FILED, Clerk of the Appellate Division, May 09, 2024, A-001350-23

Steven D'Agostino

Appellant / Plaintiff

v.

Bill Goichberg; and Continental Chess Association

Respondents / Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1350-23

CIVIL ACTION

SAT BELOW:
Honorable Joseph E. Kane, J.S.C.
Atlantic County Special Civil Part,
Small Claims section
DOCKET NO. **ATL-SC-332-23**

PRINCIPAL BRIEF AND APPENDIX
FOR APPELLANT STEVEN D'AGOSTINO

RECEIVED
APPELLATE DIVISION
MAY 09 2024
SUPERIOR COURT
OF NEW JERSEY

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PRELIMINARY STATEMENT

For the sake of simplicity, Plaintiff-Appellant Steven D'Agostino shall hereinafter refer to himself in the first person.

This simple small claims case involved a well-publicized annual chess tournament, where all of the players would pay an entry fee to compete against other similarly-matched players, so as to earn quite significant monetary prizes.

The primary basis for my bringing this case was that the defendants failed to disclose a significant limitation as to the prizes (i.e. only one prize per person). The secondary basis is that they failed to follow their own published tournament rules (i.e. about the registration cut off time) for the particular event I had entered, resulting in a significant detriment to myself and all of the other participants who had already paid their entry fees before that published cut off time.

At trial, the court made four (4) significant errors in dismissing my claims.

The first error was the trial court's finding that the Consumer Fraud Act was not applicable, because a tournament prize was not included within the definition of "merchandise" under the Consumer Fraud statute.

The second error was the trial court's finding that because it was not intentionally concealed, the undisclosed clause was nonetheless still enforceable.

The third error was the trial court's finding that a player's paid entry into the tournament did not create a contract, thus was not controlled by common-law contract principles.

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The fourth error was the trial court's finding that the doctrine of "accord and satisfaction" would have nullified my claims, even if the court had been otherwise persuaded to rule in my favor.

PROCEDURAL HISTORY [1]

The complaint was filed on July 3, 2023. (Pa1 – Pa6).

Trial was scheduled and heard on Nov 13, 2023. (1T).

On Nov 16, 2023, the trial court entered a written order of dismissal. (Pa7).

On Dec 28, 2023, I filed a timely Notice of Appeal. (Pa8 – Pa13).

STATEMENT OF FACTS

It is undisputed that "the 45th annual World Open" chess tournament events had been posted / published / advertised on the defendants' website.

It is undisputed that this event was also posted / published / advertised several times within the "Chess Life" monthly magazines, which are published by the "United States Chess Federation" (hereinafter "USCF"). [2] Additionally, I was also sent multiple advertisements in the mail about this upcoming tournament.

[1] The sole transcript is of the Nov 13, 2023 trial, and is designated as 1T, followed by page:line(s)

[2] This is not a governmental agency, and it seems surprising to me that they were allowed to use this misleading name for this organization (i.e. it was my belief that private corporations and entities cannot use words such as "United States" or "Federal" as part of their business name).

Although all of these tournament announcements had listed in detail what the prize amounts would be, what the entry fees would be, and had even listed some of the limitations as to the prizes, no mention was made anywhere that there was a global prize limitation that a player could only receive one prize per event, (Pa14-Pa16) - not even on their website page that was specific to prize information (Pa17).

So on Jul 3, 2027, I entered the "World Open G/10 Championship" event at the 45th annual World Open. Registration for this event was supposed to end at 9:30 PM, and the event was supposed to start at 10:00 PM. However the defendants selfishly kept on letting more and more players join the tournament late, for almost 90 minutes past the published cut off time to register. [3] As a result, the tournament started over an hour late, shortly after 11:00 PM on July 3, 2017. (Pa4)

But despite the late start and the unfairly increased size of my competition, I ultimately did extremely well at that event, and I had earned multiple prizes. (Pa18). However I was shocked at the end of the tournament (it was then nearly 2:00 AM on July 4, 2017) when the tournament director (Robert Messenger) handed me a prize check that I thought was way too small. (Pa1, Pa4).

[3] The defendants did this solely so that they could reap a bigger net profit for themselves (which they of course succeeded at); but conversely, this same action incurred a double detriment to the players (i.e. a significantly later starting time, as well as a substantially bigger field of competitors to fight over the same fixed prize amounts).

When I expressed my surprise to Mr. Messenger, he only then explained that there was a limitation of only one prize per person. But because of my being dead tired at that point and not wanting to hold up the line for the other people who were still waiting to get their prize checks, I did not make an issue out of it at that time.

Instead, several weeks afterwards I then sent an email to the defendants, which was responded to by Mr. Messenger, and he explained further how he had calculated my prize amount, which I still thought was way wrong. However, the check he handed me back on July 4th did not say "payment in full" or any words like that, so I decided to cash the check and possibly pursue the matter further at some later point in time (i.e. when my own schedule was less hectic).[4]

At trial, I testified that nowhere within any of the published tournament announcements was any mention ever made anywhere that there would be a limitation that a player could only receive one prize per event. (1T4:2-7, 1T6:4-12)

And in response to the trial court's questions, the defendants' witness, Bob Messenger, openly admitted to this fact. Mr. Messenger further admitted that the only place where this prize limitation was published was in the official USCF rule book, which had only been available to players whom had chosen to purchase the rule book separately. (1T5:1-18, 1T11:7-13, 1T15:4-17)

[4] But since my schedule never significantly became any less hectic, about two weeks before the 6-year statute of limitations was to elapse, I wrote to Mr. Messenger again trying to resolve the issue amicably, stating that I really did not want to take this court, unless he left me no other choice. However he never responded to that email, so at the very last minute I filed this case.

In essence, Mr. Messenger's only argument was that a player could either choose to pay for that (nearly 400-page) rule book before entering a tournament, or they could arrive at the event and then ask a tournament director if there were any other prize limitations which had not been specifically listed on the published tournament announcements. (1T7:12-14)

During the entire trial, the only disputed facts were: 1) whether or not in 2017 if there was a link to the USCF website on the main page of the defendants' website (i.e. in 2017 I had saved the pages from the defendants' website to my hard drive, which I had later printed out as exhibits for this case; while in contrast, Mr. Messenger had printed the current website pages in 2023, in response to the litigation); and 2) Bill Goichberg's level of control and influence over the USCF.

But regardless, that former disputed fact is completely irrelevant - because it undisputed that even if that website link had existed in 2017, nonetheless players still could not see any of the USCF rules if they had clicked on that (non-existent) link, nor even if the players went anywhere on the USCF website, as none of the USCF rules were published anywhere online in 2017. (Mr. Messenger testified that sometime around 2020, the USCF then decided to publish some portion of its rules online, and make that portion freely available to all). (1T5:16-18)

The latter disputed fact only has minimal relevance, and only to the extent that the defendants should try to argue that they were subservient to the whims of the

USCF rules, thus had no control over the prize limitation rule. However, for one thing this argument certainly would not be true, as Bill Goichberg was not only heavily involved in the USCF, but further he was also its executive director and president, and still continues to be heavily involved with its operation. In fact, the USCF website openly acknowledges Bill Goichberg's long-standing relationship with them, and perhaps most significantly of all, mentions the fact that Bill Goichberg had volunteered months of his time to write the official rulebook for the USCF! (Pa19, *on which I used a green marker to underline the most relevant divulgement*)

Further still, even in a verified complaint by a famous grandmaster, it was asserted that it was a conflict of interest for Bill Goichberg to have his own private corporation of Continental Chess Association (i.e. a for-profit corporation to run his own lucrative tournaments) while also being in charge of the "nonprofit" USCF, which set rules for all USCF-rated tournaments. (Pa20 – Pa21, *on which I used a green marker to place handwritten "stars" next to ¶¶3 and 26, and where I used a red ink pen to underline the most relevant exposé).*

Moreover, even assuming arguendo if the defendants were in fact subservient to the USCF rules, nonetheless they no offered no reason at all why that prize limitation was not simply published within their own tournament announcements.

Further, the notion that the defendants were forced to follow this USCF rule is directly refuted by the fact that they chose to deviate from other USCF rules.

