OGGI E. DOMANI WEST NEW YORK, LLC,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003479-22
Plaintiff,	On Appeal From:
vs.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-2690-20
RICHARD MAZAWEY, ESQUIRE; THE MAZAWEY LAW FIRM; and JOHN DOES, ESQS., 1-10 and JANE DOES, ESQ., 1-10 (a fictious designation for presently unknown licensed attorneys, professionals and/or unknown persons or entities), jointly, severally and in the alternative,	Sat Below: Hon. Bruno Mongiardo, J.S.C.
Defendants.	

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT OGGI E. DOMANI WEST NEW YORK

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Dated: January 18, 2024

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INTRODUCTORY STATEMENT

This is an action for legal malpractice by which Plaintiff/Appellant sought to recover the damages they lost as a result of the failure of their former attorney, Defendants/Respondents, Richard Mazawey, Esq. (hereafter "Mazawey") to competently advise them regarding entry into a lease for a building in West New York. Defendants/Respondents Mazawey was advised by the Plaintiffs/Appellants that the building did not have a sewer connection and therefore was unfit for its intended purpose, but Mazawery failed to advise Plaintiff/Appellant to terminate the lease within the timeframe set forth in the lease itself, which Mazawey claimed was only a "triggering date".

Defendant/Respondents successfully avoided liability by persuading the trial moved contend that the failure of Plaintiff/Appellant to amend the R. 4:5-1 certification to identify that they contemplated joining Mazawey to the lawsuit by the landlord, something that they never contemplated, and which was not required under long-established case law should result in this suits dismissal with prejudice.

Defendants/Respondents filed an enormous motion to dismiss based on R. 4:5-1 (over 1,700 pages!) on the eve of Trial, over 800 days after they filed their Answer. The Defendants/Respondents' Motion failed to cite a New Jersey

Supreme Court case, which twenty-five (25) years ago, broadcast as black letter law that "all attorney malpractice claims" are exempt "from the entire controversy doctrine" or any competent evidence pursuant to R. 1:6-6, that Defendants/Respondents have suffered substantial prejudice as a result of the Plaintiff/Appellants bringing this legal malpractice action subsequent to an underlying suit with their landlord of that failure to join their claims were inexcusable.

There was nothing competent regarding substantial prejudice. A search of Defendants' telephone book sized motion papers will reveal not one piece of competent evidence as to any identifiable prejudice due to the fact that this suit was filed within five (5) months of the conclusion of the underlying suit with the landlord. While Defendants suggest that both parties inability to locate non-party witness, Michael Angelo ("Angelo"), has somehow caused them prejudice, they do not tie this into any entire controversary doctrine failure as they themselves evidently took no action for more than twenty (20) months after the suit was filed in this matter to locate Angelo.

There is nothing set forth by the Defendants that allows one to infer that had Plaintiff amended the R. 4:5-1 disclosure in the prior suit that it would have made any difference whatsoever. There is nothing in the motion record pursuant

to R. 1:6-6 that describes what the Defendants would have done differently or how they have been prejudiced by this five (5) month interval in the litigation.

Tied to the primary point made above, how could Defendants maintain that Plaintiff's failure to join these claims to the preceding litigation was inexcusable when our Supreme Court broadcast that their claims of legal malpractice were exempt from the obligation to do so under the entire controversary doctrine? Completely absent from Defendants' papers is any competent evidence that Mazawey was unaware of the underlying action in which he was deposed or that if Plaintiffs had amended their R.4:5-1 statement, the Bergen County Court would have provided him notice, or any action that Mazawey would have taken which would have made a lick of difference in this matter or would have resulted in locating witness Angelo between February of 2020 and September of 2020. Despite this record, the Court granted the Motion to Dismiss. Plaintiff respectfully submits that this Trial Court's decision was an error and the Trial Court misapplied and misstated the law in its decision.

Plaintiff looks to this Appellate Court for justice to return this matter to the Trial Court so they can obtain a Trial on the merits.

PROCEDURAL HISTORY

This matter was instituted by Complaint filed on September 8, 2020 (Pa0001). The Complaint was amended on October 22, 2020 (Pa0015) and an Answer was filed on November 19, 2020 (Pa0026). An Affidavit of Merit was served on the Defendants and filed on November 30, 2020 (Pa0044). The Parties entered into a Consent Order regarding Discovery on February 13, 2022 (Pa0052) there were Orders Extending Discovery entered on April 1, 2022 (Pa0046) October 6, 2022 (Pa0048) November 30, 2022 (Pa0050) February 13, 2023 (Pa0052) March 17, 2023 (Pa1361). On March 1, 2023 the Defendants filed a Motion to Dismiss based upon R. 4:5-1. (Pa0058).

This Motion was filed 832 days after the affirmative defense of the entire controversary doctrine was first raised. A Notice of Appeal was filed on July 17, 2023 (Pa1411) along with the request for oral argument filed on November 2, 2023 (Pa1415).

FACTS

A. DEFENDANT MAZAWEY NEGLIGENTLY ADVISES PLAINTIFF ABOUT THE LEASE

This is a legal malpractice action arising out of Defendants' negligent advice regarding the negotiation, entry into and termination of a lease for commercial property in West New York. As a result of Defendants' negligent

advice, Plaintiff was exposed to a lawsuit for rent and improper termination of the lease. Plaintiffs settled this litigation and their counsel advised them that their legal position was precarious because of the "one-sided nature of the lease" and Mazawey's obvious failure to properly terminate the lease. The Trial Court held that the failure to amend the R.4:5-1 statement to indicate that the Plaintiffs contemplated suing Defendant Mazawey for legal malpractice prior to settling this litigation entitled Mazawey for dismissal of this legal malpractice case.

Plaintiff, Oggi sought to purchase property in West New York for use as a retail store and warehouse for retail sale of goods imported from Italy. One of the members of Oggi, Achille Scialoa ("Scialoa") was a licensed importer from Italy and would be the person to procure the goods to be sold by Oggi.

After two failed attempts to reach a deal on two prospective properties, Russo came upon a piece of property located at 6600 River Road in West New York ("Property") that was owned by 6600 River Road ("6600") (Pa1367).

Oggi was introduced to Defendant Mazawey by Anthony Mercedes ("Mercedes") in March 2016 to represent Oggi with regard to the leasing of property to house Oggi's new business venture. A retainer agreement was executed by Michael Angelo Russo ("Russo") on behalf of Oggi on March 9, 2016. The retainer agreement provided that Mazawey will provide the following

legal services: "negotiating, preparation and execution of commercial leases for the corporation". Mazawey represented Oggi on at least two potential commercial lease properties than did not come to fruition before representing Oggi with regard to the Property.

Regarding section 32 of the Lease, Mazawey called it "the greatest run on sentence put into a 'landlord lease', and described the lease as a whole as a "landlord lease that debilitates the rights of the tenant". He would advise his clients regarding section 32 of the Lease "let the buyer beware" (Pa1370).

Since the existing building on the Property was an abandoned warehouse, Oggi needed a use variance in order to operate a retail store, bakery and restaurant on the Property. Oggi contacted architect Jose Carballo ("Carballo") in early June 2016 to obtain a proposal for architectural services for the project, which was provided by letter dated June 13, 2016. By email dated May 16, 2016, Russo wrote to Azzolina & Fuery Engineering ("A & F") requesting an agreement and a time frame for performing a survey with topo. Russo retained A & F sometime in late May 2016, who performed a certified boundary and topographic survey in early June, 2016 (Pa1376).

The initial drafts of the Lease and Option Agreement were prepared by Jack Zakim, Esq. ("Zakim"), attorney for 6600 and transmitted to Mazawey by

email dated May 27, 2016. Mazawey initially advised Zakim that the form and contents of the draft documents were acceptable. There is evidence that indicates that Mazawey met with any of the members of Oggi to discuss the proposed terms of the Lease and Option Agreement or the potential risks of same before his initial response to Zakim. The earliest time record of Mazawey entry evidencing a meeting with "clients" after the delivery of the draft contract documents is June 16, 2016.

By email to Mazawey dated June 7, 2016, Zakim attached a revised Lease, amending section 4.2 (b) and (e) setting the new Lease Commencement Date as July 1, 2016 and the Rent Commencement Date as September 1, 2016, and adding section 3.6 clarifying that the free rent period does not eliminate Tenant from paying all carrying charges. Zakim's email indicated that these changes were as a result of his discussion with Mazawey. These changes are the only changes discussed and made to the proposed Lease agreement, and no changes were proposed by Mazawey to the Option Agreement.

In the same email, Zakim requested that Mazawey provide the following documents and information: confirm who will be guaranteeing the Lease and provide a current financial statement and most recent tax return for that person; address for Tenant; NAICS number; Certificate of Insurance; first month's rent

in advance in the amount of $25,000; security deposit in the amount of $50,000; Certification of Formation; Certificate of Good Standing; Operating Agreement; and Resolution authorizing the managing member to sign the Lease on behalf of Oggi (Pa1371).

By letter dated July 1, 2016, Zakim wrote to Mazawey advising that he revised the Rider to the Lease and the Lease to reflect the amended proposed use of the Property as a bakery and restaurant on the first floor and a retail store on the second. The letter also reiterated that in the event Oggi does exercise its right to terminate the lease, it would forfeit $25,000 of the security deposit, and all work product related to the application for approvals would be turned over to the Landlord and become landlord's property.

The letter confirms that the guarantors of Oggi have been identified and Zakim has enclosed a guaranty for execution, and that he is still looking for all of the company documents he requested.

Finally, Zakim requested that the additional $50,000 due under the Lease be tendered before keys to the Property would be given to Oggi. The letter was countersigned by Oggi and Mazawey. No other changes were requested by Mazawey other than identified in the July 1, 2016 letter. Mazawey delivered the

July 1, 2016 countersigned letter and the guarantee allegedly signed by Paradiso and Rivas to Zakim by email dated July 11, 2016 (Pa1373).

The contract documents consisted of a Lease, Rider to the Lease, Option Agreement and letter memorandum dated July 1, 2016 drafted by Zakim and countersigned by all parties.

Relevant portions of the "Landlord Lease" Mazawey negotiated are as follows:

> §1.2 "Neither Landlord nor Landlord's agents have made any representations or promises with respect to: (i) the physical condition of the Premises . . . or (iii) any other matter or thing affecting or related to the Premises. Tenant has inspected the Property and is fully familiar and acquainted with the Property and the Building inclusive of the condition of same and has accepted the premises in "as is" condition except as may be otherwise expressly stated in the Lease, and acknowledges that Tenant's execution of this Lease shall be conclusive evidence that the said Property and Building were in satisfactory condition at the time this lease was executed by Tenant".
>
> §3.1 Rent was to commence October 1, 2016, leaving Oggi three months to obtain the necessary permits to build on the Property.
>
> §3.6 Oggi was required to pay taxes and other carrying charges on the property from the date of possession of the Property.
>
> §5.3 Oggi shall obtain all utilities, including without limitation gas, electric, water, telephone and cable service directly from the public utility providing such service at Oggi's expense.
>
> §9.2 Landlord would not be responsible to furnish any services, utilities or repairs or perform any alterations to the Premises, whether foreseen or unforeseen. Oggi agrees that no defense or claim can arise hereunder from any physical condition now or hereinafter affecting the Premises.

§20 Tenant's right to quiet enjoyment is subject, nevertheless, to the terms and conditions of this Lease.

§28.3 Tenant, at its sole cost and expense, obtain a certificate of occupancy for the Premises, and in the event Tenant is unable to obtain a certificate of occupancy by virtue of the intended use of the Premises, Tenant, at its sole cost and expense, is to perform any work necessary to bring the Premises into legal compliance for its use so that a certificate of occupancy could issue.

§32 Tenant and its principals had inspected the Property and are fully familiar and acquainted with the entire Premises and accepted the Premises in its "as is" condition. Tenant explicitly acknowledges that Landlord made no representation or warranty as to the suitability of the Premises for the conduct of Tenant's business. Tenant waived any implied warranty that the Premises are suitable for Tenant's intended purposes and further acknowledges that the Premises were in fact suitable for the intended purpose of operating a café, bakery and retail store and warehouse.

Relevant portions of the Rider to the Lease are as follows:

§2a "Tenant will provide Landlord with a copy of its application to the Planning Board or Zoning Board of Adjustment of the Town of West New York, inclusive of Architect's Plans and all other exhibits or submissions on or before July 15, 2016".

§4 "Tenant will diligently prosecute its application for approvals referenced in paragraph 2 above at Tenant's expense".

§6 "Time is hereby made of the essence with respect to all time periods provided in the within Lease Rider" (Pa1374-Pa1375).

Sometime after the contract documents were signed, Oggi went to the West New York building department to obtain the documents necessary to apply for zoning approvals. Oggi was advised at that time that the Property had no

sewer connection and that absent such a connection Oggi would not be able to obtain permits.

Mazawey did not meet with anyone representing Oggi after the contract documents were completed until August 2, 2016 when he met with Russo and Mercedes. Mazawey did not meet again with Oggi until September 26, 2016 to discuss the status of the lease (Pa1376).

By email dated September 26, 2016, Mazawey wrote to Mercedes and Russo asking them to provide the necessary verification on the "no sewer line" issue and the need for an ejector pump from Farragut Place for an approximate cost of $100,000. The email continues: "This should come from your engineer to me ASAP to substantiate the need for more time to make first rent payment now due October 1. We will request to make said payment to January but will have no success without the above documentation" (Pa1377).

Mazawey wrote an email to Zakim dated October 28, advising that "this letter/email shall confirm my client's decision to cancel and terminate the lease contract with option to buy component effective today pursuant to the specific lease/contractual provision between the parties as signed, executed and agreed to by the parties. This letter shall also serve as my client's formal written request for the return and refund of any and all funds paid and or held by your client the

lessor/owner of the subject property in West New York". Presumably to attempt to meet the notice requirements contained in the Lease and Rider, Mazawey also sent a letter dated October 31, 2016 to D&M Carlstadt Properties, attention Michael and Murray Feit by overnight courier. Mazawey also sent a follow up email to Zakim dated October 31, 2016 as follows:

> Just sent another copy of my clients [sic] email terminating the lease with option to buy the subject West New York property. Please contact me ASAP to advise when my clients will be receiving all monies as to a complete refund and return of all funds paid, $50,000 current due and owing and $30,000 for full reimbursement of monies toward rent and carrying costs. This includes but is not limited to property clean-up costs, $12,500; engineering costs $10,000; architectural costs, $15,000, as specified and governing in the agreements between the parties. (Pa1379-Pa1380)

Zakim responded by letter dated November 7, 2017, rejecting the notice to terminate the lease for three reasons: 1) the notice was not served pursuant to section 15.2 of the Lease; 2) Oggi did not comport with the condition precedent in section 4 of the Lease Rider requiring Oggi to diligently prosecute its application for approvals; and 3) Oggi did not comply with the condition precedent in section 4 of the Lease Rider requiring Oggi to provide landlord with a copy of the application for land use approvals to the landlord on or before July 11, 2016. Zakim further indicated that his client believes that Oggi did not in fact make application for land use approvals in violation of section 2 of the

Lease Rider and in breach of the good faith and fair dealing requirement of every contract. Zakim advised that based upon these breaches, Oggi is responsible for paying rent and carrying charges for the remaining 34 months of the lease and is not entitled to the return of any funds tendered pursuant to the lease (Pa1380).

