FILED, Clerk of the Appellate Division, November 08, 2023, **A-003404-22**

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-003404-22

WELLS FARGO BANK, N.A. AS TRUSTEE FOR PARK PLACE SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES WHQ2,

PLAINTIFF-RESPONDENT,

V.

RALPH SCHIANO AND ELEANOR SCHIANO,

DEFENDANTS-APPELLANTS,

V.

WELLS FARGO BANK, N.A., AS TRUSTEE FOR PARK PLACE SECURITIES, INC. ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2004-WHQ2 PHH MORTGAGE CORPORATION, SUBSIDIARY OF OCWEN FINANCIAL CORPORATION, AND SUCCESSOR TO OCWEN LOAN SERVICING, LLC (OCWEN),

THIRD-PARTY DEFENDANTS/RESPONDENTS.

On appeal from a final order entered in the Superior Court of New Jersey, Law and Chancery Divisions, Passaic County, Docket Nos. L-1884-22, C-79-19; Hon. Ernest M. Caposela, J.S.C.; Hon. Bruno Mongiardo, J.S.C.

BRIEF OF APPELLANTS, RALPH SCHIANO AND ELEANOR SCHIANO

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BRIEF FILED ON NOVEMBER 8, 2023

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Procedural History[1]

In 2019, plaintiff sued defendants in the Chancery Division, seeking reinstatement *nunc pro tunc* of a 2004 mortgage that plaintiff alleged was mistakenly discharged. A1. Defendants filed an Answer, Counterclaim, and Third Party Complaint, seeking to quiet title on their residential property and asserting claims for money damages against plaintiff for fraud, slander of title, and intentional infliction of emotional distress. A6. Plaintiff filed an Answer and Cross Claim demanding ninety-five thousand dollars ($95,000.00) in contractual litigation fees pursuant to Section 9 of the mortgage contract. A1415.

On April 21, 2021, the Chancery court granted summary judgment for plaintiff on its claim and reinstated its mortgage *nunc pro tunc*. A1185. After

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[1] References to transcripts are as follows:

1T	6/8/21 (hearing)
2T	4/19/22 (hearing)
3T	5/6/22 (hearing)
4T	6/23/22 (hearing)
5T	7/11/22 (trial)
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7T	10/6/22 (hearing)
8T	11/9/22 (hearing)
9T	1/13/23 (hearing)
10T	4/21/23 (hearing)
11T	6/15/23 (hearing)
12T	6/22/23 (hearing)

filing of amended pleadings, Chancery Judge Caposela held a bench trial, on July 11, 2022 (5T, 6T), on defendants' claim for quiet title, then entered a July 21, 2022 judgment determining the Schianos' quiet title claim. A1172. The Schianos moved for reconsideration of Judge Caposela's ruling (A566); plaintiff opposed (A732). Judge Caposela denied reconsideration by Order entered December 16, 2022. A1163.

The Schianos' remaining claims for money damages against plaintiff for fraud, slander of title, and intentional infliction of emotional distress, and plaintiff's claim against the Schianos for contractual litigation fees, were transferred to the Law Division for determination. A429, A1187. Plaintiff moved for summary judgment dismissal of the Schianos' claims. A759. Defendants opposed. A769. Law Division Judge Mongiardo entered November 9, 2022 Orders granting plaintiff's motion for summary judgment and dismissing the Schianos' claims. A1159, A1161. The Schianos moved for reconsideration (A989), but Judge Mongiardo denied reconsideration by Order entered January 13, 2023. A1157.

With regard to plaintiff's claim for contractual litigation fees, the Appellate Division (following motion practice before the Court) ultimately entered a May 25, 2023 Order directing the Law Division to determine this last remaining claim. A1146. Defendants moved for dismissal of the claim

(A1225); plaintiff's counsel submitted a certification of attorney's fees and costs in support of the claim (A1243). After oral argument (11T, 12T), Judge Mongiardo entered a June 22, 2023 final judgment in plaintiff's favor and against defendants on plaintiff's contractual litigation claim in the amount of $188,029. A1149.

Defendants now appeal (A1151) and ask the Court to vacate the judgment entered in plaintiff's favor; order a new trial before the Chancery court on their quiet title claim; and order a trial before a jury on their claims for fraud, slander of title, and intentional infliction of emotional distress.

Statement of Facts

In 1987, the Schianos bought a home at 11 Susan Avenue in Wayne, with a loan secured by a mortgage on the property. The Schianos refinanced the loan in 1992 and 2002. They refinanced again, on October 4, 2004, when they executed a Note for a $353,000 loan from Argent Mortgage Company, LLC with an accompanying Mortgage to secure the loan, recorded by the Passaic County Clerk on October 14, 2004. A1165, A1173.[2]

[2] Following the 2004 refinancing, the Schianos instituted litigation in the United States District Court for the District of New Jersey against various defendants, including Wells Fargo Bank NA as Trustee, charging the defendant Argent with failure to pay off credit card debts that were supposed to be paid off via the 2004 loan, and contesting a claimed delinquency of an outstanding mortgage dating to 1992. The federal lawsuit ended in 2020, Schiano v. HomEq Servicing Corp. & HomEq Servicing, 832 Fed. Appx. 116, 118 (3d Cir. 2020), based on a claim of

In 2022, the Schianos obtained a new loan and mortgage for their residential property. The 2004 loan and mortgage at issue in this case, which plaintiff claimed to have held, was marked satisfied and canceled. A578.

The Chancery Division Claims

Plaintiff contended it was the lawful holder and owner of the mortgage that secured the loan that Argent had provided to the Schianos in 2004, via assignment from the original mortgage holder. A1; A145. Plaintiff contended that the mortgage was mistakenly discharged on May 31, 2019, and asked the Chancery court to enter a judgment declaring the October 4, 2004 mortgage valid and the June 6, 2019 Discharge of Mortgage void. A1. The Chancery court granted this relief to plaintiff by the summary judgment Order entered on April 21, 2021. A1185. Plaintiff never reinstated the loan. In approximately August 2022, after the Chancery Division's "Final Judgment," it was the Schianos who were successful in having the Final Judgment recorded in the Passaic County Registrar's Office (a recording mandated by the Final Judgment and by Valley Bank for the refinancing that the Schianos were finally able to obtain). A578, A995.

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lack of federal diversity jurisdiction (Homeq Servicing was never a registered New Jersey entity). The Third Circuit determined that the Schianos' loan was in default/ delinquency dating back to 1992. While the Schianos were appealing the federal lawsuit, the plaintiff in this case filed this action in the Chancery court below.

The Schianos' (defendants') claim for quiet title proceeded to a bench trial on July 11, 2022 before Judge Caposela. Judge Caposela, however, directed that plaintiff's counsel proceed with his witnesses and evidence first -- despite that it was defendants' claim being tried. Plaintiff thus proceeded to present testimony from William Fay, who formerly worked in the "Trustee Department" of Wells Fargo (Wells Fargo Trustee Department was long acquired by Computershare at the time of trial, and Mr. Fay testified that he now worked at Computershare), and from Benjamin Verdooren, a Senior Loan Analyst and representative of PHH Mortgage Corporation. 5T4-6. Fay acknowledged that the 2009 assignment done in the Schianos' case was done only in foreclosure cases – which the Schianos' loan was never in (and was never delinquent or in default in any manner). The Schianos charged that an "Investor Trust," which plaintiff's counsel said he was representing in this lawsuit, could not own a loan, since only a trustee can be the legal owner. There was never an identification of this "Investor Trust" that plaintiff's counsel represented, moreover. There was no evidence showing why Wells Fargo Bank NA had denied refinancing to the Schianos in 2013 and 2014 (denied by letter in 2016), or why there were notations of "title issues" in the files for the 2004 loan (or the cause of denials). Mr. Fay acknowledged that the Trustee Department was not responsible for refinance, and that it was

Wells Fargo Bank, N.A. – the bank - that was responsible for the refinance denials due to title. A578, A995.

Despite all of those questions, the Chancery court did not permit the Schianos to call any witnesses of their own at the trial. Dave Wigfield, Esquire was prepared to testify for the Schianos, at the bench trial, that Wells Fargo had no record of the Schianos' loan and that its refinancing denials were wrongful and severely prejudicial to the Schianos – with the refinancing denials premised on the wrongful and erroneous notations in the loan records that the Schianos' loan was in foreclosure – which was never true (there were no delinquencies or defaults of any sort). Judge Caposela did not permit the Schianos to present Mr. Wigfield's testimony (and Law Division Judge Mongiardo subsequently refused to acknowledge the factual admissions that plaintiff's own witness, Fay, made at the Chancery trial, as discussed below). A578, A995.

Instead, Judge Caposela granted a directed verdict to the plaintiff and entered the July 21, 2022 "Final Judgment" based solely on the witnesses that plaintiff had called to testify at the trial. In the July 21 Judgment, Judge Caposela said that plaintiff "is a legally valid and operational investor trust that can own, enforce, and discharge mortgage loans" – despite the Schianos' charge that an "Investor Trust" could not legally hold or own a loan and only a trustee could legally do so. Judge Caposela ruled that plaintiff "has possessed

the original October 2004 Note (or had the Note lawfully possessed on its behalf by its attorneys, agents, or contractors) from December 2004 until the present." A1172. Judge Caposela affirmed, consistent with the prior grant of summary judgment for plaintiff, that the discharge of mortgage filed in 2019 was a mistake, vacating the Discharge of Mortgage and reinstating nunc pro tunc the October 4, 2004 Mortgage and Note. A1172. Despite the Third Circuit's determination of loan default/delinquency dating back to 1992, Judge Caposela ruled that the Schianos were never in default and that no litigation fees had been charged against the Schianos. This paved the way for a new refinance application with Valley Bank that closed in October 2022. A578.

