SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000017-23

2430 MORRIS AVENUE, LLC, Plaintiff-Appellant, vs. **DEBORAH GRAMMER**, as the Administrator of the Estate of Lee Weinstein, and **MARTIN IPPOLITO**, Defendants-Respondents.	Civil Action ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, UNION COUNTY Docket No. UNN-C-44-22 Sat Below: Hon. Robert J. Mega, P.J.Ch.

PLAINTIFF-APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

PAGES

CASES

RULES AND STATUTES

Plaintiff-Appellant, 2430 Morris Avenue, LLC ("Plaintiff"), appeals from (1) a final judgment after a bench trial (i) granting in part and denying in part Plaintiff's claim for specific performance, (ii) dismissing Plaintiff's claim for breach of contract, and (iii) dismissing Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, against Defendants-Respondents, Deborah Grammer, as the Administrator of the Estate of Lee Weinstein ("Defendant Grammer"), and Martin Ippolito ("Defendant Ippolito" and, together, "Defendants") (the "Final Judgment"); and (2) an order denying Plaintiff's motion to compel discovery and granting Defendants' cross-motion for a protective order (the "Discovery Order").

PRELIMINARY STATEMENT

This appeal arises from the sale and purchase of the real property located at 2426, 2430 and 2436 Morris Avenue, Union, New Jersey 07083 (collectively, the "Property"). In 2011, the New Jersey Department of Environmental Protection ("NJDEP") designated the Property a contaminated site, and to date, the Property remains subject to remedial investigation and remediation under the NJDEP Site Remediation Reform Act ("SRRA"), *N.J.S.A.* 58:10C-1 *et seq*.

Plaintiff is an affiliated entity of the Alessi Organization, which acquires, redevelops, and owns a large portfolio of properties throughout the State. In 2018, Defendant Grammer decided to sell the Property, and approached the Alessis as

potential buyers. Following months of negotiations, the parties executed a jointly drafted Purchase and Sale Agreement, dated September 19, 2019 (the "PSA"), pursuant to which Defendants agreed to sell the Property to Plaintiff for $1,000,000.

The PSA required Defendants to undertake several environmental compliance-related obligations as conditions precedent to closing (the "Seller's Environmental Obligations"). Seller's Environmental Obligations required, among other things, that Defendants cooperate with Plaintiff and Plaintiff's Licensed Site Remediation Professional ("LSRP") to secure, to the extent possible, a site-wide Response Action Outcome ("RAO") for the Property. In order to obtain a RAO, the NJDEP first requires the completion and submission of a Remedial Investigation Report ("RIR"). Although the PSA does not contain a single reference to the RIR, the parties understood that the RIR was a prerequisite to obtaining the RAO.

After executing the PSA, Plaintiff hired a team of professionals who secured a redevelopment designation and plan for the redevelopment of the Property. Defendants, meanwhile, utterly failed to fulfill the Seller's Environmental Obligations under the PSA. Defendants and their professionals did virtually nothing to complete the remedial investigation and work toward securing the RAO, while repeatedly providing Plaintiff with lies and excuses as to their ongoing delays and actions. As such, Plaintiff was unable to close on the Property, and in April 2022,

initiated this lawsuit primarily seeking specific performance of Seller's Environmental Obligations under the PSA.

Throughout the litigation, Defendants argued that their obligation under the PSA was not to obtain a RAO, but rather only to submit a RIR—a term which does not appear a single time in the PSA. The evidence and testimony elicited at trial made clear that under the PSA, Defendants were obligated to secure a site-wide RAO. Defendant Grammer, as well as her primary environmental consultant, Joseph Lockwood ("Lockwood"), even admitted that the PSA required Defendants to secure the RAO. Defendants' LSRP, Ed Sullivan ("Sullivan"), likewise understood that he was retained by Defendants for the purpose of securing the RAO. The trial court disregarded these facts, however, and improperly relied on extrinsic evidence to determine that Defendants were obligated only to submit the RIR—an obligation which is not stated anywhere in the PSA. The trial court further erred as a matter of law by ordering Plaintiff to either close on the Property and assume responsibility for the RAO, or terminate the PSA. In doing so, the trial court improperly shifted the contractual burden of securing the RAO to Plaintiff, and effectively rewrote the PSA to Defendants' benefit.

Moreover, during discovery, Plaintiff sought to depose Defendants' transactional (and ultimately trial) counsel, Raquel Romero, Esq. ("Ms. Romero"),

who was directly involved in both the negotiations and drafting of the PSA, as well as the performance thereunder in the years that followed. Despite Ms. Romero's involvement as a fact witness, the trial court denied Plaintiff's motion to compel discovery and instead granted a protective order shielding Ms. Romero from discovery. The Discovery Order thus poisoned the trial and, ultimately, the Final Judgment, as it resulted in the trial court ruling on the meaning of the PSA without the opportunity to hear from its drafter at trial. For the reasons explained below, the Discovery Order and Final Judgment must be reversed.

PROCEDURAL HISTORY[1]

On April 28, 2022, Plaintiff filed its Complaint (the "Complaint") against Defendants asserting claims for breach of contract and specific performance (Count One), reformation (Count Two), and breach of the implied covenant of good faith

[1] In accordance with *R.* 2:6-8, the dates and designations of each volume of transcript are as follows:

TRANSCRIPT	DESIGNATION
Transcript of Motion – February 2, 2023	1T
Transcript of Trial Vol. 1 – July 12, 2023	2T
Transcript of Trial Vol. 1 – July 13, 2023	3T
Transcript of Trial Vol. 1 – July 18, 2023	4T
Transcript of Trial Vol. 1 – July 19, 2023	5T
Transcript of Trial Vol. 1 – July 20, 2023	6T
Transcript of Trial Vol. 1 – July 24, 2023	7T
Transcript of Trial Vol. 1 – July 25, 2023	8T

and fair dealing (Count Three). (Pa0001-08.) On September 12, 2022, Defendants filed an Answer to Complaint, Affirmative Defenses, Counterclaim, Notice to Produce and Jury Demand (the "Answer"), which asserted counterclaims against Plaintiff for breach of contract (Count One) and breach of the implied covenant of good faith and fair dealing (Count Two). (Pa0009-21.) On October 17, 2022, Plaintiff filed its Answer and Separate Defenses to Defendants' Counterclaim. (Pa0022-27.)

On January 18, 2023, Plaintiff filed a motion to compel discovery (the "Discovery Motion"). (Pa0028-0114.) The Discovery Motion sought, as pertinent here, to compel the deposition of a representative of Defendants' transactional counsel, the Law Office of Raquel Romero, to testify as to the negotiation and meaning of terms contained in the PSA. (*Ibid.*) On January 26, 2023, Defendants opposed the Discovery Motion and cross-moved for a protective order in connection with Plaintiff's Notice of Deposition for a representative of Defendants' counsel. (Pa0115-21.) By Order dated February 2, 2023, the trial court denied Plaintiff's Discovery Motion in its entirety and granted Defendants' cross-motion for a protective order. (Pa0190-91.)

Beginning on July 12, 2023, and continuing on July 13, 18, 19, 20, 24, and 25, the Honorable Robert J. Mega, P.J.Ch., presided over a bench trial in this matter.

(*See generally* 2T, 3T, 4T, 5T, 6T, 7T and 8T.) On August 24, 2023, Judge Mega issued his trial opinion (the "Trial Opinion") (Pa0194-0234) as well as the Final Judgment (i) granting in part and denying in part Plaintiff's claim for specific performance; (ii) dismissing Plaintiff's claims for breach of contract, reformation and breach of the implied covenant of good faith and fair dealing; and (iii) dismissing Defendants' counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing. (Pa0192-93.) With respect to the parties' obligations under the PSA, Judge Mega determined, among other things, that "[t]he obligations of the parties pursuant to the PSA would be for Defendants to complete the RIR to the satisfaction of the NJDEP and subsequently turn over responsibility for the remaining remediation to Plaintiff." (Pa0230.) The Final Judgment provides, in pertinent part, as follows:

> As for Specific Performance, the Court finds that this request is herein **GRANTED** with the following provisions. The parties shall have 30 days from the date of this Order to close on the sale and transfer title of the Subject Property from the Defendants to Plaintiff. At this closing, defendants shall turn over all communications they have had with the NJDEP in relation to the remediation efforts of the Subject Property (to the extent that Defendant's [sic] not already done so as a part of this litigation). Upon the transfer of title, Defendants shall continue to cooperate and otherwise reasonably assist Plaintiff in completing remediation and ultimately obtaining an RAO for the Subject Property. Plaintiff shall be primarily responsible for completing that remediation and obtaining the final RAO for the entirety of the Subject Property. The Court directs that if Plaintiff does not wish to close or otherwise

> take ownership of the Subject Property it shall have 10 days herein to provide notice to Defendants in writing of their intent to withdraw and terminate the contract. At such time, the September 19, 2019 Purchase and Sale Agreement shall be considered terminated by mutual consent . . . .

(Pa0192-93 (emphasis in original).)

On September 4, 2023, Plaintiff filed its Notice of Appeal from the Final Judgment and Discovery Order. (Pa0236-40.) On September 18, 2023, Defendants filed their Notice of Cross-Appeal from the Final Judgment. (Pa0241-44.)

STATEMENT OF FACTS

A. Background

1. The Parties and the Property

Plaintiff is an affiliated entity of the Alessi Organization, which is operated and controlled by brothers Francesco Alessi ("Frank Alessi") and Vincenzo Alessi ("Vincent Alessi" and, together, the "Alessis"). (2T34:21-23, 36:15-19, 42:14 to 43:5, 91:4 to 92:12.) The Alessi Organization acquires, remediates and develops distressed and environmentally contaminated properties, and otherwise owns a large portfolio of residential, commercial, and industrial properties throughout New Jersey. (2T34:24 to 37:11.) Defendant Grammer is the Executrix of the Estate of her late brother, Lee Weinstein, who owned the Property until his death in 2014. (5T76:23 to 77:14.) After Mr. Weinstein's passing, Defendants took joint ownership

and responsibility of the Property, including its associated environmental issues. (4T234:5-22, 235:20 to 236:2.)

The Property was historically used as a scrap yard for heavy metals and recycling of batteries dating back to 1919. (Pa0296; 8T16:21 to 17:9.) Defendants' family operated a scrap yard on the Property during most of this time, and in 2004, Defendants' family leased the Property to another entity, New Jersey Nonferrous Trading, which continued the scrap yard operations at the Property until approximately 2018. (Pa0295-97; 2T48:5-20; 4T236:7-21.) In 2011, following a hydraulic oil spill on the Property and subsequent investigation by the NJDEP, and due to the historical uses of the Property, the NJDEP designated the Property as a contaminated site, and to date, the Property remains subject to remedial investigation and remediation obligations. (Pa0295-97; 4T25:18-24, 164:2-20; 5T81:18-22; 6T7:20-24; 7T68:11-20; 8T6:19 to 7:1, 16:21 to 17:9.)

In 2018, Defendants decided to sell the Property. (4T237:6-12.) Defendant Grammer's son referred her to the Alessis as potential buyers, and in mid-2018, after an introductory phone call, the parties arranged for an initial meeting at a nearby diner. (4T237:17 to 238:13; 5T88:4-8.) At the initial meeting, Defendant Grammer informed the Alessis as to her understanding of the environmental issues at the Property and also introduced the Alessis to her representative, Lockwood.

(4T239:23 to 240:11; 5T88:12 to 89:3.) Lockwood had been involved with the Defendants' family and the Property since approximately 2011, assuming various roles in connection with the Property, including that of an environmental consultant. (8T4:10-23, 6:19 to 9:25.) Lockwood is not, however, a licensed LSRP with the NJDEP. (8T5:5-6.)

2. The Parties' Negotiations

After their initial meeting, the parties held subsequent meetings at the Alessi Organization's offices in Bayonne, during which the parties discussed the Property in greater depth and began negotiating potential terms of sale. (5T89:6 to 90:12; 8T12:23-25.) On the Defendants' side, those involved in the negotiation and drafting of the contract included Defendant Grammer, Lockwood, and Defendants' attorney, Ms. Romero, who was retained as transactional counsel in approximately July 2019. (2T70:8-22; 4T241:15-19, 242:20-23, 244:4 to 245:1; 5T161:10-23; Pa0118, ¶ 7.) Those involved in negotiations on behalf of Plaintiff included the Alessis, Plaintiff's transactional counsel, Victor Kinon, Esq. ("Mr. Kinon"), and Plaintiff's environmental professional, Gary Brown, the Founder and former President of RT Environmental Services ("RT Environmental") until his death in May 2020. (2T69:19 to 70:17; 4T7:17-22, 20:1 to 21:3, 37:13-17; 8T16:5-12.) After Gary Brown's passing, Justin Lauterbach and Christopher Ward assumed his

responsibilities at RT Environmental with respect to Plaintiff and the Property. (4T20:15 to 21:3, 156:17 to 157:8.)

Throughout their negotiations, the parties exchanged information concerning the Property and also conducted site inspections. (4T23:5-18; 8T22:18 to 24:5.) In August 2018, Defendants provided RT Environmental with a Remedial Investigation Summary Report (the "RI Summary Report") that was prepared by Lockwood and Sullivan. (4T23:25 to 24:21; 8T21:23 to 22:6, 39:19-24; Pa0292.) The RI Summary Report indicated that Lockwood was in the process of preparing a Preliminary Assessment Report, identified six areas of concern (each an "AOC") on the Property, which represent locations in which there is potential contamination to the soil or groundwater, and also outlined the remaining steps they deemed necessary to complete the remaining remedial action of soil and groundwater at the Property. (Pa0294; Pa0303-05; 4T25:1-17, 30:19 to 31:17; 8T72:10 to 74:2.)

The first AOC ("AOC-1") identified in the RI Summary Report pertained to the hydraulic oil spill that occurred in 2011, which has since been resolved and is no longer an issue. (4T25:18 to 26:22; Pa0294.) The remaining AOCs identified in the RI Summary Report are as follows: (i) "AOC-2", which is a former battery casing storage area from the 1950s-1960s; (ii) "AOC-3", which represents former and current operational areas impacted with lead and polychlorinated biphenyls

("PCBs"); (iii) "AOC-4", which represents the site-wide historic fill underlying the entirety of the Property; (iv) "AOC-5", which is the storm sewer system; and (v) "AOC-6", which is the former location of an underground storage tank ("UST") likely used to store gasoline. (Pa0294; 4T26:24 to 28:24.) Lockwood also indicated in the RI Summary Report that if any additional AOCs were identified during the Preliminary Assessment process, they would be investigated during the next phase of delineation sampling at the Property. (Pa0294.) As part of the Alessis' due diligence, RT Environmental reviewed the historical data of the Property, conducted a site inspection and, in approximately August 2018, prepared a draft preliminary assessment report (the "RT PA Report") reflecting its preliminary findings from their limited site inspection and review. (4T23:5-18, 36:7-20, 149:24 to 151:5, 157:9-22.)

B. The Purchase and Sale Agreement

In 2019, Plaintiff's then-counsel, Mr. Kinon, provided an initial draft of the PSA to Defendants, and over the next several months, Mr. Kinon and Ms. Romero revised and exchanged several drafts of the PSA. (4T242:20-25, 244:4-12; 5T112:21 to 113:8, 161:10-23.) The parties executed the PSA on September 19, 2019, pursuant to which Defendants agreed to sell the Property to Plaintiff for the purchase price of $1,000,000. (Pa0249, Art. 3.1; 4T240:23 to 241:14.) Under the PSA, the parties were to close on the sale and purchase of the Property two hundred

forty (240) days after execution of the PSA (the "Closing Date"). (Pa0246; Pa0248, Art. 1.26; Pa0250, Art. 4.1; Pa0253, Art. 6.1.)

The PSA required Defendants to undertake several environmental compliance-related obligations as conditions precedent to closing. (Pa0248, Art. 1.23; Pa0261, Art. 11.2.) The Seller's Environmental Obligations are set forth in Article 11.2 of the PSA, which provides, in relevant part, as follows:

> Except for Purchaser's Environmental Obligations as expressly set forth herein, and subject to the provisions of this Article 11, Seller agrees, at Seller's cost, from on or after the Effective Date not to place upon nor permit the placing at, on or under the Premises of any hazardous materials. Seller shall after the Effective Date cooperate with Purchaser and Purchaser's LSRP to secure prior to Closing of to the extent possible a site-wide RAO for all AOC's comprising the Groundwater Obligations. The preceding sentence, together with Seller's obligations set forth in this Article 11, are sometimes collectively referred to herein as "Seller's Environmental Obligations" . . . .

(Pa0261, Art. 11.2.)

The term "RAO" is defined in the PSA as "a Response Action Outcome and shall have the meaning assigned to it in the Administrative Requirements for the Remediation of Contaminated Sites ('ARRCS') (N.J.A.C. 7:26C-1 et seq.) and shall include any amendments thereto." (Pa0248, Art. 1.20.) A prerequisite to securing a RAO for any contaminated site is the completion and submission to the NJDEP of a RIR. (2T154:21 to 155:6; 4T15:19-23; 8T38:3-21; Pa2371-74.) The PSA, however,

does not contain a single reference to the RIR. (2T95:12-15; *see generally* Pa246-91.) Nevertheless, the parties understood that the completion and submission of the RIR was a necessary step toward ultimately obtaining a site-wide RAO. (2T146:3-11, 154:21 to 155:6; 4T15:19-23, 45:1-19; 6T18:20 to 19:4, 27:21 to 28:10; 8T38:3-21.)

Thus, pursuant to the express terms of the PSA, Defendants were required, as part of the Seller's Environmental Obligations, to obtain a site-wide RAO to the extent possible prior to closing, which was to be achieved through cooperation with Plaintiff's LSRP at RT Environmental. (Pa0261, Art. 11.2; 2T97:23 to 98:21; 4T44:17 to 45:5, 147:24 to 148:21, 249:18 to 250:2; 5T43:7-21, 45:11 to 46:20, 162:16 to 163:7; 8T31:8-22, 61:5-10, 64:3 to 65:15, 68:7 to 69:4.) Indeed, Defendant Grammer acknowledged in her sworn deposition testimony that she was responsible for obtaining the RAO, a prerequisite to which is the submission of the RIR. (4T249:18 to 250:14; 5T162:16 to 163:7.) Moreover, after executing the PSA, Defendant Grammer advised Lockwood that she was obligated to obtain the RAO for the Property, and Lockwood's own review of the PSA confirmed that Defendant Grammer was obligated to obtain the RAO. (8T31:8-22, 61:5-10, 68:22 to 70:21.) In fact, as recently as 2021, when Defendants re-engaged Sullivan as their LSRP, Sullivan understood that he was retained to obtain the RAO, and Sullivan's retainer

agreement clearly indicated that the purpose and ultimate goal of his engagement was to obtain a RAO for the Property. (6T78:10 to 80:8, 144:25 to 145:3.)

The PSA further provides as follows:

> It is agreed that from and after the Effective Date Purchaser, in the event Seller has not fully completed all of the above requirements then prior to Closing, the Purchaser may either cancel this Agreement or extend the date for Closing for such period as determined by Purchaser to be appropriate to allow for completion by Seller of the said obligations. If Purchaser elects to terminate this Agreement the Deposit shall be immediately refunded by Purchaser as herein required.

(Pa0261, Art. 11.2(b).) In addition, the PSA provides that "[f]rom and after the Effective Date Purchaser shall, through Purchaser's LSRP determine what remedies, if any, should be performed in order for the issuance of those items in Section 11.2 above prior to Closing." (Pa0261-62, Art. 11.2(c).)

With respect to a default by Defendants, Article 13.2 of the PSA provides, in pertinent part, as follows:

> If Seller (i) defaults in its Closing obligations (i.e., fails or refuses to timely Close as required in this Agreement) or otherwise defaults in the performance of any of its obligations hereunder which are to be performed on, or as of, the Closing Date, or (ii) otherwise defaults hereunder and such default is not cured within thirty (30) days after notice thereof . . . then, and in either such event, Seller shall immediately pay to Purchaser any and all amounts required to be paid to Purchaser pursuant to the terms of this Agreement, if any, plus Purchaser may at Purchaser's election either (x) pursue an action for specific performance of this Agreement by Seller hereunder, without abatement, credit against or reduction of the Purchase Price except as

> otherwise provided in this Agreement and/or (y) seek any and all damages available at law or in equity and/or (z) terminate this Agreement by written notice to Seller and Escrowee, whereupon the Deposit and all interest earned thereon shall be refunded to Purchaser . . . .

