KEONA PALMER, DUANE ST. AMOUR ANA ST. AMOUR, BRIAN ROWARD, JENNY ROWARD, JUDITH JONES, NIGUEL FIGUERO, OTILIO M. SEDA, JR., CARMEN SEDA, JAMES COHEN, STEPHEN BELL, SONIA LENHARDT BELL, JO-ANN WRIGHT, DENISE FRAWLEY, THOMAS FRAWLEY, BRIAN HART, JESSICA HART, SANDRA MOONEY, AND THOMAS MOONEY, Plaintiffs/Respondents. v. FLAGSHIP RESORT DEVELOPMENT CORP. d/b/a FantaSea Resorts, JOHN DOES 1-10, AND XYZ CORPORATIONS 1-5, Defendant/Appellant.	Superior Court of New Jersey Appellate Division Docket No. A-003287-22 On Appeal from: Superior Court of New Jersey, Law Division, Civil Part, Atlantic County, Docket No. ATL-L-1515-19 Sat Below: Hon. Stanley L. Bergman, Jr., J.S.C.

APPELLANT'S BRIEF (AMENDED)

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[i] Flagship's Appendix was marked deficient on January 2, 2024 for including trial court brief(s). Pursuant to R. 2:6-1(a)(2), the trial court brief is included as it addresses whether an issue was raised in the trial court germane to the appeal, specifically regarding the Parol Evidence Rule. All other deficiencies have been corrected.

PRELIMINARY STATEMENT

This appeal presents a matter of first impression regarding the New Jersey Real Estate Timeshare Act (RETA). It arises out of the trial court's erroneous application of that statute and the court's refusal to apply the well-defined Parol Evidence Rule. Flagship submits that the errors committed by the trial court require meticulous review of the applicable provisions of the RETA and the correct application of the Parol Evidence Rule.

Flagship has sold timeshare intervals out of Atlantic City, New Jersey since 1988. Between 2012 and 2017, the plaintiffs purchased timeshares from Flagship and signed multiple contractual agreements memorializing their purchases. In September of 2018, the plaintiffs sued Flagship for alleged violations of the RETA and Consumer Fraud Act (CFA). The nucleus of the plaintiffs' complaint was that Flagship's salespeople made oral misrepresentations at the time of purchase that fraudulently induced the transactions.

Tellingly, the misrepresentations claimed by the plaintiffs were those barred by the RETA at N.J.S.A. 45:15-16.70. More significantly, all of the oral misrepresentations alleged were expressly contradicted by the contractual documents the plaintiffs signed and thus, their claims were barred by the Parol Evidence Rule.

Each of the eleven (11) plaintiffs were deposed. At trial, their testimony was the same. Some admitted that the oral misrepresentations claimed in their complaint were not actually told to them. Others admitted the oral misrepresentations claimed in their complaint were opposite from what they were told when they purchased, meaning they were told the correct information. Many admitted they simply could not remember what was told to them when they purchased years ago. Most incredibly, four (4) of the plaintiffs admitted that they filed suit because they heard advertisements guaranteeing termination of their timeshare contracts and they just wanted to get out.

Over the course of four (4) years of litigation, Flagship made five (5) applications to dismiss the plaintiffs' complaint based on the Parol Evidence Rule. (Two summary judgment motions, a motion for reconsideration of the second summary judgment denial, one involuntary dismissal at the close of plaintiffs' case, and one judgment notwithstanding the verdict). Each application was rejected notwithstanding the plain and clear contractual documents expressly contradicting the plaintiffs' claims of oral misrepresentations and the plaintiffs' own admissions. The Court erroneously determined that summary judgment could not be granted on the Parol Evidence Rule without a complete factual record.

It is Flagship's position that the "fraud" claimed by the plaintiffs is nothing more than the plaintiffs orally disputing a specific, written contractual term that they

reviewed, initialed and signed and that controlled their obligations and limitations in owning a timeshare for which they intended to purchase for their own personal use. That "fraud" is parol evidence disputing not the meaning of any operative terms in the contracts, but only contradicting the existence of the operative terms themselves, and that oral testimony is barred by the substantive Parol Evidence Rule.

The trial court's ruling destroyed the purpose of written contracts and eviscerated the substantive rule of Parol Evidence. If not corrected, any timeshare owner at the Flagship or any party to any contract in New Jersey can file a lawsuit alleging they were told the opposite of a contractual term memorialized in a signed and integrated writing. Flagship submits that the trial court's error in failing to apply the Parol Evidence Rule to bar the plaintiffs' claims of oral misrepresentations under the RETA and the CFA must be corrected or the floodgates of contractual litigation will open by way of bare allegations that a plaintiff was told the opposite of a precise term covered in the contract he or she signed, timeshare owner or not.

PROCEDURAL HISTORY

Plaintiffs' complaint was filed September 21, 2018 alleging violations of the RETA and CFA. (Da1). The complaint was amended on October 17, 2018. (Da22).

On April 22, 2019, defendant filed an answer. (Da44).

On July 30, 2020, Flagship moved for summary judgment. (Da63). The motion was denied without prejudice and the plaintiffs permitted to extend discovery and conduct multiple depositions of Flagship's employees. (Da65).

On June 11, 2021, defendant moved for summary judgment a second time. (Da67).

On June 23, 2021, the plaintiffs filed a motion to amend their complaint a second time. (Da547).

On July 8, 2021, the plaintiffs' motion to amend was denied. (Da549).

On August 31, 2021, the plaintiffs filed a cross-motion for summary judgment. (Da551).

On December 14, 2021, the Hon. Michael J. Winkelstein heard oral argument and rendered an oral decision denying Flagship's motion for summary judgment and the plaintiffs' cross-motion. (2T35:15-38:2) (Da1096).

On January 3, 2022, Flagship filed a motion to reconsider and grant summary judgment pursuant to R. 4:49-2. (Da1097). The plaintiffs filed a cross-motion to reconsider on January 13, 2022. (Da1099).

On February 23, 2022, the Court held oral argument on the parties' motions for reconsideration. The Court denied Flagship's motion for reconsideration but partially granted the plaintiffs' motion with regard to technical violations of administrative code regulations. (Da1101).

On June 24, 2022 and June 26, 2022, the plaintiffs and Flagship filed their pretrial memorandums, respectively. (Da1105 & 1120).

On August 11, 2022, the Court filed the pretrial order. (Da1134).

Jury selection began on September 12, 2022 and concluded September 13, 2022.

At the close of the plaintiffs' case, Flagship filed a motion for involuntary dismissal pursuant to R. 4:37-2(b) and for judgment at trial pursuant to R. 4:40-1 based on the Parol Evidence Rule. (Da1140). On September 29, 2022, the trial court denied Flagship's motion for involuntary dismissal and for judgment at trial. (Da1144).

On September 30, 2022, the jury found in favor of the plaintiffs. The approximate $214,000 award was trebled pursuant to the CFA and doubled pursuant to the RETA.

On October 11, 2022, the Court entered an order voiding all the plaintiffs' timeshare contracts and required Flagship to correct all negative reporting to all credit bureaus affiliated with the plaintiffs. (Da1225).

On October 18, 2022, Flagship filed its motion and brief to vacate the jury's award of damages pursuant to RETA and to mold the verdict. (Da1227).

On October 20, 2022, Flagship filed its post-trial brief in support of judgment notwithstanding the verdict and for a new trial in the alternative pursuant to R. 4:49-1 and R. 4:40-2. (Da1233).

On October 26, 2022, the Court entered an order molding the jury verdict and vacating the damage award rendered under the RETA. The damage award under the CFA remained in full force and effect. (Da1352).

On November 21, 2022, the plaintiffs filed a motion to pay counsel fees. (Da1355).

On December 13, 2022, the Court heard oral argument on Flagship's motion for judgment notwithstanding verdict and motion for new trial. Both were denied.

On February 1, 2023, the Court entered an order awarding $722,714.00 in attorneys' fees and costs to plaintiffs' counsel. (Da1381).

On February 21, 2023, the plaintiffs filed a notice of motion for reconsideration and to amend the Court's order granting attorneys' fees and costs. (Da1407).

On March 31, 2023, the Court heard oral argument on plaintiffs' motion to reconsider the counsel fee award. The Court granted reconsideration on April 17,

2023 and increased the attorney fee award to plaintiffs' counsel by approximately $300,000. (Da1411).

On May 19, 2023, the Court filed an order entering final judgment pursuant to R. 4:42-1(c) in the amount of $1,668,423.88. (Da1421).

On July 21, 2023, the Court stayed execution of final judgment pursuant to Flagship's $1,775,000 cash deposit pursuant to R. 2:9-5(a). (Da1428).

On July 1, 2023, Flagship filed its notice of appeal, case information statement and proof of service. They were amended July 27, 2023. (Da1430).

Flagship sought an additional 30 days to file its appellate brief with the consent of the plaintiffs' counsel and Flagship's brief follows.

STATEMENT OF FACTS

Flagship is a corporation based in Atlantic City, New Jersey that advertises and offers for sale timeshare intervals. (Da70, ¶1). Flagship markets timeshares to consumers within a 150-mile radius and advertises timeshare sales via promotions, face-to-face transactions and its upgrade program. Id. at ¶ ¶1-2. Consumers may enter their personal information for the chance to win a promotion and consent to being contacted by a representative of the Flagship; or a consumer is offered rewards in exchange for their time spent at a presentation in a face-to-face transaction; or they are telephoned and offered the same. Id. at ¶3; Da71 ¶¶3-6; Da72 ¶¶7-8.

Regardless of the form of advertisement, it is the consumer alone who decides to schedule a presentation and visit the resort for a tour. (Da72, ¶9).

Every one of the plaintiffs here scheduled to attend the Flagship on a particular day and time for a presentation. (Da73, ¶14; Da79, ¶28; Da85, ¶42; Da90, ¶55; Da95, ¶72; Da100, ¶89; Da105, ¶103; Da109, ¶116; Da113, ¶127; Da118, ¶144; Da124, ¶163). After nine of the plaintiffs scheduled, they received a follow-up confirmation email memorializing the scheduled presentation and which disclosed that the presentation was for "THE PURPOSE OF SOLICITING TIMESHARE SALES". (Da170, 182, 186 & 189; Da90, ¶56; Da100, ¶90; Da105, ¶104; Da118, ¶145; Da123, ¶162).[1] They all attended the presentations that they voluntarily scheduled.

At the conclusion of each of the plaintiffs' presentations, they agreed to purchase timeshare intervals and they reviewed, initialed and signed multiple contractual agreements memorializing their purchases. (Da193-246; Da943-1078). Throughout the course of discovery, the plaintiffs admitted that nobody at the Flagship forced them to execute the contractual documents for the purchase of their

[1] Plaintiffs Frawley admitted they knew they were attending a timeshare presentation at Flagship. Da96, ¶76. Plaintiffs Mooney admitted they knew they were attending a timeshare presentation at Flagship and knew they were purchasing a timeshare. Da105, ¶106. Plaintiffs Roward admitted they knew they agreed to attend a presentation at Flagship and understood they were purchasing a timeshare. Da109, ¶116 & 119. Plaintiff Bell knew she agreed to attend a presentation but had "zero thoughts" about the content and just wanted to receive the rewards she was promised, which she did. Da113, ¶127.

timeshare intervals and they admitted in their complaint that they purchased the timeshares for personal, family or household purposes. (Da4, ¶27; Da25, ¶28). Years later, however, the plaintiffs filed a lawsuit alleging that Flagship's salespeople told them oral misrepresentations on the day of their purchase that were expressly contradicted by all the contractual agreements the plaintiffs reviewed, initialed and signed. (Da1; Da22).

In testimony, some of the plaintiffs admitted that the oral misrepresentations claimed in their complaint were not actually told to them. (Da86, ¶48; Da88, ¶52; Da92, ¶65; Da107, ¶112; Da111, ¶124; Da112, ¶126; Da117, ¶142). Or that they understood the information conveyed. (Da89, ¶53; Da102, ¶96; Da111, ¶124-125; Da126, ¶170). Or they couldn't recall what was told to them because it was so long ago. (Da106, ¶107; Da113, ¶¶128 & 129). Some of the plaintiffs even admitted they were told the opposite of the oral misrepresentations alleged in their complaint, meaning they were actually told the correct information. (Da78, ¶25-26; Da89, ¶53; Da104, ¶99). Others professed complete ignorance as to the terms and conditions they knowingly assumed and affirmed in writing while acknowledging they'd do anything to be released from their contractual obligations. (Da80, ¶34; Da86, ¶47; Da91, ¶64; Da96, ¶79). But most incredibly, four (4) of the plaintiffs admitted that they decided to file a lawsuit only after hearing "timeshare exit" advertisements

guaranteeing termination of their contracts or after being solicited by the "team". (Da80, ¶34; Da86, ¶47; Da110, ¶122; and Da120, ¶151).

The mantra of oral misrepresentations claimed amongst all eleven (11) of the plaintiffs and that formed the basis of their lawsuit against Flagship were and are expressly contradicted by the signed and integrated writings:

First, all eleven (11) plaintiffs claimed they were told the purchase of their timeshare was an "investment." (Da76, ¶21; Da81, ¶35; Da86, ¶48; Da92-93, ¶¶65 and 67; Da97, ¶80; Da102, ¶95; Da106, ¶109; Da111, ¶123; Da115, ¶138; Da120, ¶152; and Da126, ¶170). The one-page Owner Acknowledgment Form that each plaintiff initialed and signed says the precise opposite: "for own personal vacation use and enjoyment and not because of any financial or monetary advantage." (Da193, ¶13).[2] The 4¼ page Purchase and Sale Agreement that each plaintiff signed also contradicts that claim: "for the Buyer's personal use, and not for investment purposes." (Da201, ¶22). And each of the Public Offering Statements at issue repeatedly state the purchase is not an investment. (Da231-232).[3]

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[2] The owner acknowledgement form and purchase and sale agreement cited to here are from Plaintiff Rowards' transaction. Each of the owner acknowledgement forms and purchase and sale agreements contain the same provisions contradicting the plaintiffs' claims of oral misrepresentations and appear at Da195-Da220 & Da943-1019.

[3] Plaintiff Wright admitted in deposition that nobody told her the purchase of a timeshare was a financial investment and the word was never used. (Da86, ¶ 48). Plaintiff Seda admitted that he was never told the purchase was a "financial

Second, ten (10) of the eleven (11) plaintiffs claimed that their timeshare was likened to conventional real estate such as a single-family home or condominium. (Da76, ¶22; Da82, ¶36; Da87, ¶49; Da97, ¶81; Da102, ¶96; Da107, ¶110; Da111, ¶124; Da116, ¶139; Da121, ¶153; and Da126, ¶171). That claim of oral misrepresentation is contradicted by the one-page Owner Acknowledgment Form: "ANNUAL Unit entitling the owner to usage one interval per year." (Da193, ¶10). The first page of the Purchase and Sale Agreement provides: "PROPERTY BEING SOLD. A fee simple undivided 1/52 Interest in Unit ___ ("Unit") in the Flagship Condominium and…the right to occupy and use the Unit for one (1) week of each calendar year…" (Da201, ¶2).

Third, all but two of the plaintiffs claimed they were told the purchase of their timeshare would increase in value. (Da77, ¶23; Da82, ¶37; Da93, ¶67; Da98, ¶82; Da103, ¶97; Da107, ¶111; Da116, ¶140; Da121, ¶154; and Da126, ¶172). Yet again, that claim of oral misrepresentation is expressly contradicted by the one-page Owner Acknowledgment Form (Da193, ¶12), the 4¼ page Purchase and Sale Agreement (Da201, ¶22) and the Public Offering Statement which states: "Intervals should only be purchased for the personal enjoyment and use by a Purchaser and his family.

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investment." (Da92, ¶ 65). Plaintiff Mooney admitted that she "did not have any recollection of what was discussed or said" and that she couldn't remember the words spoken to her or the conversations she had the day she purchased the timeshare. (Da106, ¶ 107).

Intervals are not designed to be investments, nor should a Purchaser expect a profit or rate of return on the Interval." (Da231, ¶10).

Fourth, all but two of the plaintiffs claimed they were told either their timeshare was readily marketable, could be sold at any time, and/or that Flagship would buy it back. (Da77, ¶24; Da83, ¶38; Da88, ¶51; Da98-99, ¶¶83 and 86; Da103, ¶98; Da107, ¶112; Da117, ¶141; Da122, ¶155; and Da127, ¶173). That claim of oral misrepresentation is expressly contradicted by the one-page Owner Acknowledgment Form (Da193, ¶12-13) and the Public Offering Statement which state: "Intervals are not designed to be investments, nor should a Purchaser expect a profit or rate of return on the Interval…a Purchaser should not buy an Interval with the intent to resell such Interval at a profit…Purchasers wishing to sell there Interval may find that such proposed resale is in direct competition with other Intervals offered by Grantor…THERE IS NO IMMEDIATE MARKET FOR RESALES OF INTERVALS." (Da231-232, ¶10).