Mazawey never responded to Zakim's November 7, 2016 letter. Zakim sent a follow up letter to Mazawey dated December 5, 2016 confirming that Mazawey had not responded to the letter nor returned the phone call Zakim placed on November 22, 2016, prompting the letter. Zakim lists some damage to the building and advises that fill was dumped on the property which his client believes was done by Oggi since they have not returned the keys to the landlord despite terminating the lease (Pa1381).

Oggi retained the firm of Sedita, Campisano & Campisano, LLC to file suit to obtain the return of its funds and for damages for breach of contract. Joseph Campisano, Esq. ("Campisano") filed suit in the Superior Court, Bergen County on February 2, 2018 on behalf of Oggi against 6600 River Road Associates, LLC and Cervelli Real Estate, Inc. seeking return of the funds tendered to 6600 pursuant to the Lease and damages for the non-disclosure by 6600 and Cervelli of the fact that the Property had no sewer connection. 6600 filed an answer, counterclaim and third party complaint against Paradiso and

Rivas as guarantors, seeking damages for breach of contract and enforcing the guaranty against Paradiso and Rivas. Paradiso filed an answer denying that he signed the guaranty or any documents on behalf of Oggi.

Mazawey in a letter dated June 13, 2018 dishonestly denied that he was advised about the sewer issue before Russo's October 27, 2016 email by letter in response to Mercedes' email requesting Mazawey's position as to why the notice of termination was late and why the personal guarantee that was not seen before by Mercedes and Paradiso was delivered by Mazawey. However, Mazawey in fact met with Mercedes and Russo on September 26, 2016 and then sent a follow up email to Mercedes and Russo asking them to provide the necessary verification on the "no sewer line" issue and the need for an ejector pump from Farragut Place for an approximate cost of $100,000, which clearly indicates that Mazawey knew of the sewer problem at least as early as the September 26, 2016 meeting with Russo and Mercedes (Pa1382).

Moreover, Mazawey testified at his deposition that he commenced discussions with Zakim in September 2016 in an attempt to buy more time for Oggi to be required to pay base rent in light of the sewer issue, and to try to get 6600 to share on the cost of the expensive sewer hook-up, again conceding that he knew of the sewer issue and the cost of the hook up before September 30,

2016. Mazawey believed that the September 30, 2016 date was not a "drop dead" date but a triggering date that would allow Oggi to terminate the Lease after September 30, 2016. Mazawey further testified that he did not know if Oggi submitted an application for approvals before the deadline in the Lease, nor did he know if Oggi diligently prosecuted the application as required by the Lease. Mazawey believed that since the lease was silent as to when the ten day notice was to be given to accelerate the termination date of the Lease, he believed it to be within a reasonable time. Mazawey also believed that the date in the Rider for the submission of an application to West New York was a date to provide the application or a reason why an application could not be presented due to no fault of Oggi.

Mercedes responded to Mazawey's letter by email dated June 13, 2018, indicating he was stunned at Mazawey's position, as Mazawey was advised on numerous occasions through discussions with Mercedes and Russo of the sewer issue and the town not allowing Oggi to go forward with permits. Mercedes reminded Mazawey that he attempted to negotiate with 6600's attorney to either delay the date for payment of rent or to allow Oggi to spend money to fix the problem and obtain a credit for the cost, and that these negotiations went on for

months. Mercedes also indicated that both Paradiso and Granata indicated that their signatures on the guaranty are forgeries (Pa1383).

The parties reached a settlement agreement, memorialized in writing in mid-April 2019 that required Oggi and the third-party defendants Paradiso, Granata and Mercedes to pay to 6600 the sum of $120,000 within 45 days, and failure to timely pay would then result in a judgment against Oggi and the third party defendants jointly and severally in the amount of $145,000. The Settlement Agreement also provided that 6600 and its attorneys agree to cooperate with Oggi in any legal malpractice action filed against Mazawey.

Oggi settled the matter upon the advice of their attorney, Joseph Campisano, Esq. who indicated the difficulty in defending the matter given the one-sided lease that Mazawey negotiated and the failure to terminate the lease within the time frame set forth in the lease documents. Campisano did not amend the R.4:5-1 statement prior to the settlement because it was his understanding that the entire controversary doctrine did not apply to claims of legal malpractice.

B. CLAIMS OF PROFESSIONAL MALPRACTICE AGAINST DEFENDANTS

Barry E. Levine, Esq. has been a member of our bar for more than forty (40) years and rendered a legal malpractice expert report in this matter. Mr.

Levine set forth in his report (Pa1364) the materials he reviewed, how the case law and Rules of Professional Conduct defines the standard of care and he applied that standard to the factual record in this matter. Based upon Mr. Levine's review of the record, he opined, within a reasonable degree, that Defendants deviated from acceptable standards of care of an attorney retained to review and negotiate a Lease Agreement with an Option Agreement to purchase the subject property in order to fulfill Oggi's business purposes and to minimize the risks to Oggi of the transaction, and that this deviation was a substantial contributing factor in bringing about the damages sustained by Plaintiff.

1. **Failure to ascertain the client's business objectives through appropriate consultation.**

Mazawey never met with Paradiso and Rivas, the named members of Oggi. Despite not having met with representatives from Oggi, his initial reaction after reviewing the proposed contract documents was that the form and content were "acceptable" without any proposed changes. This statement was made notwithstanding his testimony that the term "as is" in leases is the greatest trap phrase in real estate history, and that section 32 of the Lease, in Mazawey's own words, was "the greatest run on sentence put into a 'landlord lease', and

described the Lease as a whole as a "landlord lease that debilitates the rights of the tenant".

When Mazawey did finally meet only with Russo, a "facilitator" for Oggi as described by Mazawey, to discuss the terms of the contract documents, some three weeks after receiving the draft documents from Zakim, Mazawey only suggested generic changes to the Lease and did not propose specific language that would have protected Oggi. The major generic change was to add a contingency for approvals to utilize the Property for Oggi's intended use, indicating that Mazawey was aware that Oggi's intended use of the Property would require zoning approval.

However, Mazawey agreed to a Lease that required Oggi to submit an application for zoning approval by July 11, 2016, some three weeks from the date he reviewed the Lease and only eleven days from the commencement date of the Lease. I have not reviewed any documents or testimony that indicates that Mazawey discussed this tight schedule with anyone from Oggi to ensure this deadline was reasonable. Mazawey also permitted the time frame for the suspension of rent to be only three months, a very tight window for obtaining approvals with regard to approvals that included a use variance, without an opportunity to expand this time frame.

In addition, there was no provision limiting Oggi's financial investment in the build-out for the intended use, despite Mazawey's testimony that his clients were willing to pay money to cure the ills of a decayed dormant building, but to a reasonable financial limit, and Mazawey's testimony that had Oggi known what it would cost to get a certificate of occupancy they never would have done the deal. I did not review any documents or testimony that indicates Mazawey discussed the budget with Oggi so as to insert a monetary limit on the cost to build out the Property as a basis to terminate the lease.

Even if 6600 rejected Mazawey's attempts to include the aforementioned provisions into the Lease, at least Oggi would be in a position, with Mazawey's counsel, to make an informed decision as to whether to accept the risks of going over budget for the build out or miss the tight deadline for filing and/or obtaining the approvals for the build out prior to signing the Lease and attendant contract documents.

2. <u>Failure to provide reasonable advice to the client "on the various legal and strategic issues" bearing on those identified business objectives.</u>

There is no evidence that Mazawey counseled anyone at Oggi, let alone the principal members, regarding the draconian terms contained in the Lease before it was signed by Paradiso on behalf of Oggi. In fact, Mazawey admitted

that he never met or had even spoken to Paradiso throughout his entire representation of Oggi. Mazawey did not meet with Paradiso knowing he prepared the very resolution that authorized Paradiso to sign the contract documents. Thus, Mazawey could not have counseled Paradiso, the authorized signatory for Oggi, on the potential pitfalls of the various provisions in the contract documents that significantly increased the risks attendant to Oggi's intended use of the Property before the Lease, Rider and Option Agreement were signed by Paradiso and therefore bound Oggi to their terms. Obviously, Mazawey did not discuss Oggi's financial budget for the build out in order to include a monetary limit on Oggi's financial exposure for the build out, which would have clearly given Oggi an out to terminate the Lease based upon the cost of extending the sewer connection to the Property. Mazawey did not discuss with Paradiso the significance of accepting the Property "as is" and that the Lease shifted the burden of obtaining a certificate of occupancy to Oggi. Mazawey did not advise Paradiso or anyone at Oggi that the plans needed to be provided to 6600 on or before July 11, 2016, a very short window, and that in order to exercise the right to terminate the Lease Oggi had to diligently prosecute the application for approvals, which of course required Oggi to in fact file an application for zoning approvals with West New York. Mazawey failed to advise

Paradiso or anyone at Oggi that failure to file a timely application would jeopardize Oggi's right to terminate the Lease.

Paradiso was provided no counsel by Mazawey on any of the three contract documents he signed and bound Oggi to, including the guaranty that he allegedly signed. Mazawey never met with Rivas either, and both Rivas and Paradiso became bound as guarantors without ever having the benefit of Mazawey's counsel on the consequences of executing the guaranty. Given Paradiso's position that he did not sign any of the contract documents, including the guarantee, Mazawey requiring a meeting with Paradiso and Rivas to discuss the contract documents would have revealed Paradiso's true position with Oggi as an investor and would have required Mazawey to identify the true owners of Oggi and counsel them on the consequences of the agreements required to be signed on behalf of Oggi.

Notwithstanding these clear deviations, Mazawey failed to timely issue a notice accelerating the termination date of the Lease before September 30, 2016. Mercedes indicated that Mazawey was told early on about the issue with no sewer connection on the Property, and Mazawey himself met with Granata and Mercedes on September 26, 2016 and acknowledged in his email to them that he knew about the "no sewer issue" and that the approximate cost for a sewer

hookup was $100,000. Mazawey should have advised his clients that their best option under the contract documents was to issue a notice of acceleration of the termination of the Lease due to the sewer issue BEFORE September 30, 2016, and then use the termination as leverage to negotiate more time to obtain approvals if Oggi wanted to resurrect the deal, or negotiate some other terms such as sharing the cost of the sewer connection with 6600 with the threat of walking away from the deal.

Mazawey took the position, mistakenly, that Oggi had until October 31, 2016 to terminate the Lease, a date that does not appear anywhere in the contract documents. Thereafter, during the underlying action, Mazawey testified that he took the position that Oggi had a "reasonable time" after September 30, 2016 to terminate the Lease on ten days' notice, as the September 30, 2016 date was not a "drop dead" date but a triggering date for the right to terminate the Lease. Even if that was a proper legal position to take, by not advising his clients of the risks of waiting until the end of October to terminate the Lease on his theory of contract interpretation instead of immediately serving notice before September 30, 2016, Mazawey deviated from accepted standards of care by failing to explain the various risks that Oggi would be taking given the choice of dates to terminate the Lease.

It is understood that 6600 had other arguments to make regarding Oggi's alleged breach of the lease such as failure to submit an application as required by the lease as a condition precedent, or failing to provide a copy of the application to 6600, but at least Mazawey would have avoided the argument that the notice accelerating the termination of the Lease was not timely.

3. Failure to scrutinize, during the drafting process, the proposed agreement to ensure that the writing effectuates the business objectives defined by the client.

Mazawey, by his own billing records, met only once with anyone affiliated with Oggi, that being Russo, someone not authorized to bind Oggi by Mazawey's own admission, before the final draft of the contract agreement were prepared. As indicated above, Mazawey did not discuss the financial budget of Oggi for the build out, nor discuss the tight timeline the Lease and Rider imposed on Oggi to file its application for zoning approval. The draft Lease itself was only changed in two minor areas: to change the intended use from warehouse and retail of clothes to adding a café and bakery and to clarify that Oggi was required to pay for carrying charges for the first three months it had possession of the Property.

No other changes were requested by Mazawey to the draft Lease. A Rider was added incorporating the contingency Mazawey requested to be included for

obtaining zoning approvals, but Mazawey did not propose any language to accomplish this request. Mazawey approved the Rider as proposed by 6600, which required that the application be filed less than two weeks from the commencement date of the Lease, and further required Oggi to pay for carrying charges for three months until the basic rent commenced. Mazawey did not attempt to negotiate a longer contingency period than three months to obtain approvals, or a contingency to expand that time period, in order to protect Oggi's investment in the engineering and architectural plans, and permitted language to remain forcing Oggi to surrender all plans to 6600 without compensation in the event Oggi terminated the Lease.

The provisions that were inserted into the Rider clearly did not inure to the benefit of Oggi, especially since the property was marketed for years without any deal consummated. Mazawey should have used this leverage to negotiate much more favorable contingency provisions, both with regard to length, extending the time period, capping expenditures, and avoiding the payment of any rent during the contingency period.

4. Failure to review the written agreement with the client, to determine that the client understood the material terms that might reasonably affect the client's decision to execute it.

I have not reviewed any documents or testimony that indicates Mazawey reviewed the agreement with the ***members*** of Oggi to determine if they understood the material terms that might affect Oggi's decision to execute the contract documents. Clearly, Mazawey did not meet with Paradiso, the person who was authorized to sign all contract documents on behalf of Oggi pursuant to a resolution that Mazawey himself prepared, to discuss the various terms contained in the documents, and therefore no members of Oggi were reasonably counseled by Mazawey so that they understood the material terms of the contract documents. There is no evidence that, even after meeting with Russo, Mazawey proposed ***any specific changes*** to the Lease or Option Agreement by submitting draft language to 6600. There is no evidence that Mazawey counseled Paradiso or Oggi's principals regarding the risks it was required to undertake based upon the language contained in the contract documents with regard to obtaining a certificate of occupancy or the fact that if the conditions precedent for exercising the right to terminate the lease were not met, Oggi would be on the hook for the accelerated payment of rent for the entire term of the Lease.

5. Failure to point out the various provisions to accomplish each of the client's stated objectives and failure to ensure that the client assents to the omission of any such objective.

As noted above, Mazawey did not discuss with Paradiso or any Oggi

principal that the contract documents as proposed would not be reasonable for the stated objectives of Oggi, to wit: being able to obtain approvals for a build out of the Property for use as a warehouse, retail store, café and bakery to be accomplished within a reasonable cost, and if this could not be accomplished, that Oggi be able to extricate itself from the long-term obligations of the Lease.

Thus, this failure would also indicate that Mazawey did not counsel Oggi's principals as to the downside risks regarding the language contained in the contract documents in light of Oggi's objectives, and therefore Mazawey could not have obtained the assent of Oggi to the omission of the objectives, as acknowledged by Mazawey's own testimony that had Oggi known about the cost of connecting to a public sewer, Oggi would not have entered into the Lease.

C. THE COURT GRANTS DEFENDANTS MOTION TO DISMISS FOR FAILURE TO AMEND R.4:5-1 STATEMENT IN THE BERGEN COUNTY CASE

As set forth above, the Court granted the Motion to dismiss and in doing so the Court stated:

> Most legal malpractice claims are exempt from the entire controversary doctrine where the prior litigation itself gave rise to the malpractice claim. However, legal malpractice claims are not exempt where the alleges malpractice accrues before the prior litigation, such as with transactional malpractice.
>
> From the motion record, the competent evidence shows Plaintiff had already decided to sue Defendants for legal

malpractice prior to the settlement of the prior lease litigation. Thus, Plaintiff's malpractice claims against the Defendants are not exempt from the entire controversary doctrine. The entire controversy doctrine bars all claims that had accrued at the time of the original action.