(Pa0265, Art. 13.2.)

C. The Course of Performance After Execution of the PSA

After executing the PSA, Plaintiff hired a team of professionals who applied for and obtained both a redevelopment designation and plan from the Township of Union for the redevelopment of the Property as contemplated by the PSA. (2T102:10 to 104:20; Pa0333; Pa0354-55; Pa0356-57.) Defendant Grammer, on the other hand, relied almost exclusively on Lockwood to handle all environmental matters in connection with the PSA and to coordinate with Plaintiff and Plaintiff's team at RT Environmental. (4T234:23 to 235:13, 240:3-11; 5T152:25 to 153:10, 173:14-22.)

However, after executing the PSA, Defendants did virtually nothing to fulfill the Seller's Environmental Obligations under the PSA. (2T160:20 to 161:5; 6T88:1-19; 8T82:12-16.) Between September 2019 and December 2021, Defendants did not conduct any delineation at the Property, and other than six holes allegedly dug by Lockwood in March 2020, there was no sampling done to determine the full extent of contamination on the Property. (4T103:5-25; 6T82:21 to 83:17, 88:1-24;

8T82:12-16.) Instead, Defendants and their representatives repeatedly lied and withheld information regarding the status of the remedial investigation, concealed their communications with the NJDEP, disregarded deficiencies in their documentation, and otherwise wholly failed to cooperate with Plaintiff and its representatives throughout the process. (2T141:12 to 142:5, 174:8 to 175:10, 179:5-19; 4T45:20 to 47:18, 49:2 to 50:7, 54:16 to 55:12, 69:14 to 70:4; 5T46:21 to 47:6; 6T88:1-24, 92:2-8, 94:10 to 95:3, 102:12 to 103:5; 8T87:18 to 89:7, 91:3 to 92:5, 93:15 to 94:4, 94:13 to 95:4, 100:14 to 101:11.)

Sullivan was the Defendants' registered LSRP for the Property between approximately 2012 until February 2020. (6T68:17-22.) By February 2020, however, Sullivan was frustrated by the lack of transparency as to what was occurring at the Property and dismissed himself as the Defendants' LSRP. (6T70:3-10.) Shortly thereafter, in March 2020, Lockwood retained Andrew Trzcinski ("Trzcinski") on behalf of Defendants to serve as the LSRP for the Property. (5T11:19 to 12:22; 8T87:6-17; Pa0358.) Defendants, however, waited months to notify Plaintiff and its personnel of the change in LSRPs. (4T45:20 to 47:5.)

During a June 29, 2020 phone call between Lockwood and RT Environmental, Lockwood advised RT Environmental that the RIR and delineation were complete and that he would provide RT Environmental with a draft of the RIR. (4T46:20 to

47:5.) Around the same time, RT Environmental requested to meet with Lockwood and Trzcinski in July to review the draft RIR, however, Lockwood indicated that he was not ready to meet, and the meeting never occurred. (4T46:17 to 47:18; 8T87:18 to 88:16; Pa0360.)

Despite retaining Trzcinski as the registered LSRP in March 2020, Lockwood did not provide him with the project files and draft RIR until approximately November 2020, at which time Lockwood asked Trzcinski to review the draft RIR and provide recommendations before it was submitted to the NJDEP. (5T17:22 to 19:12.) After completing his review, on November 30, 2020, Trzcinski emailed Lockwood with his findings, expressing concerns that delineation was incomplete and the draft RIR did not satisfy NJDEP requirements. (Pa0362; 5T19:8 to 21:6; 8T89:11 to 91:2.) Specifically, Trzcinski noted the following:

> 1. It is imperative for an RIR that we show full delineation of any compound detected above applicable NJDEP standards, both horizontally and vertically. The NJDEP has been extremely stringent on this matter recently . . . . [F]rom the data I reviewed I don't see horizontal or vertical delineation in soil or groundwater.
> . . . .
> 3. I don't see much about Receptor Evaluation – which is the 2nd most pertinent item the NJDEP will want to see for RIR to be satisfactory.
> 4. Soil tables- note that the tables seem to be a few years old and some standards have changed (most notably some PAHs).
> . . . .
> 6. I am not sure if the document titled RIR Summary Report is the one . . . that you will use as the official RIR for submission – but if it is it

> will need to be beefed up – as no RE section and needs a clearer discussion on delineation.
> 7. Soil – EPH – I saw some very high concentrations but not much follow up [on] them.
> . . . .
> As I said my comments are heavily weighted on recent NJDEP responses to reports I have received lately. Main items they consistently note 1.) All potential sources/AOCs need to have been properly investigated, 2.) full delineation needs to be completed, or contaminant not of concern properly explained "away", 3.) proper Receptor Evaluation completed….and when GW contamination identified they want to see a CEA established during RIR.

(Pa0362.)

On December 18, 2020, there was a conference call between Plaintiff, Plaintiff's attorney, Defendants' attorney, RT Environmental, and Lockwood. (4T49:2-14; 8T88:17-19.) During the phone call, Lockwood again stated that the RIR was complete and advised that it had been submitted to the NJDEP, which surprised Plaintiff and its representatives given that they never received a draft from Lockwood prior to submission. (4T49:2 to 50:7; 8T88:17 to 89:7, 91:3 to 92:5; Pa0371-72; Pa0379.) Notably, Lockwood did not inform Plaintiff or RT Environmental that Defendants' LSRP had determined that the draft RIR was insufficient for submission to the NJDEP. (4T52:24 to 53:2; 8T91:3-13.) After the phone call, on December 18, 2020, RT Environmental emailed the participants of the call with a summary of their discussion and requested that Lockwood provide, among other things, a copy of the RIR that was filed and proof of submission to the

NJDEP. (Pa0371-72.) On December 23, 2020, Lockwood replied that he had requested the documents "from the former LSRP and former attorney," which prompted even more confusion from Plaintiff and RT Environmental given the inconsistencies in Lockwood's representations. (Pa0379-80.)

In truth, however, Lockwood simply lied that the RIR had been submitted in December 2020. (4T54:21 to 55:7; 8T88:17 to 89:7.) In fact, prior to submission of the RIR, Defendants were required to first submit a preliminary assessment report to the NJDEP, which did not occur until January 2021. (5T23:16 to 25:23; Pa0383.) Interestingly, the preliminary assessment report that Lockwood directed Trzcinski to file in January 2021 was actually the RT PA Report that RT Environmental prepared in August 2018. (4T56:8 to 57:22, 179:20 to 182:3; 5T25:24 to 27:6; 8T42:19-24.) And although the RIR could have been filed after the submission of the preliminary assessment report, Trzcinski, Defendants' then-LSRP, still felt that Lockwood's proposed RIR was not sufficient for submission to the NJDEP as, among other things, delineation of contamination remained incomplete. (5T19:8 to 20:8, 22:4-10, 27:7-13; 6T81:25 to 82:8; 8T93:21 to 94:4.)

For several months in early 2021, Lockwood became unresponsive and RT Environmental was unable to contact him. (4T54:9 to 55:5; 8T93:15-23.) RT Environmental finally made contact with Lockwood in April 2021, at which time

Lockwood advised—yet again—that the RIR would be ready in about two weeks. (4T54:21 to 55:12.) Around that time, Defendant Grammer also reached out to Trzcinski, her LSRP, to inquire as to the delays and issues with submissions to the NJDEP. (Pa0387; 5T27:19 to 30:22.)

In approximately July 2021, Trzcinski dismissed himself as Defendants' LSRP due, in part, to Lockwood's failure to pay outstanding balances. (5T34:22 to 35:19.) Lockwood, on the other hand, displeased with Trzcinski's findings as to the RIR, stated only that there was "a reason" for his failure to pay Trzcinski (likely being that Lockwood was upset with Trzcinski that he would not sign off, as LSRP, on Lockwood's deficient RIR). (8T90:24 to 91:2, 98:13-24.) Thereafter, Defendants re-engaged Sullivan as their LSRP, and Sullivan understood that he was being retained for the purpose of obtaining a RAO for the Property; indeed, Sullivan's retainer agreement explicitly stated that the ultimate goal of his engagement was to obtain a RAO for the Property. (5T43:7-22, 45:9 to 46:20; 6T78:10 to 80:8, 144:25 to 145:3; 8T98:25 to 100:7.)

In December 2021, Sullivan submitted the RIR that had been prepared by Lockwood to the NJDEP. (4T188:7-10; 6T18:22 to 20:25, 81:3-7, 91:9 to 92:1; 8T100:14-16; Pa0388.) Despite repeated requests by Plaintiff and RT Environmental going back to 2020 to meet and review a draft RIR, Lockwood and

Sullivan never consulted with or provided a draft to Plaintiff or RT Environmental prior to submitting the RIR. (2T141:7 to 142:5; 5T46:21 to 47:6; 6T92:2-8; 8T100:14 to 101:11.) Plaintiff and RT Environmental received a copy of the RIR a few days after it was filed, and upon review, it was clear that other than a few minor additions, the RIR submitted by Sullivan to the NJDEP in December 2021 was essentially the same as the 2018 RI Summary Report. (4T59:19 to 60:2; 6T92:13 to 93:11; *see generally* Pa0292; Pa0388.)

After reviewing the RIR, RT Environmental determined that the remedial investigation had not been properly completed and drafted a letter to Defendants' representatives explaining the deficiencies. (4T58:13 to 59:18; Pa2277-79.) For example, the RIR that was submitted referenced a 2013 NJDEP Policy Statement regarding completeness that was superseded in 2020. (4T13:3 to 15:18, 75:2 to 76:2; Pa0406, § 3.8; Pa2371.) The 2020 NJDEP Policy Statement provides, in relevant part, as follows:

> [A] remedial investigation can be considered complete when the [LRSP] . . . can conclude: (1) there is sufficient information to know the nature and extent[, both horizontally and vertically,] of a discharge of a contaminant both on-site and off-site; (2) there is sufficient information to know which, if any, receptors may have been or may be impacted by the discharge being remediated; and (3) additional delineation is not necessary in order to select an appropriate remedial action to protect public health and the environment.

(Pa2372-73 (emphasis added).) Despite this clear guidance, Defendants never determined the nature and extent of on- or off-site contamination, and the RIR indicated that additional delineation and sampling was still needed at the Property. (4T75:2 to 80:21, 92:16 to 93:12, 94:10 to 95:3, 99:9-14; 6T105:8 to 109:4, 110:9-13; 8T94:13 to 95:13; Pa0405-08, §§ 3.7.2, 3.8, 4.1.) In fact, Sullivan was not even aware of off-site contamination until after this lawsuit commenced, and as of the final day of trial, Lockwood still had not determined the extent of off-site contamination. (6T102:12 to 103:5; 8T94:13 to 95:4.)

Between January 2022 and April 2022, RT Environmental and Sullivan exchanged comments regarding the RIR. (Pa2281-83; 4T188:22 to 190:2; 6T33:3 to 35:17.) Notably, the deficiencies identified by RT Environmental were largely consistent with those identified by Defendants' former LSRP, Trzcinski, in November 2020 (which at that point had been hidden from RT Environmental and the Alessis). (4T53:3 to 54:3; 6T81:25 to 82:20; Pa0362; Pa2277-79; Pa2281-83.) In fact, Sullivan confirmed at trial that from the time of Trzcinski's November 30, 2020 email to the filing of the RIR on December 27, 2021, no further remedial investigation activities occurred at the Property. (6T82:21 to 83:17.)

With respect to the NJDEP, the specific process that the NJDEP uses to assess a RIR is not publicly known, but consists of multiple levels of review and can take

several years. (4T121:7-20; 6T21:1-16, 27:21 to 28:4, 116:11 to 117:2.) Here, the NJDEP identified deficiencies in the RIR and communicated the same to Defendants beginning in August 2022. (4T118:19 to 120:22, 122:18 to 123:25; 5T47:7 to 48:8; 6T22:2 to 25:14, 26:9 to 27:15; Pa2284-86; Pa2292-95; Pa2296-2305.) Despite Defendants' express obligation under the PSA, Defendants kept Plaintiff in the dark as to their communications with the NJDEP; Plaintiff and RT Environmental were wholly unaware that Defendants were communicating with the NJDEP regarding the RIR until receiving the same in 2023 in discovery in this lawsuit. (2T174:8 to 175:10, 179:5-19; 4T69:14 to 70:9; 5T48:9 to 50:3; Pa2284-86; Pa2288-89.)

In October 2022, the NJDEP notified Sullivan that the RIR was incomplete because Defendants had not performed the required door-to-door survey of nearby properties in connection with groundwater contamination, and on December 19, 2022, the NJDEP advised Sullivan that they would be holding their review of the RIR until the door-to-door survey was completed. (4T123:8-25; 6T22:16-24, 121:7-22; Pa2292-95.) Despite receiving this feedback in October 2022, Sullivan did not complete and submit the results of the door-to-door survey until the morning of July 20, 2023—just hours before he testified at trial. (6T121:7 to 122:14.)

The NJDEP also identified deficiencies with respect to the classification exception areas ("CEAs"), for which Sullivan failed to submit the required

applications at the time he submitted the RIR. (4T115:2 to 116:10, 118:19 to 120:15; 6T24:13 to 25:14, 26:9 to 27:15, 122:9-14; Pa2288-91.) Between August 2022 and April 2023, Sullivan exchanged numerous emails with the NJDEP and provided additional information and submittals regarding the CEAs. (4T119:13 to 120:22; 6T24:13 to 25:14, 26:9 to 27:15; Pa2284-86; Pa2296-2305.) The NJDEP approved the CEAs on June 29, 2023, with the caveat that such approval does not mean that further delineation will not be required. (4T120:23 to 121:1; 6T27:4 to 28:4, 118:5-21.)

Plaintiff commenced this lawsuit on April 28, 2022. (Pa0001.) In May 2022, the parties and their respective attorneys, representatives, and environmental consultants convened to discuss the current situation and attempt to resolve their disputes and the issues surrounding the RIR. (3T126:9 to 127:5; 5T163:8-20.) During a subsequent phone call between Defendant Grammer and Vincent Alessi, Vincent Alessi proposed that the purchase price for the Property be reduced to $100,000 and, in exchange for the $900,000 discount, Plaintiff would assume Defendants' environmental obligations under the PSA. (5T163:8 to 164:18.) Although Defendant Grammer was in agreement with the proposal, she declined to accept the offer after receiving the proposed terms in writing. (5T163:8 to 164:18, 166:8-21.)

Thereafter, consistent with their access rights under the PSA, and as permitted by the trial court, Plaintiff and RT Environmental performed additional sampling and surveying between September and December 2022. (4T62:12 to 67:13, 86:2-22, 104:1-22, 114:2-15; 6T103:12-14.) RT Environmental also continued pleading with Lockwood to provide them with necessary data and documentation, but Lockwood was ultimately unable to produce anything, and to date, RT Environmental has not received any of the data or documentation it sought. (4T67:14 to 69:13; Pa2376.) In addition, because Lockwood failed to conduct the ground penetrating radar ("GPR") survey that he indicated in the 2018 RI Summary Report would be done, RT Environmental engaged a subcontractor to do so, and the GPR survey revealed a previously undisclosed UST on the northeast corner of the Property. (4T64:19 to 67:13, 114:2-15, 203:10 to 204:4; 6T54:16 to 55:4, 125:1-23; Pa2378-81.)

Although Defendants submitted the RIR to the NJDEP in December 2021, the remedial investigation remains incomplete; to date, Defendants have not fully completed the vertical and horizontal delineation required by the NJDEP and are unable to determine whether there is any off-site contamination. (4T58:13-23, 76:3 to 80:21, 92:16 to 93:12, 99:9-14, 200:15 to 201:24, 202:13-19; 6T88:1-24, 94:10 to 95:3, 102:12 to 103:5, 106:17 to 110:13; 8T94:13 to 95:13; Pa0405-08, §§ 3.7.2, 3.8, 4.1.) At trial, Sullivan acknowledged that in his view, the remedial investigation was

"at least complete enough" to move onto the next phase, but in truth, he was just kicking the can down the road and shifting the burden to Plaintiff to complete delineation during the redevelopment process. (6T31:26 to 32:12, 106:17 to 107:24; 8T94:13-15.)

Nevertheless, at this stage, it is possible for Defendants to work toward and obtain a site-wide RAO for the Property. (4T140:7 to 142:6; 6T122:21 to 126:15; 8T69:7 to 70:21.) To do so, after the remedial investigation phase is complete, Defendants would need only ensure that the Property is adequately capped. (4T140:4 to 141:9.) In fact, most of the Property already qualifies as being capped by the concrete and asphalt foundations that are in place, and AOC-2 is the only remaining AOC that is uncapped. (4T141:2-9; 8T69:7 to 70:4.) In addition, the mere fact that Plaintiff intends to redevelop the Property in no way affects Defendants' ability to obtain a RAO; rather, after Defendants sufficiently cap the Property and obtain the RAO, Plaintiff can perform the redevelopment and modify the Remedial Action Permit to indicate that the previous cap was removed and replaced during redevelopment. (4T141:10 to 142:6; 6T122:21 to 124:16; 8T69:7 to 70:21.)

LEGAL ARGUMENT

POINT I

APPLICABLE STANDARD OF REVIEW

A mixed standard of review applies to the Final Judgment. "[F]or mixed questions of law and fact, [an appellate court] give[s] deference . . . to the supported factual findings of the trial court, but review[s] *de novo* the lower court's application of any legal rules to such factual findings." *State v. Pierre*, 223 N.J. 560, 577 (2015) (quoting *State v. Harris*, 181 N.J. 391, 416 (2004)); *Kieffer v. Best Buy*, 205 N.J. 213, 223 n.5 (2011) ("*De novo* review of a contract is predicated on the absence of a factual dispute at issue. When there is such a factual dispute, the finder of fact must resolve it, and a deferential standard of review applies."); *Jennings v. Pinto*, 5 N.J. 562, 569-70 (1950). Thus, the Court should defer to the trial court's factual findings that are "supported by sufficient credible evidence in the record," *State v. Mohammed*, 226 N.J. 71, 88 (2016) (citation omitted), however, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

With respect to the Discovery Order, an abuse of discretion standard applies. *Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc.*, 230 N.J. 73, 79-80

(2017). Although a reviewing court will generally "defer to a trial court's disposition of discovery matters, including the formulation of protective orders, unless the court has abused its discretion, deference is inappropriate if the court's determination in drafting its order is based on a mistaken understanding of the applicable law." *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 559 (1997) (citations omitted); *Capital Health Sys., Inc.*, 230 N.J. at 79-80 ("[A]ppellate courts . . . will defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.").

POINT II

THE TRIAL COURT'S INTERPRETATION OF THE PSA IS UNSUPPORTED BY THE FACTS AND THE LAW (Pa0192; Pa0194)

A. The Trial Court Erred in Dismissing Count One of the Complaint and Granting in Part and Denying in Part Specific Performance

The trial court's interpretation of the PSA is flawed as a matter of fact and law. The Final Judgment is based on the trial court's factual findings as to the parties' intent with respect to the PSA, which the trial court relied upon to interpret the PSA and ultimately determine the parties' respective obligations thereunder. In reaching the Final Judgment, the trial court disregarded dispositive evidence and testimony establishing that Defendants are obligated under the PSA to obtain a site-wide RAO,

and the trial court's interpretation of the PSA runs counter to the firmly established principles of contract interpretation.

1. Applicable Law

When interpreting a written contract, a court may not "make a different or better contract than the parties have seen fit to make for themselves." *Schnakenberg v. Gibraltar Savings & Loan Ass'n*, 37 N.J. Super. 150, 155 (App. Div. 1955). Rather, the polestar of contract construction is to discover "the intention of the parties to the contract as revealed by the language used, taken as an entirety." *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269 (2006) (quoting *Atl. N. Airlines v. Schwimmer*, 12 N.J. 293, 301 (1953)) (emphasis added). To aid the interpretation of an integrated contract, evidence of the situation of the parties and surrounding circumstances is always admissible, even where the contract is free from ambiguity on its face. *Schwimmer*, 12 N.J. at 301.