Fifth, each of the eleven (11) plaintiffs claimed in their complaint that they were told maintenance fees would not increase. (Da78, ¶25; Da84, ¶39; Da88, ¶52; Da94, ¶69; Da98, ¶84; Da104, ¶99; Da108, ¶113; Da112, ¶126; Da117, ¶142; Da122, ¶156; and Da127, ¶174). Notwithstanding the fact that the one-page Owner Acknowledgment Form and the Public Offering Statement provide that an owner should expect maintenance fees to increase (Da228-229, ¶4), five (5) of the plaintiffs

admitted that no oral misrepresentations regarding maintenance fees were told to them. Hart admitted he was told maintenance fees would increase and the complaint was an error. (Da78, ¶25). Wright admitted that nobody told her annual maintenance fees would not increase. (Da88, ¶52). St. Amour admitted he was told maintenance fees would go up. (Da104, ¶99). The Rowards admitted that they were told there was a maintenance fee each year and they simply could not remember anyone affirmatively telling them that maintenance would increase or decrease. (Da112, ¶126). Finally, Lenhardt-Bell admitted no Flagship representative made an oral misrepresentation to her that maintenance fees would not increase. (Da117, ¶142).

Last, all but three (3) of the plaintiffs claimed that they were told they could exchange their timeshare intervals whenever and wherever they wanted; that they could use their intervals whenever they wanted; and that they could reserve rooms at owner's rates whenever they wanted. (Da78, ¶26; Da84, ¶40; Da89, ¶53; Da93, ¶66; Da98, ¶85; Da104, ¶100; Da108, ¶114; and Da112, ¶125). The one-page Owner Acknowledgment Form and the Public Offering Statement make absolutely clear that all exchanges and/or reservations were subject to availability. (Da193, ¶¶ 2, 6 & 7; Da232-233, ¶11). Three (3) of the plaintiffs admitted that they knew all exchanges and/or reservations were subject to availability notwithstanding their claims of oral misrepresentation in their complaint. (Da78, ¶26; Da89, ¶53; and Da112, ¶125). Most significantly, the Mooneys knew all exchanges and reservations

were subject to availability and they exchanged their interval twice but were simply unhappy they didn't get their first choice. (Da108, ¶114).

The facts as set forth above were the operative facts for which the plaintiffs claimed fraud and all of their claims were and are expressly contradicted by the contractual documents that they reviewed, initialed and signed. They all admitted they were not forced to sign the contracts and they all intended to purchase timeshares for their own personal use and enjoyment as acknowledged in their complaint and amended complaint. And the contractual documents make plain and clear that they had a 3-day attorney review period and a 7-day cancellation period to review their transactions at liberty before they became legally executed and binding. (Da204, ¶23 & Da205, ¶24). The plaintiffs' claims of oral misrepresentations were barred.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW BY REFUSING TO APPLY THE PAROL EVIDENCE RULE ON SUMMARY JUDGMENT; ALL THE ORAL MISREPRESENTATIONS CLAIMED BY THE PLAINTIFFS WERE EXPRESSLY CONTRADICTED BY THE CONTRACTUAL DOCUMENTS THEY SIGNED AND WERE BARRED. (2T35:15-38:2; Da1096).

After the trial court denied Flagship's July 30, 2020 motion for summary judgment without prejudice, Flagship re-filed on June 11, 2021 at the close of

discovery. Therein, Flagship argued that the Parol Evidence Rule barred the plaintiffs' claims of oral misrepresentations that precisely contradicted the express terms of the integrated contracts each plaintiff signed. It was and is Flagship's legal position that one party to a transaction cannot claim years later that the other party told them the precise opposite of a term memorialized in an integrated writing.

The motion Judge rejected Flagship's position, found the Parol Evidence Rule inapplicable and determined that a full trial record was required because plaintiffs claimed fraud in the inducement. (2T35:15-38:2) In making that determination, however, the trial court ignored the express contract terms directly contradicting the alleged oral misrepresentations and ignored the undisputed admissions of each plaintiff.

A. The Parol Evidence Rule

In its summary judgment filings, Flagship thoroughly and meticulously analyzed the doctrine of Parol Evidence and its application to the facts as alleged in the plaintiffs' complaint. The Parol Evidence Rule is a substantive rule of law that bars alleged oral misrepresentations that are expressly contradicted in a written agreement. Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 574-75 (App. Div. 1991) (affirming dismissal). The Rule also bars alleged oral misrepresentations contradicting the terms of an integrated contract in support of Consumer Fraud Act claims or other fraud related claims. Id. (Affirming dismissal of, *inter alia*, CFA

claims because alleged oral misrepresentations contradicted the terms of the lease and were barred by the Parol Evidence Rule). Our Supreme Court addressed the Parol Evidence Rule in Conway v. 287 Corporate Center Associates, 187 N.J. 259 (2006) and unambiguously held "the Parol Evidence Rule prohibits the introduction of evidence that tends to alter an integrated written document". Id. Filmlife said the same. 251 N.J. Super. at 574-76 (where the agreement has an entire agreement integration clause, the written agreement is not to be varied or contradicted by Parol Evidence).[4]

The fraud in the inducement exception to the Parol Evidence Rule was addressed by this Court in Filmlife, supra:

> The fraud exception to the Parol Evidence Rule is not without its limits. There is a distinction between fraud regarding matters expressly addressed in the integrated writing and fraud regarding matters wholly extraneous to the writing. 251 N.J. Super. at 574. (Emphasis added).

The plaintiff in Filmlife entered into a written lease for a Lincoln Town Car and at the time of signing, he traded in a 1984 Cadillac for a $6,000 trade-in value. Id. at 572. The express terms of the lease provided that the $6,000 trade-in value would be applied to the downpayment. Id. Later, the plaintiff filed a lawsuit claiming he was told that the $6,000 trade-in would be paid to him in cash. Id. The trial court dismissed plaintiff's complaint because his claim of fraud was expressly

[4] Each of the Purchase and Sale Agreements contain an entire agreement clause. (Da203, ¶14).

contradicted by the written terms of the contract he signed and was not wholly extraneous to the writing. Thus, the fraud exception to the Parol Evidence Rule was inapplicable. Id. at 573.[5]

Two decades after the Filmlife decision, this Court decided Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171 (App. Div. 2012). The plaintiff in Walid alleged that the financial circumstances of the business he purchased were fraudulently misrepresented to him at the time of purchase. Id. at 176-78. The plaintiff also argued that the fraud in the inducement exception to the Parol Evidence Rule permitted him to present evidence of the claimed oral misrepresentations regarding financials. This Court agreed, finding that the alleged oral misrepresentations regarding financials were an exception to the Parol Evidence Rule because such financials were not addressed in the contract the parties signed:

> This case differs from Filmlife, where the plaintiff asserted it was entitled to receive the cash value of a trade-in vehicle on a new lease whereas the lease expressly provided that the trade-in value would be utilized as the capitalized cost reduction. Filmlife, supra, 251 N.J. Super. at 573. Here, by contrast, material misrepresentations were made to plaintiffs respecting the income of the business they were

[5] The Filmlife court relied on the Appellate Division's decision in Winoka Village v. Tate, 16 N.J. Super. 330 (App. Div. 1951). The defendant in Winoka claimed that a representative of the plaintiff's landlord who sued him for unpaid rent pursuant to a written lease told him it was the policy of the landlord to forfeit one month's deposit in the event the defendant had to move out before the end of his term, and nothing more would be required of him. Id. at 332-33. The defendant vacated the premises four months before the expiration of the lease and when sued, claimed fraud. The Court rejected defendant's claim because the contract expressly dealt with a tenant's premature termination of his lease and the Parol evidence was barred.

> purchasing and then in an effort to escape later liability for such misrepresentations, a contract was prepared with a general integration clause. Walid, 425 N.J. Super. at 186.

The oral misrepresentations in Walid consisted of financial inflation of a business by forty-two to sixty-two percent (42% to 62%) and such financials were wholly extraneous to the contract the parties signed. Id. at 176-78 (emphasis). The factual circumstances of this appeal are similar to Filmlife, not Walid. All of the oral misrepresentations claimed by the plaintiffs here were precisely addressed in their contracts and the express terms of the contracts contradict their claims. There was no fraud claimed by the plaintiffs that was wholly extraneous to any of their contracts.

B. Application of the Law to the Facts of Each Plaintiff's Transaction on Summary Judgment.

Flagship submitted 174 paragraphs of undisputed material facts in its motion for summary judgment filed June 11, 2021. Just like Filmlife and Winoka, supra, paragraphs 13 through 174 detailed the alleged oral misrepresentations claimed by each plaintiff and the particular provisions of the contractual documents expressly contradicting those claims. Simply put, the facts alleged by the plaintiffs on fraudulent inducement were simply a denial of the express written terms of the contract; none of the fraud claimed was wholly extraneous to the contracts. The plaintiffs did not allege any evidence that was relevant to prove the meaning or

interpretation of any ambiguous term in the contract or integrated documents, nor to discern the parties' intent. (See Section C within this Point Heading below).

First, and notwithstanding the fact that all plaintiffs admitted in their complaint and their amended complaint that they purchased timeshare intervals for personal, family or household purposes, each of them alleged that they were told the purchase was a financial "investment." Each and every contractual document that the plaintiffs reviewed, initialed and signed at the time of their purchase specifically addressed "investment" and stated the precise opposite of what the plaintiffs claimed:

> "Purchaser(s) represent that this unit Interval is being purchased for their own personal vacation use and enjoyment and not because of any financial or monetary advantage…" (Da193, ¶13).
>
> "Buyer also acknowledges, represents and warrants that the purchase of the Interval is made for the buyer's personal use, and not for investment purposes …" (Da204, ¶22).
>
> "Intervals should only be purchased for the personal enjoyment by a purchaser and his family. Intervals are not designed to be investments …" (Da231-232, ¶10).

See Flagship's Statement of Facts, supra at 10, regarding the express contradictions as to "investment."

Second, ten (10) of the eleven (11) plaintiffs claimed that their timeshare interval was likened to conventional real estate such as a single-family home and/or

condominium. That claim of oral misrepresentation is also expressly contradicted by all the contractual documents that the plaintiffs reviewed, initialed and signed:

> "Purchaser further understands that the Unit purchased is an ANNUAL Unit entitling the owner to usage one interval per year." (emphasis). (Da193, ¶10).

> "PROPERTY BEING SOLD. A fee simple undivided 1/52 interest … the right to occupy and use the unit for one (1) week of each calendar year …". (emphasis). (Da201, ¶2).

See Flagship's Statement of Facts, supra at 10-11, regarding the express contradictions as to "same as conventional real estate."

Third, nine (9) of the plaintiffs claimed that they were told that the purchase of their timeshare interval would "increase in value over time." Yet again, all of the contractual documents that the plaintiffs reviewed, initialed and signed expressly contradict this claim of oral misrepresentation:

> "Purchaser(s) represent that this unit Interval is being purchased for their own personal vacation use and enjoyment and not because of any financial or monetary advantage…" (Da193, ¶13).

> "Buyer also acknowledges, represents and warrants that the purchase of the Interval is made for the buyer's personal use, and not for investment purposes …" (Da204, ¶22).

> "Intervals should only be purchased for the personal enjoyment by a purchaser and his family. Intervals are not designed to be investments …" (Da231-232, ¶10).

See Flagship's Statement of Facts, supra at 11, regarding the express contradictions as to "increase in value."

Fourth, nine (9) of the plaintiffs also claimed that they were told either that their timeshare interval was readily marketable, could be sold at any time, and/or that Flagship would buy it back. All of the contractual documents that the plaintiffs reviewed, initialed and signed expressly contradict this claim of oral misrepresentation:

> "THERE IS NO IMMEDIATE MARKET FOR RESALES OF INTERVALS." (Da231-232, ¶10).
>
> "Purchaser has been informed that neither the seller, nor any of its affiliates, is engaged or involved in the resale of any week at FantaSea Resorts …" (Da193, ¶12).

See Flagship's Statement of Facts, supra at 11-12, regarding the express contradictions as to "resale" and "buyback."

Fifth, each of the eleven (11) plaintiffs claimed in their complaint that they were told maintenance fees would not increase.[6] Again, the contractual documents that the plaintiffs reviewed, initialed and signed expressly contradict this claim of oral misrepresentation:

> "A purchaser should expect the maintenance fee to increase during the term of his ownership of an interval, for example, because of an increase of real estate taxes." (Da228-229, ¶4).

See Flagship's Statement of Facts, supra at 12-13, regarding the express contradictions as to "maintenance fees would not increase."

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[6] See Flagship's Statement of Facts, supra, at pages 12-13.

Finally, eight (8) of the plaintiffs claimed that they were told they could exchange their intervals "whenever and wherever" they wanted or they could use their intervals "whenever they wanted" and that they could reserve rooms at owner's rates "whenever they wanted." All of the contractual documents that the plaintiffs reviewed, initialed and signed expressly contradict their "whenever, wherever" claims of oral misrepresentation and provide that all reservations are subject to availability:

> "Owner has the option to exchange their week to vacation elsewhere by depositing their week with RCI. … All exchanges are made through RCI and are subject to availability." (emphasis).
>
> "To maximize vacation usage each year, owner must either deposit their week with RCI or request a reservation at FantaSea Resorts no later than September 1st of each year." (emphasis). (Da193, ¶¶2, 6 & 7).

See Flagship's Statement of Facts, supra at 13, regarding the express contradictions as to "whenever, wherever."

Flagship submits that the trial court erred by ignoring the plain and clear contradictions between the express terms of the written and integrated contracts and the plaintiffs' claims of oral misrepresentations and by refusing to apply the Parol Evidence for all of the reasons set forth above in subheading A and below in subheading C.

C. The Trial Court's Refusal to Apply the Parol Evidence Rule.

In denying Flagship's Motion for Summary Judgment and Reconsideration, the motion Judge held that the Parol Evidence Rule does not prohibit a cause of action for fraud in the inducement of a contract. (2T35:15-38:2). The trial court relied on Conway v. 287 Corporate Center Associates, 187 N.J. 259 (2006). The court reasoned that because the plaintiffs were not attempting to alter the terms of the contract but instead challenging the validity of the contract, the Parol Evidence Rule was inapplicable. In essence, the Court found that a full factual record regarding each plaintiff's transaction was required before the Court could decide application of the Parol Evidence Rule and thus, could not address application on summary judgment. All of it was error. (2T35:15-38:2)

First, the Court erred when it ignored the fact that each of the eleven (11) plaintiffs in this case purchased timeshare intervals for their "own personal, family or household purposes." All of the contractual documents that the plaintiffs reviewed, initialed and signed make clear that they purchased for their own personal use and not for investment purposes. As such, and critical to the Parol Evidence Rule context, there was no misunderstood intent between the parties and thus no parol evidence necessary for that purpose.

Second, the motion Judge erred as a matter of law when he refused to consider the fact that each of the plaintiffs' claims of oral misrepresentations were nothing

more than the plaintiffs orally disputing a specific, written contractual term that the plaintiffs initialed and signed for and that controlled their obligations and the limitations in owning a timeshare. Had the Court simply compared the six alleged fraudulent misrepresentations in plaintiffs' complaint to the contractual documents that they reviewed, initialed and signed, it would have been immediately apparent that the plaintiffs had done nothing more than provide oral testimony in direct contradiction to the specific written terms secondary and unrelated to their initial intent to purchase a timeshare. That oral testimony, however, is barred. Plaintiffs did not present any evidence of fraud wholly extraneous to the contracts.

Third, the motion Judge erred as a matter of law when he relied on Conway v. 287 Corporate Center Associates, 187 N.J. 259 (2006) to rule that application of the Parol Evidence Rule could only be analyzed upon a complete factual trial record because plaintiffs alleged fraud in the inducement. The Conway case, however, stands for the proposition that the introduction of parol evidence is necessary to define the intent of the parties. Specifically, Conway involved the meaning of the word "modification" used by Attorney Conway in his retainer agreement in order to activate his client's obligation to pay him a bonus of $375,000. The retainer agreement defined the triggering prerequisite for that bonus as the attorney's ability to effect "any modification of the zone change which permits construction of any type, residential or commercial, or the sale or lease of the property." The Court

reviewed the integrated documents, namely the retainer with a prepared complaint, letter and memoranda and based on the full set of the documents, determined that "modification" meant not only that Conway had to secure a change in zoning status, but also that the change had to permit roadway access to the land-locked property.

The Conway Court further reviewed the draft complaint wherein Conway averred that the current zoning made it "impossible for traffic to exit to and from plaintiff's property." And it looked further to the damages clause wherein Conway was seeking a mandatory injunction directing the township to rezone the entire property commercial and allow "reasonable access to Foothill Road." As such, parol evidence was necessary to determine what the parties intended by the word "modification." Each party argued competing definitions of the word that required the Court to analyze the complete set of integrated documents to divine the true intent. Relying on ATL. M. Airlines v. Schwimmer, 12 N.J. 293 (1953), the Conway court stated:

> Evidence of the circumstances is always admissible in the aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. 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 adduceable 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. Conway v. 287 Corporate Center Associates, 187 N.J. 259, 269 (2006) (emphasis added).