In the instant matter, Plaintiff's malpractice claim against the Defendant is subject to the entire controversary doctrine, as the claim has already accrued before the prior lease litigation with the landlord. The malpractice allegedly committed by the Defendants for failing to competently advise Plaintiff regarding entry into the lease agreement was transactional in nature and had already happened before Plaintiff initiated the prior litigation against the landlord of the property.

Plaintiff's representatives admit that the decision to pursue a legal malpractice action against the Defendants was made during the prior lease litigation with the landlord, in consultation with the attorney who represented Plaintiff in that litigation. In making this determination, and in setting up this subsequent litigation against the Defendants, Plaintiff even secured a provision in the settlement agreement, that the landlord would cooperate in a subsequent malpractice action against the Defendants. Importantly, the Defendants did not represent Plaintiff in the prior lease litigation against the landlord. And as a result of that, all of the policy considerations identified in Olds v. Donelly, supra, for exempting Plaintiff's claims from the entire controversy doctrine are absent herein.

The testimony of Attorney Campisano, Mr. Mercedes, and Mr. Gram – Grenada demonstrate that a decision to bring a legal malpractice action against the Defendant was intentionally and strategically decided during the lease litigation and intentionally and specifically delayed until after the lease litigation settled. Mr. Mercedes testified that he made a decision on behalf of Plaintiff to sue Defendants toward the end of the lease litigation. Similarly, Mr. Grenada testified that a decision to bring a legal malpractice action

against the Defendants was made during the lease litigation, by the time of settlement negotiations, and discussed with Mr. Campisano.

The most telling, uncontroverted fact, that a decision to sue the Defendants was made during the lease litigation is further evidence by the inclusion of a provision in the settlement agreement in the lease litigation that Plaintiff's insistence, which would require 6600 River Road to cooperate in a legal malpractice against the Defendants. Plaintiff has not presented any explanation, excusable or otherwise, as to why it elected not to assert legal malpractice claims against the Defendants during the lease litigation.

Plaintiff has the benefit of the Defendant Mazawye's deposition testimony in the lease litigation without formally bringing claims against him until after the fact. This strategic decision has prejudiced the Defendants, as Mr. Mazawey did not have the advise of counsel while deposed and was unaware that his client was seeking to sue him. Plaintiff had an unfair advantage to question Mr. Mazawey while knowingly contemplating a legal malpractice action against him. This was tantamount to an ambush. The crux of Plaintiff's legal malpractice claim is that it instructed Mr. Mazawey to terminate the lease in July or August of 2016, but Mr. Mazawey failed to do so, all areas of inquiry presented by the Defendant Mazawey's deposition.

The Defendants now argue that they are prejudiced in that the additional cited damages would have never occurred if the Defendants were a party to the lease litigation, as Defendants could have been a party to the settlement and now are being looked to for the entire amount. Plaintiff has not offered any sanction, short of a dismissal, which could possibly cure the prejudice to the Defendants. (T1)1

Several statements in the Court's opinion are contrary to the case law. For example, the case law does not provide that the entire controversary doctrine

1 T1= Transcript of Decision dated June 9, 2023 located at Pa1417.

requires the joinder of legal malpractice claim if "the legal malpractice claims occurs before the prior litigation such as transactional malpractice." As set forth below this is directly contrary to the holding it holds. The black letter law permitted the Plaintiff to do exactly what they did in the landlord/tenant lawsuit as they attempted to litigate their damages by recovering against the landlord and should they prove unsuccessful they could then sue their negligent attorney for the damages for while his malpractice caused.

D. MAZAWEY'S MALPRACTICE IS A SUBSTANTIAL CONTRIBUTING FACTOR GIVING RISE TO PLAINTIFF'S LOSSES.

Had Defendants not deviated from the standard of care as detailed above, either Oggi would have been able to terminate the Lease without recourse, or Oggi would have been able to make a business decision on whether to take the risk of executing the Lease in the event 6600 refused to allow changes to be made to the contract documents that would have given Oggi more time to apply for zoning approval and/or limit Oggi's financial expenditure for the build out given the need to extend the sewer connection to the Property, a business decision Mazawey himself testified that would have resulted in Oggi refusing to sign the contract documents.

Oggi's damages, as listed it is answers to interrogatories, include: the funds advanced pursuant to the Lease for security and first month rent in advance in the amount of $80,000; engineering fees in the amount of $10,000; architect's fees in the amount of $15,000; cleanup and maintenance costs for the building and grounds in the amount of, $12,500; legal fees incurred by Oggi in prosecuting its claim for breach of the Lease and defending 6600's counterclaim for breach damages against Oggi in the total amount of $67,057.05; the amount of legal fees paid to Mazawey in the amount of $10,000; the amount of the settlement paid to 6600 in the underlying case in the amount of $120,000; and the difference between the cost of inventory purchased by or on behalf of Oggi and the current auction value of the inventory as calculated by Harry Byrnes of A.J.Willner Auctions in the amount of $250,772, plus interest on all elements of these damages.

In addition to the foregoing, the attorneys' fees and litigation costs incurred by Oggi in the instant case are a proper element of its damages. *See*, *Saffer v. Willoughby*, 143 *N.J.* 256 (1996).

Since Mazawey's deviations were made while he was an employee of the firm, the firm is also liable to Oggi for its damages based upon the doctrine of *respondeat superior*.

Mazawey was deposed in the underlying litigation and asserted the attorney client privilege on behalf of the Plaintiff regarding his private communications with them. As set forth above, Oggi, upon the advice of counsel settled the litigation in Bergen County with the substantial payment to the landlord. Within five (5) months of settling this litigation, Oggi instituted instant action against the Defendants.

ARGUMENT

I. "ALL" LEGAL MALPRACTICE CLAIMS ARE EXEMPT FROM THE ENTIRE CONTROVERSY DOCTRINE; THIS IS A LEGAL MALPRACTICE CLAIM; THE COURT ERRED IN DISMISSING SAME

(APPEALING ORDER DATED JUNE 9, 2023 FOUND AT PA1409)

The reach of the Entire Controversy Doctrine was at its most expansive following the Court's 1995 decisions in *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, P.C.*, 142 *N.J.* 280 (1995). Eventually the Court moderated its approach by reinterpreting the doctrine as it related to parties and certain claims and, in that context, by directing the Civil Practice Committee to propose revisions to the relevant *Rules*. *See Olds v. Donnelly*, 150 *N.J.* 424, 444–49 (1997). *Rule* 4:5–1(b)(2) was amended as part of changes made in 1998 to the *Rules* governing mandatory joinder.

Our Supreme Court finally resolved these issues concerning non-joinder of attorneys by holding that the entire controversy doctrine did not bar

subsequent lawsuits for legal malpractice. *Olds v. Donnelly,* 150 *N.J.* 424, 428 (1997); *Karpovich v. Barbarula* 150 *N.J.* 473, 476 (1997); *Donohue v. Kuhn,* 150 *N.J.* 484, 485 (1997). In reaching its determination in *Olds, supra,* the Court acknowledged the criticism leveled at the entire controversy doctrine and mandatory joinder of parties as well as the sanction of preclusion. 150 *N.J.* at 444–46. In its decision, the Court emphasized "that preclusion is a remedy of last resort." *Id.* at 446 (citing *Gelber v. Zito Partnership,* 147 *N.J.* 561, 565 (1997)). While recognizing that the purpose of the doctrine is to encourage litigants to bring to the trial court's attention persons who should be joined, not to bar meritorious claims, the Court acknowledged the reality that there exists some attorneys who "have elected to conceal or withhold claims against additional parties." *Olds, supra,* 150 *N.J.* at 447 (citations omitted).

The *Olds* Court concluded by imparting to the Civil Practice Committee and its Entire Controversy Doctrine Subcommittee the responsibility to examine the exemptions that should apply to mandatory joinder, as well as any amendments that should be made to *R.* 4:30A. *Id.* at 449. It identified the "need for a procedural device, such as a Rule 4:30A, to protect parties, the courts and the public from excessive and costly litigation." *Id.* at 447–48 (citations

omitted). The Court stressed that "mandatory joinder should not be confused with mandatory preclusion." *Id.* at 448. In considering the sanction to be imposed for failure to give the required notice the Court said, "[i]f a remedy other than preclusion will vindicate the cost or prejudice to other parties and the judicial system, the court should employ such a remedy." *Ibid.* (citation omitted). Quoting from its decision in *Abtrax Pharmaceuticals, Inc. v. Elkins–Sinn, Inc.*, the Court emphasized, " '[s]ince dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault.' " *Ibid.* (quoting *Abtrax Pharmaceuticals, Inc.v. Elkins–Sinn, Inc.*, 139 *N.J.* 499, 514 (1995) (quoting *Zaccardi v. Becker*, 88 *N.J.* 245, 258 (1982) (citations omitted)).

As a result of its decision in *Olds*, the Supreme Court, in September 1998, amended *R.* 4:30A, removing the previous provisions related to non-joinder of parties and limiting its application to non-joinder of claims. The Court also adopted *R.* 4:29–1(b), which permits the trial court, on its own motion, to "order the joinder of any person subject to service of process whose existence was disclosed by the notice required by R. 4:5–1(b)(2) or by any other means who

may be liable to any party on the basis of the same transactional facts." The Court further revised *R.* 4:5–1(b)(2), which now provides:

Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. *Further, each party shall disclose in the certification the names of any non-party* who should be joined in the action pursuant to R. 4:28 or *who is subject to joinder pursuant to R. 4:29–1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification.*

The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29–1(b). *If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the non-complying party of litigation expenses that could have*

been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action. [R. 4:5–1(b)(2) (emphasis added).]

The revised version of R. 4:5–1(b)(2) thus "... addresses the issue of sanctions for failure to make the required disclosures. The court is authorized to impose monetary sanctions and/or counsel fees later incurred that would have been avoidable by disclosure." *Pressler, Current N.J. Court Rules,* comment 3 on R. 4:5–1 (1999). Preclusion is, therefore, available as a sanction only in the limited circumstances where a lesser sanction is not sufficient to remedy the problem caused by an inexcusable delay in providing the required notice, thereby resulting in substantial prejudice to the non-disclosed party's ability to mount an adequate defense. Substantial prejudice in this context means substantial prejudice in maintaining one's defense. Generally, that implies the loss of witnesses, the loss of evidence, fading memories, and the like." *Ibid.* In *Escalante v. Township of Cinnaminson,* we observed that the delay alone does not serve to create substantial prejudice. 283 *N.J.Super.* 244, 253, 661 *A.*2d 837 (App.Div.1995) (citing *Kleinke v. Ocean*

City, 147 *N.J.Super.* 575, 581, 371 *A.*2d 785 (App.Div.1977)). Instead, it is the lack of availability of information which results from the delay that is, for the most part, determinative of the issue of substantial prejudice. *Id.* at 252–53, 661 *A.*2d 837. Thus, a party's "access to relevant information is largely dispositive of the 'substantial prejudice' issue...." *Lamb v. Global Landfill Reclaiming,* 111 *N.J.* 134, 152, 543 *A.*2d 443 (1988). *Mitchell v. Procini*, 331 N.J. Super 445, 453 (App. Div. 2000).

Case law establishes that in order to obtain a dismissal pursuant to the entire controversary doctrine after the doctrine was softened by *Olds v. Donnelly*, 150 N.J. 424, 443 (1997), the movant must show both 1) **an inexcusable failure to comply with the notice provisions of the entire controversary doctrine and 2) substantial prejudice**. *Hobart Bros. v. Nat'l Union Fire Ins. Co.*, 354 N.J. Super. 229, 242 (App. Div.), certif. Denied, 175 N.J. 170 (2002). There was nothing in the record below that was competent evidence that either of these prongs were met on this motion.

The holding in *Olds v. Donnelly*, 150 N.J. 424, 443 (1997) exempting all legal malpractice claims from the entire controversary doctrine was not overruled by *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C.* 237 N.J. 91 (2019). That case simply delt with the issue of when a

client is sued by an attorney for fees whether the client has a duty to assert as a counterclaim for legal malpractice. The Court held that when a client is sued by a lawyer for fees, the Court must look to see whether or not the entire controversary doctrine requires a client to assert his or her claim against a former attorney when they are already adversaries in a lawsuit. Certainly, that is not the case here. Indeed, the Dimitrakopoulos Court reiterated it's holding in *Olds v. Donnelly*, 150 N.J. 424, 443 (1997) that "the entire controversary doctrine does not require an attorney's current or former client to assert a legal malpractice claim against that attorney in the litigation that gave rise to the malpractice claim even if the two claims arise from the same or related facts and otherwise would be subject to mandatory joinder.". 237 N.J. at 112. The Court further reiterated that it declined to adopt a separate rule for the application of the entire controversary doctrine to legal malpractice claims from transactional matters and thus all of those claims were also exempt from application of the doctrine. *Id see note 4*. See also *Sklodowsky v. Lushis* 417 N.J. Super. 648 (App. Div. 2011); *Short Hills Associates in Clinical Psychology v. Rothbard, Rothbard, Kohn & Kellar*. Defendants should have informed this Court of this controlling precedent when making the instant motion to dismiss pursuant to the entire controversary doctrine; instead, they were seeking to have this Court overrule a

twenty-five (25) year old precedent of our Supreme Court.

The entire controversary doctrine proscribes dismissal of a successive suit unless both **inexcusable failure** to comply with the notice provision and **substantial prejudice** are established by the undisclosed party. The party asserting the entire controversy doctrine as a defense, bears "the burden of establishing both inexcusable conduct and substantial prejudice." *Hobart Bros. v. Nat'l Union Fire Ins. Co.*, 354 N.J. Super. 229, 242 (App. Div.), certif. denied, 175 N.J. 170 (2002) (emphasis added). In *Mitchell v. Charles P. Procini, D.D.S., P.A.*, 331 *N.J. Super.* 445, 454 (App. Div. 2000) (Mitchell II), the Court considered the meaning of "substantial prejudice" in the second prong of the analysis and held that "substantial prejudice" means "the loss of witnesses, the loss of evidence, fading memories, and the like." *Ibid.*

Even if both prongs are proved, courts may, instead, consider lesser sanctions. The basis for the imposition of less draconian remedies follows long-standing jurisprudential tenets. As the Court explained in *Alpha Beauty v. Winn–Dixie Stores*, 425 N.J. Super. 94, 102 (App. Div. 2012):

> Our Court Rules, from their inception, have been understood as "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." *Ragusa v. Lau*, 119 N.J. 276, 284 (1990).

As a result, the Supreme Court has recognized a "strong preference for

adjudication on the merits rather than final disposition for procedural reasons." *Galik v. Clara Maass Med. Ctr.*, 167 N.J. 341, 356 (2001) (quoting *Mayfield v. Cmty. Med. Assocs., P.A.*, 335 N.J. Super. 198, 207 (App. Div. 2000)).

The Trial Court in deciding an entire controversy dismissal motion must first determine from the competent evidence before it whether a *Rule* 4:5–1(b)(2) disclosure should have been made in a prior action because a non-party was subject to joinder pursuant to *Rule* 4:28 or *Rule* 4:29–1(b). If so, the court must then determine whether (1) the actions are 'successive actions,' (2) the opposing party's failure to make the disclosure in the prior action was 'inexcusable,' and (3) 'the right of the undisclosed party to defend 'the successive action has been substantially prejudiced by not having been identified in the prior action.' [*700 Highway 33 LLC v. Pollio,* 421 *N.J. Super.* 231, 236 (App. Div. 2011) (quoting *R.* 4:5–1(b)(2)).] "If those elements have been established, the trial court may decide to impose an appropriate sanction. Dismissal is a sanction of last resort." *Id.* at 236–37 (citing *Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co.,* 207 *N.J.* 428, 453–54 (2011).

