider the prevailing party for fees in that court.

CROSS-APPEAL CONCLUSION

This Court should affirm the superior court's rulings on the Management Contract.

RESPECTFULLY SUBMITTED this 13th day of January, 2021.

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