Importantly, however, where a contract is integrated, the parol evidence rule bars the introduction of extrinsic evidence that tends to alter, vary, or contradict the integrated written agreement. *See U.S. v. Clementon Sewerage Auth.*, 365 F.2d 609, 613 (3d Cir. 1966); *Conway*, 187 N.J. at 269. Indeed, as stated by the New Jersey Supreme Court in *Schwimmer*,

> [t]he admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

Schwimmer, 12 N.J. at 301-02 (emphasis added); *Clementon Sewerage Auth.*, 365 F.2d at 613 ("[E]vidence, whether parol or otherwise, of antecedent understanding and negotiations will not be admitted for the purpose of varying or contradicting the writing." (citation omitted)).

To prove a claim for breach of contract, a plaintiff must establish (1) the existence of a contract containing certain terms; (2) that the plaintiff did what the contract required it to do; (3) that the defendants did not do what the contract required them to do; and (4) that the defendants' breach caused a loss to the plaintiff. *See, e.g.*, *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 482 (2016). "Each element must be proved by a preponderance of the evidence," which requires the plaintiff to "establish that a desired inference is more probable than not." *Ibid.* (citations omitted).

Specific performance is a discretionary remedy based upon equitable principles. *Stehr v. Sawyer*, 40 N.J. 352, 357 (1963).

> [T]o establish a right to the remedy of specific performance, a plaintiff must demonstrate that the contract in question is valid and enforceable at law, that the terms of the contract are "expressed in such fashion that the court can determine, with reasonable certainty, the duties of each party and the conditions under which performance is due," and that an order compelling performance of the contract will not be "harsh or oppressive."

Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598-99 (App. Div. 2005) (citations omitted). Thus, the right to specific performance turns not only on whether the plaintiff has a legal right, but also whether performance of the contract represents an equitable result. *Id.* at 605.

To demonstrate, *89 Water Street Assocs. v. Reilly*, 2019 WL 4793073, at *1 (App. Div. Oct. 1, 2019) (unpublished opinion, cited in accordance with *R.* 1:36-3), involved a contract for the sale and purchase of a contaminated property. (Pa2383.) The parties' contract contained a closing date of August 15, 2005, and provided that if the conditions in the agreement had not been satisfied by that date, the closing date could be extended for an additional six months. *Ibid.* As a condition precedent to the plaintiffs-purchasers' obligations, the defendants-sellers were required to obtain prior to closing certain environmental clearance documents which, after the enactment of the SRRA in 2010, included a RAO. *Id.* at *2. If the sellers failed to

obtain a RAO by the closing date, the purchasers had the right to cancel the contract; however, in the event that the sellers continued to work in good faith toward obtaining the RAO, neither party was permitted to cancel the contract. *Ibid.* For approximately seven (7) years after signing the contract, the sellers continued to work with the NJDEP toward a RAO. *Ibid.* In December 2012, the sellers attempted to cancel the contract, but the purchasers wished to proceed and rejected the sellers' position that the contract was terminated. *Id.* at *3.

In 2015, the purchasers filed suit alleging, among other things, breach of contract and breach of the implied covenant of good faith and fair dealing, for which they sought a declaratory judgment and specific performance. *Ibid.* At trial, the sellers argued that the purchasers did not seek to extend the closing date and suggested that the remediation efforts had become too costly. *Id.* at *3-4. The trial court determined that neither party could cancel the contract while the sellers continued to work with the NJDEP, but that given the parties' expectation of a quick transaction, the length of time the sellers pursued the RAO, delays by the NJDEP, the cost and time of the LSRP process, and the language of the contract, the contract would be specifically enforced to allow the purchasers to either cancel the contract or proceed to closing and assume the cost of obtaining the RAO. *Id.* at *4-5. The purchasers appealed, arguing that the trial court erred by making purchasers'

contractual right to purchase the property conditioned upon the purchasers' assumption of the sellers' environmental obligations under the contract. *Id.* at *1.

The Appellate Division agreed with the purchasers, finding that the trial court misinterpreted the contract and that the evidence did not support the trial court's findings as to the parties' expectations. *Id.* at *7. Among other things, there was no evidence to suggest that the parties contemplated a limitation on costs, and the sellers' conduct until December 2012 demonstrated that the sellers were not concerned with the time or expenses, but rather moved forward with the matter as originally contemplated by the parties' agreement. *Id.* at *8-9, 11. In addition, the Appellate Division found that there was no evidence indicating that the parties intended to shift the burden of the costs associated with the sellers' environmental obligations to the purchasers, *id.* at *8, and reiterated that it is not the court's function "to rewrite a contract for the parties better than or different from the one they wrote for themselves." *Id.* at *9 (quoting *Kieffer*, 205 N.J. at 223). Thus, the Appellate Division reversed and remanded, concluding that that the purchasers were entitled to relief and the contract "should have been enforced without modification"—in other words, the sellers were obligated to complete their remediation obligations and obtain the RAO. *See id.* at *11.

2. The Final Judgment

Here, the trial court's conclusion that "the obligations of the parties pursuant to the PSA would be for Defendants to complete the RIR to the satisfaction of the NJDEP and subsequently turn over responsibility for the remaining remediation to Plaintiff" is unsupported by the evidence and incorrect as a matter of law. (Pa0230.) The evidence and testimony elicited at trial clearly establish that Defendants understood that they were required under the PSA to obtain a site-wide RAO, and there is nothing in the PSA to support the trial court's finding that Defendants were required only to submit the RIR prior to closing. (Pa0261, Art. 11.2; 2T97:23 to 98:21; 4T44:17 to 45:5, 147:24 to 148:21, 249:18 to 250:2; 5T43:7-21, 45:11 to 46:20, 162:16 to 163:7; 6T78:10 to 80:8, 144:25 to 145:3; 8T31:8-22, 61:5-10, 64:3 to 65:15, 68:7 to 69:4.) However, the trial court improperly relied on extrinsic evidence and effectively rewrote the PSA—which does not contain a single reference to the RIR—to the Defendants' benefit. Moreover, as in *89 Water Street Assocs.*, the trial court's order for specific performance improperly shifts the burden of Defendants' contractual obligations to Plaintiff. *See* 2019 WL 4793073, at *8-11.

The testimony elicited from Defendant Grammer and her representatives at trial contradicts the trial court's determination that the PSA required only that Defendants finalize and submit the RIR prior to closing. For example, on cross-

examination, Lockwood, on whom Defendant Grammer primarily relied to handle environmental matters in connection with the PSA, expressly stated that "[b]ased on the contract, [the Alessis] had [Defendant Grammer] staying in the project until an RAO was possibly obtained." (8T31:8-22.) Lockwood further testified that after reading the PSA (which he had no part in drafting or negotiating in the months prior to its execution), he understood that Defendants were responsible for obtaining the RAO. (8T68:7 to 69:4, 70:19-21.) And although Defendant Grammer attempted to change her testimony at trial, she admitted during her sworn deposition that her obligations under the PSA included obtaining the RAO. (5T162:16 to 163:7.) Even Defendants' LSRP, Sullivan, understood that when he was re-engaged as the LSRP in 2021, the ultimate goal of his engagement was to issue a site-wide RAO, and Sullivan stated the same in his retainer proposal to Defendant Grammer. (6T78:10 to 80:8, 144:25 to 145:3.) Nevertheless, the trial court disregarded this evidence in determining that Defendants were obligated only to submit the RIR.

Further, the trial court's determination that Defendants' interpretation of Article 11 of the PSA "is more plausible and in line with the language contained within the four corners of the contract" is belied by the PSA itself. (Pa0228.) There is no dispute that Defendants were required to finalize and submit a RIR to the NJDEP prior to closing, yet that obligation is not stated in the PSA. (2T154:21 to

155:6; 4T15:19-23, 45:1-19; 6T18:20 to 19:4, 27:21 to 28:10; 8T38:3-21.) In fact, the term "RIR" does not appear anywhere in the PSA. (2T95:12-15; *see generally* Pa0246-91.) However, this obligation did not arise from thin air; rather, the Defendants' obligation to submit the RIR is merely a statutory and known prerequisite toward satisfying their express obligation under the PSA to obtain a site-wide RAO. (2T154:21 to 155:6; 4T15:19-23; 8T38:3-21; Pa2371-74.)

In determining that the PSA required only that Defendants submit the RIR, the trial court effectively rewrote the PSA for the Defendants' benefit. *See Schnakenberg*, 37 N.J. Super. at 155. To the extent that any extrinsic evidence suggests that the parties' intent was for Defendants to be responsible only for submitting the RIR, the term "RIR" does not appear anywhere in the PSA, and "an intention wholly unexpressed in the writing . . . is irrelevant." *Schwimmer*, 12 N.J. at 301-02. Moreover, contrary to the firmly established principles of contract interpretation, the trial court relied on extrinsic evidence as to the parties' intent to alter the terms of the PSA and manufacture an obligation that does not appear anywhere in the parties' written agreement. *See Schwimmer*, 12 N.J. at 301-02.

In reaching its conclusion, the trial court also relied on the "realities surrounding the remediation process" which, in order to obtain a RAO, will involve placing a cap on the Property. (Pa0229.) Specifically, the trial court noted that

during redevelopment, any caps on the Property would be destroyed or damaged by the redevelopment work. (*Ibid.*) At trial, Plaintiff's expert clearly explained that Plaintiff's redevelopment plans have no effect on Defendants' ability to obtain a RAO. (4T141:10 to 142:6.) In addition, the remedial actions that Defendants would need to take to obtain a RAO at this stage would be far less extensive than those that Plaintiff would need to take during redevelopment. (*Ibid.*) Regardless, Plaintiff's future redevelopment plans are simply irrelevant to the Seller's Environmental Obligations under the PSA.

Defendants' obligations under the PSA are clear: Defendants are to cooperate with Plaintiff and Plaintiff's LSRP to secure prior to closing, to the extent possible, a site-wide RAO. (Pa0261, Art. 11.2.) And as demonstrated by the evidence and testimony from trial, it was and remains entirely possible for Defendants to work toward and ultimately obtain the site-wide RAO with relatively minimal effort. (4T140:7 to 142:6; 6T122:21 to 126:15; 8T69:7 to 70:21.) And, pursuant to Article 11.2(b) of the PSA, Plaintiff is entitled to extend the Closing Date until Defendants satisfy the Seller's Environmental Obligations under Article 11—that is, until Defendants obtain a site-wide RAO for the Property. (Pa0261, Art. 11.2(b).)

As to the remedy, pursuant to Article 13.2 of the PSA, Plaintiff is entitled to specific performance of the PSA in the event of a default by Defendants, which

includes the Defendants' failure to satisfy the Seller's Environmental Obligations. (Pa0265, Art. 13.2.) However, rather than requiring Defendants to comply with their contractual obligations, the trial court's order for specific performance provided Plaintiff the opportunity to either (i) close on the Property within thirty (30) days and assume the responsibility for obtaining the RAO, or (ii) terminate the contract. (Pa0192-93.) There is nothing in the PSA to indicate that the parties contemplated shifting the Seller's Environmental Obligations to Plaintiff. Rather, as in *89 Water Street Assocs.*, it was improper for the trial court to unilaterally shift the burden of Defendants' contractual obligation to obtain the RAO to Plaintiff and effectively rewrite the PSA. *See* 2019 WL 4793073, at *8-11; *Kieffer*, 205 N.J. at 223.

In sum, the trial court's interpretation of the PSA is unsupported by the evidence and the law. The PSA expressly provides that the Seller's Environmental Obligations include obtaining a site-wide RAO to the extent possible, and by all accounts, it was and remains possible for Defendants to do so. Moreover, because the PSA imposes the obligation to obtain the RAO on Defendants, the trial court's order for specific performance is improper as a matter of law. Accordingly, the Final Judgment should be reversed as to Count One of the Complaint, and Plaintiff is entitled to an order for specific performance requiring Defendants to satisfy their obligations under the PSA and obtain a site-wide RAO.

B. The Trial Court Erred in Dismissing Count Three of the Complaint

The trial court further erred in dismissing Plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The trial court based its dismissal primarily on its determination as to the parties' obligations under the PSA which, as explained above, is factually and legally improper. (Pa0231.) The trial court further concluded that Plaintiff failed to sufficiently indicate that Defendants acted in bad faith or with wrongful motives in their performance of the PSA. (Pa0231-32.) For the reasons explained below, the trial court's dismissal of Count Three of the Complaint must be reversed.

"Every party to a contract . . . is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 224 (2005). To establish a claim for breach of the implied covenant, a party "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." *Id.* at 225 (quotation omitted).

In *Brunswick Hills*, the Supreme Court held that specific performance of a real estate contract was warranted as a result of the defendant's breach of the implied covenant of good faith and fair dealing. *Id.* at 231-32. There, a commercial tenant

was contractually required to exercise an option for a long-term lease by both giving notice and tendering a fixed sum of money to the landlord by a specific date. *Id.* at 214. The tenant timely notified the landlord of its intent to exercise the option but failed to make the up-front payment necessary to perfect the option. *Ibid.*

Over the next nineteen months, the tenant repeatedly wrote and spoke with the landlord for the purpose of setting the date and terms of the closing. *Ibid.* The landlord, through a series of written and verbal evasions, delayed responding to the tenant's requests. *Ibid.* The landlord never requested the option payment or advised the tenant that it had not fulfilled an essential term of the contract. *Ibid.* When the deadline for exercising the option passed, the landlord, for the first time, pointed out the deficiency to the tenant and unilaterally declared the option "null and void." *Ibid.* Under these circumstances, the Supreme Court came to the "inescapable conclusion" that the landlord breached the implied covenant of good faith and fair dealing. *Id.* at 229-30. The court reached this conclusion even though the tenant had breached the terms of the parties' contract regarding the exercise of the option. *Id.* at 223-24. Notwithstanding the tenant's breach, as a consequence of the landlord's breach of the implied covenant of good faith and fair dealing, the Supreme Court ordered specific performance of the lease option in accordance with the terms of the contract. *Id.* at 231-32.

Like the landlord in *Brunswick Hills*, Defendants breached the implied covenant of good faith and fair dealing. After executing the PSA, while Plaintiff and its representatives performed their respective obligations, Defendants and their representatives did virtually nothing to complete delineation and work toward satisfying the Seller's Environmental Obligations under the PSA; instead, Defendants and their representatives repeatedly lied and withheld information regarding the status of the remedial investigation, concealed their communications with the NJDEP, disregarded deficiencies in their documentation, and otherwise wholly failed to cooperate with Plaintiff and its representatives throughout the process. (2T141:12 to 142:5, 174:8 to 175:10, 179:5-19; 4T45:20 to 47:18, 49:2 to 50:7, 54:16 to 55:12, 69:14 to 70:4; 5T46:21 to 47:6; 6T88:1-24, 92:2-8, 94:10 to 95:3, 102:12 to 103:5; 8T87:18 to 89:7, 91:3 to 92:5, 93:15 to 94:4, 94:13 to 95:4, 100:14 to 101:11.) Indeed, Defendants and their professionals worked surreptitiously to allegedly complete the RIR process up to and including one of the last days of trial—all the while ignoring the deficiencies identified by their own LSRP, Trzcinski, and RT Environmental, about incomplete horizontal and vertical delineation of contaminants as required by applicable NJDEP guidance. (2T174:8 to 175:10, 179:5-19; 4T52:24 to 54:8, 69:14 to 70:9, 120:23 to 121:1; 5T46:21 to 48:8; 6T27:16-20, 88:1-24, 92:2 to 93:11, 94:10 to 95:3, 102:12 to 103:5; 8T93:15

to 95:4, 100:14 to 101:11.) Thus, contrary to the trial court's conclusion, the evidence sufficiently demonstrates that Defendants acted in bad faith in their performance of the PSA and deprived Plaintiff of its benefit of the bargain.

In short, Defendants' bad faith performance of the PSA and attempt to shift liability to Plaintiff for contaminants that, to date, remain undefined, constitutes a breach of the implied covenant of good faith and fair dealing. Accordingly, Plaintiff is entitled to specific performance of the Seller's Environmental Obligations under the PSA, and the trial court's dismissal of Count Three of the Complaint should be reversed.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION AND MISAPPLIED THE LAW IN DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND GRANTING DEFENDANTS' CROSS-MOTION FOR A PROTECTIVE ORDER (Pa0190; 1T20-23)

With respect to the Discovery Order, the trial court abused its discretion and misapplied the law in denying Plaintiff's motion to compel the deposition of a representative of the Law Office of Raquel Romero and granting Defendants' cross-motion for a protective order. For the reasons explained below, if the Final Judgment is not reversed consistent with the foregoing, the Discovery Order had a profound impact on this litigation and poisoned the Final Judgment, and thus the Final

Judgment should be reversed to afford Plaintiff the opportunity for limited additional discovery, and the case remanded for re-trial on a full record.

When reviewing a discovery order, "appellate courts must start from the premise that discovery rules 'are to be construed liberally in favor of broad pretrial discovery.'" *Capital Health Sys., Inc.*, 230 N.J. at 80 (quoting *Payton*, 148 N.J. at 535). Indeed, New Jersey courts have "long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties [may become] conversant with all available facts." *Ibid.* (quoting *Jenkins v. Rainner*, 69 N.J. 50, 56 (1976)). As such, parties are entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." *R.* 4:10-2(a). To that end, "there is no general prohibition against obtaining the deposition of opposing counsel regarding relevant, non-privileged information." *Kerr v. Able Sanitary and Environmental Servs., Inc.*, 295 N.J. Super. 147, 154 (App. Div. 1996); *see also R.* 4:10-2(a); *R.* 4:14-1.

Although a "request to depose a party's attorney itself constitutes presumptive 'good cause' for a protective order" under *R.* 4:10-3, the party seeking discovery may overcome that presumption by demonstrating that "the propriety and need for the deposition outweigh the possible disruptive or burdensome effects that the prospective deposition will have on the underlying litigation." *Kerr*, 295 N.J. Super.

at 158. In evaluating the propriety and need for the deposition of an opposing attorney, courts should consider: (1) "the relative quality of the information purportedly in the attorney's knowledge;" (2) "the availability of the information from other sources that are less intrusive into the adversarial process, *i.e.*, the extent to which all other reasonable alternatives have been pursued to no avail;" (3) "the extent to which the deposition may invade work product immunity or attorney-client privilege;" and (4) "the possible harm to the party's representational rights by its attorney if called upon to give deposition testimony." *Id.* at 159.

In *Kerr*, the Appellate Division expressly recognized that circumstances exist under which a party's attorney may be compelled to submit to a deposition: "For instance, . . . where an attorney is a fact witness in the sense that the attorney has observed or participated in the underlying transaction or occurrence giving rise to the cause of action, the presumption in favor of a protective order may be overcome." *Id.* at 159-60; *see also Johnston Dev. Grp., Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) ("The deposition of the attorney may be 'both necessary and appropriate' where the attorney may be a fact witness, such as an 'actor or viewer,' rather than one who 'was not a party to any of the underlying transactions giving rise to the action.'" (citations omitted)).

Here, the trial court's Discovery Order is premised on a misapplication of the law. During oral argument, the trial court found that the discovery sought from Ms. Romero was privileged, that Plaintiff failed to overcome the presumption in favor of a protective order, that Ms. Romero was not a fact witness, and that the information sought could have been "directly and easily" sought from Defendant Grammer. (1T22:6-19.) These findings are unsupported by the motion record and, as explained below, completely ignore the Appellate Division's clear guidance in *Kerr*. *See Kerr*, 295 N.J. Super. at 159-60.

Ms. Romero was retained as Defendants' transactional counsel in July 2019. (Pa0118, ¶ 7.) For the next three months, the parties and their respective transactional attorneys negotiated the PSA until its execution in September 2019. (Pa0123, ¶ 3.) In addition to pre-contract negotiations with Plaintiff's transactional counsel, Ms. Romero's firm remained counsel to Defendants over the next three years and directly participated in numerous communications and meetings involving Plaintiff and its counsel regarding obligations and disputes arising under the PSA. (Pa0123, ¶ 3; Pa0156 at 83:2-20; Pa0161 at 102:4-22.) Moreover, Defendant Grammer acknowledged in her sworn deposition testimony that she believes Ms. Romero is the most knowledgeable person on Defendants' side regarding the terms and conditions of the PSA. (Pa0123, ¶ 3; Pa0146 at 43:3 to 44:11.)