R. 4:5-1(b) analysis in this case must start with the understanding that legal malpractice actions are exempt from the entire controversy doctrine: "the entire controversy doctrine no longer compels the assertion of a legal

malpractice claim in an underlying action that gives rise to the claim". *Olds. V. Donnelly*, 150 N.J. 424, 443 (1997). Olds dictates that "all attorney malpractice actions" are exempt from the entire controversy doctrine. Id. at 442. Accordingly, since a legal malpractice action is not required to be joined with pending litigation, it cannot consider an action subject to joinder under R. 4:5-1(b)(2).

The purpose of the R. 4:5-1(b) certification is to "implement the philosophy of the entire controversy doctrine." *See* Pressler & Verniero, *Current N.J. Court Rules*, cmt. 2.1 to R. 4:5-1. Defendant Mazawey had to establish that he was a party subject to joinder under R. 4:28 or R. 4:29-1(b). *See* R. 4:5-1(b)(2). As Plaintiff's claim against Defendant Mazawey is for legal malpractice, it was not subject to joinder in the underlying litigation, and Mazawey's motion fails.

In addition to failing to demonstrate that Defendant was a party subject to joinder, which the Defendants' motion papers make no attempt to establish, the Defendants' next burden would be to establish that any failure to identity them was **inexcusable**. Here, the Plaintiffs' failure to identify Defendant Mazawey in the R. 4:5-1(b)(2) certification was excusable because it was made based on an analysis performed by its counsel at the time determining that the R. 4:5-1(b)(2)

rules would not require naming Defendant Mazawey given the black letter law of *Olds v. Donnelly*, 150 N.J. 424, 443 (1997).

As set forth by Plaintiff's prior counsel, Joseph Campisano, Esq. ("Campisano"), at his deposition "I don't handle malpractice claims. I've never prosecuted a malpractice claim. But I do know that if I miss a timeframe to cancel a contract, whether it be a purchase contract, lease contract or any other kind of contract, and I was informed to do so by my client, I know that could very well result in a malpractice action" (Pa0772).

As set forth above, not only was the failure to amend the R.4:5-1 claim excusable, the Defendants incurred no substantial prejudice. The loss of evidence or ability to find witnesses in the five (5) month interval between the settlement of the case and the institution of this action has had no effect on Defendants' ability to defend this action. The Defendants did not even assert a credible claim of substantial prejudice.

The only hint that Defendants make as to prejudice in this matter is their inability to locate Angelo. Yet, Defendants were served with this lawsuit in September of 2020 and they did not seek to depose Angelo until July of 2022. If the Defendants identified a reason why they waited twenty-two (22) months after the filing of the lawsuit to seek to depose Angelo, they have not set it forth

in their papers nor have they set forth any plausible difference it would have made had Mr. Campisano amended the R.4:5-1 statement in the underlying action.

As set forth above, pursuant to R. 4:5-1 in the underlying action, the Court, in its discretion, would decide whether or not to notify Mr. Mazawey if the R. 4:5-1 statement were amended. If the Court had done so, what difference would it have made? Does Mr. Mazawey seriously claim that he would somehow have taken action to preserve the testimony of Michael Angelo or to somehow enhance his ability to locate him in the time period between the settlement in February 2020 and September 2020 when they sat on their hands for nearly two (2) years after being sued? Furthermore, Mazawey presumably knew of the potential claim for legal malpractice. As set forth by Mr. Campisano on page sixty-eight (68) of his deposition, when an attorney blows a deadline to cancel a lease, they should know that there is a potential legal malpractice claim (Pa0772).

The record does not contain anything from either Mr. Mazawey or his counsel providing competent evidence of any prejudice they have suffered as the supposed failure of Mr. Campisano to amend a R.4:5-1 statement when the party who had been identified in such a statement is not subject to joinder in the

action and when the claims of legal malpractice were exempt from the entire controversary doctrine. Plaintiffs' failure to amend the R. 4:5-1 statement did not cause any substantial prejudice and was excusable.

As set forth above, given the holding in *Olds*, the Plaintiff were entitled to do exactly was they did in the landlord tenant litigation. Namely, to litigate that claim on the merits before and separate from any claim for attorney malpractice against the Defendants. The same issues that the *Olds* Court identified *i.e.* the revelations of attorney confidences and alike which caused the Court to overrule *Circle Chevrolet,* were present in the landlord tenant litigation. Defendant Mazawey was deposed and asserted the attorney client privilege. The failure to keep to join these claims or to file on R4:5-1 notice was not inexcusable; it is practice specifically condoned by *Olds*. But of even greater significance than the Courts misinterpretation of the law is the fact that nothing in the Courts finding would allow the conclusion that the amendment of the R. 4:5-1 statement would have made any difference whatsoever in the underlying litigation nevermind the erroneous conclusion that it caused substantial prejudice as defined by our case law. The Trial Court's ruling in an injustice that this Court should correct.

CONCLUSION

For the foregoing reasons, Plaintiffs/Appellants respectfully request that the Order by reversed and this matter be remanded for Trial on the merits.

SIMON LAW GROUP, LLC,
Attorneys for Plaintiff/Appellant

Dated: January 18, 2024

By: /s/ Kenneth S. Thyne
Kenneth S. Thyne

Superior Court of New Jersey

Appellate Division

Docket No. A-003479-22

OGGI E. DOMANI WEST NEW YORK, LLC, *Plaintiff-Appellant,* vs. RICHARD MAZAWEY, ESQUIRE, THE MAZAWEY LAW FIRM; and JOHN DOES, ESQS., 1-10 and JANE DOES, ESQ., 1-10 (a fictious designation for presently unknown licensed attorneys, professionals and/or unknown persons or entities), jointly, severally and in the alternative, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO.: PAS-L-2690-20 Sat Below: HON. BRUNO MONGIARDO, J.S.C.

DEFENDANTS/RESPONDENTS' BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL OF A MOTION TO DISMISS

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PRELIMINARY STATEMENT

This matter arises from an appeal of Defendants/Respondents', Richard Mazawey, Esq. and Law Offices of Richard S. Mazawey (hereinafter "Respondent", “Defendant” or "Mazawey") Motion to Dismiss for failure to state a claim pursuant to Rule 4:5-1 and the Entire Controversy Doctrine.

On September 8, 2020, Plaintiff, Oggi E. Domani West New York LLC (hereinafter "Appellant", “Plaintiff”), brought claims for legal malpractice against Defendants in connection with legal advice provided in the preparation of and negotiations of a commercial lease and related documents for a Property located at 6600 Hillside Avenue, in West New York, New Jersey (hereinafter “Property”).

Two years prior, on February 2, 2018, Plaintiff brought suit against the Property's landlord, 6600 River Road, LLC, for constructive eviction, breach of lease, fraud in the inducement, unjust enrichment, breach of the covenant of good faith, and violations of the Consumer Fraud Act under Docket No. BER-L-873-18 (hereinafter “Lease Litigation”). After over two years of litigation, on April 27, 2020, a consent order was entered as Plaintiff settled the Lease Litigation, knowing they had a claim against Defendants. In fact, as part of the settlement in the Lease Litigation, Plaintiff negotiated the assistance of the Landlord’s counsel in a planned and subsequent legal malpractice action against

Defendants arising from the same transaction. Thereafter, Plaintiff filed this legal malpractice action against Defendants under Docket No. PAS-L-2690-20 (hereinafter "Instant Action"), in an attempt to recover the amounts paid in the Lease Litigation as well as counsel fees and costs.

Plaintiff failed to name Defendants in the Lease Litigation previously commenced and settled, which for over two years of litigation involved the same parties and the same alleged damages as the Instant Action. Plaintiff's tactical and strategic decision to sue Defendants, two years after filing suit in the underlying Lease Litigation was done to prejudice the Defendants and create piecemeal litigation which is prohibited under New Jersey Court Rules and binding case law.

To that end, on March 1, 2023, Defendants filed a Motion to Dismiss pursuant to Rule 4:5-1 and the Entire Controversy Doctrine. On June 9, 2023, the Honorable Bruno Mongiardo, J.S.C. granted Defendants' Motion to Dismiss which is the basis for the current appeal.

The Instant Action contains the same factual basis presented in the Lease Litigation, often times using the exact same language. Plaintiff's tactical and strategic decision not to sue Defendants in the Lease Litigation runs afoul of the Entire Controversy Doctrine. Plaintiff's intentional decision to settle the Lease Litigation without asserting its claims against Defendants during the Lease

Litigation is exactly what the Entire Controversy Doctrine seeks to avoid - piecemeal litigation which then prejudices the later sued party. Defendants have been prejudiced as critical witnesses are no longer available, documents have been lost, and memories have faded. Plaintiff's claims for damages were artificially inflated to include costs of the Lease Litigation that would have been avoided if all issues had been resolved in one litigation. Lastly, and most egregious, is that Defendant was deposed in the Lease Litigation, as a nonparty witness, while Plaintiff was methodically considering bringing a lawsuit against him and using that knowledge gained from the deposition.

Before this Honorable Court on appeal is the narrow issue of whether the Trial Court was within its discretion when it found that the Entire Controversy Doctrine bars Plaintiff's claim for legal malpractice against the Defendants. While much of Plaintiff's brief is devoted to the malpractice allegations, this is not the proper forum for Plaintiff to argue the specifics of the malpractice allegations against Defendants. The crux of the issue before the Appellate Division is that Plaintiff's purposeful and strategic decision to sue Defendants in the Instant Action, two years after filing suit in the Lease Litigation, was done to prejudice the Defendants and create piecemeal litigation which is prohibited under New Jersey Court Rules and precedent case law.

PROCEDURAL HISTORY

On September 8, 2020, Plaintiff commenced the Instant Action with the filing of the Complaint (Pa0001) and subsequently filed an Amended Complaint on October 22, 2020. (Pa0015). Defendants filed an Answer on November 19, 2020. (Pa0026).

On March 1, 2023 the Defendants filed a Motion to Dismiss pursuant to Rule 4:5-1 and the Entire Controversy Doctrine. (Pa0058). Defendants argued that pursuant to Rule 4:5-1 Plaintiff failed to name Defendants in the Lease Litigation, which was previously commenced and settled, and involved the same parties and the same alleged damages in violation of the Entire Controversy Doctrine. On April 28, 2023, Defendants' Motion to Dismiss was argued before the Honorable Bruno Mongiardo, J.S.C. On June 9, 2023, Judge Mongiardo delivered His Honor's oral opinion where His Honor granted Defendants' Motion to Dismiss. At the outset, Judge Mongiardo clearly held that not all legal malpractice claims are exempt from the Entire Controversy Doctrine. (T19:6-8). His Honor found that the Entire Controversy Doctrine barred the legal malpractice claims against Defendants. A Notice of Appeal was filed on July 17, 2023. (Pa1411). A Request for Oral Argument was filed on November 2, 2023. (Pa1415).

STATEMENT OF FACTS

This is a legal malpractice action brought by Plaintiff, Oggi E. Domani West New York LLC in connection with the legal advice provided in the preparation and negotiations of a commercial lease and related documents in connection with the purchase of a property. (Pa0015). The Plaintiff is a limited liability corporation formed under the laws of the State of New Jersey. (Pa0025). Steven Paradiso (hereinafter "Paradiso") and Patricia Rivas (hereinafter "Rivas") are listed as the members/managers of Plaintiff as set forth in the Operating Agreement, dated January 30, 2016, with their interest in Plaintiff at 51% and 49%, respectively. (Pa1178-Pa1187).

Defendant, Richard Mazawey, Esquire, is an attorney-at-law in the State of New Jersey and a principal with Defendant The Mazawey Law Firm. On behalf of Plaintiff, Michelangelo "Mike" Russo (hereinafter "Russo") entered into and signed a Retainer Agreement ("Retainer") dated March 9, 2016, with Defendants for legal services in "negotiating, preparation and execution of commercial leases for [Plaintiff]." (Pa1272). Defendants were retained to represent Plaintiff in connection with the negotiation of a commercial property located at 6600 Hillside Avenue, in West New York, New Jersey for a lease term of thirty-six (36) months. (Pa0015, ¶ 5). At all relevant times, the Property was

owned by 6600 River Road Associates, LLC (hereinafter "6600 River Road"). (Pa0015, ¶ 5).

A. The Lease Litigation Negotiations

Defendants began negotiating with 6600 River Road on or about May 16, 2016, over terms for a lease agreement for the Property. (Pa 0830,T148:3-10). The underlying lease and associated closing documents were executed on or about July 1, 2016. (Pa1188-Pa1261). The negotiation between Plaintiff and 6600 River Road generated four (4) documents concerning the lease of the Property: a Lease Agreement dated July 1, 2016 (hereinafter "Lease") (Pa1188); a Rider to the Lease Agreement dated June 30, 2016 (hereinafter "Lease Rider") (Pa1243); an Option Agreement for the future purchase of the Property dated July 1, 2016 (Pa1247); and Guaranty of the Lease Agreement dated July 1, 2016. (Pa1267).

Mr. Russo, a representative of Plaintiff, played a pivotal role in the lease negotiations and subsequent termination of the Lease from March 2016 to November 2016. Mr. Russo's role during the lease negotiation period was described by Mr. Mercedes in the Lease Litigation as follows:

> During negotiations for the Lease, Option and Rider that are at issue in [the Lease Litigation], [Russo], a non-member of Plaintiff, was appointed as primary contact person between Plaintiff, Michael Cervelli Real Estate, LLC, and Plaintiff's Counsel, Richard Mazawey. As such, with very few exceptions, Russo handled all communications on behalf of Plaintiff relative to

> the above entities and people insofar as negotiations for the Lease, Option and Rider at issue in this litigation was concerned. (Pa 1126-Pa1127).

Mr. Russo handled all communications on behalf of Plaintiff relative to the above entities and people insofar as negotiations for the Lease, Option and Rider at issue in this litigation and the subsequent termination of same. (Pa1126-Pa1128). Mr. Russo was similarly described, in Plaintiff's Answers to Supplemental Interrogatories in the Lease Litigation, as someone "who was utilized to gather information and submit the same to Plaintiff." (Pa1314 ¶27). Mr. Russo was involved in providing Defendants with Plaintiff's corporate documents, including the Certificate of Formation, a corporate resolution authorizing Plaintiff to sign the lease, and the Operating Agreement. (Pa1132). Mr. Russo provided the corporate documents to Mr. Mazawey on behalf of Plaintiff on June 27, 2016. (Pa1132). On October 27, 2016, Mr. Russo, once again, acted on behalf of Plaintiff and instructed Mr. Mazawey, to terminate the Lease due to the lack of a sewer connection to the Property. (Pa1022).

Plaintiff took control of the Property after the execution of the Lease on July 1, 2016. (Pa0017 ¶11). The Lease Rider contains several provisions which are at issue in this matter and were the focus of the Lease Litigation. Paragraphs 2 and 4 of the Lease Rider read as follows:

> 2. If [Plaintiff] does not receive approvals from the Town of West New York for its proposed use of the property for a café

> (restaurant), and bakery on the first floor of the building and a retail clothing store on the second floor of the building on or before September 30, 2016, [Plaintiff] shall have the right to accelerate the Termination Date of the Lease on (10) days' notice to [6600 River Road]. (Pa1244).
>
> > a) [Plaintiff] will provide [6600 River Road] with a copy of its application to the Planning Board or Zoning Board of Adjustment of the Town of West New York, inclusive of Architect's Plans and all other exhibits or submissions on or before July 15, 2016. (Pa1244).
>
> 4. [Plaintiff] will diligently prosecute its application for approvals referenced in Paragraph 2 above at [Plaintiff] 's expense. (Pa1245).