The Law Division Claims

Plaintiff claimed a right to recover contractual litigation fees from the Schianos under Section 9 of the mortgage agreement (A359), which provided that if "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under the Security Instrument," the Lender may obtain "reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument[.]" 11T17-18. In Plaintiff's cross claim, a demand for ninety-five thousand dollars ($95,000.00) in contractual litigation fees as additional debt was asserted, A1415. Thus, Plaintiff sought "a money judgment against the Schianos" under this provision

(11T21:1-25), ultimately demanding (A1243) more than two hundred thousand dollars in attorney's fees and costs. A1150. Defendants argued that plaintiff's claim failed as a matter of law. 11T7:1-25. Law Division Judge Mongiardo entered a November 9, 2022 Order denying defendants' motion to dismiss plaintiff's claim (A1159, A1161), and, on June 22, 2023, ruled that plaintiff was entitled to recover $188,029 in fees and costs from the Schianos under Section 9 of the mortgage agreement. "[D]efendants have claimed throughout the litigation that the plaintiff did not own and could not enforce [its] security interest in their property. Under the plain language in the mortgage contract … plaintiff is entitled to reasonable attorney's fees for protecting its security interest," Judge Mongiardo said, then determining that $188,029 was the reasonable amount. 12T11:1-25.

The Schianos sought damages against plaintiff for fraud, slander of title, and intentional infliction of emotional distress. As noted above, the Schianos charged that plaintiff was not a legal entity, had no lawful ownership rights or interest in the 2004 note or mortgage, and plaintiff fraudulently converted and placed the Schiano's loan and mortgage into default and foreclosure – placing a cloud on the Schianos' title to their own residential property, causing the Schianos' loan account to be assessed thousands of dollars in fees and charges, and preventing the Schianos from being able to refinance the 2004 loan for

nearly two decades -- until they were finally able to refinance in October 2022 following the Chancery Court's determinations (Valley Bank relied on the no default declaration as to Schianos and mandated that the Final Judgment be recorded). Plaintiff's "fraudulent actions resulted in an invalid mortgage, no title to their home and an inability to refinance for well over a decade from a high interest rate loan to a lower interest loan due to the invalid title and fraudulent character of the debt," the Schianos charged. 8T17-19. The Schianos sought "damages for the significant financial loss in inability to refinance due to Plaintiff, PHH/Ocwen and Wells Fargo Bank, N.A. fraudulent actions…" "Not only was the 2009 default/foreclosure assignment wrongful, as Schianos were never in default," "Plaintiff Investor Trust has also fraudulently misrepresented its status." Defendants charged that the plaintiff "Investor Trust" is not a legal entity and not a legal holder of the 2004 loan. "The identity of the Investor has yet to be disclosed. A valid trust requires a trustee as legal holder of the loan," defendants contended. The Plaintiff "Investor Trust" has no trustee as Wells Fargo, trustee, admits that it is not holder of any Schiano mortgage. The "Investor Trust" is not a mortgagee as it is not a lender under federal law, the Schianos charged. 8T17-20

With regard to their slander of title claim, defendants charged that, in November 2018, they applied for refinance at Kearny Bank. Kearny Bank

consulted an "internal published database record or records available to banks and lenders but not available to the general public." Kearny Bank could not validate the Schianos' mortgage with either Wells Fargo or Wells Fargo Trustee despite the fact that Wells Fargo was the last recorded assignee. Defendant charged that plaintiff defamed the Schianos in that manner, and fraudulently concealed the true mortgage holder/owner which, along with the false default of the loan that was reported, precluded the Schianos from refinancing with Kearny Bank or any other lender. 8T19:1-25.

With regard to their intentional infliction of emotional distress claim, defendants charged "fraudulent and outrageous conduct, including fraud, fraudulent concealment, defamation and slander" by plaintiff that caused Ralph Schiano to suffer "extreme emotional distress which is critically affecting his physical health." The failure to temporarily modify the Schianos' loan while they were asserting a quiet title claim constituted extreme and outrageous conduct that caused emotional distress to Mr. Schiano. 8T19-20.

Judge Mongiardo dismissed all of those claims on summary judgment, however. 8T20-25. Judge Mongiardo ruled that the Schianos' fraud claim failed because the Chancery court had found, following the July 11, 2022 bench trial, that plaintiff was a valid investor trust that owned the 2004 mortgage loan. 8T21. Defendants' slander of title claim failed on the same

ground – because Chancery Judge Caposela found that plaintiff is the valid owner of the loan. 8T22-23. Defendants' emotional distress claim failed because the proofs were insufficient to support the required elements of the claim – that (1) plaintiff acted intentionally; (2) its conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community; (3) plaintiff's actions proximately caused defendants' emotional distress; and (4) the emotional distress was so severe that no reasonable person could be expected to endure it. 8T23-25.

The Schianos now appeal and ask this Court to vacate the $188,029 judgment in plaintiff's favor on the contractual litigation claim, remand for a new bench trial on their quiet title claim, and remand for a jury trial on their claim for fraud, slander of title, and intentional infliction of emotional distress. A1151.

Argument

Point 1

The Law Division erred in entering judgment for plaintiff on its contractual litigation claim against defendants (A1149)

Plaintiff claimed, and Judge Mongiardo ruled, that plaintiff had a right to obtain contractual litigation fees under Section 9 of the mortgage agreement, which provides that if "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under the Security Instrument," the Lender may obtain "reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument[.]" A359; 11T17-18; 11T21:1-25; 12T9-33. Upon this provision Judge Mongiardo granted plaintiff a money judgment against the Schianos.

This was erroneous because Section 9 does not provide plaintiff (which claims to have stepped into the shoes of the "Lender" under the Mortgage Agreement) with a contractual right to obtain a money judgment against the Schianos. Section 9 provides, "Any amounts disbursed by Lender under this Section 9 **shall become additional debt of Borrower secured by this Security Instrument**. These amounts shall bear interest at the Note rate from the date of disbursement and **shall be payable, with such interest, upon notice from Lender to Borrower requesting payment**." (emphasis added) Under that plain language, the Lender's only remedy was to add to the debt of

the Borrower (the Schianos) that was "secured by this Security Instrument" – i.e., the accompanying 2004 Loan. That does not provide plaintiff with a right to obtain a money judgment against the Schianos, as the Law Division's judgment erroneously provides.

That remedy that plaintiff even arguably had, moreover, is no longer in existence, because the "debt of Borrower secured by this Security Instrument" – the 2004 loan -- is no longer in existence. The 2004 loan was satisfied, and the accompanying mortgage extinguished, in October 2022, when the Schianos finally obtained a new loan and mortgage from another lender, and the new loan was used to pay off the 2004 loan. Since the "debt of Borrower" that plaintiff (at least in theory) could have "added to" no longer exists, plaintiff's remedy no longer exists. Plaintiff lost the remedy that Section 9 possibly provided to it once the Schianos refinanced in 2022 and the 2004 loan and mortgage that plaintiff held was paid off – as several other courts have held in ruling on this issue, see, e.g., Oella Ridge Tr. v. Silver State Sch. Credit Union, 137 Nev. 760, 763 (2021) (reviewing identical clause in mortgage agreement and ruling, "We agree and conclude this provision enables Silver State to add its attorney fees to the secured debt at the time Silver State disburses those amounts" but "Oella Ridge is not personally liable for attorney fees under the deed of trust"); Hart v. Clear Recon Corp., 27 Cal. App. 5th 322

(Cal. Ct. App. 2018) (explaining that identical provision in deed of trust was "a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt" but recognizing caselaw providing that this grants lender right only to "convert the amounts spent on attorneys' fees into additional debt secured by the mortgage" as part of additional "contractual debt" under the loan and mortgage in question), citing Richardson v. Wells Fargo Bank, N.A., 740 F.3d 1035, 1038 (5th Cir. 2014)).

Section 9 upon which plaintiff relies in this case refers, moreover, to "a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument" then provides "such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, or enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations" (A359). This lawsuit is none of those identified matters and is not comparable to any of them. This lawsuit was brought by plaintiff to reinstate a mortgage that it claimed was accidentally discharged – it had nothing to do with plaintiff moving to protect its interest in the secured property that arose out of something the debtors had done as would be the case with respect to bankruptcy, condemnation, or similar proceedings. Though the Schianos filed counterclaims for fraud, slander of title, and

emotional distress, those claims are not comparable to the "legal proceedings" that Section 9 identifies as illustrative of the type of the matter in which the lender may add reasonable attorney's fees to the secured debt. Judge Mongiardo erred in ruling that this provision under Section 9 gave plaintiff a right to recover attorney's fees and costs from the Schianos in this case.