Thus, in seeking discovery from Ms. Romero, Plaintiff was not seeking privileged testimony or documents; rather, Ms. Romero was directly involved in the negotiations of the PSA, and thereafter took positions on behalf of Defendants regarding the terms and conditions of the PSA, as well as compliance (or non-compliance) therewith over the course of three years as Defendants' transactional counsel. These are precisely the circumstances under which the Appellate Division in *Kerr* recognized that an attorney may be compelled to submit to a deposition. *See Kerr*, 295 N.J. Super. at 159-60. Despite the Appellate Division's clear and express guidance in *Kerr*, the trial court improperly denied Plaintiff's motion to compel the deposition of Ms. Romero and granted Defendants' cross-motion for a protective order.

The Discovery Order poisoned the trial and, as a result, the Final Judgment. Because discovery from Ms. Romero was prohibited, she continued as Defendants' trial counsel without fear of violating *R.P.C.* 3.7. Ms. Romero, however, had personal knowledge as to what occurred during the negotiation and drafting of the PSA and was able to make unchallenged statements and arguments at trial, and even pose questions in suggestive ways, based upon her personal involvement without fear of cross-examination. On the other hand, it would have been highly prejudicial to Plaintiff to call its transactional counsel, Mr. Kinon, to testify without Plaintiff

also being afforded the opportunity to cross-examine Defendants' transactional counsel, Ms. Romero. Despite the risk of prejudice to Plaintiff and his prior conclusion that discovery from Ms. Romero would be privileged and/or duplicative, the trial judge nevertheless made it a point to note during trial that testimony from Mr. Kinon was absent, but the absence of testimony from either parties' transactional attorney was the direct result of the Discovery Order and impacted the admissibility of certain other written evidence as well. (2T29:23 to 31:9, 81:19 to 87:8, 135:13 to 136:17.)

Thus, without testimony from either transactional attorney, in reaching the Final Judgment, the trial court ultimately ruled on the meaning of the PSA without the opportunity to hear from its drafters, which opportunity was improperly foreclosed by the Discovery Order. As such, the Discovery Order should be reversed to grant Plaintiff the opportunity to conduct limited additional discovery, and the Final Judgment should be vacated and remanded for re-trial based on a full record.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully asks that this Court reverse the Final Judgment and grant specific performance ordering Defendants to comply with their obligations under the PSA and secure a site-wide RAO or, alternatively, reverse the Final Judgment and remand this matter for re-trial consistent with this

Court's decision. Further, Plaintiff respectfully asks that this Court reverse the Discovery Order to afford Plaintiff the opportunity to conduct limited additional discovery, vacate the Final Judgment, and remand the case for re-trial based on a full record.

Respectfully submitted,

CLARK GULDIN
Attorneys for Plaintiff-Appellant

By: _____
Jonathan T. Guldin, Esq.

Dated: February 2, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET No. A-000017-23, TEAM 02

2430 MORRIS AVENUE, LLC
Plaintiff-Appellant

-against-

DEBORAH GRAMMER, AS THE ADMINISTRATOR OF THE ESTATE OF LEE WEINSTEIN, MARTIN IPPOLITO
Defendants - Respondents - Cross Appellants

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY. CHANCERY DIVISION, UNION COUNTY

SAT BELOW HONORABLE ROBERT J. MEGA, P.J.Ch.

BRIEF/REPLY BRIEF FOR DEFENDANTS-RESPONDENTS-CROSS APPELLANTS DEBORAH GRAMMER AND MARTIN IPPOLITO

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Table of Contents

PAGE

Table of Authorities

Cases **Page (s)**

Rules and Statutes

Table of Judgements, Orders, and Rulings

PRELIMINARY STATEMENT

This appeal is in regards to the contract for the sale of environmentally compromised commercial real estate lots in Union County.

It is pivotal to understand that the Plaintiff/Appellant/Purchaser did not bring suit to compel a closing; instead, Plaintiff filed suit for specific performance to compel the seller to perform and file additional remediation plans. That duty - or rather whose duty it is - is the basis of the trial court decision, and now in the hands of the appellate court.

This distinction is critical to the ultimate ruling: namely that Defendants/Respondents/Sellers were not required to perform additional remediation but were required to close within thirty (30) days. Defendants were ready, but Plaintiff refused.

Following the trial, the presiding Chancery judge found no duty on the seller to perform and obtain a Remediation Action Order (RAO) for the redevelopment proposed by the Plaintiff for the vacant and obsolete commercial lots on Morris Avenue, Union, New Jersey.

Despite its extensive experience in redevelopment, Plaintiff maintained during the trial that Defendants/Respondents/Sellers, two unrelated seniors who inherited from a sibling and a spouse, had agreed to undertake a

remediation for which they had no experience, and for property on which there was no income.

The testimony of Plaintiff's main witness did not convince the trial judge as being credible. The language in the contract as written by Plaintiff's transactional attorney states only that Defendants would cooperate with Plaintiff. Moreover, Plaintiff's testimony yielded irrelevant but revealing statements about "Heiress," generational wealth, community value, and the like. In short, it became a diatribe against past generations' activities on the property.

Pursuant to its statutory obligation, Defendants produced an RIR that was ultimately filed with the NJ DEP on December 21, 2021. Defendants sought a closing date, and Plaintiffs stalled. Thereafter, Defendants filed a Time of Essence notice. Plaintiff became enraged and filed its own Time of the Essence notice (despite the fact that Defendants never refused to close title on the property).

When Defendants refused to enter into a joint venture with Plaintiff, Plaintiff filed suit against them.

During the trial, Plaintiff engaged in a protracted analysis of alleged "deficiencies' in the RIR. Its arguments are again recited in the Plaintiff's brief

- despite the fact that the RIR is never mentioned in the contract. Defendants produced the RIR because it is their statutory obligation as owners, and the property had been in default with the NJDEP for several years. The RIR was submitted on December 21, 2021, and accepted by the NJDEP on July 23, 2023 (during the trial). Yet, inexplicably, although Plaintiff could move forward to close title and proceed to redevelopment, it found fault with the RIR and refused to proceed to closing. Its tactics and delay should be seen for what it is: an attempt to force Defendants to perform an RAO using Defendants' DEP number, so that Plaintiff would not have the cost or the burden despite the substantial reduction in price already negotiated some four (4) years earlier.

As will be detailed in this brief, it is apparent that Plaintiff wants the Courts to force Defendants to perform, to any and all of Plaintiff's specifications, and only then, maybe, and at their absolute discretion, Plaintiff might possibly decide to close. Alternatively, if the Plaintiff did decide, voluntarily, to withdraw from the contract it would most likely only come if the Plaintiff could have the Court impose an unreasonable financial burden on the Defendants.

Following the trial, and pronounced in the Order for Judgment, the trial court gave Plaintiff thirty (30) days to close title or terminate the contract.

Plaintiff did neither. On September 4, 2023, a letter was sent by Plaintiff to Defendants stating that Plaintiff did not wish to close or otherwise take ownership of the property pending appeal. In fact, Plaintiff additionally filed another lis pendens to prevent the enforcement of the termination of the contract and prevent the Defendants from exercising their right to terminate.

While Plaintiff has a right to appeal, no party has a right to ignore the remedy imposed without seeking a stay. Their capricious failure to request a stay is a bar to any future purchase of the property in question, and this court is asked to affirm the trial court's decision to terminate the contract and discharge the lis pendens.

For that reason, Defendants have filed a cross-appeal in their effort to terminate the contract and discharge the lis pendens.

PROCEDURAL HISTORY

On February 24, 2022, Defendants sent Plaintiff a Time of the Essence letter setting a closing date of March 11, 2022. **Da1.**

On April 20, 2022, correspondence was sent from Attorney for Plaintiff, 2430 Morris Avenue, LLC to Attorney for Defendants, Deborah Grammer, as administrator, and Martin Ipolito, declaring Defendants in formal default under the PSA, Complaint #21. **Da2.**

On April 28, 2022, a three (3) count Complaint was filed on behalf of Plaintiff, 2430 Morris Avenue, LLC, against the Defendants for breach of contract, for a reformation of the contract, and for breach of the covenant of good faith and fair dealing. Plaintiff was seeking a mandatory injunction to compel Defendants to perform certain environmental obligations and/or awarding financial compensation to Plaintiff. **Pa0001.**

On August 2, 2022, a Notice of Lis Pendens was filed on behalf of Plaintiff. **Da8.**

On September 12, 2022, an Answer to Complaint and Counterclaim was filed on behalf of Defendants. **Pa0009.**

On January 18, 2023, a Motion to Compel Discovery was filed on behalf of Plaintiff. **Pa0030.**

On January 26, 2023, an Opposition to Motion and Cross Motion for Protective Order was filed on behalf of Defendants. **Pa0115.**

On January 30, 2023, A Reply Brief was filed with the Court by Plaintiff in response to Defendants' Opposition to Motion. **Pa0122.**

On February 2, 2023, an Order Granting the Defendants' Protective Order was filed. **Pa0190.**

On July 12, 2023, the trial before Judge Mega commenced. **2T5.**

On July 19, 2023, Oral Argument was presented to the Court by Defendants arguing a Motion to Dismiss. **5T61.**

On July 25, 2023, the Final Day of the trial, closing arguments were presented. **8T121.**

On August 24, 2023, the Order for Final Judgment issued by Judge Mega was filed. **Pa0194.**

On September 4, 2023, a Notice of Appeal was filed with the Appellate Division on behalf of Plaintiff. **Pa0236.**

On September 18, 2023, a Notice of Cross Appeal was filed with the Appellate Division on behalf of Defendants. **Da41.**

On November 17, 2023, a Motion to Dismiss the Appeal was filed with the Appellate Division on behalf of the Defendants. **Da12.**

On December 4, 2023, a denial of the Order to Dismiss was filed by the Appellate Court. **Da15.**

DEFENDANTS' STATEMENT/COUNTER STATEMENT OF FACTS

I. Owners and Ownership

The property in question has been in the Weinstein family since about 1919. It was a farm up until the 1940's when it then became a scrap metal recycling business. Pa0296; 8T16-21 to 17-9; 5T77-17.

When the founding generations passed on, the property passed to Lee Weinstein and his cousin Melinda "Mindy" Ippolito (nee Weinstein), grandchildren of Max Weinstein, the original owner. 5T76-25 to 77-9.

Lee Weinstein, brother to Deborah Grammer (nee Weinstein), ran and managed the property for his and Cousin Mindy's interest. Lee was the sole manager of the property from 2006 to when he died in 2014. 5T76-23 to 77-14; 5T80-13 to 21.

Neither Defendant in this lawsuit was a direct heir to the property from the founding member. 5T77-2; 5T80-13 to 21.

Mindy Ippolito passed away in 2008, with her 50% share of the property going to her husband Martin Ippolito. 3T198-15 to 23.

Upon Lee's death in 2014, his 50% share transferred to his sister, Deborah Grammer. 5T77-4 to 77-12.

Deborah Grammer then became the executor of Lee Weinstein's Estate, which includes the property in question. 5T79-23 to 25; 5T84-6 to 12.

Deborah Grammer has no prior experience, training, or interest in the field of environmental contamination and remediation. 5T93-10 to 12; 5T152-25 to 153-2.

Deborah Grammer has no advanced education, having left college after one (1) year to marry and have children. 5T79-8 to 13.

Martin Ippolito also has no prior experience in environmental contamination and remediation. 3T196-7 to 23.

II. Property – Environmental

Since 2011, the property has been under DEP oversight when a tenant, New Jersey Non-Ferrous Trading, had a hydraulic oil spill and remediation was required. Neither individual Defendant in this lawsuit was involved in that process at the time. 8T6-18 to 7-1; Pa0296 to Pa0297.

It was at this time that Lee Weinstein hired Environmental Consultant Joseph "Joe" Lockwood to oversee the work done by ECC, the environmental remediation company hired by the tenants. 8T6-19 to 7-7.

Upon completion of the remediation of the hydraulic oil spill and submission of a RAO specific to this spill cleanup, it was also reported to the NJDEP that the property, as a whole, was potentially contaminated with Lead and PCBs. Pa0297.

In light of these additional environmental issues needing to be addressed Lee Weinstein asked Joe Lockwood to stay on and work on the site investigation required by the NJDEP. Pa0297; 8T8-2 to 9-1.

In 2012, Edward "Ed" Sullivan was brought in by Joe Lockwood to be the LSRP for the property site remediation. 6T7-20 to 8-4.

Defendants will be in direct regulatory oversight on May 7, 2024. 5T125-1 to 13; 4T-9 to 25.

The stringent oversight regulation requires financial security bonds, retention or employment of an LSRP, and an environmental plan for remediation. 4T214-1 to 217-21.

III. Property Sale Negotiations and PSA

By 2018, it became clear to Deborah Grammer and co-owner Martin Ippolito that the family property would have to be sold. The property had become too much for Deborah Grammer and Martin Ippolito to handle. 4T237-6 to 12.

Deborah's son, Sam Grammer, referred Vincent Alessi to her. 4T237-20 to 21.

Deborah Grammer solicited Vincent Alessi to discuss the sale of the Weinstein commercial property 4T237-17.

The first meeting, in 2018, between Deborah Grammer and the Alessi brothers occurred at a diner across the street from the Property. 5T88-15 to 18.

The next meeting was held in the Bayonne Office of Vincent Alessi in 2019. 5T89-11 to 12.

In the initial pre-purchaser meeting, Joe Lockwood accompanied Deborah Grammer. In addition to the Alessi brothers and other family members, Gary Brown from RT Environmental, and the Alessi's Attorney at the time, Victor Kinon, were also there. 5T90-13 to 23.

During the first pre-purchaser meeting, Joe Lockwood provided the Alessi brothers with a copy of the Remedial Investigation Summary Report he and Ed Sullivan prepared for them. Pa0200; Pa0292.

Plaintiff required Defendant Deborah Grammer to sign two (2) confidentiality agreements in 2018 whereby Defendants, not Plaintiff, were required to maintain confidentiality about their own property and the transactions between the parties. 5T103-23 to 105-7; 7T-18 to 22; Da17; Da22; Da24.

The Alessi Group insisted on receiving all documentation and information related to any aspect of the property. 3T101-21 to 102-7.

The Alessi brothers are self-described redevelopers of contaminated properties. 2T34-24.

The Alessi group is a collection of corporate entities that profess to be redevelopers of environmentally contaminated commercial properties. 2T34-24;1T36-3 to 14;2T38-19 to 39-14.

Plaintiff engaged an LSRP as early as 2018, to whom Defendants were required to provide information and access. 4T20-2 to 14.

Lockwood testified that he had contact with Gary Brown of RT Environmental (who passed away) and then Christopher “Chris” Ward. 8T22-12 to 24-5.

Chris Ward, Alessi's LSRP, recalled that RT Environmental was retained by the Alessi brothers in May 2018, and that RT was on property taking samples as early as 2018. 4T33-25 to 34-4.

Plaintiff offered to hire Lockwood to do the Maecitite--a specialized remedial extraction process that has few other experts in New Jersey who have experience in using it. 8T20-6 to 10.

Both parties had ongoing and detailed discussions of both parties' intentions for nearly eighteen (18) months prior to the signing of the PSA. 7T4-22 to 6-10.

In anticipation of their purchase and subsequent redevelopment Plaintiff conducted and procured site plan/drawings and surveys. Da30; Da36; 5T91-15 to 92.

By the time the parties signed the PSA, Plaintiff had already received unfettered access to the property and all documentation in possession by Defendants. Pa0245; 3T85-13 to 23; 3T86-15 to 18.

Part of Defendants' obligation was to surrender and assign all prior insurance policies to, and for the benefit of, Plaintiff. Pa0245.

At the time of the signing of the PSA in September 2019, Plaintiff was aware that the property was in default (as of 2017) within the NJDEP's timeframe. 7T68-9 to 24.

At the time that the PSA was signed, the entity the Plaintiff was referred to as, 2430 Morris Avenue LLC, unknown to Defendants, had not yet been formed as a corporate entity and would not be formed until November 5, 2019, six (6) weeks after the date of signing. Da38.

According to the PSA and Alessi, the closing was anticipated to occur on or about May 2020. Pa0245; 7T71-18 to 23.

The closing was supposed to be quickly done; a quick closing was doable because Plaintiff was the developer. 8T35-6 to 18.

The PSA permitted the parties to close as is without an abatement. J-8; 7T24-11 to 20.

Vincent Alessi knew that the property was in "oversight status". 7T79-7 to 16.

Plaintiff understood that Defendants wanted to sell the property if the Plaintiff would cap and assume the remaining liability associated with the property. 7T12-17 to 23.

Vincent Alessi understood that the Defendants wanted to limit their continued responsibility. 7T12-17 to 23.

The discussion of price did not arise until January 2019 at which time Defendants sought a $1.5M price. Plaintiff balked and ultimately procured a reduction for remediation costs. 3T218-6 to 25; 5T94-1 to 95-19; 8T16-15-20.

The Purchase and Sale Agreement (PSA) was signed on September 19, 2019. Pa0245.

The purchase price of $1M was ratified in the PSA. Pa0245.

Vincent Alessi failed to respond clearly to the initial questions as to the reason why the price was reduced from $1.5M to 1M (7T12-9), only later attributing it to the difference in his appraised value versus the Defendants' appraised value (7T15-2 to 9) yet acknowledges that Defendants' concerns were discussed at the same time. 7T14-1 to 25.

When asked when a closing would occur, Vincent Alessi referred to sundry financial, environmental, regulatory and land use requirements that would prevent a closing. 7T34-07 to 22.

Defendants forwarded all documentation related to the property and ceded to demands made by Vincent Alessi to evict both tenants by 2020. 8T27-21 to 25.

Since 2020, the property in question remains without tenants. 5T84-20 to 24; 5T109-4 to 15.

IV. Redevelopment Plans and Actions

Although Vincent Alessi claimed otherwise, Plaintiff's intent was to keep Defendants' "on the hook" through redevelopment. 7T26-19; Pa0245.

Vincent Alessi wanted Defendants to enter into joint venture with Plaintiff for the development of the property, but Defendant Grammer unequivocally refused. 5T153-16 to 154-14; 8T19-14 to 20.

Plaintiff was already lining up prospective tenants prior to the initial closing date. 7T72-17 to 73-8; 7T125-6 to 16; 8T36-14 to 19; 2T126-17 to 127-3.

When asked the question as to why an experienced developer would want to go into business with inexperienced Defendants, Alessi responded that it was because of the Summary Investigation Report that Lockwood provided him with. 7T46-22 to 47-12.

From the time of the PSA execution forward, Plaintiff was never prevented from access to the property. Yet on September 7, 2022, Frank Alessi arrived--

without permission by or prior notice to Defendants -- on the property with backhoe, trucks, machinery and cut off the locks. 8T51-19 to 53-13.

V. Remediation, RIR, and RAO

The required procedures and filings to the NJDEP for this property are, first, the Preliminary Assessment (PA), followed by the Site Investigation (SI), then the Site Investigation Report (SIR), followed by the Remedial Investigation (RI), then the Remedial Investigation Report (RIR). 8T38-6 to 25.

The RAO is the final filing that needs to be submitted to the NJDEP after completion of the Full Site Remediation. 6T130-18 to 23.

Testimony from Joe Lockwood and Chris Ward both state that an RAO has a 3-year lookback or audit, after approval, from the NJDEP for continued compliance. 8T39-7 to 17; 4T12-20 to 22.

Vincent Alessi stated that he had previously completed RAOs on other properties. 7T18-8 to 23.

Vincent Alessi maintains that neither the RIR nor the RAO were completed. 6T21-5 to 21.

Defendants' environmental expert, Joe Lockwood, commented that typically the RAO and development are done together, or as he stated, the "cleanup and the remedy" based on the proposed site end use. 8T113-5 to 14.

Plaintiff's environmental expert, Chris Ward outlined the step-by-step process that connects redevelopment to the RAO. 4T220-7 to 20.

Vincent Alessi also acknowledged that RAO and redevelopment "go hand in hand". 7T15-18; 6T34-03.