Discovery in both the Lease Litigation and the Instant Action showed that Plaintiff began investigating the sanitary sewer connection in June or July of 2016. Plaintiff presented deposition testimony in the Lease Litigation that in an effort to determine the ability to establish a sewer connection, Mr. Granata, on behalf of Plaintiff, ran a camera down a toilet that went "nowhere." (Pa0193-Pa0194,T129:14-130:24). Mr. Granata testified that he was looking to apply for permits with the City of West New York but was told that he was "wasting [his] time, there's no sewer there." (Pa0195-Pa0196,T131:16-132:6). Mr. Granata never disclosed this information to Defendants. Instead Mr. Granata claimed that he disclosed this information to Mr. Mercedes, who was going to report the findings to Mr. Mazawey, but did not know if this ever occurred. (Pa0198-Pa0199,T134:21-135:18).

Mr. Mercedes purportedly told Mr. Mazawey to cancel the lease sometime in July after learning about the sewer connection issue from the town of West New York. (Pa0839,T182:18-183:2). This instruction was not confirmed in writing. (Pa0839,T183:3-12). It was not until October 27, 2016, that Mr. Russo, on behalf of Plaintiffs, via email, instructed Mr. Mazawey, to terminate the Lease due to the lack of a sewer connection to the Property. (Pa1022). On October 31, 2016, Mr. Mazawey, on behalf of Plaintiff, sent a correspondence to Mr. Zakim, counsel for 6600 River Road, terminating the Lease. (Pa1024). On November 7, 2016, 6600 River Road sent a letter in response stating that Plaintiff was responsible for the remaining thirty-four (34) months of rent and was not entitled to a refund of monies already paid. (Pa1026-Pa1027). The November 7, 2016 letter also confirmed that Plaintiff failed to comply with Paragraphs 2 and 4 of the Lease Rider, as it did not submit the application with the town of West New York. Ibid.

On February 2, 2018, Plaintiff brought suit against 6600 River Road, for constructive eviction, breach of lease, fraud in the inducement, unjust enrichment, breach of the covenant of good faith, and violations of the Consumer Fraud Act. (Pa0957). This Lease Litigation ultimately settled between Plaintiff and Defendant 6600 River Road Associate, and a Consent Order

regarding the settlement was filed in Court on April 27, 2020. (Pa1272)(Pa1016).

Of particular importance to the Instant Action is provision (5) in the Settlement Agreement entitled, "Cooperation by Defendant and Counsel for Defendant in Action Against Plaintiff's Former Counsel." (Pa1274). The provision sets forth that Plaintiff may pursue "a claim for malpractice against Plaintiff's former counsel attorney Richard Mazawey in connection with the transaction which is the subject of the Civil Action." (Pa1274). A short time after settling the Lease Litigation, knowing they had a claim against Defendants, Plaintiff filed this Instant Action against Defendants, in an attempt to recover the amounts paid in the Lease Litigation as well as counsel fees and costs. (Pa0001).

B. The Lease Litigation And The Legal Malpractice Action Claims Arise From Related Facts Or Series Of Transactions

The Amended Complaint in the Instant Action contains the same factual basis presented in the Lease Litigation, oftentimes using the exact same language. On February 2, 2018, Plaintiff brought the Lease Litigation suit against 6600 River Road, for constructive eviction, breach of lease, fraud in the inducement, unjust enrichment, breach of the covenant of good faith, and violations of the Consumer Fraud Act. (Pa0957). Plaintiff commenced the Instant Action with the filing of the Complaint on September 8, 2020, and a

subsequently filed an Amended Complaint on October 22, 2020. (Pa001)(Pa0015). A comparison of both complaints clearly shows that both complaints emanate from a single larger controversy with interrelated and at times identical facts. In fact, the alleged claims under both complaints accrue at the same time from the same series of events. There are striking similarities between the Lease Litigation Complaint and the Instant Action Complaint.

> Instant Action: 5. Defendants represented the Plaintiffs in a negotiation of a lease dated July 1, 2016 with 6600 River Road Associates, LLC to lease property at 6600 Hillside Avenue, West New York, New Jersey for a lease term of thirty-six (36) months ("the Lease"). (Pa0001)(Pa0015).
>
> Lease Litigation: 3. By a certain lease dated July 1, 2016 ("Lease"), Landlord agreed to lease the Premises to Plaintiff for a term of 36 months at a base rent ("Base Rent") of $25,000.00 per month, plus additional rent in the form of certain expenses and real estate taxes associated with the Premises. (Pa0957).
>
> Instant Action: 11. The lease provided that Plaintiff's obligation to pay rent did not commence until October 1, 2016 when Plaintiff was given access to the premises as of July 1, 2016. (Pa0001)(Pa0015).
>
> Lease Litigation: 5. The Lease provided that Plaintiff's obligation to pay Base Rent did not commence until October 1, 2016 though Plaintiff was given access to the Premises as of July 1, 2016 in order to allow Plaintiff to begin work on the Premises. (Pa0957).
>
> Instant Action: 12. Prior to and upon execution of the lease, Plaintiff paid to the landlord a $5,000.00 nonrefundable deposit, a $50,000.00 security deposit, and a $25,000.00 representing a pre-payment of base rent. (Pa0001)(Pa0015).
>
> Lease Litigation: 7. Prior to and upon execution of the Lease, Plaintiff paid to Landlord a $5,000.00 non-refundable deposit, a

$50,000.00 security deposit and $25,000.00, representing a pre-payment of Base Rent. (Pa0957).

Instant Action: 13. Shortly after taking possession of the property, Plaintiff discovered that the premises lacked a sanitary sewer connection. (Pa0001)(Pa0015).

Lease Litigation: 10. Shortly after taking possession, Plaintiff discovered that the Premises lacked a sanitary sewer connection. (Pa0957).

Instant Action: 14. Plaintiff advised Defendant, Mazawey, of this development in July of 2016 and discussed same with him in August and September, 2016. (Pa0001)(Pa0015).

Instant Action: 16. Paragraph 2 of the Lease provided Plaintiff with the right to terminate on ten days' notice to the landlord in the event the Plaintiff did not receive approvals from the town of West New York for its intended use on or before September 30, 2016. (Pa0001)(Pa0015).

Instant Action: 17. Despite the plain language of the Lease, Defendant did not advise Plaintiff to terminate the lease prior to September 30, 2016. (Pa0001)(Pa0015).

Lease Litigation: 11. Upon further investigation, Plaintiff discovered that the City of West New York had no sanitary sewer connection in the vicinity of the Premises, and further, that the existing laterals in the Premises were all blocked preventing any sewerage from being discharged from the Premises. (Pa0957).

Lease Litigation: 12. Absent a sanitary sewer connection, Plaintiff was unable to obtain a certificate of occupancy for the Premises thereby rendering the Premises uninhabitable. (Pa0957).

Lease Litigation: 13. Upon making this discovery, Plaintiff notified Landlord and offered to attempt to correct the sanitary sewer problem if Landlord would agree to a rent abatement to determine if a solution was economically feasible. Landlord denied Plaintiff’s request. (Pa0957).

> Instant Action: 18. Despite the plain language of the Lease, Defendant did not provide notice to the landlord terminating the lease until October 28, 2016, which termination was rejected by the landlord as untimely. (Pa 0015).
>
> Lease Litigation: 14. By phone call and email dated October 28, 2016, Plaintiff's legal counsel notified Landlord's legal counsel that due to the ongoing sanitary sewer connection issue, Plaintiff was cancelling the Lease and demanded a full return of all sums paid to Landlord thereunder. (Pa 0957).

With respect to damages in the Instant Action, Plaintiff claims that they are entitled to damages in the amount of approximately $117,500.00, including $80,000.00 for the security deposit and rent; $15,000.00 in architectural fees; $10,000 in engineering fees; and $12,500.00 in costs in cleaning up the Property. (Pa0015). Similarly, these items were the same exact damages claimed by Plaintiff in the Lease Litigation. Ibid.

C. The Strategic Decision to Depose Defendant Mazawey in the Lease Litigation Had Far Reaching Effects on His Defense in the Instant Action

Defendant Richard Mazawey was deposed in the Lease Litigation on November 7, 2019, a year before Plaintiff undertook a lawsuit against Defendant Mazawey. At this deposition, Defendant Mazawey was questioned extensively by both counsel for 6600 River Road and Plaintiff regarding his knowledge of the facts and events involving the lease negotiations between 6600 River Road and Plaintiff. He was questioned about who he communicated with at the

Plaintiff organization with respect to the negotiations and execution of the lease. (Pa1054,T99:15-25). There were in depth probative questions about the terms and requirements of the lease. (Pa1058-Pa1060). Plaintiff's counsel could have obtained the same information which Defendant Mazawey was questioned about in his deposition from his own client. Notwithstanding, Defendant Mazawey was questioned about the investigation performed by Plaintiff into the sewer connection issue and Defendant Mazawey's knowledge of Plaintiff attempting to obtain a Certificate of Occupancy in the underlying action. (Pa1065). Perhaps most troubling was the line of questioning regarding the termination of the lease agreement, which is directly relevant and probative as to Plaintiff's claims against Defendants in the malpractice lawsuit. This line of questioning is as follows:

> Q. "What does it say about the tenant's right to terminate?"
>
> A. "….but in paragraph 2 it says if the tenant doesn't receive approvals from the town of West New York for its proposed use of the property for a cafe…and bakery….and a retail clothing store….on or before September 30, 2016." (Pa1073, T174:1-15).
>
> Q. "Do you know whether or not the tenant ever exercised its right to terminate in accordance with this agreement?" (Pa1074-Pa1075, T180:16-18).
>
> A. "I believe they did that. I think we did that in October, if I'm not mistaken. And I know there was probably some discussions with the principals and with your father and I in September." (Pa1074-Pa1075, T180:19-23).

> Q. "Why was it terminated in October if the tenant was to….wasn't that after the date of September 30th?" (Pa1074-Pa1075, 180:24-181:1).
>
> A. "Again, my interpretation of the 30th….is that that's a trigger date, not a drop dead deadline." (Pa1074-Pa1075,T181:2-4).
>
> Q. "Did the Plaintiff LLC exercise its right to accelerate the termination of lease as provided for under the rider to the lease?" (Pa1082,T210:15-17).
>
> A. "I know the lease was terminated in October of 2016." (Pa1082,T210:18-19).
>
> Q. "Can you identify any-did you convey that termination?" (Pa1082,T210:20-21).
>
> A. "Yeah, we kind of did it almost every way in creation. We did e-mails. We did regular mail." (Pa1082,T210:22-24).

D. The Decision To Sue Mr. Mazawey In The Instant Litigation Came During The Lease Litigation

The decision to sue Defendants predated the settlement of the Lease Litigation and was strategically made during the Lease Litigation. The record is filled with Plaintiff's admissions that they absolutely decided to sue the Defendants in a separate lawsuit, during the settlement of the Lease Litigation to attempt to recoup the damages incurred in the Lease Litigation. Mr. Mercedes, Plaintiff's designated representative, testified that he decided, in consultation with his attorney, Joseph M. Campisano, Esq., to pursue a legal malpractice action against Defendants, towards the end of the Lease Litigation. (Pa0844,T203:1-5;T205:15-21). In making this determination and in setting up

this subsequent litigation against Defendants, Plaintiff secured a provision in the Settlement Agreement where he negotiated 6600 River Road's cooperation in a subsequent malpractice action against Defendants. (Pa0845,T206:24-207:12). Mr. Mercedes could not articulate any valid reason why Defendants were not sued during the Lease Litigation.(Id., T207:19-T208:5).

Likewise, Mr. Granata, another individual who acted on behalf of the Plaintiff, testified that the decision to start a legal malpractice action against Defendants was discussed and decided during the Lease Litigation at the time of the settlement negotiations.(Pa0252-Pa0254,T188:18-190:17). According to Mr. Granata, the idea of pursuing a legal malpractice action against the Defendants could be traced to discussions with Mr. Mercedes and Mr. Paradiso prior to the Settlement Agreement. (Pa0260,T196:2-6)(Pa0255,T191:13-15). As a result of these discussions, Plaintiff obtained a provision in the Settlement Agreement to secure the assistance of 6600 River Road's attorney in a legal malpractice action against Mr. Mazawey. (Pa0255, T195:18-196:6). This provision for cooperation in a legal malpractice action is significant not only because it forecasted the impending malpractice lawsuit, but also because it admitted that the claim for malpractice was connected to the Lease Litigation:

> In consideration of the Settlement Payment and only to the extent the Settlement Payment is made and received in full by [6600 River Road] in accordance with this Settlement Agreement, in the event Plaintiff **pursues a claim for malpractice against Plaintiff's**

> **former counsel attorney Richard Mazawey in connection with the transaction which is the subject of the Civil Action**, [6600 River Road] and [6600 River Road]'s counsel shall, at no cost or expense to the [6600 River Road]and/or the law office of Zakim & Zakim, P.C. cooperate and provide support to Plaintiff in the form of testimony, affidavits and/or releasing relevant documents from counsel's closing file (redacted as necessary for purposes of preserving attorney client privilege). (Pa1274) (Emphasis added).

The time period between when Plaintiff settled the Lease Litigation and when they commenced the instant action is critical. On or about April 27, 2020, a Consent Order memorializing that a settlement had been reached was filed with the Court. (Pa1016). Within five (5) months of settling the Lease Litigation, Plaintiff brought the Instant Action against Defendants. (Pa0015).

In the Instant Action, on March 1, 2023, Defendants filed a Motion to Dismiss pursuant to Rule 4:5-1 and the Entire Controversy Doctrine. On June 9, 2023 the Honorable Bruno Mongiardo, J.S.C. granted Defendants' Motion to Dismiss which is the basis for the current appeal.

LEGAL ARGUMENT

POINT I.
LEGAL MALPRACTICE CLAIMS ARE NOT PER SE EXEMPT FROM THE ENTIRE CONTROVERSY DOCTRINE

There is no blanket legal malpractice exemption to the Entire Controversy Doctrine. Plaintiff's entire argument on appeal is that it is immune from a Rule 4:5-1(b)(2) disclosure because legal malpractice cases are exempt from the Entire Controversy Doctrine under Olds v Donnelly, 150 N.J. 424(1997).

(Pb31). As Plaintiff's restricted reading of Olds is unavailing and inapplicable to the case at bar, Plaintiff's argument collapses.

In Olds v. Donnelly, the plaintiff client retained the defendant attorney, who ultimately withdrew as counsel, to pursue a medical malpractice action. Olds, 150 N.J. at 428. The plaintiff alleged that, before the attorney withdrew, they failed to serve the summons and complaint on the doctor. Ibid. The trial court in the medical malpractice action dismissed the complaint with prejudice for untimely service. Ibid. The plaintiff then filed a legal malpractice action against the attorney. Ibid. The attorney moved to dismiss, arguing that the client should have joined him in the medical malpractice action. Ibid. The trial court denied the motion to dismiss, ruling that the legal malpractice claim did not accrue until dismissal of the medical malpractice claim. Ibid. The Appellate Division affirmed.