There was no term within the integrated contracts that the plaintiffs claimed was ambiguous and further, no misunderstood intention between the parties because the plaintiffs admitted, in fact conceded in their complaints, that they purchased the timeshares for their "own personal, family or household purposes." Nor was there any fraud presented by the plaintiffs that was wholly extraneous to the contracts. It was error for the trial Judge to refuse application of the Parol Evidence Rule based on Conway.

Fourth, beyond the Court's erroneous reliance on Conway, Flagship submits the Court simply failed to understand Conway. Conway quoted and relied on the California Court's decision in Pacific Gas & Electric Company v. GW Thomas Drayage & Rigging Company, 69 Cal. 2d 33 (1968), 442 P. 2d 641, 69 Cal. Rptr. 561, 40 ALR 3d 1373. The California Court provided a basic, two-step judicial interpretive function to determine application of the Parol Evidence Rule. First, the Court must determine whether given preliminary consideration of all credible evidence to prove intent of the parties, there is a rational interpretation that is apparent. Pacific Gas, supra. at 36-38. Second, if the Court decides that the language of the contract "is fairly susceptible to either one of two interpretations," it must rule that extrinsic evidence is admissible; if, however, the evidence permits

only one rational interpretation, extrinsic evidence is inadmissible. Id. at 39-40. That was not the case here.

What Conway and Pacific Gas teach, therefore, is that where a contractual term is susceptible to an alternate interpretation other than its "plain meaning," it along with all the facts and circumstances may be relevant in determining the parties' intent. Those cases, however, had absolutely no application to the facts before the Court on summary judgment. All the claims of oral misrepresentations were precisely addressed and expressly contradicted by the contracts and therefore barred.

The determination of the trial court served to nullify and destroy the essential purpose of a written contract. The trial court's rulings eviscerated the Parol Evidence Rule, allowing any plaintiff to circumvent the Rule by simply alleging they were told the opposite of a precise term covered in a signed and integrated writing.

POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW BY CHARGING BOTH THE RETA AND THE CFA TO THE JURY NOTWITHSTANDING DIRECT CONFLICT BETWEEN THE TWO AND THE NATURE OF THE CASE. (Da1158-1166; Da1421).

A. The Conflict Triggering Application of RETA Only

On September 24, 2022, Flagship submitted its brief in support of proposed jury instructions arguing that the RETA was the only cause of action legally permitted to be submitted to the jury. Flagship's position was that the RETA requires

that a defendant "knowingly engaged in false, deceptive, misleading promotional or sales methods ..." while the CFA does not require any intent or standard of culpability for affirmative acts. And the RETA statute makes clear that the RETA controls when there is a conflict between it and any other law.

Under the RETA, a private cause of action exists if:

(1) Plaintiff suffers an ascertainable loss from the violation of the Act;

(2) Defendant knowingly engaged in false, deceptive, misleading promotional or sales methods; and

(3) There is a proximate nexus between the ascertainable loss and the alleged violation.

N.J.S.A. 45:15-16.80.

When those elements and the necessity of proof under the RETA are compared to the two types of causes of action under the CFA, the result is absolute conflict in what a jury is required to determine. An affirmative act under the CFA requires no intent whatsoever of a defendant. (See Model Charge 4.43). The RETA requires that the defendant "knowingly engaged" in some false or deceptive or misleading promotional or sales methods. That conflict triggers a cause of action under the RETA only:

> Except as provided in this section, no provision of this Act shall invalidate or modify any provision of any zoning, subdivision, or building code, law, ordinance or regulation. In a case of conflict between the provisions of this Act and the provisions of any other law,

> ordinance or regulation governing or purporting to govern the creation, administration, disclosure requirements for sale of timeshare interests in a component's site, the provisions of this Act shall control. (emphasis).

N.J.S.A. 45:15-16.55.

The inherent conflict as to the elements required to be proved under the RETA and the CFA created undeniable confusion that resulted in the jury's award under both Acts. The jury's verdict was ultimately molded into a judgment under the CFA, but Flagship submits only judgment under the RETA should have been entered.

B. Nature of the Case and Exclusivity of RETA

Furthermore, the RETA provides a very specific, pinpoint cause of action for timeshare owners. While it is indisputable that two different statutes can be charged to a jury on the same factual predicate, this case presents the exception. The law with regard to what the focus should be when charging two different statutes is as follows:

> We conclude that, irrespective of the nature of the damages, a CFA claim alleging express misrepresentations – deceptive, fraudulent, misleading and other unconscionable practices – may be brought in the same action as a PLA claim premised upon product manufacturing, warning or design defects. It is the nature of the claims brought, and not the nature of the damages sought, that is dispositive of whether the PLA precludes the separate causes of action. In other words, the PLA will not bar the CFA claim alleging express or affirmative misrepresentations. Sun Chemical Corp. v. Fike Corporation, 243 N.J. 319, 325 (2020) (emphasis).

In Sun, plaintiff purchased a fire suppression system from Fike Corporation to prevent explosions in its dust collection system. The system failed and seven employees were injured plus damage caused to plaintiff's facility. Sun sued under both the CFA and the Products Liability Act and argued that its losses to its facility were not exclusively caused by the product defect but instead by Fike's misrepresentations. Sun alleged the CFA was therefore applicable. Defendant argued that the PLA was the only directly applicable statute because of the "essential nature of the claim," and it could not be charged in addition to the CFA.

After analyzing both statutes and the existing law, the Sun court stated:

> As our review of the statutes reveals, the CFA and the PLA are intended to govern different conduct and provide different remedies for such conduct. There is thus no direct and unavoidable conflict between the CFA and PLA. The PLA governs the legal universe of products liability actions as defined in that Act and the CFA applies to fraud and misrepresentation and provides unique remedies intended to root out such conduct. Id. at 335-36.

Ultimately the Court's holding was based on the nature of the claims being asserted:

> If a claim is premised upon a products manufacturing, warning or design defect, that claim must be brought under the PLA with damages limited to those available under that statute; CFA claims for the same conduct are precluded. But nothing about the PLA prohibits a claimant from seeking relief under the CFA for deceptive, fraudulent, misleading and other unconscionable commercial practices in the sale of the product. Indeed, the CFA is expressly "in addition to and cumulative of any other right, remedy or prohibition imposed by the common law or statutes of this State". N.J.S.A. 56:8-2.13. Said differently, if a claim is based on deceptive, fraudulent, misleading, and other unconscionable commercial practices, it is not covered by the PLA and may be brought as a separate CFA claim. Id. at 336-37.

The RETA is precisely fact-specific to all the plaintiffs' claims. It also consumes the very same claims one can assert under the CFA for deceptive, fraudulent, misleading, and other unconscionable commercial practices. Indeed, the nature of the claims brought is entirely within both the factual and legal structure of the RETA. Most importantly, it is the same conduct being alleged as establishing both causes of action. Each and every claim, accusation and damage alleged by the plaintiffs was entirely within the express and dedicated purpose of timeshare misconduct under the RETA. The CFA is a law of general application for all kinds of advertising misconduct while the RETA is pinpoint fact and law specific for all timeshare cases allegedly involving "false, deceptive, misleading promotional or sales methods.". All of the above mandates application of a fundamental rule of statutory construction:

> … that a special statutory provision dealing with the particular subject prevails over a general statute on the same subject. Zoning Board of ADJ. v. Service Electric Cable TV, 198 N.J. Super at 370, 381 (App. Div. 1985).

It was error for the Court to charge the CFA. Only the RETA applies.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO ADDRESS AND RESOLVE THE CONFLICT BETWEEN THE RETA STATUTE AND REGULATIONS REGARDING DELIVERY OF THE PUBLIC OFFERING STATEMENT. (Da1176).

Notwithstanding each plaintiffs acknowledging receipt of the Public Offering Statement, the plaintiffs argued that Flagship either failed to provide them with a copy and/or failed to timely deliver a copy. The plaintiffs relied on an administrative code regulation promulgated by the Real Estate Commission at N.J.A.C. 11:5-9A.6(a) which states:

> No person shall dispose of any timeshare interest in a registered timeshare plan unless he or she delivers a current Public Offering Statement and affords the purchaser a reasonable opportunity to read the same before the purchaser signs the contract or Purchase Agreement. (emphasis).

That regulation, however, is in direct conflict with the RETA and is therefore trumped by the RETA:

> Except as provided in this section, no provision of this Act shall invalidate or modify any provision of any zoning, subdivision or building code, law, ordinance or regulation. In case of a conflict between the provisions of this Act and the provisions of any other law, ordinance or regulation governing or purporting to govern the creation, registration, disclosure requirements or sale of timeshare interests in a component site, the provisions of this Act shall control. N.J.S.A. 45:15-16.55. (emphasis).

With regard to delivery of the Public Offering Statement, the RETA states at N.J.S.A. 45:15-16.59:

> A. The developer shall: (1) prepare a Public Offering Statement; (2) provide the statement to each purchaser of a timeshare interest in any timeshare plan at the time of purchase; and (3) fully and accurately disclose those facts concerning the timeshare developer and timeshare plan that are required by this Act or by regulations promulgated by the Commission.
>
> B. A Public Offering Statement shall be in writing and dated and shall require the purchaser to certify in writing that the purchaser received the statement. Upon approval of the Commission, the developer may offer to deliver the Public Offering Statement and other documents on CD-ROM format, internet website or other electronic media if the purchaser consents. (emphasis).

Nowhere in the statute does it say that "on the day of purchase, a purchaser must be afforded a reasonable opportunity to review the Public Offering Statement before signing." Only the code does, and that is a direct conflict.

Each of these plaintiffs agreed to receive and acknowledged that they did receive the Public Offering Statement on a CD contemporaneously with the signing of their contracts on the day of their purchase as required by N.J.S.A. 45:15-16.59. And consistent with the RETA at N.J.S.A. 45:15-16.80(b), each plaintiff here had a 3-day attorney review period and a 7-day cancellation period to review the contents of the Public Offering Statement before the contract became legally binding and fully executed. (Da204, ¶23 & Da205, ¶24).

It was error for the trial court not to resolve the conflict and to submit a question of statutory interpretation regarding delivery of the Public Offering Statement to the jury.

POINT IV

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT SUBMITTED A QUESTION OF CONTRACT INTERPRETATION TO THE JURY REGARDING "ANTI-WAIVER" PROVISIONS IN THE PLAINTIFFS' CONTRACTS WITHOUT ANY INSTRUCTION. (Da1180-1181).

On September 24, 2022, defendant submitted its request for jury instructions which contained a specific instruction on contract terms and "anti-waiver" provisions with regard to the RETA. The request for instructions regarding the "anti-waiver" provisions was based on the plaintiffs' introduction of specific provisions in the plaintiffs' contracts intended to ensure that they understood the obligations they knowingly assumed and that they did not hear something different than those terms and conditions memorialized in their contracts. For example, each of the plaintiffs' contracts contained the following provisions:

> Buyer also acknowledges, represents and warrants that the purchase of the interval is made to the buyers personal use, and not for investment purposes, without reliance on representations concerning rentals, rent return, tax advantages, depreciation or investment potential, or other monetary or financial advantage, by seller, its agents, employees or associates.
>
> Purchasers further acknowledge that they have entered into this Purchase and Sale Agreement freely and voluntarily, without coercion or undue pressure from employees and/or agents of the Flagship Resort.
>
> The Purchasers acknowledge that he/she/they had/have not relied upon any statement as to the price to be derived from the resale of his/her/their rental unit.

> The owner acknowledges that they have not relied upon any statements as to resale value of their week.
>
> No representations, claims, statements, advertising, promotional activities made by seller or seller's agents or representatives, shall in any way be binding upon the seller. (All at Da1222-1224).

It was the plaintiffs' position that those provisions bound plaintiffs to Flagship's waiver of compliance with the RETA in violation of N.J.S.A. 45-15-16.80(c). That provision states:

> Any stipulation or provision purporting to bind a purchaser acquiring an interest in a timeshare plan subject to the provisions of this Act to a waiver of compliance with the provisions of this Act shall be void. Id.

On September 28, 2022, the trial court determined that as a matter of law, Flagship's contracts did not violate the "anti-waiver" provisions pursuant to the RETA. (15T110:10-112:4). The next day however, the trial court on its own motion vacated that decision and determined that the issue was one of fact for the jury. (16T62:5-72:4). The Court then charged N.J.S.A. 45:15-16.80(c) as the fifteenth violation by the defendant. (Da1180-1181). Other than reciting the subsection, the jury was simply told to decide whether Flagship knowingly had the plaintiffs sign contracts whereby the plaintiffs waived Flagship's compliance with the RETA.

Without any instruction whatsoever as to the nature of a contract, the intent of the parties or the specific terms and conditions of the contractual documents that allegedly constituted waiver, the jury was directed to make that determination.

Instructing the jury to decide such a question in a vacuum is the antithesis of the very purpose of jury charges. That is why Flagship provided the trial court with a proposed instruction as to the "anti-waiver" provisions that was critical and necessary for the jury to understand the issue before deciding it. Most problematic, however, is the trial court having first ruled there was no violation by Flagship as a matter of law which left no issue for the jury to consider, but then reversing that determination on its own and submitting a question of contract interpretation to the jury. The trial Court erred and the error requires correction.

POINT V

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED THE PLAINTIFFS TO INTRODUCE EVIDENCE OF ALLEGED ADMINISTRATIVE CODE VIOLATIONS DETACHED FROM AND BEYOND THOSE PLED IN EITHER COMPLAINT. IT WAS FURTHER ERROR WHEN THE COURT CONVERTED THE ALLEGED CODE VIOLATIONS INTO INDEPENDENT CAUSES OF ACTION UNDER RETA. (Da1134; Da1166-1189).

As stated throughout this appellate brief, the plaintiffs' initial complaint and first amended complaint was focused on alleged oral misrepresentations told to them by Flagship's salespeople when they purchased timeshares. Then on June 23, 2021, the plaintiffs filed a motion to amend their complaint a second time in an attempt to introduce a litany of alleged Administrative Code Regulations promulgated by the Real Estate Commission and others related to the RETA. (Da547). Significantly, the plaintiffs' motion to amend to include the alleged Administrative Code Regulations

came ten (10) days after Flagship's second motion for summary judgment arguing that the plaintiffs' claims of oral misrepresentations were barred by the Parol Evidence Rule. On July 8, 2021, the parties appeared for oral argument on plaintiffs' motion to amend and the Court denied that motion indicating that the Court believed the proposed amended complaint attempted to introduce new causes of action. (Da549).

Two months after that, on August 31, 2021, the plaintiffs cross-moved for summary judgment on the same Administrative Code violations rejected by the trial court when denying their motion to amend. (Da551). At that point, discovery had been closed and none of the Administrative Code Regulations had been addressed in discovery. For three (3) years, Flagship had been defending the plaintiffs' claims of oral misrepresentations allegedly in violation of the RETA and the CFA. By the time Flagship's motion for summary judgment was heard in December of 2021, a new motion Judge was assigned and granted a portion of the plaintiffs' cross-motion with regard to an alleged Administrative Code violations. (Da1101). The prejudice to Flagship at that point was significant.

The parties appeared for pretrial conference on June 29, 2022. In advance, both parties submitted their pretrial memorandums. (Da1105 & Da1120). Plaintiffs' pretrial memorandum sought to introduce at trial the alleged Administrative Code violations that were rejected with their motion to amend, Flagship objected but the

plaintiffs were permitted to introduce those alleged Administrative Code violations after Flagship's concession based solely on the fact the alleged Administrative Code violations were "technical violations" for which no proximate nexus existed to form any ascertainable loss to the plaintiffs. (Da1134). As repeatedly stated, the plaintiffs' central claims were that oral misrepresentations induced their transactions and only those oral misrepresentations could form the basis of any ascertainable loss.

It was error for the trial Court to allow the introduction of evidence regarding alleged Administrative Code Regulations for which no discovery had been conducted and after the plaintiffs' motion to amend their complaint to include those allegations was denied.

Beyond that, the trial Court converted the alleged Administrative Code violations into independent causes of action under the RETA. Take the Court's Jury Verdict Sheet, for example, at Pa1190. Under the Section titled "New Jersey Real Estate Timeshare Act," the Court sets out multiple subparts 3A-3P. (Da1192). Subpart 3E states:

> Did defendant violate N.J.A.C. 11:5-6.9(e) and (m) by knowingly failing to (i) verbally inform buyers of the four business relationships, (ii) provide the correct version of the Consumer Information Statement (CIS) to each plaintiff, or (iii) provide the correct CIS no later than the first showing and, if no showing is conducted, no later than the preparation of an initial offer or contract?