Alessi was well aware that the site was in DEP oversight and fines had been assessed. 7T24-4 to 9; 7T79-7 to 80-3.

Plaintiff's Environmental Expert, Chris Ward, and Defendants' Environmental Expert, Ed Sullivan, both agree that a sitewide cap would be required to complete the remediation and obtain the RAO. 4T140-17 to 25; 6T47-14 to 16.

Plaintiff's Environmental Expert stated that, if the Defendants capped the site prior to sale, Plaintiff would then remove that cap and put in a new cap as part of the redevelopment. 4T141-14 to 20.

Plaintiff's Environmental Expert also stated that the RAO can only remain valid as long as the entire site is protected and that documentary modifications

are only done to the Remedial Action Permit which precedes the RAO, not to the RAO itself. 4T219-21 to 25.

Defendants' Environmental Expert stated that an RAO cannot be issued until the remediation is totally complete. 6T47-11 to 12.

Defendant's Environmental Expert also stated that the redevelopment itself acts as the cap, and that the DEP has to first issue a remedial action permit which covers the cap, including requirements for maintaining it. 6T47-20 to 5T48- 4.

Defendants' Environmental Expert additionally stated that the NJDEP permit review process could take up to a year. With the final capping and remediation required for the RAO after the permit is reviewed and approved, this process could take several years. 6T49-1 to 9.

All information regarding the RIR was disclosed to prospective purchaser, Plaintiff, and is also a matter of public record, as was known and confirmed by Alessi. Da39; 2T156-14 to 157-1.

On December 21, 2021, Defendants filed the Remediation Investigation (RIR). 6T11-5 to 8; 6T45-10 to 14.

After the RIR was filed, Plaintiff complained and threated litigation because it had been filed without prior notice to them of it being submitted to the NJDEP. 7T81-1 to 8.

After Plaintiff refused to close, Defendants sent a "Time of the Essence" notice in February 2022. D-14, 5T51-14 to 18.

In February 2022, Plaintiff sent Defendants their own "Time of the Essence" notice, but instead of closing, also filed their lawsuit in April 2022. Da1

During the course of the litigation and trial testimony, Plaintiff stated that the DEP would never accept the RIR as filed. 2T160-7 to 11.

On July 20, 2023, the DEP finalized and accepted the RIR. 6T126-16 to 22.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

In addressing an appeal of a contract case, the Supreme Court of New Jersey augmented the standard of review, stating:

> Although the interpretation of a contract is generally subject to de novo review, (citation omitted), we apply a deferential standard here because the trial court determined the validity of the retainer agreement by taking the testimony of the parties and by making credibility and factual findings, *see Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)*. "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" *Id. 154 N.J. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997*)). We may not overturn the trial court's fact findings unless we conclude that those findings are "manifestly unsupported" by the "reasonably credible evidence" in the record. *Seidman v. Clifton Sav. Bank, S.L.A.*, 205 N.J. 150, 169 (2011) (quoting *In re Tr. Created By Agreement Dated Dec. 20, 1961*, 194 N.J. 276, 284 (2008)). *Balducci v. Cige, 240 N.J. at 594-595.*

Because a trial court "'hears the case, sees and observes the witnesses, [and] hears them testify', it has a better perspective than a reviewing court in evaluating the veracity of witnesses." *Pascale v. Pascale,* 113 N.J. 20, 33 (1988*) (quoting Gallo v. Gallo,* 66 N.J. Super. 1, 5 (App.Div.1961)) (alterations in original).

"An appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand." *State v. Nash*, 212 N.J. 518 (2013). The trial court "has the opportunity to

make first-hand credibility judgments about the witnesses who appear on the stand; it has a 'feel of the case' that can never be realized by a review of the cold record."

The higher court noted that they are "obliged to give deference to those findings of the trial judge which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.'" *State v. Locurto,* 157 N.J. 463, 471 (1999) *(quoting State v. Johnson,* 42 N.J. 146, 161 (1964)). "We will set aside a trial court's findings of fact only when such findings 'are clearly mistaken.'" *State v. Dunbar,* 229 N.J. 521, 538 (2017) *(quoting State v. Hubbard,* 222 N.J. 249, 262 (2015)).

We respectfully submit that Plaintiff-Appellant-Purchaser (Plaintiff) cannot show such a "clear mistake" in the case at bar.

II. LEGAL ANALYSIS

A. THE TRIAL COURT CORRECTLY DECIDED THAT DEFENDANTS HAD NO DUTY TO OBTAIN AN RAO UNDER THE CONTRACT (Pa0192; Pa0194; Pa0245)

The first issue presented is whether Defendants-Respondents-Sellers (Defendants) were required to obtain an RAO prior to Selling the property, and if so, whether Plaintiff was entitled to specific performance to compel Defendants to perform the environmental obligation to obtain an RAO. Plaintiff contends that Defendants were required to obtain the RAO and are entitled to specific performance to compel Defendants to obtain it. The trial court answered "no."

Following is the factual history of the PSA as it relates to the lawsuit between these parties.

1. Negotiations

Defendant Grammer was introduced to Plaintiff Vincent Alessi in 2018. 4T238-3 to 5[1]. Defendants were told that Plaintiff was a redeveloper of contaminated properties. 5T88-19 to 89-3. Plaintiff's own statement in his

[1] 1T – Transcript of Motion, February 2, 2023
2T – Trial Transcript, July 12, 2023
3T – Trial Transcript, July 13, 2023
4T – Trial Transcript, July 18, 2023
5T – Trial Transcript, July 19, 2023
6T – Trial Transcript, July 20, 2023
7T – Trial Transcript, July 24, 2023
8T – Trial Transcript, July 25, 2023

pleadings, testimony, and briefs, convey his experience with and acquisition of environmentally challenged properties. 2T34-24 to 37-11. This information was a relief to Defendants who were inexperienced, having acquired the property through inheritance. Indeed, several witnesses at trial discussed Plaintiff's anticipated redevelopment plans for this site - plans that even pre-dated the PSA.

The initial meeting between the parties was held at the diner across from the property in question (5T88-15 to 18); present were Grammer, Vincent Alessi, Frank Alessi, and Joe Lockwood. 5T88-15 to 18. Subsequently, there were additional meetings between the parties. One such meeting was at Vincent's office. 5T89-11 to 12. The next meeting also occurred in Vincent's Bayonne office, (5T90-10 to 12) in which Plaintiff's contract attorney, Victor Kinon, Esq., was in attendance. 5T90-13 to 23. Subsequent to these meetings, discussions regarding the environmental conditions continued directly between the parties, with Grammer giving Lockwood "the lead" as to the environmental specifics. 5T93-7 to 17.

In 2019, before Defendants retained a transaction attorney, the parties had agreed upon the price. Defendants sought a $1.5 million sale price (5T94-1 to 11); and the issue of contamination was clearly discussed. 5T95-3 to 10. The amount of a $500,000 reduction in price was expressly testified to by Grammer

and by Lockwood. 8T16-15 to 20. Conversely, Plaintiff gave a vague statement about the reduced price being a result of appraisals. 7T11-10 to 21.

In addition, Plaintiff continued to meet with Lockwood during 2018 and 2019. 7T95-20 to 96-5. The parties' dealings continued with a Confidentiality and Non-Disclosure Agreement which they executed in 2018. 7T5-18 to 22; Da17; Da24. The Agreement was prepared by Plaintiff's contract attorney. 5T106-3 to 8. Grammer confirmed that she did not have attorney representation "in discussing a million dollar property with a developer." 5T106-20 to 22. The PSA (Sale Contract) was also prepared by Plaintiff's contract attorney. 5T112-21 to 25; Pa0245.

Grammer testified at length regarding her understanding of the terms of the contract, specifically, that she reduced the price by $500,000.00 in consideration of Alessi completing the cleanup, her intent not to remain connected to the property after sale, and her desire not to have the Alessi name attached to her DEP number. 5T122-15 to 18.

2. Trial Court Decision

In this case, the experienced Chancery Judge presided over the case for one (1) year before the commencement of the trial. At trial, the judge presided over seven (7) days of trial, eight (8) witnesses, and one hundred and seventy-two (172) exhibits. The forty-three (43) page written decision made factual

determinations, credibility assessments and reasoned conclusions. Pa0194. Plaintiff's position failed due to a lack of candor, a paucity of evidence, and specific contractual language as to the parameters of each party's environmental obligations.

Defendants, and their environmental consultant Lockwood, understood that their sale obligation relating to the RAO was only cooperation, however the Defendants' obligation to perform the RI remained. 5T45-23 to 46-10; 5T117-17 to 21; 8T44-16 to 24.

The court noted and relied upon the pertinent contractual language in Article:

> "Seller shall after the Effective date cooperate with Purchaser and Purchaser's LSRP to secure prior to closing of to the extent possible a site-wide RAO for all AOCs comprising the groundwater obligations" Pa0245.
>
> "Purchaser shall, through Purchaser's LSRP determine what remedies, if any, should be performed in order for the issuance of those items in Section 11.2 prior to closing)" Pa0245.
>
> "Seller shall not communicate with NJDEP regarding Purchaser's Obligations." Pa0245.

The trial judge made credible findings about Defendants' pivotal issue and found Defendants and their consultant to be truthful. Pa0194. Conversely, the trial court assessed Plaintiff's truthfulness to be less than credible. Pa0194.

Of particular note was the Judge's impression of Vincent Alessi, whom the Judge noted "could not point out any article in the PSA which supported his

version of the facts" (Pa0216); admitted that his second LLC was not named "2430 Morris Ave LLC" when he executed the PSA on this entity's behalf (Pa0217), that Alessi was "throughout his testimony…often evasive and argumentative …[f]requently attempted to avoid unfavorable questions posed to him", (Pa0218) and became argumentative with Defendants' Counsel on several occasions during his questioning. Pa0218. The Judge further noted that "during some of these instance, Vincent Alessi did not directly answer the question posed and instead opted to begin narrating his own views of the case, the parties, and what was in the best interest of the community." Pa0218. The court ended its analysis of Alessi's credibility by noting that "a few of Vincent Alessi's statements were also contradicted by the available evidence and his own subsequent testimony." The Judge found Alessi "somewhat less credible than the other witnesses." Pa0218.

Following summations, the court filed a thorough and extensive decision with specific findings of fact as to contract interpretation, credibility and intent. Pa194.

The court found that Plaintiff was obliged to obtain to the RAO. Additionally, the court went so far as to enlarge the timeframe to close, granting Plaintiff an additional opportunity to perform (close title) or cancel the contract. To date, Plaintiff equivocates, and declines to close. As the Trial

Court has presented its findings with careful thought, expertise, and critical analysis of the evidence and testimony, the Appellate Division owes deference to the trial court.

3. Plaintiff Relies on an Unsupported Reading of an Unpublished Case.

In its assertion that the trial judge erred, Plaintiff relies heavily on an unpublished Appellate Division case that differs substantially from the case at bar. Though both cases contain a contaminated property and an RAO, in *89 Water Street Assocs. v. Reilly, 2019 WL 4793073*, the language of the contract contained clear language that the Seller was to secure an RAO. Plaintiff's reliance on that case is misplaced.

Plaintiff here posits that since the Seller in *89 Water Street* was required to perform an RAO, so should the Defendants in the case at bar. Plaintiff contends that requiring Defendants herein to perform the RAO would be "equitable." Pb31.

The most important distinction between the case at bar and *89 Water Street* is the actual wording of the contract. In *89 Water Street*, the writing contained unambiguous language that laid the obligation on the Seller, specifically: "the parties acknowledge[ed] that [ISRA], the regulations promulgated thereunder[,] and any amending or successor legislation and regulations" applied to the transaction. It also provided that as a condition precedent to

plaintiff's obligations under the agreement, defendants must "receive[] from the Industrial Site Evaluation Element [(ISEE)] or its successor . . . a Clearance Document by the Closing Date." The obligation in *89 Water Street* was purely Seller's, wherein the obligation herein was only for Defendants to cooperate with Plaintiff. Pa0245.

In the instant matter, not only the contract - but the evidence adduced at trial – proves that Defendants herein were only obligated to cooperate "to the extent possible" (Pb2) with Plaintiff. Though Plaintiff wished to deflect attention from that language, it did not wholly obligate the Defendants to obtain environmental clearance in this matter, unlike *89 Water Street*.

Despite the clear language in that contract, the trial court in *89 Water Street* concluded that the contract contemplated Defendants only being obligated to secure a clearance document under ISRA and not under SRRA as a superseding law. This was, obviously, contrary to the actual wording of the contract.

Though Plaintiff herein would like to rely on *89 Water Street* as a case starkly analogous to the case at bar, that logic ignores the actual terms of the two distinct contracts – which in *89 Water Street* inarguably held Seller to be responsible for any current and superseding laws, and did not, as herein, only oblige Sellers to cooperate with Purchaser.

B. TRIAL COURT DID NOT ERR IN PERMITTING EXTRINSIC EVIDENCE (Pa0192; Pa0194; Pa0245)

1. Plaintiff's Parol Evidence Argument is Irrelevant as Plaintiff Elicited Extrinsic Evidence in its Case in Chief

Plaintiff states that the trial court should not have relied on Grammer's testimony regarding her intent not to enter into a joint venture with Plaintiff. This also implies that the trial court should have instead believed Plaintiff's testimony as to intent. Pb28.

As Plaintiff opened the door for the admission of parol evidence, and ultimately sought Grammer's understanding of her obligations under the PSA, the information sought (Grammer's frame of mind and understanding of the PSA) was elicited directly from her at trial. 4T245-15 to 19.

Plaintiff is incorrect and proffers contradictory arguments. First, as mentioned above, Plaintiff opened the door to extensive testimony regarding the RIR. 2T9-14 to 25.

Plaintiff then argues the opposite, specifically that the trial court "rewrote" the PSA which "does not contain a single reference" to an RIR. Pb3. Plaintiff spent extensive time presenting "evidence" as to the alleged failure to complete the RIR, despite the fact that an RIR was filed with the NJDEP five (5) months before the filing of the Complaint. 8T45-10 to 14. However, the fact remains that it was Plaintiff who raised the issues (2T9-14 to 25; 2T12-21

to 25; 2T14-9 to 12), expended several days of testimony on the issues, and now argues that the court should not have allowed the issue to have been raised. Pb3.

Count Two of Plaintiff's Complaint referenced the RIR, specifically seeking that the property be delivered "free and clear of environmental concerns and/or at the very least with an acceptable RIR in a timely manner is substantial and fundamental to the purpose of the PSA." Pa0001. It would be expected that a trial court would entertain testimony that referred to Plaintiff's pleadings.

2. No Legal Error was Committed by allowing Extrinsic Evidence in the Within Contract Case

It is well settled that "the polestar of contractual interpretation is the intent of the parties." *Kearny PBA Local #21 v. Town of Kearny,* 81 *N.J.*208, 221 (1979), citing *Atlantic N. Airlines, Inc. v. Schwimmer*, 12 *N.J.* 293, 301 (1953); *Basic Iron Ore Co. v. Dahlke*, 103 *N.J.L.* 635, 638 (E. & A. 1927); *Atlantic Northern Airlines, Inc. v. Schwimmer*, *12 N.J. at 304*.

The court directed specific and repeated questioning to each witness (except Defendant Martin Ippolito whose deposition was read as he was absent following cardiac surgery). There were four (4) witnesses who spoke as to the negotiations that occurred pre-execution: Deborah Grammer, Vincent Alessi, Frank Alessi, and Joe Lockwood. Plaintiff chose not to call their transactional attorney Victor Kinon. 2T30-2 to 6.

Grammer acknowledged her inexperience in matters relating to managing the property, about how she inherited the property, and how and why she decided to sell the property only four (4) years after her brother passed away. 5T85-14 to 20. She kept her late brother's environmental experts onboard as she was required to do since the property was in default on its DEP filing obligations and more remediation needed to be done. 4T234-19 to 235-10.

Defendants' decision was to sell the properties that had been in the family for over one hundred (100) years to an established developer and to absolve herself and her cousin of further DEP filing obligations and tenant issues. Grammer spoke plainly and directly; she answered "yes" and "no," and admitted unhesitatingly when she made a mistake. Pa0208. Grammer stated that she did not have environmental training, and at one point confused the acronym "RIR" with "RAO." 4T246-10 to 19; 4T249-18 to 250-1 to 8.

Throughout the trial, Plaintiff attempted to use Grammer's misstatement to establish their entitlement to damages. Pb13. Yet it is wholly silent as to the same blunder when made by their side when Plaintiff's Counsel confused these acronyms as well, referring to "RAO" when he meant "RIR" in his opening statement. 2T13-4 to 14.

Plaintiff, when it was still a "prospective purchaser," was allowed unfettered access to the property as early as May 2018, some fourteen (14)

months before the PSA was executed. Post-execution, Defendants continued with the process to create an RI, in order to proceed to closing. Plaintiff did not accept that and insisted that Defendants were required to act further and obtain an RIR. While neither Lockwood nor Grammer believed that to be accurate, they nonetheless continued with the process in order to reach a closing date. 8T44-16 to 45-24.

From November 2019 to December 2021, there were delays, including COVID-19 and a substitution of the LSRP, but ultimately an RIR was filed on December 21, 2021. 8T45-12 to 14. Defendants expected a quick closing date afterward, but instead received default notices from Plaintiff's transactional attorney, angry phone calls, and threatening voicemail messages from Vincent Alessi. 5T137-22 to 138-8. Despite no requirement in the PSA referring to an RIR, Plaintiff began a campaign to disparage Defendants' professionals and deny the filing of the RIR.

While Plaintiff maintains that the single most important aspect of the contract is the RAO, the RAO was only mentioned, in terms of obligations in the PSA, once. Pa0245.

The RAO is the last regulatory step after a property has been fully remediated and capped – which occurs during the process of redevelopment. The two steps go "hand in hand" according to Alessi. 7T31-16 to 19.

Plaintiff's argument contradicts its own expert relating to the amount of work necessary to obtain an RAO, first stating that Plaintiff's expert opined as to Defendants' ability to obtain an RAO, about how "far less extensive" their actions would be in comparison to the Plaintiff during redevelopment. Pb37.

This contradicts the testimony by Defendants' expert, (with which Plaintiff's expert agreed), (4T11-1 to 11) who testified that an RAO could not be obtained prior to sale, as the post-sale redevelopment itself would act as a sitewide cap, redevelopment which can only be completed by the Plaintiff. 6T47-9 to 48-12; 6T123-1 to 124-3. Despite this reality, Plaintiff argues that their future redevelopment plans are irrelevant to Defendants' obligations. Pb37.

Plaintiff asserts that its own expert's testimony should have been considered over Defendants' expert, however it is the trial court's prerogative to believe the testimony of one expert over another. *City of Long Branch v. Liu*, 203 N.J. 464, 491-92 (2010); *Angel v. Rand Express Lines, Inc.*, 66 N.J. Super. 77, 85-86 (App. Div. 1961) (recognizing the trier of fact's ability to accept, in full or in part, the testimony of one expert over another)

While it is a rational and fair reading of the PSA that Defendants were required to cooperate with Plaintiff, it is improbable that Defendants would agree to assume the responsibility for the RAO in light of the extended

negotiations, one third reduction in price, and surrender of prior insurance policies to Plaintiff. The trial judge found that Plaintiff's preposterous assertions were unestablished in fact. Pa0194.

The PSA even contained an assignment clause for the prior insurance policies in favor of Plaintiff - demonstrably showing that, as intended, Plaintiff would be responsible for the RAO. Pa265.

The trial court ruling is fundamentally logical and consistent with the acts and words of the parties involved. Plaintiff opened the door to extrinsic evidence (Pb) yet complains that the Judge chose to believe the testimony and intent of Grammer over Alessi. We respectfully submit that Judge Mega's decision should not be disturbed as he heard the extrinsic evidence from both sides and decided based on facts and testimony.

3. Plaintiff's Reference and Argument Related to the RIR is Moot

Plaintiff's brief is replete with details of the property's environmental contamination. This recitation is immaterial as the trial court dismissed Count Two of the Complaint relating to completion of the RIR, and Plaintiff did not appeal the dismissal of that Count. Pa0192.