The New Jersey Supreme Court affirmed the Appellate Division's holding that the Entire Controversy Doctrine did not bar that action, not because of some *per se* exemption from the Entire Controversy Doctrine for legal malpractice claims, but because it "**had not accrued during the pendency of the underlying medical-malpractice action.**" Ibid. (emphasis added). Rather, the claim only accrued upon the trial court's dismissal of the medical malpractice complaint. Ibid. The Court in Olds limited this exception of the Entire

Controversy doctrine to legal malpractice claims and their underlying litigation. Specifically the Court found

> **With transactional malpractice, such as negligence in drafting a contract or will or performing a real estate closing, the need for an exception to the entire controversy doctrine is not as compelling**. The attorney is not saddled with the conflicting roles of advocating on behalf of the client in the underlying litigation and representing his or her own interests as a defendant. Moreover, a legal-malpractice claim alleging transactional negligence is a claim against a primary tortfeasor. As such, **the entire controversy doctrine's purposes are served by requiring plaintiffs to notify the trial court of their potential malpractice claims. The attorney, like the other defendants, is a potential cause of a plaintiff's damages.**

Olds, 150 N.J. at 442 (emphasis added).

Thus, the New Jersey Supreme Court in Olds v. Donnelly found that the plaintiff's legal malpractice claim was not barred by the Entire Controversy Doctrine because the alleged malpractice occurred in the "underlying action that [gave] rise to the claim." 150 N.J. at 443.

The Supreme Court revisited this decision in Dimitrakopoulus v. Borrus, 237 N.J. 91, 109 (2019), and refined the Olds' analysis as to the Entire Controversy Doctrine's application for legal malpractice cases. In Dimitrakopoulos, the Court permitted the Entire Controversy Doctrine to bar a legal malpractice claim when the two claims arose from related facts or the same transaction. Dimitrakopoulos 237 N.J. at 119; DiTrolio v. Antiles, 142 N.J. 253,

267(1995).

In Dimitrakopoulos, the plaintiff client formed a limited liability company with a business associate. 237 N.J. at 100. The client became suspicious that his business associate was diverting funds, and retained the defendant law firm to file a complaint against the associate. Id. at 101. The law firm moved to withdraw as counsel shortly after filing the complaint, and was eventually permitted to withdraw as counsel. Id. at 101-02. The firm later filed a complaint against the client for collection of legal fees. Id. at 102. The client did not bring any counterclaims against the firm. Ibid. The firm ultimately obtained judgment against the client. Id. at 103.

Three years after the entry of judgment in the collection action, the client sued the firm for legal malpractice with respect to its handling of the action against the business associate before withdrawing as counsel. Id. at 104. The firm moved to dismiss the complaint for failure to state a claim based on the Entire Controversy Doctrine. Ibid. The trial court agreed that the client should have asserted their malpractice claim in the collection matter. Id. at 104-05. The Appellate Division affirmed that decision, confirming that, for purposes of the Entire Controversy Doctrine, the "underlying action" was the litigation between the client and the business associate, not the firm's collection action. Ibid. The client appealed to the New Jersey Supreme Court, which confirmed that legal

malpractice claims are not *per se* exempt from the Entire Controversy Doctrine. Id. at 119-20. In so holding, the court stated as follows:

> We reiterate our holding in Olds v. Donnelly that the entire controversy doctrine does not compel a client to assert a legal malpractice claim against an attorney **in the underlying litigation in which the attorney represents the client**. 150 N.J. 424, 443, 696 A.2d 633 (1997). A collection action brought by a law firm against its client, however, **does not constitute such underlying litigation for purposes of the principle stated in Olds**. The assertion of a malpractice claim in such an action -- in which the attorney and client are already adverse -- does not raise the privilege and loyalty concerns that warranted the exception to the entire controversy doctrine recognized in Olds.

Id. at 99 (emphasis added).

A proper reading of Olds and Dimitrakopoulos together results in a finding that the Entire Controversy Doctrine bars a plaintiff from bringing claims for legal malpractice that occurred in a transactional setting, when the claims arise from related facts and the same transaction as a previous litigation wherein the defendant did not represent the plaintiff.

The Dimitrakopoulos Court specifically focused on the issue of the timing of the accrual of the claims as well as their relationship to one another. Id. at 119.

> When a court decides whether multiple claims must be asserted in the same action, its initial inquiry is whether they "arise from related facts or the same transaction or series of transactions…the determinative consideration is whether distinct claims are aspects

> of a single larger controversy because they arise from interrelated facts. Ibid.

The Dimitrakopoulos Court followed the Olds' Court rulings in finding that in instances where the Entire Controversy Doctrine does not bar the action, it is not because of some *per se* exemption from the Entire Controversy Doctrine for legal malpractice claim. Rather, it is because the two claims do not "arise from related facts or the same transaction or series of transactions" Ibid. Unlike Olds, where a plaintiff's legal malpractice claim accrued as a result of the underlying action, the Entire Controversy Doctrine's purpose is served by requiring the plaintiff to notify the trial court of the potential claim which was known and existed during the underlying action. In Dimitrakopoulos, the plaintiff's claim for alleged legal malpractice against defendants which was known and existed before the litigation was barred by the Entire Controversy Doctrine. Id. at 119. Both Olds and Dimitrakopoulos focused on the importance of the timing of the accrual of an action. They reviewed when the claim arose and whether they arose from similar or related facts. Olds, 150 N.J. at 428; Dimitrakopoulos , 237 N.J. at 119.

The Instant Action is not a case where the allegations of legal malpractice accrued after the pendency of the underlying action. In fact, the claims for alleged legal malpractice were known to the Plaintiff during the pendency of the Lease Litigation. This is not a case where the allegations in the Instant Action

are separate and distinct from the Lease Litigation. In fact, they are interconnected as they both arise from the same transaction as evidenced by both the pleadings and in discovery. This is not a case where the Defendants represented Plaintiff in the Lease Litigation, thereby putting them in conflicting roles of representing the client in the underlying action and also representing their own interest as defendants and implicating issues of privilege or fairness. See Olds, 150 N.J. at 442. Quite simply, Plaintiff brought the Instant Action for legal malpractice subsequent to the Lease Litigation wherein claims against Defendants had already accrued and the circumstances surrounding the transaction were already litigated.

The Instant Action certainly falls outside the scope of exception to the Entire Controversy Doctrine as set forth in Olds. Ibid. In the Lease Litigation, Defendants were not acting as counsel for Plaintiff and the alleged malpractice accrued prior to litigation. The Olds Court's policy considerations for exempting plaintiff's claim from the Entire Controversy Doctrine were also not present in this matter. Ibid. Plaintiff's claim for legal malpractice against Defendants is not protected from the Entire Controversy Doctrine pursuant to the exceptions set forth in Olds v Donnelly, 150 N.J. 424(1997) and the holding in Dimitrakopoulos v. Borrus, 237 N.J. 91, 119 (2019).

POINT II.

THE APPLICABLE STANDARD OF REVIEW IS ABUSE OF DISCRETION

Rule 4:5-1(b)(2), "Requirements for First Pleadings - Notice of Other Actions or Potentially Liable Persons" requires each party to disclose in the certification the names of any other party who should be joined in the action. Parties have a continuing obligation to amend the certification. When a party neglects their obligation under Rule 4:5-1(b)(2), a trial court may impose sanctions for failure to comply. A trial court's imposition of sanctions for failure to comply with Rule 4:5-1(b)(2) is reviewed under an abuse of discretion standard. Karpovich v. Barbarula, 150 N.J. 473, 483 (1997). An abuse of discretion occurs if the court "failed to consider controlling legal principles…" Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (internal quotation marks and citation omitted).

It is a well-recognized legal principle that the Entire Controversy Doctrine is an equitable principle and its application is left to judicial discretion based on the factual circumstances of the case. Bank Leumi USA v Kloss, 243 N.J. 218 (2020); Dimitrakopoulus v Borrus, 237 N.J. 91, 114 (2019); 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011); Highland Lakes Country Club & Comty. Ass'n v. Nicastro, 201 N.J. 123, 125 (2009). The Entire Controversy Doctrine promotes judicial fairness. "In considering whether the

application of the doctrine is fair, courts should consider fairness to the court system as a whole, as well as to all parties." Dimitrakopoulus 237 N.J. at 114. The judicial discretion standard of review is limited and is in no way intended to allow for the substitution of the lower court's judgment by the Appellate Court. Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523 (App. Div. 1996). "[I]n reviewing the exercise of discretion it is not the appellate function to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute [their] judgment for that of the lower court. The question is only whether the trial judge pursues a manifestly unjust course." Id. at 528. The judicial discretion standard applicable to the Appellate Court's review of Entire Controversy Doctrine dismissal includes the lower court's determination whether a Rule 4:5-1(b)(2) disclosure should have been made in a prior action. 700 Highway 33 LLC v Pollio, 421 N.J. Super. 231, 236 (App. Div. 2011). "That disclosure requirement exists 'to implement the philosophy of the entire controversy doctrine." Dimitrakopoulus v. Borrus, 237 N.J. 91, 109 (2019).

The Trial Court's granting of Defendants' Motion to Dismiss pursuant to Rule 4:5-1(b)(2) should be reviewed under an abuse of discretion standard.

POINT III.

LEGAL MALPRACTICE CLAIMS AGAINST DEFENDANTS ARE NOT EXEMPT FROM THE ENTIRE CONTROVERSY DOCTRINE

A. The Trial Court Correctly Determined that Plaintiff Failed to Comply with the R. 4:5-1 Disclosure Requirement In Violation of the Entire Controversy Doctrine

Rule 4:5-1(b)(2) states, in pertinent part:

> Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a **continuing obligation** during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29-1(b).
>
> (emphasis added)

Rule 4:5-1(b)(2) has codified the Entire Controversy Doctrine which promotes the principle that a legal controversy should occur in one litigation in one court where parties present all of their claims and defenses. Bank Leumi USA v. Kloss, 243 N.J. 218, 227 (2020); Wadeer v N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015); Dimitrakopoulos v. Borrus, 237 N.J. 91, 108 (2019) (quoting

Cogdell ex rel. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989). The doctrine "seeks to impel litigants to consolidate their claims arising from a 'single controversy whenever possible.'" Thorton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983). "The goals of the [entire controversy] doctrine are to promote judicial efficiency, assure fairness to all parties with a material interest in an action, and encourage the conclusive determination of a legal controversy." Olds v Donnelly, 150 N.J. 424, 431(1997). Rule 4:5-1(b)(2) ensures that these goals are met by requiring each party to certify with its first pleading whether the matter in controversy is the subject of any pending [or contemplated] litigation." Karpovich v Barbarula, 150 N.J.473, 480 (1997).

The Trial Court correctly found that Plaintiff should have complied with Rule 4:5-1(b)(2) and included Defendants as a party to the Lease Litigation. The rule requires the parties to certify "whether any other action … is contemplated; and, if so, the certification shall identify such actions and all parties thereto." R. 4:5-1(b)(2). When the Trial Court examined the potential for another action emanating from the underlying facts, the Court determined that a malpractice claim against Defendants was contemplated by the Plaintiff well before the termination of the Lease Litigation, as Plaintiff believed that Defendant Mazawey's alleged malpractice was a substantial contributing factor for Plaintiff's losses. R. 4:5-1(b)(2); (T14:10-15). There is ample evidence in the

record for the Trial Court to have found that Plaintiff's representatives admitted that the decision to pursue a legal malpractice action against the Defendants was made during the Lease Litigation with the landlords. (T24:14-18)(Pa0844,T203:1-5;T205:15-21).

In fact, as part of a settlement in the Lease Litigation, Plaintiff secured a provision in the settlement agreement, that the landlord would cooperate in a subsequent malpractice action against the Defendants. (T24:19-23)(Pa08745, T206:24,T207:12)(Pa0260,T196:26)(Pa0255, T195:18-T196:6). Notably, the provision securing cooperation used language which directly connected the claim for malpractice against Defendants with the transaction which is the subject of the Lease Litigation. (Pa1274).

Rule 4:5-1(b)(2) requires: "Each party shall disclose in the certification the names of any non-party who should be joined in the action… because of potential liability to any party on the basis of the same transactional facts". This is a continuing obligation to disclose. Ibid. It is not up to the parties to determine the necessity for joinder. Rather, this is within the court's discretion to compel joinder. It is abundantly clear, as the Trial Court pointed out, that the Complaint in the Instant Action alleges the same factual basis presented in the Complaint in the Lease Litigation often sharing the same language. (T14:7-10)(Pa0001)(Pa0015)(Pa0957). In fact the Trial Court correctly described the

two actions and the damages asserted in both the Lease Litigation and the Instant Action as "overlapping". (T14:7-17). In addition, the Settlement Agreement in the Lease Litigation contains the provision which states: "claim for malpractice against Plaintiff's former counsel attorney Richard Mazawey in connection with the transaction which is the subject of the [Lease Litigation]." (Pa1274). By including this language "in connection with the transaction" in the provision to describe the relationship between Defendants' alleged malpractice and the Lease Litigation, Plaintiff recognized the strong connection between the two actions.

The Trial Court correctly found that Defendants should have been joined because the claims in the Lease Litigation and the Instant Action arise from related facts or the same transaction and any alleged malpractice claims were transactional in nature and accrued before the prior litigation. (T19-21). In addition, the Trial Court recognized that Plaintiff alleged he had already suffered damages when he discovered his attorney's alleged negligence. (T15). In fact, the Trial Court listed the alleged identical damages pled in both actions namely: the funds advanced pursuant to the lease for security and first month of rent, engineering fees, architect's fees, cleanup and maintenance cost for the building and grounds, and the fees paid to Defendant Mazawey. (T14:16-25,T15:1-6,T24:1-13)(Pa0001)(Pa0015)(Pa0957). The Trial Court's findings are in line with the requirements under the Court Rules. Plaintiff was required to identify

Defendants so as to ensure that the legal controversy were to occur in one litigation, in one court, with all parties. Instead, Plaintiff made a strategic decision to pursue Defendants in a second forum for a second bite at the apple, causing piecemeal litigation to the prejudice of Defendants. Accordingly, the Trial Court did not abuse its discretion in finding that Plaintiff's disregard of its obligation to name Defendants in the Lease Litigation pursuant to Rule 4:5-1 should warrant dismissal.

B. The Trial Court Correctly Determined that the Instant Action is a Successive Action Thereby Subject to Dismissal Under The Entire Controversy Doctrine.

The Legal Malpractice Claim against Defendants is a successive action to the Lease Litigation, emanating from the same set of facts, and thus should be dismissed. In determining whether successive claims constitute one controversy for purposes of the Doctrine, courts have looked at whether the claims against the different parties arise from related facts or the same transaction or series of transactions. Claims of legal malpractice which accrue prior to the instant matter and are transactional in nature are not exempt from the Entire Controversy Doctrine. Dimitrakopoulos v Borrus, 237 NJ 91 (2019); DiTrolio v. Antiles, 142 N.J. 253, 267(1995); Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J.Super. 463, 497(App.Div.1978), *certif. denied,* 79 *N.J.* 488, 401 *A.*2d 243 (1979). It is the core set of facts that

provides the link between distinct claims against the same or different parties and triggers the requirement that they be determined in one proceeding. See Newmark v. Gimbel's, Inc., 54 N.J. 585, 600–01(1969); Applestein v. United Bd. & Carton Corp., 35 N.J. 343, 356(1961); Vacca v. Stika, 21 N.J. 471, 476, (1956); Ajamian v. Schlanger, 14 N.J. 483, 488, cert. denied, 348 U.S. 835, 75 S.Ct. 58, 99 L.Ed. 659 (1954). In DiTrolio v. Antiles, 142 N.J. 253, 267(1995) the Court held that a test for determining whether a litigant should assert claims in a suit, rather than save them in reserve for a later suit, is whether "after final judgment is entered, [the parties will] likely ... have to engage in additional litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions." Id. at 268; Archbrook Laguna, LLC v. Marsh, 414 N.J. Super. 97, 105–06(App. Div. 2010).