For example, for each and every chess player in their system, the USCF maintains 3 separate ratings: 1) a "regular" rating (i.e. for the several-hour-long classical games); 2) a "quick" rating (i.e. for games that are between 10 minutes to one hour long); and 3) a "blitz" rating (i.e. for games less than 10 minutes long).

Within the defendants' published tournament announcements for this event, it stated that this "G/10" (i.e. each game would be 10 minutes per side) event would only affect the players' "quick" USCF ratings (an announcement which is in accordance with the USCF rules). However, contrary to the USCF rules, the announcements inconsistently stated that the higher of a player's "quick" or "regular" USCF ratings would be used for pairings and prizes. (Pa16)

Thus, my position also included the argument that I also should have qualified for yet an additional prize (i.e. the under 1300 class prize), since my quick rating was just under 1300 (although my regular rating was just over 1300).

ARGUMENTS

1) The Consumer Fraud Act was applicable (raised below: Pa1, Pa6, 1T4, 1T12)

The trial court erred in its finding that the Consumer Fraud Act (i.e. *N.J.S.A. 56:8-1 et. seq.*) was not applicable, holding that the prize offered by the defendants did not fit the statutory definition of "merchandise". (1T12:10-12, 1T24:1) In *Bandler v.*

Landry's Inc., 464 N.J. Super. 311, 235 A.3d 256 (App. Div. 2020), this Court reversed the trial court's dismissal of the plaintiff's consumer fraud claims, which involved deceptively-advertised prize money for a poker tournament. Although the primary thrust of that case was deciding whether or not the Casino Control Act preempted the Consumer Fraud Act (an issue obviously not relevant here), this Court held that the defendant's false advertising of a tournament prize violated the Consumer Fraud Act, and that the prize offered was undoubtedly "merchandise", which was broadly defined under *N.J.S.A. 56:8-1(c)* to include services. Id. at n.3

In *Bandler*, this Court noted the following: "We previously addressed the alleged conflict between the CFA and the CCA regarding deceptive advertising in *Smerling v. Harrah's Entertainment, Inc.*, 389 N.J. Super. 181, 184-85, 912 A.2d 168 (App. Div. 2006). Invoking both the CFA and CCA, the plaintiffs alleged that promotional advertisements that falsely promised cash incentives induced them to visit a casino hotel. Id. at 184, 912 A.2d 168. The trial court held that the Division had exclusive jurisdiction over the plaintiffs' claims and dismissed the CFA claims under *Rule 4:6-2(e)*. Id. at 185-86, 912 A.2d 168. We reversed, concluding the CCA did not preempt plaintiffs' CFA claims from proceeding. Id. at 193, 912 A.2d 168."

Thus, in this case it is clear that the trial court erred by finding that the prize offered by these defendants did not constitute "merchandise" under the CFA.

2) The undisclosed clause was unenforceable (raised below: Pa1, Pa5, 1T4, 1T16-20)
The trial court erred by finding that because it was not intentionally concealed, the undisclosed clause was nonetheless still enforceable. Likewise, it was error to find that a tournament participant should need to spend additional money to purchase a rule book, then expend an excessive amount of time to read that nearly 400-page rule book cover to cover, all just to find out what other (if any) undisclosed limitations may exist as to the announced prizes for each event. Further still, it was error for the trial court not to at least consider the authorities I was citing (and then render a statement of reasons as to why he believed those to be inapplicable).

In *Hoffman v. Supplements Togo Mgmt., LLC*, 419 NJ Super. 596 (App Div. 2011), this Court held that the disputed clause was unenforceable because it "was unreasonably masked from the view of the prospective purchasers because of its circuitous mode of presentation." Id. at 611-612 This Court therein recognized and adopted the rulings in *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir.N.Y. 2002), which found the "browse wrap" agreement to be unenforceable:

> [T]he Second Circuit held in *Specht* that the arbitration clause was unenforceable because the plaintiffs had not been provided with reasonable notice of its existence. *Id. at 31-32*. Applying California state law, which, like our State, requires such reasonable notice as a predicate to enforceability, the Second Circuit concluded that the arbitration clause lacked the plaintiffs' knowing assent. *Ibid*. The court was unpersuaded that "a reasonably prudent [person] in these circumstances would have known of the existence of [the] license terms." *Id. at 31*. Instead, the plaintiffs in *Specht* "were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of

> assent to those terms." *Ibid.* As Judge Sotomayor aptly wrote, "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Id. at 35* (emphasis added).

However here, the facts are much more compelling than those in either *Hoffman* or *Specht*, as here the prize limitation clause was not presented at all, and was not visible at all no matter how much of a circuitous route which the tournament participant was willing to travel. (As repeatedly stated during the trial, in 2017 the clause was not available at all online, no matter what website links the participant visited – instead, it could only be seen if the person also decided to separately purchase a voluminous rule book). For example, in *Hoffman*, even though the forum selection clause was readily available to the user if " he or she scrolled down to a submerged portion of the webpage where the disclaimer containing the clause appeared", this Court held that the clause was "presumptively unenforceable", because it was "unlikely that consumers would ever see it at all on their computer screen." But here in this instant matter, it was impossible that consumers could ever see it at all on their computer screen, because at the time of my entry into this 2017 tournament, those rules did not exist online anywhere! And at trial, the defendants could not explain why they simply did not add one extra sentence, which stated their intended limitation of "only one prize per person", to any of their multiple tournament announcements and advertisements,

nor why they did not add this one extra sentence even on their own website.

Thus, there can be no question that the unannounced provision of "only one prize per person per event" is unenforceable as a matter of law.

3) My paid entry into the tournament created a contract (raised below: 1T16-1T23)

The third error was the trial court's finding that a player's paid entry into the tournament did not create a contract, thus was not controlled by common-law contract principles. This error is evident from an unpublished opinion, *Fehr v. Algard*, 2011 WL 13670 (*reversed on grounds not applicable here* [5]) recognizing (as the trial court had also) that the defendant's offer of a prize for a fishing tournament created a contract with the plaintiff when he paid his entry fee, which was then governed by contract law. In relevant part, in *Fehr* this Court noted:

> "In this appeal, the parties agree their dispute is governed by contract law. See *Brown v. Morrisey & Walker*, 106 N.J.L. 307, 312 (E. & A. 1930) (holding that "[t]he offer of a prize may mature into a binding contract in favor of a successful contestant who has complied with the terms of the offer"); see also *Robertson v. U.S.*, 343 U.S. 711, 713, 72 S. Ct. 994, 996, 96 L.Ed. 1237, 1240 (1952) ("The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract."); *6 Corbin on Contracts, § 1489* (same); *Annotation, "Private Contest and Lotteries: Entrants' Rights and Remedies,"* 64 A.L.R.4th 1021, 1045-52 (1988) (stating the promoter of a contest makes an offer by making public the conditions and rules of the contest). At issue then is whether plaintiff complied with all Tournament rules, representing the terms of defendants' offer, entitling him to receipt of an award". *Fehr*, *3

[5] Note that unlike the situation here, in *Fehr* the disputed contract clause (i.e. about false information being grounds for disqualification) **was provided to those plaintiffs**, and contained within the same tri-fold tournament brochure. This court noted: "[t]he rules brochure also includes the registration portion … [stating] directly … above the captain's signature: 'Anyone who is found to have provided false information is subject to immediate disqualification'."

Instead, the trial court erred by determining that contract law did not apply at all, simply because the disputed and undisclosed limitation clause was contained within a rule book. But even aside from the undisclosed clause, they breached the contract by allowing the late registrations, and by delaying the starting time.

Further, it appears that the trial court gave weight to the fact that the rule book was supposedly published by an independent national organization, which these defendants had no control over, nor had any choice but to blindly follow. But certainly it was error for the trial court not to then give weight to the facts that such assumptions were in error, as for one thing defendant Bill Goichberg actually wrote the USCF rule book (see Pa19), causing a conflict of interest which had been an issue of earlier lawsuits even by famous grandmasters (see Pa20-Pa21). And for another thing, these defendants parted from the USCF rules when it came to using the player's established USCF quick ratings (i.e. see Pa16, where these defendants had stated that this event would only affect the player's USCF quick ratings; but contrary to the USCF rules, inconsistently also stated that they would use the higher of the players' regular or quick rating for pairings and prizes).