Defendants have never denied – nor do they now deny - the existence of such contamination. If the purpose of Plaintiff's extensive "explanation" is to suggest that the RIR is flawed, and not acceptable to the DEP, Plaintiff

presented no such proof to support this contention. Indeed, at the start of trial Plaintiff had a representative of the DEP on the witness list, but any such alleged planned testimony was abandoned. They did not produce any DEP personnel to support the conclusion they now beg this Court to accept.

The RIR was completed and accepted by the NJDEP. 6T126-16 to 22. As a result, the sufficiency or insufficiency of RIR is irrelevant to this appeal. Pa0231.

Procedurally, Plaintiff has not appealed the trial court's decision to dismiss Count Two of the Complaint. Pa0231. For both substantive and procedural reasons, this argument is moot.

C. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT'S CLAIM OF A VIOLATION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING (Count 3 of Plaintiff's Complaint – Pa0001)

The covenant of good faith and fair dealing that is contained in all contracts mandate that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965).*

> The implied covenant of good faith and fair dealing has evolved to the point where it permits the adjustment of the obligations of contracting parties in a number of different ways. Some cases have focused on a plaintiff's inadequate bargaining power or financial vulnerability in order to avoid an inequitable result otherwise

> permitted by a contract's express terms. *See e.g. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997)*. Other decisions have revolved around the expectations of the parties, generating a need to contrast those expectations with the absence of any express terms. *See e.g., Onderdonk v. Presbyterian Homes, 85 N.J. 171 (1981)*. And still others have emphasized the defendant's bad faith or outright dishonesty. *See e.g., Pickett v. Lloyd's, 131 N.J. 457(1993).*

Given the harassment, bullying, and proclamation by Plaintiff that "I'm going to come after every God damn cent for what you guys did to me" and that "you're not going to get rid of me", (5T140-19 to 20; 5T142-15 to 16) it is ironic that Plaintiff comes to this Court complaining that Defendants breached the covenant of good faith and fair dealing. Pb0006. Plaintiff's actions throughout the transaction violated the doctrine of unclean hands in the most offensive of fashion, starting with the constant verbal abuse by Vincent Alessi aimed at Grammer, then continuing with the nasty and bullying voicemail messages, which were presented to and heard by the trial judge, (5T139-145) and ending with Alessi's illegal breaking and entering onto her property. 5T148-21 to 149-15; 8T51-19 to 53-13. Plaintiff acted (and continues to act) in a manner meant to do nothing more than harass Grammer and force her to continue to litigate this matter for the expressed reason that he did not get his way. There are no more clearer examples of violating the covenant of good faith and fair dealing than Vincent Alessi's actions herein.

Plaintiff's argument then contradicts itself: on one hand, arguing that Defendants did "virtually nothing" in furtherance of the PSA (Pb2), then in arguing that Defendants, and their professionals, worked with the State of New Jersey (allegedly "surreptitiously") to complete an RIR. Pb41. As Defendants had an obligation to secure an RIR, it is perplexing that Defendants are being accused of "concealing" their communications with the DEP. Pb41. Notice of the RIR submission was provided to Plaintiff on December 30, 2021. Da39. As the self-touted "sophisticated developer" Vincent Alessi claims to be, he should have known that Defendants would be working toward same. The New Jersey Supreme Court addressed this issue and held that any obligation of prior governmental approvals imposed by the New Jersey Legislature unstated in a contract but otherwise required by law necessarily is incorporated into the contract. *Kalogeras v. 239 Broad Ave., L.L.C 202 N.J. 349 (2010)*.

Plaintiff's allegations of bad faith recite generalized opinions that Defendants did "virtually nothing." Pb41. Plaintiff initially filed a count for reformation claiming that an RIR was not done, (Pa0005) yet when an RIR was filed in December 2021, they continued their grievances but changed it to "disregarded differences and failure of cooperation" (Pb41) to the trial judge, even though their own expert acknowledged that the NJDEP had extended the timeline for one (1) year. 4T230-5 to 10.

D. THE TRIAL COURT CORRECTLY GRANTED A PROTECTIVE ORDER TO BAR PLAINTIFF FROM DEPOSING DEFENDANTS' TRIAL ATTORNEY AND/OR SOMEONE FROM HER STAFF (Pa0190)

Plaintiff complains that the Trial Court judge erred in denying the motion to compel the testimony of Defendants' attorney. Plaintiff sought Defendants' attorney "who was directly involved in both the negotiations and drafting of the PSA, as well as the performance thereunder in the years that followed". Pb4. Such an extraneous request can only be viewed as tactical and strategic, not as relevant or vital.

First, this issue is moot, as Plaintiff waived its rights to raise the issue. During the oral argument on the Motion to Compel, Plaintiff's Counsel stated no issue of prejudice was raised. 5T69-19 to 70-9. Plaintiff never filed a Motion for Reconsideration to permit the Court to revisit its conclusion. Furthermore, Plaintiff proffered no fact to allege, much less support, any prejudice to them. 5T69-19 to 70-9.

Second, the statement is inconsistent with the testimony of the witnesses. Defendants' transaction lawyer was not retained until July 2019--only two (2) months before execution, and fourteen (14) months after the parties began to negotiate by and between themselves. Pb9.

The *Kerr v. Able Sanitary and Environmental Services, Inc.*, 295 N.J. Super. 147 (App. Div. 1996) court stated that "[c]onsideration of these or

any other relevant factors, either singly or in combination, will determine in a particular case whether the party seeking the deposition of opposing counsel has overcome the presumptive "good cause" for the Protective Order. If such showing is not made, a Protective Order should issue." *Id. at 159.* Plaintiff made no such showing, nor can it make such a showing now. Plaintiff based its argument on *Kerr,* but neglected to point out that the Appellate Court in this case reversed a lower court ruling that permitted such subpoenas. *Kerr, supra.*

It is well settled that a party's attorney being called to testify in a case should be the rarest of exceptions and not the norm. The presumption is the grant of a Protective Order – and Plaintiff has come forth will no proof that that tenet should be violated in this case. *Kerr, supra.*

Third, Plaintiff failed to call its own transactional attorney. 2T29-23 to 30-7. In addition, Plaintiff advised the trial judge that it subpoenaed a DEP representative – but no such witness was called. 2T15-14 to 18; Pa0199.

Plaintiff posited throughout the trial that Defendants' attorney was the drafter of the PSA. Pb4. Its brief also contends that the Trial Court should have heard from the drafter. Pb4. Defendants contend that Plaintiff's transactional attorney drafted the contract, and the Trial Court agreed, and concluded

likewise. Pa194. Yet Plaintiff never presented the testimony of its own transactional attorney to rebut the Defendants' assertion.

Based on these facts and arguments, the Trial Court's decision granting Defendants' attorney a Protective Order should not be disturbed.

III. CROSS-APPEAL ISSUES

In *United States v. American Ry. Express Co., 265 U.S.425 (1924)*, the Supreme Court espoused that a party may argue to affirm a judgment in its favor based on any grounds supported by the record, even if that may "involve an attack upon the reasoning of the lower court". Only if the prevailing party seeks to enlarge its own rights, or lessen those of the losing party, such is the case herein, must it take a cross-appeal.

Defendants herein argue that the Trial Court judge was correct in its ruling but did not envision that Plaintiff would "game" the Order by creating its own timeline—to the detriment of Defendants. Specifically, Plaintiff declined to close, refused to terminate the contract, refused to discharge the Lis Pendens it filed on the property and ignored that a stay was required to preserve any rights it may have under the contract. Plaintiff is thereby attempting to create its own timetable and remedy.

A. APPELLANT'S FAILURE OR REFUSAL TO APPLY FOR A STAY OF THE JUDGMENT RENDERS THE CONTRACT TERMINATED (Pa0192; Pa0194)

Rule 2:9-5. Stay of Proceedings in Civil Actions, Contempts, and Arbitrations, provides in pertinent part:

> A judgment or order in a civil action adjudicating liability for a sum of money or the rights or liabilities of parties in respect of property which is the subject of an appeal or certification

> proceedings shall be stayed only upon the posting of a supersedeas bond or other form of security.

Following a trial, the primary purpose of a stay is to preserve the status quo of the parties. This keeps the issue of contention ripe for the Appellate Court. The practical application is for the appealing party to stay the Order that compels or grants a right. Here Plaintiff received a time-based right to purchase the property in question for a specific period after trial. Pa194.

Plaintiff elected not to follow the Rules of Court, specifically choosing not to file a stay, and instead opting to gamble that it can wait until this Appellate Court speaks before making a decision whether to purchase or walk away. We submit they lost that right when they failed to file for a stay. *R. 2:9-5*.

Judge Mega's August 24, 2023 Order "directs that if Plaintiff does not wish to close or otherwise take ownership of the Subject Property it shall have 10 days herein to provide notice to Defendants in writing of their intent to withdraw and terminate the contract. At such time, the September 19, 2019 Purchase and Sale Agreement shall be considered terminated by mutual consent (emphasis in original)." Pa194.

By the ten (10) day mark, September 4, 2023, Plaintiff notified Defendants that it was appealing the final judgment and "does not wish to close or otherwise take ownership of the [property] pending a full and final resolution of Plaintiff's Appeal."

As an experienced developer, Plaintiff was, and is, fully aware of the DEP regulatory trajectory, (2T101-21 to 102-7) and specifically, the timeline for this property. 7T24-4 to 7. It is no accident that the delay combined with the demand for another reduction in price was timed precariously for the Defendants and to the benefit of Plaintiff.

Defendants will be in direct regulatory oversight on May 7, 2024. The stringent oversight regulation requires financial security bonds, retention or employment of an LSRP, and an environmental plan for remediation. N.J.S.A. 58:10C-27.

Defendants continue with the economic and regulatory burdens of the property while Plaintiff – given the option to close – instead gambled to see if the trial judge's decision will be overturned. While we recognize Plaintiff's right to appeal, its failure to apply for a stay of the remedy ordered acts to benefit Plaintiff while economically and legally harming Defendants. The damage they have inflicted, and continue to inflict on these innocent Defendants, should not be condoned.

Despite requests, Plaintiff refused to vacate the Lis Pendens so that Defendants continue to incur costs while being deprived of the benefits of their real property. This is compounded by the continued lack of assurance that Plaintiff can even afford this property as it failed to post a supersedeas bond

that would have shown Defendants – and this Court – that Plaintiff can even proceed to sale.

Consistent with the tenet and purpose of *Rule 2:9-5*, Defendants filed a motion to dismiss the within appeal as interlocutory and sought to have the Lis Pendens removed as Plaintiff failed to file a stay and post the necessary bond while it tied up Defendants' real property without proof of solvency (or, indeed, proof of their very corporate existence). 7T118-1 to 120-5. Though the Trial Court disagreed that it retained jurisdiction in its Order of December 20, 2023, Judge Mega noted in his analysis that his decision was final and that "neither party filed a motion for a stay."

Defendants are requesting this Court confirm the finality of Judge Mega's Order terminating the PSA as Plaintiff failed to take the necessary steps to preserve any right it had to purchase the property. Plaintiff neglected to follow the proper procedure and is attempting to equate this appeal as fulfilling its obligation to file a stay. Defendants ask that this Court confirm termination of the PSA and foreclose any further contractual remedy by Plaintiff.

B. UNFULFILLED CONDITION PRECEDENT IN THIS CONTRACT RENDERS THE CONTRACT UNENFORCEABLE AND BRINGS INTO QUESTION WHETHER A CONTRACT EVEN EXISTS (Pa0245)

Defendants raised the issue of condition precedent below in the Trial Court following the close of Plaintiff's case. 5T7.

In the event that the Appellate Court reverses the Trial Court's decision, Defendants then seek to preserve this issue herein.

If a condition is construed to be a condition precedent, there is no binding contract until the condition is satisfied. *Purich v. Weininger*, 72 N.J. Super 344, (App. Div. 1962)

Executory contracts are contracts that have obligations not yet completed.

In this case at bar, the Plaintiff has recited a number of events that Defendants have not performed: that documents were not turned over to Plaintiff, that vital information not turned over to Plaintiff, that detailed environmental work was not done, that an RIR was not valid, that an RAO not performed, and so on. Plaintiff posits that critical regulatory obligations were not performed or improperly performed.

Plaintiff continues to insist that it is Defendants' obligation to secure an RAO. They have taken the position throughout this litigation that, absent affirmative action by Defendants to obtain an RAO, they are not obliged to close on the property. They have made this a condition precedent to their obligation to close.

A condition precedent is an event that must occur or a fact that must exist before any right to performance can arise; it is a condition that must be satisfied before there can be any breach of contract or right to judicial

remedies. *Moorestown Management v. Moorestown Bookshop*, 104 N.J. Sup. 250, 249 (Ch. Div. 1969).

The intention of the parties comes in the making and in the construction of contracts. The parties may make contractual liability dependent upon the performance of a condition precedent; and where the performance of the condition made vital to the existence of the contract is impossible as in violation of public policy, a contractual obligation does not come into being. Generally, no liability can arise on a promise subject to a condition precedent until the condition is met.

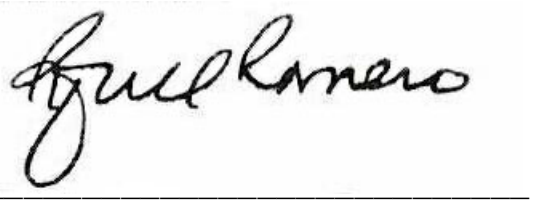
As Plaintiff has decided that it cannot or will not obtain an RAO, this contractual condition goes unfulfilled. As the RAO remains an unmet condition, the grant of which lies with a governmental institution over which Defendants has no control, and Defendants has no responsibility to seek an RAO, Defendants asks this Court to confirm that the contract is void.

CONCLUSION

RESPONDENT as owners of the property request that the Appellate Court affirm the decision of the trial court, and render the Contract terminated. We further request a Discharge of the Lis Pendens.

If the Appellant Court reverses the decision of the trial court, Respondents seek that the issue of condition precedent be preserved for further examination by the trial judge.

Date: May 2, 2024 Respectfully Submitted



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000017-23

2430 MORRIS AVENUE, LLC, Plaintiff-Appellant, vs. **DEBORAH GRAMMER**, as the Administrator of the Estate of Lee Weinstein, and **MARTIN IPPOLITO**, Defendants-Respondents.	Civil Action ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, UNION COUNTY Docket No. UNN-C-44-22 Sat Below: Hon. Robert J. Mega, P.J.Ch.

PLAINTIFF-APPELLANT'S REPLY/CROSS-RESPONDENT BRIEF

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

PAGES

CASES

RULES AND STATUTES

OTHER

Plaintiff-Appellant/Cross-Respondent, 2430 Morris Avenue, LLC ("Plaintiff"), respectfully submits this brief in further support of its appeals of the Final Judgment and the Discovery Order, and in opposition to the cross-appeals by Defendants-Respondents/Cross-Appellants, Deborah Grammer, as the Administrator of the Estate of Lee Weinstein ("Defendant Grammer"), and Martin Ippolito ("Defendant Ippolito" and, together, "Defendants").[1]

PRELIMINARY STATEMENT

Defendants fail to meaningfully counter Plaintiff's arguments on appeal. Instead, Defendants' opposition eschews legal and factual analysis in favor of broad and conclusory statements that are neither tethered to facts in the record nor consistent with well-established legal principles.

With respect to the Final Judgment, the trial court improperly relied on extrinsic evidence to alter the terms of the PSA. Rather than address the core of Plaintiff's argument, Defendants merely recite purported "facts" regarding the negotiations of the PSA, much of which are irrelevant, yet do not dispute that their environmental consultants both testified as to their understanding that Defendants were responsible for obtaining the RAO, consistent with the terms of the PSA. As to legal arguments, Defendants focus on irrelevant legal concepts, such as the

[1] Unless otherwise stated herein, all capitalized terms shall have the same meaning ascribed in Plaintiff's Appellant Brief ("Plaintiff's Brief").

"opening the door" doctrine, that have no bearing on this case whatsoever, and otherwise present meritless arguments that hardly warrant discussion. Nevertheless, Defendants concede, as they must, that the term "RIR" does not appear anywhere in the PSA and that the term "RAO," in terms of obligations, appears in the PSA one time—that is, as part of the Seller's Environmental Obligations.

As to the Discovery Order, Defendants' arguments are unavailing. Defendants claim that Plaintiff waived its right to appeal the Discovery Order, but fail to provide any legal authority to support their novel theories. Aside from their meritless legal arguments, Defendants make incoherent claims and egregious statements that are patently false. For example, Defendants claim that the trial court concluded that Plaintiff's transactional attorney drafted the PSA, yet that claim is flatly contradicted by the Final Judgment. Defendants also point to the fact that Plaintiff did not call its transactional attorney to testify at trial, but Defendants ignore that this decision was necessary given the resulting prejudice to Plaintiff absent the opportunity to cross-examine Defendants' transactional and trial attorney, Ms. Romero.

With respect to Defendants' cross-appeals, Defendants' arguments are true head-scratchers. First, Defendants argue that Plaintiff was obligated to seek a stay in the trial court prior to commencing this appeal, but Defendants fail to identify any legal authority to establish that Plaintiff was required to do so. Moreover,

Defendants' request for relief on this issue—that this Court confirm the finality of the Final Judgment—simply defies logic.

The second issue raised by Defendants on cross appeal pertains to the trial court's denial of Defendants' motion for involuntary dismissal, but Defendants' arguments are incoherent and riddled with misstatements of law and unsupported factual assertions. Nevertheless, Defendants' condition precedent argument is nothing more than a red herring that falls flat given the express language of the PSA.

As a final point, Defendants' Brief warrants a reminder: lawyers have an obligation to discharge their responsibilities "ever mindful of our ethical duty to uphold the highest possible standards of the legal profession." *Walters v. YMCA*, 437 N.J. Super. 111, 122 (App. Div. 2014). Defendants' Brief is egregious and "shows a lack of professional respect, not only to the [C]ourt, but to the legal profession itself." *Id.* at 121. Defendants repeatedly introduce "facts" that are not supported by the record, fail to provide accurate citations to the appendices and transcripts, and otherwise present incoherent arguments that have no basis in law or fact. "Besides being an imposition on this [C]ourt, such deficiencies are patently unfair to other litigants whose equally legitimate demands on the court's time are presented in a manner conforming in all respects to the requirements of the rules." *Miraph Ents., Inc. v. Bd. of Alcoholic Beverage Control of Paterson*, 150 N.J. Super. 504, 508 (App. Div. 1977). Defendants' "shoddy work . . . diminishes our profession

and must be condemned as unacceptable in the strongest possible terms." *Walters*, 437 N.J. Super. at 122.

COUNTERSTATEMENT OF FACTS

Defendants' counterstatement of facts imposes an unnecessary burden on the Court (and Plaintiff). Defendants repeatedly provide incorrect citations to the record and otherwise assert "facts" that are not supported by the record. As such, Plaintiff offers the following Counterstatement of Facts to address some, but not all, of these deficiencies and to assist the Court in its review.

Defendants' statement that "the initial pre-purchaser meeting" was attended by Joe Lockwood, Defendant Grammer, the Alessis, Gary Brown, and Victor Kinon is not supported by the record. (*See* Db11.) Rather, the meeting to which Defendants refer was the third meeting between the parties. 5T88:12 to 90:23.

Defendants incorrectly state that Plaintiff required Defendant Grammer to sign two (2) confidentiality agreements that required only Defendants, and not Plaintiff, to maintain confidentiality regarding the parties' dealings. (*See* Db12.) To the contrary, the confidentiality agreements apply equally to both Plaintiff and Defendants and require both parties to maintain the same level of confidentiality. (Da17-18 at Art. 1; Da24-25 at Art. 1.)

Defendants' statement that the "Alessi Group insisted on receiving all documentation and information related to any aspect of the property" is not

supported by the record. (*See* Db12.) Rather, the exchange of documentation and information was an express requirement set forth in the PSA. (Pa0261 at Art. 11.2(ii).)

Defendants statement that the "parties had ongoing and detailed discussions of both parties' intentions for nearly eighteen (18) months prior to the signing of the PSA" is not supported by the record. (*See* Db13.) Rather, the parties' discussions occurred over a period of approximately sixteen (16) months prior to the execution of the PSA. (7T4:25 to 6:10.)