In addition, a mortgage contract merges into a final judgment and no additional fees can be assessed thereafter. Hatch v. T & L Associates, 319 N.J. Super. 644 (App. Div. 1999). In Hatch, the plaintiff brought an action to enforce the mortgage note in the Law Division instead of a foreclosure in general equity on the mortgage. Thus, since the mortgage still remained as only enforcement of the note was pursued, the court affirmed the trial court's denial of additional fees on other grounds. Here, the Chancery Division's Final Judgment included the mortgage, left the 2009 foreclosure assignment in place, specifically stated amount due via pay-off letter, specifically stated that no litigation fees were charged to the defendants, and mandated that the Final Judgment be recorded. Acting upon that recorded Final Judgment, Valley Bank refinanced in October 2022. The prior 2004 loan that was at issue in this case was closed and paid off in full, Valencia v. Carrington Mortg. Servs., LLC, 2013 U.S. Dist. LEXIS 88886, U.S.D.C. Hawaii, June 25, 2013 (citing Section 9 of the mortgage contract and stating litigation/ attorney fees can only

be additional secured debt that must be included in the final judgment; cannot be separate awards); Chacker v. JPMorgan Chase Bank, N.A., 27 Cal. App. 5th 351, 237 Cal. Rprt. 3d 921, 2018 Cal. App. LEXIS 832, 2018 WL 4474732 (A.D. 2018) (provision authorizing attorney fees to be added to loan amount did not authorize separate fee award to the lender but only allowed fees to be added to outstanding balance due under promissory note); Hart v. Clear Recon. Corp., 27 Cal App. 5th 322, 237 Cal. Rptr. 3d 907, 2018 Cal. App. LEXIS 829, 2018 WL 4443242 (A.D. 2018) (under same provision, attorney fees can only be added to secured debt).

Pursuant to the "American Rule," a party is not entitled to collect counsel fees from the opposing party absent a contractual right (which plaintiff does not have in this case as argued with regard to Section 9 of the Mortgage Agreement above), a statute authorizing an award of fees (there is none in this case), or a finding of frivolous litigation (which was not found in this case). In re Niles, 176 N.J. 282, 293 (2003).

In sum, the Law Division's June 22, 2023 judgment is invalid because it grants to plaintiff a money judgment against the Schianos that Section 9 of the mortgage agreement does not provide plaintiff with a right to obtain, and because this lawsuit that plaintiff brought arising from a mistaken discharge of the mortgage is not comparable to any of the proceedings that Section 9 sets

forth as illustrative of the type of proceedings triggering the lender's right to attorney's fees. The Court should vacate the Law Division's June 22, 2023 judgment in its entirety.

Point 2

The Chancery Court erred in the manner in which it conducted trial of the Schianos' quiet title claim, warranting reversal for a new trial on the claim (A1172)

The purpose of a quiet title claim is to compel the person or business named to come forward and prove to a judge that they have a valid, lawful right or interest in the property. Brookdale Park Homes, Inc. v. Bridgewater Twp., 115 N.J. Super. 489, 496 (Ch. Div. 1971). In addition to the right under statutory law, "quia timet is an equitable proceeding of ancient origin which permits the plaintiff to take affirmative action to protect or perfect his title because he fears [quia timet] the claim of the defendant may be injurious to him." Phoenix Pinelands Corp. v. Davidoff, 467 N.J. Super. 532, 614 (App. Div. 2021), cert. denied, 249 N.J. 95 (2021); Fittichauer v. Metro. Fireproofing Co., 70 N.J. Eq. 429, 430 (Ch. 1905) (discussing "suits in equity under the ancient jurisdiction of the court of chancery classified as bills quia timet, or bills of peace"). As our former Court of Errors and Appeals explained, "in cases where an instrument exists which, though really void, has an ostensible validity, and which throws a doubt over the title to real estate, a court of equity

will interfere, and relieve against the injustice of such an illusion." Bogert v. City of Elizabeth, 27 N.J. Eq. 568, 570 (1876); Estate of Gilbert Smith v. Cohen, 123 N.J. Eq. 419, 424 (1938); Shotwell v. Shotwell, 24 N.J. Eq. 378, 387 (Ch. 1874); Phoenix Pinelands Corporation, supra, 467 N.J. Super. 614.

In this case, the Schianos affirmed that they had never missed a loan payment since they bought their home in 1987, yet they had been falsely placed in default or noted as being in foreclosure by plaintiff's wrongful and erroneous record and file notations. The Schianos charged that plaintiff had no rightful, lawful interest in the 2004 loan and mortgage and underlying residential property. The Schianos sought a judicial declaration that title to the property was vested solely in them, the designation of a valid mortgagee/ lender, the elimination of erroneous foreclosure assignments and fees assessed to the loan account, and monetary damages for the false defaults having been declared by plaintiff – which had precluded the Schianos from refinancing the 2004 loan for nearly two decades (until they were finally able to refinance in 2022). The wrongful 2009 assignment remained in place until the October 2022 refinance that the Schianos obtained. The Schianos never ceased paying the loan at the high interest that they could not escape, and thus paid three times over what refinancing earlier would have greatly reduced.

Reversal and remand for a new bench trial is warranted here because Judge Caposela violated the Schianos' right to present their own evidence in support of their quiet title claim. Directing that plaintiff's counsel present his witnesses, then granting a directed verdict for plaintiff and determining the Schianos' (defendants') quiet title claim without defendants ever being able to present their own testimony and evidence on their own claim (5T-6T; A1172), was fundamental error warranting reversal and remand for a new trial here on appeal, cf. Poland v. Parsekian, 81 N.J. Super. 395, 400 (App. Div. 1963) (motion for dismissal made at close of plaintiff's case admits truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom which is favorable to the plaintiff, and denies only its sufficiency in law); Melone v. Jersey Cent. Power & Light Co., 18 N.J. 163, 170 (1955) (same).

As defendants argued to Judge Caposela in moving for reconsideration of the July 22 judgment, "[t]he Court did not permit the Schianos to present their Quiet Title claim. Had the Schianos been permitted to present their case in chief in as to their Quiet Title claim, the Court would have been apprised of above and additional critical facts that have not been addressed by this Court."

> As claimants, the Schianos should have proceeded first with their case in chief. Instead, the Plaintiff/PHH proceeded first at trial - and proceeded on Schianos' claim. This is contrary to procedural law. Schianos should have been provided first opportunity to present evidence of their claim, and, while the Court has discretion, they should have been provided at least some

> opportunity to present their evidence of their Quiet Title claim. How the Plaintiff and PHH/Ocwen can be awarded Final Judgment on Schianos' claim of Quiet Title when Schianos had no opportunity to present their evidence is significant grounds for motion for reconsideration and reversal of the Final Judgment. Providing the Plaintiff (not established as a trust - or by financial accounts receivable) and PHH/Ocwen first opportunity to present evidence on Schianos' Quiet Title claim has no precedence in law, and not providing the Schianos an opportunity to be heard equally lacks in precedence. It is noteworthy that the Schianos prepared to present their case in chief first at trial. All hard copies of Exhibits were forwarded to the Court and opposing counsel. Schianos were thoroughly prepared. Unfortunately, permitting the Plaintiff/PHH to go first on Schianos' claim of Quiet Title, and then not permitting the Schianos to proceed at all - led to the necessity of focusing on different questions for limited cross examination and a thoroughly different assessment on how to proceed - creating an unfair and erroneous advantage to the Plaintiff/PHH. [A572]

Judge Caposela's July 21, 2022 judgment is invalid because it was the result of a bench trial premised on this fundamental procedural flaw that violated the Schianos' right to present evidence and testimony in support of their own claim, see Warner v. Smith, 115 N.J. Eq. 572 (1934) (noting burden on party who brings quiet title claim). The result was that the Schianos were not only precluded from presenting evidence in support of their quiet title claim before Judge Caposela, but the chancery ruling was then used by Law Division Judge Mongiardo as part of his premise to grant summary judgment dismissal of the Schianos' claims against plaintiff for money damages.

The Schianos were precluded from telling the courts below about the decade-long debacle of refinance and false declarations of default that had

precluded them from refinancing for nearly two decades. The Schianos were precluded from showing that Wells Fargo reported the erroneous default to the Office of the Comptroller of the Currency in April 2011 (A601). The Schianos never disputed any prior "default in 2001-2003" as they were never aware of a reported default until Ocwen began its servicing of the loan in 2010.

The Schianos were precluded, because of the manner in which the bench trial was conducted, from showing evidence (A634) that Park Place Securities Inc. (PPSI) is the last owner of claimed assets, as there is no trust or trustee. PPSI was dissolved in 2010, and no successor was named. This Plaintiff "Investor Trust" has no trustee as Wells Fargo, trustee, admits it is not holder to any Schiano mortgage (A862). Since no trust was formed (A832), no conveyance to a legal trustee by trust indenture occurred. An "Investor Trust" is not a mortgagee as it is not a lender under federally defined law. Plaintiff was asserting a false and fraudulent claim to possess the 2004 loan and mortgage on defendants' property when, in fact, the plaintiff "Investor Trust" is not a legal entity, not a mortgagee, and not a legal holder of the 2004 loan and mortgage. A trust requires a trustee to be the legal owner/holder of assets, see Paloian v. LaSalle Bank, N.A., 619 F.3d 688 (7th Cir. 2010) (trustee is legal owner of trust's assets).