4) "Accord and satisfaction" did not nullify my claims (raised below: 1T23)

The fourth error was the trial court's finding that the doctrine of "accord and satisfaction" would have nullified my claims, even if the court had been otherwise persuaded to rule in my favor.

I testified to the fact that I had cashed the check "under protest" (i.e. with preservation of rights). (1T23:15) And Mr. Messenger did not testify that the check was marked as "payment in full" (nor any words like that). And although not testified to at trial, I will attest herein that there was no such language (e.g. "payment in full") written anywhere on that check.

This Court has already addressed the exact same scenario over 25 years ago in *Zeller v. Markson Rosenthal & Co.*, 299 NJ Super. 461 (App. Div. 1997), where this Court reversed the trial court's finding that accord and satisfaction precluded plaintiff's claim. In *Zeller*, the defendant gave plaintiff a check for an amount which it had calculated was owed to the plaintiff, along with an explanation letter of same. However, neither the check nor the transmittal letter indicated that plaintiff's acceptance would constitute "full satisfaction". And on top of that, the plaintiff endorsed the check with the words: "under protest with full reservation of rights," indicating it was not her intention to relinquish her claim to the balance that she alleged was still due. This Court ultimately held that in the absence of evidence of both parties' intention that the payment was to act as full payment, "the defense of accord and satisfaction is unavailing to defeat a creditor's claim for payment in full". Id. at 466. Here in this case, there was no such evidence offered by either party, and I clearly stated that I had cashed the check "under protest".

The trial court stated that there was a recent authority on the issue of "accord and satisfaction" that "came out about nine months ago." (1T23:20-22)

However, after the trial I then searched for the "9-month old" authority that the court had referred to - but despite my searching on Google Scholar, Westlaw, and Lexis, I could not (and still can not) find anything at all, neither state nor federal, neither published nor unpublished, anywhere within even the last few years.

Moreover, even assuming arguendo if there was such an authority that has recently come out, and even further assuming arguendo that this new authority was precedential and that it supersedes this Court's rulings in *Zeller*, unless those new rulings were also deemed to act retrospectively, then they would have no bearing on my 2017 decision to cash the check "under protest" and still preserve my future rights, which I did in accordance with this Court's rulings in *Zeller*.

5) The undisclosed prize limitation is illogical, nonsensical, and absurd (not raised below)

Lastly, I respectfully submit that the undisclosed prize limitation of "one prize per person" is not only counter-intuitive, but further is also illogical, nonsensical, and just downright absurd. That is, both logically and intuitively, if a given player earns more than one prize, then he/she should receive each of the prizes that were earned, which is the obvious expectation. In other words, rhetorically speaking, why should he/she not be awarded all of the prizes that he/she has fairly earned?

I think I should also note that although it should not be necessary to show the defendants' intent, I believe the facts here clearly infer a nefarious intention on the defendants' part. That is, the defendants' choice to announce other prize limitations, but yet not announce this one, should clearly infer a deceptive intent to conceal this limitation, as obviously this limitation would only act to deter players from entering a given tournament. It certainly would not entice them to do so. In other words, no player would ever say: "Gee, I am thinking about entering this tournament, which offers significant (and potentially multiple) prizes to the winners; but then if I should win multiple prizes, I wouldn't want to get paid the prize money for all of them - instead, I'd only want to be paid for just one prize".

Obviously, no player would ever say (or think) that, and the defendants know this; so in all probability, that's why they didn't disclose it in their announcements.

CONCLUSION

Obviously, the definition of merchandise under the Consumer Fraud Act (N.J.S.A. 56:8-1 et. seq.) includes a player's entry into a tournament (particularly when there are prizes involved). So that was the trial court's first error, in deeming the CFA to be inapplicable.

Secondly, the undisclosed clause, which was <u>impossible</u> for a player to see, was clearly unenforceable – this Court has held even in cases where it was possible to see a given clause, but if it was either "submerged" or required the

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customer to navigate elsewhere to see it (i.e. a "submerged clause" or a "browse wrap" clause), those clauses were not enforceable. Obviously, the invisible and undisclosed limitation of "one prize per person" is far worse. So that was the trial court's second error, in deeming that clause to be enforceable.

The trial court's third error was deeming that a player's paid entry into the tournament did not create a contract. This Court, as well as other authorities, have clearly held otherwise (e.g. "the acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract.")

The fourth error was the trial court's misapplication of the doctrine of accord and satisfaction (which would have been the defendants' burden to prove, which they did not even attempt to do). This Court has made clear that in the absence of such proof, the defense of accord and satisfaction is unavailable.

Lastly, the undisclosed clause makes no sense. The defendants could not explain why this rule even exists, despite the fact that defendant Bill Goichberg had actually written the USCF rule book.

Thus based on the foregoing, I respectfully submit that this Court must reverse the trial court's dismissal of my claims. Thank you.

Respectfully submitted,

Steven D'Agostino

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STEVEN D'AGOSTINO,

Plaintiff/Appellant

v.

BILL GOICHBERG AND CONTINENTAL CHESS ASSOCIATION,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001350-23T1

CIVIL ACTION

On Appeal of Trial Court's Decision Following November 13, 2023 Bench Trial:

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
SPECIAL CIVIL PART,
SMALL CLAIMS SECTION
DOCKET NO. ATL-SC-332-23

Honorable Joseph E. Kane, J.S.C.
Sat below

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS BILL GOICHBERG AND CONTINENTAL CHESS ASSOCIATION

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Date Submitted: September 19, 2024

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PRELIMINARY STATEMENT

Defendant Bill Goichberg ("Bill") runs the Continental Chess Association ("CCA"). Bill and the CCA have been running chess events for over 50 years. Pa19. Bill began his career organizing chess tournaments by running scholastic tournaments for kids in New York City. He has been running the Continental Chess Association since 1968 and currently the CCA holds tournaments in 26 states. Id. The CCA's largest event is the World Open and it is held in Philadelphia every year. Id. This tournament not only offers players a number of prizes but it gives younger players the chance to become titled chess players. Id.

In addition to bringing chess to city kids, Bill Goichberg also focused on bringing chess to areas that lacked playing opportunities such as Vermont. Id. Since 1990 the CCA has run the Vermont Resort Open and other events in the state contributing to the tripling of the number of chess players in the state since 1990. Id.

The Plaintiff in this case is a chess player. The Plaintiff had a history of playing in the Defendant's events. In the Plaintiff's own words:

> "Plaintiff Steven D'Agostino, who is a chess player and participant in the defendants' events, shall refer to himself in the first person." Pa3

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This case involves the 2017 World Open Game 10 Championship. That is a side event that takes place one night during the week that the World Open is held. The World Open is held over seven days. The World Open G/10 is played in one night.

Almost 6 years to the day of the 2017 G/10 tournament, the Plaintiff filed a wide ranging lawsuit against the Defendants alleging among other things:

1. That non-party United States Chess Federation ("USCF") is wrongfully using "United States" and "Federation" in their name;

2. Some people have alleged that Bill Goichberg has too much power because, in addition to running the CCA, over the years he volunteered his time to the USCF;

3. The 2017 G/10 tournament started at close to 11 pm rather than at 10 pm;

4. He wasn't awarded multiple prizes; and

5. Even though the CCA announced they would use the higher of a player's regular rating or quick rating, he thought that decision was unfair.

The Defendants paid out 100% of the guaranteed prize fund. The Plaintiff was paid his prize. He asked if they calculated it correctly and they assured him they did. The Plaintiff took the check and cashed the check. Six (6) years later, the Plaintiff filed this lawsuit.

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The trial court gave the Plaintiff his day in court. After hearing the parties' testimony and having let them put documents into evidence, the trial court ruled against the Plaintiff on multiple grounds. Those rulings were correct and the appeal should be denied.

PROCEDURAL HISTORY

This case involves a chess tournament which was held on July 3, 2017. On July 3, 2023, the Plaintiff filed this lawsuit. Pa1. The Defendants are in New York and the Plaintiff lives in Ocean County New Jersey. Pa1. The Plaintiff filed this lawsuit in Atlantic County. Pa1. Having the case in Atlantic County made it a further drive to the courthouse for the Defendants.