That question deals with an Administrative Code Regulation promulgated by the Real Estate Commission that is not covered by the RETA. Yet the Court took that

Administrative Code Regulation, inserted the "knowingly" element required by the RETA and submitted the Administrative Code Regulation to the jury as an independent cause of action under the RETA. (Da1196). That is but one example. The Court submitted the following Administrative Code Regulations to the jury as independent causes of action under the RETA as follows:

N.J.A.C. 11:5-6.7 at Da1196;
N.J.A.C. 11:5-6.7(b)(4)(e) at Da1197;
N.J.A.C. 11:5-9A.6(a) at Da1199;
N.J.A.C. 11:5-9A.6(b)(9) at Da1201;
N.J.A.C. 11:5-9A.6(10) at Da1207.

The Court simply took the text of each of those Administrative Code Regulations promulgated by the Real Estate Commission but not set forth in the RETA, inserted the "knowingly" element into the text of the Code Regulations and submitted the Code Regulations to the jury as independent causes of action under the RETA. That was error.

POINT VI

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RECONSIDERED THE FEBRUARY 1, 2023 ATTORNEY FEE AWARD TO PLAINTIFFS' COUNSEL AND INCREASED THE AWARD BY $300,000. (Da1411).

At the outset, Flagship submits that assuming this Appellate Division determines that only a RETA cause of action exists, any attorney fee award to plaintiffs' counsel will require adjustment for purposes of proportionality.

On February 1, 2023, the trial Court issued its 20-page Memorandum of Decision awarding a total of $722,714.00 in attorneys' fees and costs. (Da1381) That included a ten percent (10%) enhancement under the Lodestar. In reaching that award, the trial court reviewed (1) plaintiffs' 40-page brief in support of their motion for attorneys' fees; (2) the dozen page certifications from the three attorneys; (3) multiple attorney certifications with exhibits; (4) defendant's 15-page opposition; and (5) plaintiffs' 16-page reply with additional certifications. The Court then held a multi-hour oral argument on those submissions. In its thoroughly detailed, 20-page decision meticulously analyzing the relevant facts and the law, the Court determined that the plaintiffs' fee application upwards of $2,000,000 was a "free for all," "incredible", "unreasonable," "extremely excessive" and "unnecessary." Still, the Court awarded plaintiffs' counsel almost four times the amount of the jury's award.[7]

In its decision, the Court cited and meticulously analyzed the law with regard to fee shifting and Lodestar and applied all of it to plaintiffs' counsels' application. The Court made the required inquiries pursuant to Rendine v. Pantzer, 141 N.J. 292 (1995), evaluated plaintiffs' request under the appropriate rule and then considered

[7] The jury awarded the base sum of $214,000 to 11 plaintiffs which translates to approximately $20,000 per plaintiff. That award was trebled under the CFA but as briefed throughout this appeal, Flagship maintains that the CFA is inapplicable. At most, the $214,000 award could be doubled under the RETA.

each of the factors set forth in RPC 1.5 as required. Here is what the Court initially said about plaintiffs' fee request:

> The Court finds trying the matter did not involve any specialized skills …
>
> The number of attorneys involved in the matter was excessive.
>
> The sheer amount of time billed by the plaintiffs' full time attorneys and staff are (sic) found to be unreasonable.
>
> Solseng … requested billing time for himself at 1,968.10 hours during the time in which he was involved February 2018 and ended in mid-November 2022 for approximately 57 months. This calculates out as 35 hours per month for almost one full week per month being spent on this one matter. The Court finds such to be incredible and unreasonable.
>
> A review of the billings for all three law firms show extreme overlap on almost every issue involved in this matter.
>
> The Court finds that the billings by all the plaintiffs' law firms were excessive and were "generously" billed due to the fee shift provisions contained in the CFA and RETA.
>
> The plaintiffs' billings were excessive, unfettered, unreasonable, overlapping and duplicative.
>
> The Court finds that the term "free for all" best describes the request of the plaintiffs' attorneys. (All Da1387–1388)

The most significant examples of the "free for all" billing event perpetrated by the plaintiffs and that supported the Court's initial award are as follows:

> Attorneys Solseng and Milz billed 80.7 and 60.7 hours, respectively, on their attorney fee applications compared to attorney Ricci's 8.9 hours. That was "unreasonable."

> The Court found attorney Solseng's 81.6 hours of legal research regarding the Parol Evidence Rule to be "excessive" but still awarded two full, eight-hour workdays of research on the topic.
>
> The Court reduced the almost 400 hours billed by plaintiffs' counsel on summary judgment to 80 hours for attorney Solseng and 40 hours for attorney Ricci because the issues had been repeatedly dealt with and the time spent was "extremely excessive."
>
> Plaintiffs' counsel sought upwards of 100 hours for a second amended complaint that was denied. (Da1388–1393)

Finally, the Court flatly denied reimbursement of certain costs to plaintiffs' counsel defined by R. 1:21-7(d). (Da1394)

On April 17, 2023, the trial Court granted plaintiffs' motion for reconsideration and increased the attorney fee and cost award from $722,714.00 to $996,013.00. (Da1420). Flagship is not appealing the Court's reconsideration of the denial of specific costs requested in the amount of $10,494.00. Flagship does, however, appeal the Court's reconsideration of its 33% fee reduction and its increase of a 10% enhancement to a 25% enhancement.

After reviewing the incredible fee application of plaintiffs' counsel and issuing its 20-page decision categorizing the fee request as a "free for all," the Court granted reconsideration without amending or striking any of its comments that plaintiffs' counsels' billing tactics were "excessive," "incredible," "unreasonable" and "unnecessary." (Da1411). The Court's 8-page decision granting reconsideration respectfully restated the incomprehensible billing practices of plaintiffs' counsel

captured by their fee application, yet the Court minimalized the previous 33% reduction and increased the fee enhancement based only on the Rendine's Court's statement that the range in "typical contingency cases ranges between 20% and 35% of the Lodestar," with a general range of 5% to 50%. Rendine, supra at 343. That statement in Rendine, however, allowed the trial Court to do exactly what it did when it set a 10% enhancement and reduced the total award by a percentage that in the trial Court's discretion was appropriate based on plaintiffs' counsels' excessive and unfettered billing practices.

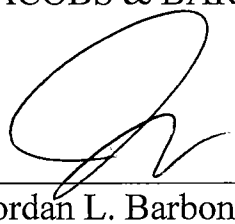
Although Flagship acknowledges that the award of attorneys' fees and costs is committed to the discretion of the trial Court, Flagship submits that the Court abused its discretion when it reconsidered its original award of $722,714.00 in attorneys' fees and costs based on nothing more than a single sentence from the Rendine Court that permitted the Court to do precisely what it did and without amending or striking any of its factual findings regarding the plaintiffs' excessive and unfettered billing practices as set forth in its February 1, 2023 Order and Memorandum of Decision. The Court erred when it abused its discretion and increased the attorney fee award to the plaintiffs by approximately $300,000.00.

CONCLUSION

For all the reasons set forth above the appeal should be granted.

Respectfully submitted,

JACOBS & BARBONE, P.A.



Jordan L. Barbone

Dated: 1/9/24

KEONA PALMER, DUANE ST. AMOUR ANA ST. AMOUR, BRIAN ROWARD, JENNYROWARD, JUDITH JONES, NIGUEL FIGUERO, OTILIO M. SEDA, JR., CARMEN SEDA, JAMES COHEN, STEPHEN BELL, SONIA LENHARDT BELL, JO-ANN WRIGHT, DENISE FRAWLEY, THOMAS FRAWLEY, BRIAN HART, JESSICA HART, SANDRA MOONEY, AND THOMAS MOONEY, Plaintiffs/Respondents, v. FLAGSHIP RESORT DEVELOPMENT CORP. d/b/a FantaSea Resorts, JOHN DOES 1-10, AND XYZ CORPORATIONS 1-5, Defendant/ Appellant.	Superior Court of New Jersey Appellate Division Docket No. A-003287-22 On Appeal from: Superior Court of New Jersey, Law Division, Civil Part, Atlantic County, Docket No. ATL-L-1515-19 Sat Below: Hon. Stanley L. Bergman, Jr., J.S.C

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* R. 2:6-1(a)(2) allows a party to submit relevant portions of briefs submitted to the trial court if the question of whether the issue was raised in the trial court is germane to the appeal. That is the case here and counsel has only attached relevant portions of Defendant's trial briefs.

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PRELIMINARY STATEMENT

This case epitomizes the reasons for the fraud exception to the parol evidence rule. It also explains why the New Jersey legislature expressly outlawed exculpatory waivers of consumer rights in timeshare sales.

The Defendant below, Flagship Resort Development Co. ("Flagship"), purposefully inserts disclaimers of the exact misrepresentations it knows its salespeople will use to defraud consumers into signing its contract documents. These disclaimers serve no contractual purpose in that they do not identify any rights or responsibilities under the contract. Rather, they serve only to attempt to trigger the parol evidence rule in an effort to insulate Flagship from its fraud scheme. Flagship admitted this at trial. If the fraud exception to the parol evidence rule is not applied here, serious problematic unintended consequences could follow: The Court will unwittingly provide a template for every deceitful business to use against unsuspecting consumers.

Flagship sells timeshares at its three Atlantic City resorts. It targets potential buyers within a 200-mile radius of Atlantic City. It knows potential owners would refuse to attend its Atlantic City sales presentations so it hides the real reason they are being solicited. Flagship also knows that potential buyers would not purchase its timeshares if they had an accurate understanding of the cost and limitations of its product. Because of this, Flagship's business model

involves violating numerous statutes and code regulations designed to protect consumers from unscrupulous resorts like Flagship's.

Flagship knows both which misrepresentations its salespeople tell consumers and which statutes and regulations it violates to trick consumers into buying Flagship's (worthless) timeshares. Trial demonstrated that Flagship actually coaches use of these misrepresentations in its training manual and has heard them used by its sales agents on the sales floor. These misleading statements often include that the timeshare will increase in value over time, that the consumer can easily rent out their timeshare for profit, that their payments are deductible on their taxes, that the consumer can sell the timeshare at any time for a profit, that Flagship will help the consumer resell their timeshare, that it is easy to book stays, and that it is easy to trade in their timeshare for stays at resorts all around the world. None of this is true.

Once Flagship's salespeople have talked the consumer into buying a timeshare, they are turned over to a "deeder," to sign the numerous contract documents. The "deeder" races the consumer through the contract execution in a carefully orchestrated presentation designed to prevent the exhausted consumer from reading or understanding what they are signing and initialing.

Buried in the contract documents are numerous disclaimers whose only purpose is to try to insulate Flagship from its deceitful practices. The "deeder"

gets the consumer to sign and initial these disclaimers without knowing their contents. These disclaimers include clauses in which the consumer "acknowledges" things Flagship knows are not true. Likewise, they ensure by the stroke of the pen the consumer denies being told the exact falsities Flagship knows its salespeople tell them. When the consumer realizes they have been defrauded, Flagship argues these written disclaimers, which serve no legitimate purpose, contradict their claims of fraud and preclude any testimony to the contrary. The fraud exception is designed to prevent this type of deception and resulting misuses of the parol evidence rule.

Four different judges have ruled six times that the fraud exception to the parol evidence rule applies in this case and the Plaintiffs could testify to the misrepresentations they were told. This includes two rulings by the trial judge, who ruled after considering all the facts aired at the jury trial.

Flagship is not arguing the trial court improperly admitted what it calls parole evidence, but rather is asking this Court to reverse the jury's verdict based on one judge's denial of its summary judgment motion. This request ignores both the fact that there were significant factual disputes the jury resolved, Flagship's damning admissions, and that nine of the 14 statutory and code violations the jury concluded Flagship had committed are completely divorced from Flagship's renewed parol evidence protests.

PROCEDURAL HISTORY

Plaintiffs accept Flagship's procedural history with the following additions and corrections:

On December 18, 2018, Flagship filed a motion to dismiss Plaintiffs' First Amended Complaint pursuant to R. 4:6-2(e). This claim was based primarily on the parol evidence rule. (Pa1-5).

On April 12, 2019, Hon. Lisa M. Vignuolo, J.S.C. denied the motion to dismiss. (Pa6-7).

Flagship's July 30, 2020 summary judgment motion was again based mainly on the parol evidence rule. (Pa8-13). On October 26, 2020, Hon. James P. Savio, J.S.C. denied this motion. (Da65).

Flagship's June 11, 2021, second motion for summary judgment was again based primarily on the parol evidence rule. (Pa14-19). On December 14, 2021, Hon. Michael J. Winkelstein, J.A.D. (recall) denied this motion. (Da1096). On January 3, 2022, Flagship filed a motion for the court to reconsider the denial of its summary judgment motion. This motion for reconsideration was based solely on the parol evidence rule. (Pa20-22). On March 14, 2022, Judge Winkelstein denied this motion. (Da1101). This was the fourth time a judge had refused to dismiss this case based on the parol evidence rule, making Judge Winkelstein the third judge to reject Flagship's parol evidence rule argument.

On June 23, 2021, after deposing several of Flagship's employees and learning their standard sales practices violated the CFA and the RETA by violating several statutes and code provisions, Plaintiffs filed a motion to amend their complaint a second time. (Da547).

On July 8, 2021, Plaintiffs' motion to amend was denied by Judge Savio after oral argument. Judge Savio ruled that the Second Amended Complaint was not necessary because it merely specified which sections of the Consumer Fraud Act ("CFA") and the Real Estate Timeshare Act ("RETA") Plaintiffs were alleging Flagship had violated. (21T13:19-15:17). Since Flagship was already on notice that Plaintiffs were alleging violations of the CFA and the RETA, no further clarification by way of amendment was necessary.

At the time of the July 8, 2021 oral argument, Flagship had filed a second Motion for Summary Judgment based on the then-operative First Amended Complaint. (Da67). Plaintiffs stated their intent to file a Motion for Summary Judgment based on the factual allegations in the Second Amended Complaint. Judge Savio delayed hearing Flagship's motion and set a briefing schedule for Plaintiffs to file their summary judgment motion and for Flagship to respond. Judge Savio suggested that Flagship's response could include lack of notice of the allegations in the Second Amended Complaint, could substantively address the more specific allegations, or both. (21T18:5-19:10).

At oral argument on the motions on December 14, 2021, Flagship chose to not argue lack of notice and instead addressed the allegations in the Second Amended Complaint substantively. (2T9:20-16:9). Judge Winkelstein, who had been asked to rule on the motions because of the voluminous pleadings involved, denied both parties' motions. (Da1096). It is these denials of Flagship's summary judgment motions that Flagship is appealing. Pointedly, Flagship is not appealing the later admission at trial of what it calls parol evidence. (Db15). This argument ignores completely the nine statutory and code violations the jury found were violations of the CFA and the RETA, which are not impacted by Flagship's parol evidence argument. (Da1192-1207). Even if this Court were to agree with Flagship on the parol evidence rule, the jury's verdict should still be upheld because of the nine claims the jury found that did not rely on statements made by Flagship's salespeople. (Da1190). These claims were ample evidence of Flagship's violations of the CFA and the RETA.

At the February 23, 2022, reconsideration hearing on both parties' summary judgment motions, Flagship again chose not to argue lack of notice and instead addressed the allegations in the Second Amended Complaint substantively. (3T9:1-13:18, 22:21-41:8). On March 14, 2022, Judge Winkelstein denied Flagship's motion. (Da1101).

On June 29, 2022, Hon. Stanley L. Bergman, Jr., J.S.C. held a pretrial conference. One of the issues addressed concerned Judge Savio's denial of Plaintiffs' Second Motion to Amend. Plaintiffs explained they intended to proceed under the causes of action in the Second Amended Complaint, that Judge Savio had only denied the motion because he deemed amendment unnecessary, and that Flagship had been on notice of the claims since June 2021. Flagship did not oppose proceeding under the Second Amended Complaint, stated it was "not going to gripe" about Plaintiffs proceeding under those allegations, and that it was prepared to "defend against those technical violations." (22T12:6-14:5).

On August 11, 2022, the court issued its final pretrial order pursuant to R. 4:25-1(b). (Da1134). Consistent with the June 29, 2022 hearing, ¶6 points out that the Plaintiffs' motion to file a second amended complaint was denied as unnecessary since it "only clarified which statutes and regulations Plaintiffs allege Defendant violated. Defendant has acknowledged being on notice as to Plaintiffs' allegations at trial and will not claim lack of notice as to Plaintiffs' allegations."

At the conclusion of the Plaintiffs' case-in-chief at trial, Flagship moved for dismissal based on the parol evidence rule. Judge Bergman specifically stated that he was not bound by any of the other judge's previous denials of the

motion because he alone had heard all the evidence. Still, he denied the motion orally on September 27, 2022 (14T22:1-28:20) and in writing on September 29, 2022. (Da1144).

Flagship's October 20, 2022 post-trial motions for judgment notwithstanding the verdict and for a new trial were yet again based primarily on the parol evidence rule. (Pa23-31). The trial court denied the motions on December 23, 2022 and issued a memorandum of decision. (Pa32-49). This tallied the sixth time a judge had rejected Flagship's parol evidence argument.