The Schianos were precluded from presenting witnesses such as Mr. Wigfield, a real estate attorney, who was repeatedly told by Wells Fargo that it did not own the Schianos' 2004 loan or hold any Schiano mortgage, precluding refinance by the Schianos with any lender.

Judge Caposela's resulting "Final Judgment" does not reflect the evidence that the Schianos were not given the chance to present. The judgment does not determine whether the loan was falsely placed in default status, as the Schianos charged it was. The judgment does not determine whether the loan was falsely assigned to a foreclosure enforcement assignment in 2009, as plaintiff's own witness, Fay, acknowledged in his testimony. Judge Caposela said only that the Schianos have never been in default but made no determination that the enforcement assignment to trust/trustee in 2009 was erroneous – as plaintiff's witness, Fay, indicated.

The Schianos wanted the Chancery court to declare that the 2009 assignment to the trustee/trust was erroneous, and order that said assignment be removed from the recorded registry in its entirety – a critical remedy for the Schianos. The manner in which the Chancery court proceeded prevented the Schianos from presenting their proofs and obtaining a determination of that issue. Judge Caposela's judgment left the wrongful assignment in place and continued to subject the Schianos to an invalid mortgage title that permitted

erroneous processing of wrongful default/foreclosure advanced fees that remain unaddressed by the court's ruling below.

The testimony that the Chancery court heard reflected only part of the evidence that the Schianos had the right to present at the trial on their quiet title claim. On cross examination, plaintiff's witness, Mr. Fay, who had worked in the Trustee Department of Wells Fargo, acknowledged that an assignment to a trustee for a trust, as was done in 2009 with regard to the Schianos' loan, is typically done only in foreclosure cases – which the Schianos were not, in fact, in. 5T111, 133, 143; 6T260. This explained why the Schianos had been consistently denied refinance by lenders for so many years -- the 2009 assignment was viewed as a foreclosure enforcement assignment. Thus, in 2013, the Schianos were denied refinance by Valley Bank due to the 2009 assignment; their application for refinance was deemed "dead on arrival" because of this completely inaccurate and misleading 2009 assignment indicating a foreclosure that, in fact, had not occurred. Mr. Fay testified that the trustee department had nothing to do with refinance, and that it was the "Bank" -- Wells Fargo Bank, N.A. -- that had denied refinance twice due to invalid title. The "Trust" was not formed as a trust but rather as a segregated pool of assets with Park Place Securities Inc. (PPSI) as the owner of the assets (PPSI is long defunct).

The Schianos were precluded from presenting their proofs on the trust requiring a legal holder trustee, Paloian, supra, 619 F.3d 688. By IRS filings, it is Park Place Securities, Inc. (PPSI) that owned the claimed assets at the time of the IRS filings – no trust or trustee conveyance was formed. Six separate "segregated pool of assets" were reported to the IRS, with Park Place Securities Inc. (PPSI) as corporate owner of assets for each of the six segregated non-trust Real Estate Mortgage Investment Conduits (A634). PPSI was dissolved in 2009 with no successor. Instead of a legal trust formed, PPSI formed a title series name that segregated the ultimate pool, in violation of Regulation AB, for Mortgage/Asset Backed Securities as determined by the Securities and Exchange Commission (SEC) into six distinct Real Estate Mortgage Investment Conduits (REMICs) claimed as “segregated pool of assets” to IRS with PPSI as the corporate asset owner. PPSI is long defunct, with no successor. Wells Fargo Bank, N.A. does not hold a mortgage for Schianos (A862). Wells Fargo Corporate Trust Services (WFCTS) is defunct as acquired by Computershare Ltd/Computershare Trust Company, N.A. (Computershare) on November 1, 2021.

As the Schianos stressed, without a legally formed trust, there can be no legal holder trustee. Witness Fay admitted that the box for trust was not checked off and instead "segregated pool of assets" was checked off on the

applicable IRS form. All of this evidence should have negated the Chancery court's determination that the plaintiff "investor trust" is a valid owner or holder of the 2004 loan – it never was. As the Schianos would have presented at the chancery trial had they been given a chance to do so, no lender existed for the 2004 loan since Argent and Ameriquest Mortgage Company were dissolved in 2007 – long before the claimed 2009 assignment. No authority existed for the 2009 assignment from Ameriquest to Wells Fargo Bank, N.A., trustee, PPSI, by the Limited Power of Attorney from Ameriquest to Barclays Capital Real Estate d/b/a Homeq Servicing (A824, Commonwealth Land title n/k/a Fidelity National). The Schianos had no Lender or Mortgagee -- only a wrongful 2009 assignment reflecting a wrongful default and foreclosure enforcement that never, in fact, occurred, and ultimately caused grave financial damage to the Schianos.

Importantly, the Schianos were also precluded from presenting proofs about the wrongful foreclosure and default fees that were assessed to them over the years. These advances fees began in 2010 by Ocwen, but also came from prior servicer, Barclays Capital Real Estate d/b/a Homeq Servicing. These advanced fees were the result of the wrongful assignment of the Schianos' account as a foreclosure or default.

The Schianos were not permitted to present evidence showing that the collection of all those fees was reflected in a New Residential Investment Corporation (d/b/a NewRez) Master Servicer Advance Receivables Trust (A604). NewRez is the owner of Master Servicing rights and advances - which have priority recovery from any collection from borrowers.

As the Schianos argued in asking for relief from the court below, these fees cannot simply be eliminated by the chancery court's July 21, 2022 order but must be extinguished via directive to New Rez. The Schianos were precluded from presenting documentary proofs showing that the fees assessed began as collection costs in 2010 (A616) and accumulated to approximately $250,000 by the time of the chancery trial held below – fees that were wrongful and never should have been assessed against the Schianos in the first place.

All of these proofs the Schianos were prevented from presenting at the Chancery trial because of the manner in which Judge Caposela proceeded. Not hearing any presentation of proofs from the party whose claim the court was actually hearing and determining resulted in a completely skewed decision and order that failed to address the most critical issues that the Schianos raised on their quiet title claim – most critically the $250,000 of "advance fees" that were assessed against the Schianos because of the wrongful placement into

default and foreclosure and that needed to be properly extinguished to fully and completely remedy the harm done to the Schianos as a result. As noted by plaintiff's own witness, Mr. Fay, assignment to a trustee of a claimed trust is only recorded when the loan is in default or there is a foreclosure enforcement. Declaring that the Schianos are not in default but leaving the erroneous 2009 enforcement assignment in place, as the Chancery court's July 21 order does, severely prejudices the Schianos and leaves them in the erroneous position of being subjected to a renewed enforcement action at some point in the future – with the $250,000 in "advance fees" continuing to hang over their head.

For all these reasons, the Court should reverse and remand for a new bench trial on the Schianos' quiet title claim so that the Schianos have a chance to present the additional evidence and testimony as outlined by the Schianos in the relief portion of their motion for reconsideration filed below:

> 4. The Schianos are hereby permitted to submit evidence that loan(s) have already been declared in default/delinquency dating back to the 1992-2002 loan which the Third Circuit deemed is currently "another" delinquent/outstanding loan. Record of reported default/delinquency of Schianos' Freddie Mac loan by Wells Fargo to Freddie Mac is permanent record, and remains permanent.
>
> 5. It is hereby ordered that in accordance with Plaintiff witness testimony, loans are only assigned to a trust's trustee when in default/foreclosure. The Schianos' loan was therefore wrongfully assigned to trustee/trust in 2009.

6. It is hereby ordered that the 2009 recorded assignment to trustee shall be removed from recorded registry, as, despite any declaration of no default, said assignment designates default/enforcement foreclosure.

7. It is hereby ordered that the alleged trust is not a trust, but rather a segregated pool of assets with PPSI (long defunct) as corporate asset owner - pertinent to IRS as no trust was formed. There is no legal trustee to Schianos' loan.

8. New Rez is hereby added as an interested party.

9. The Schianos and New Rez are hereby ordered to submit evidence that foreclosure related fees, approximately $250,000.00, have already been assessed to Schianos' loan by an Advanced Receivables Collection New Rez account, have priority over payment of loan balance, are owned by New Rez, and in accordance with the Pooling and Servicing Agreement (PSA), Exhibit 5, from P1 at p. 149 (P. 155) any Advances deemed Non-recoverable shall be evidenced by an Officer's Certificate of the Master Servicer (now NewRez) delivered to the trustee (now Deutsche Bank) and the NIMS (Net Interest Margin Security) Insurer.