On November 13, 2023 a bench trial was held in Atlantic County small claims court. The Plaintiff testified.T3:4:7, 8:15-18; 12:13-25; 13:15-16; 15:3, 15:12-16, 17:7-21: 16; 22:1-5. A representative of the Defendant testified. There was extensive discussion about the tournament, the prizes, the Defendants' website, and the rules that the Unites States Chess Federation ("USCF") applied to this and all other rated chess tournaments. The parties presented multiple documents to the court that related to the issues in the case. T3:1-24:4

The trial court let the Plaintiff argue at length about his position in the case. Id. The Plaintiff was allowed to keep arguing even after the Judge ruled. Id. On November 13, 2017, following the bench trial, the court found in favor of the

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Defendants and dismissed the Plaintiff's claim with prejudice. T: 24-3 and Pa7

STATEMENT OF FACTS

People who organize chess tournaments are referred to as organizers. People who are onsite running the tournament are called tournament directors. T16:23-17:3. Tournaments can take place in a morning or afternoon. Pa14-16. Some tournaments last all day. Some tournaments are held over multiple days. Pa14-16. To play in the Defendants' chess tournament, a player must join the United States Chess Federation ("USCF"). T4:18-19. The USCF publishes a rule book. T4:20-22. The rulebook is "used all over the country." T11:8-9 and T19: 24-25.

At the time of the 2017 tournament, the rulebook was not available online. However, the Defendants' representative testified that their website said "More rules are in the US Chess Federation rulebook." T4:20-21. The Defendants' representative said they let people know that the USCF rules are followed. "So as posted, that rulebook will be followed." T4:22-23. Additionally, their tournaments, including the one in question, are run by tournament directors. And "the tournaments director always brings a rulebook onsite." T5: 9-10.

In fact, the defendant's representative Mr. Robert Messenger, was the tournament director who ran this 2017 tournament.

The Plaintiff was well aware of how the Defendants ran their tournament and that rulebook applied to chess tournaments. In fact, in his complaint, he admits

he has been a "participant in the defendants' events." Pa3. That's events, plural.

Further, the Plaintiff was well aware of the rulebook prior to playing in any tournament. You have to join the USCF before you can play in the defendants' tournaments. T4: 19-20. The Plaintiff testified:

> "You had to purchase that rulebook. You know when you join a USCF, they don't give you a copy, you can pay your annual dues, but you have to pay extra to pay that rulebook." T6:7-10.

He was actually familiar with the rulebook. In the Plaintiff's own words he knew it was a "nearly 400 page rulebook." Pb9. He also knew that the rulebook "changes constantly." T6:10.

The Plaintiff undeniably knows the rules that apply to chess tournaments, including CCA tournaments. Pa3. We know this because the Plaintiff's complaint states:

"[T]he USCF will often change its rules and policies in ways that directly benefit … [the] Continental Chess Association (CCA)." Additionally, the Plaintiff stated "Plaintiff Steven D'Agostino… is a chess player and participant in the defendants' events." Pa3.

The Plaintiff's complaint has multiple other references to the chess rules. For example, the Plaintiff talks about tournaments where the prize fund is based on a certain number of players showing up. If not enough players show up then the

tournament organizer is still required to pay out 50% of the advertised prize fund. Or, as the Plaintiff would say, the "prize amounts are cut in half." Pa3. How does the Plaintiff know this? Because it's in the rules that apply to all chess tournaments.

Every tournament that wants to be rated must follow the USCF rules. T5:5-15 and T11:7-13.. There are organizations like the CCA that run tournaments. Pa19.

The Plaintiff claims he did not want to sue the Defendants. He testified:

> "I really didn't want, because I appreciate everything that the defendant has done for the game of chess, I really didn't want to bring this suit. But I…" T5: 21-23.The trial court said "But you did" And the Plaintiff said "I did" T5:24-25.

Under the Plaintiff's best case scenario, if the rules were ignored, he would receive an extra $105. Pa4 and T12:5-8. However, the Plaintiff stated at the trial he was "suing for $780." T3:11-12.

Even though the Plaintiff "appreciated everything the defendant has done for the game of chess" he kept arguing after the Judge ruled. The Plaintiff wanted to bring a motion for reconsideration. And then the Plaintiff told the Judge he was going to appeal his ruling. The trial court stated:

> "So just remember, but don't tell me in the beginning of your case that you didn't want to go ahead and go this far, when you tell me now you're going to appeal? Well, at least, at least be consistent."T20:13-16

This case involves a 2017 chess tournament. The Defendants advertised

what the prizes were. 100% of the advertised prizes were paid out. Every penny that was in that ad was paid out. Pa18.

The Plaintiff does not claim the ad induced him into playing. He does not say that if he knew of the particular rule in question, he would not have played in the tournament. Pa4-6.

The prizes or the rule in question were not on his mind when he entered the tournament. There is no such evidence in the record. He had a very good and unusual result. The Plaintiff was obviously surprised by his performance in the tournament. In his own words "I ended up with an amazing result." Pa4. The Defendants paid him what they owed him that night.

LEGAL ARGUMENT

I. THE TRIAL COURT'S RULING FOLLOWING THE BENCH TRIAL SHOULD NOT BE OVERTURNED

A trial court's ruling after a bench trial is entitled to substantial deference. "The scope of Appellate review of a trial court's fact finding function is limited." Seidman v. Clifton Sav.Bank, 205 N.J. 150, 169 (2011).

An Appellate Court should review rulings made by the trial court "premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard." Nelson v. Elizabeth Board of Ed., 466 N.J. Super. 325, 366 (App Div. 2021). N.J. 168, 182 (2013). The Supreme Court noted "an Appellate Court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020). The Plaintiff was able to

argue (and keep arguing even after the Judge ruled). There were documents presented to the court. After the Defendant's representative testified, the Plaintiff was allowed to argue again against their position. The Plaintiff had more than his "day in Court." "Only when the trial court's conclusions are so clearly 'mistaken' and 'wide of the mark' should we interfere to ensure there is not a denial of justice." Gnall v. Gnall, 222 N.J. 414, 428 (2015).

In sum, the Plaintiff has no basis to challenge the ruling over his ever changing dollar demand. The trial court made factual findings and those findings should not be disturbed. "Factual findings premised upon evidence admitted in a bench trial are final on appeal, when supported by adequate, substantial, credible evidence." Potomac Ins. Co of Ill. v. Pa Mfrs'. Ass'n Ins. Co., 215 N.J. 409, 421 (2013).

There was testimony about chess tournaments, the advertising in this case, the defendant's website, the rules of chess and how they were accessible at that time, the particulars of this tournament and what the prize structure was. These topics were discussed in detail during the trial. The trial court considered all the testimony and the documents and ruled against the Plaintiff. The trial court ruled:

> "No, because I am listening to both of you go back and forth. And it's giving me a lot of good information. And I find that the rules are available, whether convenient or not, but

> they're available. And maybe you have to spend some time and money to get them if you want them physically in your hand. But they're available. They're not hiding anything from anybody. And if they are, they're hiding it nationwide, which I find not credible." T15: 20-25, T16:1-2

The Plaintiff was allowed to argue at length. After the trial court's ruling, the Plaintiff kept arguing. At that point the Plaintiff said he should have been awarded "straight breach of contract damages." T16: 22

The court rejected that argument as well and ruled:

> "No, no, you don't. Because the rules were available? I am. I'll grant you, they're not the easiest thing to get to. But I think if you, and I don't hear any dispute, that if you go to the tournament and ask…the tournament director, he would answer any questions you would have. So they're not trying to hide anything. So I find you're entitled to one prize, sir. T16:23-25, T17: 1-6

The Plaintiff is essentially arguing the factual determinations the trial court made are wrong. The Judge was correct. The Plaintiff has not identified the correct standard, let alone argued it. Regardless, he cannot meet that standard.

> "It has otherwise been stated that our Appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the

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> competent, relevant and reasonably credible evidence as to offend the interest of justice."

Rova Resort, Inc. v. Investors Inc. Co., 65 N.J. 474, 484 (1974).

II. THE PLAINTIFF FAILED TO PROVE A CONSUMER FRAUD VIOLATION

The Consumer Fraud Act, *N.J.S.A.* 56:8-2, provides:

> "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . ."