STATEMENT OF FACTS

Preliminarily, the Court should not accept Flagship's Statement of Facts as accurate. Virtually all the factual allegations contained therein are drawn from Defendant's Statement of Undisputed Material Facts submitted with Defendant's Second Motion for Summary Judgment on June 11, 2021. (Da69-127). As part of that motion, Plaintiffs painstakingly showed in their Response to Defendant's Second Statement of Material Facts that many of these "facts" were not true. (Da771-938). Flagship continues its obfuscation in its opening brief by citing to evidence that does not support what Flagship claims

it does.[1] This Court should not accept any fact supposedly supported by citations to Da69-127 as accurate.

Evidence at trial showed:

Flagship owns and operates three timeshare resorts in Atlantic City and Brigantine. (Pa58 ¶66-67). The Plaintiffs were each solicited to attend a "presentation" at one of Flagship's resorts by third-party entities through cold-calls, solicitations on the Atlantic City Boardwalk, or at booths or tables set up at events such as shopping malls, ballparks, festivals, etc. (Pa58 ¶¶69-70). Flagship's business model included violating numerous statutes and code provisions designed to protect consumers against unscrupulous timeshare resorts. These violations started with the solicitation process, which was designed to hide the real purpose of the solicitations, and continued throughout the sales process until the Plaintiff literally walked out the door. (Pa50-89).

The "presentations" the Plaintiffs attended were actually high-pressure and deceptive timeshare sales pitches. (Pa50-89). At trial, Flagship's Director of Sales Andrew Bello boasted of writing the company's training manual (Da666-

[1] As just one example, Flagship claims at page 8 of its opening brief that nine Plaintiffs received pre-sales presentation emails warning them that the purpose of the presentation was to sell timeshares. The documentation cited for six of these Plaintiffs, however, actually shows they did **not** receive this warning. (Palmer, Seda, St. Amour, Mooney, Jones, and Cohen.)

718) which directs salesmen to say things like: "Isn't it nice to know you'll have a place just like home you can use 365 days a year close to home." (14T38:6, 79:2-83:18). Flagship admitted (through its corporate designee Jay Korn) that it was aware of salesmen referring to the timeshare as an "investment" and "like conventional real estate." (12T223:21-225:22).

After being worn down by a long sales presentation, Flagship rushed the Plaintiffs through hundreds of pages of purchase documents by a "deeder." (Pa53 ¶18). These purchase documents contained numerous clauses that contradicted the promises made by Flagship's employees, material omissions, acknowledgments Flagship had Plaintiffs execute knowing they were false, and disclaimers designed to insulate Flagship from the misrepresentations it knew its employees were telling the Plaintiffs. (Pa50-89). For example, a RETA regulation requires resorts to give a Consumer Information Statement prior to the first showing of the property. Flagship does not do this, but has the consumer sign an acknowledgment that it does, even though Flagship knows this is inaccurate. (12T263:7-24). The deeders admitted that although they instruct the buyers to initial these disclaimers, they do not actually tell them what they are initialing. (12T89:8-90:2). Flagship knows its misrepresentations are prohibited by the RETA, and candidly admitted at trial that is precisely why it has

consumers sign documents with exculpatory clauses it can then use to thwart consumer fraud lawsuits:

> Atty Milz: Flagship says you shouldn't believe our oral representations, doesn't it?
>
> Mr. Korn: Correct.
>
> Milz: Flagship says you shouldn't believe what our own salesmen are telling you, correct?
>
> Korn: Correct.
>
> Milz: And when people sue Flagship and say, "I've been lied to, Flagship has made misrepresentations to me," Flagship comes into court and waves that around and says "no you didn't, you acknowledged that we warned you not to listen to us. We warned you not to let yourself be lied to." Right?
>
> Korn: Correct.

(12T262:12-25).

At trial, Plaintiff presented evidence of Flagship's numerous violations of several statutory and code provisions of the RETA as detailed in their proposed Second Amended Complaint. At the pretrial conference, Flagship agreed it would not oppose introduction of evidence of these violations on lack of notice grounds. During trial, Flagship never objected to the admission of evidence of violations of specific RETA violations.

Each and every Plaintiff testified to the same basic facts. Plaintiff Duane St. Amour's testimony was typical of all the Plaintiffs. He described filling out

sweepstakes entry forms for several prizes at the Monmouth Racetrack while on a Father's Day family outing. (6T88:2-15). Nothing about the display or the forms they completed said anything about timeshares. (6T88:16-24). They were told they had won a free night at FantaSea resort in Atlantic City. (6T89:22-25). In the subsequent telephonic and email communications with the St. Amours to set up their free night, Flagship did not give any indication that the St. Amours would be required to attend a timeshare sales presentation during their stay. (6T90:19-91:2 and 91:20-92:14). Upon checking in, the St. Amours were told they had to sit through a "short presentation" the next morning. They still were not told this was a timeshare sales pitch. (6T93:18-94:14).

The next morning, they were ushered into an office and met Flagship's salesman, who was acting as the seller's agent for Flagship. The salesman did not explain the four business relationships a real estate agent can have with a buyer and did not give them a Consumer Information Statement as required by code. (6T96:1-97:4). As he had been trained, the salesman instead questioned the St. Amours to learn their vacation and travel interests so he could craft his sales presentation to them. (6T99:9-100:21).

Carlos Figuero, one of Flagship's salesmen, corroborated this by testifying he does not tell potential buyers he is acting as the seller's agent (8T121:1-7), that he does not tell a potential buyer about the four business relationships, that

he does not provide them with the Consumer Information Statement, and that he did not remember ever seeing a Consumer Information Statement in the six years he had worked for Flagship. (8T122:10-123: 15). He described being trained in "the warm-up," from Flagship's training manual, in which salespeople ask questions to learn the potential buyer's "dominant buying motives," their "emotional hot buttons," so the salesperson can "tell them the things they want to hear" to make the sale. (8T141:19-143:24).

The St. Amours were told they would have access to hotels all around the world, that Flagship's timeshare was like "any other piece of real estate," "something tangible you could use," and that improvements to Atlantic City would increase the value of their timeshare. (6T101:1-103:8). Their salesman claimed he had a Flagship timeshare and that he acted, "like a rich uncle" by giving his niece a week in Hawaii for her honeymoon. (6T102:1-21). Their salesperson compared the timeshare to "owning a house, where you could buy, you could sell, and there was a market for it." (6T103:25-104:6). The St. Amours understood they could book stays at Flagship whenever they wanted.

(6T105:6-18). Their salesman described the timeshare as an "investment," but pointedly never referred to it as a timeshare. (6T106:3-18).[2]

Plaintiff Otilio Seda's experience was typical after he was convinced to purchase a timeshare. He and his wife were taken to the deeder's office and given a large stack of papers. (11T176:3-197:3). They were rushed through the signing process, not understanding anything they signed. (11T178:1-12). They (like the other Plaintiffs) did not realize they swore under penalty of perjury that they had sold the same timeshare they had just purchased back to Flagship for $1.00. (11T179:13-181:6). The legal description they were given said they were buying a "peak season" timeshare, "as more specifically set forth in Grantor's Public Offering Statement." (Pa90). Deeder Violet Stransky admitted in her testimony that the Seda's POS does not define "peak season," but only an irrelevant "red season." (11T53:10-54:16). Ms. Stransky, who is the Flagship employee designated to explain the contract documents to buyers, also admitted she has never read any POS. (11T 48:20-49:10; 11T144:16-18). When confronted with the contents of the POS, she had to admit several things she tells buyers are contradicted by the POS' terms. These include the fact that there

[2] Flagship admitted making these misrepresentations, which all violate the RETA's prohibition on such misleading statements, N.J.S.A. 45:15-16.70(a)(1)-(5). (See e.g. 12T216:3-14; 217:14-218:8; 223:21-225:22).

is no immediate market for reselling a timeshare (11T118:7-119:6), that anyone trying to resell their timeshare would be competing against Flagship (11T117:20-25 and 119:7-20), that stays must be booked at least 30 days in advance (instead of the instant booking she tells them), that cancellations must be made at least 15 days in advance (instead of the 48 hours she tells them), and that the penalty for late cancellations is loss of their stay that year (instead of no penalty). (11T144:19-149:2).

Ms. Stransky tells buyers they are free to resell their timeshare at any time without any restrictions (11T58:16-59:4), but had to admit the mortgage she has them sign says the timeshare cannot be resold "without prior written consent of the owner." (11T114:20-115:4).

Plaintiff JoAnn Wright's experience after being duped into buying Flagship's timeshare was typical of all the Plaintiffs: After paying Flagship thousands of dollars at high interest, she was never able to book any stays with it. Her timeshare was worthless. (10T190:22-191:1).

As shown by the jury's verdict (Da1190-1224), Plaintiffs proved that Flagship had violated the Consumer Fraud Act ("CFA") and the Real Estate Timeshare Act ("RETA") by violating 14 different statutes and code provisions. The jury also unanimously found for each Plaintiff that Flagship's purchase documents contained some combination of the nine different exculpatory

clauses designed to bind a purchaser to a waiver of Flagship's compliance with the provisions of the RETA. (Da1222-1224). Per N.J.S.A. 45:15-16.80(c), these clauses – an integral part of Flagship's fraud scheme – are void.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED FLAGSHIP'S SUMMARY JUDGMENT MOTION AND PROPERLY APPLIED THE FRAUD EXCEPTION TO THE PAROL EVIDENCE RULE TO ALLOW PLAINTIFFS' TESTIMONY. (2T9:20-16:9; 2T32:25-37:12; 3T20:10-22:17; 21T16:16-17:2; Da1096).

Flagship's brief does not challenge the admission of what it terms parol evidence at trial. Rather it challenges only that Judge Winkelstein, who heard one of Plaintiff's summary judgment motions (and the subsequent motion for reconsideration), erroneously refused to apply the parol evidence rule when denying Flagship's motions. Because of this, Plaintiffs will first address the denial of Flagship's summary judgment motion. Because Flagship may also try to substantively argue the parol evidence rule should have excluded some oral statements at trial, Plaintiffs address that as well. Since Flagship never moved to exclude this evidence at trial, the Court should review the parol evidence rule issue under the plain error standard. R. 2:10-2; *T.L. v. Goldberg*, 238 N.J. 218, 232 (2019).

A. DENIAL OF FLAGSHIP'S SUMMARY JUDGMENT MOTION.

R. 4:46-2(c) states that a motion for summary judgment should be granted if the pleadings:

> show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial" in viewing the facts in the light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995) (citation omitted). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

A reviewing Court "employ[s] the same standard that governs trial courts in reviewing summary judgment orders." *Antheunisse v. Tiffany & Co., Inc*. 229 N.J.Super. 399, 402 (App.Div.1988), *certif. denied*, 115 N.J. 59 (1989). Thus, the movant must show that there does not exist a "genuine issue" as to a material fact and not simply one "of an insubstantial nature." *Brill,* 142 N.J. 520 at 529-530. It is critical that a trial court ruling on a summary judgment motion not

"shut a deserving litigant from his [or her] trial." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 77 (1954).

The trial court's rulings were unambiguous: Significant issues of disputed material fact concerning the parol evidence rule needed to be resolved by the jury. Virtually all the facts Flagship submitted to the Court as "undisputed" (Da69-127) were, in fact, disputed by the Plaintiffs in their Response. (Da771-938). Flagship now takes these same disputed facts (which made summary judgment impossible) and presents them to this Court, as it did to the trial court, as undisputed. At trial Plaintiffs flatly refuted as false those same facts Flagship presents here. After hearing all the evidence in the case, the trial judge ultimately resolved the disputed facts in Plaintiffs' favor.

As Judge Winkelstein stated, "Factual disputes, credibility issues, issues of intent, questions about documents, those issues are all through the record." (2T32:25-33:2). He emphasized the difficulties inherent in analyzing parol evidence issues where fraud in the inducement is alleged, and that to resolve those issues, "you have to look at the entire matter in context. What's going on, what are—what are the parties trying to do here? What is their intention? And I don't think we can address that in a summary judgment motion." (2T36:4-8). Judge Winkelstein found, "there are issues of intent, there are certainly issues of credibility and factual disputes…that may be appropriate for a trial judge to

address." (2T36:20-37:8). To resolve these issues, Judge Winkelstein concluded, "you really need a factual setting. How do these things take place? What were—what was each individual purchaser told at the time? What did they do? And again, this is not a case for summary judgment without a factual record." (2T37:12-17).

Flagship moved for reconsideration, Judge Winkelstein denied the motion and recited passages from three cases supporting his ruling that fraud in the formation invites an examination of all the circumstances surrounding the execution of the contract before deciding if the parol evidence rule applies: *Atlantic Northern Airlines v. Schwimmer*, 12 N.J. 293 (1953); *Ocean Cape Hotel Corp. v. Masefield Corp.*, 63 N.J.Super. 369 (App.Div.1960); and *Conway v. 287 Corporate Center Associates*, 187 N.J. 259 (2005). Judge Winkelstein restated there were too many significant issues of material fact to resolve this case via summary judgment. (3T20:10-22:17).

Each of the three judges who denied similar motions six separate times in this case were correct. This case was not appropriate for summary judgment because there were a myriad of significant facts in dispute that had to be resolved at trial. The 167-page Plaintiff's Response to Defendant's Second Statement of Material Facts filed in this matter supports this conclusion, showing most of

Flagship's "undisputed facts" submitted in support of its motion were, in fact, disputed. (Da771).

Flagship argued as a matter of law Plaintiffs could not prove any of the allegations, including the statutory and code violations from the Second Amended Complaint. Flagship's parol evidence argument only applies to five of the 14 allegations the jury eventually found. Even if the Court had excluded the parol evidence, it would only have resulted in dismissal of some of the claims against Flagship. Further, Plaintiffs' claims based on misrepresentations would have survived, because Flagship admitted making those same false statements to consumers. With or without application of the parol evidence rule, dismissal on summary judgment was simply not appropriate in this case.

Judge Bergman presided over the trial and concluded the fraud exception to the parol evidence rule applied.

B. THE THREE CONTRACT DOCUMENTS.

Flagship claims three purchase documents contradict the Plaintiffs' trial testimony and therefore trigger the parol evidence rule: The POS; the Purchaser's Acknowledgment (Annual or Bi-Annual) Usage forms ("PAAU or PABU"); and the Purchase and Sale Agreement ("PSA"). Judge Winkelstein identified significant dispute as to whether these documents actually

contradicted the Plaintiffs' testimony. Even if there were no dispute, the parol evidence rule still does not apply to each document for the following reasons:

1. The POS. Uncontroverted testimony at trial established both that Flagship failed to provide the POS to any Plaintiff prior to execution of the contract or agreement in violation of N.J.S.A. 45:15-16.80(b) and also failed to afford any Plaintiff a reasonable opportunity to read the POS before they signed the contract or purchase agreement in violation of N.J.C.A. 11:5-9A.6. Indeed, delivering the POS to the Plaintiffs only after the contracts were signed and then only on a CD which they could not access was Flagship's standard practice. (11T 28:16-31:6; 12T 93:15-19). And the deeders, who are assigned to explain the contract terms to the buyers as they close, testified they have never read the POS because it is so long. (11T36:22-37:22).

A contract can only be binding if it has been mutually agreed upon by the parties. *Hoffman v. Supplements Togo Management, LLC*, 419 N.J.Super. 596, 606 (App.Div.2011). For mutual assent to exist, there must have been a meeting of the minds of the parties. *Pop's Cones, Inc. v. Resorts Int'l Hotel*, 307 N.J.Super. 461, 467-68 (App.Div.1998). A meeting of the minds requires "that each party to the contract must have been fairly informed of the contracts' terms before entering into the agreement. *Hoffman* at 606.

Given that Flagship actively prevented each Plaintiff from learning the contractual terms in the POS, the parol evidence rule cannot apply to any of the POS's contents.

2. The PAAU/PABU: Each Plaintiff testified to misrepresentations they were told by Flagship's salespeople. Only after these statements convinced the Plaintiffs to make a purchase were they handed off to the "deeder" to sign the contract documents. The "deeder" is not told what the salespeople told the buyer and the salespeople are not allowed in the room with the "deeder" and the buyer. (11T242:5-243:25).

Importantly, the PAAU/PABU only claims to recite what the "deeder" told the buyer, *not* the salespeople. The first sentence of each PAAU/PABU claims only that "the items set forth below have been fully disclosed and explained to them **by the person witnessing this document**." (Da193, 195 (emphasis added)). Each PAAU/PABU is signed only by the buyers and the "deeder," not any salesperson. (Da193, 195). Since the PAAU/PABU claim only to state what the "deeders" told each Plaintiff, not the salespeople, they cannot contradict what the Plaintiffs were told by the salespeople. The contents of the PAAU/PABU cannot trigger the parol evidence rule.