Defendants' statement that Defendants were obligated to surrender and assign all prior insurance policies to Plaintiff is misleading and not supported by Defendants' citation to the record. (*See* Db13.) To clarify, Defendants were required to assign their insurance policies to Plaintiff "[a]t the Closing" of the sale of the Property," but not prior thereto. (Pa0256 at Art. 7.1(l); Pa00263 at Art. 11.7.)

Defendants' egregious and inappropriate statement that "[a]lthough Vincent Alessi claimed otherwise, Plaintiff's intent was to keep Defendants' 'on the hook' through redevelopment. 7T26-19; Pa0245" is contradicted by the record. (*See* Db16 (emphasis added).) On cross examination of Vincent Alessi, Defendants' counsel stated: ". . . . Are you understanding what I'm saying? I'm talking about keeping the seller on the hook on this property which is what this contract seems to be doing," to which Vincent Alessi responded: "Absolutely not. You're 100 percent inaccurate."

(7T34:2-6.) Thus, despite acknowledging that the witness' testimony contradicts their statement, Defendants nevertheless assert their opinion as fact.

Defendants incorrectly identify Lockwood as "Defendants' environmental expert." (*See* Db18.) In addition, Defendants state that Lockwood "commented that typically the RAO and development are done together" (*see ibid.*), but Defendants omit the remainder of Lockwood's statement, in which Lockwood clarified that "[i]t's whatever is the cheapest alternative for the client, typically." (8T113:5-12.)

Plaintiff's redevelopment plans do not affect Defendants' ability to obtain the RAO. (4T141:10 to 142:6; 6T122:21 to 124:16; 8T69:7 to 70:21.) The submission of a remedial action permit is a known step in the process toward obtaining the RAO for any contaminated site, and after Defendants implement the necessary caps on contaminated areas of the Property and obtain the RAO, Plaintiff "could modify the site, and in turn, eventually modify the remedial action permit to show that the capping that was originally in place has been removed, this new construction has taken place. This is now the new cap. And that gets filed appropriately." (4T16:9 to 17:2, 141:10 to 142:6 ("[T]hose documents would basically say, in layman's terms, we took the old building, removed it, put a new building here. This is the new cap."), 219:18 to 221:8; 6T47:24 to 48:4.)

Defendants state that Sullivan testified that the process for obtaining the RAO could take several years (*see* Db19), but Defendants fail to indicate that Sullivan

made that statement with the assumption that redevelopment would be occurring during that same time period. (6T48:21 to 49:9 ("Well, it depends on the construction schedule, first of all . . . .").)

Defendants state that throughout this litigation and at trial, "Plaintiff stated that the DEP would never accept the RIR as filed." (*See* Db20.) However, the testimony cited by Defendants provides as follows: "So now we have to now accept this inferior document, which ultimately will be rejected or potentially, you know, further questioned or further scrutiny from the DEP." (2T160:2-13.) In fact, the DEP did precisely that, both questioning and scrutinizing Defendants' RIR filing over the course of approximately eleven (11) months through at least one of the last days of trial (and perhaps continuing). (4T118:19 to 120:22, 122:18 to 123:25; 5T47:7 to 48:8; 6T18:22 to 19:4, 22:2 to 25:14, 26:9 to 27:15, 121:7 to 122:14; Pa2284-86; Pa2292-95; Pa2296-2305.)

LEGAL ARGUMENT

POINT I

APPLICABLE STANDARD OF REVIEW

The Final Judgment presents mixed questions of law and fact and is, therefore, subject to a mixed standard of review pursuant to which an appellate court "give[s] deference . . . to the supported factual findings of the trial court, but review[s] *de novo* the lower court's application of any legal rules to such factual findings." *State*

v. Pierre, 223 N.J. 560, 577 (2015) (citation omitted); *Kieffer v. Best Buy*, 205 N.J. 213, 223 n.5 (2011). Thus, the Court should defer to the trial court's factual findings that are "supported by credible evidence in the record," *State v. Mohammed*, 226 N.J. 71, 88 (2016) (citation omitted), however, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

An abuse of discretion standard applies to the Discovery Order. *Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc.*, 230 N.J. 73, 79-80 (2017). Although a reviewing court will generally "defer to a trial court's disposition of discovery matters, including the formulation of protective orders, unless the court has abused its discretion, deference is inappropriate if the court's determination in drafting its order is based on a mistaken understanding of the applicable law." *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 559 (1997) (citations omitted); *Capital Health Sys., Inc.*, 230 N.J. at 79-80 ("[A]ppellate courts . . . will defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.").

Defendants fail to address the applicable standard of review with respect to their cross-appeal of the trial court's denial of Defendants' motion for involuntary dismissal under *Rule* 4:37-2(b). In reviewing a trial court's decision on a motion

pursuant to *Rule* 4:37-2(b), appellate courts apply the same standard that governs the trial court. *See Carbajal v. Patel*, 468 N.J. Super. 139, 157-58 (App. Div. 2021) (citations omitted). On a motion pursuant to *Rule* 4:37-2(b), the trial court must determine

> whether the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of the party opposing the motion, *i.e.*, if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be adduced therefrom, reasonable minds could differ, the motion must be denied.

Alves v. Rosenberg, 400 N.J. Super. 553, 565 (App. Div. 2008) (quoting *Dolson v. Anastasia*, 55 N.J. 2, 5 (1969)). Thus, an appellate court "must accept as true all evidence presented by plaintiff and the legitimate inferences drawn therefrom to determine whether the proofs are sufficient to sustain a judgment in his favor." *Carbajal*, 468 N.J. Super. at 158; *see Verdicchio v. Ricca*, 179 N.J. 1, 30 n.4 (2004) ("It goes without saying that a reviewing court faced with a *R.* 4:37-2(b) issue must disregard evidence adduced on the defense case.").

POINT II

THE TRIAL COURT'S INTERPRETATION OF THE PSA IS UNSUPPORTED BY THE FACTS AND THE LAW (Pa0192; Pa0194)

A. The Trial Court Erred in Dismissing Count One of the Complaint and Granting in Part and Denying in Part Specific Performance

The trial court's interpretation of the PSA is unsupported by the evidence and the law. The PSA expressly provides that the Seller's Environmental Obligations include obtaining a site-wide RAO to the extent possible. The trial court improperly relied on extrinsic evidence to effectively rewrite the PSA, and the trial court's order for specific performance improperly shifts the burden of obtaining the RAO from Defendants to Plaintiff. Rather than address the core of Plaintiff's argument, Defendants merely recite purported "facts" regarding the parties' negotiations while ignoring the crucial testimony of their own representatives. Moreover, Defendants' legal arguments are inconsistent with applicable law and rely on irrelevant legal doctrines. Accordingly, the Final Judgment should be reversed as to Count One of the Complaint, and Plaintiff is entitled to an order for specific performance requiring Defendants to satisfy their obligations under the PSA and obtain a site-wide RAO.

1. The Trial Court's Determination of the Parties' Obligations Under the PSA is Unsupported by the Facts

The testimony elicited from Defendant Grammer and her representatives at trial contradicts the trial court's determination that the PSA required only that

Defendants finalize and submit the RIR prior to closing. Defendants fail to address the core of Plaintiff's argument and instead recite purported "facts" regarding the negotiations of the PSA, much of which are irrelevant, and otherwise rely on the testimony of Vincent Alessi, whom Defendants called to testify and whose testimony the trial court deemed "somewhat less credible than the other witnesses." (Db23-28; Pa0218.)

Defendants do not dispute, or even address, that Lockwood, whom Defendant Grammer primarily relied on to handle environmental matters in connection with the PSA, expressly stated at trial that "[b]ased on the contract, [the Alessis] had [Defendant Grammer] staying in the project until after an RAO was possibly obtained." (8T31:8-22 (emphasis added).) Nor do Defendants address Lockwood's testimony that after reading the PSA, which he had no part in drafting or negotiating, Lockwood understood that Defendants were responsible for obtaining the RAO. (8T68:7 to 69:4, 70:19-21.) Defendants also ignore the testimony of their own LSRP, Sullivan, who understood that when he was re-engaged by Defendants as the LSRP in 2021, the ultimate goal of his engagement was to issue a site-wide RAO, which understanding was reflected in his retainer proposal to Defendant Grammer. (6T78:10 to 80:8, 144:25 to 145:3.)

In addition, this Court should disregard Defendants' incorrect, misleading, and otherwise unsupported factual assertions. *See* Pressler & Verniero, *Current N.J.*

Court Rules, cmt. 1 on *R.* 2:5-4(a) (2024) ("It is, of course, clear that in their review the appellate courts will not ordinarily consider evidentiary material which is not in the record below by way of adduced proof, judicially noticeable facts, stipulation, admission or a recorded proffer of excluded evidence."). For example, Defendants claim, among other things, that the trial court "assessed Plaintiff's truthfulness to be less than credible." (Db26.) Plaintiff is an entity, and the trial court did not assess the entity's truthfulness. (*See generally* Pa0198-221.) Defendants are likely referring to the trial court's credibility findings as to Vincent Alessi, whom Defendants—not Plaintiff—called to testify at trial. (7T3:14-16.) Defendants also incorrectly assert that Defendant Grammer "testified at length regarding . . . her intent not to remain connected to the property after sale, and her desire not to have the Alessi name attached to her DEP number. 5T122 – 15 to 18." (Db25 (emphasis in original).) To the contrary, however, the cited testimony of Defendant Grammer was not regarding her own intent and desires, but rather that of Vincent Alessi. (5T122:11-19 ("[H]e did not want the Alessi name, the Alessi Organization, whatever, attached to my cleanup and only wanted to clean it up under my DEP number.").)

2. The Trial Court Improperly Relied on Extrinsic Evidence to Alter the Terms of the PSA

Defendants contend, without any legal authority to support their position, that because Plaintiff elicited testimony regarding the RIR and "opened the door to

extrinsic evidence," the trial court's reliance thereon was proper. (Db30-31, 35.) Defendants miss the mark. The issue, as clearly stated in Plaintiff's Brief, is that the trial court improperly relied on extrinsic evidence to alter the terms of the PSA. Rather than meaningfully address the issue, Defendants instead offer misguided and unsupported legal and factual assertions insufficient to rebut Plaintiff's argument.

The polestar of contract construction is to discover "the intention of the parties to the contract as revealed by the language used, taken as an entirety." *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269 (2006) (quoting *Atl. N. Airlines v. Schwimmer*, 12 N.J. 293, 301 (1953)) (emphasis added). When interpreting a written contract, a court may not "make a different or better contract than the parties have seen fit to make for themselves." *Schnakenberg v. Gibraltar Savings & Loan Ass'n*, 37 N.J. Super. 150, 155 (App. Div. 1955) (emphasis added). As stated by the New Jersey Supreme Court in *Schwimmer*,

> the admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show . . . an intention wholly unexpressed in the writing, it is irrelevant.

Schwimmer, 12 N.J. at 301-02 (emphasis added).

Thus, while evidence of the situation of the parties and surrounding circumstances is always admissible to aid the interpretation of an integrated contract,

Schwimmer, 12 N.J. at 301, the parol evidence rule bars the introduction of extrinsic evidence that tends to alter, vary, or contradict the written agreement. *See U.S. v. Clementon Sewerage Auth.*, 365 F.2d 609, 613 (3d Cir. 1966); *Conway*, 187 N.J. at 269. In other words, "there is a 'distinction between the use of evidence of extrinsic circumstances to illuminate the meaning of a written contract, which is proper, and the forbidden use of parol evidence to vary or contradict the acknowledged terms of an integrated contract.'" *YA Global Investments, L.P. v. Cliff*, 419 N.J. Super. 1, 12 (App. Div. 2011) (quoting *Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 497 (App. Div. 1963)); *Clementon Sewerage Auth.*, 365 F.2d at 613 ("[E]vidence, whether parol or otherwise, of antecedent understanding and negotiation will not be admitted for the purpose of varying or contradicting the writing." (citations omitted)).

Here, the term "RIR" does not appear anywhere in the PSA. (*See generally* Pa0246-91.) The trial court, however, improperly relied on extrinsic evidence as to the parties' intent to determine that Defendants were responsible only for obtaining the RIR. *See Schwimmer*, 12 N.J. at 301-02 ("[A]n intention wholly unexpressed in the writing . . . is irrelevant."); *Schnakenberg*, 37 N.J. Super. at 155. Thus, contrary to the longstanding principles of contract interpretation, the trial court relied on extrinsic evidence to manufacture an obligation that does not appear anywhere in the parties' written agreement. *See Schwimmer*, 12 N.J. at 301-02.

Rather than meaningfully address the issue, Defendants offer a novel legal theory that is wholly inconsistent with the firmly established principles of contract interpretation. Defendants contend—without any supporting legal authority—that because Plaintiff "opened the door" to extrinsic evidence, the trial court properly relied thereon. (Db30, 35.) Plaintiff does not dispute that it elicited testimony and presented evidence at trial regarding the RIR, but that is irrelevant to the issue. The fact that the trial court heard testimony and evidence regarding the RIR, regardless of by whom it was presented, does not mean that the trial court may rely on that extrinsic evidence to change the terms of the parties' contract. *See, e.g.*, *Schwimmer*, 12 N.J. at 301-02; *Clementon Sewerage Auth.*, 365 F.2d at 613; *YA Global Investments, L.P.*, 419 N.J. Super. at 12.

To the extent Defendants attempt to rely on the "opening the door" doctrine, Defendants' reliance is misplaced. The "opening the door" doctrine is wholly irrelevant in this context. *See, e.g.*, *State v. Prall*, 231 N.J. 567, 582-83 (2018) ("The [opening the door] 'doctrine operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context.'" (quoting *State v. James*, 144 N.J. 538, 554 (1996))).

There is no dispute that Defendants were responsible for the RIR, but that obligation is merely a statutory and known prerequisite to satisfying their express obligation under the PSA to obtain a site-wide RAO. (2T154:21 to 155:6; 4T15:19-23; 8T38:3-21; Pa2371-74.) And while the term "RIR" does not appear anywhere in the PSA, Defendants correctly point out that the term "RAO," in terms of obligations, is found in the PSA one time—that is, as part of the Seller's Environmental Obligations. (Pa0261 at Art. 11.2.)

With respect to specific performance, the trial court's order for specific performance is premised on its erroneous determination as to the parties' obligations under the PSA. To that end, Defendants attempt to distinguish this case from *89 Water Street Assocs. v. Reilly*, 2019 WL 4793073 (App. Div. Oct. 1, 2019) (unpublished opinion, cited in accordance with *R.* 1:36-3) (*see* Pa2383-92), on the grounds that the contract in *89 Water Street Assocs.* "laid the obligation on the Seller" to secure the clearance document (*i.e.*, the RAO), whereas Defendants' obligation here, they contend, was only to cooperate with Plaintiff. (Db28-29.) As explained above, however, the trial court's determination as to the parties' obligations under the PSA was incorrect. The PSA requires that Defendants secure the RAO to the extent possible prior to closing, and there is nothing in the PSA to indicate that the parties contemplated shifting the Seller's Environmental Obligations to Plaintiff. As such, it was improper for the trial court to unilaterally shift the burden of Defendants'

contractual obligation to obtain the RAO to Plaintiff and effectively rewrite the PSA. *See 89 Water Street Assocs.*, 2019 WL 4793073, at *8-11.

As a final point, again, the Court should disregard Defendants' numerous unsupported and misleading factual assertions. *See* Pressler & Verniero, cmt. 1 on *R.* 2:5-4(a). For example, among other things, Defendants falsely contend that redevelopment of the Property "can only be completed by the Plaintiff." (Db34.) Defendants also imply that Defendants were obligated to surrender certain insurance policies to Plaintiff, but by the plain language of the PSA, the assignment of Defendants' insurance policies to Plaintiff does not occur until the parties close on the sale of the Property. (Db35; Pa0263 at Art. 11.7.) Lastly, Defendants take issue with the fact that "Plaintiff's brief is replete with details of the property's environmental contamination" and contend that "the sufficiency or insufficiency of [the] RIR is irrelevant to this appeal." (Db35-36.) Defendants simply fail to recognize that such evidence is highly relevant to Plaintiff's claim under Count Three of the Complaint for breach of the implied covenant of good faith and fair dealing.

B. The Trial Court Erred in Dismissing Count Three of the Complaint

The trial court's dismissal of Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is based primarily on its determination as to the parties' obligations under the PSA which, as explained above, is factually and

legally improper, and the dismissal is otherwise based on the trial court's finding that Plaintiff failed to sufficiently indicate that Defendants acted in bad faith or with wrongful motives in their performance of the PSA. (Pa0231-32.) Contrary to the trial court's conclusion, however, the evidence sufficiently demonstrates that Defendants acted in bad faith in their performance of the PSA and deprived Plaintiff of its benefit of the bargain. Defendants misconstrue Plaintiff's arguments in this regard and, as is a theme throughout Defendants' Brief, make unsupported factual assertions with no basis in the record.

After executing the PSA, Defendants and their representatives dragged their feet throughout the remedial investigation process, repeatedly lied and withheld information from Plaintiff regarding the status of remedial investigation, concealed their communications with the NJDEP, disregarded deficiencies in their documentation, and otherwise wholly failed to cooperate with Plaintiff and its representatives throughout the process. (2T141:12 to 142:5, 174:8 to 175:10, 179:5-19; 4T45:20 to 47:18, 49:2 to 50:7, 54:16 to 55:12, 69:14 to 70:4; 5T46:21 to 47:6; 6T88:1-24, 92:2-8, 94:10 to 95:3, 102:12 to 103:5; 8T87:18 to 89:7, 91:3 to 92:5, 93:15 to 94:4, 94:13 to 95:4, 100:14 to 101:11.) Defendants contend that Plaintiff's argument contradicts itself by first claiming that Defendants did "virtually nothing" in furtherance of the PSA and then arguing that Defendants worked surreptitiously to complete the RIR. (Db38.) Despite Defendants' misguided belief, Plaintiff's

argument does not contradict itself; rather, Defendants conveniently ignore the fact that this conduct occurred over the course of approximately two (2) years. (*See, e.g.*, 2T141:12 to 142:5 (regarding Lockwood's failure to communicate with respect to the draft RIR in 2020), 174:8 to 175:10 (regarding emails in 2022 between Defendants and the DEP that were not shared with Plaintiff), 179:5-19 (regarding emails in 2023 between Defendants' LSRP and the DEP that were not shared with Plaintiff); 4T45:20 to 47:18, 49:2 to 50:7 (discussing lack of communication regarding RIR filing prior to December 2020 phone call), 54:16 to 55:12 (discussing inability to contact Lockwood during early-2021), 69:14 to 70:4 (discussing DEP communications prior to December 2022); 5T46:21 to 47:6 (regarding failure to consult with Plaintiff prior to filing RIR in December 2021); 6T88:1-24 (regarding lack of delineation activities at the Property between September 2019 and December 2021), 92:2-8 (regarding draft RIR that was never shared with Plaintiff prior to filing in December 2021); 8T87:18 to 89:7 (regarding Lockwood's failure to respond to requests for meetings and Lockwood lying that the RIR was filed in December 2020), 91:3 to 92:5, 100:14 to 101:11 (acknowledging that despite Plaintiff's requests for meetings going back to 2020, the RIR was not shared with Plaintiff prior to filing in December 2021).) Defendants' disingenuous contention warrants no further discussion. For the reasons more fully explained in Plaintiff's Brief, Plaintiff is entitled to specific performance of the Seller's Environmental Obligations under

the PSA, and the trial court's dismissal of Count Three of the Complaint should be reversed.

Although it bears little relevance to the ultimate disposition of Plaintiff's claim, Plaintiff must also address Defendants' baseless allegations that Plaintiff somehow violated the doctrine of unclean hands and is pursuing this litigation to harass Defendants. (Db37.) There is absolutely nothing in the record to establish that Plaintiff "violated the doctrine of unclean hands in the most offensive of fashion." (*Ibid.*) Defendants claim that such violation began "with the constant verbal abuse by Vincent Alessi" yet, again, there is nothing in the record to support this claim. (*Ibid.*) Defendants otherwise refer to a few voicemails from Vincent Alessi to Defendant Grammer, which occurred after the parties' relationship began to sour. (*Ibid.*) However, upon a full reading of the transcripts of these voicemails, Defendants' characterization of same as "harassment" and "bullying," let alone a violation of the doctrine of unclean hands, is absurd. (*See* 5T140:4-21, 141:6-17, 142:6-21, 143:6-25, 144:8 to 145:13, 146:2-4.) Lastly, the Court should disregard Defendants' unsupported and wholly improper claim that Plaintiff is acting "in a manner meant to do nothing more than harass [Defendant] Grammer and force her to continue to litigate this matter for the expressed reason that he did not get his way." (Db37.) Again, there is absolutely nothing in the record to support Defendants' claim. *See* Pressler & Verniero, cmt. 1 on *R.* 2:5-4(a).