Any "person" who is injured "as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act" may recover treble damages, reasonable attorney's fees, filing fees and reasonable costs of suit. *N.J.S.A.* 56:8-19. To be covered by the CFA, the defendants' conduct must be found to be an "unconscionable commercial practice." D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super, 11, 29-30 (App. Div. 1985).

As the New Jersey Supreme Court said in Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997) "[N]ot just 'any erroneous statement' will constitute a

misrepresentation prohibited by [the Act]. The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase. In the Gennari v. Weichert case the defendants made material misrepresentations to buyers of newly built homes. The builder was known to build substandard homes. The Supreme Court noted: "The purchasers were induced to close on homes that were poorly built. Experts hired by the purchasers discovered serious problems with insulation, infiltration of cold air into the home, water damage and water leakage, poor quality lumber, inappropriate framing and support beams and the use of certain substandard materials." Id. at 588. In our case, there's no misrepresentation. The ad was accurate. The prizes were correct and 100% of the advertised prize fund was paid out. Pa18.

The only alleged misrepresentation raised by the Plaintiff in his complaint was about the tournament start time (it started close to an hour late). The Plaintiff said: "The first basis is that the defendants misrepresented the event registration end time, as well as the event start time, in their promotional materials and on its websites." Pa6. However, the Plaintiff waived this claim by not raising it at trial. It was admittedly a speculative claim. In his complaint, the Plaintiff stated: "*However, I anticipate the defendants' challenge that I cannot possibly prove that this definitively would have been the outcome otherwise.* While that challenge would be valid, conversely they also cannot possibly prove that their doing so

made no difference to the ultimate outcome." Id.

The Plaintiff argues there was an omission in the ad for this tournament. In his complaint, the Plaintiff stated:

> "The contest rules were not fully disclosed in any of the defendants' promotional materials, nor anywhere on any of the defendants' websites. Particularly with respect to the limitation of "only 1 prize per player", ***the defendants completely omitted any mention of this contract term.*** " Pa4 (emphasis added).

The Plaintiff argues the Defendants should have referenced the rule in question that impacted him. The Plaintiff argues that omission harmed him. However, to prove a CFA claim that an advertisement omitted material information, you have to prove the omission was intentional. "[T]he Act specifically provides that acts of omission must be 'knowing' and committed with 'intent' to induce reliance." Vagias v. Woodmont Properties, LLC, 384 N.J. Super. 129, 134 (App. Div. 2006). There was no evidence that the Defendants intended to mislead the Plaintiff. At the bench trial, the Plaintiff testified. The Defendant's representative testified. There was testimony about the ad, the rules, the Defendant's website and the USCF rulebook. There was testimony about the rule in question and that it was applied nationwide. There was testimony that tournament directors were on site with a copy of the rulebook at every tournament. The trial court allowed the Plaintiff to testify at length. The trial court considered

all of this testimony and other evidence and concluded there was no intent to mislead.

The Plaintiff is not challenging the finding there was no intent to mislead. Instead, the Plaintiff is saying, even with that factual finding, the Court should have still ruled in his favor. Specifically, the Plaintiff says: "The trial court erred by finding that because it was not intentionally concealed, the undisclosed clause was nonetheless still enforceable." Pb9.

The Plaintiff does not challenge the finding that there was no intent to deceive or mislead. The Plaintiff should not be allowed to challenge that ruling now. New arguments in a reply brief are not allowed. Borough of Berlin v. Remington and Vernick Engineers, 337 N.J. Super. 590, 596 (App. Div. 2001). See also Bouie v. New Jersey Dept. of Community Affairs, 407 N.J. Super 518, 538 (App. Div. 2009) ("A party may not advance a new argument in a reply brief").

The Plaintiff cannot point to any evidence to challenge this ruling, even if he were to suddenly raise this new argument. This ruling following a bench trial is entitled to deference. Regardless, there is no evidence that justifies overturning the trial court.

III. THE PLAINTIFF DOES NOT HAVE A BREACH OF CONTRACT CLAIM

The Plaintiff claims there was a breach of contract because there was a "hidden term." There was no hidden term. There are the rules of chess that every tournament chess player knows about and has to abide by if they want to play in a

rated chess tournament. The Plaintiff was an experienced tournament chess player when he entered this 2017 chess tournament. He had played in multiple of the Defendants' events before the tournament in question. Pa3.

The Plaintiff knew the rules well before this July 2017 chess tournament.

The Plaintiff and the Defendants had an established course of conduct. That history cannot be ignored.

"One form of conduct which may manifest the parties' intent is a course of dealing that establishes 'a common basis of understanding for interpreting their expressions and other conduct."

> D'Agostino v. Appliances Buy Phone, Inc., 2016 N.J. Super. Unpub. LEXIS 504 (App. Div. 2003) and Restatement (Second) of Contracts § 223 (1) (1981) Da16-30.

The Plaintiff's Brief and Appendix have multiple references to the USCF and the Rulebook. He knew about the rulebook and that it was close to 400 pages. He knows "that it changes constantly." By his own admission, before this chess tournament, he played in the defendants' events. He admittedly received advertisements for this 2017 event because of his "involvement in past CCA events." Pa3.

One of the cases that the Plaintiff highlights is Hofffman v Supplements Togo Management LLC, 419 N.J. Super. 596 (App. Div. 2011). The Plaintiff falsely claims that the court ruled that the forum selection clause was not enforceable. What the court actually said is:

> "We therefore hold that the forum selection clause in this case was presumptively

> unenforceable. We do not resolve rather that presumption can be overcome if the defendants establish on remand that Hoffman actually read the forum selection clause before purchasing the product." Id.

Even if the Plaintiff is right and this rule is presumptively unenforceable, the presumption was overcome. This is one of the rules in the 400 page rulebook that applies to all chess tournaments across the country. The Plaintiff knew about the rulebook because of all the past events he played in before the one in question. We know he knew about it because he made multiple references to the rulebook in his brief and appendix. He testified about it at trial. He knew this rulebook applied to this tournament. As the Defendant's representative said, "[I]t's used all over the country. It's the same rulebook for everyone." T11:8-9.

The Plaintiff also cites to the unreported case of Fehr v. Algard, 2011 WL 13670. The Plaintiff spends a lot of time talking about this case and how important it is because he says that it proves that "the defendant's offer of a prize for a fishing tournament created a contract with the Plaintiff when he paid his entry fee." Pb11. However, this case does not help the Plaintiff. It shows why this appeal should be dismissed. The Appellate Division in Fehr ruled that whether or not there was a contract or a breach of contract was for the fact finder at trial. The court held:

> "Therefore determination of whether plaintiff complied with the Tournament rules and the implied covenant of good faith and fair dealing requires a resolution by a fact finder." Id. page 19 and Pa24.

That's exactly what happen in this case. This was a bench trial and the trial court was the fact finder. The trial court listened to all of the testimony and considered the documents discussed by the parties and concluded there was no breach of contract. There was evidence to support the trial court's finding and it should not be disturbed.

IV. THE PLAINTIFF'S CLAIMS ARE BARRED BY ACCORD AND SATISFACTION

The Plaintiff played in the July 3, 2017 G/10 tournament. He was told what his prize was. He claimed he said he thought he would get more. It was explained to him what the correct prize amount was. The Plaintiff accepted the check and cashed the check. He then waited exactly 6 years to file a lawsuit. After listening to the testimony, the trial court concluded there was an accord and satisfaction. The trial court made the correct decision.

Whether there was an accord and satisfaction is a question of fact best left to the fact finder. Wells Reit II-80 Park Plaza, LLC v. Director, Div. of Taxation, 414 N.J. Super. 453, 467 (App. Div. 2010). The issue in the Wells Reit case, was whether or not there was a novation. However, the same analysis applies to accord and satisfaction. Moche v. Levy, 2016 N.J. Super. Unpub. LEXIS 928, 29. Da31-44.