3. The PSA: Flagship quotes one sentence fragment buried on the fourth page of the PSA and alleges it triggers the parol evidence rule. (Db19,

20). This quote obscures the fact that it is buried in a section titled "RECEIPT OF CONDOMINIUM DOCUMENTS." That paragraph first has the buyer acknowledge receipt of the POS and other documents that Flagship knows have not yet been provided.

The list of false acknowledgments that track the misstatements Flagship knows it uses is also absent from this same paragraph. These false acknowledgments include that the buyer purchased, "without reliance on representations concerning rentals, rent return, tax advantages, depreciation or investment potential, or other monetary or financial advantage, by Seller, its agents, employees or associates." (Da204 ¶22). Hidden language like this, carefully crafted to protect a seller from misleading or downright false statements it knows its agents tell buyers, exemplifies the reason for the fraud exception to the parol evidence rule.

C. BECAUSE PLAINTIFFS SEEK TO VOID THEIR FRAUDULENTLY INDUCED CONTRACTS, NOT ALTER THEM, THE PAROL EVIDENCE RULE DOES NOT APPLY.

Flagship attempts to pervert the laudable goal of the parol evidence rule, which is to provide finality in contract cases. The rule is designed to be a shield to protect the integrity of written contracts, but Flagship is using it as a sword to strike otherwise admissible evidence of its wrongdoing. Knowing which falsehoods its agents use to trick potential owners into purchasing timeshares, Flagship puts

otherwise unnecessary language into its contract documents to contradict those falsities used to procure sales. If a defrauded owner files a lawsuit calling out they were promised something other than what they were sold, Flagship claims the parol evidence rule prohibits them from providing evidence of Flagship's fraud.

Properly applied, "the parol evidence rule prohibits the introduction of evidence that tends ***to alter*** an integrated written document." *Conway v. 287 Corp. Ctr. Assocs.,* 187 N.J. 259, 268 (2006) (*quoting* Restatement (Second) of Contracts § 213 (1981); (emphasis added)); *see also Ocean Cape Hotel Corp. v. Masefield Corp.*, 63 N.J. Super. 369, 378 (App.Div.1960) (citing *Naumberg v. Young*, 44 N.J.L. 331 (Sup. Ct. 1882) ("[T]he parol evidence rule operates to prohibit the introduction of oral promises **to alter or vary** an integrated written instrument…."; (emphasis added.)) In other words, a court being asked to **enforce** the terms of a contract cannot consider alleged oral representations that contradict the written terms. To hold otherwise would subject every contract to challenge based on alleged oral representations.

Just as clearly, the parol evidence rule does not apply where, as here, a party seeks to **avoid** a contract they were defrauded into signing. In these cases, evidence of oral statements made to fraudulently induce a party into signing a contract is admissible to prove the fraud, not the terms of the contract. "[E]vidence of fraud in the inducement will suspend the parol evidence rule because fraud prevents

formation of a valid contract—no contract, no parol evidence rule." *In re Tarragon Corp.*, 2010 W.L. 3921996 (D.N.J. September 27, 2010); *Mellon Bank v. First Union Real Estate,* 951 F.2d 1399, 1408 (3d Cir.1991) (quoting *Betz Lab Inc. v. Hines,* 647 F.2d 402, 406 (3d Cir.1981)).

A review of cases involving the application of the parol evidence rule bears this out. The parol evidence rule has been properly applied to exclude evidence in cases where a party sought to enforce a contract under terms different from the written contract. *See: Filmlife, Inc. v. Mal "Z" Ena,* 251 N.J. Super. 570 (App.Div. 1991)(court refused to allow evidence of alleged oral representations where Plaintiff was trying to alter contract terms as to how the trade-in value of an automobile would be applied); *Winoka Village, Inc. v. Tate*, 16 N.J.Super. 330 (1951)(court refused to allow evidence of oral representations that would have altered the terms of a written lease); and *In re Tarragon Corp.*, 2010 W.L. 3921996 (D.N.J. September 27, 2010)(court refused to amend purchase contracts for condominium units based on alleged oral representations).

On the other hand, New Jersey courts have correctly allowed parol evidence where a party sought to void a contract that had been secured by fraudulent representations. *See*: *Walid v. Yolanda for Irene Couture, Inc.*, 425 N.J. Super. 171 (App. Div. 2012)(allowed evidence of fraudulent accounting in suit to void contract to purchase a business); *Berman v. Gurwicz,* 189 N.J. Super. 89

(Ch.Div.1981)(allowed evidence of undisclosed lease of swimming pool to condominium purchasers seeking to void lease payments); and *Square Two, LLC v. JJJ Solutions, LLC,* 2021 N.J. Super. Unpub. LEXIS 369 (App. Div. 2021) (allowed evidence of misrepresentations of income from restaurant despite a "no reliance" clause in contract in suit to void purchase contract).

In *Walid*, the Appellate Division reaffirmed a long-held and broad version of the "fraud exception" to the parol evidence rule. This exception permits introduction of extrinsic evidence to prove fraud in the inducement, regardless of whether the alleged misrepresentation regarded a matter expressly addressed in the contract. Under *Walid's* formulation of the fraud exception,

> "[A] party to an agreement cannot, simply by means of a provision in the written instrument, create an absolute defense or prevent the introduction of parol evidence in an action based on fraud in the inducement to the contract." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 204, 188 A.2d 24 (1963)(quoting *Ocean Cape Hotel Corp. v. Masefield Corp*., 63 N.J. Super. 369, 377-78, 164 A.2d 607 (App.Div.1960)).
>
> Thus while the parol evidence rule operates to prohibit the introduction of oral promises to alter or vary an integrated written instrument, parol proof of fraud in the inducement is not considered as either additional or substitutionary but rather as indicating that the instrument is, by reason of the fraud, void or voidable. The evidence is admitted, not in order to enforce the contract, but rather to avoid it, or as here, to prosecute a separate action predicated upon the fraud. Thus, a limitation such as…[that] herein does not bar evidence of such fraud.

Walid, 425 N.J. Super. at 185.

Just like Flagship here, the defendants in *Walid* urged the Court to adopt the limited version of the fraud exception applied in *Filmlife, Inc. v. Mal "Z" Ena,* 251 N.J. Super. 570 (App.Div.1991), in which pre-sale statements are admissible to prove fraud only if they concern matters that were not expressly addressed in the contract. *Walid* at 185-186. The Court expressly rejected this restriction, at least in cases in which the "specific facts misrepresented are peculiarly within that party's knowledge and were, in fact, intentionally misrepresented." *Walid* at 186 (*citing Solutia Inc. v. FMC Corp*., 385 F.Supp.2d 324, 340 (S.D.N.Y.2005)). The Court concluded the fraud exception to the parol evidence rule applied to that case:

> Here…material misrepresentations were made to plaintiffs respecting the income of the business they were purchasing and then, in an effort to escape later liability for such misrepresentations, a contract was prepared with a general integration clause. As we have noted, **where the "allegedly misrepresented facts are peculiarly within the misrepresenting party's knowledge, <u>even a specific disclaimer</u> will not undermine another party's allegation of reasonable reliance on the misrepresentation."** *Warner Theatre Assocs. P'ship v. Metro. Life Insl. Co.,* 149 F.3d 134, 136 (2d Cir.1998)(emphasis added). In such a case, the introduction of extrinsic evidence to prove fraud in the inducement is a well-recognized exception. Here…material misrepresentations were made to plaintiffs respecting the income of the business they were purchasing and then, in an effort to escape later liability for such misrepresentations, a contract was prepared with a general integration clause. As we have noted, where the "allegedly misrepresented facts are peculiarly within the misrepresenting party's knowledge, even a specific disclaimer will not undermine another party's allegation of reasonable reliance on the misrepresentation." *Warner Theatre Assocs. P'ship v. Metro. Life Ins. Co*.,149 F.3d 134, 136 (2d Cir.1998) (emphasis added). In such a case, the introduction of

> extrinsic evidence to prove fraud in the inducement is a well-recognized exception to the parol evidence rule. *Ocean Cape, supra*,63 N.J.Super. at 377–78, 164 A.2d 607.

Walid at 186 (emphasis added). *See also Schlossman's Inc. v. Niewinski*, 12 N.J. Super. 500, 506, (App.Div.1951): "[W]here 'fraud in the inducement is charged,…testimony [is not] made inadmissible because the contract in suit includes a provision, 'this is our entire agreement and cannot be changed orally."

Here, Plaintiffs have pleaded and proven that Flagship's misrepresentations were made knowingly and intentionally, as part of a pattern and practice to induce consumers to purchase timeshares. (Da131, ¶¶30, 44, 45). Therefore, *Walid* controls, not *Filmlife*, and the specific disclaimers in the contracts and other documents referencing the misrepresented matters cannot preclude the Plaintiffs from introducing the misrepresentations in the sales presentations to support their claims.

Even if the Court were to ignore *Walid* and assume *Filmlife* controls, the latter acknowledges that:

> Introduction of extrinsic evidence to prove fraud in the inducement, however, is a well-recognized exception to the parol evidence rule. "It is well settled that a party to an agreement cannot, simply by means of a provision in a written instrument, create an absolute defense or prevent the introduction of parol evidence in an action based on fraud in the inducement of contract." *Ocean Cap, supra*, 63 N.J. Super. At 377-78. Extrinsic evidence to prove fraud is admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or "to prosecute a separate action predicated upon the fraud." *Id.* at 378.

Filmlife at 573-574.

In *Filmlife*, the plaintiff motor vehicle lessees asked the court to amend a written contract by filing a claim under common law fraud and the CFA. The contract provided the lessees would be given $6,000 trade-in credit as a reduction to the lease cost of a vehicle while the lessees sought the $6,000 in cash as they alleged they were orally promised. *Id.* at 576. The *Filmlife* court stated the parol evidence rule barred "plaintiffs from presenting such evidence to vary the terms of the lease agreement" for the purposes of establishing common-law fraud. *Id*.

The *Filmlife* court tried to avoid the absurd result of the plaintiff receiving both $6,000 in trade-in credit and $6,000 in cash for a vehicle the parties acknowledged was worth $6,000, not $12,000. "Certainly, simple logic, sound business principles and fundamental fairness militates against a party receiving both a $6,000 cash payment and a $6,000 capitalized cost reduction in the cost of a lease for the single $6,000 trade-in allowance." *Id*. After holding the parol evidence rule applied and prohibited evidence of alleged oral representations designed to **alter** the terms of the contract under plaintiffs' several fraud-based claims, the Court in *Filmlife* stated simply, "[T]his same reasoning also applies to the claimed violations of the Consumer Fraud Act." *Id.* The Court was merely stating the obvious: Because the parol evidence rule is a substantive rule of law, the rule—and its exceptions—apply regardless of the type of claims alleged. Because Plaintiffs seek to void

contracts they were fraudulently induced into, the parol evidence fraud exception applies under both the CFA and the RETA.

Finally, the clauses that Flagship argues conflict with the oral misrepresentations Flagship made to the Plaintiffs are qualitatively different than those addressed in the published cases on the parol evidence rule. All the published cases concern real contractual terms such as the price to be paid or the duration of the lease contract. The cases address either efforts to enforce the terms of the contract or to receive compensation for breach of contract.

The clauses Flagship would have this Court enforce serve no real contractual purpose because they do not define any party's rights or duties under the contract. The Court cannot enforce "terms" such as, "Buyer acknowledges they are not purchasing for investment purposes," or, "There is no immediate market for resales of intervals." Flagship's clauses are instead the equivalent of recitations, hidden in hundreds of pages of boilerplate documents meant to disclaim and immunize Flagship from the completely opposite, false representations made during the timeshare presentations. The parol evidence rule was never intended as the "get out of jail free card" Flagship seeks, to say anything so long as they write the opposite in the boilerplate contracts.

The facts adduced at trial – the testimony of sales agents, the corporate testimony of Mr. Korn, the training manual, the specific language in Flagship's

carefully crafted exculpatory clauses – all demonstrated Flagship's intended use of the parol evidence rule in just that manner. Indeed, it was part of the company's plot to insulate itself from any repercussions from its damaging misstatements to these Plaintiffs and others.

Importantly, Flagship never made a motion at trial to exclude what it terms parol evidence. Defendant's Pretrial Memorandum argued only that Plaintiffs' "claims are barred by the Parol Evidence Rule." (Da1124). If a party fails to object to evidence at trial, the evidence is reviewed under the plain error standard—was its admission "clearly capable of producing an unjust result" per R. 2:10-2. *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 317-18 (2006). Given the overwhelming evidence of Flagship's deception throughout its sales process, it cannot be said that the jury's verdict here was unjust.

The jury found unanimously that Flagship had violated the CFA and the RETA by violating 14 statutes and code provisions. (Da1190). Flagship's parol evidence rule argument impacts, at most, five of these violations. The rest were proven without any of the evidence Flagship would have this Court deem as parol evidence, including the resort's own admissions. Even if this Court were to find the parol evidence rule applies to exclude some of the Plaintiffs' testimony, there is more than enough evidence of Flagship's violations of the CFA and the RETA to sustain the verdict in all respects.

POINT II

THERE IS NO CONFLICT BETWEEN THE CFA AND THE RETA AND THE COURT PROPERLY CHARGED THE JURY WITH BOTH. (Da1158-1181; Da1421).

Flagship argues that the CFA and the RETA conflict with each other because the RETA includes a knowing element while the CFA does not. Flagship argues that because of this conflict, the Court should have molded the verdict into a judgment under only the more specific RETA instead of the CFA. The practical result of this argument is that the Flagship would be subject to only double damages under the RETA instead of the treble damages the Court ordered under the CFA. This argument is without merit.

In *Sun Chemical Corporation v. Fike Corporation*, 243 N.J. 319, the New Jersey Supreme Court laid out the history of the CFA:

> The Legislature passed the CFA in 1960 "to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer." In so doing, the Legislature "intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public."
>
> The CFA prohibits deceptive, fraudulent, misleading, and other unconscionable commercial practices "in connection with the sale…of any merchandise or real estate…."[3]
>
> In 1971, the Legislature amended the CFA to provide for private causes of action by consumers to recover for an "ascertainable loss of moneys or property, real or personal." The amendment also enabled successful private plaintiffs to recover treble damages,

[3] The Legislature added "real estate" to the CFA in 1976. *Arroyo v. Arnold-Baker & Associates, Inc.*, 206 N.J.Super. 294, 296-97 (Law Div. 1985).

> reasonable attorneys' fees and costs and "any other appropriate legal or equitable relief." The private right of action "is integral to fulfilling the [CFA's] legislative purposes," and by allowing recovery of attorneys' fees and costs, private attorneys are incentivized to bring CFA claims, thus reducing the enforcement burdens that otherwise would fall on the State.
>
> The CFA's history "is one of constant expansion of consumer protection." The statute has been "repeatedly amended and expanded…often by adding sections to address particular areas of concern and to include them specifically within its protective sweep."
>
> In addition to its ever-growing scope, "[t]he language of the CFA evinces a clear legislative intent that its provisions be applied broadly." "[L]ike most remedial legislation, the [CFA] should be construed liberally in favor of consumers."
>
> And, by the plain terms of the statute, "[t]he rights, remedies and prohibitions" created by the CFA are "in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State." Courts are therefore reluctant "to undermine the CFA's enforcement structure…by carving out exemptions for each allegedly fraudulent practice that may concomitantly be regulated by another source of law."

Sun at 329-331 (citations omitted).

The Court then went on to reaffirm the principles it had laid out in *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255 (1997). There the Court found a presumption that the CFA applies to a covered activity and that that presumption can only be overcome if the court finds "a direct and unavoidable conflict" between the CFA and another regulatory scheme. Overcoming this presumption must be difficult to avoid rendering the CFA impotent simply because a defendant's fraud is also covered by another statute.

Courts should be wary of inferring that legislation designed to augment consumer protection, was actually intended to subject a defendant to less, rather than more, regulation. *Sun* at 331-332.

In *Lemelledo*, the Court established a rigorous test that must be met before a court should hold another statute preempts the CFA. Before doing so, the court must find a "direct and unavoidable conflict exists" that is both "patent and sharp." The court must be convinced that the other regulations "deal specifically, concretely, and persuasively with the activity, "implying a legislative intent not to subject parties to multiple regulations that…will work at cross-purposes." *Lemelledo* at 270.

Flagship argues that language in the RETA "triggers" RETA's superiority over the CFA. *Bandler v. Landry's Inc*., 464 N.J.Super. 311 (App. Div. 2020) rejected this same argument Flagship advances. In *Bandler*, the plaintiff sued a casino under both the Casino Control Act ("CCA") and the CFA for falsely advertising the prize money available in a poker tournament. The CCA contains language addressing possible conflicts with other remedial statutes that is very similar to the RETA language. As Flagship points out, the RETA says, "In a case of conflict between the provisions of this Act and the provisions of any other law…the provisions of this Act shall control." The CCA has similar language: "[I]f any provision is inconsistent with, in conflict with, or contrary to any

provision of law, such provision of [the CCA] shall prevail…" The CCA goes even further than the RETA: It dictates the Division of Gaming Enforcement "shall have exclusive jurisdiction over all matters delegated to it or within the scope of its powers under the provisions of [the CCA]." Despite this language, the Court in *Bandler* held that there was no conflict between the CCA and the CFA and the plaintiff could proceed under both statutes.