10. It is hereby ordered that each Master Servicer advanced fee, and exact cause of fee by coding, must be disclosed to determine the cause of the advanced fee – regardless of whether currently billed to Schianos or not- as fees are owed to Master Servicer Advance Trust investors. Non-recoverable status can only be effectuated by Master Servicer/NIM certificates and in compliance with IRS charge-off policy. As currently stands, all Schianos payments, and potential payoff, are misdirected to recovery of Master Servicer Advance Trust fees attached to Schiano account. Therefore, the remaining loan claimed balance and associated foreclosure advanced fees are with two different entities. In other words – the claimed remaining loan balance and foreclosure advanced related fees are in two different spots. Coding of fees must be disclosed. Discharge of recorded lien will not eradicate the fees that are owned to another entity – unless there is full compliance with Master Servicer certificates required for advances deemed non-recoverable. Only New Rez can

eradicate the wrongfully assessed advanced foreclosure related fees. [A580]

These additional proofs will enable the Chancery court to address whether the invalid assignment and wrongful indication of default and foreclosure must be deleted and eliminated from the recorded chain of title – a critical part of the Schianos' quiet title claim. Judge Caposela violated the Schianos' right to present their own evidence in support of their own claim at the trial, and by granting what was essentially a directed verdict for plaintiff (the "defendant" on the Schianos' claim) without hearing any evidence from the party whose claim it was -- fundamental legal error warranting reversal and remand for a new trial here on appeal, we submit, cf. Poland, supra, 81 N.J. Super. 400 (motion for dismissal made at close of plaintiff's case admits truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom which is favorable to the plaintiff, and denies only its sufficiency in law); Melone, supra, 18 N.J. 170. Because of this fundamental procedural error, critical evidence was never heard by the chancery judge hearing the trial (as summarized above) -- evidence that impacted Judge Caposela's determinations on the Schianos' quiet title claim and, furthermore, their claims for money damages that the Law Division subsequently dismissed on summary judgment in part on Judge Caposela's bench trial ruling. The Court should vacate the July 21, 2022 judgment and order that Judge Caposela

entered and remand for a fresh bench trial determination of the Schianos' quiet title claim before a new judge.[3]

Point 3

The Law Division erred in granting plaintiff's motion for summary judgment and dismissing as a matter of law defendants' claims for fraud, slander of title, and intentional infliction of emotional distress (A1159-1161), and in denying defendants' subsequent motion for reconsideration seeking reinstatement of the dismissed claims (A1157).

The primary damages that the Schianos sought was the amount of money they had spent in excess interest charges (and lost equity) on the 2004 loan because of their inability to refinance the loan for nearly two decades, until finally being able to refinance in 2022. As the Schianos affirmed, they tried to refinance the 2004 loan many times but were consistently denied because their loan, which plaintiff claimed to possess and own, was wrongfully noted by plaintiff as being in default, and there was a 2009 assignment to a trustee for a trust – which in industry parlance indicated to potential lenders that there was a foreclosure. Neither of this was true, but the Schianos lost numerous

[3] This Court has the authority to direct that remand proceedings be assigned to a new judge where "there is a concern that the [motion] judge has a potential commitment to his or her prior findings" or "where the motion judge had expressed opinions regarding the intent of one of the parties." New Jersey Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 617 (1986); Graziano v. Grant, 326 N.J. Super. 328, 350 (App. Div. 1999).

refinance applications as a result nonetheless – even being twice denied by Wells Fargo Bank, N.A. itself. Plaintiff, moreover, had not simply made mistakes; it refused to correct the wrongful information and notations indicating default and foreclosure for years – causing the potential lenders to deny refinancing to the Schianos and increasing their financial loss with more interest and fees.

The wrongful notations of default and foreclosure are evidenced by numerous documents presented below, see A791-815, including,

- Exhibit A, all collateral sent to JP Morgan Chase on October 8, 2004, including a modification that was never presented to Schianos, and that they thus never signed;
- Exhibit B, a mortgage commitment from Argent Mortgage on October 4, 2004; the Schianos did not close on October 4, 2004, were never before a notary on October 4, 2004, and only obtained mortgage commitment on October 4, 2004;
- Exhibit C, response by Chase that they been custodian/collateral holder since year 2000;
- Exhibit D, by PHH/Ocwen produced logs sent to the Schianos in January 2020, stating that the Schianos "collateral" was sent to Ocwen on June 15, 2006 with "Bailee Request on Hold." The

Schianos did not have any mortgage servicer or entity in litigation in 2006 and did not have Ocwen as a servicer until September 2010;

- Exhibit E, by PHH/Ocwen logs, on May 8, 2014, Ocwen requested an assignment from MERS, nominee to Fremont General, prior loan, an assignment to "FC Matrix" (FC- foreclosure). This assignment/allonge was drafted with Ocwen stating: "Does not pertain to our amount." (By Valley Bank Oct. 2022 refinance, PHH Mortgage returned the Fremont Mortgage stamped PAID).

Though the Chancery court's July 21, 2022 judgment provides that the Schianos had never been in default or delinquency on the 2004 loan, the default that had been reported and indicated previously -- including the 2009 wrongful assignment, and the collection of "advanced fees" assessed to the Schianos because of the wrongful notations of default and foreclosure, prevented the Schianos from refinancing for many years (including denials by Wells Fargo Bank, N.A. for applications in 2013 and 2014), and denials by Quicken Loan in 2015 and 2017. A907, A912. All these refinance applications were denied because of the erroneous default and foreclosure indications in the Schianos' loan files that plaintiff never corrected. As noted above, Mr. Fay himself acknowledged that the assignment done in 2009 to a

trustee for an "investor trust" is done only in cases of default or foreclosure. Therefore, such assignments are a red flag to potential lenders. Plaintiff never removed the wrongful 2009 default/foreclosure assignment despite years of knowing of its falsity.

These facts set forth prima facie claims showing that the Law Division erred in dismissing the claims on summary judgment (A1159), or at least erred in denying the Schianos' motion for reconsideration seeking to reinstate the claims (A1157).

To prevail on a claim for fraud, the party must shows that the defendant (1) made a representation or omission of a material fact; (2) with knowledge of its falsity; (3) intending that the representation or omission be relied upon; (4) which resulted in reasonable reliance; and that (5) caused damages. Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981). Plaintiff's own witness at the chancery trial, Mr. Fay, established these elements. His testimony affirmed that the Schianos were never in default and never missed a loan payment, yet were wrongfully assigned to "in default/ foreclosure" status and to the 2009 "investor trust" so indicating. Plaintiff took no steps to rectify the wrongful default/foreclosure assignment. And when the Schianos tried to refinance the 2004 loan over the years, plaintiff, and the file maintained on the Schianos' 2004 loan, continued to erroneously show the default/foreclosure

assignment – precluding the Schianos from obtaining refinancing and sticking them with the high interest 2004 loan for years and years. As summarized above, the Schianos lost numerous refinances due to the false title issues that the 2009 assignment to "default/foreclosure" caused -- including two denials of refinancing by Wells Fargo Bank, N.A., two by Quicken Loans, and outright rejection of a loan application by Valley Bank (DOA – dead on arrival). Plaintiff did nothing to correct this erroneous information that was hurting the Schianos even though it was aware that the 2009 assignment was wrongful and was leading potential lenders to believe that the 2004 loan had been defaulted or involved in foreclosure.

New Jersey law defines the tort of slander of title "as publication of a false assertion concerning plaintiff's title, causing plaintiff special damages," Lone v. Brown, 199 N.J. Super. 420, 426 (App. Div. 1985); Andrew v. Deshler, 45 N.J.L. 167, 169–72 (1883). "Another element is malice, which has to be either express or implied." Rogers Carl Corp. v. Moran, 103 N.J. Super. 163, 168 (App. Div. 1968). "Malice is defined as the intentional commission of a wrongful act without just cause or excuse." Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 152 (Ch. Div. 1951), aff'd, 9 N.J. 605 (1952).

The proofs in this case showed that prospective refinancer Kearny tried to put the refinance through, and was willing to accept a court discharge of the

lien upon refinance (as required by title insurer, Old Republic Title). Yet the Plaintiff "Investor Trust" and PHH/Ocwen would not agree to this – despite knowing that the 2009 default/foreclosure assignment was incorrect and wrongful, and harming the Schianos. The Schianos lost the Kearny refinance due to the inactions of Plaintiff and PHH/Ocwen (the loan servicer). As noted, plaintiff's own witness, Mr. Fay, testified at the July 11, 2022 bench trial that only loans that are in default or foreclosure are assigned to a trustee for a trust. Judge Caposela declared that the Schianos have never been in default and never missed a loan payment. Yet the Schianos' loan was fraudulently assigned to a trustee for a claimed trust in 2009 for default/foreclosure enforcement – and was assessed $250,000 in "advance fees" over the years because of this. Plaintiff and PHH/Ocwen did nothing to cure this wrongful notation of default and foreclosure - - and everything possible to thwart all refinance attempts the Schianos made. They also concealed the real cause of fees.

The malice and slander of title continued even by the time of the chancery trial. Plaintiff and PHH/Ocwen failed to disclose to the Chancery court that foreclosure related fees in the sum of approximately $250,000 were attached to the Schianos' loan, and were placed in a NewRez NRZ Advance Receivables Trust by which advances have priority and must be paid first prior

to any loan balance being deemed satisfied (A609, A415, A893). The Schianos were required to disclose the foreclosure related fees to potential refinance lenders. The foreclosure related fees must be deemed non-recoverable in accordance with the PSA (A609) and the NRZ Trust. All of this negatively impacted the Schianos' ability to refinance and caused damages to them even when they were finally able to refinance in October 2022 (due to the declaration of no default by the Schianos in the Final Judgment).

With regard to the Schianos' claim for intentional infliction of emotional distress, the proofs are also sufficient to allow a reasonable jury to find that (1) plaintiff acted intentionally or recklessly (in deliberate disregard of a high degree of probability that emotional distress will follow); (2) plaintiff's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;" (3) plaintiff's actions proximately caused emotional distress to the Schianos; and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it." Segal v. Lynch, 413 N.J. Super. 171, 191 (App. Div. 2010); Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 366 (1988); see Model Charge 3.30F.

The emotional distress is apparent to any reasonable person. There is a large amount of equity in the Schianos' home. They are senior citizens and have never missed a loan payment, or payments for taxes and insurance, for the 35-plus years they have owned their home. As the Schianos charged, the Plaintiff "Investor Trust" and PHH/Ocwen were determined to obtain the Schianos' equity via foreclosure related fees (which have collected to approximately $250,000), by claimed litigation and other foreclosure-related fees (Ocwen confirmed they were foreclosure-related), and by a path of distressed debt and default. There has never been any cooperation by plaintiff to remove the wrongful 2009 default/foreclosure assignment that was harming the Schianos by precluding any refinancing. There was no cooperation to provide a loan modification to stop the damages caused by the high interest rate of the 2004 loan. There was no cooperation to assist with judicial discharge, which would have resolved refinance. There was no disclosure of foreclosure related fees that, the records show, were wrongfully attached to the Schianos' account.

In Clark v. Nenna, 465 N.J. Super. 505 (App. Div. 2020), the court noted that only emotional distress that is severe or genuine and substantial is actionable. Here, the fact that the Schianos have been in litigation over these and related issues for nearly twenty years speaks to the severity and substantial

distress caused to them. The Schianos have suffered the severe distress caused by the wrongful and persistent default/foreclosure path assigned to their loan --without any effort by the plaintiff to correct the wrongful assignment and related notations of default that never occurred.

The investor billables for the foreclosure related fees, approximately $250,000, *still* have not been addressed by plaintiff or the court below and continues to cause severe emotional distress in particular to Mr. Schiano. It is unknown as to where the Valley Bank refinance money was applied other than to PHH Mortgage (sub-servicer to NewRez). No medical or expert proof is required to establish a prima facie case of emotional distress damages worthy of trial. The Schianos are senior citizens with substantial equity in the home they have owned for so many years. They have suffered emotional distress from the malicious acts and process that plaintiff has caused and repeatedly refused to remedy, Baglini v. Lauletta, 338 N.J. Super. 282 (App. Div. 2001). No reasonable person could state that malicious continuation of process, and failure to rectify the wrongful default/foreclosure assignment, is not cause for serious emotional distress to such senior citizens.

In sum, the Law Division erred in granting summary judgment to plaintiff and dismissing these claims for monetary damages that should be determined by a jury at trial.

Point 4

The Law Division erred in denying the Schianos' motion to amend their Counterclaim/Third Party Complaint to add Wells Fargo Bank, N.A. (A1157, A1161)

The Schianos explained the role of Wells Fargo Bank, N.A. in their pleading below. A90. It was Wells Fargo Bank, N.A. – not the trustee department – that twice denied refinance (the Schianos' 2013 and 2014 applications for refinancing were both denied on the false ground of an invalid title). The Law Division had ordered that the Schianos were not precluded from filing a motion to amend their complaint to include Wells Fargo Bank, N.A. based on new evidence. A86.

As the Schianos explained below, Wells Fargo Bank, N.A.'s trustee department was only a department under Wells Fargo Bank, N.A., and at the time of the Chancery trial the trustee department no longer existed (as it had been long acquired by Computershare). At the chancery trial, plaintiff's witness, William Fay, testified that the trustee department had nothing to do with refinance denials, and that refinance denials were solely denied by the "bank" – i.e., Wells Fargo Bank, N.A. Mr. Fay testified that the trustee department had no knowledge of the refinance denials. The Schianos moved to amend their claims to include as a defendant Wells Fargo Bank, N.A. based on this evidence that came from plaintiff's own witness, Mr. Fay. The trustee

department no longer existed; the trustee department had nothing to do with refinance and nothing to do with the twice wrongful denial of the Schiano's application to refinance. These charges of the twice wrongful denial of refinancing by Wells Fargo Bank, N.A. were central to the Schianos' allegations and claims for monetary and equitable relief. Mr. Fay was no longer an employee of the trustee department (as it was acquired by Computershare). Mr. Fay admitted at the chancery trial that the 2009 foreclosure assignment was only done in foreclosure matters. For all these reasons, the Law Division committed reversible error in denying the Schianos' motion, based on new evidence, to amend their claims to add Wells Fargo Bank, N.A. as a third party defendant.

Conclusion

For all these reasons, the Court should

- vacate in its entirety the $188,029 judgment in plaintiff's favor on its contractual litigation claim,
- remand for a new chancery trial, before a new judge, on the Schianos' quiet title claim, and
- remand for a jury trial on defendants' claims for fraud, slander of title, and intentional infliction of emotional distress.
- reverse the denial of the Schianos' motion to amend their claims to add Wells Fargo Bank, N.A. as a third party defendant.

Respectfully submitted,

/s/ Michael Confusione
Hegge & Confusione, LLC
Counsel for Appellants,
Ralph and Eleanor Schiano

Dated: November 8, 2023

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-003404-22

WELLS FARGO BANK, N.A. AS TRUSTEE FOR PARK PLACE SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES WHQ2,

PLAINTIFF-RESPONDENT,

V.

RALPH SCHIANO AND ELEANOR SCHIANO,

DEFENDANTS-APPELLANTS,

V.

WELLS FARGO BANK, N.A., AS TRUSTEE FOR PARK PLACE SECURITIES, INC. ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2004-WHQ2 PHH MORTGAGE CORPORATION, SUBSIDIARY OF OCWEN FINANCIAL CORPORATION, AND SUCCESSOR TO OCWEN LOAN SERVICING, LLC (OCWEN),

THIRD-PARTY DEFENDANTS/RESPONDENTS.

On appeal from a final order entered in the Superior Court of New Jersey,
Law and Chancery Divisions, Passaic County, Docket Nos. L-1884-22, C-79-19;
Hon. Ernest M. Caposela, J.S.C.; Hon. Bruno Mongiardo, J.S.C.

REPLY BRIEF OF APPELLANTS,
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REPLY BRIEF FILED ON JANUARY 10, 2024

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REPLY PRELIMINARY STATEMENT

A. Was there structural error in the Chancery Court when the trial judge had Plaintiff proceed first at July 11, 2022 trial when Plaintiff had no claim to try, the claim to be tried was the Defendants', Eleanor and Ralph Schiano, claim of Quiet Title, and Directed Verdict was granted to Plaintiff prior to Defendants' presentation of evidence?

Answer: Yes. This was not a foreclosure case - it was a Defendants' Quiet Title claim which solely involves property ownership determination. The Plaintiff had no claim to try. Moreover, it is ludicrous to count Mrs. Schianos' ten (10) minute testimony at the pre-trial conference in June 2022 as: 1) Ms. Schiano basically just informed the Court of what she did for a living; 2) the Judge called her to the stand because she was visibly upset and obviously neither attorney was prepared for anything as it was a pre-trial conference; 3) Ms. Schiano is not even on the mortgage note, 4) the Schianos had another couple weeks to prepare for their Quiet Title trial, presentation of evidence and documents, and presentation of witnesses in proper order.

According to Plaintiff, Mrs. Schiano testified at pre-trial conference that "**she and her husband lived peaceable in the property** …" and "**peaceably occupied the property**," Plaintiff's Response Brief at pages 29 and 32 respectfully. Mrs. Schiano made no such statements, and the fact that Plaintiff wrongfully states in Response Brief that Mrs. Schianos testified same is very disturbing as the statement(s) imply that Mrs. Schiano does not own her property but rather simple lives peaceably and occupies same. The Chancery Court never decided Quiet Title and ownership of property.

Plaintiff current motives to imply no Schiano property ownership rights, and only occupied peaceably, should be very disturbing to the within Court. It should be noted only Mr. Schiano is on the mortgage note, and that Mr. David Wigfield, Esq. was to testify as a factual witness regarding fact that for years Wells Fargo Bank, N.A. could not locate Schianos' loan for refinance despite Mr. Wigfield's, real estate attorney, numerous attempts. The Chancery Court erred as it determined that the Schianos were not in default - which did pave way to obtain refinance but was in contradiction to Third Circuit which the Chancery Court failed to acknowledge. Plaintiff counsel drafted the Findings of Fact and Conclusions of Law which were adopted verbatim by trial judge and which omitted key critical trial testimony and already decided decisions such as the Third Circuit determination of loan default since 1992.

B. Did the Law Division judge err in granting Plaintiff's motion for summary judgment as to Schianos' remaining claims transferred to the Law Division?

Answer: Yes. Schianos' allegations centered on wrongful denials of refinance by numerous banks, including twice by Wells Fargo Bank, N.A. (WF), due to invalid title and foreclosure issues (Quicken Loan), see WF denials and WF Holly Randolph letter, App. at A649-A650. At the Chancery trial, Plaintiff own witness, William Fay, testified that Schianos' last recorded mortgage assignment is typically only done in foreclosure, Trial Transcript p. 221-222. Mr. Fay also testified that Plaintiff Wells Fargo trustee department has nothing to do with refinances and that refinances are done solely by WF – the bank, Trial Transcript p. 235. Despite this clear testimony, the Law

Division judge erroneously granted summary judgment to Plaintiff – without even having the correct party – Wells Fargo Bank, N.A. – the bank, added as a party. The Law Division ignored all pertinent Chancery testimony, ignored the fact that the Third Circuit had already determined the Schiano loan was in default since 1992, and erroneously failed to decide Quiet Title which is property ownership.

C. Did the Law Division err in tacking on Section 9 contractual legal fees in any sum (here nearly $200,000.00) after final judgment with exact pay off amount stated and recorded in the Registrar Office, and the loan was subsequently refinanced and paid off and discharged?

Answer. Yes. The Schianos did not fit in any category of Section 9 of mortgage contract which permits legal fees, the loan merged into Final Judgment, and loan was paid off via refinance with payoff amount stated in Final Judgment, and was discharged. No additional debt can later be added.

REPLY STATEMENT OF FACTS

Original note and mortgage; Plaintiff Investor trust; Defendants' Federal Lawsuit; The Trial; Final Judgment; Law Division claims.

Mrs. Schiano is not on the Argent mortgage note. Schianos received a letter from Government Comptroller of the Currency (A177-A178) that they are in default on their Freddie Mac loan and it was paid out by "GE." Schianos never disputed anything as they were never aware of any default. The Third Circuit Court of Appeals decided in 2020 that the Schianos are in default since 1992 (Freddie Mac) loan (how

this occurred is not stated by the Third Circuit). Prior default precludes future securitization and causes fees. Mr. David Frasier of Wells Fargo Corporate Trust Services, in 2016, informed Schianos that they are in default to *two trusts* – Freddie Mac REMIC 2859 and Park Place Securities Inc. (PPSI) 2004 WHQ2. Plaintiff's witness, Mr. William Fay, of Computershare, testified at trial that there are two loans for Schianos in the system (one loan wrongly stated as First Franklin rather than Fremont Mortgage) (Trial transcript p. 229). Two Schiano mortgages and two HUD statements (Fremont and Argent) are in collection system (A820-A823).

Only Master Servicer - New Residential Mortgage (NewRez) n/k/a Rithm Capital) (A330-A333) can confirm the status of foreclosure related advanced fees assessed to Schianos' loan. On June 23, 2022, Judge Caposela implied stated that New Rez would testify. However, NewRez was denied a party to litigation, and Schianos never had an opportunity to present any evidence or documents. Despite many requests for Plaintiff to identify cause of fees, Plaintiff refused (and will not state who advanced them). Only collection costs of $1,170.00 charged to Schiano in 2010 (A248) (ultimately waived in 2012) was identified in 2016, as attorney fees *allowed* under foreclosure (A393). Although Plaintiff never initiated a foreclosure, they were preparing to do so. These fees, despite waiver, were sent to Ocwen by prior servicer Homeq Servicing, thus, Ocwen acquired in (wrongful) default. Waiver does not negate cause of collection fees. Ocwen placed Schianos in a trial period and assessed large

capitalization/escrow shortages (Schianos did not escrow taxes or insurance and timely paid), PHH/Ocwen logs, A808- A810. Ocwen reflects disbursement during “trial period,” A813. Schianos were not informed of any trial period, and were informed by Ocwen that fees include forced placed insurance, property inspections, and broker-price opinions – all used in foreclosure.

Mr. Wigfield, who could not locate Schianos loan and Mr. Clark Cornwell, Esq. were extremely concerned as to prior (erroneous) reported default (Comptroller of Currency) and fees despite fact that Schianos could prove all payments. No loan could be located at Wells Fargo, A211-231. Default precludes future securitization. Mr. Cornwell, also then a Vice-President for Old Republic Title demanded a Court discharge to clear title for any title insurance should a refinance be obtained (A234). This could not be obtained. In 2009, Mr. Wigfield sought an opinion from Commonwealth Title as to 2009 assignments and Limited Power of Attorney. Commonwealth states the “assignment from Ameriquest to Wells Fargo Bank, NA does not fall under the scope of the Limited Power of Attorney,” (LPOA) (A226). The Pooling and Servicing Agreement mandates that Wells Fargo, the bank, grant LPOA and not Ameriquest/Argent (defunct in 2007), (A224-A231).

Mr. William Fay testified at trial that the 2009 Schiano assignment is only done in foreclosure (Trial Transcript p. 221-222). Judge Caposela wanted a refinance for Schianos and not extraction of equity. Plaintiff informed Judge Caposela at trial that

no fees are being charged to Schianos (Trial Transcript p. 239). The Schianos, Valley Bank, and title insurer relied upon Final Judgement. No fees (attorney, foreclosure fees or litigation fees) were disclosed by attached payoff statement.

Security investors are only cash flow beneficiaries and not legal holders of a mortgage. Schianos have no mortgage holder. Refinance denials are straightforward. By Wells Fargo – the bank (not trustee) refinance denials for 2013 and 2014 applications (both denied in 2016), were solely denied due to "Title issues" (A642-A648). Wells Fargo informed Schianos: "we (Wells Fargo) do not hold your mortgage as trustee." (A649-A650), and Trial Transcript p. 234-235). Also, Quicken Loan wrongly denied refinance twice due to claimed title/foreclosure issues. Quicken could not verify Schianos have a mortgage (A669-A672). Credit reports showed no active payments and account CLOSED (A1128-A1137). Valley Bank refused an application in 2013 due to "title in trustee name" and "DOA" (Dead on Arrival), A1017-A1020. Plaintiffs knew that Mr. Wigfield was to be called as a fact witness at trial, attached Trans. ID: CHC2022131873. Mr. Wigfield traveled from California and was not heard.

"Current" does not mean prior internal reported delinquency/default was not recorded previously recorded as already (falsely) determined by Comptroller of Currency and the Third Circuit. No fees can be attached to account if it is not in default status. Such an assignment as in 2009 against Schianos is a red flag to potential

lenders of default. In 2016, Ocwen sent a letter to Schianos stating that their first payment could not be located (A390 – bottom of page). Schianos have proof of said payment. That payment mysteriously then showed as recorded at trial. A spread sheet is not financial accounting for receivables.

Chase Bank has been custodian/Collateral holder since year 2000 (A802). Chase was also 2004 warehouse lender and last collateral holder (A377 – A379). In June 2006, by PHH/Ocwen logs, collateral was sent to Ocwen with “Bailee Request on Hold” (A667). This was long before any mortgage allegations were pled in federal court and long before Ocwen began servicing in 2010. In addition, by Logs, an assignment and allonge was requested and executed from MERS nominee for Fremont to “FC Matrix” (foreclosure matrix) (A1062). By October 2022 refinance with Valley Bank, *NewRez* returned Argent note *and* Fremont mortgage stamped paid. Plaintiff claims he was never informed of Schianos refinance application with Valley Bank. Plaintiff was informed at October 6, 2022 conference (Transcript Oct. 6, 2022 p. 8) and knew Chancery judge intended for Schianos to refinance by a “no default” declaration stated in Final Judgment (FJ). Schianos could return to trial court if needed additional help, Trial Transcript p. 261 and 268. Valley Bank can confirm that Defendants informed them of Plaintiffs’ fees and relied on FJ. No motion was made to amend. .

At trial, it was shown that PPSI 2004 WHQ2 was not formed as a trust by IRS tax documents but rather as six “segregated pools of assets” owned by Park Place

Securities Inc. (PPSI) (long defunct), A637. Rating agencies ceased ratings for PPSI, but Fitch rates for United Kingdom. If validly formed, top tranches are for principal payoff. Fitch reports all top tranches as prematurely paid off- making *principal payoff* to same impossible. Bottom "credit enhancement" default tranches are rated as "junk," (A1097-A1116). REMIC V and VI were never sold for securitization but rather sold by Ameriquest to a third party (A256-A270). Plaintiff ceased electronic withdrawal of defendant's payments, multiple times, without notice, and federal court had to reinstate. Plaintiff placed defendant's payment in "Suspense account" and Court had to intervene. Fees divert payments and likely caused "Closed" status of Schianos account, (A915-A920).

Plaintiff represented to the court that "no fees" would be charged. Given the two loans in the "system," the 'partial' security Argent security interest had long been paid off by the Schianos leaving only the 2004 Fremont Mortgage loan in the system existing. Plaintiff attached debt collection letter (Plaintiff Exhibit 6) "This is an attempt to collect a debt" was received by Schianos at *same time* the lien was released in the County. Massive fees are assessed and paid for on single day, Christmas 2016, and indicative of year-end charge-off. Fee charge-off must include loan charge-off.

An investor trust cannot exist with a trustee legal holder. Wells Fargo is not mortgage holder as trustee, see Holly Randolph letter, A649-650, and Park Place (PPSI) was dissolved in 2010 without a successor trust depositor as required. The

Mortgage Loan Purchase Agreement (MLPA) is only an intent to sell, A 272. Two of the segregated REMICs were not securitized, A253- A270. In federal court, Citigroup, security underwriter, stated they have no knowledge of Schianos for securitization.

ARGUMENT

POINT I

SCHIANOS' QUIET TITLE CLAIM WAS NEVER HEARD. QUIET TITLE IS OWNERSHIP OF PROPERTY AND NOT ABOUT WHO POSSESSES THE NOTE.

The Chancery Court never heard or decided Schianos' Quiet Title claim of ownership of property. Instead the trial proceeded with Plaintiff first presenting evidence of possession of the note (foreclosure) and obtaining Directed Verdict prior to Schianos' presentation of their Quiet Title claim, (ownership of property) evidence and documents. Schianos and Valley Bank have not paid off the loan as Plaintiff wrongfully attaching nearly $200,000.00 in legal fees to said loan which was not disclosed at trial and is in contradiction and violation of the law. In addition, another $200,000.00 in foreclosure related fees attached to the loan remain outstanding.

The sole issue for the scheduled July 11, 2022 trial was the Schianos' claim of Quiet Title which is determination of ownership of property. The issue was not foreclosure and not who possessed the mortgage note which is typically the focus in a foreclosure trial. The trial court never decided Quiet Title (ownership of property) in its Final Judgment. In its Response Brief, Plaintiff tries to wrongfully imply to this

Court that Mrs. Schiano admitted at the pre-trial conference that she does not own the property and that "**she and her husband lived peaceable in the property** …" and "**peaceably occupied the property**," Plaintiff's Response Brief at pages 29 and 32 respectfully. Mrs. Schiano never stated same, and the implication is disturbing particularly in light of the fact that the Schianos were never permitted to present their Quiet Title claim and evidence of the foreclosure related fees that had attached to their loan in the sum of approximately $200,000.00 (this is separate from the legal fees that the Law Division awarded to Plaintiff).

The Third Circuit already decided that the loan was in default dating back to 1992. The Schianos never missed a loan payment. It was only Plaintiff who wrongfully placed the Schianos, or continued wrongful default and assessed approximately $200,000.00 in foreclosure related fees to their account. Schianos were not permitted to present their Quiet Title claim and evidence. Following Plaintiff presentation of foreclosure enforcement of note, Plaintiff was granted Directed Verdict on Schianos' claim of Quiet Title without Schianos' ever presenting any Quiet Title evidence and documents.

Plaintiff erroneously states NJ R EVID N.J.R.E. 611 (a) in support of its wrongful assertion that Mrs. Schiano's pretrial June 23, 2022 ten (10) minute testimony counted as toward the trial that was not to occur until July 11, 2022. This is absurd. Both Plaintiff and Defendant still had a couple weeks to prepare for trial, and

Mrs. Schianos' testimony was about her character and what she did for a living. The Judge called her to the stand, and neither attorney was prepared for trial testimony. NJ R EVID N.J.R.E. 611 (a) does not give the trial judge broad discretion in converting a pre-trial conference into the actual trial. Further, NJ R EVID N.J.R.E. 611 (a) does not give the trial judge broad discretion in permitting Plaintiff to proceed first on Schianos' claim of Quiet Title, and then granting Plaintiff Directed Verdict before Plaintiff had opportunity to present their Quiet Title claim, evidence, and documents. The procedural error is not harmless. It is structural error that completely wiped out Schianos Quiet Title claim presentation. Equally important, Quiet Title and ownership of property was never decided by the trial judge, This is particularly disturbing given the fact that not only does Plaintiff extract a wrongful award of legal fees under Section 9 of the mortgage contract, but they subject Schianos to loss of title to property and multiple future actions for additional fees (the foreclosure related fees assessed to loan are still outstanding). Plaintiff wrongfully cites State v. Pinkston, 233 N.J. 495 (2018) and State v. Jones, 232 N.J. 308 (2018) in support of the cited Rule. *Pinkston* has to do with final statement prior to criminal sentencing, and *Jones* involved pre-trial detention hearing. Plaintiff is totally off the mark. The Schianos were precluded from presenting any Quiet Title evidence including key testimony from factual witness Mr. Wigfield regarding the fact that WF could not locate Schianos' loan. This was not

harmless error – it was major structural procedural error, including wrongful Directed Verdict, which should equate to automatic reversal.

POINT II

THE LAW DIVISION ERRONEOUSLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF ON SCHIANOS' REMAINING CLAIMS.

The Law Division did not even have the correct parties. Schianos' allegations centered on wrongful denials of refinance by Wells Fargo Bank, N.A. – the bank (WF). Neither the Plaintiff nor WF trustee department had anything to do with refinance, see above Mr. Fay testimony. The Law Division, and Chancery Court, ignored and failed to incorporate all critical evidence from the July 11, 2022 trial. The Chancery Court simply used the Final Judgment drafted by Plaintiff verbatim. Critical testimony was omitted including testimony from Mr. Fay that Schianos' assignment only occurs in foreclosure and that Wells Fargo trustee department had nothing to do with refinances, see above Transcript reference, and therefore could not address Schianos' major allegations that they had been twice wrongfully denied refinance by Wells Fargo Bank, N.A. due to title. While in litigation, state and federal, for over a decade, Plaintiff could have removed the wrongful assignment that is only done in foreclosure. Instead, Plaintiff continued the false assignment by filing an action to reinstate the wrongful assignment that is only done in foreclosure. The Third Circuit, Schiano v. Homeq Servicing, et. al, Docket 19-1956, and the Comptroller of the Currency (OCC), A177-A178 had already determined and stated that Schianos' loan was in default dating back

to 1992. The loan was already in wrongful default by the time Ocwen became servicer in 2010. The Chancery Court and Law Division ignored the Third Circuit and OCC, and failed to give full faith and credit to said already decided determination(s) of default. This is major procedural error which mandates reversal.

POINT III

THE LAW DIVISION HAD THE WRONG PARTY AND SHOULD HAVE PERMITTED SCHIANOS TO AMEND THEIR COMPLAINT.

Judge Caposela decided that Schianos could seek to amend their complaint to include Wells Fargo Bank, N.A. (WF) in the future, see attached Appendix April 2022 Order. Once Mr. Fay testified at trial that the Wells Fargo trust department has nothing to do with refinance and refinance denials, Trial Transcript p. 234-235, (WF twice denied refinance due to title) A, it should have been clear to the Law Division that the only party that should answer Schianos' allegations of wrongful denial of refinance due to title would be Wells Fargo Bank, N.A. – the bank, and therefore should have permitted Schianos to add same as a party. WF – the bank was not without notice as it was named in Schianos' original third party complaint, and served with the third party complaint. Thus, there was no prejudice to WF. Mr. Fay testified that he spoke with Holly Randolph and was aware of her letter forwarded to the Schianos stating that WF "does not hold (Schiano) mortgage as trustee." and that refinance was twice denied due to title, see Trial Transcript 234-235, and A642-A650. The Law Division should have

permitted the Schianos' to amend their complaint to include the proper party Wells Fargo Bank, N.A. – the bank – the entity who wrongfully twice denied refinance due to a foreclosure assignment that the Plaintiff wrongfully recorded.

POINT IV

THE LAW DIVISION ERRONEOUSLY AWARDED ATTORNEY FEES TO PLAINTIFF.

The Schianos never missed a loan payment, and had every right to challenge a wrongful foreclosure assignment that prevented them from refinancing. Section 9 of the mortgage contract only permits attorney fees in certain scenarios which Schianos did not fall into, and in the permitted scenarios only prior to entry of Final Judgment. The mortgage contract merges into the Final Judgment – the Chancery Final Judgment was relied upon by the Schianos and Valley Bank as total amount due to refinance.

In Garcia v. Fed. Home Loan Mortgage Corp., 3:20-CV-01458-L, 2022 WL 4007984 (N.D. Tex. Sept. 2, 2022), the court stressed the fact that Section 9 applies to Lender's interest in cases such as bankruptcy, probate, condemnation or forfeiture. Schianos did not fall into any of said scenarios. Further, the loan merged into Chancery Final Judgment, and the Schianos paid the loan in full at refinance with Valley Bank. Judge Caposela specifically stated in the Final Judgment that no fees were charged to the Schianos. Judge Caposela was intent on the Schianos getting past a wrongful foreclosure assignment (Argent Mortgage originator had long been dissolved and no successor) so that they could refinance. Judge Caposela certainly did

not contemplate another nearly $200,000.00 to be tacked on as additional debt owed under the mortgage. This would have defeated the purpose of any refinance.

All litigation fees and attorney fees under Section 9 of the mortgage contract must be considered additional debt under the security instrument, and therefore must be included prior to Final Judgment as additional debt owed by the borrowers. Hatch v. T & L Associates, 319 N.J. Super. 644 (App. Div. 1999), was clear that a Plaintiff can proceed to enforce the note in either General Equity or the Law Division. However, Plaintiff must proceed cautiously as attempt to collect the debt in Law Division without foreclosure (General Equity) could result in unfair attorney fees to homeowner that would have been greatly reduced had the Plaintiff proceeded for foreclosure on the mortgage in General Equity. The Plaintiff in Hatch was severely criticized for not proceeding in General Equity. Proceeding in the Law Division increased the attorney fees significantly for the borrower, and the mortgage was not foreclosed upon. Thus, since the mortgage remained (no foreclosure) the *Hatch* court had to reverse on other grounds as the mortgage remained and could not merge into the final judgment. Plaintiff in the within case totally misconstrues the *Hatch* case.

CONCLUSION

For the reasons set forth above, the Court should reverse the Orders/Judgments Schianos have appealed.

Dated: January 10, 2024 /s/ Michael Confusione