The Plaintiff claimed he questioned the award that night. The Plaintiff also claimed he emailed the Defendants in the weeks after the tournament. No such emails were produced, were not part of the record below and are not part of the record on this appeal. A natural conclusion is the fact finder did not find the

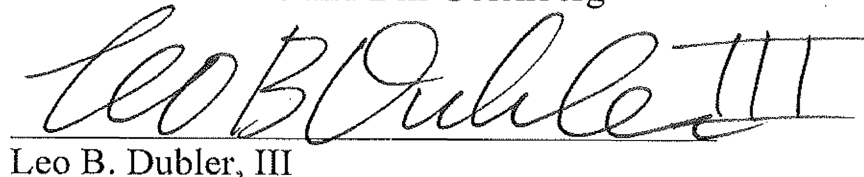
Plaintiff's testimony credible. The Plaintiff's testimony certainly conflicted in parts. He appreciated "everything that the defendant has done for the game of chess" and he did not want to sue. Not only did he sue, but he kept arguing with the trial court, said he wanted to file a reconsideration motion, and told the trial court he was going to file an appeal. The Plaintiff's best day, if the rules are ignored, is he would have received an extra $105. T12:7-8. However, he told the trial court he was suing for $780. T3: 11-12. The contradictory testimony led the trial court to tell the Plaintiff "Well, at least, at least be consistent." T20:16.

The trial court listened to the parties' testimony and is in the best position to judge the parties' credibility. The trial court, after hearing the parties' testimony, concluded there was a clear intention that the check the Plaintiff accepted and cashed was in full satisfaction of the amount owed. That determination by the fact finder should not be overturned.

CONCLUSION

Based upon all of the above, it is respectfully requested that Plaintiff's appeal be denied.

Law Offices of Leo B. Dubler, III
Attorneys for Defendants/Respondents
Continental Chess and Bill Goichberg



Dated: September 19, 2024

Leo B. Dubler, III

FILED, Clerk of the Appellate Division, October 01, 2024, **A-001350-23**

Steven D'Agostino

Appellant / Plaintiff

v.

Bill Goichberg; and
Continental Chess Association

Respondents / Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1350-23

CIVIL ACTION

SAT BELOW:
Honorable Joseph E. Kane, J.S.C.
Atlantic County Special Civil Part,
Small Claims section
DOCKET NO. **ATL-SC-332-23**

REPLY BRIEF AND APPENDIX
FOR APPELLANT STEVEN D'AGOSTINO

RECEIVED
APPELLATE DIVISION
OCT 01 2024
SUPERIOR COURT
OF NEW JERSEY

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* Note that the Respondents' brief cites two (2) unpublished opinions, *Moche v. Levy*, 2016 NJ. Super. Unpub. LEXIS 928, 29 and *D' Agostino v. Appliances Buy Phone, Inc.*, 2016 N.J. Super. Unpub. LEXIS 504 (App. Div. 2016). Yet they fail to attach either of those unpublished opinions as an appendix to their Respondent brief, which is violation of *Rule 1:36-3*.

PRELIMINARY STATEMENT

For the sake of simplicity, Plaintiff-Appellant Steven D'Agostino shall hereinafter refer to himself in the first person.

The Respondents failed to offer any valid refutation to my arguments, despite their having more than 4 months time (and with multiple attempts) to do so.

I believe that just from what is completely lacking in their brief, it should be quite telling that their position is completely without merit.

For one, they don't make a single argument that the trial court's ruling, as to the inapplicability of the Consumer Fraud Act to tournaments, was correct.

They also don't make a single argument that the trial court's ruling, as to the inapplicability of the contract law to tournaments, was correct.

And the only argument they raise as to the unenforceability of the undisclosed prize limitation, is based upon a falsely-purported fact (i.e. that I had supposedly already known about the limitation prior to entering this tournament), which was never raised at trial, and which this Court has already ruled to be impermissible.

Their scant remaining arguments likewise rely entirely upon false distortions of fact, most of which were never even raised at trial.

PROCEDURAL HISTORY (supplemental)

The complaint was filed on July 3, 2023. (Pa1 – Pa6).

Trial was scheduled and heard on Nov 13, 2023. (1T).

On Nov 16, 2023, the trial court entered a written order of dismissal. (Pa7).

On Dec 28, 2023, I filed a timely Notice of Appeal. (Pa8 – Pa13).

On May 10, 2024, I timely filed and served my opening Brief and Appendix.

The Respondents deadline to file their brief and appendix was June 10, 2024, but for reasons never explained, they missed this deadline. And in the end, because of several of their own failures, their deadline was ultimately extended to Sep 20, 2024 - affording them over 4 months' time in which to file their final version of their Respondent brief (and they then did so without any appendix of their own).

STATEMENT OF (THE MOST SALIENT**) REBUTTAL FACTS**

Most notably and most egregiously, the Respondents continue to argue about a newly-purported "fact", which they introduced for the very first time in their Respondents' brief(s), and which this Court has expressly prohibited them from doing in the prior motion order. (Pra1). However despite this express ruling from this Court, they continue to assert the same newly-purported (and false) "fact" – namely, that when I entered the 2017 tournament, I had supposedly already known about the undisclosed prize limitation - even though they had offered absolutely no testimony or exhibits about this whatsoever, at any time during the trial.

Moreover, early on in my direct testimony, I had unequivocally testified to the exact opposite fact – I had testified that I had not been aware of the limitation:

> MR. D'AGOSTINO: "But unbeknownst to me, there was an undisclosed limitation of only one prize per player." (1T3:24 - 1T4:1)

However at no time did the defendants attempt to cross examine me on this testimony, nor did they ever provide any of their own testimony to the contrary, nor did they ever present any documents / exhibits (e.g. even such as my own complaint) to challenge my testimony. Instead, they had accepted this as true.

Yet this third-amended Respondent brief still primarily relies upon numerous references to their false and newly-purported fact of what I had supposedly known about in 2017. The Respondents try to cloak these impermissible attempts by pointing to passing references in my complaint about the existence of the USCF rule book and its approximate volume. However, they never asked me questions about those passing comments that were within my complaint, nor did they ever even attempt to bring those passing comments to the court's attention.

Instead, the actual testimony of the defendants' witness makes clear that the defendants did not dispute the fact that I was unaware of the undisclosed prize limitation – instead they suggest it was my own fault for not buying a rule book and/or not asking the specific question to one of the tournament directors.

And in turn, the trial court made no finding that I had already been aware of the undisclosed prize limitation. Instead, the court accepted my testimony that I had been unaware, but also accepted the defendants' legal position as well (i.e. which placed the blame upon me for not buying a rule book, or for not asking the specific question to one of the tournament directors).

ARGUMENTS (REBUTTAL)

1. Contrary to the Respondents' arguments, the gravamen of my appeal is based upon the trial court's rulings of law, and not upon its findings of fact.

The closest that the Respondents come to making a valid argument, is their citing of treatise as to the correct standard of review for a trial court's findings of fact.

That is, on pages Db7 - Db9 of their brief, they cite treatise as to the deferential standard that is afforded to a trial court's factual findings. They then try to distort my bases for this appeal as supposedly being based upon factual findings, when in reality my arguments are mostly based upon the trial court's rulings of law.

Therefore, those rulings of law are subject to a de novo review by this Court.

2. The Respondents do not – and can not – argue that the trial court's rulings of law were free from error. The trial court erred in several rulings of its law:

The Respondents do not even attempt to challenge my arguments that several of the trial court's ruling of law were in fact made in error. Such errors include:

A) The CFA "merchandise" definition, as it relates to the tournament entry

The trial court's repeated, sole basis for denying the Consumer Fraud claim was because of his ruling of law, that the paid entry into the tournament did not qualify as "merchandise" as defined in the Consumer Fraud statute, *N.J.S.A. 56:8-2* :

> THE COURT: "Well, let me let me see if I can make the interpretation a little bit easier. On your claim, plaintiff, that it's consumer fraud, under 56:8-2.1, this does not fit the definition of merchandise. So it's not consumer fraud". (1T12:9 -12)

And even at the very end of the case, the trial court again reiterated this basis:

> THE COURT: "Now, you may think you're entitled to consumer fraud damages, but you don't, because it's not the definition of merchandise." (1T23:24-1T23:2)

However, as argued in my opening / principal brief, and as the Respondents do not even attempt to refute, this ruling of law was unquestionably in error.