There is no conflict between the CFA and the RETA either. By enacting the RETA and amending the CFA to specifically apply to real estate transactions, the legislature showed its intent to have both statutes protect consumers. The two statutes do not work at cross-purposes in any way. The only "conflict" Flagship alleges is that the RETA includes a knowing element which the CFA does not. Adopting Flagship's position would create the absurd result where a consumer can meet the higher "knowing" standard of proving a claim under RETA, but somehow fail to prove a claim for misrepresentation under the lower standards of the CFA. The jury was charged with the elements of each statute and understood them. Flagship's bald assertion that applying both statutes "created undeniable confusion" (Db28) has no support in the record.

POINT III

SIMILARLY, THERE IS NO CONFLICT BETWEEN THE RETA STATUTE AND THE REGULATIONS PROMULGATED UNDER ITS AUTHORITY. (Da1176-77).

Flagship next argues there is a "conflict" between N.J.A.C. 11:5-9A.6(a) and N.J.S.A. 45:15-16.59. The Regulation, N.J.A.C. 11:5-9A.6(a), requires a timeshare resort to "afford the purchaser a reasonable opportunity to read [the Public Offering Statement ("POS")] **before the purchaser signs** the contract or Purchase Agreement." (emphasis added).[4] Wholly ignored by Flagship in its brief, the Regulation comports with the express language of the remedies section of the RETA statute itself, which states in relevant part:

> The court, in addition to the remedies provided in this act, may award any other relief appropriate under the circumstances, including, in the court's discretion, restitution of all monies paid and, **where a developer has failed to provide to a purchaser a copy of the current public offering statement approved by the commission prior to execution of the contract or agreement**, rescission of the contract.

N.J.S.A. 45:15-16.80(b) (emphasis added).

[4] N.J.S.A. 45:15 *et seq*. gives the Real Estate Commission the authority to "promulgate necessary rules and regulations" "for carrying into effect the provisions of this article." N.J.S.A. 45:15-6. Under this mandate and the mandates of N.J.S.A. 45:15-10.4; N.J.S.A. 45:15-16.2g; N.J.S.A. 45:15-16.49; N.J.S.A. 45:15-16.82; N.J.S.A. 45:15-17t; N.J.S.A. 45:15-17.4; and N.J.S.A. 45:15-42, the Commission enacted the regulations in N.J.C.A. 11:5-1 *et seq*.

The section of the RETA cited by Flagship, N.J.S.A. 45:15-16.59, requires a timeshare resort to "provide the [POS] to each purchaser of a timeshare interest in any timeshare plan at the time of purchase." This POS may be provided "on CD-ROM format…if the purchaser consents."

The statute and the regulation do not conflict. The less specific provision of "at the time of purchase" in N.J.S.A. 45:15-16.59(a) does not conflict with the other two provisions when considering the remedial purpose of the RETA and RETA Regulations. Furthermore, "at the time of purchase" does not mean afterwards. When Plaintiffs finished signing their sales documents, they had completed their purchase. Plaintiffs established at trial that Flagship regularly and routinely violated the statute and the regulation by only providing the POS after the contract documents were signed and they were ready to walk out the door, and then on a CD that could not be contemporaneously viewed by any Plaintiff. Violet Stransky and Rosemary Rapp testified under oath they did this each and every time, Flagship knew this, and the resort never took any steps to change their processes. (11T28:16-31:6 and 14T255:17-257:4). Flagship should not now be allowed to argue that the contents of the POS, which it delivered late and in violation of their statutory duty, contain contract terms that each Plaintiff knew of and agreed to.

Timeshare resorts are expected to know and comply with the RETA in its entirety. This includes giving a prospective buyer a copy of the POS and affording them a reasonable chance to read it before they sign the contract documents. The POS may be provided on CD-ROM format, but the duty to afford the buyer a reasonable chance to access the contents of the CD-ROM and read it before signing remains regardless of what format the POS is in. There is nothing conflicting about the statute and the code provision, they simply complement each other.

These requirements are reasonable because the POSs contain many of the purchase contract terms the resorts, including Flagship, later hold buyers to. (Pa56 ¶34). It is unfair to hold a consumer to the terms of a contract the seller prohibits them from reading in violation of the RETA regulations.

POINT IV

THE TRIAL COURT PROPERLY DETERMINED THE ISSUE OF WHETHER FLAGSHIP'S CONTRACT DOCUMENTS VIOLATED N.J.S.A. 45:15-16.80(c) WAS AN ISSUE FOR THE JURY AND PROPERLY INSTRUCTED THE JURY ON FLAGSHIP'S "EXCULPATORY WAIVERS". (Da1180-81).

Flagship's brief mischaracterizes the circumstances surrounding the submission to the jury of whether it violated N.J.S.A. 45:15-16.80(c)'s prohibition against a timeshare resort inserting clauses in its contracts that waive

compliance of any provision of the RETA.[5] Flagship erroneously claims that the Court first ruled as a matter of law that Flagship had not violated these "anti-waiver" provisions, then reversed itself and submitted the issue to the jury. (Db34-35). It is this alleged reversal by the Court that is the gravamen of Flagship's argument.

In reality, the Court never reversed itself. What actually happened was that Plaintiffs moved for a directed verdict on this issue following the close of evidence pursuant to R. 4:40-1. (Da1142). During oral argument on September 28, 2022, Flagship argued against the motion on the grounds that this should be decided by the jury, not the Court. Flagship argued, "the Court is really not in a position to make that determination," and, "it's a jury question," and "these provisions would be argued to the jury." (15T101:25-102:15). The Court agreed and denied Plaintiffs' motion for a directed verdict. (Da1146). When the parties were arguing jury instructions the next day, Flagship contradicted its own argument and insisted this issue should be one for the Court to decide. Now Flagship argued, "this is not a jury question," and "That is a function exclusively

[5] "Any stipulation or provision purporting to bind a purchaser acquiring an interest in a timeshare plan subject to the provisions of this act to a waiver of compliance with the provisions of this act shall be void." N.J.S.A. 45:15-16.80(c).

in the Court's zone, not the jury zone." (16T62:21-63:4). The Court maintained its original position and charged the jury on this issue.

Flagship also claims that it submitted a proposed jury instruction on this issue but has not provided a copy of this on appeal. The parties' discussion of the jury instruction on this issue does not include any reference to a proposed instruction from Flagship. (16T62:5-72:4).

The Court charged the jury on N.J.S.A. 45:15-16.80(c), including adding a "knowing" element from N.J.S.A. 45:15-16.80(a). (Da1180-81). The jury questionnaire listed each "anti-waiver" clause separately and asked the jury to determine which of the nine possible clauses violated N.J.S.A. 45:15-16.80(c). The jury voted unanimously that all nine clauses violated the statute. (Da1222-24). Even if this were a question for the Court, the clauses clearly violate N.J.S.A. 45:15-16.80(c) as a matter of law, and were meant to operate precisely how Flagship intended them – to defeat claims of misrepresentation in violation of RETA and keep consumers with valid claims out of court. (12T262:12-25).

If a party fails to request an instruction, the decision is reviewed under the plain error standard—was it "clearly capable of producing an unjust result" per R. 2:10-2. *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 317-18 (2006). Flagship does not argue that the Court's instructions on this issue meet the plain

error standard. The Court properly instructed the jury on this issue and this argument should be denied.

POINT V

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF ADMINISTRATIVE CODE VIOLATIONS OF WHICH FLAGSHIP WAS ON NOTICE. (21T13:19-15:15; 4T13:14-15:2; Pa1134-39; Pa1156-1189).

Preliminarily, Flagship's brief misstates several important facts in this section. First, Flagship asserts the Court issued an order denying Plaintiffs' motion to file a Second Amended Complaint after "indicating that the Court believed the proposed amended complaint attempted to introduce new causes of action." (Db37). In reality, the Court's written order denied the motion to amend "for the reasons set forth on the record on July 8, 2021." (Da550). That record makes it clear that although Judge Savio originally assumed Plaintiffs were adding new causes of action, he ultimately denied the motion for a different reason entirely: An amendment was not necessary because Plaintiffs were **not** introducing new causes of action, but only clarifying which parts of the CFA and the RETA they intended to allege. (21T13:19-15:15).

Second, Flagship erroneously asserts that at the June 29, 2022, pretrial conference "Flagship objected" to the allegations in the Second Amended Complaint being introduced at trial. (Db37). The record shows the opposite.

When asked about whether Flagship opposed Plaintiffs' plan to introduce at trial evidence of the violations alleged in the Second Amended Complaint, Flagship's counsel responded, "I don't know if I really oppose it." Flagship's counsel then explained that Flagship intended to defend against the allegations as technical violations only. (4T13:14-14:3). Indeed, over five pages of Defendant's Pretrial Memorandum filed on June 26, 2022, were dedicated to addressing each code violation. (Da1125-1130). At the end of the pretrial conference, Judge Bergman reiterated three times on the record that Flagship was not objecting to introduction of evidence of allegations in the Second Amended Complaint. (4T14:15-15:2).

R. 2:10-2 states:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

The "[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made," and it "also deprives the court of the opportunity to take curative action." *Jackowitz v. Lang*, 408 N.J.Super. 495, 505 (App.Div.2009) (quoting from *State v. Timmendequas*, 161 N.J. 515, 576 (1999)).

To warrant reversal and entitlement to a new trial, the plain error must have been clearly capable of producing an unjust result. *T.L. v. Goldberg*, 238 N.J. 218, 232 (2019).

Flagship acknowledged it was aware of and ready to defend against the allegations in the Second Amended Complaint and that it would not object to evidence of these violations. Reversal is only appropriate if admission of this evidence was plain error that produced an unjust result. Defendant does not argue plain error because it cannot show any. Given all the evidence in this case, the jury's verdict was just.

Flagship next complains that the trial court improperly "converted" the RETA code violations into "independent causes of action." It is not clear from Flagship's brief what is improper about this.

Chapter 15 of Title 45 regulates real estate brokers, broker-salespersons, and salespersons. N.J.S.A. 45:15-1 et seq. includes a number of statutory provisions applicable to entities and persons that sell timeshares. Timeshares in New Jersey are considered real property, so anyone selling timeshares must be a licensed real estate agent and comply with all real estate regulations. N.J.S.A. 45:15-16.51. Plaintiffs' theory was that Flagship violated the CFA and the RETA by violating specific code sections. It was entirely appropriate for the Court to require Plaintiffs to prove each alleged code violation. The only way to establish

this was to ask the jury to identify which specific code violations they believed had been proven.

POINT VI

THE TRIAL COURT PROPERLY RECONSIDERED ITS ORIGINAL ATTORNEYS' FEE AWARD. (Da1381; Da1411).

In opposing plaintiffs' fee application below, Flagship conceded that a continency fee enhancement was warranted in this case and argued "defendant submits that a 25% fee enhancement is more than reasonable." (Pa91-94, especially 94). Flagship should be estopped or precluded from arguing now on appeal that a 25% contingency fee enhancement – the very number it endorsed – was somehow an abuse of discretion.

Both the CFA and the RETA provide that the consumer is entitled to reasonable counsel fees, both so as not to decrease the award to the prevailing party and so the consumer can attract competent counsel. *See* N.J.S.A. 56:8-19 (CFA: "the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit"); N.J.S.A. 45:15-16.80(a) (RETA: "the court shall, in addition to any other appropriate legal or equitable remedy, award…court costs, including reasonable attorneys' fee.").

Trial courts have considerable latitude in resolving fee applications, and a reviewing court will not set aside an award of attorneys' fees except "on the rarest of occasions, and then only because of a clear abuse of discretion." *Grow*

Co., Inc. v. Chokshi, N.J. Super 357, 367 (App. Div. 2012) (quoting *Rendine v. Pantzer*, 141 N.J. 292 at 317 (1995)). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571 (2002) (quoting *Achacoso-Sanchez v. Immigration & Naturalization Serv.*, 779 F.2d 1260, 1265 (7th Cir. 1985)).

When a party moves the court to re-examine a ruling, "reconsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice. *D'Atria v. D'Atria*, 242 N.J.Super. 392, 401 (Ch.Div.1990). As Judge Bergman noted in his Memorandum of Decision issued with his April 17, 2023, Order Granting Plaintiffs' Motion for Reconsideration and to Amend Order Granting Attorneys' Fees and Costs, "[R]econsideration is especially appropriate in situations where an issue is not fully evaluated by the Court. *See Calcaterra v. Calcaterra*, 206 N.|J.Super. 398, 403-04 (App.Div. 1986)." (Da1415).

Judge Bergman's February 1, 2023, original attorneys' fee award (1) eliminated over $82,000.00 in fees for attorneys Flitter, Hailey, and Breen (Da1394); (2) denied all costs (Da1394-95); (3) reduced the time of attorneys Milz, Solseng, and Ricci by 1,047.25 hours (Da1399); (4) further reduced the

attorneys' hours by 33% (Da1387-88); and (5) awarded an enhancement of 10%. (Da1402). These were substantial and unwarranted reductions.

Nonetheless, Plaintiffs' motion for reconsideration of the attorneys' fee award asked Judge Bergman to address only: (1) the additional 33% overall fee reduction; (2) the total denial of costs; (3) the 10% enhancement multiplier; and (4) the Court's mischaracterization of one week of trial time as trial preparation time, a factor in the Court's 33% fee reduction. (Da1415-16). Plaintiffs did not ask the Court to reconsider its elimination of 1,047.25 attorney hours.

Judge Bergman's April 17, 2023, amended attorneys' fee award changed the first three of these categories. In amending his original fee reduction of 33% to 20%, Judge Bergman found his original reduction amount "somewhat excessive" due to the Court's failure "to appropriately analyze the facts" supporting his original figure. (Da1416).

The Court also allowed some of the requested costs, finding "the court erred by not permitting reasonable costs to be included in its award." (Da1417). The Court acknowledged that it had originally failed to recognize that both the CFA and the RETA "require reasonable costs to be paid by a defendant in a case where a jury verdict is rendered in a plaintiff's favor." (Da1417).

The Court also found "reconsideration is appropriate" for its original 10% enhancement and found that figure "to be low" "under the facts of this consumer

fraud and RETA matter." (Da1417). The Court also found it had "erred by giving excessive weight in its findings concerning the fee which would have been generated by a 1/3 contingency agreement as such is minimally relevant in a consumer action." (Da1417). The Court's original award had improperly anchored its enhancement to the contingency fee formula in N.J.C.R. 1:21-7, which the Court realized did not apply to a fee-shifting case. (Da1399-1400). The Court increased the enhancement to 25%. (Da1417-19).

It is clear from Judge Bergman's April 17, 2023, MOD that he did exactly what he should have when faced with a motion to reconsider: He re-evaluated his earlier decision and realized he had misapplied the law and the facts and adjusted his award accordingly. Judge Bergman, as trial judge, was in the best position to evaluate the appropriate attorneys' fees to award. His ultimate decision was rational, well-reasoned, and based on legal precedent. His amended fee award should not be reversed.

CONCLUSION

The record is replete with evidence of Flagship's scheme to defraud consumers, including admissions that the resort used illegal waivers and the parol evidence rule to insulate itself from legal ramifications. Because the Court properly denied Flagship's summary judgment motion, because there is no conflict between the RETA and the CFA, because the jury was properly charged,

because Flagship was on notice of Plaintiffs' allegations, and because the Court properly reconsidered its attorneys' fee award, this Court should deny Flagship's appeal, affirm the court below, and affirm the jury's award.

Respectfully submitted this 6th day of February, 2024.

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DEFENDANT/APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

There is no question that at this point in the litigation, Flagship is fighting for its life after three different Judges heard multiple motions based on the Parol Evidence Rule and refused to apply that substantive rule of law. And although Flagship will not in this brief attempt to dispute the technical, regulatory violations found by the jury, Flagship's position is this:

Plaintiff/Respondents' initial complaint and first amended complaint filed in 2018 alleged that they purchased timeshare intervals based on alleged oral misrepresentations. The oral misrepresentations claimed were those expressly barred by the Real Estate Timeshare Act ("RETA"). Further, those same alleged oral misrepresentations are expressly contradicted by the contractual documents that Plaintiff/Respondents reviewed, acknowledged and agreed to be bound by.

There was no claim of fraud wholly extraneous to the contracts between the parties. And there was no ambiguous term or provision in any of the contracts requiring extrinsic evidence for the purpose of interpretation and/or meaning as was the issue in the cases relied upon by the Trial Court at summary judgment and that Plaintiff/Respondents reinforced here. Those cases are inapplicable. All of the Plaintiffs intended to purchase timeshare intervals for their own personal use and enjoyment and they specifically said that in their complaint. So by law, all the

Plaintiffs claims of oral misrepresentations should have been barred. The Trial Court's decision rendered the Parol Evidence Rule useless.