The factual basis of the Lease Litigation and the Instant Action pleadings are intrinsically linked by the same occurrence and facts. This is established by the repetitive nature of the complaints and the plain language in the Settlement Agreement. (Pa0001)(Pa0015)(Pa0957(Pa1273-Pa1279). This is not a case where the Entire Controversy Doctrine is used "to bar component claims either unknown, unrisen or unaccrued at the time of the original action." Pressler &

Verniero, Current N.J. Court Rules, R. 4:30A, cmt. 3.3 (2023); Dimitrakopoulos, 237 N.J. at 118-21.

The Trial Court properly followed the Dimitrakopoulos Court in determining that the instant claims for legal malpractice were transactional and had accrued at the time of the Lease Litigation. (T23:16-25). The type of transaction and the timing of Defendants' alleged malpractice differentiates this case from the defendants in Olds v. Donnelly, 150 N.J. 424 (1997) making that case inapposite. In the Instant Action, the claims in the Amended Complaint are based upon the same factual basis as the claims in the Complaint in the Lease Litigation "at times using almost the exact same language found therein," as correctly pointed out by the Trial Court. (Pa0001)(Pa0015)(Pa0957)(T14:7-10). The record clearly shows the strong link between the Instant Action and the Lease Litigation. In fact, Plaintiff does not hide the fact that Plaintiff's own representatives admitted that they decided to sue defendant during the pendency of the Lease Litigation. (Pa0844,T203:1-5,T205:15-21)(T24:14-18).

The Trial Court focused on the timing of the events of the alleged legal malpractice in relation to the Lease Litigation to determine that the Instant Action was a successive action. The Court found that legal malpractice claims, similar to transactional malpractice, are not exempt from the Entire Controversy Doctrine where the alleged malpractice accrues before the prior litigation.

(T20:24-25,T21:1). The alleged malpractice in Defendants' advice to Plaintiff regarding the lease agreement was not only transactional in nature but had already happened before Plaintiff initiated the Lease Litigation.(T23:23-25). Similarly, a review of the claim for damages in both complaints shows the same claim for the same damages in both cases. (Pa0001)(Pa0015)(Pa0957). With respect to damages, the Trial Court correctly concluded that Plaintiff had already suffered damages when he discovered the Defendant's alleged negligence. (T15:4-5).

The most glaring and egregious example of the interconnectedness of the two actions is found in the Lease Litigation Settlement Agreement provisions. Mr. Mercedes, on behalf of the Plaintiff, placed a provision in the Settlement Agreement where he secured the cooperation of 6600 River Road in a subsequent malpractice action against Defendants, wherein it was specifically noted that the transaction is the same as the Lease Litigation. (Pa1272)(T27:15-21). The Trial Court correctly found that because the Lease Litigation and the Instant Action were successive, Plaintiff had the ability to bring a claim against the Defendants in the Lease Litigation. Plaintiff's failure to do so violated the Entire Controversy Doctrine. (T25:17-22).

It is difficult to imagine that on the one hand Plaintiff argues that they did not have to join Defendants in the Lease Litigation, but then devotes twelve

pages of the brief to demonstrate that the allegations of legal malpractice occurred before the Lease Litigation settlement. (Pb 4-16). The Entire Controversy Doctrine applies to known and accrued claims that the litigant had a fair and reasonable opportunity to fully litigate in the prior forum. Dimitrakopoulos, 237 N.J. at 99-100. Plaintiff is unable to avoid the Entire Controversy bar because they cannot show that they did not know or reasonably should not have known of the existence of the claims in the underlying action. They also have failed to put forth any evidence showing that they did not have "a fair and reasonable opportunity" to fully litigate claims against Defendants in the Lease Litigation especially when they were cognizant of the potential malpractice claim, the Lease Litigation was litigated for over two years, and were strategizing how to move forward with the claim in a subsequent action.

The Instant Action is exactly the type that the Dimitrakopoulos Court referenced where claims are not joined in the prior action when the two claims arise from related facts or the same transaction or series of transactions, but need not share common legal theories. Dimitrakopoulos, 237 N.J. at 119. (T19:13-17). The timing and facts of the Lease Litigation and the Instant Action clearly show that the actions are successive. The Trial Court correctly dismissed the Instant Action as violative of the Entire Controversy Doctrine.

C. The Trial Court Correctly Determined that Plaintiff's Failure to Join Defendants in the Lease Litigation was an Inexcusable Strategic Decision

Plaintiff's decision not to join Defendants in the Lease Litigation was an inexcusably calculated strategic decision which mandates a dismissal of action under the Entire Controversy Doctrine. Rule 4:5-1(b)(2) "is intended to be applied to prevent a party from voluntarily electing to hold back a related component of the controversy in the first proceeding by precluding it from being raised in a subsequent proceeding thereafter." Hobart Bros. v. National Union Fire Ins. Co. 354 N.J. Super. at 240–41(App. Div.), certif. denied, 175 N.J. 170 (2002) (quoting Oltremare v. ESR Custom Rugs, Inc., 330 N.J. Super. 310, 315 (App. Div. 2000). This application of the Entire Controversy Doctrine prohibits a party from undertaking strategic choices with unfair results upon others. See Thomas v Hargest, 363 N.J. Super 589, 595 (App. Div. 2013).

The New Jersey Supreme Court has held that when "a party deliberately chooses to fragment litigation by suing certain parties in another jurisdiction and withholds claims against other parties, a court need not later entertain the claims against the omitted parties if jurisdiction was available in the first forum." Mortgageling Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 338 (1995). The court must be sensitive to the possibility that a party has purposely withheld claims from an earlier suit for strategic reasons or to obtain "two bites

at the apple." Hillsborough Twp. Bd. of Educ. v. Faridy Thorne Frayta, P.C., 321 N.J. Super. 275, 284 (App. Div. 1999). A court should not permit itself to be made a party to such strategic choices that result in unfair consequences to others. The Entire Controversy Doctrine does not bar claims that were unknown, unrisen or unaccrued at the time of the original action. Id. at 285. Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 241(App. Div. 2002). To that end, courts who are deciding whether a failed disclosure is inexcusable will make "determinations of what 'impelled' it and whether that course was reasonable." Id.

Plaintiff's failure to join Defendants was inexcusable based on numerous examples from the record where Plaintiff consistently made strategic decisions that resulted in unfair consequences to the Defendants. The record is filled with critical facts such as the testimony of Plaintiff's own agents, Mr. Mercedes and Mr. Granata, which showed that that a decision to bring a legal malpractice action was "intentionally and strategically decided during the Lease Litigation and intentionally and specifically delayed until after the lease litigation settled." (T27:3-14)(Pa0844, T203:1-5;T205:15-21). As the Trial Court correctly found, the testimony all points to one conclusion - the Plaintiff made a strategic choice to hold off on suing the Defendants in the Lease Litigation. (T27:3-14). In fact, the Trial Court couched its decision in words like "intentionally" and

"strategically" to explain Plaintiff's delay in waiting until after the Lease Litigation settled to bring a claim against the Defendants. (T27:1-7).

Plaintiff cannot escape the fact that it intentionally and strategically included a provision in the Settlement Agreement of the Lease Litigation which required the then defendant, 6600 River Road, to cooperate in a legal malpractice claim against Defendants, for claims arising out of the same facts of the Lease Litigation. (Pa1272). As correctly found by the Trial Court, this provision, was the "most telling, uncontroverted fact" which connected Defendant Mazawey to the Lease Litigation. (T27:15)(Pa1272). Lastly, because of its calculated decision not to sue Defendants in the Lease Litigation, Plaintiff elicited Defendant's testimony without him having any knowledge of the impending successive legal malpractice action against him, resulting in what was effectively a legal ambush where Plaintiff could question Defendants without any notice of a claim for legal malpractice. (T28:5-9).

Nothing stopped Plaintiff from bringing the claims for legal malpractice in the Lease Litigation as was required by Rule 4:5-1(b)(2). (T25). Even in the face of all of the overwhelming evidence in the record that Plaintiff recognized the potential legal malpractice claim against the Defendants during the pendency of the Lease Litigation, Plaintiff continues to not put forth any tangible evidence or explanation for not asserting a legal malpractice claims against Defendants in

the Lease Litigation. Plaintiff simply states that they failed to join the Defendants in the Lease Litigation upon the advice of his counsel. (Pb40). Despite the fact that the Trial Court did not accept Plaintiff's excuse of blaming prior counsel for the decision not to join Defendants, Plaintiff makes another attempt on appeal to argue that this decision was excusable as it was "based on an analysis performed by its counsel at the time determining that the R. 4:5-1(b)(2) rules would not require naming Defendants Mazawey." (Pb40-41). The Trial Court correctly pointed out during the Motion to Dismiss that Plaintiff had not supplied the Trial Court with any caselaw to support this reliance on prior counsel. (T26:11-15). Prior counsel's advice does not excuse Plaintiff nor does it allow Plaintiff to severely prejudice Defendants as to the claims for legal malpractice.

Plaintiff continues to remain silent as to any explanation to refute the strategically orchestrated decision to bring a second law suit. In an attempt to diminish the consequences of its decision not to join Defendants, Plaintiff unilaterally decides that "(t)he loss of evidence or ability to find witnesses in the five (5) month interval between the settlement of the case and the institution of this action has had no effect on Defendant's ability to defend this action." (Pb41). It is not Plaintiff's right to determine how Defendants would have defended his case had they had proper notice.

Plaintiff was aware of their responsibility under Rule 4:5-1(b)(2) and admittedly intentionally disregarded it. (Pb40-41). Defendants met their burden of showing that the Plaintiff's decision to deliberately not join Defendants in the Lease Litigation was inexcusable. The Trial Court was careful to consider the idea where "…a party purposely withheld claims from an earlier suit for strategic reasons" the subsequent suit could be open for dismissal. (T26:15-17). There was no abuse of discretion where the Trial Court found what still remains true, that Plaintiff improperly failed to assert legal malpractice claims against the Defendants during the Lease Litigation, and there is no evidence to excuse same. (T27:21-25).

D. The Trial Court Correctly Determined that the Plaintiff's Failure to Join Defendant in the Lease Litigation Pursuant to Rule 4:5-1 resulted in Substantial Prejudice to the Defendants.

Plaintiff's failure to name Defendants in the prior action was inexcusable and greatly prejudicial. There is no dispute between the parties that prejudice occurs when there is a lack of availability of information, "access to relevant information is largely dispositive of the "substantial prejudice" issue. (Pb 36). Courts determine the issue of substantial prejudice through a lens of lack of availability of information. Mitchell v Charles P. Procini, D.D.S. P.A., 331 N.J. Super 445, 454 (App. Div. 2000). “Substantial prejudice” can include the loss of evidence or other proofs needed to defend a suit, or an increase in damages

occasioned by a separate action. Kent Motor Cars, Inc. v Reynolds and Reynolds, Co. 207 N.J. 428, 446-447 (2011); Mitchell v Charles P. Procini, D.D.S. P.A., 331 N.J. Super 445, 454 (App. Div. 2000) (finding "the loss of witnesses, the loss of evidence, and fading memories and the like" can create substantial prejudice). Courts look to "fairness to the parties and fairness to the system of judicial administration." Gelber v. Zito P'ship, 147 N.J. 561, 565 (1997). "Fairness is thus a protective concept that focuses primarily on whether defendants would be in a better position to defend themselves if the claims against them had been raised and asserted in the first litigation." DiTrolio v Antitles, 142 NJ 253, 273 (1995).

i. Prejudice from Loss of Witnesses and Evidence

Defendants have suffered such substantial prejudice with Plaintiff's deliberate strategic decision to engage in piecemeal litigation, that the only appropriate recourse was for the Trial Court to grant the motion to dismiss. (T33:1-8). The record is replete with examples of loss of witnesses and evidence which resulted in Defendants being prejudiced. Plaintiff cannot refute the countless examples that Defendants have provided of suffering prejudice, so Plaintiff simply diminishes their effect. (Pb41).

With respect to loss of witnesses, Defendants cannot locate critical members of the Plaintiff organization. Defendants have unsuccessfully

attempted to serve subpoenas on Mr. Russo at multiple known locations via a subpoena service, Guaranteed Subpoena, on five occasions in July and August of 2022. (Pa1159-1161). Mr. Russo is critically important to the underlying action and thus Defendants' defense of the legal malpractice action. Mr. Russo, as a representative of Plaintiff, was involved with the lease negotiations and subsequent termination from approximately March 2016 to November 2016. Mr. Russo's role during the lease negotiation period was described in Mr. Mercedes' Certification as follows:

> During negotiations for the Lease, Option and Rider that are at issue in [the Lease Litigation], [Russo], a non-member of Plaintiff, was appointed as primary contact person between Plaintiff, Michael Cervelli Real Estate, LLC, and Plaintiff's Counsel, Richard Mazawey. As such, with very few exceptions, Russo handled all communications on behalf of Plaintiff relative to the above entities and people insofar as negotiations for the Lease, Option and Rider at issue in this litigation was concerned. (Pa1126-Pa1127).

Mr. Russo's role cannot be understated, as he gathered information and shared it with the Plaintiff as well as handled all communications on behalf of Plaintiff. (Pa 1314 ¶ 27)(Pa 1126-Pa1128). Most importantly it was Mr. Russo, on behalf of Plaintiffs, who instructed Mr. Mazawey to terminate the Lease due to the lack of a sewer connection to the Property. (Pa1022). Without Mr. Russo's testimony regarding his position within Plaintiff and his authority to act, Defendants are severely prejudiced in the defense relating to the elements of duty and breach. If Defendants had been sued in 2018, they would have had a much greater chance

of successfully serving Mr. Russo with a subpoena only a year and a half after the lease negotiations concluded rather than six (6) years after the pertinent acts.

With respect to the loss of evidence, Mr. Russo was involved in providing Defendants with Plaintiff's corporate documents, including the Certificate of Formation, a corporate resolution authorizing Plaintiff to sign the lease, and the Operating Agreement. Mr. Russo provided the corporate documents to Defendant Mazawey on behalf of Plaintiff on June 27, 2016. (Pa1132). The prejudice lies in the fact that Defendants do not have the ability to question Mr. Russo about these critical corporate documents.

Similarly, Defendants have pursued a deposition of Ms. Rivas, member of Plaintiff, by requesting the same from Plaintiff's counsel several times. However, Plaintiff's counsel has stated via email that it is not in contact with Ms. Rivas and cannot produce her for a deposition. (Pa1177). Defendants are entitled to depose a known member of Plaintiff with knowledge of the events and circumstances surrounding this litigation.