B) The creation of a contract via the prize offer for my paid tournament entry

The trial court held that my paid entry into the Defendants' tournament, which offered me the possibility of winning one or more prizes, did not create a contract. This ruling of law was plainly stated by the trial court near the end of the trial:

> THE COURT: "This is not a common law contract." (1T20:25)

However, as argued in my opening / principal brief, and as the Respondents yet again do not even attempt to refute, and further as the Respondents actually more or less concede to (e.g. see Db15), this ruling of law was unquestionably in error.

Instead, the Respondents simply chose to palter here, by falsely stating that the trial court had made a factual finding that there had been no breach of contract, when in fact the trial court had never made any such ruling. Instead, the obvious truth is that trial court had made an erroneous ruling on an issue of law – namely, that common law contract principles did not apply.

C) The proper scope and application of the accord and satisfaction doctrine

As soon as the trial court learned that I had cashed the check (for the single prize I had been awarded), and without making any further inquiry whatsoever, the trial court instantly ruled that my claims were nullified because of accord and

satisfaction. However, as set forth in my opening / principal brief, this was yet another erroneous ruling of law, for which the Respondents do not even attempt to argue that my cited authority (i.e. *Zeller v. Markson Rosenthal & Co.*, 299 NJ Super. 461 (App. Div. 1997)) was somehow misapplied, or that my cited authority is no longer good law (*e.g. that there was a recent change in controlling law, as was mentioned by the trial court*), etc.

Moreover, even as indirectly argued by the Respondents, via both of their own cited authorities, a defense of "accord and satisfaction" or "novation" is "highly fact-specific" as to the parties' intent.[1] But here in this case, without even inquiring about the parties' intent, nor inquiring as to any of the specifics, the trial court held that accord and satisfaction categorically precludes my recovery.

Further still, as I argued within my brief, the defense of accord and satisfaction would be the defendants' burden to prove, a premise that is established even via both of the Respondents' own cited authorities, where this Court held: "the burden of proof rests on the defendant to show the intention by the obligee to discharge the original debtor." (Citing *Fusco v. City of Union*, 261 N.J. Super. 332, 337 (App. Div. 1993)). But they did not even attempt to raise (let alone prove) this defense. Instead, it was only raised (and immediately applied) by the trial court.

[1] The Respondents only cited one unpublished opinion pertaining to the applicability of a "novation" analysis to "accord and satisfaction", and a published opinion regarding a "novation" analysis, both of which held that the issue was "highly fact-specific" as to the parties' intent.

3. The Respondents rely primarily upon falsely-purported facts, and/or upon gross distortions of fact, where much of which had never been raised at trial.

In this section, I will just list (as bullet points) some examples from the Respondents' brief, which show that the vast majority of the Respondents' arguments rely primarily upon falsely-purported "facts", and/or upon gross distortions of fact, where much of which had never even been raised at trial.[2]

- On Db4, the Respondents falsely (and impermissibly) state: "The Plaintiff was well aware of how the Defendants ran their tournament and that rulebook applied to chess tournaments".
- On Db5, the Respondents falsely (and impermissibly) state: "The Plaintiff undeniably knows the rules that apply to chess tournaments, including CCA tournaments".
- On Db14, the Respondents falsely (and impermissibly) state: "The Plaintiff knew the rules well before this July 2017 chess tournament".
- On Db14, the Respondents falsely (and impermissibly) state: "By his own admission, before this chess tournament, he played in the defendants' events."*This was not raised at trial; nor did I state in my complaint when I had played in any events.*
- On Db15, the Respondents falsely (and impermissibly) state: "The Plaintiff knew about the rulebook because of all the past events he played in before the one in question."
- On Db15, the Respondents falsely (and impermissibly) state: "He knew this rulebook applied to this tournament."

All of the above statements are not only untrue (i.e. as I had testified that I had **not** been aware of the limitation at the time I entered the 2017 tournament); but further, these statements are impermissible, as no challenge to this testimony was ever raised at trial. Moreover, the defendants, as well as the trial court, had **accepted** my testimony as true. The defendants' contention was that my own fault for not knowing:

[2] More examples can be found in my pending motion to partially suppress the Respondents' brief.

> MR. MESSENGER: "So our contention would be because that was posted there, if you read that, you would see that there are more rules in the USCF rulebook. ... So either then you could buy a rule book or you could ask a tournament director, could you explain this part of the rules to me?" (1T7:8-14)
>
> MR. MESSENGER: "As I said, since the rules aren't available online, you can either buy a rule book, or you can ask a tournament director to tell you the rule that you're interested in." (1T15:14-17)

So this newly-purported fact, which was improperly introduced for the first time during this appeal, is clearly impermissible. But yet despite this Court's express rulings on my motion (Pra1), nonetheless they are still impermissibly trying to "sneak this in" so as to indirectly "amend" / supplement the record below.

• On Db16, as to their breach of contract, the Respondents falsely state: "The trial court listened to all of the testimony and considered the documents discussed by the parties and concluded there was no breach of contract."

The trial court did not make a factual finding that there had been no breach of contract. Instead, the obvious truth is that trial court had made its ruling solely upon an issue of law – namely, that common law contract principles did not apply here:

> THE COURT: "This is not a common law contract." (1T20:25)

• On Db16, as to accord and satisfaction, the Respondents falsely state: "The trial court, after hearing the parties' testimony, concluded there was a clear intention that the check the Plaintiff accepted and cashed was in full satisfaction of the amount owed.". And then immediately after they made that false statement of fact, they disingenuously argued: "That determination by the fact finder should not be overturned".

However, a review of the transcript reveals that the trial court never made any ruling as to any party's intent. Instead, without conducting any factual inquiry at all, the trial court immediately ruled (in pertinent part):

> THE COURT: "It doesn't matter ... once you cashed that check, your case is over."

• On Db16-Db17, the Respondents falsely state: " ... the fact finder did not find the Plaintiff's testimony credible. ... The contradictory testimony led the trial court to tell the Plaintiff "Well, at least, at least be consistent".

They falsely stated that the trial court had concluded that my testimony (about accord and satisfaction) was not credible, when in reality all I had testified to about that was that I had accepted the check "under protest" – a fact which the court did not doubt, concluding instead that "it doesn't matter." But their paltering did not stop there.

They then continued their pattern of grossly distorting the truth so as to suggest that the purported finding of "no credibility" had formed the basis for the trial court's finding that my contract claim was barred by the doctrine of accord and satisfaction.

But clearly this is yet another disingenuous gross distortion of fact – as a review of the transcript reveals that the "inconsistency" which the trial court referred to was my indicating that I did not want to bring the case, and then indicating my desire to appeal the ruling. Here is exactly what the court stated, in its full and proper context:

> THE COURT: "So just remember, but don't tell me in the beginning of your case that you didn't want to go ahead and go this far, when you tell me now you're going to appeal? Well, at least, at least be consistent". (1T20:13-16)

Thus the actual truth of course is that the trial court never made any conclusion(s) whatsoever as to either party's intent, nor about either party's credibility. And the accord and satisfaction ruling was not based upon credibility or intent, but rather it was only based upon the trial court's interpretation of law (i.e. that it didn't matter whether or not if I had accepted the check "under protest", nor what the surrounding circumstances were – whenever a defendant's payment check is cashed, then accord and satisfaction automatically and categorically extinguishes all of plaintiff's remaining rights and remedies). To be exact, the trial court held:

> THE COURT: "It doesn't matter. Acceptance is acceptance. It's like when you cash a check, you may be writing on it under protest, but once you cashed that check, your case is over". (1T23:16-19)

Therefore what the Respondents argued on D16 and Db17 is not only disingenuous, but further I believe that it is down right offensive and appalling.

- On Db12 and Db13, the Respondents falsely state: "The trial court considered all of this testimony and other evidence and concluded there was no intent to mislead."