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION AND MISAPPLIED THE LAW IN DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND GRANTING DEFENDANTS' CROSS-MOTION FOR A PROTECTIVE ORDER (Pa0190; 1T20-23)

The trial court abused its discretion and misapplied the law in denying Plaintiff's motion to compel the deposition of a representative of the Law Office of Raquel Romero and granting Defendants' cross-motion for a protective order. Defendants' arguments in support of the Discovery Order are unavailing and premised on misstatements of fact and law. And despite Defendants' efforts to downplay the issue as not "relevant or vital," the Discovery Order had a profound impact on this litigation and poisoned the Final Judgment. Accordingly, the Final Judgment should be reversed to afford Plaintiff the opportunity for limited additional discovery, and the case remanded for re-trial on a full record.

When reviewing a discovery order, "appellate courts must start from the premise that discovery rules 'are to be construed liberally in favor of broad pretrial discovery.'" *Capital Health Sys., Inc.*, 230 N.J. at 80 (quoting *Payton*, 148 N.J. at 535). Consistent with New Jersey's liberal discovery rules, "there is no general prohibition against obtaining the deposition of opposing counsel regarding relevant, non-privileged information." *Kerr v. Able Sanitary and Environmental Servs., Inc.*, 295 N.J. Super. 147, 154 (App. Div. 1996); *see also R.* 4:10-2(a); *R.* 4:14-1.

Although a "request to depose a party's attorney itself constitutes presumptive 'good cause' for a protective order" under *R.* 4:10-3, the party seeking discovery may overcome that presumption by showing "that the information sought is relevant to the underlying action and is unlikely to be available by other less oppressive means." *Kerr*, 295 N.J. Super. at 158-59.

In *Kerr*, the Appellate Division expressly recognized that circumstances exist under which a party's attorney may be compelled to submit to a deposition, namely, "where an attorney is a fact witness in the sense that the attorney has observed or participated in the underlying transaction or occurrence giving rise to the cause of action, the presumption in favor of a protective order may be overcome." *Id.* at 159-60; *see Johnston Dev. Grp., Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) ("The deposition of the attorney may be 'both necessary and appropriate' where the attorney may be a fact witness, such as an 'actor or viewer,' rather than one who 'was not a party to any of the underlying transactions giving rise to the action.'" (citations omitted)). There, the Appellate Division reversed the trial court's order compelling the deposition of the plaintiff's attorney because the defendants failed to demonstrate that the plaintiff's attorney "had first-hand knowledge, or direct involvement in the events giving rise to the action, or any other facts that might have established that the deposition was essential to prevent injustice." *Kerr*, 295 N.J. Super. at 162.

Here, as more fully explained in Plaintiff's Brief, the trial court's Discovery Order is premised on a misapplication of the law and factual findings that are unsupported by the motion record. In sum, Plaintiff was not seeking privileged testimony or documents from Ms. Romero; rather, Ms. Romero was directly involved in the negotiations of the PSA, and thereafter took positions on behalf of Defendants regarding the terms and conditions of the PSA, as well as compliance (or non-compliance) therewith over the course of three years as Defendants' transactional counsel. (Pa0118, ¶ 7; Pa0123, ¶ 3; Pa0156 at 83:2-20; Pa0161 at 102:4-22.) Moreover, Defendant Grammer acknowledged in her sworn deposition testimony that she believes Ms. Romero to be the most knowledgeable person on Defendants' side regarding the terms and conditions of the PSA. (Pa0123, ¶ 3; Pa0146 at 43:3 to 44:11.)

Defendants raise four (4) unavailing arguments in opposition to Plaintiff's appeal. First, Defendants contend that "Plaintiff waived its rights to raise the issue" because, according to Defendants, "Plaintiff's Counsel stated no issue of prejudice was raised" during oral argument on the motion. (Db39.) Defendants do not provide any legal authority to support this misguided theory, nor do they provide any factual support; instead, Defendants include a citation to the trial transcript wherein the trial court denied Defendants' motion for involuntary dismissal. (*See* Db39 (citing 5T69:19 to 70:9).) Similarly, Defendants contend that Plaintiff "never filed a Motion

for Reconsideration to permit the Court to revisit its conclusion and/or motion argument." (Db39.) Yet again, however, Defendants do not provide any legal authority to support their novel theory that a reconsideration motion is a condition precedent to appeal of an interlocutory order.

Defendants further argue that "the statement is inconsistent with the testimony of the witnesses," but it is a mystery as to what "statement" Defendants are referring. (Db39.) Defendants then reiterate, with a citation to Plaintiff's Brief, that Ms. Romero was retained by Defendants in July 2019, two (2) months prior to the execution of the PSA. (*Ibid.*) Thus, at a minimum, Defendants do not dispute that Ms. Romero was involved in the drafting and negotiation of the PSA.

Among the more egregious claims by Defendants, however, is the following: "Defendants contend that Plaintiff's transactional attorney drafted the contract, and the Trial Court agreed, and concluded likewise. Pa194." (Db40-41.) This is patently false. In fact, the trial court expressly found that Defendant Grammer "ultimately retained counsel to draft the finalized language for a purchase and sale contract." (Pa0222 (emphasis added); *see also* Pa0209 ("Following these discussions, in March or April of 2019, Grammer said that she retained an attorney who assisted in the final negotiations to draft the PSA language." (emphasis added).)

Lastly, Defendants attempt to rely on the fact that Plaintiff did not call its own transactional attorney to testify at trial. (Db40.) This argument is without merit.

First, Defendants do not offer any explanation as to how Plaintiff's selection of witnesses at trial—which occurred months after the Discovery Order—demonstrates that the Discovery Order was proper. Second, as Plaintiff indicated at trial and in Plaintiff's Brief, Plaintiff did not call its transactional attorney to testify at trial because it would have been highly prejudicial to Plaintiff to expose their transactional counsel to cross-examination by Ms. Romero, without the ability to also examine and/or cross-examine Ms. Romero as Defendants' transactional counsel. (*See* 2T30:24 to 31:9, 136:12-17; Pb46-47.) Ms. Romero has personal knowledge as to what occurred during the negotiation and drafting of the PSA and was able to make unchallenged statements and arguments at trial, and even pose questions in suggestive ways based upon her personal involvement. Had Plaintiff been permitted to obtain discovery from Ms. Romero, the trial court would have had the opportunity to hear from both drafters of the PSA, but that opportunity was foreclosed by the Discovery Order.

Thus, the Discovery Order should be reversed to grant Plaintiff the opportunity to conduct limited additional discovery, and the Final Judgment should be vacated and remanded for re-trial based on a full record.

POINT IV

PLAINTIFF WAS NOT REQUIRED TO SEEK OR OBTAIN A STAY OF THE FINAL JUDGMENT (Issue Not Raised Below)

On cross-appeal, Defendants wrongly contend that Plaintiff was required to seek a stay of the Final Judgment before appealing therefrom, and based on this erroneous legal argument, Defendants ask that this Court "confirm the finality of Judge Mega's Order terminating the PSA," and "confirm termination of the PSA and foreclose any further contractual remedy by Plaintiff." (Db42-45.) Tellingly, Defendants fail to identify any legal authority that would require Plaintiff to seek a stay of the Final Judgment before commencing this appeal. Instead, Defendants offer a strained interpretation of *Rule* 2:9-5 that is inconsistent with the *Rule's* express language, and otherwise rely on unsupported and incorrect statements of law and wrongly introduce purported "facts" that are not part of the record. The Final Judgment was precisely that—final. Thus, there are simply no proceedings to be stayed in the trial court, and Defendants' requests for relief on this issue defy logic, as the PSA was terminated in accordance with the Final Judgment. Accordingly, as more fully explained below, the Court should deny Defendants' cross-appeal on this issue.

Pursuant to *Rule* 2:2-3(b)(3), an appeal may be taken as of right from "orders properly certified as final under R. 4:42-2." *Rule* 2:9-1 provides, in pertinent part,

that "the supervision and control of proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." As such, "[t]he ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule." *Manalapan Realty, L.P.*, 140 N.J. at 376. In other words, a party may appeal a final judgment as of right, and upon filing a notice of appeal, jurisdiction over the case shifts from the trial court to an appellate court. *Ibid.*

Defendants' reliance on *Rule* 2:9-5(a) is misplaced. *Rule* 2:9-5(a) provides, in pertinent part, as follows:

> Except as otherwise provided by *R.* 1:10 (Contempt), neither an appeal, nor motion for leave to appeal, nor a proceeding for certification, nor any other proceeding in the matter shall stay proceedings in any court in a civil action . . . but a stay with or without terms may be ordered in any such action or proceeding in accordance with *R.* 2:9-5(b) . . . . A judgment or order in a civil action adjudicating liability for a sum of money or the rights or liabilities of parties in respect of property which is the subject of an appeal . . . shall be stayed only upon the posting of a supersedeas bond or other form of security pursuant to *R.* 2:9-6 or a cash deposit pursuant to *R.* 1:13-3(c), unless the court otherwise orders after notice and on good cause shown. Such posting or deposit may be ordered by the court as a condition for the stay of any other judgment or order in a civil action.

(emphasis added). In other words, while a party may seek a stay by filing a motion in the appropriate court, *Rule* 2:9-5 does not require a party to do so.

Thus, contrary to Defendants' contention, Plaintiff properly commenced this appeal. There is simply nothing in *Rule* 2:9-5 that requires a party to obtain a stay before commencing an appeal, and Defendants do not offer any other legal authority to support their erroneous position. (*See* Db42-45.) Rather, the Final Judgment was final pursuant to *Rule* 4:42-2, and by virtue thereof, there were no outstanding issues or proceedings to be heard by the trial court and, thus, nothing to be stayed. To the extent Defendants ask this Court to "confirm the finality of Judge Mega's Order terminating the PSA," Defendants fail to acknowledge that (i) there is no dispute that the Final Judgment is final; and (ii) there is no dispute that the PSA was terminated in accordance with the Final Judgment, which expressly provides that the PSA "will be considered terminated by mutual consent" upon written notice by Plaintiff that it does not wish to close or otherwise take ownership of the Property. (Pa0193.)

It must also be noted that Defendants, yet again, introduce and rely upon evidence that is not part of the record on this appeal, and otherwise make incoherent and unsupported claims. *See* Pressler & Verniero, cmt. 1 on *R.* 2:5-4(a). For example, Defendants take particular issue with Plaintiff's filing of a second *lis pendens* (the "Second *Lis Pendens*") following the Final Judgment, but Defendants' contentions are without merit. (*See* Db44-45.) In short, although it is not part of the record on this appeal, Plaintiff is not required to seek a stay, post a bond, or undertake

any other form of action to file a *lis pendens* under *N.J.S.A.* 2A:15-14. Rather, in connection with this appeal, Plaintiff had a statutory right thereunder to file a *lis pendens*. *N.J.S.A.* 2A:15-14 provides, in pertinent part, as follows:

> Whenever a final judgment is made in favor of the defendant or defendants in any action . . . the real estate described in the notice shall be discharged of all equities or claims set up in the complaint in the action, unless the plaintiff takes an appeal or institutes proceedings for relief from the judgment and files a similar notice of lis pendens in said office, stating in the notice the object of the appeal or proceedings. Such notice shall, during the pendency of such appeal or proceedings, have the effect of the notice first filed . . . .

(emphasis added). Thus, *N.J.S.A.* 2A:15-14 provides that a plaintiff may file (i) a notice of appeal; and (ii) "a similar notice of lis pendens . . . stating in the notice the object of the appeal . . . ." Plaintiff properly exercised its statutory right under *N.J.S.A.* 2A:15-14. On or about August 3, 2022, shortly after the commencement of this action, Plaintiff filed its original *lis pendens* (the "Original *Lis Pendens*") under *N.J.S.A.* 2A:15-6. (Da8.) After entry of the Final Judgment, Plaintiff promptly discharged the Original *Lis Pendens*. Plaintiff filed its Notice of Appeal of the Final Judgment on September 4, 2023 (Pa0236-40), and, in connection therewith, on September 21, 2023, filed the Second *Lis Pendens*. Plaintiff was not required to seek a stay, and the termination of the PSA has no effect on the Second *Lis Pendens* filed in connection with this appeal.

In addition to their *lis pendens* arguments, Defendants attempt to introduce (i) a letter from Plaintiff dated September 4, 2023, and (ii) Defendants' motion to dismiss this appeal and the trial court's related order dated December 20, 2023, none of which is part of the record on this appeal. (Db43-45.) With respect to Defendants' claim that Plaintiff is "fully aware of the DEP regulatory trajectory" and that "[i]t is no accident that the delay combined with the demand for another reduction in price was timed precariously for the Defendants and to the benefit of Plaintiff," it is an absolute mystery to Plaintiff as to what Defendants are referring. (*See* Db44.) Defendants' reference to the "delay" and "demand for another reduction in price" is simply incoherent.

In sum, Defendants fail to provide any legal authority establishing that Plaintiff was required to seek a stay in the trial court or post a bond before commencing this appeal and filing the Second *Lis Pendens*. Defendants' request for relief is misplaced, as there is no dispute regarding the finality of the Final Judgment or whether the PSA was terminated in accordance therewith. In addition, the termination of the PSA has no effect on Plaintiff's Second *Lis Pendens*. The Final Judgment concluded that Defendants satisfied their obligations under the PSA—a conclusion with which Plaintiff disagrees and is appealing—and thus forms the basis for Plaintiff's Second *Lis Pendens*, filed under *N.J.S.A.* 2A:15-14, in which

Plaintiff's continuing interest in the Property is preserved during appellate review. Accordingly, this Court should deny Defendants' cross-appeal.

POINT V

DEFENDANTS' CONDITION PRECEDENT ARGUMENT IS UNSUPPORTED BY THE FACTS AND THE LAW (5T61:5 to 70:9)

The second issue raised by Defendants on cross-appeal, which Defendants preface as an alternative argument "[i]n the event that the Appellate Court reverses the Trial Court's decision," is that an unfulfilled condition precedent in the PSA renders the PSA unenforceable. (*See* Db45-47.) Although it is not entirely clear from Defendants' Brief, Plaintiff presumes that Defendants' cross-appeal is directed at the trial court's denial of Defendants' motion for an involuntary dismissal under *Rule* 4:37-2(b). (*See* 5T61:5 to 70:9.) Defendants now raise the issue again, this time prefacing it as an alternative argument "[i]n the event that the Appellate Court reverses the Trial Court's decision." (Db46.) Defendants' argument is incoherent, riddled with misstatements of law and unsupported legal and factual assertions, and, yet again, attempts to introduce purported facts that are both false and not contained anywhere in the record. Accordingly, the Court should affirm the trial court's denial of Defendants' motion for dismissal under *Rule* 4:37-2(b).

First, Defendants' argument is incoherent. Defendants preface their argument on this issue as follows: "In the event that the Appellate Court reverses the Trial

Court's decision, Defendants then seek to preserve this issue herein." (Db46.) Thus, Defendants' argument is premised on a determination by this Court that Defendants—not Plaintiff—are obligated under the PSA to obtain the RAO. By the end of their argument, however, Defendants reverse course, stating—without any support—that "Plaintiff has decided that it cannot or will not obtain an RAO" and "Defendants has [sic] no responsibility to seek an RAO." (Db47.) In other words, Defendants' argument begins with the premise that Defendants are responsible for obtaining the RAO, but later relies on the trial court's finding that Plaintiff was responsible for obtaining the RAO. (Db46-47.)

In addition, with respect to this cross-appeal issue, Defendants' Brief contains just one (1) citation to the record, which, as with many other citations throughout Defendants' Brief, does not support the proffered statement. (*See* Db45-47.) Defendants not only fail to provide citations to the record, but also attempt to introduce new "facts" that are not found anywhere in the record. *See* Pressler & Verniero, cmt. 1 on *R.* 2:5-4(a). For example, Defendants assert that "Plaintiff has decided that it cannot or will not obtain an RAO . . . ." (Db47.) Other than Plaintiff's assertion that Defendants are responsible to obtain the RAO in accordance with the PSA, the record is devoid of any facts to support such a claim.

Turning to the merits, or lack thereof, again, Plaintiff presumes for purposes of this argument that Defendants' cross-appeal is directed at the trial court's denial

of their motion for involuntary dismissal under *Rule* 4:37-2(b). Defendants fail to even address the applicable standard of review on this issue, but nevertheless, their argument fails both as a matter of law and fact.

> Pursuant to *Rule* 4:37-2, at the close of a plaintiff's case at trial, a defendant
>
> > may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

R. 4:37-2(b). In reviewing a trial court's ruling on a motion pursuant to *Rue* 4:37-2(b), an appellate court applies the same standard governing the trial court's decision and "must accept as true all evidence presented by plaintiff and the legitimate inferences drawn therefrom to determine whether the proofs are sufficient to sustain a judgment in his favor." *Carbajal*, 468 N.J. Super. at 158; *see Verdicchio v. Ricca*, 179 N.J. 1, 30 n.4 (2004) ("It goes without saying that a reviewing court faced with a *R.* 4:37-2(b) issue must disregard evidence adduced on the defense case."); *see also Dolson*, 55 N.J. at 5-6 ("[T]he judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.").

Defendants do not address the applicable standard of review, and their argument is otherwise wanting legal support. That said, Defendants' condition

precedent argument is nothing more than a red herring. Defendants claim that because the PSA made Defendants securing of the RAO "a condition precedent to [Plaintiff's] obligation to close" on the sale of the Property, the non-occurrence of that condition renders the PSA void. (Db46-47.) Defendants conveniently omit the fact that the PSA expressly provides that if Defendants have not satisfied their obligations under Article 11 of the PSA prior to closing, Plaintiff "may either cancel this Agreement or extend the date for Closing for such period as determined by [Plaintiff] to be appropriate to allow for completion by [Defendants] of the said obligations." (Pa0261 at Art. 11.2(b) (emphasis added).) Thus, the parties' contract permits Plaintiff to extend the closing date until Defendants comply with their obligations under the PSA—which include securing the RAO. (*Ibid*.)

There is no truth to Defendants' claim that "Plaintiff has decided that it cannot or will not obtain an RAO," and in any event, as mentioned above, Defendants premise this argument on this Court reversing the Final Judgment; in other words, their condition precedent argument is premised on Defendants being responsible for obtaining the RAO. (Db46.) Although Defendants aver that it is impossible to secure the RAO, Defendants do not provide any explanation as to why the RAO cannot be obtained, and there is nothing in the record to support such a claim. (*See* 4T140:4 to 142:6 (explaining process by which Defendants can obtain RAO prior to closing); 8T69:7 to 70:21 (explaining that Defendants could obtain RAO prior to

redevelopment).) In truth, the only thing preventing Defendants from securing the RAO is themselves, and Defendants cannot claim that their mere refusal to perform their contractual obligations constitutes the failure of a condition precedent rendering the PSA void, particularly in light of the express provision of the PSA that permits Plaintiff to extend the closing date. (*See* Pa0261 at Art. 11.2(b).) For all these reasons, the Court should deny Defendants' cross-appeal and affirm the trial court's denial of Defendants' motion for involuntary dismissal under *Rule* 4:37-2(b).

CONCLUSION

For all the foregoing reasons and those more fully explained in Plaintiff's Brief, Plaintiff respectfully asks that this Court reverse the Final Judgment and grant specific performance ordering Defendants to comply with their obligations under the PSA and secure a site-wide RAO or, alternatively, reverse the Final Judgment, reverse the Discovery Order, and remand to afford Plaintiff the opportunity to conduct limited additional discovery and for a re-trial based on a full record. Lastly, Plaintiff respectfully asks that Defendants' cross-appeals be denied in their entirety.

Respectfully submitted,

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By: _____
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