Plaintiff now also contends that it suffered additional monetary damages as a result of the delay in action. In addition to the damages in the Lease Litigation and the Instant Action, Plaintiff has added categories of damages to include the $125,000.00 settlement and $63,557.05 in legal fees and costs incurred in the Lease Litigation, and a claim that Plaintiff was unable to sell

$134,223.00 in products that have decreased in value. (Pa0015). Defendants are prejudiced in that the additional damages would have never occurred if Defendants were party to the Lease Litigation. Defendants could have been a party to the settlement and now are being looked to for the entire amount. If Defendants were litigants in the Lease Litigation, these expenses would not have occurred. The Trial Court reviewed these damages and found that "Plaintiff has not offered any sanction, short of a dismissal, which could possibly cure the prejudice to the Defendants." (T32:6-8).

Plaintiff argues that Defendants have not suffered any prejudice from their inability to locate a key witness such as Mr. Russo, despite Mr. Russo's pivotal role in the lease litigation. (Pb41). Plaintiff has unilaterally determined that "the loss of evidence or ability to find witnesses in the five (5) month interval between the settlement of the case and the institution of this action has had no effect on Defendants' ability to defend this action." (Pb 41). Plaintiff's calculations of time are completely misplaced. Plaintiff filed suit in the Lease Litigation on February 2, 2018 and then proceeded to litigate the matter for two years. Plaintiff then filed the successive legal malpractice action over two years later on September 8, 2020. (Pa0001). Had Defendants been properly apprised of the prior action or joined as Defendants, they would have had the benefit of

the discovery in the underlying action. Instead, Defendants are impeded by the passage of over two years of time.

ii. Prejudice of Defendant Mazawey being deposed in Lease Litigation

Defendant has suffered such prejudice by being deposed in the underlying action but not being named as a defendant, that the Trial Court aptly termed it an "ambush." (T28:10). In DiTrolio v Antitles, 142 NJ 253, 273 (1995) the New Jersey Supreme Court examined this very issue where the defendants were deposed in the underlying action where they were not named as defendants. In finding that the defendants were prejudiced, the Court pointed out:

> "There is no doubt that defendants are now **disadvantaged because they were not parties to the first litigation.** Each of the four defendant-doctors were deposed as witnesses during the discovery period in plaintiff's suit against the Hospital. Although they were represented by counsel during these depositions, had they been made parties to the original action, they might have approached the depositions and discovery process differently….They would have been able actively to participate in discovery by objecting to interrogatories and requests for documents. Moreover, they would have been able to engage in discovery of their own. **Thus, it is clear that their inability to participate as parties in the first trial affects their position in the second, relative to that of the plaintiff, especially in this instance where many of the facts and much of the evidence are the same in both actions.** Id. at 273 (emphasis added).

In his deposition during the Lease Litigation, Defendant Mazawey was repeatedly asked about the scope of this representation of Plaintiff in the lease negotiations. (Pa1042,T49:6-19). He was questioned about who he

communicated with at the Plaintiff organization in the negotiation and execution of the lease. (Pa1054,T99:15-25). He was extensively questioned about the terms and requirements of the lease. (Pa1058-Pa1060). Throughout his deposition, Defendant Mazawey was questioned about his knowledge of Plaintiff attempting to obtain a Certificate of Occupancy in the underlying action. (Pa1065). Perhaps most egregious, Defendant Mazawey was questioned extensively on the issue of termination of the lease which would be critical in the malpractice claim against him.

> Q. "What does it say about the tenant's right to terminate?"
>
> A. "….but in paragraph 2 it says if the tenant doesn't receive approvals from the town of West New York for its proposed use of the property for a cafe…and bakery….and a retail clothing store….on or before September 30, 2016." (Pa1073,T174:1-15).
>
> Q. "Do you know whether or not the tenant ever exercised its right to terminate in accordance with this agreement?" (Pa1074-Pa1075, T180:16-18).
>
> A. "I believe they did that. I think we did that in October, if I'm not mistaken. And I know there was probably some discussions with the principals and with your father and I in September." (Pa1074-Pa1075, T180:19-23).
>
> Q. "Why was it terminated in October if the tenant was to….wasn't that after the date of September 30th?" (Pa1074-Pa1075, T180:24-T181:1).
>
> A. "Again, my interpretation of the 30th….is that that's a trigger date, not a drop dead deadline." (Pa1074-Pa1075,T181:2-4).

> Q. "Did the Plaintiff LLC exercise its right to accelerate the termination of lease as provided for under the rider to the lease?" (Pa1082,T210:15-17).
>
> A. "I know the lease was terminated in October of 2016." (Pa1082,T210:18-19).
>
> Q. "Can you identify any-did you convey that termination?" (Pa1082,T210:20-21).
>
> A. "Yeah, we kind of did it almost every way in creation. We did e-mails. We did regular mail." (Pa1082,T210:22-24).

Plaintiff diminishes the prejudicial impact of Defendant Mazawey being deposed without knowledge that there was a potential lawsuit against him. Plaintiff's only response is that "Mazawey presumably knew of the potential claim for legal malpractice." (Pb 42)(T28). However, Plaintiff's decision to depose Mazawey in the underlying Lease Litigation was "tantamount to an ambush." (T28:10).

> Plaintiff had the benefit of the Defendant Mazawey's deposition testimony in the lease litigation without formally bringing claims against him until after the fact. This strategic decision has prejudiced the Defendants, as Mr. Mazawey did not have the advice of counsel while deposed and was unaware that his client was seeking to sue him. Plaintiff had an unfair advantage to question Mr. Mazawey while knowingly contemplating a legal malpractice action against him. (T28:1-9)

Plaintiff provides no explanation to refute a claim for prejudice for failing to abide by Rule4:5-1 disclosure. Instead, Plaintiff posits what would have happened if they had amended the disclosure:

> what difference would it have made? Does Mr. Mazawey seriously claim that he would somehow have taken action to preserve the testimony of Michael Angelo or to somehow enhance his ability to locate him….Furthermore, Mazawey presumably knew of the potential claim for legal malpractice. (Pb42).

This statement is irrelevant, as it does not explain the failure to abide by Rule 4:5-1 and the prejudice suffered. Rather, as agreed upon by the Trial Court, Plaintiff deliberately prevented Defendants from preparing a defense and subjected Defendant Mazawey to a deposition by ambush, which resulted in undue prejudice for any defense in a legal malpractice action. Rule 4:5-1 does not have an exception to the notice rule if a plaintiff decides that defendant "presumably knew" of the possibility of litigation. Plaintiff cannot refute a claim of prejudice by unilaterally determining that notice under Rule 4:5-1 would not have made a difference. (Pb43).

Accordingly, the Trial Court did not abuse its discretion when it found that there was no sanction short of dismissal which would address the substantial prejudice incurred by Defendants. (T32:4-8).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court uphold and affirm the Trial Court's granting of the motion to dismiss pursuant to Rule 4:5-1(b)(2) and the Entire Controversy Doctrine.

Respectfully submitted,

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Attorneys for Defendants/Respondents Richard Mazawey, Esq. and The Law Offices of Richard S. Mazawey

By: */s/ Spenser F. Frieri*
Spenser F. Frieri

Dated: April 2, 2024

OGGI E. DOMANI WEST NEW YORK, Plaintiff, vs. RICHARD MAZAWEY, ESQUIRE; THE MAZAWEY LAW FRIM; and JOHN DOES, ESQS., 1-10 and JANE DOES, ESQS., 1-10 (a fictitious designation for presently unknown licensed attorneys, professionals and/or unknown persons or entities), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. : A-003479-22 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-2690-20 Sat Below: Hon. Bruno Mongiardo, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT OGGI E. DOMANI WEST NEW YORK, LLC.

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I. OLDS V. DONELLY EXEMPTED "ALL ATTORNEY MALPRACTICE ACTIONS FROM THE ENTIRE CONTROVERSY DOCTRINE."

At page 19 of the Respondents' brief, there is a block quote from page 442 of the Supreme Courts' decision in Olds v. Donnelly. The Defendants inform this Court that pursuant to this block quote that Olds held that the exemption from the Entire Controversy Doctrine in Olds pertained to legal malpractice claims where "the alleged malpractice occurred in the underlying action that gave rise to the claim." (Rb19)

However, Respondents brief omits the following language on the same page of the decision in Olds:

> The line between transactional and litigation representation, however, is not always clear. Often, the same law firm or even the same attorney may represent a client in both transactional and litigation matters. Thus, transactional attorneys and their firms often have a ongoing relationship with their clients. **Requiring a client to notify a trial court of a potential malpractice claim relating to one transaction** when the attorney or firm continues to represent the client on other matters **can intrude unduly on the attorney–client relationship.**
>
> Basing the application of the entire controversy doctrine on the nature of the alleged malpractice would be difficult to administer. **The better response is not to distinguish litigation malpractice from other kinds of malpractice, but to exempt all attorney-malpractice actions from the entire controversy doctrine.** Olds v. Donnelly, 150 N.J. 424 (1997). (emphasis added).

Similarly, the Defendant's reading of Dimitrakopoulus v. Borrus, Goldin et al., 237 N.J. 91 (2019) glides over two issues which are fatal to his argument. The Court in Dimitrakopoulus, was dealing with a situation in which there had been a previous litigation **between** the attorney and the attorney's former client and the legal malpractice claims were not asserted or disclosed. The concerns which animated Olds exemption of claims of legal malpractice claims from the Entire Controversy Doctrine were not present in a law firm's collection action against a former client.

> A collection action brought by a law firm against its client, however, does not constitute such underlying litigation for purposes of the principle stated in Olds. The assertion of a malpractice claim in such an action -- in which the attorney and client are already adverse -- **does not raise the privilege and loyalty concerns that warranted the exception to the entire controversy doctrine recognized in Olds**. In appropriate settings, a court may apply the entire controversy doctrine to preclude a legal malpractice claim that a client has declined to assert in the attorney's action to collect unpaid legal fees. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 99 (2019). (emphasis added).

Obviously, the revelation of attorney-client privilege communication would not be an issue in such a collection action because such communications would have been between the two parties to the litigation.

Here, a hypothetical amendment of the R. 4:5-1 statement by the Plaintiffs in the lease litigation would disclose to third parties that Plaintiff, Oggi was

contemplating a suit against the Defendant for his negligence. Such a disclosure would be a strategic boon to the Defendants in the lease litigation and would be an obstacle to any effective mitigation of damages by the Plaintiff.

Plaintiff's adversaries in the lease litigation could have sought to pierce the attorney-client privilege, could seek to join Mazawey as a third-party Defendant tortfeasor, could cross-examine representatives of the Plaintiff that they were contemplating suing the attorney who "negotiated" the lease on their behalf or other such litigation tactics which would cause the same concerns which resulted in the Supreme Court's adoption of a blanket exemption of all attorney malpractice claims from the Entire Controversey Doctrine.

The second omission from Defendant's discussion of Dimitrakopoulus, is the footnote in which the Court recognizes that transactional malpractice was exempted from the Entire Controversy Doctrine in Olds. Footnote 4 states;

> In Olds, we noted that malpractice claims arising from legal services in a transactional matter are unlikely to raise the same concerns as claims arising from a representation in litigation, as a transactional attorney "is not saddled with the conflicting roles of advocating on behalf of the client in the underlying litigation and representing his or her own interests as a defendant." 150 N.J. at 442, 696 A.2d 633. We observed, however, that "[t]he line between transactional and litigation representation ... is not always clear," and we declined to adopt a separate rule for the application of the entire controversy doctrine to legal malpractice claims arising from transactional matters. Ibid. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91 (2019)

The Supreme Court did not overrule Olds' exemption, if they were going to overrule a bright line rule, they would have said so; not only does this leave as good law the exemption of all legal malpractice claims from the Entire Controversy Doctrine, it also renders excusable Plaintiff's failure to join these claims to the lease litigation.

II. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO.

This Court need look no further than the case upon which Respondents most heavily rely, Dimitrakopoulus, to confirm that the standard of review in this matter is de novo. Defendants, recognizing that it was too late to file a motion for summary judgment, filed a Motion to Dismiss which the Court effectively converted into a motion for Summary Judgment, this is the same appellate posture as Dimitrakopoulus. Dimitrakopoulus set forth the appellate standard of review: "An appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e). Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286 (App. Div. 2017). It owes no deference to the trial court's legal conclusions. Rezem Family Assocs., 423 N.J. Super. at 114, 30 A.3d 1061." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91 (2019).

III. PLAINTIFF'S FAILURE TO JOIN OR DISCLOSE THE CLAIMS AGAINST PLAINTIFF IN THE LEASE LITIGATION WAS NOT INEXCUSABLE AND DEFENDANTS DID NOT SUFFER SUBSTANTIAL PREJUDICE.

In the case Defendants most heavily rely upon, Dimitrakopoulus, the Court held that in an action for a collection for legal fees in which they were averse to their former client the Supreme Court still did not hold that the failure to join these claims were inexcusable or that the law firm had suffered substantial prejudice.

Here, the Plaintiffs' failure to identify Defendant Mazawey in the R. 4:5-1(b)(2) certification was excusable because it was made based on an analysis performed by its counsel at the time determining that the R. 4:5-1(b)(2) rules would not require naming Defendant Mazawey given the black letter law of *Olds v. Donnelly*, 150 N.J. 424, 443 (1997). How can Plaintiffs failure be termed inexcusable through this prism?

How did Plaintiff's supposed failure to provide an amended R. 4:5-1 notice prior to the dismissal of the lease litigation prejudice Defendants? The loss of evidence or ability to find witnesses in the five (5) month interval between the settlement of the lease case and the institution of this action has had

no effect on Defendants' ability to defend this action. The Defendants did not even assert a credible claim of substantial prejudice pursuant to R.1:6-6.

The only hint that Defendants made as to prejudice in this matter was their inability to locate the witness, Angelo. Defendants were served with this lawsuit in September of 2020 and they did not seek to depose Angelo until July of 2022. If the Defendants identified a reason why they waited twenty-two months after the filing of the lawsuit to seek to depose Angelo, they have not set it forth in their papers nor have they set forth any plausible difference it would have made had Mr. Campisano amended the R.4:5-1 statement in the underlying action.

Pursuant to R. 4:5-1 in the underlying action, the Court, in its discretion, would decide whether or not to notify Mr. Mazawey if the R. 4:5-1 statement were amended. If the Court had done so, what difference would it have made? Does Defendant seriously claim that he would somehow have taken action to preserve the testimony of Michael Angelo or to somehow enhance his ability to locate him in the time period between the settlement in February 2020 and September 2020 when they sat on their hands for nearly two years after being sued? Furthermore, Mazawey presumably knew of the potential claim for legal malpractice. As set forth by Mr. Campisano on page sixty-eight (68) of his

deposition, when an attorney blows a deadline to cancel a lease, they should know that there is a potential legal malpractice claim.

The record does not contain anything from either Mr. Mazawey or his counsel providing competent evidence of any prejudice they have suffered as a consequence of the supposed failure of Mr. Campisano to amend a R.4:5-1 statement when the party who had been identified in such a statement is not subject to joinder in the action and when the claims of legal malpractice were exempt from the entire controversy doctrine. Plaintiffs' failure to amend the R. 4:5-1 statement did not cause any substantial prejudice and was excusable.

By simply disclosing to the Trial Court in an amended 4:5-1(b) certification in the lease litigation that Plaintiffs were contemplating suing the Defendants prior to the Stipulation of Dismissal being filed, the Plaintiffs would indisputably be immune from the Entire Controversy Motion to Dismiss that was granted in this case. This Court should ask what the practical difference such a disclosure would have made when considering substantial prejudice.

CONCLUSION

For the foregoing reasons set forth above and in Appellant's initial brief, the Trial Court's dismissal of Plaintiff's action should be reversed, and this matter be remanded to the Court for trial on the merits.

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