However, as I already pointed out, this is clearly not true at all – the trial court never made any such ruling. Instead, the court had only concluded they did not "hide"

anything (i.e. "hiding", which would be an affirmative act). [3] To be exact, the trial court's rulings about the undisclosed prize limitation were as follows:

> THE COURT: "I find that the rules are available, whether or not convenient, but they're available. And maybe you got to spend some money to get them if you want them physically in your hand. But they're available." (1T15:22-25)
>
> THE COURT: "Because the rules were available? I am. I'll grant you, They're not the easiest thing to get to. But I think if you, and I don't hear any dispute, that if you go to the tournament and ask the ... tournament director, he would answer any questions you would have. So they're not trying to hide anything. So I find that you're entitled to one prize, sir". (1T16:23 - T17: 6)
>
> THE COURT: "But it's there. It's on the nationwide rulebook. It's made available by a person who could answer your questions when you go to the tournament. It's, they're not hiding anything. That's what it comes down to. They're not making it glaringly available. Okay, it's maybe not where you would like it to be. But it's there. Okay?" (1T19:24-25, 1T20:1-4)
>
> THE COURT: "Now, you may think you're entitled to consumer fraud damages, but you don't, because it's not the definition of merchandise. So that removes that argument." (1T23:24-25, T24: 1-2)

4. Despite my being "cut off at the knees" by the trial court's ruling about the "merchandise" definition, nonetheless I still was able to prove (to some extent) that there had been a violation of the Consumer Fraud Act.

The Respondents argue that I did not prove my allegations of their Consumer Fraud, which consisted of two parts: 1) their misrepresentation as to the tournament's starting time (i.e. an affirmative act); and 2) their undisclosed prize limitation (i.e. an intentional omission). But these arguments ignore the obvious.

[3] Here, the Respondents disingenuously distort an argument that I had inaccurately stated within my brief. That is, I now see that within my brief, I had essentially misspoken when I had therein argued: "the trial court's finding that because it was not intentionally concealed, the undisclosed clause was nonetheless still enforceable." However instead, I should have stated it far more accurately, by using an adverb of "actively" or "affirmatively", rather than the adverb of "intentionally". But of course this Court does not need to "just take my word" for this - a review of the transcript plainly reveals that the trial court never mentioned anything about either party's intent. As shown above, the trial court repeated his finding several times, and each only used the word "hiding" (i.e. which infers an affirmative act), and never once used the word: "intent" (or "intend", "intention", "intentional", "intended", etc.), nor any similar words.

Specifically, they argue that I did not raise the starting time issue at trial at all, and therefore the issue should be deemed to be waived on appeal. They also argue that I did not prove that their omission about the undisclosed prize limitation was intentional. However, both of these arguments ignore the fact that I was essentially "cut off at the knees" by the trial court's erroneous ruling that my entire Consumer Fraud claim was essentially moot, because the tournament entry did not constitute "merchandise" as defined under the Consumer Fraud statute (i.e. *N.J.S.A. 56:8*). [4] So because of that ruling, I never had a proper opportunity to prove my allegations; and as result, it is irrefutably true that I never raised the start time issue at trial. But my testimony and evidence, which was <u>prevented by an erroneous ruling of law</u>, should not be deemed to now be permanently foreclosed.[5]

However as to the second half of my Consumer Fraud claim, because I continued to argue after the judge's rulings as the Respondents repeatedly mention

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And I had even clarified that factual finding, by informing the trial court of my understanding of his rulings, which was that what he had meant by "hiding", was I would then need to prove "an act of concealment." The trial court did not then say that my understanding of his rulings was incorrect. So to the extent that my opening brief suggested otherwise, that was an inaccuracy on my part, and I apologize for any confusion, and for not being more accurate with presenting my arguments.

[4] Please forgive the "cut off at the knees" vernacular, as I could not think of a better substitute for it.

[5] It is important to note a very material distinction: Here, <u>the trial court prevented me</u> from properly proving my CFA claim, which is completely unlike the defendants' failure to present any evidence or testimony to challenge my testimony that the undisclosed clause was "unbeknownst to me". Thus unlike my CFA claim, the trial court did not place any obstacle(s) so as to prevent or impede the defendants from challenging my testimony (which they had accepted as true). Instead, they never made any attempt at all to introduce any such evidence or testimony at trial Further still, even if that had been the scenario, then their correct recourse would have been to file a cross appeal (i.e. challenging the trial court's decision to disallow that evidence). But in any event, they don't get a "do over" to present a better trial case, nor can they add it now to get a better appeal.

within their brief, I was able to prove (at least to some extent) that their omission of their prize limitation clause was in fact an intentional omission on their part.

That is, on two (2) separate occasions during the trial (in connection with my arguments as to the unenforceable submerged clause), I brought it to the court's attention that they had multiple avenues and opportunities where they could have alerted me (and all other potential tournament entrants) to that prize limitation, simply by adding "one more sentence", but yet they didn't do so.

> MR. D'AGOSTINO: "And the fact of the issue is, on this information regarding a tournament, they have other limitations listed. For example, they have other prize limitations listed. But no listing that only one prize per person. They very easily could have added one more sentence that says if you earn multiple prizes, at any given event, you will only get one prize. That's not on here. That's not on here. That's not on here, ..." (1T16:11-18)

> MR. D'AGOSTINO: ".....that's easy to do, one sentence, one prize per person, ..." (1T18:8-9)

And the defendants did not (and could not) explain why they simply did not add that one extra sentence: (e.g. "If a player wins more than one prize in any given event, only one prize will be awarded.") anywhere – not on any of their multiple website pages, nor within any of their multiple (and numerous) advertisements.

For example, the Respondents failed to explain why they had made no mention made of this prize limitation at all, not even in the "Continental Chess Prize Information" page of their website (i.e. where they specified numerous other prize

terms and conditions, see Pa17), nor even within their "Prize limits" paragraph, which was on the main event page of their website (see Pa15, top of page).

This should have constituted sufficient proof of a CFA violation, as "it has been recognized that one's state of mind is seldom capable of direct proof and ordinarily must be inferred from the circumstances properly presented and capable of being considered by the court." *Wilson v. Amerada Hess Corp.*, 168 NJ 236, 254, 773 A.2d 1121 (2001) (citing *Amerada Hess Corp. v. Quinn*, 143 *N.J.Super.* 237, 249, 362 *A.*2d 1258 (Law Div.1976)). Thus, the undisputed facts here more than sufficiently preponderated that their omission (of the prize limitation) was in fact an intentional one. Note that unlike common law fraud, which requires "clear and convincing" evidence, statutory fraud violations (such as violations of the Consumer Fraud Act, Insurance Fraud Protection Act, etc.) requires only proof by a preponderance of the evidence. In *Liberty Mutual Ins. Co. v. Land*, 186 NJ 163, 172, 892 A.2d 1240, 1247-1248 (2006), the N.J. Supreme Court held:

> In discussing the requisite standard of proof under the CFA, the Appellate Division has stated: "We find no indication that the Legislature intended to impose any greater burden of proof [under the CFA] than that usually required in a civil action." *Gennari, supra*, 288 *N.J.Super.* at 541, 672 *A.*2d 1190; *see also* Hyland v. *Aquarian Age 2,000, Inc.*, 148 *N.J.Super.* 186, 191, 372 *A.*2d 370 (Ch.Div. 1977) **[S]ince [the CFA] is a civil action, preponderance of the evidence, the usual civil standard of proof, should be the applicable standard.").** [Emphasis added]

Thus, although there was no "direct proof" of the defendant's intent (as "intent is seldom capable of direct proof"), and even though I was deprived of any real opportunity to properly and fully prove this fact, nonetheless I respectfully submit

that there was (at least) a preponderance of the evidence to show that the defendants had intentionally omitted the disclosure of this prize limitation from any of their own advertisements, and had intentionally omitted the disclosure of this prize limitation from any of their own website pages.

Thus in turn, without even necessarily getting to the other issue about their misrepresentation of the tournament's starting time, if the trial court had made the correct interpretation of the law and had then rendered a correct factual ruling, I should have sustained my statutory cause of action for Consumer Fraud, as well as my common law cause of action for breach of contract.

CONCLUSION

Contrary to the Respondents' arguments, the gravamen of my appeal is based upon the trial court's rulings of law, and not its findings of facts. The Respondents do not challenge my legal arguments, and instead they simply try to grossly distort the truth in numerous ways; and in the process of doing so, they deliberately flout this Court's express motion rulings, by continuing to introduce purported "facts" that were never raised below. Further, I also incorporate the conclusion section of my opening brief, as if set forth at length herein. Thank you.

Respectfully submitted,

Steven D'Agostino