Flagship replies with the following three (3) legal arguments focusing on the Parol Evidence Rule and the ill-defined RETA and submits that reversal is warranted.

LEGAL ARGUMENT

POINT I

FLAGSHIP'S MOTION FOR SUMMARY JUDGMENT BASED ON THE PAROL EVIDENCE RULE SHOULD HAVE BEEN GRANTED; THE ALLEGED ORAL MISREPRESENTATIONS SHOULD HAVE BEEN BARRED; AND THE PLAINTIFFS LEFT TO PROVE THAT THE TECHNICAL VIOLATIONS ALLEGED THREE YEARS AFTER FILING THE INITIAL COMPLAINT CAUSED ASCERTAINABLE LOSS. (2T35:15-38:2; Da 1096).

Without repeating the law on Parol Evidence as set forth in Flagship's moving Appellate brief, Flagship addresses Legal Argument, Point I of Plaintiff/ Respondents' opposition regarding the Parol Evidence Rule as follows:

First, Plaintiff/Respondents claim that Flagship is not challenging the admission of Parol Evidence at trial and only challenging Judge Winkelstein's summary judgment denial. That ignores logic. Flagship's motions for summary judgment and for reconsideration and for involuntary dismissal at the close of Plaintiffs' case and for judgment notwithstanding the verdict were all pinpoint specific to the Parol Evidence Rule. Were Flagship's motion for summary judgment granted on the Parol Evidence Rule then all the oral misrepresentations claimed by

Plaintiff/Respondents would have been precluded and there would have either been no trial at all or a trial where Plaintiff/Respondents were left to prove that the technical violations alleged three years after filing the complaint caused ascertainable loss.

Second, Plaintiff/Respondents argue that summary judgment was properly denied for two reasons: (1) "all facts Flagship submitted were disputed and (2) the Trial Court's analysis regarding Parol Evidence and the Fraud Exception was correct. Pb 17-20. With regard to Plaintiff/Respondents' claims that all facts were disputed at summary judgment, it is simply not accurate. All the Plaintiffs alleged in their complaint six (6) specific oral misrepresentations they claimed induced their purchase. Each of the six (6) alleged oral misrepresentations were addressed by the contractual documents each of the Plaintiffs signed. And each of the signed contractual documents said the precise opposite of what the Plaintiffs claimed they were told in their complaint. There simply was no dispute that a comparison of the alleged oral misrepresentations and the contractual documents stating the precise opposite triggered the Parol Evidence Rule and barred the claims of oral misrepresentation.

As to the analysis, the Trial Court held that when analyzing Parol Evidence issues where fraud is alleged, "you have to look at the entire matter in context. What's going on, what are – what are the parties trying to do here? What is their

intention?" (2T36:4-8). The Trial Court found that issues of intent and issues of credibility required a factual setting appropriate for a trial judge. (2T36:20-37:17). The trial judge relied on three (3) decisions standing for the proposition that the introduction of Parol Evidence is necessary to define the intent of the parties. Conway v. 287 Corporate Center Associates, 187 N.J. 259 (2006). But there was no misunderstood intent between the parties. The Plaintiff/Respondents intended to purchase timeshare intervals for their own personal use and enjoyment. And there was no ambiguous term or provision in any of the contractual documents that required the Court to define the meaning of such term or provision. The Plaintiff/Respondents did nothing more than allege that the precise opposite of a contractual term that they acknowledged and signed off on was told to them at the time they purchased their timeshares. And their claims of misrepresentations themselves contradict the fact that the Plaintiffs intended to purchase for their own personal use and enjoyment.

The Trial Court's decision denying summary judgment rendered the Parol Evidence Rule useless. And the decision also destroyed the meaning and the purpose of a contract between two parties. The Trial Court's refusal to apply the Parol Evidence Rule on summary judgment essentially allows any party to a contract to file a lawsuit simply alleging that they were told the precise opposite of the contractual terms, and the complaint will survive so long as there is a claim of fraud.

This decision will effectively open contractual litigation floodgates namely in the world of timeshares. But a factual setting, and namely a trial, was not required for the Trial Court to compare the alleged oral misrepresentations to the contractual documents and to bar those alleged claims of oral misrepresentations as the Parol Evidence Rule dictates.

Third, Flagship maintains that Filmlife, Inc. v. MAL "Z" ENA, 251 N.J. Super. 570 (App. Div. 1991) controls here. Flagship will not repeat what it spelled out in its moving Appellate brief at Db 15-18. Plaintiffs' reliance on Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super 171 (App. Div. 2012) is misplaced because the allegations of oral misrepresentations in that case were not covered by any of the contractual documents the parties signed. The claim of fraud in Walid was wholly extraneous to the entire, integrated agreement.[1] So the financial fraud in Walid that was not addressed in the writing and entirely disrupted the intent of the parties and the purpose of the contract requiring introduction of Parol Evidence.

The facts of this case are distinct from those in Walid and Berman. Plaintiff/ Respondents did nothing more than orally dispute and contradict six (6) specific

[1] Plaintiff/Respondents also cite and rely on Berman v. Gurwicz, 199 N.J. Super. 89 (Chancery Div. 1981) in furtherance of their reliance on Walid. But the Berman case involved a "undisclosed lease" of a swimming pool that was obviously not covered in the contract that the parties signed and was wholly extraneous to the writing just like the financial fraud was wholly extraneous to the contract in Walid. That is not the case here.

terms covered in their signed and executed contracts. All the other technical and regulatory violations found by the jury had absolutely nothing to do with the claims of oral misrepresentation that triggered the filing of this lawsuit. For example, the fact that the Plaintiff/Respondents alleged in June 2021 that the incorrect version of the Consumer Information Statement was provided had nothing to do with the claims of oral misrepresentation. Nor did the discrepancy in time regarding provision of the Public Offering Statements have anything to do with the alleged oral misrepresentations claimed. The same goes for all the other technical, regulatory violations separate and apart from the alleged oral misrepresentations and that could not be the basis causing an ascertainable loss.

Fourth, Plaintiff/Respondents claim that the Parol Evidence Rule is inapplicable because they seek to "void" the contracts, not alter them. But in order to void a contract one must show that the alleged fraud he or she claims induced the timeshare purchase and was wholly extraneous to the contract, disrupting the parties' purpose and intent. None of that happened because all of these Plaintiffs intended to purchase timeshares for their own personal use and enjoyment. And while orally disputing the precise written terms of the contracts they signed, the terms have nothing to do with their desire to have purchased the timeshare for their own personal use and enjoyment (Investment, increase in value, resale, etc.). So, whether Plaintiff/Respondents say they sought to void the contracts or not, all they did was

allege the precise opposite of the contractual terms that had nothing to do with their intent to purchase and the Parol Evidence Rule is and was applicable.

POINT II

> THE RETA CONTROLLED EACH OF THE TIMESHARE TRANSACTIONS AT ISSUE IN THIS CASE AND THE CFA SHOULD NOT HAVE BEEN CHARGED; THE AWARD UNDER THE CFA SHOULD BE VACATED. (Da 1158-1181; Da 1421).

At pages 32 and 33 of their opposition, Plaintiff/Respondents dispute Flagship's argument that only the RETA should have been charged to the jury and only the RETA award should remain. Flagship submits the arguments by Plaintiff/Respondents fail. Flagship reinforces the arguments made in Point II of its moving appellate brief and makes the following additional arguments.

First, Plaintiff/Respondents argue that Sun Chemical Corporation v. Fike Corporation, 243 N.J. 319 and Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255 (1977) contradict Flagship's argument that only the RETA applied. Specifically, Plaintiffs rely on the "rigorous" test required to be met before preempting the CFA set forth in Lemelledo:

> Before doing so, the Court must find a "direct and unavoidable conflict exists" that is both "patent and sharp." The Court must be convinced that the other regulations "deal specifically, implying a Legislative intent not to subject parties to multiple regulations that … will work at cross purposes." See PB 34, citing Lemelledo at 270.

Flagship submits that it has met the "rigorous" test based on the following:

1. The RETA is pinpoint, fact and law specific to presale solicitation, sale and purchase of timeshare properties;

2. The requisite mental states perpetrating wrongful conduct under the RETA and the CFA conflict (see pgs. 27 through 32 of Flagship's moving appellate brief);

3. The RETA allows for double damages while the CFA permits treble damages based on the same wrongful conduct but with conflicting requisite mental states (the RETA requires that the defendant "knowingly engaged" in the wrongful conduct while the CFA required no intent whatsoever).

In this instance, the RETA consumes the very same claims that Plaintiffs/ Respondents asserted under the CFA for deceptive, fraudulent, misleading, and other unconscionable commercial practices. The nature of the claims brought by Plaintiff/Respondents is entirely within the factual and legal structure of RETA from presale solicitation to purchase. And the same conduct was alleged to establish both causes of action. The CFA is a law of general application for all kinds of advertising misconduct while the RETA is specific to timeshare cases alleging "false, deceptive, misleading promotional or sales methods." And a special statutory provision dealing with the particular subject prevails over general statute on the same subject. Zoning Board of ADJ v. Service Electric Cable TV, 198 N.J. Super. at 370, 381 (App. Div. 1985).

Second, the Plaintiff/Respondents recite Bandler v. Landry's, 464 N.J. Super. 311 (App. Div. 2020) at PB 34-35. Although Plaintiff/Respondents generally explain that there were conflicts alleged in that case and that the Court ultimately held no

conflict between the CCA and the CFA, Plaintiff/Respondents never actually spell out the alleged conflict that the Court dismissed. In Bandler, the issue was whether Plaintiff's CFA complaint could proceed within the Courts for a claim of damage or whether the Division of Gaming Enforcement Division had sole jurisdiction. Id. at 315. The question in Bandler had nothing to do with conflicting requisite mental states in perpetration of wrongful conduct under two different statutes like this present appeal. Further, Bandler dealt with a distinction between non-gaming related advertising and advertising related to the games themselves. Ultimately, the Appellate Division in Bandler found that the conflict between the CCA and the CFA was not enough to eliminate Bandler's common law claims and to prevent him from seeking relief in Court:

> Referring to Campione, we noted that "[e]ven in the context of New Jersey's highly regulated casino industry, the Court has held that the Legislature "did not intend to prevent patrons from seeking vindication of common law claims in the Courts." Bandler, 464 N.J. Super. at 322. (emphasis).

The Court held that Bandler's CFA claim could proceed in Superior Court because the advertisement he complained of did not pertain to arcane or technical rules of the game which the CCA required for its application. The big picture is this: the alleged conflict alleged in Bandler would have entirely prohibited Bandler from seeking relief from the Court under the CFA. That is not the case here. In this appeal, Plaintiff/Respondents have alleged the same factual theory under two

different statutes and only one of them specifically applies to timeshare transactions and everything involved from presale-solicitation to purchase. And that statute is the RETA, not the CFA. The Bandler case Plaintiff/Respondents rely upon is not on point.

Third, Plaintiff/Respondents also claim that the CFA covers "real estate" and therefore the Legislature intended that it apply to timeshare transactions. In a footnote, Plaintiff/Respondents cite a case explaining that the Legislature added "real estate" to the CFA in 1976. But the Real Estate Timeshare Act was enacted 30 years after real estate was added to the CFA. And the text and title of the RETA addresses real estate and timeshares as one. And as stated throughout this Point, the RETA covers the same wrongful conduct as the CFA but with differing requisite mental states to be proved. For all these reasons, this Appellate Division should reverse and vacate the trebled damage award under the CFA.

POINT III

THERE IS A CONFLICT BETWEEN THE RETA STATUTE AND THE REGULATIONS REGARDING DELIVERY OF THE PUBLIC OFFERING STATEMENT (Da 1176-77).

At PB 36 through 38, Plaintiff/Respondents dispute that the language of the RETA statute regarding delivery of the Public Offering Statements conflicts with the language of the Regulation regarding delivery of the Public Offering Statements.

Flagship reinforces the arguments made in Point III of its moving appellate brief filed January 9, 2024 and makes the following additional arguments in reply.

First, Flagship did not "wholly ignore" the RETA provision at N.J.S.A. 45:15-16.80(b). Instead, Flagship cited the provision and disposed of it in one sentence at Db 33:

> And consistent with the RETA at N.J.S.A. 45:15-16.80(b), each plaintiff here had a three-day attorney review period and a seven-day cancellation period to review the contents of the Public Offering Statement before the contract became legally binding and fully executed. (Da 204, ¶ 23 and Da 205, ¶ 24).

Plaintiff/Respondents cite the entirety of N.J.S.A. 45:15-16.80(b) at Pb 36 which states:

> The Court, in addition to the remedies provided in this Act, may award any other relief appropriate under the circumstances, including, in the Court's discretion, restitution of all monies paid and, where a developer has failed to provide the purchaser a copy of the current Public Offering Statement approved by the Commission prior to execution on the contractor agreement, recission of a contract. (emphasis added).

Plaintiff/Respondents argue that terms "prior to execution" of the contract or agreement as stated in N.J.S.A. 45:15-16.80(b) and as cited above, combined with N.J.S.A. 45:15-16.59(a) which requires the POS to be delivered "at the time of purchase" is the equivalent to the RETA regulation providing that they have an opportunity to review the POS before signing. That reasoning does not comport with logic.

The RETA statute at N.J.S.A. 45:15-16.59(a) is the starting point and it required Flagship to provide the POS to a purchaser "at the time of purchase." Each of these purchasers received and acknowledged their receipt of the POS on a CD-ROM at the time they signed contracts for the purchase of a timeshare and before they left the resort.

Second, N.J.S.A. 45:15-16.59(b) expressly allowed Flagship to deliver the contents of the POS on CD-ROM format. Each plaintiff acknowledged their receipt of the POS on CD-ROM. Nowhere in the statute or the regulation does it say that if a purchaser agrees to receive the POS on a CD-ROM, which all of them here affirmed, then Flagship must supply them with a laptop or a computer system suitable for reviewing the POS before they exit the resort.

Third, Flagship submits that the terms "prior to execution" set forth in N.J.S.A. 45:15-16.80(b) are subject to conflicting definitions and interpretations based on Flagship's contractual documents culminating the entire transaction. It is Flagship's position that "prior to execution" as stated in the RETA statute and as defined by Black's Law Dictionary means:

> The act of carrying out or putting into effect;
>
> Validation of a written instrument, such as a contract or a will, by fulfilling the necessary legal requirements.

Execution, Black's Law Dictionary, (11th Ed. 2019) (emphasis added). In addition, the word execute is defined by Black's Law as:

To perform or complete (a contract or duty);

To bring (a legal document) into its final legally enforceable form.

Execute, Id.

In addition to all that, Flagship's contractual documents that each Plaintiff/Respondent reviewed, acknowledged and signed make clear that it is not until the expiration of the three-day attorney review/cool off period that the contract becomes legally binding:

> Study by attorney: the buyer may choose to have an attorney study this contract. If an attorney is consulted, the attorney must complete his or her review of the contract within a three-day period. **This contract will be legally binding at the end of the three-day period subject to the concurrent seven-calendar day recission period** provided in Section 24 of this contract unless an attorney for the buyer reviews and disapproves of the contract. (emphasis added).

And even further, following the three-day attorney review period, the contract is put on pause and held in escrow until expiration of the seven-day cancellation period:

> Any closing documents you sign before the expiration of the cancellation period will be held in escrow until the cancellation period has expired. Legal title to the interval may not change until expiration of the seven-calendar day cancellation period.

So after leaving the resort with copies of their Public Offering Statements on CD-ROM, each Plaintiff/Respondent had an additional three days to review the Public Offering Statements with an attorney and an additional seven days to review the Public Offering Statements on their own. It was not until the end of the three-day

attorney review cool off period that the Plaintiff/Respondents contracts became legally binding and therefore fully executed. And all of that directly conflicts with the regulation at N.J.A.C. 11:5-9A.6(a) requiring Flagship to "afford the purchaser a reasonable opportunity to read [the Public Offering Statement] before the purchaser signs the contract or purchase agreement." (emphasis added).

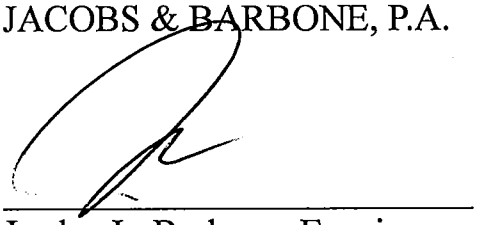
There is no question that the provisions of the RETA statute and the regulations are in conflict. And when there is a conflict, the RETA statute controls, not the regulations.

CONCLUSION

For all the reasons set forth above the appeal should be granted.

Respectfully submitted,

JACOBS & BARBONE, P.A.



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Dated: