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| JOHN FENDT, ALAN WOZNIAK MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>NICHOLAS MENAS, ESQ., COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.C., TNM DEVELOPMENT CONSULTING, LLC, ERIC FORD, PULTE HOMES, KDL REALTY MANAGEMENT, LLC, THERESA MENAS, JAMES WALLS, MICHAEL BORINI, 322 WEST ASSOCIATES, LLC, JOSEPH ROCCO, ESQ., PEPPER HAMILTON, LLC, TIMOTHY J. BLOH, ESQ., CHRISTOPHER C. FALLON, III, ESQ., FOX ROTHSCHILD, LLP, JOHN L. SLIMM, ESQ., JEREMY J. ZACHARIAS, ESQ., MARSHALL DENNEHEY WARNER COLEMAN GOGGIN,<br><br>Defendants/Respondents. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003660-21<br><br>ON APPEAL FROM:<br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MONMOUTH COUNTY<br>Docket No. Below: MON-L-819-20<br><br>Sat Below:<br>Hon. Mara Zazzali-Hogan, J.S.C. |

# PLAINTIFFS-APPELLANTS' BRIEF

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[1] Said Transcript is included in the appendix as an exception to Rule 2:6-1(a)(1), as said Transcript was repeatedly cited by the Trial Court Judge in the Statement of Reasons attached to the Orders, being appealed, Dismissing Plaintiffs' Complaint against Defendants.

## INTRODUCTORY STATEMENT

In this case alleging fraud, tortious interference, conversion, unjust enrichment, New Jersey RICO, fraudulent concealment, aiding and abetting, conspiracy to commit same (hereinafter collectively referred to as "Tort Claims" or "Tort Counts") and legal malpractice, the Law Division made numerous serious legal errors. 1a[1]. Plaintiffs John Fendt ("Fendt"), Alan Wozniak ("Wozniak"), Monroe Township Development Company, LLC ("MTDC"), and PCH Associates, LLC ("PCH Associates") (collectively, "Plaintiffs") seek to appeal each of those errors and respectfully request that they be reversed in the interest of justice.

In the matter of Fendt et al. v. Menas, et al., MON-L-3782-15, currently also on appeal (hereinafter the "2015 Action"), Plaintiffs alleged that within the context of a commercial transaction, Defendants Nicholas Menas, Esq. ("Menas"), and Cooper Levenson (collectively, "M&C") received Plaintiffs' money for the transaction, sent said money to certain Defendants, and said Defendants divided said money among all Defendants, unbeknownst to Plaintiffs. 259a. Plaintiffs never disputed the appropriateness of the transactional legal work performed by

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[1] "1a" denotes the accompanying appendix.
1T = January 24, 2020 Transcript of Motion to Amend Complaint in Fendt et al. v. Menas, et al., MON-L-3782-15. 844a. Said Transcript is an exception to Rule 2:6-1(a)(1), as said Transcript was repeatedly cited by the Trial Court Judge in the Statement of Reasons attached to the Orders, being appealed, Dismissing Plaintiffs' Complaint against Defendants.

M&C. Rather, Plaintiffs alleged and provided proof that M&C and their co-conspirator Defendants committed the blatant, simple, and wrongful acts of essentially "stealing" Plaintiffs' money by committing civil law theft. The Court in the 2015 Action dismissed all of Plaintiffs' claims against M&C, including the Tort Counts, through an abusive and unjust misapplication of the Affidavit of Merit ("AOM") statute. 284a. The identical Tort Counts remained alive and well against all the other non-attorney co-conspirators Defendants, proceeded to trial, and settled. 286a.

After the dismissal of M&C in the 2015 Action, newly discovered evidence led to newly discovered claims against M&C and others, as well as claims for their fraudulent concealment of the newly discovered evidence. The Court in the 2015 Action denied Plaintiffs' efforts to amend the complaint to state those newly discovered claims because the Court was concerned by the trial date that was then approaching (ultimately the 2015 Action did not go to trial for another 31 months, rendering that concern misplaced). 287a. As such, following the Court's statement in the 2015 Action that Plaintiffs could instead file these new claims in a new matter (885a – 886a; 1T, 81:18 – 82:5), Plaintiffs filed this action against M&C, TNM Development Consulting, LLC ("TNM"), Eric Ford ("Ford"), Pulte Homes ("Pulte"), KDL Realty Management, LLC ("KDL"), Theresa Menas, James Walls ("Walls"), Michael Borini ("Borini"), 322 West Associates, LLC ("322 West"),

Joseph Rocco, Esq. ("Rocco") and Pepper Hamilton, LLC (collectively, "R&P"), Timothy Bloh, Esq., Christopher Fallon, Esq., and Fox Rothschild LLP (collectively, "Fox Defendants"), and John Slimm, Esq., Jeremy Zacharias, Esq., and Marshall Dennehey Warner Coleman & Goggin (collectively, "Marshall Defendants"). Plaintiffs settled their claims against Pulte, Ford, KDL, TNM, Theresa Menas, Borini, and Walls on August 18, 2022. 286a.

First, the Law Division erroneously dismissed Plaintiffs' Amended Complaint pursuant to Res Judicata and the Entire Controversy Doctrine, despite the fact that Plaintiffs' claims were new, unknown, and unaccrued at the time of a prior dismissal in the 2015 Action. Point I and Point III, infra. In addition, the Law Division dismissed the legal malpractice claims against M&C pursuant to Res Judicata and the Entire Controversy Doctrine, again despite the fact that Plaintiffs' claims were new, unknown, and unaccrued at the time of a prior dismissal of the 2015 Action. Point II, infra. Also, the Law Division erroneously dismissed Plaintiffs' legal malpractice claims against the Marshall Defendants, by finding that attorneys have no duty to non-clients in litigation to refrain from fraudulent concealment. Point IV, infra. Finally, the Law Division erroneously sanctioned Plaintiffs and granted M&C attorney fees by abusing its discretion to find that Plaintiffs' Amended Complaint was filed in bad faith. Point V, infra.

This Court should reverse all said errors of the Law Division.

## STATEMENT OF PROCEDURAL HISTORY

Plaintiffs filed the Complaint on March 4, 2020. 1a. Plaintiffs filed an Amended Complaint on April 30, 2020. 68a. M&C filed a motion to dismiss Plaintiffs' Amended Complaint on May 28, 2020. 142a. The Marshall Defendants filed a motion to dismiss Plaintiffs' Complaint on May 29, 2020. 144a. R&P filed a motion to dismiss Plaintiffs' Complaint on June 3, 2020. 146a. Plaintiffs filed opposition briefs to said motions to dismiss on July 30, 2020. On August 28, 2020, the Trial Court erroneously granted all of said motions to dismiss. 148a – 185a.

The Marshall Defendants and M&C filed motions for sanctions and counsel fees on September 15, 2020. 186a – 189a. Plaintiffs filed opposition briefs to said motions on October 8, 2020. The Trial Court granted the Marshall Defendants and M&C's motions on January 25, 2022. 190a – 203a. The Marshall Defendants and M&C filed motions for sanctions and counsel fees on February 8, 2022. 204a – 207a. Plaintiffs filed an Opposition and Cross-Motion to Reconsider the Orders of January 25, 2022, on February 24, 2022. 208a. On June 30, 2022, the Trial Court granted in part Plaintiffs' Cross-Motion and reconsidered its Order of January 25, 2022, granting counsel fees to the Marshall Defendants. 209a – 232a. Also on June 30, 2022, the Trial Court denied in part Plaintiffs' Cross-Motion to Reconsider its Order of January 25, 2022, granting counsel fees to M&C, and granted M&C's motion for counsel fees. 209a – 232a.

Plaintiffs timely filed a Notice of Appeal on July 29, 2022 (233a), and timely filed an Amended Notice of Appeal on August 8, 2022. 246a. The appeal against the Fox Defendants was dismissed on March 2, 2023. 258a.

## STATEMENT OF FACTS

Menas was an attorney licensed to practice law in the State of New Jersey with Cooper Levenson. 799a (13:3-13). In March/April 2006, Fendt met with Menas and Ford, a representative of Pulte. 471a (694:17–695:4). Menas and Ford represented to Fendt that the real estate opportunity in Monroe Township would be rezoned and developed as a "free market" development of approximately four hundred (400) townhouses and that Plaintiffs could purchase said real estate and either develop it or sell the eventual delineated lots "approved and improved" to Pulte at a certain price. 472a (698:23–701:15).

Menas and Ford explained that the aforesaid real estate would consist of an assemblage of various adjacent properties located in Williamstown, Monroe Township ("Pork Chop Hill Assemblage"). 471a – 472a (697:23–698:4). Menas and Ford explained that Plaintiffs would enter into agreements of sale for the purchase of said real estate and hire the requisite professionals. 472a (700:17-24). Menas and Ford had a second meeting with Plaintiffs and discussed the Township's affordable housing issues in conjunction with another real estate opportunity in Monroe Township ("Duncan Farms"). 473a (702:2–703:17). At a

third meeting, Menas and Ford represented to Plaintiffs that Duncan Farms should be rezoned for affordable housing to create coverage for the affordable housing obligation of the intended Pork Chop Hill Assemblage development, thus pushing said obligation onto the Duncan Farms offsite. 473a (703:18–704:20).

Menas and Ford assured Plaintiffs that they would ultimately convey Duncan Farms to an affordable housing developer. 473a (704:21–705:9). Based on Menas's and Ford's representations that Pulte would purchase the Pork Chop Hill Assemblage from Plaintiffs approved and improved at a certain price, eventually set forth in a Letter of Intent and Memorandum of Understanding, Plaintiffs decided to pursue the proposed real estate opportunities. 634a–636a; 690a–693a. Plaintiffs retained M&C as counsel in the pursuit of the purchase and development of the Pork Chop Hill Assemblage and the Duncan Farms transaction. 554a–556a.

On August 31, 2006, Menas formed MTDC and was listed as the registered agent of MTDC on the Certificate of Formation, with Cooper Levenson's office listed as the registered office. 557a – 560a. On September 14, 2006, Menas formed Pork Chop Hill Associates, LLC ("PCHA") and was listed as the registered agent of PCHA on the Certificate of Formation, with Cooper Levenson's office listed as the registered office. 561a. The primary portion of the Pork Chop Hill Assemblage which would provide for approximately 200 of the intended 400 townhouse development was certain real estate owned by the McTague family ("McTague

Property"). 569a–586a. Menas and Ford, unbeknownst to Plaintiffs, directed Walls to execute on behalf of PCHA the Agreement of Sale, dated September 6, 2006, to purchase the McTague Property, which was amended on September 21, 2006 ("McTague-PCHA Agreement"). 569a–586a. The McTague-PCHA Agreement required a deposit of only $2,000.00, called for a minimum of 200 free market units, $16,500.00 per unit, thus requiring a minimum purchase price of $3.3 million. 569a–586a. Thereafter, on October 3, 2006, pursuant to the representations of Menas and Ford, Plaintiffs signed the Assignment and Assumption of the McTague-PCHA Agreement of Sale ("PCHA-MTDC Assignment"). 562a–568a. Pursuant to the PCHA-MTDC Assignment, PCHA would assign the McTague-PCHA Agreement to Plaintiffs and Plaintiffs were to make deposit payments totaling $500,000.00. In addition, the PCHA-MTDC Assignment called for a minimum of 200 free market units, $23,500.00 per unit, thus a minimum purchase price of $4.7 million. 562a–568a.

On October 23, 2006, Menas presented Walls a finalized Operating Agreement of PCHA and directed Walls to execute same. 375a–378a. Pursuant to said Operating Agreement, Walls was the Sole Member of PCHA. 375a–378a. However, on October 24, 2006, one day later, Menas presented Walls a finalized Amended and Restated Operating Agreement of PCHA, whereby Walls, pursuant to the direction of Menas and Ford, signed same relinquishing 99% of his

ownership interest in PCHA to Michael Brestle ("Brestle"), another long-time friend of Menas and Ford, for no consideration. 378a–405a; 430a (108:21–109:3). Said Amended and Restated Operating Agreement of PCHA was executed by Brestle as General Manager. 378a–405a. In January 2007, Menas directed Brestle to execute the Second Amendment to the McTague-PCHA Agreement. 587a–600a. Though Walls and Brestle were the only Members of PCHA, neither ever saw nor executed, on behalf of PCHA, the PCHA-MTDC Assignment. 433a (178:9–179:14); 533a–534a (30:24–34:10). However, Plaintiffs, pursuant to the representations of Menas and Ford, were made to spend substantial funds in contractual payments in pursuit of the PCHA-MTDC Assignment. 562a–568a.

Notwithstanding that Menas and Ford contacted Plaintiffs and had in person meetings with Plaintiffs months prior to the formation of PCHA and the execution of the McTague-PCHA Agreement, Menas and Ford had Walls (a long-time friend of Menas and Ford) on behalf of PCHA, the "flipper", enter into the McTague-PCHA Agreement. 569a–586a. Menas and Ford set in place this contract flip in Plaintiffs' pursuit to purchase the McTague Property, creating a mechanism by which the co-conspirator Defendants would wrongfully take and receive a substantial financial gain. 562a–586a. That is, instead of negotiating on behalf of Plaintiffs directly with McTague to enter into an agreement of sale for the McTague Property (as was done with owners of the other real estate that comprised

the Pork Chop Hill Assemblage), Menas and Ford, in concert with the other co-conspirator Defendants, created the flip transaction of the McTague Property pursuant to which Plaintiffs' payments for the PCHA-MTDC Assignment purportedly paid to PCHA, unbeknownst to Plaintiffs, were to be ultimately transferred and divided between the co-conspirator Defendants. 735a–737a.

Pursuant to the representations and direction of Menas and Ford, Plaintiffs signed, pertaining to the PCHA-MTDC Assignment, the General Release of April 25, 2008, the Amended General Release of September 2008, and the Second Amendment and Restatement of the General Release of January 2009 ("Releases"). 637a–642a; 664a–668a; 684a–688a. However, neither Walls nor Brestle ever saw or executed the PCHA-MTDC Assignment or Releases. 429a (83:15–85:10); 431a (122:21–124:19); 432a (158:18-23); 433a (178:9–179:14); 434a–435a (189:10–190:16); 435a (191:12–193:8); 535a–536a (49:14–52:4); 541a–542a (106:17–111:7); 543a–544a (119:10–122:5); 544a–545a (124:12–127:15). Walls and Brestle testified they never opened any bank accounts on behalf of PCHA and were never aware of any money paid by Plaintiffs to PCHA, or of any money paid by PCHA to the Defendants or anyone else. 428a (53:19-22); 537a–538a (89:10–90:20); 543a (120:24–121:9); 545a (127:16–128:10); 547a (165:5-10); 549a (191:9–192:8). Said PCHA-MTDC Assignment and Releases required Plaintiffs to make certain payments on specified dates as were allegedly negotiated by Menas

and Ford. 637a–642a; 664a–668a; 684a–688a. In total, as a result of this conspiracy, Menas and the other co-conspirator Defendants transferred and divided among themselves approximately $1.4 million. 735a–757a.

In accordance with the conditions of the PCHA-MTDC Assignment and Releases, and pursuant to the representations of Menas and Ford, at certain times Plaintiffs were made to make payments. 735a–757a. Initially, payments were deposited into and transferred from the Cooper Levenson Attorney Trust Account, usually via wire transfers to KDL. 786a–790a. Subsequently, pursuant to the representations of Menas and Ford, Plaintiffs were made to make payments via wire transfer and checks made payable to the Cooper Levenson Attorney Trust Account, PCHA and William Russo ("Russo). 735a–757a. Subsequently, said funds transferred or deposited in the Cooper Levenson Attorney Trust Account, PCHA bank accounts, or Russo bank account, were thereafter transferred via checks and account-to-account transfers to and among Menas and the co-conspirator Defendants. 701a–734a; 762a – 772a.

**Russo and PCHA**

On May 15, 2008, Menas filed a "Certificate of Change-Registered Agent or Address, or Both" regarding PCHA, whereby the registered agent was changed from Menas to Rocco and the registered office was changed from the office of Cooper Levenson to the office of Pepper Hamilton. 650a. Menas manipulated

Russo and opened bank accounts in the name of PCHA for the co-conspirator Defendants' wrongful use and benefit. 812a (73:1-11); 812a–813a (76:19–77:4); 814a (89:2-11); 823a (208:21–209:7); 824a (210:1-2); 825a (227:20–228:6). Russo testified he never owned PCHA and the banking activity, checks, deposit slips, and endorsement of checks, done in his name or through his personal bank account on behalf of PCHA, was actually done by Menas. 827a (334:22–336:2); 828a (407:9-12, 407:21-23); 810a (65:18–66:21, 67:3-14, 68:19-20); 811a–812a (69:6-17, 70:8–73:11, 75:5-14); 815a–816a (102:6–105:4); 817a–818a (124:17 – 126:10); 819a (181:15 – 182:10); 823a–824a (207:20–209:7, 209:10–213:17). Further, Russo explicitly testified that his purported handwriting and signature for banking activity pertaining to PCHA were not his own, but rather were forgeries by Menas. 828a (407:24–408:4).

Almost the entirety of the aforesaid payments, initially held in Cooper Levenson's Attorney Trust Account, the wire transfer to the aforesaid PCHA bank account, and other checks made payable to PCHA and Russo and negotiated through their respective bank accounts, were thereafter immediately (or within days) transferred to the bank accounts of KDL and TNM, via wire transfers or checks made payable to KDL and TNM. 701a–734a; 773a–796a. After KDL and TNM received said wire transfers or checks, KDL and TNM initially transferred part of the funds between and among themselves. 701a–734a; 762a–772a; 773a –

796a. A substantial amount of the funds transferred to the bank account of TNM was ultimately transferred to the personal bank account of Menas, via account-to-account transfers. 718a–734a. Neither prior to nor after the execution of the Agreements of Sale for the Pork Chop Hill Assemblage, including the PCHA-MTDC Assignment and Releases, were Plaintiffs ever told that the aforementioned payments they were instructed by Menas and Ford to make, either through Cooper Levenson's Attorney Trust Account, wire transfer to PCHA, or with checks made payable to PCHA or Russo, were ultimately going to be transferred into the bank accounts of KDL, TNM, Menas, and other co-conspirators. 462a–463a (566:19–572:15); 464a–466a (607:10 – 615:16); 492a (158:5-24); 499a (369:1–370:6); 509a (513:14–514:2); 510a (534:18 – 535:16); 512a (555:12–556:17); 517a (632:11–634:21).

**Newly Discovered Evidence of Menas's role in TNM and PCHA**

During the course of discovery in the 2015 Action and three years after the dismissal with prejudice of M&C in the 2015 Action, it was discovered that Menas was the Sole Member of TNM. 643a; 695a; 698a–700a. Plaintiffs discovered a TNM Mortgage ("Mortgage") dated May 7, 2008, executed by Menas as Sole Member of TNM. 643a. In opposition to Plaintiffs' Motion to Vacate the Order of November 10, 2016, filed as a result of this discovery, M&C, by way of their counsel, Slimm, presented a certain Collateral Assignment (332a) to the Court and

represented that "a debt owed from Teddy Menas to Nicholas Menas in the amount of $250,000.00. . . . was [memorialized] in an assignment between Nicholas and Teddy Menas (Exhibit "S") One of the consequences to that assignment required Nicholas Menas to sign certain mortgage documents . . . ." 289a[2].

In August 2019, after continued obstructionist tactics by M&C despite the Trial Court's Orders of May 24, 2019 (527a–530a), checks were uncovered that proved the Collateral Assignment, assuming arguendo it was ever real, was extinguished long before May 7, 2008. 698a–700a. The alleged subject $250,000.00 debt of the Collateral Assignment was more than paid by January 10, 2008, since from May 4, 2007 to January 10, 2008, funds were transferred via account-to-account transfers from the TNM bank account to Menas's personal bank account totaling $151,107.41, and two KDL checks totaling $152,000.00, made payable to TNM were deposited into Menas' personal bank account, amounting to $302,107.41. 698a–700a; 718a–723a. In addition, after continued obstructionist tactics by M&C, in November 2019, Plaintiffs discovered an

[2] Pursuant to Rule 2:6-1(a)(2), Slimm's brief is permissible content for Appellants' Appendix as it raises an issue which is germane to the appeal. Namely, Slimm's brief, producing the Collateral Assignment for the first time in the 2015 Action, formed the basis of M&C's argument that Menas was not the Sole Member of TNM despite the Mortgage. As a result of Slimm's brief, and the Court's reliance on said brief in the 2015 Action, Defendants succeeded in fraudulently concealing the fact that Menas was the Sole Member of TNM.

Affidavit of Title related to the Mortgage, identifying Menas as the Sole Member of TNM. 695a. Thus, Menas executed the Mortgage and related required Affidavit of Title as the Sole Member of TNM because Menas was the Sole Member of TNM, as the Collateral Assignment had been extinguished by January 10, 2008 643a; 695a; 698a–700a.

**Rocco's Role in PCHA**

In 2006, Menas provided Rocco the PCHA-MTDC Assignment. 803a (167:20–168:23). Rocco collaborated with Menas on the preparation of the Releases. 452a (20:16–21:7); 454a (35:20–36:10). Said Releases listed Rocco as the attorney for PCHA and set forth that all notices to PCHA were to be sent to Walls and/or Rocco. 637a–642a; 664a–668a; 684a–688a. Walls never conveyed any of his interest in PCHA to anyone other than the 99% he conveyed to Brestle pursuant to the instructions and direction of Menas and Ford. 426a (34:15 – 35:4); 427a–428a (49:22 – 51:1); 438a (202:16-19); 439a (213:20-25); 440a (216:20–217:25). Walls testified that he never heard of, knew, or communicated with Rocco. 433a (179:18–180:21).

Rocco testified that prior to being served with the complaint in the 2015 Action, he never heard of, knew, or communicated with Walls despite claiming to be the attorney for PCHA and despite the fact that Walls' name appeared in the PCHA-MTDC Assignment and Releases. 458a (143:1-6); 637a–642a; 664a–668a;

684a–688a. Similarly, Rocco never heard of, knew, or communicated with Brestle despite claiming to be the attorney for PCHA and Brestle owning 99% of PCHA. 832a–833a (45:22–46:4); 458a (143:7-22); 375a; 379a. Finally, Rocco never recalled ever meeting Russo, and Rocco "stipulated" that he never spoke or communicated with Russo despite claiming to be the attorney for PCHA and Defendants claiming, with a forged and unexecuted document, that after the death of Teddy Menas PCHA was owned by Russo. 836a–837a (164:3–167:1); 525a (770:12–773: 11); 689a. However, Russo never owned PCHA, never heard of PCHA, never heard of, knew, or met Rocco, never heard of Pepper Hamilton, and was never at the offices of Defendant Pepper Hamilton. 828a (407:9-23); 827a (334:22–336:1); 828a (409:7-13).

Brestle specifically testified that he never heard of, knew, or communicated with Rocco, and he never met or communicated with Walls. 539a (97:3-14); 542a (112:6-8); 546a (138:3-13); 550a (204:16-19); 542a (112:9 – 113:1). Further, Brestle never heard of, knew, or communicated with Russo, despite Defendants claiming that at some point in time PCHA was owned by Russo. 544a (122:6-23); 550a (203:19 – 204:9).

In addition, Rocco testified that PCHA was owned by Teddy Menas, and that prior to the death of Teddy Menas, Rocco dealt with only Teddy Menas regarding PCHA. 833a (47:16–48:1); 834a (120:9-12); 835a (139:22–140:

10). However, Walls and Brestle both testified that neither one of them ever conveyed their membership interest in PCHA to Teddy Menas or anyone else. 540a (104:23–105:1, 105:22-25); 547a (162:16–163:8, 164:4-22); 548a (166:22-25); 550a (202:1–203:7); 551a (207:2-13); 552a (214:21–215:8); 426a (34:15–35:4); 427a–428a (49:22 – 51:1); 438a (202:16-19); 439a (213:20-25); 440a (216:20–217:25). Menas and Rocco staged the April 2009 meeting, at the office of Pepper Hamilton, where Rocco misrepresented to Wozniak that he was the attorney for PCHA. 487a (39:21–40:8); 487a–488a (40:21–41:1). In addition, Wozniak testified that Rocco misrepresented that the other person at the meeting in the office of Pepper Hamilton who was there to accept the $250,000.00 check on behalf of PCHA, was William Russo. 488a (43:3-9); 497a–498a (349:10–353:21). Finally, Rocco authored and forwarded a default letter dated December 17, 2009, to Plaintiffs, acting as the attorney for the sham entity PCHA in furtherance of Defendants' conspiracy. 694a; 455a–457a (86:1–94:14).

## POINT I

## THE TRIAL COURT ERRED IN DISMISSING THE FIRST COUNT THROUGH THE EIGHTH COUNT OF PLAINTIFFS' COMPLAINT AGAINST DEFENDANTS PURSUANT TO RES JUDICATA AND THE ENTIRE CONTROVERSY DOCTRINE (182a)

The First Count through the Eighth Count of Plaintiffs' Amended Complaint allege Fraud, Tortious Interference, Conversion, Unjust Enrichment, Violation of New Jersey RICO, and Aiding and Abetting and Conspiracy to commit said

intentional torts, against Menas, TNM, and Ford. As Plaintiffs have settled their claims against TNM and Ford, Plaintiffs will discuss said Counts against Menas, only. Said Counts arise solely from Plaintiffs' newly discovered evidence in the 2015 Action that Menas was the Sole Member of TNM and controlled and operated PCHA as a sham entity, and the newly discovered claims arising therefrom. None of these facts nor claims were alleged in the complaint that was dismissed against Menas in the 2015 Action, as said facts were only discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole basis for dismissing said Counts against Menas is Res Judicata and the Entire Controversy Doctrine. The Trial Court stated: "These claims are barred by the Entire Controversy Doctrine and res judicata, as they are identical to the claims asserted in the 2015 action…" 182a. The Trial Court did not explain how claims that are entirely new, arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity – facts and claims which were not pled before the dismissal of the complaint against Menas in the 2015 Action, since they were unknown by Plaintiffs at the time – could possibly be "identical" to the claims that were dismissed.

The Trial Court's simplistic, unnuanced, and curt analysis seems to strain itself in order to achieve a desired outcome, but it comes woefully short of making any sense in fact, law, or reason. It is a factual, legal, and physical impossibility for

Plaintiffs' new claims, arising solely out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity, to be "identical" to prior, dismissed claims, which never alleged such facts.

The New Jersey Supreme Court in DiTrolio v. Antiles, 142 N.J. 253, 273–74, 662 A.2d 494, 505 (1995) held that "[T]he entire controversy doctrine does not apply to unknown or unaccrued claims." It is a well-established principle of justice and fairness that the Entire Controversy Doctrine is inapplicable to, and does not apply to bar component claims either unknown, unarisen, or unaccrued at the time of the original action. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70, 800 A.2d 861, 868 (2002). See Mauro v. Raymark Indus., Inc., 116 N.J. 126, 138, 561 A.2d 257 (1989) (holding that Entire Controversy Doctrine would not bar toxic-tort plaintiff's damage claim because plaintiff discovered existence of disease after first litigation); Zaromb v. Borucka, 166 N.J.Super. 22, 27, 398 A.2d 1308 (App.Div.1979) (holding that slander claim was not precluded by Entire Controversy Doctrine because the party was not aware of its existence).

There is no rule or case law prohibiting a party from seeking to bring a new claim, previously unknown and unknowable, against parties who were previously dismissed with prejudice prior to the discovery of said new claim. The erroneous dismissal of the prior claims against M&C in the 2015 Action was not a "global" dismissal in the way that settlements can be "global" and settle even claims that

were unknown at the time of settlement. Instead, a dismissal only applies to known or knowable claims at the time of the dismissal. Plaintiffs' new claims against M&C were not known, could not have been known, and therefore were not pled at the time of the dismissal of Plaintiffs' previous claims. Said claims may be filed once discovered despite a previous dismissal with prejudice of prior, distinct claims.

In addition, when "considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant has had a fair and reasonable opportunity to have fully litigated that claim in the original action." Gelber v. Zito P'ship, 147 N.J. 561, 565, 688 A.2d 1044, 1046 (1997). In the context of this matter and these new claims, there can be no doubt that Plaintiffs' claims arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity *after* the dismissal of the complaint in the 2015 Action, were unknown, unarisen, and therefore unaccrued at the time of the filing of the original complaint in the 2015 Action, as well as at the time of dismissal of certain claims in the 2015 Action. These new claims arose *after* they were uncovered by Plaintiffs during the course of litigation in the 2015 Action, overcoming years of Defendants' concerted efforts to fraudulently conceal them. It is inconceivable to conclude that Plaintiffs' mere efforts to bring these new claims in the 2015 Action by way of a motion to amend constitutes Plaintiffs'

fair and reasonable opportunity to have fully litigated these new claims in the 2015 Action, especially considering the fact that The Honorable Lourdes Lucas, J.S.C., did not deny Plaintiffs' motion to amend in the 2015 Action for substantive reasons related to the merits of Plaintiffs' new claims. Judge Lucas could have simply denied Plaintiffs' motion to amend in the 2015 Action by holding that the claims were not in fact "new", if that were the case and if that were the Court's position. Rather, as is apparent by Judge Lucas's own words, Judge Lucas solely denied Plaintiffs' motion to amend because Her Honor did not want to delay the trial and found that Plaintiffs would not be barred from filing these new claims in a new action, where they would then be given a fair and reasonable opportunity to be fully litigated. (885a – 886a;1T, 81:18 – 82:5).

While the Trial Court held that Plaintiffs misinterpreted the language and holding of Judge Lucas in the 2015 Action, it is apparent from a plain reading of Judge Lucas's holding that it is actually the Trial Court which misinterpreted the language of Judge Lucas. The Trial Court erroneously stated:

> As Comment 2.3 to the Rule explains, the preclusion of these claims in a later action due to the Entire Controversy Doctrine was a factor to be properly considered by Judge Lucas in denying the motion to file the Fourth Amended Complaint, "particularly where the assertion [of new claims] is so late as to prejudice other parties." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3 on R. 4:9-1 (2020). That is precisely the case here – knowing that Plaintiffs could be barred from asserting these claims in a separate action, the Court denied the motion to amend and assert these "new" causes of action. Accordingly, the prejudice to Plaintiffs has already been evaluated

> by the Court, and it was decided that these fraudulent concealment claims could have been asserted earlier but are not allowable now.

181a.

It is difficult to understand how the Trial Court could have arrived at this misinterpretation of Judge Lucas's holding. Judge Lucas specifically and unequivocally held:

> "[A]s counsel for plaintiffs acknowledge during oral argument, there is nothing that would prevent the plaintiff to the extent that there are newly discovered claims that were not knowable…prior to now against parties, counsel's free to file a complaint."

(884a – 885a; 1T, 79:22 – 80:2).

In other words, Judge Lucas ruled that Plaintiffs' new, previously unknown and unknowable claims at the time of the filing of the original complaint and the dismissal of the original legal malpractice claims in the 2015 Action, were not barred by the Entire Controversy Doctrine. In addition, during the course of oral argument before Judge Lucas, counsel for M&C attempted to argue that the dismissal with prejudice of Plaintiffs' prior claims against M&C precluded the filing of all claims against M&C from the beginning of time, whether known or unknown at the time of the filing of the original complaint and its dismissal. Counsel for Plaintiffs immediately interjected and stated, "Your Honor, a dismissal – a dismissal of prejudice of old claims or even a judgment of old claims never

precludes filing a new claim that was unaccrued or unknown at the time." Judge Lucas replied, "Understood. Thank you for saying that." (881a; 1T, 73:13-19).

In a moment when Judge Lucas could have agreed with M&C's substantive argument that the new claims were barred as a result of the dismissal of the prior claims, Judge Lucas did not agree with M&C. Instead, Judge Lucas implicitly expressed agreement with Plaintiffs' argument to the contrary. In Judge Lucas's conclusion, which the Trial Court entirely ignored in its erroneous reasoning, Judge Lucas's implicit agreement became unequivocally explicit when she stated the following:

> When I balance that prejudice against these defendants and their interests and their right to have this case expeditious – expeditiously decided, to have this case expeditiously go to trial, which already has not been too expeditious, ***balanced against the interest of the plaintiff in this case, which would not be foreclosed from bringing these claims, they would just have to bring it in a different procedural posture***, the Court is not persuaded that allowing an amendment to the complaint at – complaint at this late stage of the case when we have a trial date looming in March would not be in the interest of justice to the parties in this case at this point.

(885a – 886a; 1T, 81:18 – 82:5, emphasis added).

It is obvious that in denying Plaintiffs' motion to amend in the 2015 Action, Judge Lucas never inculpated Plaintiffs or held that Plaintiffs should have attempted to file their Motion to Amend earlier in time, and certainly did not find that the new claims were barred by the dismissal of the previous claims. Indeed, Judge Lucas specifically stated: "And so again, and that is by no way should be

interpreted as in -- as an indication that the Court is casting any type of critique against the plaintiffs. The case evolved as the case evolved. And to the extent that new claims are discovered during discovery, well, they are discovered." (885a; 1T, 80:19-24). It is confounding that the Trial Court nevertheless misinterpreted Judge Lucas so blatantly. A plain reading of the plain language of the transcript demonstrates that Judge Lucas denied Plaintiffs' motion to amend the complaint because she was solely swayed by the finding that there would be no prejudice to Plaintiffs as they would not lose, under any doctrine, case law, or court rule, their right to bring these newly discovered claims in a new action. Judge Lucas explicitly found that there would be no prejudice to Plaintiffs in denying their motion to amend, because they would not be foreclosed from bringing these newly discovered claims in a different procedural posture.

Yet, somehow, the Trial Court misinterpreted Judge Lucas and stated the opposite. The Trial Court misinterpreted Judge Lucas as finding that "Plaintiffs could be barred from asserting these claims in a separate action" and nevertheless "denied the motion to amend and assert these "new" causes of action". 181a. Based on this blatant misinterpretation of Judge Lucas's clear statement to the contrary, the Trial Court erroneously concluded that "the prejudice to Plaintiffs has already been evaluated by the Court, and it was decided that these …claims could have been asserted earlier but are not allowable now". 181a. It is difficult to understand

how the Trial Court could have so blatantly misread and misinterpreted Judge Lucas's holding that in evaluating the prejudice against Plaintiffs in denying the motion to amend, Plaintiffs "would not be foreclosed from bringing these claims, they would just have to bring it in a different procedural posture." 885; 1T, 81:23-25. Judge Lucas did the opposite of what the Trial Court misinterpreted; Judge Lucas evaluated the prejudice of whether Plaintiffs would be barred from bringing these new claims in a new action, and found that there would be no such prejudice because they would not be barred.

The Trial Court relies heavily on confusing statements made by Judge Lucas after the fact, in the context of a subsequent motion to consolidate in the 2015 Action filed by Plaintiffs after the filing of their Amended Complaint in this action. At oral argument in said motion to consolidate, Judge Lucas, for whatever reason, attempted to undermine her previous clear holding, and characterize Plaintiffs' clear, black and white English reading of said holding as an "interpretation". 182a. Ultimately, however, Judge Lucas stated that the "Court's ruling will speak for itself." 182a. Plaintiffs submit that the Court's ruling does in fact speak for itself, and the ruling never stated that Plaintiffs' new claims were barred as a result of the prior dismissal of prior claims. Instead, the ruling stated that Plaintiffs would not be barred from filing these new claims in a new matter. Therefore, the ruling stated that in weighing the prejudices, the Court found that there would be no prejudice to

Plaintiffs in denying the motion to amend precisely because the new claims are not barred and can be filed in a new matter. There was no "interpretation" given by Plaintiffs nor required by The Honorable Mara Zazzali-Hogan, as any so-called "interpretation" to the contrary awkwardly and perplexingly attempting to fit a square peg into a round hole, whether by Judge Lucas irrelevantly after the fact in some other hearing, or by Judge Zazzali-Hogan in this matter, is erroneous.

Ultimately, Judge Lucas's initial, clear ruling that Plaintiffs' new claims were not barred by the dismissal of prior claims, was absolutely correct. When The Honorable Katie Gummer, J.S.C., dismissed the claims against M&C in the 2015 Action, she explicitly held that every single claim pled by Plaintiffs against M&C in the 2015 Action, however labeled, was a legal malpractice claim. 284a. Indeed, Judge Gummer dismissed all of Plaintiffs' claims against M&C in the 2015 Action due to the lack of an affidavit of merit. 284a. A court cannot dismiss non-legal malpractice claims for lack of an affidavit of merit. Accordingly, in dismissing all of the prior claims against M&C in the 2015 Action, it necessarily follows that Judge Gummer ruled that all of Plaintiffs' prior claims against M&C were legal malpractice claims. Therefore, as forcefully and repeatedly argued by M&C and as Judge Gummer agreed and held, the Court in the 2015 Action held that Plaintiffs never filed a non-legal malpractice claim against M&C in the 2015 Action. Accordingly, there is no way the Trial Court in this matter could now find that

Plaintiffs' new, non-legal malpractice claims in this matter against Menas arising solely from the discovery that he was Sole Member of TNM and controlled and operated PCHA as a sham entity, and not arising out of his capacity as a lawyer, were previously dismissed – because, again, Judge Gummer explicitly found that all of Plaintiffs' previous claims against M&C were legal malpractice claims.

Moreover, M&C were judicially estopped from arguing otherwise, and the Trial Court should have rejected said argument. The doctrine of judicial estoppel forecloses a party from making a factual assertion when: (1) the party made a contrary assertion in an earlier proceeding, and (2) that tribunal relied upon or accepted that contrary assertion. Kimball Inter'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606-07 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001); see Ali v. Rutgers, The State Univ. of N.J., 166 N.J. 280, 287-88 (2000) (citing Kimball Inter'l with approval). "[A] party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953). Inconsistent assertions typically undermine the integrity of the judicial process when a party is "playing fast and loose with the courts" to gain an advantage in litigation. Cummings v. Bahr, 295 N.J. Super. 374, 387, 685 A.2d 60, 67 (App. Div. 1996). The New Jersey Supreme Court succinctly formulated the doctrine of judicial estoppel in the following words: "The general

rule is that a party who, with knowledge of the facts, has assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." Brown v. Allied Plumbing & Heating Co., 129 N.J.L. 442, 446 (Sup. Ct.) (cited in Kimball Inter'l, supra, 334 N.J. Super. at 606), aff'd, 130 N.J.L. 487 (E. & A. 1943).

M&C's argument that Plaintiffs' Tort Claims against Menas as Sole Member of TNM and his control and operation of PCHA as a sham entity were already dismissed in the 2015 Action is a quintessential example of why the doctrine of judicial estoppel exists. M&C repeatedly, successfully argued before Judge Gummer that *all* of the previous claims against M&C in the 2015 Action were legal malpractice claims because the factual predicates of those claims arose out of Menas's role as Plaintiffs' attorney, and M&C should have been judicially estopped from suddenly claiming otherwise. If all the previous claims against M&C in the 2015 Action were legal malpractice claims (as M&C repeatedly successfully argued), then every single non-legal malpractice claim in this Amended Complaint against Menas solely arising out of his capacity as Sole Member of TNM and his control and operation of PCHA as a sham entity, is necessarily a new claim, previously unknown, never pled, and therefore never dismissed. Ultimately, the new Tort Claims against Menas solely arising out of his

previously unknown and unknowable ownership of TNM and control and operation of PCHA as a sham entity, are not legal malpractice claims whatsoever. It is self-evident that the new Tort Claims against the Sole Member of TNM as Sole Member of TNM have absolutely nothing to do with legal malpractice. It is self-evident that the new Tort Claims against a person who controlled and operated PCHA as a sham entity to perpetrate a conspiracy against Plaintiffs have absolutely nothing to do with legal malpractice. Such claims simply arise out of an individual's ownership of an entity alleged to have been engaged in tortious conduct, and an individual's control and operation of a sham entity to perpetrate a conspiracy engaged in tortious conduct. Therefore, by logical necessity, the new claims against Menas were never dismissed, because such claims are not legal malpractice claims and Defendants argued and Judge Gummer explicitly held that only legal malpractice claims were alleged against Menas in the 2015 Action. If only legal malpractice claims were alleged against Menas, then non-legal malpractice claims were never alleged and must therefore be new claims which were never dismissed by Judge Gummer. This is basic logic, and it cannot be disputed. Unable to dispute this reality, the Trial Court simply ignored it in its erroneous decision.

Ultimately, Res Judicata and the Entire Controversy Doctrines are equitable doctrines to be considered and applied in the interest of justice. As the Court in J-

M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 459, 129 A.3d 342, 349 (App. Div. 2015) held:

> The decision whether to apply the Entire Controversy Doctrine is "ultimately 'one of judicial fairness and will be invoked in that spirit.'" Archbrook, supra, 414 N.J.Super. at 104, 997 A.2d 1035 (quoting Crispin, supra, 96 N.J. at 343, 476 A.2d 250). It is not an artificial bright line rule. See id. at 104–05, 997 A.2d 1035.

The Trial Court's application of Res Judicata and the Entire Controversy Doctrine was a perversion of such equitable principles. A litigant cannot attempt to knock on one courtroom door, be told by the judge to instead go knock on the next courtroom door because the judge believes there is no prejudice to the litigant as the case will not be dismissed by the second judge, only for the second judge to then dismiss the case with prejudice because the second judge believes the claims should have been heard and/or were dismissed by the first judge. This is not justice. This madness is not what equitable doctrines were designed to accomplish. Plaintiffs have not only been the victims of numerous erroneous decisions, but also of maddening inconsistency within the interplay of those decisions.

Moreover, the timing and circumstances of this Amended Complaint cannot be understood in a vacuum, disconnected from the reality of what occurred for years in the 2015 Action and was pled in this matter. As pled in Plaintiffs' Amended Complaint, for years Defendants went above and beyond, and oftentimes into the realm of bad-faith delay tactics, obstruction, perjury, and fraudulent

concealment, in order to keep Plaintiffs from obtaining the factual predicates for their new claims. Had Defendants cooperated in good faith with the discovery process in the 2015 Action instead of requiring Plaintiffs to overcome never-ending motion practice in order to obtain the depositions and documents that the Court ultimately granted, and had Defendants refrained from committing perjury, falsifying documents, and producing false documents to conceal evidence, Plaintiffs would have been able to complete the puzzle years earlier, discover these new claims years earlier, and file a motion to amend in the 2015 Action years earlier. For the same Defendants who created this situation with their fraudulent conduct to then claim that they are prejudiced if Plaintiffs are allowed to state the claims they discovered overcoming Defendants' fraudulent conduct, is a profanation of any sense of fairness and justice.

As established by the Supreme Court of New Jersey in Rosenblit v. Zimmerman, 166 N.J. 391, 411, 766 A.2d 749, 760 (2001):

> [W]here an adversary has intentionally hidden or destroyed (spoliated) evidence necessary to a party's cause of action and that misdeed is uncovered in time for trial, plaintiff is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrongdoer and may also amend his or her complaint to add a claim for fraudulent concealment. Where the hiding or destruction is not made known until after the underlying litigation, in which plaintiff's case has been lost or impaired due to the missing evidence, a separate tort action for fraudulent concealment will lie.

Here, Plaintiffs uncovered necessary evidence of claims against M&C and other Defendants that was intentionally hidden. While Plaintiffs uncovered the new

evidence in the underlying litigation, the Court in the 2015 Action explicitly denied Plaintiffs' attempt to amend their complaint to bring these new claims by holding that Plaintiffs could do so in a new action, and nothing would foreclose them from doing so. Plaintiffs acted pursuant to Judge Lucas's holding, and the Trial Court in this matter misinterpreted said holding and precluded Plaintiffs from seeking the remedies provided by the Supreme Court of New Jersey in Zimmerman. The grave injustice that has been visited upon Plaintiffs who have not been permitted to allege the new claims they discovered by overcoming Defendants' fraudulent concealment, is glaring and egregious. Defendants have effectively been rewarded for their bad-faith delay tactics, obstruction, perjury, and fraudulent concealment, which were all part of a concerted effort to keep Plaintiffs from discovering and pleading these claims entirely or for as long as possible. This egregious miscarriage of justice must be reversed.

This Court must ultimately decide whether application of Res Judicata and the Entire Controversy Doctrine in this matter, with these facts, in this context, in the backdrop of Judge Lucas' decision to deny Plaintiffs' amendment in the 2015 Action solely because Judge Lucas believed Plaintiffs could bring these new claims in a new action, is fair and just. Plaintiffs submit that failure to reverse the Trial Court would be egregiously unfair and unjust, and would only reward Defendants for their fraudulent concealment devised to achieve this very result.

Ultimately, neither Res Judicata nor the Entire Controversy Doctrine bar the First Count through the Eighth Count of Plaintiffs' Amended Complaint, as Judge Lucas correctly contemplated when finding that there would be no prejudice to Plaintiffs in denying their motion to amend in the 2015 Action. Accordingly, the Trial Court's error should be reversed.

## POINT II
## THE TRIAL COURT ERRED IN DISMISSING THE NINTH COUNT THROUGH THE ELEVENTH COUNT OF PLAINTIFFS' COMPLAINT FOR LEGAL MALPRACTICE AGAINST M&C (183a)

The Ninth Count through the Eleventh Count of Plaintiffs' Amended Complaint allege legal malpractice against M&C. The legal malpractice alleged in said Counts arises solely from Plaintiffs' newly discovered evidence and newly discovered claim in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. The legal malpractice claimed against M&C arises solely from Menas's failure to advise Plaintiffs of said facts during the course of his representation. None of these facts nor claims were alleged in the complaint that was dismissed against M&C in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole basis for dismissing said Counts against M&C was expressed by the Trial Court as follows:

> To the extent these Counts are based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case, they are

> clearly barred by the Law of the Case Doctrine, as the legal malpractice claims asserted in that case were dismissed with prejudice by the Court…

183a.

The Trial Court does not explain how claims that are entirely new, arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity – facts and claims which were *not* pled before the dismissal of the complaint against M&C in the 2015 Action, since they were unknown by Plaintiffs at the time – could possibly be "based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case."

The Trial Court's simplistic, unnuanced, and curt analysis seems to strain itself in order to achieve a desired outcome, but it comes woefully short of making any sense in fact, law, or reason. It is a factual, legal, and physical impossibility for Plaintiffs' new claims, arising solely out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity, to be "based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case", which never alleged such facts.

The new legal malpractice claims against M&C were not and could not have been known or pled prior to the dismissal of the previous claims, because they arise solely out of Menas's ownership of TNM and control and operation of PCHA as a sham entity, which are facts that could not have been known and were not

previously known or alleged at the time of the original complaint in the 2015 Action. The new legal malpractice claims against M&C have absolutely no connection to the prior, dismissed legal malpractice claims, and share absolutely no factual predicates. Instead, the prior dismissed claims, as M&C so forcefully argued and Judge Gummer held, were all legal malpractice claims arising out of Menas's legal work on behalf of Plaintiffs with respect to the transaction. The new legal malpractice claim against M&C, on the other hand, is solely supported by the previously unknown and unknowable fact that Menas was the Sole Member of TNM and controlled and operated PCHA as a sham entity, and therefore committed malpractice by failing to advise Plaintiffs of these facts.

To make this indisputable reality even more perfectly clear, this Court can view the prior, dismissed legal malpractice claim against M&C in the 2015 Action for itself and compare it with the new, previously unknown and unknowable legal malpractice claim against M&C. As this Court can read in the "First Count" of Plaintiffs' complaint in the 2015 Action which was dismissed by Judge Gummer, the prior, dismissed legal malpractice claim alleged that M&C committed malpractice by failing to:

> a.) timely advise Plaintiffs, in advance of being retained as legal counsel and entering into any negotiations or transactions related to the Pork Chop Hill and Duncan Farms, of Defendants' past and/or concurrent representation of all the other parties involved in each and every agreement related to the said real estate;

b.) timely advise Plaintiffs that the real intended use and beneficiaries of the rezoning and pursued conveyances of Pork Chop Hill and Duncan Farms were not Plaintiffs, but Pulte, MBI, and/or others;

c.) timely and properly advise Plaintiffs of the true nature, status, and events of the Duncan Farms and Pork Chop Hill transactions prior to terminating its Agreements with NJ 322 and MBI;

d.) timely advise Plaintiffs that they structured, negotiated, and drafted all the contracts pertaining to the pursuit of the purchase, sale, rezoning, and approvals for Pork Chop Hill and Duncan Farms and served as legal counsel to most, if not all, of the other persons and entities involved in the pursuit of said transactions;

e.) advise Plaintiffs that Ford, KDL, Borini, 322 West, TNM, Theresa Menas and Menas had an interest in the aforesaid real estate transactions and that said individuals and entities would ultimately receive moneys paid by Plaintiffs in pursuit of the aforesaid transactions and developments.

271a – 272a.

On the other hand, as this Court can read in the Ninth Count of Plaintiffs' Amended Complaint in this matter, Plaintiffs allege that M&C committed malpractice by failing to:

a) advise Plaintiffs that Defendant Nicholas Menas was the sole member of Defendant TNM;

b) advise Plaintiffs that Defendant Nicholas Menas solely, or with Defendant Ford, operated Defendant PCHA, the sham entity to which Plaintiffs were directed by Defendants Nicholas Menas and Ford to make payments in pursuit of the PCHA-MTDC Assignment and Releases.

124a – 125a.

It is self-evident that the previously dismissed claim for legal malpractice in the 2015 Action had absolutely none of the factual predicates of the legal malpractice claim in the Amended Complaint in this matter, and for obvious reason: Plaintiffs did not know and could not have known at the time of the filing of the complaint in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. These facts only emerged during the course of discovery in the 2015 Action, after the dismissal of Plaintiffs' prior claims. For the Trial Court to state that the present legal malpractice claims against M&C, predicated solely on the discovery of Menas's ownership of TNM and operation of PCHA as a sham entity, have the "same factual predicates" as Plaintiffs' previously dismissed legal malpractice claim which did not and could not have alleged any of these predicate facts because they were unknown, is a confounding error. 183a.

Plaintiffs' new claims against M&C based on new, separate, and apart predicate facts, are certainly new and were never dismissed by Judge Gummer because they were not known and could not have been pled at the time of the original complaint in the 2015 Action. As such, Plaintiffs cannot be barred from stating these new claims, and the Trial Court's error should be reversed.

## POINT III

## THE TRIAL COURT ERRED IN DISMISSING THE THIRTEENTH COUNT THROUGH THE FIFTEENTH COUNT OF PLAINTIFFS' COMPLAINT PURSUANT TO RES JUDICATA AND THE ENTIRE CONTROVERSY DOCTRINE (179a)

The Thirteenth Count through the Fifteenth Count of Plaintiffs' Amended Complaint allege Fraudulent Concealment, and Aiding and Abetting and Conspiracy to commit same, against M&C, TNM, Ford, Pulte, KDL, Theresa Menas, Walls, Borini, 322 West, R&P, and the Marshall Defendants. As Plaintiffs have settled their claims against TNM, Ford, Pulte, KDL, Theresa Menas, Walls, Borini, and 322 West, Plaintiffs will discuss said Counts against M&C, R&P, and the Marshall Defendants only, and will refer to them hereinafter in Point III collectively as "Defendants". Said Counts arise solely from Defendants' fraudulent concealment of the newly discovered evidence in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity, and the new claims arising therefrom. None of these facts nor claims were alleged in the complaint that was dismissed against Menas in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole bases for dismissing said Counts are Res Judicata and the Entire Controversy Doctrine. The Trial Court stated: "Plaintiffs seek to assert claims against [Defendants] based upon the same claims, the same factual allegations, and the same transactions at issue in the 2015 case…" 179a. The Trial

Court did not explain how claims that are entirely new, arising out of the discovery that Defendants fraudulently concealed evidence that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity – facts and claims which were not pled before the dismissal of the complaint against M&C in the 2015 Action, since they were unknown by Plaintiffs at the time – could possibly be "the same factual allegations" as the claims that were dismissed. In addition, the fraudulent concealment had not yet occurred at the time of the dismissal of the claims against M&C in the 2015 Action, so the Trial Court's holding that the fraudulent concealment claims had already been dismissed in the 2015 Action before the fraudulent concealment even occurred confounds all logic, as well as notions of time and space.

The Trial Court's simplistic, unnuanced, and curt analysis seems to strain itself in order to achieve a desired outcome, but it comes woefully short of making any sense in fact, law, or reason. It is a factual, legal, and physical impossibility for Plaintiffs' new claims, arising solely out of the discovery that Defendants fraudulently concealed evidence that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity, to be "identical" to prior, dismissed claims, which never alleged nor could have alleged such facts.

For the same legal argument set forth in Point I, Res Judicata and the Entire Controversy Doctrine do not bar Plaintiffs' newly discovered claims that

Defendants fraudulently concealed evidence that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. The Trial Court's error should be reversed.

## POINT IV

## THE TRIAL COURT ERRED IN DISMISSING THE SIXTEENTH COUNT THROUGH THE NINETEENTH COUNT OF PLAINTIFFS' COMPLAINT FOR LEGAL MALPRACTICE AGAINST THE MARSHALL DEFENDANTS (184a -185a)

The Sixteenth Count through the Nineteenth Count of Plaintiffs' Amended Complaint allege legal malpractice against the Marshall Defendants. Said legal malpractice Counts arise solely from the Marshall Defendants' fraudulent concealment of the newly discovered evidence and newly discovered claim in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. None of these facts nor claims were alleged in the complaint that was dismissed against M&C in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole basis for dismissing said Counts was stated as follows:

> [N]o duty is owed to opposing parties in litigation. See Restatement of the Law Governing Lawyers, § 51, cmt. b (1998). Moreover, Plaintiffs point to no case law or other legal authority explicitly extending the imposition of a duty to non-clients to the litigation setting. The Court agrees with the Defendants that the extension of such a duty would chill the adversarial process and is not warranted here. As a result, the claims for legal malpractice and negligent supervision fail as a matter of law.

184a – 185a.

The Trial Court does not explain how claims for legal malpractice arising from an attorney's fraudulent concealment of evidence would "chill the adversarial process." 185a. The Trial Court's simplistic, unnuanced, and curt analysis seems to strain itself in order to achieve a desired outcome, but it comes woefully short of making any sense in fact, law, or reason. The Trial Court's holding is deeply disconcerting, as it necessarily implies that fraudulent concealment is an acceptable tool for attorneys in the adversarial process. The Trial Court's erroneous holding necessarily implies that attorneys may lie, cheat, forge, and conceal in litigation simply because they owe no duty to opposing parties.

The Trial Court acknowledges the decision of the Supreme Court of New Jersey in Petrillo v. Bachenberg, 139 N.J. 472 (1995). However, the Trial Court erroneously holds that Petrillo does not extend to the litigation setting. The Supreme Court of New Jersey in Petrillo recognized a duty in favor of a non-client stating, "attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys' representations…." Id. at 483-84. As the Trial Court admits, nowhere in Petrillo does the Supreme Court of New Jersey state that this holding applies *only* to attorneys in transactional settings. 184a. Accordingly, there was no reason for the Trial Court to conclude that Plaintiffs are unable to state a legal malpractice claim against the Marshall

Defendants arising out of their fraudulent concealment and fraudulent representations which were made knowing that Plaintiffs would rely on them. For years, Defendants fraudulently concealed evidence that would have revealed to Plaintiffs the existence of new claims and caused Plaintiffs to suffer years of damages in pursuit of that evidence.

In addition to Petrillo, there are other cases which support Plaintiffs' ability to state this claim, and which never confine such a claim to transactional settings only. Courts have held that a lawyer is not permitted to provide misleading information on which third parties may foreseeably rely. Id. See also Stewart v. Sbarro, 142 N.J. 581 (App. Div. 1976). R.J. Longo v. Schragger, 218 N.J. Super. 206 (App Div. 1987). RPC 4.1. A member of the bar owes a fiduciary duty to persons though not strictly his clients who he knows or should know rely on him in his professional capacity. See Albright v. Burns, 206 N.J. Super. 625, 632–33, 503 A.2d 386, 389 (App. Div. 1986). Moreover, an attorney has a fiduciary duty to refrain from unethical conduct. See In re Palmieri, 76 N.J. at 63. All of Plaintiffs' allegations of fact fit squarely within this governing case law.

Ultimately, the Trial Court's rejection of Plaintiffs' argument that the duty imposed by Petrillo that lawyers are not to provide misleading information to third parties or fraudulently conceal evidence extends to the litigation context, effectively stands for the proposition that lawyers are immune from liability for

lying, cheating, forging, and concealing evidence in litigation. The Trial Court's decision that attorneys have no duty to refrain from fraudulent concealment eviscerates fraudulent concealment as a cause of action, since fraudulent concealment necessarily takes place during the course of litigation. In the Trial Court's view, to prohibit such conduct by attorneys would "chill the adversarial process." Plaintiffs respectfully request that this Court reject the Trial Court's idea of what constitutes the "adversarial process." If Plaintiffs are permitted to state legal malpractice claims arising out of the Marshall Defendants' fraudulent concealment of evidence, such a holding would discourage attorneys from lying, cheating, forging, and concealing evidence; this would not "chill the adversarial process". 185a. Instead, such a holding would encourage honesty, good faith, and honorable conduct. Permitting fraudulent conduct by attorneys in litigation simply because they are attorneys, does not protect the adversarial process; it defiles it. Accordingly, the Trial Court's error should be reversed.

The Trial Court additionally acknowledges that the Marshall Defendants argued that Plaintiffs' legal malpractice claims against them, arising out of their fraudulent concealment of evidence, is barred by the litigation privilege. 183a. It is unclear whether the Trial Court agreed with the Marshall Defendants and dismissed Plaintiffs' legal malpractice claims against them pursuant to litigation

privilege, but the Trial Court did not explicitly reject this argument. In the absence of that clarity, the litigation privilege must be discussed.

Litigation privilege applies to communications or conduct: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. Hawkins v. Harris, 141 N.J. 207 (1995). As the Marshall Defendants argued with chilling vigor, fraudulent concealment is, in their mind, conduct to achieve the objects of the litigation and that has some connection or logical relation to the action. Shockingly and appallingly, the Trial Court failed to reject this argument. However, Plaintiffs maintain – and hope this is not a controversial idea – that fraudulent concealment is *not* an acceptable tool in the litigation toolbox. Indeed, for the Trial Court to fail to reject the argument that fraudulent concealment is contemplated by the litigation privilege requires that fraudulent concealment be accepted as permissible to achieve the objects of a litigation. Plaintiffs insist, in the name of the integrity of our judicial system, and in accordance with the clear, unreversed holding of Viviano v. CBS, Inc., 251 N.J. Super. 113 (1991), that such an assertion is blatantly incorrect.

In Viviano, the Court held that "Immunizing the willful destruction or

concealment of evidence would not further the policy of encouraging testimonial candor." The Court in Viviano at 127, goes on to explain:

> Destruction [or concealment] of evidence known to be relevant to pending litigation violates the spirit of liberal discovery. Intentional destruction [or concealment] of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.
>
> Consequently, recognizing the defendants' liability for wilfully concealing the Brand memorandum is not inconsistent with either the letter or the rationale of New Jersey's policy of affording immunity to testimony given during the course of judicial proceedings.

According to the Marshall Defendants, the Viviano Court should have condoned fraudulent concealment and granted attorneys absolute immunity to fraudulently conceal evidence in litigation, presumably so that the Marshall Defendants could continue to implement it as a staple of their litigation strategy. Thankfully, however, despite the Marshall Defendants' disdain for the Viviano decision and the Trial Court's erroneous failure to reject the Marshall Defendants' argument, Viviano remains good law for over thirty-one years and counting. Despite the Trial Court's erroneous failure to reject the argument that litigation privilege barred Plaintiffs' claims, there is no case law in the State of New Jersey which has extended litigation immunity to fraudulent concealment. Indeed, there is case law which establishes the exact opposite.

As is self-evident in the holding of Viviano, there is no litigation immunity from claims of fraudulent concealment during the course of a litigation. Even basic

reason and logic would lead to such a conclusion, since the cause of action of fraudulent concealment would cease to exist if this were true, as fraudulent concealment necessarily takes place during litigation. The Trial Court's failure to reject the Marshall Defendants' litigation privilege argument stands for the outrageous proposition that attorneys may fraudulently conceal evidence with absolute immunity. Fortunately, that day has not yet come, and the Trial Court did not have authority to reverse Viviano. Accordingly, the legal malpractice claims against the Marshall Defendants should not have been dismissed pursuant to the litigation privilege. To the extent the Trial Court did dismiss Plaintiffs' claims pursuant to the litigation privilege, the Trial Court's error must be reversed.

## POINT V

## THE TRIAL COURT ERRED IN SANCTIONING PLAINTIFFS FOR FILING THE COMPLAINT AND GRANTING DEFENDANTS M&C ATTORNEY FEES (190a – 203a; 209a – 232a)

A party may recover legal fees if permitted by, among other authorities, a statute or court rule. See R. 4:42-9; Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009). N.J.S.A. 2A:15-59.1 and Rule 1:4-8 permit a judge to award attorney's fees as sanctions against a litigant or an attorney for pursuing a frivolous complaint. Rule 1:4-8 applies only to attorneys or self-represented parties, and N.J.S.A. 2A:15-59.1 applies to represented parties. See Toll Bros. v. Township of

W. Windsor, 190 N.J. 61, 67-69 (2007); see also Trocki Plastic Surgery Ctr. v. Bartkowski, 344 N.J. Super. 399, 404-05 (App. Div. 2001).

Both Rule 1:4-8 and the statute require that the prevailing party seeking the sanction prove that the non-prevailing party acted in bad faith, McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 549 (1993), "for the purpose of harassment, delay or malicious injury," or pursued the action "without any reasonable basis in law or equity and could not ... support [its actions] by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1) to (2); see also R. 1:4-8; Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016) ("The party seeking sanctions bears the burden to prove bad faith."); Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 408 (App. Div. 2009) ("[A]n award cannot be sustained if the 'plaintiff did not act in bad faith in asserting' or pursuing the claim." (quoting McKeown-Brand, 132 N.J. at 549)); United Hearts, L.L.C., 407 N.J. Super. at 389 ("Where a party has [a] reasonable and good faith belief in the merit of the cause, attorney's fees will not be awarded." (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007))).

As explained by the Court in Konefal v. Landau, No. A-2781-18T2, 2020 WL 2466216, at 2–3 (N.J. Super. Ct. App. Div. May 13, 2020) (839a):

> *[T]he Legislature has not defined "bad faith" as used in N.J.S.A. 2A:15-59.1. "An act in bad faith is an act by one person or entity that affects another, failing to accord a reasonable duty of care toward the other, unjustifiably harming the other's interests by an act of a quality or form that would not occur if the person or entity had acted with good faith." Stephen Michael Shepherd, The Wolters Kluwer Bouvier Law Dictionary Desk Edition, 2012. Other New Jersey courts have noted sister state definitions that "[b]ad faith is not simply bad judgment or negligence, rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Borzillo v. Borzillo, 259 N.J. Super. 286, 292 (Ch. Div. 1992) (citations omitted). While the court is not bound by these definitions, case law and the absence of a statutory definition support the view that the court is required to make a determination of whether bad faith exists on a case-by-case basis. The statutory language and relevant case law make clear that a claim lacking a legal basis, coupled with a finding of bad faith, may warrant sanctions against a non-prevailing party.*
>
> *[Wolosky v. Fredon Township, 31 N.J. Tax 373, 392-93 (2019) (emphasis added).]*
>
> "The court must strictly interpret the frivolous litigation statute

and Rule 1:4-8 against the applicant seeking attorney's fees and/or sanctions." Id. at 390 (citing LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009)). Courts should exercise restraint in awarding frivolous litigation sanctions. See McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 499 (App. Div. 2011) ("Sanctions are not to be issued lightly."). The goal of the statute is to "deter baseless litigation," but "without discouraging honest, creative advocacy," and "keep[ing] in mind our significant policy that litigants should usually bear their own litigation costs." DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226-27 (App. Div.

2000). Accord Iannone v. McHale, 245 N.J. Super. 17, 26-28 (App. Div. 1990). A judge should only award sanctions for frivolous litigation in exceptional cases. See Id. at 28.

Sanctions imposed under Rule 1:4-8 "are specifically designed to deter the filing or pursuit of frivolous litigation." LoBiondo, 199 N.J. at 98. They "will not be imposed against an attorney who mistakenly files a claim in good faith." Bove v. AkPharma Inc., 460 N.J. Super. 123, 148 (App. Div. 2019); see also First Atl. Fed. Credit Union, 391 N.J. Super. at 432 (holding that where an "objectively reasonable belief" in the merits of the case exists, attorney's fees will not be awarded). Moreover, sanctions should not be "imposed because a party is wrong about the law and loses his or her case." Tagayun, 446 N.J. Super. at 580. Rather, "[a] claim will be deemed frivolous or groundless [only] when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999). Even then, "[w]hen a prevailing defendant's allegation is based on the absence of 'a reasonable basis in law or equity' for the plaintiff's claim and the plaintiff is represented by an attorney, an award cannot be sustained if the 'plaintiff did not act in bad faith in asserting' or pursuing the claim." Wolosky, 31 N.J. Tax 373, at 391 (quoting Ferolito, 408 N.J. Super. at 408).

In addition, "[f]alse allegations of fact will not justify a fee award unless they are made in bad faith, for the purpose of harassment, delay, or malicious injury." Belfer, 322 N.J. Super. at 144. "When the plaintiff's conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Id. at 144-45; see also DeBrango, 328 N.J. Super. at 227 (holding that counsel fee sanction is not warranted when plaintiff had reasonable good faith belief in merits of claim); Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 86 (App. Div. 1993) ("The most that can be said is that plaintiffs were perhaps overly optimistic in seeking a remedy, but this does not mean that the litigation was essentially frivolous.").

There can be no doubt that the Order of January 25, 2022, and the Order June 30, 2022, contradict the clear case law precedent cited above. Judge Zazzali-Hogan abused her discretion in finding bad faith under the facts of this case. It is impossible to find that there was no rational argument, no support of credible evidence, and no reasonable person who could have expected Plaintiffs' Amended Complaint to succeed, when Plaintiffs did precisely what Judge Lucas said Plaintiffs could do. To the extent the Trial Court believed Plaintiffs were mistaken in their good faith beliefs in the merits of their claims, mistaken in their optimism in seeking a remedy, mistaken in their reliance on Judge Lucas's holding, or

mistaken in their understanding of Judge Lucas's holding, none of that justifies a holding that Plaintiffs acted in bad faith. It is impossible under these facts and circumstances for M&C to have proven that Plaintiffs acted in bad faith, and it is impossible for the Trial Court to have come to that conclusion absent abuse of discretion and undue animus against Plaintiffs. The Trial Court's error should be reversed.

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the decision of the Law Division dismissing Plaintiffs' Amended Complaint and granting counsel fees to M&C, and remand the matter to the Law Division.

Dated: May 17, 2023

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*/s/ Giovanni De Pierro*

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| **JOHN FENDT, ALAN WOZNIAK, MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC and PCH ASSOCIATES, LLC,**<br><br>**Plaintiffs/Appellants,**<br><br>**v.**<br><br>**NICHOLAS MENAS, ESQ., COOPER, LEVENSON, APRIL NIEDELMAN & WAGENHEIM, P.A., TNM DEVELOPMENT CONSULTING, LLC, ERIC FORD, PULTE HOMES, KDL REALTY MANAGEMENT, LLC, THERESA MENAS, JAMES WALLS, MICHAEL BORINI, 322 WEST ASSOCIATES, LLC, JOSEPH ROCCO, ESQ., PEPPER HAMILTON, LLC, TIMOTHY J. BLOH, ESQ., CHRISTOPHER C. FALLON, III, ESQ., FOX ROTHSCHILD, LLP, JOHN L. SLIMM, ESQ., JEREMY J. ZACHARIAS, ESQ., MARSHALL DENNEHEY WARNER COLEMAN GOGGIN,**<br><br>**Defendants/Respondents.** | **SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003660-21**<br><br>**ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION MONMOUTH COUNTY DOCKET NO. : MON-L-819-20**<br><br>**Sat Below: Hon. Mara Zazzali-Hogan, J.S.C.** |

# BRIEF OF DEFENDANTS-RESPONDENTS JOSEPH ROCCO, ESQ. AND PEPPER HAMILTON LLP

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Submitted to the Court: July 19, 2023

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## PRELIMINARY STATEMENT

This matter arises from the dismissal of one of two duplicative lawsuits that Plaintiffs-Appellants filed against Respondents Joseph Rocco, Esq., Pepper Hamilton LLP and others involving the same parties, the same underlying transaction, and the same controversy.

In 2015, Plaintiffs-Appellants filed suit in the Superior Court of New Jersey, Monmouth County (hereinafter the "2015 Action") alleging that the defendant Eric Ford (an officer of Pulte Homes) and Nicholas Menas, Esq. (an attorney formerly associated with Cooper Levenson law firm) defrauded them into entering a transaction whereby they purchased an assignment of the contract rights held by an entity called Pork Chop Hill Associates, LLC ("PCHA") to buy certain farmland in Gloucester County, New Jersey (the "Pork Chop Hill Assemblage") for a planned residential real estate development. In summary, Plaintiffs-Appellants alleged that they entered into the assignment transaction based on the "representations, directions and assurances" of Mr. Ford and Mr. Menas that Pulte Homes would purchase the Pork Chop Hill Assemblage from them -- for a lucrative "per approved lot" purchase price -- once Plaintiffs-Appellants obtained the necessary land use approvals and installed the initial site improvements needed to develop the tract for residential purposes. Plaintiffs-Appellants further alleged that Mr. Ford and Pulte Homes reneged on their alleged promise and that the amounts that Plaintiffs-Appellants paid

for the assignment of rights from PCHA were pocketed by Mr. Menas, Mr. Ford, and/or by their respective family members or related companies.

Nicholas Menas represented Plaintiffs-Appellants in underlying assignment transaction. Mr. Rocco, who was then an attorney at Pepper Hamilton, represented PCHA. Plaintiffs-Appellants nevertheless joined Mr. Rocco and Pepper Hamilton in the 2015 Action alleging legal malpractice, conspiracy to commit fraud, and other causes of action. Applying the standards enunciated in Petrillo v. Bachenberg (governing when an attorney can be held liable to a non-client for professional negligence) and other controlling authorities, however, the trial court granted Mr. Rocco and Pepper Hamilton summary judgment in the 2015 Action on December 9, 2021 based upon Plaintiff-Appellants' unequivocal admissions in discovery that Mr. Rocco did not furnish them with any legal advice or opinions, did not make any assurances or representations to them, and did not supply them with any information about the assignment transaction, the Pork Chop Hill Assemblage, or Pulte at any point in time.

While the 2015 Action was still pending, and before the trial court granted Mr. Rocco and Pepper Hamilton summary judgment in that case, Plaintiffs-Appellants filed another action in the Superior Court, Monmouth County (the "2020 Action") that duplicated the 2015 Action except for three changes. In addition to repeating the allegations in the 2015 Action, the pleadings in the 2020 Action **(i)**

alleged, without basis, that Mr. Rocco concealed evidence or conspired to conceal evidence during the course of discovery in the still-pending 2015 Action, **(ii)** brought claims against the law firms and attorneys who represented some of the other defendants in the 2015 Action for allegedly concealing evidence during the course of discovery in the 2015 Action, and **(iii)** re-asserted Plaintiffs-Appellants' various claims against Nicholas Menas for alleged wrongdoing in connection with the Pork Chop Hill transaction, all of which had previously been dismissed in the 2015 Action due to Plaintiffs-Appellants' failure to file an Affidavit of Merit with respect to Mr. Menas.

Mr. Rocco and Pepper Hamilton timely moved for dismissal of the 2020 Action on two grounds. First, the pleadings in the 2020 Action failed to allege facts which, even if proven to be true, could have supported a claim for fraudulent concealment of evidence. The pleadings in the 2020 Action failed to identify any document or other tangible evidence that Mr. Rocco allegedly knew about but deliberately withheld in the discovery being conducted in the 2015 Action. Rather, Plaintiffs-Appellants' claims were limited to an unsupported accusation that Mr. Rocco "lied" during his depositions in that case. As set forth within, however, such an allegation is, even if true, legally insufficient to support a claim for fraudulent concealment of evidence under New Jersey law. See infra., Legal Argument, Point One.

## STATEMENT OF PROCEDURAL HISTORY

Plaintiffs-Appellants filed the 2020 Action (MON-L-819-20) on March 4, 2020, at a time when the 2015 Action (MON-L-3782-15) was five years old and listed for trial on July 1, 2020. 1a-67a; 259a-283a. Plaintiffs-Appellants filed an Amended Complaint in the 2020 Action on April 30, 2020. 68a-414a. Mr. Rocco and Pepper Hamilton moved to dismiss the 2020 Action, as to them, on June 3, 2020. 146a-147a. The trial court granted that motion and dismissed the 2020 Action as to Mr. Rocco and Pepper Hamilton by way of Decision and Order dated August 28, 2020. 148a-154a

It is important to note that the 2020 Action was actually the fourth in a series of related lawsuits filed by Plaintiffs-Appellants' counsel concerning the Pork Chop Hill Assemblage and a related parcel called Duncan Farms. The matters were: Schwartz, et al. v. Menas, et al., MON-L-4776-13; Russo, et al. v. Menas, et al., ATL-L-2510-15; Fendt, et al. v. Ford, et al., MON-L-3782-15 (the 2015 Action); and the instant matter, Fendt, et al. v. Menas, et al., MON-L-819-20 (the 2020 Action). 1a-67a; 259a-283a.

## STATEMENT OF FACTS

Plaintiff-Appellants' pleadings in the 2020 Action involved the same claims, the same parties, and the same issues as the 2015 Action, with the exception of **(a)** adding unsubstantiated allegations of fraudulent concealment of evidence by the

defendants during the conduct of discovery in the 2015 Action, **(b)** suing certain parties' defense counsel for allegedly concealing evidence during the conduct of discovery in the 2015 Action, and **(c)** attempting to resurrect various claims against Plaintiffs-Appellants' counsel in the Pork Chop Hill transaction, Nicholas Menas, which had previously been dismissed from the 2015 Action for failure to file an Affidavit of Merit. 1a-67a; 68a-141a; 259a-283a; Da004-051.

In Paragraphs 1 through 202 of the Amended Complaint, Plaintiffs-Appellants alleged, just as they were alleging at the same time and in the same court house in their then still pending 2015 Action, that Mr. Menas and Mr. Ford duped them into entering the Pork Chop Hill Assemblage, that Mr. Ford and Pulte reneged on their alleged promise to purchase the land from them once they had obtained the requisite land use approvals and made the initial site improvements needed to develop the land for residential use, and that the amounts they had paid for the assignment of PCHA's contract rights to purchase the Pork Chop Hill Assemblage had been pocketed by Mr. Ford, Mr. Menas, and their respective family members and affiliated business entities, all of whom Plaintiffs-Appellants named as defendants not just in the 2020 Action but also in the 2015 Action (including defendants Theresa Menas, TNM Development Consulting, LLC, and KDL Realty Management, LLC). 68a-112a. Just like the then-pending Second Amended Complaint in the 2015 Action, the Complaint and Amended Complaint in the 2020 Action asserted claims

against Mr. Ford, Mr. Menas and a Menas family company, TNM Consulting, for alleged fraud, tortious interference, unjust enrichment, and RICO violations arising from their roles in the alleged scheme to defraud Plaintiffs-Appellants in the Pork Chop Hill transaction. 1a-67a; 68a-141a; Da004-051.

As described above, Plaintiffs-Appellants sued Mr. Rocco and Pepper Hamilton in the 2015 Action alleging legal malpractice despite the fact that Mr. Rocco did not represent them in the Pork Chop Hill transaction and neither gave them any advice, supplied them with any information, nor made any representations or assurances to them in connection with the deal. 259a-283a.

The Complaint and Amended Complaint in the 2020 Action, on the other hand, went one frivolous step further by alleging that Mr. Rocco "lied" in his depositions for the 2015 Action by testifying that he believed the owner of PCHA to be Ted Menas, the father of Nicholas Menas, whereas Plaintiffs-Appellants' theory of the case was that PCHA was really controlled by Nicholas Menas and Eric Ford. 106a. The Complaint and Amended Complaint in the 2020 Action also alleged that Mr. Rocco "lied" in his depositions for the 2015 Action by testifying that he believed the owner of TNM Consulting to be Ted Menas, whereas Plaintiffs-Appellants at all times contended that TNM Consulting was owned and controlled by Nicholas Menas himself. 106a-110a.

In the Thirteenth Count of the Amended Complaint, Plaintiffs-Appellants alleged that "Defendants [including Mr. Rocco and Pepper Hamilton] intentionally spoliated and withheld [evidence], falsely testified at depositions in the [2015 Action], and provided false, fraudulent and/or forged documents in the [2015 Action] for the purposes of disrupting the litigation in the [2015 Action]." 131a-132a. In the Fourteenth and Fifteenth Counts, Plaintiffs-Appellants alleged that the defendants conspired with and aided and abetted each other in the alleged fraudulent concealment or withholding of evidence in the 2015 Action. 132a-134a.

Neither the Complaint nor the Second Complaint in the 2020 Action, however, identified any document or other tangible evidence that Mr. Rocco allegedly knew about but concealed (let alone falsified or "forged") at any time during the course of the several years of discovery that had been conducted to date in the 2015 Action. 1a-67a; 68a-141a; Da004-051.

Rather, and as their counsel phrased it when opposing Mr. Rocco's and Pepper Hamilton's motion to dismiss the 2020 Action, Plaintiffs-Appellants were alleging that "Defendant Rocco knew the light was green, yet testified that the light was red" during his depositions for the 2015 Action.

## STANDARD OF REVIEW

The Appellate Division applies a de novo standard of review on appeals from the trial court's dismissal of an action for failure to state a claim upon which relief can be granted. See Stop & Shop Supermarkets Co. v. Cty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017).

The decision to dismiss or stay a second-filed action on the basis of comity generally lies within the trial court's discretion. Sensient Colors, Inc. v. Allstate, 193 N.J. 373, 390 (2008). In determining whether or not the trial court has abused that discretion, the reviewing court may consider, inter alia, whether the trial court considered "all relevant factors" or rested its decision on "irrelevant or inappropriate factors." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002).

Moreover, it is "well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp v. City of Rahway, 168 N.J. 191, 199 (2001).

## LEGAL ARGUMENT

## POINT ONE

### THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS-APPELLANTS' AMENDED COMPLAINT IN THE 2020 ACTION FOR FAILURE TO STATE A CLAIM AGAINST MR. ROCCO AND PEPPER HAMILTON UPON WHICH RELIEF COULD BE GRANTED (154a)

The Amended Complaint failed to allege facts which, if proven to be true, could have sustained a cause of action against Mr. Rocco or Pepper Hamilton for allegedly concealing evidence, conspiring to conceal evidence, or aiding and abetting others in their alleged concealment of evidence the course of discovery in the 2015 Action.

## A. The Trial Court Properly Dismissed Plaintiffs' Fraudulent Concealment Claims Against Mr. Rocco and Pepper Hamilton (Thirteenth Count) for Failure to State a Claim Upon Which Relief Can Be Granted (154a)

A plaintiff who alleges fraudulent concealment of evidence must establish the following: (1) that defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) that the evidence was material to the litigation; (3) that plaintiff could not reasonably have obtained access to the evidence from another source; (4) that defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; (5) that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence concealed. Rosenblit v. Zimmerman, 166 N.J. 391, 406-07 (2001).

As set forth above, Plaintiffs-Appellants' factual allegations against Mr. Rocco and Pepper Hamilton in the 2020 Action were limited to the assertion that Mr. Rocco "lied" under oath about who he believed the owner of PCHA and TNM to be. It is axiomatic, however, that allegations that a witness lied during his

deposition or court testimony are insufficient as a matter of law to sustain a claim for fraudulent concealment of evidence. In Viviano v. CBS, 251 N.J. Super. 113 (App. Div. 1991) certif. den., 127 N.J. 565 (1992), the Court held that liability for fraudulent concealment of evidence can only arise from the withholding of documentary or other tangible evidence, and not for giving allegedly false testimony. Id. at 124-25. In so concluding, the Court noted that "an absolute privilege for words spoken in the course of a judicial proceeding [is] necessary to promote testimonial candor by shielding witnesses from fear of subsequent civil suits; criminal penalties [are] sufficient sanctions against perjury." Id. Additionally, and particularly relevant here, the Court observed that permitting a disappointed suitor to seek damages from a witness who had allegedly committed perjury [would] prolong litigation indefinitely." Id. Thus, the Court held that even willfully false testimony does not support a claim for fraudulent concealment of evidence. Id.

The policy reasons behind this rule are manifest. Consider the following hypothetical: Smith is witness to a two-vehicle collision that results in a lawsuit between the two drivers involved in the crash. Plaintiff calls Smith as a witness and, when asked the question, Smith testifies that the light was green when the plaintiff entered the intersection. The defendant driver, however, finds another eyewitness, Jones, who recalls things differently. Jones testifies that the light was red when the plaintiff entered the intersection, and that the defendant had the green light. Jones

even testifies that he watched the accident happen from a much better vantage point than Smith, whose view of the accident was somewhat obstructed. The jury nevertheless believes Smith's version of the events and finds in favor of the plaintiff driver as to liability.

If the defendant could then sue Smith for allegedly lying under oath, litigation over the color of the light when the plaintiff driver entered the intersection could go on forever. Here, the trial court in the 2020 Action properly declined to go down that kind of rabbit hole.

The Amended Complaint in the 2020 Action also failed on its face to meet the fifth element for establishing a fraudulent concealment claim, namely, that Plaintiffs-Appellants were damaged in the 2015 Action "by having to rely on an evidential record that did not contain the evidence the defendants [allegedly] concealed." Rosenblit at 407. If, and as they alleged in the 2020 Action, Plaintiffs-Appellants had other evidence to refute Mr. Rocco's deposition testimony and prove that Nicholas Menas was in fact the true owner of PCHA and TNM, then, whatever that evidence was, it would have necessarily been available to Plaintiffs-Appellants in the 2015 Action because the 2015 Action was still pending.

The Amended Complaint therefore failed to state a claim for fraudulent concealment of evidence against Mr. Rocco and Pepper Hamilton, and the trial court's dismissal of the 2020 Action against these Respondents should be affirmed.

## B. The Trial Court Properly Dismissed Plaintiffs-Appellants' Aiding and Abetting Claims (Fourteenth Count) and Conspiracy Claims (Fifteenth Count) Because They Failed to Plead any Specific Facts to Show that Mr. Rocco or Pepper Hamilton Acted in Concert with the Other Defendants to Conceal any Evidence (154a)

Claims for conspiracy and aiding and abetting both require proof of a coordinated effort among the participants to engage in the alleged scheme. Plaintiffs-Appellants' Amended Complaint in the 2020 Action, however, did nothing more than cite to arguably conflicting evidence over who owned PCHA and TNM Consulting and then jump to the conclusion that there "must have been" a scheme among the defendants to conceal unspecified evidence. For that reason, the trial court's dismissal of the Fourteenth and Fifteenth Counts in the 2020 Action should be affirmed.

In order to establish a conspiracy, the plaintiff "must demonstrate that there was one plan, and that its essential scope and nature was known to each person" allegedly involved in carrying out the plan. Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App. Div. 2003). Relatedly, liability for civil aiding and abetting is only found where "one party knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself." State of New Jersey, Dept. of Treasury v. Qwest Communications International, Inc., et al., 387 N.J. Super. 469, 481 (App. Div. 2005). To survive a

motion to dismiss, claims for conspiracy to commit fraud and aiding and abetting the commission of a fraud must, like any other fraud claim, satisfy the heightened pleading requirements of R. 4:5-8 (a). See id. at 486 (finding that plaintiff's complaint sufficiently pled a claim for aiding and abetting a fraud under the heightened pleading requirements of the Rule, but only because it listed specific facts which, if true, would be sufficient to prove that the defendant accountants presented and propagated a false accounting report they knew would mislead their client's investors).

In this case, the Complaint and Amended Complaint in the 2020 Action did nothing more than parrot the elements of these causes of action without alleging a single specific fact which, if proven to be true, could establish that Mr. Rocco or Pepper Hamilton acted in concert with any of the other defendants to conceal evidence. "Pleadings reciting mere conclusions without facts [to support them] do not justify a lawsuit," however, and Plaintiffs-Appellants' barebones allegations of concerted action among the defendants were legally insufficient to survive Mr. Rocco's and Pepper Hamilton's motion to dismiss the Amended Complaint. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998).

Finally, proof of conspiracy to commit fraud and/or aiding and abetting a fraud also requires proof of the underlying fraud (in this case, alleged fraudulent concealment of evidence). State Dep't of Treasury v. Quest Communications, 387

N.J. Super. at 484. As briefed above, Plaintiffs-Appellants' pleadings in the 2020 Action failed to allege any facts which, if proven to be true, would be sufficient to establish that Mr. Rocco was involved in concealing any documentary or tangible evidence in the 2020 Action. Since the Amended Complaint for the 2020 Action failed to satisfy the requirements for pleading any actionable fraud, Plaintiffs-Appellants' claims for conspiracy to commit fraud and aiding and abetting a fraud were also properly dismissed.

## POINT TWO

### THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS-APPELLANTS' AMENDED COMPLAINT SHOULD BE AFFIRMED BASED ON PRINCIPLES OF COMITY (148a – 154a)

New Jersey courts recognize the common sense and "commonly-held principle that where two courts in the same jurisdiction have concurrent jurisdiction over [the same] matter, the court in which jurisdiction is first invoked obtains exclusive jurisdiction." Union City Associates v. Union City, 115 N.J. 17, 26 (1989). It is fundamentally "oppressive and unjust to make [a] defendant defend two identical actions" at the same time. Id.

By analogy an action may, "as a matter of sound discretion," be dismissed or stayed by a court in deference to an earlier-filed action involving the same parties, claims and legal issues. American Home Products Corp. v. Adriatic Ins. Co., 286 N.J. Super. 24, 33 (App. Div. 1995). This principle is grounded in New Jersey public

policy that seeks to avoid "vexatious and oppressive multiple litigation . . . [that] could yield inconsistent results." Bass v. DeVink, 336 N.J. Super 450, 458 (App. Div. 2001). To dismiss or stay a New Jersey action on the basis of comity, the moving party must show that: (1) there is an earlier-filed action; (2) the prior action involves substantially the same parties, the same claims, and the same legal issues as the second-filed action; and (3) the plaintiff in the second-filed action will have an opportunity for adequate relief in the first-filed action. American, 286 N.J. Super. at 37. For purposes of this analysis, the actions need not be identical; rather, they need only involve substantially the same parties, claims, and legal issues in order for principles of comity to be invoked. American, 286 N.J. Super. at 37.

A simple comparison of the caption for the 2020 Action with the caption for the 2015 Action demonstrates the substantial similarity of the parties in the two cases. Each and every defendant in the 2020 Action was also named as a defendant in the 2015 Action, with the exception of certain newly named lawyers and their firms, all of whom were already involved in the 2015 Action either as defense counsel or, in the case of Nicholas Menas, as a party. Both matters also involved the same (or substantially the same) claims and legal issues. Indeed, each and every paragraph in the Statement of Facts section of the Second Amended Complaint in the 2015 Action also appears, nearly verbatim, in the Statement of Facts section of

the Amended Complaint in the 2020 Action. Compare DA006 – Da031 with 70a – 110a.

From a factual standpoint, Plaintiffs-Appellants' core claim in both the 2015 Action and the 2020 Action was that they were allegedly defrauded into purchasing an assignment of PCHA's contract right to buy the Pork Chop Hill Assemblage. Additionally, the pleadings in both Actions asserted numerous duplicative causes of action, including alleged fraud, tortious interference, conversion, RICO, as well as conspiracy and aiding and abetting in connection with each of the foregoing claims. While the 2020 Action included new causes of action for alleged concealment of evidence, those claims all related to the same Pork Chop Hill Assemblage transaction that formed the basis for the 2015 Action. Thus, the 2015 Action and the 2020 Action involved the same (or at least substantially the same) parties, claims, and legal issues.

Finally, dismissal of the 2020 Action in deference to the then still-pending 2015 Action in no way deprived Plaintiffs-Appellants of an opportunity for adequate relief, which they had the right to continue to pursue against Mr. Rocco and Pepper Hamilton in the 2015 Action. In fact, Plaintiffs-Appellants had already served an expert report in the 2015 Action on September 18, 2019, which propagated the same theory that Plaintiffs-Appellants later tried to plead when they filed the 2020 Action,

namely, that Mr. Rocco allegedly lied in his deposition about who owned PCHA and TNM Consulting. See Da074.[1]

On December 9, 2021 (more than a year after the 2020 Action was dismissed) the trial court granted Mr. Rocco and Pepper Hamilton summary judgment in the 2015 Action. The trial court granted Mr. Rocco and Pepper Hamilton summary judgment based on the abject lack of evidence to support Plaintiffs-Appellants' claims against them, and not because Plaintiffs-Appellants were hamstrung in any way by the prior dismissal of the 2020 Action. The trial court's dismissal of the 2020 Action should therefore be affirmed based on principles of comity because the 2015 and 2020 Actions involved the same parties, claims and issues, and because dismissal of the 2020 Action did not prevent Plaintiffs-Appellants from pursuing or obtaining adequate relief against Mr. Rocco and Pepper Hamilton in the 2015 Action, if those claims had any merit whatsoever.

[1] Plaintiffs-Appellants will attempt to argue that they did not have an opportunity for "equal" relief because the trial court had previously denied their motion for leave to file a Third Amended Complaint in the 2015 Action that would have added their purported claims for fraudulent concealment of evidence to that aged lawsuit. Such an argument would have no merit, however, because (a) Plaintiffs-Appellants' fraudulent concealment claim failed to set forth facts which, if true, could give rise to liability for that cause of action and because (b) had the trial court not granted Mr. Rocco and Pepper Hamilton summary judgment in the 2015 Action, Plaintiffs-Appellants could and would have argued to the jury in that case (albeit without basis) that Mr. Rocco had "lied" in his deposition about who owned PCHA and TNM Consulting.

## CONCLUSION

For the reasons set forth above, Respondents Joseph Rocco, Esq. and Pepper Hamilton, LLP respectfully submit that the trial court's dismissal of the 2020 Action should be affirmed.

**LEWIS BRISBOIS BISGAARD & SMITH LLP**
*Attorneys for Respondents Joseph Rocco, Esq. and Pepper Hamilton LLP*

By: */s/ Jonathan M. Preziosi*
Jonathan M. Preziosi, Esq. Dated: July 19, 2023

| | |
|---|---|
| JOHN FENDT, ALAN WOZNIAK MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC,<br>*Plaintiffs-Appellants*<br>v.<br>NICHOLAS MENAS, ESQ., COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.C., TNM DEVELOPMENT CONSULTING, LLC, ERIC FORD, PULTE HOMES, KDL REALTY MANAGEMENT, LLC, THERESA MENAS, JAMES WALLS, MICHAEL BORINI, 322 WEST ASSOCIATES, LLC, JOSEPH ROCCO, ESQ., PEPPER HAMILTON, LLC, TIMOTHY J. BLOH, ESQ., CHRISTOPHER C. FALLON, III, ESQ., FOX ROTHSCHILD, LLP, JOHN L. SLIMM, ESQ., JEREMY J. ZACHARIAS, ESQ., MARSHALL DENNEHEY WARNER COLEMAN GOGGIN,<br>*Defendants-Respondents.* | Superior Court of New Jersey<br>Appellate Division<br>Docket A-003660-21<br><br>On Appeal From:<br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION:<br>MONMOUTH COUNTY<br>DOCKET NO.: MON-L-000819-20<br><br>SAT BELOW:<br>Hon. Mara Zazzali-Hogan, J.S.C. |

# BRIEF OF JOHN L. SLIMM, JEREMY J. ZACHARIAS, AND MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, P.C.

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## I) Preliminary Statement

Defendants John L. Slimm, Esquire, Jeremy J. Zacharias, Esquire, and Marshall Dennehey Warner Coleman & Goggin ("Marshall Dennehey Defendants") submit this brief and ask this Court to affirm the dismissal of Plaintiffs' Amended Complaint, pursuant to R. 4:6-2(e). The Hon. Mara Zazzali-Hogan, J.S.C. properly dismissed the Amended Complaint asserting claims for fraudulent concealment and legal malpractice. She concluded that the Amended Complaint was an improper attempt to re-litigate issues which could have been brought in Plaintiffs' previous action filed at Docket No. MON-L-3782-15 (the "2015 action"), and determined that no duty existed to support the legal malpractice claims.

In the 2015 action, the Marshall Dennehey Defendants acted as counsel of record for Nicholas Menas, Esquire and Cooper Levenson April Niedelman & Wagenheim, P.C. ("Cooper Levenson") In that capacity, the Marshall Dennehey Defendants obtained a dismissal of their clients, as Plaintiffs failed to file and serve Affidavits of Merit. As a result of the early dismissal, neither Menas and Cooper Levenson nor the Marshall Dennehey Defendants participated in any way in discovery during the 2015 action.

Since that dismissal, Plaintiffs sought to bring Menas and Cooper Levenson back into the 2015 action on several occasions, under different,

alternative theories, including a motion for reconsideration, a motion to vacate, a motion to amend, a motion to consolidate, and a motion for leave to appeal to this Court. Plaintiffs further sought to subpoena Mr. Menas' personal bank records. The Marshall Dennehey Defendants successfully fought each of these attempts.

When all such efforts were exhausted, Plaintiffs then filed the present suit, which not only asserted claims against Menas and Cooper Levenson, but also alleged baseless claims against the Marshall Dennehey Defendants for fraudulent concealment and legal malpractice, among other claims.

Judge Zazzali-Hogan dismissed the Amended Complaint, concluding that the entire controversy doctrine, claim preclusion, and law of the case doctrine barred Plaintiffs' fraudulent concealment claims. Alternatively, that dismissal was proper because of the lack of discovery in the 2015 action means that the Marshall Dennehey Defendants never had a duty to Plaintiffs upon which a fraudulent concealment action could be based, and because the litigation privilege applies to them.

Further, the legal malpractice theories against the Marshall Dennehey Defendants were also untenable, as no attorney-client relationship ever existed between Plaintiffs and the Marshall Dennehey Defendants, nor did the

Marshall Dennehey Defendants take any action upon which a legal malpractice claim may rest.

Consequently, the dismissal of Plaintiffs' complaint was proper and the Marshall Dennehey Defendants ask this Court to affirm that decision.

## II) Statement of Facts and Procedural History[1]

On June 11, 2015, Plaintiffs filed the initial lawsuit in the 2015 action case against, *inter alia*, Nicholas Menas and Cooper Levenson. (Pa259-283) On July 20, 2015, the Marshall Dennehey Defendants filed an answer to the complaint on behalf of Menas and Cooper Levenson. (Da8-21) They further filed a motion to dismiss the complaint for failure to assert a cause of action, as Plaintiffs did not provide an Affidavit of Merit as the law requires. (Da22-28). Judge Katie A. Gummer, J.S.C. granted the motion on January 19, 2016, and dismissed the complaint against Menas and Cooper Levenson with prejudice. (Da29-34)

Plaintiffs then filed several motions seeking to bring Menas and Cooper Levenson back into the 2015 action, all of which were unsuccessful.

[1] Because the facts and procedural history of this case are inextricably intertwined, for the convenience of this Court, and to avoid unnecessary repetition, the statements of the facts and procedural history will be presented together.

Judge Gummer denied a motion to reinstate the complaint on November 10, 2016. (Da35-43; 44-46) She issued a well-reasoned and comprehensive decision, reasoning that under either the R. 4:50-1 standard or the R. 4:49-2 standard, an Affidavit of Merit was required under the circumstances. (Da47-70)

Next, Plaintiffs' motion for reconsideration of the November 10, 2016 was denied on December 20, 2016. (Da71-75; 76-78) Judge Gummer set forth her reasons for the denial in the transcript of oral argument. (Da79-97)

Plaintiffs then filed a motion for leave to appeal the November 10, 2016 and December 16, 2016 orders to this Court, at Docket No. AM-000318-16T3. (Da98-104) This Court denied a motion for leave to appeal on February 9, 2017. (Da105-106)

On February 28, 2018, Plaintiffs filed a motion seeking to vacate Judge Gummer's November 10, 2016 order and to reinstate the complaint. (Da107-113) In support of the motion, Plaintiffs argued that "newly discovered evidence" existed that supposedly could not have been presented previously, and which allegedly revealed that "the actions of Nicholas Menas fit clearly under the common knowledge exception of the [Affidavit of Merit] statute or were not acts of malpractice at all, but rather were clearly intentional torts and civil law theft." (Da110)

On March 29, 2018, Judge Gummer held oral argument on Plaintiffs' motion to vacate, during which Plaintiffs' counsel argued:

> MR. DEPIERRO: [Now] ***we know that Mr. Menas is actually [TNM Development Consulting, LLC ("TNM")]***, and we only found out about this also recently, of concealment, and misrepresentation, and quite outright perjuries, ***now we know that Mr. Menas was the managing member and sole managing member of TNM.***
>
> . . . In this case, there was no legal issue. . .
>
> THE COURT: Then why did you plead one?
>
> MR. DEPIERRO: At the time we—we didn't have this—this is newly discovered evidence . . .
>
> [Da146-147 (emphasis added)]

The supposed newly discovered evidence, cited during the March 29, 2018 oral argument in the 2015 action, dealt with the alleged ownership of TNM. (Da149) The Court ultimately denied plaintiffs' Motion to Vacate, holding:

> COURT: I don't see any reason to revisit that. I'm going to deny the motion. Whether it's—whether this is deemed as simply another motion for reconsideration under 4:49-2, which is really what it appears to be, in reality, or under 4:50-1, it really is just asking the Court to revisit its decision, but in doing so fails to address the extensive analysis that the Court conducted under Couri v. Gardner, 173 N.J. 328.
>
> . . .

> Plaintiff asserts that there is new evidence, but again, I have to look at the factual allegations pled, and I don't see any basis to vacate the Court's order on that argument. I'm denying the motion.
>
> [Da150]

On April 3, 2018, Judge Gummer issued her order denying the motion to vacate. (Da152-154)

Plaintiffs then sought to obtain Mr. Menas' personal banking records, and attempted to bring Menas and Cooper Levenson into a then-pending parallel action, captioned Schwartz v. Menas, at Docket No. MON-L-3904-11. In each instance, the Marshall Dennehey Defendants took the appropriate actions on behalf of their clients and, in each instance, the court denied Plaintiffs' requests, as the following orders memorialize:

1. November 14, 2014 Order of Judge Joseph P. Quinn in the Schwartz case (Da155-157);
2. January 22, 2018 Order of Judge Gummer (Da158-160);
3. February 5, 2019 Orders of Judge Lourdes Lucas (Da161-166)
4. March 29, 2019 Order of Judge Lucas (Da167-175)
5. May 24, 2019 Order of Judge Lucas (Pa527-528)

On December 4, 2019, Plaintiffs sought leave to file a fourth Amended Complaint in the 2015 action to re-join Nicholas Menas and Cooper Levenson, and to add Pork Chop Hill Associates, LLC ("PCHA") as parties. They also

sought to assert "new" tort and legal malpractice claims against Menas and Cooper Levenson. (Da176-549) Plaintiffs' Motion for Leave was based, again, on the alleged newly discovered evidence indicating that Mr. Menas was allegedly the sole owner of TNM. The Marshall Dennehey Defendants, on behalf of Menas and Cooper Levenson, opposed the motion, arguing that Plaintiffs raised these same arguments before and that the Law Division had repeatedly rejected Plaintiffs' arguments. After argument on January 24, 2020, Judge Lucas denied Plaintiffs' motion for leave to amend. (Pa287-288)

Having lost each of their attempts to bring Mr. Menas and Cooper Levenson back into the 2015 action, Plaintiffs instituted the present action on March 4, 2020. (Pa1-67) That complaint asserted the same factual allegations and claims, against the same set of defendants, arising out of the same series of transactions, involving the same parcels of land that was at issue in the 2015 action. (Id.) Plaintiffs also included three fraudulent concealment claims against based on the Defendants' alleged failure to disclose, during discovery in the 2015 action, that "Defendant Menas was the sole member of Defendant TNM and that Defendants Menas and Ford controlled and operated PCHA as a sham entity." (Id.)

Thus, the allegations in the present action mirror the allegations in Plaintiffs' Third Amended Complaint and the proposed Fourth Amended

Complaint in the 2015 action, and the crux of that failed Fourth Amended Complaint, and the supposedly new evidence upon which it is based, exactly parallel the Plaintiffs' purported basis in the present action.

On March 11, 2020, Plaintiffs filed a Motion to Consolidate the present action with the 2015 action. (Da551-555) Plaintiffs' letter brief in support of the Motion to Consolidate conceded that the two actions addressed identical matters, stating that "[t]here can be no doubt that this matter and the Related Matter involve ***common questions of law or fact and arise out of the same transaction or series of transactions***." (Da554, emphasis added)

Judge Lucas heard oral argument on Plaintiffs' Motion to Consolidate and denied the motion by order dated April 24, 2020. (Da556-558)

On April 30, 2020, six days after Judge Lucas denied the motion to consolidate, Plaintiffs filed an Amended Complaint in the present action to add counts against, *inter alia*, the Marshall Dennehey Defendants.[2] (Pa68-141) In this Amended Complaint, the counts alleged against the Marshall Dennehey Defendants include the following:

- Thirteenth Count: Fraudulent Concealment

[2] Plaintiffs also filed suit against Timothy Bloh, Esquire, Christopher C. Fallon, Esquire and Fox Rothschild, LLP, who were the counsel of record in the 2015 action for Michael Borini; 322 West Associates, LLC; Theresa Menas; and TNM Development Consulting, LLC. (Pa68-141).

- Fourteenth Count: Conspiracy to Commit Fraudulent Concealment
- Fifteenth Count: Aiding and Abetting Fraudulent Concealment
- Sixteenth and Seventeenth Counts: Legal Malpractice
- Eighteenth and Nineteenth Counts: Negligent Supervision/Respondeat Superior

(Id.)

Thus, by filing the present action, Plaintiffs improperly sought a re-litigation of the 2015 action based on the same allegedly "newly discovered evidence" that Menas is the sole owner of TNM, which they sought to assert in the 2015 action.[3]

On May 29, 2020, the Marshall Dennehey Defendants moved to dismiss the Amended Complaint with prejudice. (Da1-566) Plaintiffs opposed the motion, and the Marshall Dennehey Defendants filed a reply to that opposition. (Da567-643) After oral argument, Judge Zazzali-Hogan granted the motion to dismiss, and a similar motion filed by co-Defendants, Joseph Rocco, Esq., and Pepper Hamilton, LLP. (Pa148-185) Judge Zazzali-Hogan held that the Entire Controversy Doctrine and the principal of *res judicata* barred the claims asserting fraudulent concealment. (Id.) She further held that the legal

[3] The 2015 action was finally fully resolved by way of settlement among the then-remaining parties on August 18, 2022, while scheduled for trial, and through an order enforcing settlement, issued on November 7, 2022.

malpractice claims were barred because, as non-clients, Plaintiffs were not owed a duty by the Marshall Dennehey Defendants. (Id.)

Litigation then ensued over whether Plaintiffs should be sanctioned for frivolously filing the Amended Complaint. (Pa190-208) Judge Zazzali-Hogan initially granted attorney's fees to both Nicholas Menas and Cooper Levenson, as well as the Marshall Dennehey Defendants, but on reconsideration, Judge Zazzali-Hogan vacated the award to the Marshall Dennehey Defendants by order dated June 30, 2022. (Pa209-232)

The remaining parties in the present action stipulated to a dismissal of the remaining claims on December 20, 2022. This appeal followed. (Pa233-257)

## IV) Legal Argument

### *ISSUE I: STANDARD AND SCOPE OF REVIEW*

In reviewing the grant of a motion to dismiss under R. 4:6-2, this Court employs a *de novo* review and applies the same standard as the trial court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005) Under R. 4:6-2(e), a court may dismiss the complaint if the facts alleged do not state a viable claim as a matter of law. Further, dismissal is appropriate when no rational jury could conclude from the evidence that an essential element of the

plaintiff's case is present. See Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001).

A court must search the complaint in depth to determine if a claim may be gleaned from the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989); Smith v. SBC Communications. Inc., 178 N.J. 265, 282 (2004). The court must accept as true all facts alleged in the complaint and grant plaintiff all reasonable inferences. Craig v. Suburban Cablevision, 140 NJ. 623, 625 (1995); Communication Workers of America v. Whitman, 298 NJ. Super. 162, 166-167 (App. Div. 1997). However, the court should not credit legal assertions nor sweeping conclusions. See, Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

Dismissal is proper when "even a generous reading of the allegations does not reveal a legal basis for recovery." Kieffer v. High Point Insurance Company, 422 N.J. Super. 38, 43 (App. Div. 2011), quoting Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005). However, the legal requisites for the claim must be apparent in the complaint, itself. Teamsters Local 97 v. State of New Jersey, 434 N.J. Super. 393, 412 (App. Div. 2014).

Generally, the scope of the court's review in a motion to dismiss is limited to the four corners of the complaint. Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div), certif. den., 188 N.J. 353 (2006)

However, while consideration of matters outside the complaint will normally convert the motion into one for summary judgment, a court may consider matters of public record and documents attached to the complaint, and analyze the motion employing the motion to dismiss standard. Teamsters Local 97, 434 NJ. Super. at 412; Williamson v. Treasurer of the State of New Jersey, 350 NJ. Super. 236, 242 (App. Div. 2002) (taking "judicial notice of the fact that pleadings and other documents on file in the Superior Court are generally public records")

Consequently, since the documents attached to the Marshall Dennehey Defendant's motion and considered by Judge Zazzali-Hogan in granting the motion to dismiss were pleadings, motion papers, and orders entered by the court in the 2015 action, they were public records and, as such, properly considered by Judge Zazzali-Hogan without converting the motion to one for summary judgment.

### ***ISSUE II: THE MOTION JUDGE PROPERLY DISMISSED THE COUNTS OF PLAINTIFFS' AMENDED COMPLAINT ALLEGING FRAUDULENT CONCEALMENT.***

Plaintiffs' first argument relevant to the Marshall Dennehey Defendants[4] asserts that Judge Zazzali-Hogan erred in dismissing Counts 13-15 alleging

[4] Only Points III and IV of Plaintiffs' brief address the Marshall Dennehey Defendants, so this brief will not address Points I, II, or V.

fraudulent concealment under the doctrines of *res judicata* and the entire controversy doctrine[5]. There was no error in Judge Zazzali-Hogan's decision, as these doctrines apply to bar counts thirteen to fifteen Plaintiffs' Amended Complaint against the Marshall Dennehey Defendants.

The entire controversy doctrine holds that all parties involved in litigation must present all the claims and defenses that are related to the underlying controversy in a single action. Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15 (1989). Rule 4:30A, which codifies the rule, provides that any claim not joined when required is thereafter barred:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions)
>
> [R. 4:30A.]

The doctrine requires the joinder in one action of all claims between same parties "arising out of or relating to same transactional circumstances." Brown v. Brown, 208 N.J. Super. 372, 377-78 (App. Div. 1986).

[5] Judge Zazzali-Hogan also cited to the law of the case doctrine in support of the dismissal, but noted that, on the facts of this case, it amount to being "one and the same" as the other two theories. (Pa182)

> In determining whether successive claims constitute one controversy for purposes of the doctrine, the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions. . . . 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.
>
> [DiTrolio v. Antiles, 142 N.J. 253, 267-68 (1995) (internal citations omitted)]

The doctrine applies when claims arise from interrelated facts, but does not require a "commonality of legal issues." DiTrolio, 142 N.J. at 271. In Mystic Isle Dev. Corp. v. Nehmad, 142 N.J. 310 (1995), in a claim for lost profits arising out of a development, the New Jersey Supreme Court held that

> the objectives behind the doctrine are threefold: (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation.
>
> [Mystic Isle Dev. Corp., 142 N.J. at 322]

*Res judicata*, also known as "claim preclusion," precludes the re-litigation of a claim previously disposed of in a prior lawsuit. Adelman v. BSI Fin. Servs., Inc., 453 N.J. Super. 31, 39 (App. Div. 2018). It applies when three elements are met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
>
> [Watkins v. Resorts Int'l Hotel & Casino. Inc., 124 N.J. 398, 412 (1991).]

The bar applies not only to "all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented but were not." Culver v. Ins. Co. of N. Am., 115 N.J. 451, 463 (1989). Further, a full trial is not required for a court's decision to have preclusive effect. Velasquez v. Franz, 123 N.J. 498, 506-07 (1991) (recognizing that *res judicata* may be premised on successful motions to dismiss for failure to state a claim, for judgment on the pleadings, or for summary judgment)

The Law of the Case doctrine provides "that a legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case." Tully v. Wu, 457 N.J. Super. 114, 128 (App. Div. 2018) (quoting Lombardi v. Massa, 207 N.J. 517, 548 (2011)) The doctrine is discretionary in nature but intends to prevent re-litigation of a previously resolved issue. Id. The doctrine is triggered when a court is faced with a ruling on the merits by a different and co-equal court on the identical issue. Id.

The inclusion of the fraudulent concealment counts in Plaintiffs' Amended Complaint, constituted an attempt to re-litigate the 2015 action. However, every element of the Watkins test was established. First, the judgment in the prior action was valid, final, and on the merits. The court dismissed Mr. Menas and Cooper Levenson from the 2015 action on January 19, 2016, before the parties exchanged any discovery or took any depositions. The parties in this case are identical to or in privity with those in the prior action. Finally, claim preclusion applies because the present action grew out of the same transaction or occurrence as the earlier action as Judge Zazzali-Hogan properly determined. See, Watkins, 124 N.J. at 412.

Judge Zazzali-Hogan recognized that the same transaction or occurrence gave rise to both the 2015 action and the current action:

> Here, the acts complained of and the demand for relief are the same in both actions, as Plaintiffs take issue with Defendants' actions in the 2015 case and seek the same relief. The theory of recovery is the same. as the same causes of action are asserted, the witnesses and documents necessary at trial are the same, and the material facts alleged are identical.
>
> [Pa180]

Plaintiffs seek to avoid that conclusion by arguing that the Amended Complaint is based on allegedly "newly discovered evidence," and thus not on the same transaction or occurrence. Specifically, Plaintiffs allege that they

only discovered the fact that Menas is the sole owner of TNM Development Consulting, LLC during the pendency of the 2015 action.

In granting the motion to dismiss, Judge Zazzali-Hogan properly pointed out that Plaintiffs sought to consolidate this action with the 2015 action, which constitutes a candid admission that this case arises from the same transaction or occurrence as the claims asserted in the 2015 action. Indeed, in the March 11, 2020 letter brief in support of the Motion to Consolidate, Plaintiffs' counsel specifically conceded as much, stating, "that "[t]here can be no doubt that this matter and the Related Matter involve ***common questions of law or fact and arise out of the same transaction or series of transactions***." (Da554, emphasis added)

Judge Lucas rejected Plaintiffs' argument—that the information concerning Mr. Menas' ownership of TNM Development Consulting was unknown prior to the exchange of discovery in the 2015 action—during both the March 29, 2018 and January 24, 2020 oral arguments in the 2015 action.

Thus, the argument that Plaintiffs did not know about the "newly discovered information" until after the claims were adjudicated has already been decided and was rejected by Judge Lucas.

Moreover, Judge Zazzali-Hogan properly concluded that permitting Plaintiffs to assert the claims now would "run[] contrary to the goals and

purposes of both the Entire Controversy Doctrine and the doctrine of *res judicata*, and is not grounded in fairness." She recognized that "the preclusion of these claims in a later action due to the Entire Controversy Doctrine was a factor to be properly considered by Judge Lucas in denying the motion to file the Fourth Amended Complaint, 'particularly where the assertion [of new claims] is so late as to prejudice other parties.'" (Pa181, quoting Pressler & Vernier, Current N.J. Court Rules, cmt. 2.3 on R. 4:94 (2020))

She further stated that

> knowing that Plaintiffs could be barred from asserting these claims in a separate action, the Court denied the motion to amend and assert these "new" causes of action. Accordingly, the prejudice to Plaintiffs has already been evaluated by the Court, and it was decided that these fraudulent concealment claims could have been asserted earlier but are not allowable now.
>
> [Pa181]

Plaintiffs' brief mischaracterizes Judge Lucas' ruling by arguing that when she stated "there is nothing that would prevent the plaintiff[s] to the extent that there are newly-discovered claims that were not knowable . . . prior to now against the parties, counsel's free to file a complaint," that she was holding that Plaintiffs could, in fact, file a new complaint. (See, Pb21, citing 1T79:23.80:2) Judge Zazzali-Hogan correctly rejected that argument and recognized that Judge Lucas did not determine that Plaintiffs could file another

complaint, but, rather, asserted that if the claims were, in fact, newly discovered, that a new complaint might be proper.

However, this was not the case, as Judge Lucas specifically held that there was sufficient evidence that was available to Plaintiffs to have previously raised the issue, regardless of whether the affidavit of title, which they allege constitutes new evidence, bolstered that claim or not:

> And again, certainly not that the Court is not cognizant of the fact that the affidavit of title may bolster the understanding of the plaintiff with regards to Mr. Menas's involvement, but certainly there was sufficient information already available, as the defendants have pointed out, to the plaintiff with regards to Nicholas Menas' involvement in TNM, that those claims may also have been raised and -- and most -- most assuredly raised before now, before December.
>
> So for all these reasons, the Court is going to deny the application to amend the complaint.
>
> [1T84:9-20]

Judge Lucas, herself, has already rejected the Plaintiffs' mischaracterization of her statement. In the April 24, 2020 hearing on Plaintiffs' Motion to Consolidate, in response to Plaintiffs' counsel's assertion that the statement indicated that Plaintiffs could bring a new claim, Judge Lucas, addressing Plaintiffs' counsel, stated, "[y]ou do not speak for the Court, and your interpretation of this Court's Order at that time is your interpretation.

The defendants obviously have a different interpretation of this Court's ruling, and this Court's ruling will speak for itself." (Da593)

She then explained that at the January 24, 2020 hearing, she questioned Plaintiffs' counsel as to how a denial of their motion to amend the complaint if it was, in fact, new evidence would prejudice Plaintiffs. (Da594) However, she then specifically stated:

> It wasn't a holding by this Court in any way or a ruling on whether or not those -- a new complaint, which the Court did not have the benefit of seeing, right, and was not even drafted, whether that new complaint which has now been filed would be subject to any attack by the defendants that they might make when they look at the complaint.
>
> [Id.]

She then further rejected Plaintiffs' counsel's mischaracterization by stating that she "wanted to make sure that that was clear on the record, is that whatever characterization the plaintiffs may have of this Court's ruling is really of no moment." (Id.)

Plaintiffs argue that this Court should simply accept Judge Lucas' initial statement in the manner which Plaintiffs misconstrue it, and reject the idea that Judge Lucas' further statements can shed light on the issue, asserting that they are "irrelevant[]." (Pb25) However, in interpreting the meaning of Judge Lucas' statement, her own statements interpreting and discussing her initial

ruling would be very relevant because she is ultimately the person who is the most knowledgeable as to her own intent and the meaning she intended to convey. Thus, this Court should reject Plaintiffs' argument concerning Judge Lucas' ruling, as it is nothing more than a misinterpretation of her holding.

Therefore, as there was no error in Judge Zazzali-Hogan granting the motion to dismiss the Marshall Dennehey Defendants, this Court is asked to affirm that decision.

### *ISSUE III: THE MOTION JUDGE PROPERLY DISMISSED THE PLAINTIFFS' LEGAL MALPRACTICE CLAIMS.*

Next, Plaintiffs assert that Judge Zazzali-Hogan erred in dismissing the legal malpractice claims against the Marshall Dennehey Defendants. The legal malpractice and *respondeat superior* claims fail because there was no attorney-client relationship between the Marshall Dennehey Defendant and Plaintiffs upon which a legal malpractice may be premised. Plaintiffs asserting legal malpractice must allege: (1) an attorney-client relationship creating a duty of care from the attorney to the plaintiff; (2) a breach of that duty by the attorney; and (3) that the breach proximately caused damages to the plaintiff. Jerista v. Murray, 185 N.J. 175, 190-91 (2005); Kranz v. Tiger, 390 N.J. Super. 135, 147 (App. Div. 2007).

Because Plaintiffs assert no facts establishing that an attorney-client relationship existed between Plaintiffs and the Marshall Dennehey

Defendants—given that the latter represented Plaintiffs' adversaries in the litigation—and because the very narrow circumstances by which a non-client may assert a legal malpractice do not exist here, no legal malpractice claim of any kind is viable.

The grounds upon which a plaintiff may pursue a malpractice claim against an attorney in the absence of an attorney-client relationship are exceedingly narrow. See, Green v. Morgan Properties, 215 N.J. 431 (2013). In Green, the Supreme Court noted its "tradition[] reluctan[ce] to permit a non-client to sue an adversary's attorney" and quoted LoBiondo v. Schwartz, 199 N.J. 62 (2009) to explain that the "good reason" for doing so is the inevitable chill on zealous advocacy which would result from permitting such suits:

> [O]ur reluctance to permit non-clients to institute litigation against attorneys who are performing their duties is grounded on our concern that such a cause of action will not serve its legitimate purpose of creating a remedy for a non-client who has been wrongfully pursued, but instead will become a weapon used to chill the entirely appropriate zealous advocacy on which our system of justice depends.
>
> [LoBiondo, 199 N.J. at 100.]

The Green Court then emphasized that "[o]ur ordinary reluctance to permit non-clients to sue attorneys remains unchanged." Green, at 460.

The limited circumstances under which non-clients can bring a claim against attorneys who did not represent them are not applicable on the facts of

this case because of the complete lack of privity between Plaintiffs and the Marshall Dennehey Defendants. See, Petrillo v. Bachenberg, 139 N.J. 472 (1995).

Plaintiffs argue that Judge Zazzali-Hogan erred, because Petrillo did not specifically hold that legal malpractice actions by non-clients are only viable in transactional matters, as opposed to in adversarial proceedings. (Pb40-41) But as Judge Zazzali-Hogan correctly noted, "a review of the Petrillo decision demonstrates that although the Court never specifically limited the doctrine to transactional settings, the duty has not been extended to adversarial litigation settings, and the purposes underlying the extension of such a duty do not comport with the imposition of such a duty." (Pa184)

In Petrillo, the Court declared that "the point is to cabin the lawyer's duty..." Petrillo. 139 N.J. at 483-84. See also, Barsotti v. Mercedes, 346 N.J. Super. 504, 508 (App. Div. 2002) (affirming dismissal of claim that defendants' attorney owed a duty to the plaintiff to ensure proceeds of the defendants' sale of a house remained available for the plaintiff's benefit where the sales proceeds belonged to the defendants and where the attorney did not supply false information); Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 185-86 (App. Div. 1999) (declining to extend duties owed to attorney to non-client where attorney discarded evidence, because the attorney made no

misrepresentation inducing non-client's reliance) The Supreme Court, thus, could not be any clearer in its analysis of legal malpractice claims filed by non-clients.

As Judge Zazzali-Hogan further highlighted, the Petrillo Court was guided in its analysis by the then-proposed Restatement of the Law Governing Lawyers. (Pa184) The comments to the Restatement of the Law Governing Lawyers explicitly state that an attorney in litigation almost never owes a duty to his client's party opponent:

> Opposing Parties. A lawyer representing a party in a litigation has no duty of care to the opposing party under this section and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement . . . [T]he opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel.
>
> [Restatement of the Law Governing Lawyers, §51 cmt. b (1998)]

See, also, DeAngelis v. Rose, 320 N.J. Super. 263, 274-75 (App. Div. 1999) (citing tentative draft of the Restatement) Of course, determining if a duty exists to a third-party is a question of law for the Court. Estate of Albanese v. Lolio, 393 N.J. Super. 355, 368 (App. Div), certif. denied, 192 N.J. 597 (2007). In this case, the privity requirement may not be relaxed because the Marshall Dennehey Defendants were Plaintiffs' adversary counsel.

In this case, the Amended Complaint did not set forth facts under which the Marshall Dennehey Defendants could have had any liability to Plaintiffs as non-clients. Plaintiffs do not assert that the Marshall Dennehey Defendants ever represented them, nor that the Marshall Dennehey Defendants took any position or made any statement during discovery upon which Plaintiffs might have relied. The Marshall Dennehey Defendants never provided Plaintiffs with counsel or an opinion letter of any kind. Further, none of the case law Plaintiffs cite extends a duty to non-clients to the litigation setting. See, Matter of Palmieri, 76 N.J. 51, 63 (1978) (attorney disciplinary matter concerning representation against former clients, not duty to non-party); R.J. Longo Const. Co. v. Schragger, 218 N.J. Super. 206, 207 (App. Div. 1987) (malpractice suit against municipal attorney over preparation of contract documents or failure to obtain right of ways, in connection with bidding for municipal contract); Albright v. Burns, 206 N.J. Super. 625, 629 (App. Div. 1986) (malpractice suit by estate beneficiaries against estate over improper handling of estate assets prior and after testator's death); Stewart v. Sbarro, 142 N.J. Super. 581, 584 (App. Div. 1976) (legal malpractice suit stemming from property sale)

Under the circumstances presented in this case, there is no basis to find that the Marshall Dennehey Defendants could owe a duty to Plaintiffs and, as such, no legal malpractice action is viable. See, Green, 215 N.J. at 460.

Similarly, the court properly dismissed the *respondeat superior* claims. Under that doctrine, an employer may be liable for its employee's negligence if, at the time of the occurrence, the employee was acting within the scope of his employment. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619 (1993) (quoting Restatement (Second) of Agency § 219 (1958)) It requires pleading (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment. Carter v. Reynolds, 175 N.J. 402, 408-409 (2003).

Here, because the Marshall Dennehey Defendants owed no duty to Plaintiffs and because there was no "tortious act" upon which to base *respondeat superior* liability, Plaintiffs' claims failed as a matter of law.

### *ISSUE IV: ALTERNATIVE ARGUMENTS EXIST TO AFFIRM THE ORDER DISMISSING THE AMENDED COMPLAINT.*

If this Court were to somehow find that the reasoning by Judge Zazzali-Hogan somehow does not apply, this Court should nevertheless affirm the order dismissing the Amended Complaint as to the Marshall Dennehey Defendants, as alternative bases for that dismissal exist.

As an initial matter, it is well-established law that this Court may affirm a dismissal for reasons other than those found by the trial judge. See Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) ("if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not

stand in the way of its affirmance"); Voellinger v. Dow, 420 N.J. Super. 480, 483 (App. Div), certif. denied, 208 N.J. 599 (2011); Grow Co. v. Chokshi, 403 N.J. Super. 443, 467 n. 8 (App. Div. 2008); Khalil v. Motwani, 376 N.J. Super. 496, 499 (App. Div. 2005). See, also, State v. Maples, 346 N.J. Super. 408, 417 (App. Div. 2002) (recognizing that an appeal is taken from the court's order rather than reasons for its decision)

*A) The Fraudulent Concealment Counts Fail To Assert A Viable Cause Of Action.*

If this Court finds that Entire Controversy Doctrine and *res judicata* reasoning does not apply to justify the dismissal of the three fraudulent concealment counts (alleging fraudulent concealment, conspiracy to commit fraudulent concealment, and aiding and abetting fraudulent concealment), that dismissal is nevertheless proper because all those counts fail to state a cause of action. Each of the causes of action are premised on the defendant having a duty to disclose the information allegedly being concealed, and the Marshall Dennehey Defendants were never subject to such a duty.

In Viviano v. CBS, 251 N.J. Super. 113 (App. Div. 1991), this Court set out the elements of a cause of action for fraudulent concealment in the context of discovery in a legal case, stating that the plaintiff had to show (1) that the defendants were legally obligated to disclose the discovery, (2) that this discovery was material to the case, (3) that the plaintiff could not readily learn

of the discovery without disclosure in discovery; (4) that defendants intentionally failed to disclose it to the claimant, and (5) that the plaintiff was harmed by relying on the nondisclosure. Viviano, 251 N.J. Super. at 123.

Here, Plaintiffs' fraudulent concealment claim must fail. The Marshall Dennehey Defendants acted as counsel for Nicholas Menas and Cooper Levenson during the 2015 action and obtained a dismissal of those clients for failure to provide an Affidavits of Merit on January 19, 2016. Accordingly, no discovery was exchanged between Plaintiffs and Menas and Cooper Levenson through their counsel, the Marshall Dennehey Defendants. Consequently, the Marshall Dennehey Defendants were never subject to a legal duty to turn over any information to Plaintiffs.

The same is true regarding the Marshall Dennehey Defendants' numerous successful objections to Plaintiffs' subpoenas in the 2015 action seeking Mr. Menas' personal banking records. The Court in the 2015 action held that the subpoenas were improper and quashed them each time. (See Da155-174; Pa527-528) Therefore, the Marshall Dennehey Defendants had no duty to disclose any information and Plaintiffs cannot establish the first element needed to assert a fraudulent concealment cause of action, as a matter of law.

Likewise, the claim for conspiracy to commit fraudulent concealment also fails to state a claim. A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, a principal element of which is to inflict a wrong against or injury upon another, together with an act that results in damage. Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App. Div. 2003). A plaintiff asserting that claim must show that there was one plan, and that its essential scope and nature was known to each person who was charged with responsibility for the consequences. Id.

Here, because the Marshall Dennehey Defendants did not participate in discovery in the 2015, and therefore had no duty to provide any information, they could not, as a matter of law, have committed an unlawful act. Moreover, there was no allegation in the Amended Complaint that the Marshall Dennehey Defendants accomplished their defense of Nicholas Menas and Cooper Levenson through unlawful means. As such, Plaintiffs presented no basis for the conspiracy claim.

Finally, in asserting a viable aiding and abetting claim for fraudulent concealment, a person is liable for harm resulting to a third person from the conduct of another when he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other

so to conduct himself . . . ." Restatement (Second) of Torts § 876(b) (1977); see also, Landy v. Federal Deposit Ins. Co., 486 F.2d 139, 162 (3d Cir. 1973).

Here, Menas and Cooper Levenson were dismissed with prejudice in the initial phases of the 2015 litigation, due to Plaintiffs' failure to provide an Affidavit of Merit. Those parties therefore had no discovery obligations and therefore no duty to breach. Consequently, the acts of the Marshall Dennehey Defendants—in obtaining the dismissal and in opposing the Plaintiffs' attempts to bring those parties back into the case—could not have "aided and abetted" a breach of duty by Menas and Cooper Levenson when Menas and Cooper Levenson had no duty. They were also all within protection of the litigation privilege, which precludes an aiding and abetting a cause of action for fraudulent concealment.

As such, if this Court were to conclude that Judge Zazzali-Hogan's reasoning was somehow erroneous, her order dismissing Plaintiffs' Amended Complaint should nevertheless be affirmed.

*B) The Legal Malpractice Counts Are Barred By The Litigation Privilege.*

Finally, the Marshall Dennehey Defendants argued, in support of their Motion to Dismiss, that the litigation privilege bars the allegations in the Amended Complaint that relate to the 2015 action. (Da561-566) The litigation privilege shields "any communication (1) made in judicial or quasi-judicial

proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995). The litigation privilege protects attorneys from a host of tort- related claims. Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 583 (2006) ("In New Jersey, the litigation privilege protects attorneys not only from defamation actions, but also from a host of other tort-related claims.")

It has been held that whether a common-law or statutory immunity applies to a party is a question of law. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). In Malik, the Court further held that "[i]f an immunity applies and bars civil liability, it trumps any theory of negligence." Id.

See, also, e.g., Peterson v. Ballard, 292 N.J. Super. 575, 582 (1986) (applying the litigation privilege in dismissing a cause of action arising from attorney's interview of a witness in anticipation of trial); Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 68 N.J. Super. 85, 91-92 (App. Div. 1961) (explaining that same public policy concerns supporting application of litigation privilege in defamation action arise in action for tortious interference)

In Loigman, the Court addressed whether the litigation privilege applied to a civil suit under 42 U.S.C. § 1983, alleging the improper sequestration of a spectator from a public hearing. The Supreme Court held the litigation privilege granted immunity to the defendants for the claim. In concluding that the litigation privilege applies more broadly than to merely defamation claims, the Loigman Court noted that "as new tort theories have emerged, courts have not hesitated to expand the privilege to cover theories, actions and circumstances never contemplated by those who formulated the rule..." Loigman, 185 N.J. at 583 (citing, T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L. Rev. 915, 928 (2004)) The Loigman Court further recognized the breadth of that expansion:

> In many jurisdictions, [t]he spectrum of legal theories to which the privilege has been applied includes negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations [and] fraud.
>
> [Id., 185 N.J., at 927-928.]

The litigation privilege bars the claims against the Marshall Dennehey defendants because each claim is based on or arises out of their legal work in the 2015 litigation, either in obtaining the dismissal of their clients, Menas and Cooper Levenson, or opposing the attempts by Plaintiffs to bring them back

into the case or to obtain Menas' bank records. (Da158-174; Pa527-528) Therefore, any action taken by the Marshall Dennehey defendants on behalf of Menas and Cooper Levenson were all made (1) during the 2015 action, (2) by Menas and Cooper Levenson's attorneys; (3) in furtherance of protecting their interests, and (4) logically related to the 2015 action. Thus, each element of the Hawkins test is met and the litigation privilege applies. Hawkins, supra, 141 N.J. at 216 (1995)

Accordingly, the litigation privilege applies to shield the Marshall Dennehey Defendants from this civil suit, and this Court should affirm the dismissal of the Amended Complaint accordingly.

## V) Conclusion

For all the foregoing reasons, the Marshall Dennehey Defendants respectfully ask this Court to affirm Judge Zazzali-Hogan's order dismissing the Amended Complaint with prejudice.

Respectfully Submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

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Dated: August 3, 2023

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| JOHN FENDT, ALAN WOZNIAK, MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC<br><br>Plaintiffs/APPELLANTS,<br>v.<br>NICHOLAS MENAS, ESQ., COOPER, LEVENSON, APRIL NIEDELMAN & WAGENHEIM, P.A., TNM DEVELOPMENT CONSULTING, LLC, ERIC FORD, PULTE HOMES, KDL REALTY MANAGEMENT, LLC, THERESA MENAS, JAMES WALLS, MICHAEL BORINI, 322 WEST ASSOCIATES, LLC, JOSEPH ROCCO, ESQ., PEPPER HAMILTON, LLC, TIMOTHY J. BLOH, ESQ., CHRISTOPHER C. FALLON, III, ESQ., FOX ROTHSCHILD, LLP, JOHN L. SLIMM, ESQ., JEREMY J. ZACHARIAS, ESQ., MARSHALL DENNEHEY WARNER COLEMAN GOGGIN,<br>Defendants/Respondents. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>DOCKET NO.: A-003660-21<br><br>ON APPEAL FROM:<br>SUPERIOR COURT, LAW DIVISION<br>MONMOUTH COUNTY<br>DOCKET NO. : MON-L-819-20<br><br>Sat Below:<br>Hon. Mara Zazzali-Hogan, J.S.C.<br><br>**DATE SUBMITTED: 08/03/23** |

# BRIEF OF DEFENDANTS/RESPONDENTS NICHOLAS MENAS, ESQUIRE & COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

On the Brief: John L. Slimm, Esquire - NJ Attorney ID No. 263721970

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## PRELIMINARY STATEMENT

Defendants, Nicholas Menas, Esquire & Cooper Levenson April Niedelman & Wagenheim, P.A. (collectively, the "Cooper Levenson Defendants"), ask this Court to affirm various Orders of the trial court, including the following:

1. Order of August 28, 2020 Dismissing Plaintiffs' Complaint against Defendants Nicholas Menas, Esquire and Cooper Levenson (164a-185a);

2. Order of Order of January 25, 2022 Granting Sanctions Against Plaintiffs and Awarding Counsel Fees to Defendants Nicholas Menas, Esq., and Cooper Levenson (190a-203a);

3. Order of June 30, 2022, Denying Plaintiffs' Motion to Reconsider the Order of January 25, 2022, with respect to Defendants Nicholas Menas, Esq. and Cooper Levenson (209a-232a); and

4. Order of June 30, 2022 Granting Defendants Nicholas Menas, Esq. and Cooper Levenson's Motion for Attorney Fees (209a-232a)

Even since their dismissal in 2016 from the Law Division matter under Docket No. MON-L-3782-15 ("2015 case"), plaintiffs have continuously attempted to bring Mr. Menas and Cooper Levenson back into the 2015 case, arguing various alternative theories. The Court, at each juncture, has denied plaintiffs' requests to bring Mr. Menas and Cooper Levenson back into the case. Plaintiffs, in their new Amended Complaint filed under Docket No. MON-L-819-

20 ("2020 case"), similar to numerous times in the past, simply seek to pour old wine in new bottles, making the same arguments before different courts in an attempt to obtain a different result. Plaintiffs, differing from their past strategy, filed the 2020 case, which involves the same parties, the same underlying transaction, and the same controversy. This Amended Complaint is highly improper based on numerous applicable doctrines, including the Entire Controversy Doctrine, the Doctrine of *Res Judicata*, and the Law of the Case Doctrine.

As is alleged in the 2015 case[1] and as alleged in the 2020 case, the 2015 matter and this matter involve the same complex legal malpractice action that arises out of the same complex land transactions involving land in Gloucester County, New Jersey known as Pork Chop Hill Assemblage ("PCHA"), zoning approvals, and the options available to a developer in making its fair share affordable housing contribution involving multiple parties and multiple lawsuits. The issues were raised in the Plaintiffs' original Complaint filed in 2015, were raised in plaintiff's proposed Fourth Amended Complaint, which was properly barred by the trial court, and were also raised in 2020 lawsuit that is the subject of this appeal. The allegations raised by plaintiffs at all avenues in the 2015 case and

[1] Plaintiffs/Appellants' appeal of the trial court's decisions in the 2015 case is presently under Appellate Docket No. A-354-22.

in this action, implicate the standard of care concerning the legal representations by Nicholas Menas and the Cooper Levenson firm; communications as counsel; and allegations pertaining to disbursement of funds from the Cooper Levenson Trust Account; and Cooper Levenson's supervision of Mr. Menas when he was an attorney with the firm.

In the 2015 case, plaintiffs failed to provide an Affidavit of Merit to substantiate their claims against Mr. Menas and Cooper Levenson, which led to the Complaint being dismissed, with prejudice, on January 19, 2016. Because Menas and Cooper Levenson were dismissed for plaintiffs' failure to secure an Affidavit of Merit, no discovery responses were served or exchanged between plaintiffs and Menas and Cooper Levenson. Plaintiffs, over four years after Menas and Cooper Levenson have been dismissed from the 2015 case, with prejudice, improperly attempted to file a frivolous lawsuit pleading the same issues raised in the 2015 case. The same was summarily and properly struck down by the trial court and fees and sanctions were properly awarded on behalf of the Cooper Levenson defendants, and it is respectfully submitted that this Court affirm those proper rulings.

## PROCEDURAL HISTORY

On March 4, 2020, Plaintiffs instituted their 2020 Lawsuit by filing a Complaint against the same set of Defendants and asserting factual allegations and

claims arising out of the same series of transactions involving the same parcels of land -- namely, the PCHA (the "2020 Lawsuit"). (1a) This "new" Complaint directly tracked the allegations in Plaintiffs' Third Amended Complaint and the proposed Fourth Amended Complaint in the 2015 Lawsuit. Plaintiffs also included three (3) "new" claims for "fraudulent concealment" against all Defendants based on their alleged failure to disclose, during discovery in the 2015 Lawsuit, that "Defendant Menas was the sole member of Defendant TNM and that Defendants Menas and Ford controlled and operated PCHA as a sham entity." (1a)

On April 24, 2020, counsel for the Cooper Levenson defendants issued a R. 1:4-8 letter to plaintiff's counsel demanding the withdrawal of the Complaint. (SDa1)

On April 30, 2020, without responding to counsel's R. 1:4-8 letter or withdrawing the Complaint, plaintiffs filed an Amended Complaint to add Counts against Timothy Bloh, Esquire, Christopher C. Fallon, Esquire and Fox Rothschild, LLP, counsel of record for defendants, Michael Borini, 322 West Associates, LLC, Theresa Menas, and TNM Development Consulting, LLC. ("Fox Rothschild defendants") (68a) Plaintiffs also added Counts against John L. Slimm, Esquire, Jeremy J. Zacharias, Esquire and Marshall Dennehey Warner Coleman & Goggin, P.C, counsel of record for the Cooper Levenson defendants. ("Marshall Dennehey defendants")(Id.)

On May 28, 2020, the Cooper Levenson defendants filed their Motion to Dismiss the Amended Complaint, based, *inter alia*, on numerous applicable doctrines, including the Entire Controversy Doctrine, Law of Case Doctrine, and the Doctrine of *Res Judicata*. (144a)

On August 21, 2020, Judge Zazzali Hogan held oral argument on defendants' Motions to Dismiss and on August 28, 2020, the Court issued its Order and Opinion dismissing plaintiffs' Complaint, with prejudice. (148a)

After being dismissed, with prejudice, from the 2020 case, on September 15, 2020, the Cooper Levenson defendants filed their Motion for Fees and Sanctions pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. (186a).

On January 25, 2022, the trial court entered an Order granting the Cooper Levenson defendants' Motion and ordered that counsel for the Cooper Levenson defendants submit a fee application within fourteen (14) days of receipt of the Order. (190a).

On February 8, 2022, the Cooper Levenson defendants submitted its fee application in the amount of $23,765.50. (206a).

On June 30, 2022, the trial court properly granted the Cooper Levenson defendants' fee application. (211a).

On June 29, 2022, Plaintiffs filed their instant appeal. (233a and 246a).

## STATEMENT OF FACTS

The procedural history of this matter involves numerous unsuccessful attempts by plaintiffs' counsel to bring the Cooper Levenson defendants back into the 2015 matter, which is explained in detail below:

On June 11, 2015, Plaintiffs filed a Complaint against the Cooper Levenson defendants, among others, under docket number MON-L-3782-15 (the "2015 Lawsuit"[2]). (259a).

On July 20, 2015, Nicholas Menas, Esquire and Cooper, Levenson, April, Niedelman & Wagenheim, P.C. filed an Answer to the Complaint with Separate Defenses and a Demand for Affidavits of Merit. (259a). On or about November 24, 2015, Nicholas Menas, Esquire and Cooper, Levenson, April, Niedelman & Wagenheim, P.C. filed a Motion to Dismiss the plaintiffs' Complaint for failure to provide an Affidavit of Merit.[3] The Motion was granted by Judge Gummer, and the Complaint against Menas and the Cooper Levenson firm was dismissed, with prejudice, on January 19, 2016. (284a).

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[2] Based on the legal argument presented below, it is respectfully submitted that this Court take judicial notice of the pleadings and Motions filed in the 2015 action, which involve the same facts and transaction as the instant matter.

[3] Plaintiffs did not submit an Opposition to Menas and Cooper Levenson's Motion to Dismiss. Plaintiffs did not dispute that they were served properly and timely with the initial Motion to Dismiss. Plaintiffs did not dispute that they timely received the Court's Order and Statement of Reasons.

Plaintiffs filed a Motion to Reinstate the Complaint, which was denied by Judge Gummer on November 10, 2016. (SDa3). The November 10, 2016 decision resulted in a 42-page transcript and was announced during the proceeding that took one hour and 11 minutes to complete. The trial court, in denying plaintiffs' Motion to Reinstate the Complaint as to Mr. Menas and Cooper Levenson, entered a well-reasoned and comprehensive decision. (SDa5).

The trial court's opinion quoted several portions of the plaintiffs' Complaint in its decision. (Id. at 14: 4-13). The trial court provided a review, with quotations, of the pleadings filed by the plaintiffs and Menas and the Cooper Levenson firm. (Id. at 14:4-19:6.). Specifically:

> Plaintiffs assert that they are bringing this motion under Rule 4:50-1. They argue that the court's order should be vacated, because according to plaintiffs, an affidavit of merit was not required as to their legal malpractice claims, because according to plaintiffs, those legal malpractice claims fall within the common knowledge exception to the requirement for an affidavit of merit. Plaintiff assert that no legal expert is necessary to explain any aspect of defendants purported legal malpractice. Plaintiffs also argues -- plaintiffs also argue that a dismissal of the entire complaint for failure to provide an affidavit of merit was improper, asserting that the dismissal of the non-legal malpractice claims of fraud, tortious interference, conspiracy, based on an affidavit of merit was not proper, because according to plaintiffs, those claims do not constitute legal malpractice, and thus, do not require an affidavit of merit.
> Specifically, on page 22 of their brief in support of this motion, plaintiffs assert that "Defendants Menas and Cooper Levenson's carelessness, negligence, tortious

> interference, and fraud that gives rise to their legal malpractice, are certainly "readily apparent to anyone of average intelligence, and ordinary experience" and therefore, does not require the filing of an AOM.
> …
> Specifically, Defendants Menas and Cooper Levenson failed to advise plaintiffs that Defendants Menas, Ford, KDL, TNM, Theresa Menas, Walls, Borini, 322 West, were personally gained from the real estate transaction at issue, and that defendants would conspire, and ultimately deviate, and transfer a substantial amount of the funds paid by plaintiffs in pursuit in the aforesaid intended transactions and developments."
> [P]laintiffs also assert that Defendant Cooper Levenson's negligent supervision of its attorney's trust account does not require the explanation of a legal expert." Id., at 23.
> …
> THE COURT: In opposition to the motion, defendants argue that plaintiffs motion for relief under Rule 4:50-1 is improper, and really is a motion for reconsideration in the guise of a motion for relief under Rule 4:50-1.
> …
> Defendants argue that none of those predicate circumstances are present here. They contend that both the motion and the order were properly served and that plaintiff has failed to establish that newly discovered evidence exists or that reversal is justified, because of fraud mistaken, inadvertent surprise, or excusable neglect.
> Substantively, defendants argue that the court correctly decided the motion asserting that an affidavit of merit was required under these circumstances, and that an affidavit of merit was required for all of the causes of action, regardless of how labeled, because all of them are based on alleged acts of legal malpractice.
> …

(SDa13-SDa15).

Having reviewed the moving papers, the Court agreed with the position of Menas and the Cooper Levenson firm that the Motion, presented as one under R. 4:50-1, was actually a Motion for Reconsideration of the Court's dismissal Order. (SDa17). The Court then held that plaintiffs' Motion to Reinstate and vacate the Order of Dismissal of January 19, 2016 would be denied, and that considering the issues under either a R. 4:50-1 standard or a R. 4:49-2 standard, an Affidavit of Merit was required under the circumstances. (SDa18).

The Court noted that the plaintiffs did not attribute the failure to provide an Affidavit of Merit to Extraordinary Circumstances. Rather, they asserted that no Affidavit was required. (SDa20).

The Court determined that "in none of the cases cited by plaintiff under the common knowledge exception come anywhere close to the complexity of the issues that would have to be put before a fact finder". (Id. at 34:9-12). Judge Gummer found that "even how plaintiffs characterize the causes of action, again, make it clear to the Court of the need for an affidavit of merit, and made it clear to the Court that the allegations do not fall within the common knowledge exception." (Id. at 35:9-14).

Judge Gummer further stated that:

> It was the same allegation of what these defendants did or failed to do that formed the premise of the remaining counts of the Complaint, and—and not any separate or distinct factual predicate.

(Id. at 21:13-17).

The trial court found that the common knowledge exception did not apply in this case:

> THE COURT: The—in the first count, plaintiffs identify three ways in which defendants allegedly breached their duty to defendants allegedly breached their duty to… [plaintiffs], and failed to meet the standard of care required by those engaged in the legal profession. Reviewing each of those, it's—again, as I said, it's clear to the court that they do not fall within the common knowledge exception.

(Id. at 32:18-25; 33:1.)

Also, the trial court stated as follows concerning plaintiffs' claims pertaining supervision of the attorney trust account:

> THE COURT: I -- on Page 23, plaintiffs assert that Cooper Levenson's negligent supervision of the attorney trust account would not require the explanation of a legal expert.
> I -- I -- again, they -- they cite no case law that supports that proposition. And of course, there are a number of rules that address an attorney's obligation, or law firm's obligation with respect to its attorney trust account.
> So, again, respectfully, I -- I just cannot see how that would be within the ken of a -- of a juror.
> THE COURT: It's not a situation where a deadline was missed. It's not a situation where there was a failure to file a motion timely. It's not a case where there was a failure to relay a settlement offer, for example. It's not simply a failure to produce an expert witness in a trial. It's - it's not that simple.

(Id. at 36:4-23.)

The Court stated as follows concerning its application of the standard set forth in the Couri matter:

> THE COURT: with respect to the issue as to the remaining counts against Defendants Menas and Cooper Levenson, both sides asserted that the court should be guided by the Couri v. Gardner case, 173 N.J. 328, 2002.
>
> THE COURT: In that case, the court addressed the affidavit of merit statute.
>
> THE COURT: And specifically addressed whether that -- whether the affidavit of merit statute could be applicable to a breach of contract claim.
> The court there found that "it is not the label placed on the action that is pivotal, but the nature of the legal inquiry. Accordingly, when presented with a tort or contract claim asserted against a professional specified in the statute, rather than focusing on whether the claim is denominated as tort or contract, attorneys and courts should determine if the claims underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession. If such proof is required, an affidavit of merit is required for that claim, unless some exception applies." Id. at 340.
>
> THE COURT: "a claimant should determine if the underlying factual allegations of the claim require proof a deviation from the professional standard of care for that specific profession."
> Applying that standard to the remaining claims, the court respectfully denies the motion, and maintains its dismissal of the remaining claims.
> Again, I'm guided by what is specifically pled. And in reviewing this matter again, it was clear to the court that really the factual predicates for the legal malpractice claims and the non-legal malpractice claims remain the same.

Plaintiff - plaintiffs do not identify either in their pleading or in their briefs in support of this motion a -- a factual predicate that applies only to the purported non-malpractice claims and not to the legal malpractice claims.

So, for example, in the fourth count, how these defendants conducted themselves with respect to the transactions, with respect to the agreements, how these lawyers conducted themselves in connection with their clients, again, would require an expert to set forth the standard of care as to what someone in the profession should or should not do.

With respect to fraud, again, here, this is the fifth count, plaintiffs allege that defendants engaged in fraud by misrepresenting the true status of the transactions, events, terminations of the agreements, assignments, and on from there.

That allegation in Paragraph 3 of Count --the fifth count, really is saying effectively the same thing that plaintiffs say in the first count in Subparagraphs A through E, as well as the third paragraph of Count 3, in which plaintiffs, again, allege as to a number of allegations as to how these defendants failed to – provide certain information, failed to timely advise them of certain aspects regarding the transactions, and the structures of the transactions, and the interrelationship between the parties.

It -- it really all goes back to that set of allegations which, as I've said, would require an expert to set forth the standard of care.

The conversion, as I've noted, the use of an attorney trust account would require an expert to talk about law firm and attorneys responsibilities with respect to the trust account.

With respect to the seventh count, in terms of conspiracy, again, that relates, to the defendants conduct in these transactions, what they should have -- what information they should have relayed, what action they should have taken, should not have taken.

> And again, as I've set forth that, again, it's effectively the same wrongful acts or inactions that are alleged in connection with the legal malpractice claims for which the court has found an expert would be necessary.

(Id. at 37:13-40:21).

Plaintiffs then filed a Motion for Reconsideration of Judge Gummer's November 10, 2016 Order. (SDa28) Judge Gummer conducted oral argument of this Motion for Reconsideration on December 16, 2016 and denied Plaintiffs' Motion by order of December 20, 2016. (SDa29). Judge Gummer set forth her reasons for her denial of the plaintiffs' Motion for Reconsideration at oral argument. (SDa31). Judge Gummer provided a thorough review of the applicable case law. (Id. at 14:8-17:14). Judge Gummer noted on the record as follows:

> Even just now during oral argument counsel stated that there is no legal work that is being questioned and/or that gives rise to the litigation, and respectfully, that just not is---that just is not an accurate representation of what was plead in this matter.

(Id. at 18:6-11).

Judge Gummer rejected plaintiffs' claim that the factual predicate for the causes of action labeled legal malpractice, as opposed to those not labeled legal malpractice, were separate and distinct. The trial court "simply did not discern any factual predicate who the remaining counts of the Complaint that were separate and distinct from what was plead in connection with the legal malpractice counts." (Id. at 21:9-13). None of the cases cited by the plaintiffs in support of the Motion

for Reconsideration were decided subsequent to the November 10, 2016 Order of Judge Gummer.

On February 28, 2018, plaintiffs filed a Motion to Vacate the Order of Judge Gummer of November 10, 2016 and again moved to Reinstate the Complaint against Nicholas Menas, Esq. and Cooper Levenson. (SDa49). On March 29, 2018, Judge Gummer held oral argument on plaintiffs' Motion to Vacate the November 10, 2016 Order (SDa50) and on April 3, 2018, Judge Gummer entered an Order denying plaintiffs' Motion to Vacate the Order of November 10, 2016. (SDa87). During the March 29, 2018 oral argument, Mr. DePierro, on behalf of the plaintiffs, argued:

> **[Now] we know that Mr. Menas is actually TNM, and we only found out about this also recently, of concealment, and misrepresentation, and quite outright perjuries, now we know that Mr. Menas was the managing member and sole managing member of TNM.** And TNM got over half the money, the million four was almost equally divided between TNM and KDL. KDL was Eric Ford and TNM was Nicholas Menas. And the money from TNM then was transferred, back to back transfers, into the personal bank account of Nicholas Menas and Theresa Menas. There was no legal work here. There's no—the issue of, well, was it a complex legal issue, because that's the thread, as the Court says, that runs through is that there was no—where there is no complex legal issue you don't need an affidavit of merit for legal malpractice claims. In this case here there is no legal issue. There was no legal issue…
> THE COURT: Then why did you plead one?
> ….

> MR. DEPIERRO: At the time we—we didn't have this—this is newly discovered evidence. We didn't have Mr. Walls, who provided this information, saying that—I didn't—I didn't even know.

(SDa50 pages 61:13-62-13.)

The newly discovered evidence cited by plaintiff during the March 29, 2018 oral argument dealt with the alleged ownership of TNM. (Id. at page 67: 7-9.). During the March 29, 2018 oral argument, the Court ultimately denied plaintiffs' Motion to Vacate, holding:

> COURT: I don't see any reason to revisit that. I'm going to deny the motion. Whether it's—whether this is deemed as simply another motion for reconsideration under 4:49-2, which is really what it appears to be, in reality, or under 4:50-1, it really is just asking the Court to revisit its decision, but in doing so fails to address the extensive analysis that the Court conducted under Couri v. Gardner, 173 N.J. 328.
>
> As required under Couri v. Gardner, the Court did an extensive analysis of the allegations in that case, or the allegations in the case, and came to the conclusion -- the conclusions that the Court came to. And plaintiff has not articulated any basis other than
> taking what seems to be yet another bite at the apple that would prompt the Court to revisit that extensive analysis.
>
> Plaintiff asserts that there is new evidence, but again, I have to look at the factual allegations pled, and I don't see any basis to vacate the Court's order on that argument. I'm denying the motion.

(Id. at page 68:7-69:2)

On August 8, 2018, Plaintiffs filed a Third Amended Complaint (incorrectly captioned as "Second Amended Complaint"), which (among other things) added Michael Brestle as a Defendant. On December 4, 2019, Plaintiffs sought leave to file another (fourth) Amended Complaint to re-join Nicholas Menas, Cooper Levenson, and Pork Chop Hill Associates, LLC ("PCHA") as parties and assert "new" tort and legal malpractice claims against Menas and Cooper Levenson, among others. (SDa89.) Plaintiffs' Motion for Leave was based on alleged "newly discovered evidence", alleging that they have discovered that Mr. Menas was allegedly the sole owner of TNM Development Consulting, LLC. Mr. Menas and Cooper Levenson filed a Brief in Opposition to plaintiffs' Motion for Leave to File a Fourth Amended Complaint arguing that plaintiffs raised these same arguments before and the Court previously rejected these arguments numerous times. This Court, after hearing oral argument on January 24, 2020, denied plaintiffs' Motion for Leave to File a Fourth Amended Complaint[4]. (844a). The crux of plaintiffs failed Fourth Amended Complaint and the alleged "newly discovered evidence" is the exact basis for plaintiffs' Complaint filed in the instant matter. (1a)

[4] The Court denied Plaintiffs' motion for leave to file a Fourth Amended Complaint due to the extreme tardiness of Plaintiffs' motion – 4 ½ years after the initial Complaint and 4 months after the controlling deadline to seek further amendments – which would substantially delay the proceedings and prejudice the remaining Defendants.

Despite the foregoing ruling, and having lost each of their attempts to bring Mr. Menas and Cooper Levenson back into the 2015 case, on March 4, 2020, Plaintiffs instituted the instant 2020 Lawsuit by filing a Complaint against the same set of Defendants and asserting factual allegations and claims rising out of the same series of transactions involving the same parcels of land -- namely, the PCHA (the "2020 Lawsuit"). (1a) This "new" Complaint directly tracked the allegations in Plaintiffs' Third Amended Complaint and the proposed Fourth Amended Complaint in the 2015 Lawsuit. Plaintiffs also included three (3) "new" claims for "fraudulent concealment" against all Defendants based on their alleged failure to disclose, during discovery in the 2015 Lawsuit, that "Defendant Menas was the sole member of Defendant TNM and that Defendants Menas and Ford controlled and operated PCHA as a sham entity."

On March 11, 2020, plaintiffs' filed a Motion to Consolidate the instant lawsuit with the preexisting case under Docket No. MON-L-3782-15. (SDa164.) Plaintiffs letter brief in support of the Motion to Consolidate states the following:

> There can be no doubt that this matter and the Related Matter involve common questions of law or fact and arise out of the same transaction or series of transactions.

(Id.)

On April 24, 2020, Judge Lucas heard oral argument on plaintiffs' Motion to Consolidate and entered an Order denying plaintiffs' Motion. (SDa166).

Also, on April 24, 2020, counsel for the Cooper Levenson defendants issued a R. 1:4-8 letter to plaintiff's counsel demanding the withdrawal of the Complaint. (SDa1) Specifically, this letter stated:

> Dear Mr. De Pierro:
>
> As you know, we represent, Nicholas Menas, Esquire and Cooper, Levenson, April, Niedelman and Wagenheim, P.C. in the subject litigation you have initiated. We believe that the Complaint violates the provisions of R. 1:4-8. You have instituted this new matter, alleging the same allegations as you alleged in the Complaint under docket number: MON-L-3782-15, and this new lawsuit has been initiated for the improper purpose of harassing our clients creating needless litigation costs in an attempt to remedy the dismissal with prejudice, that occurred in 2016, over four years ago. We demand that you withdraw the Complaint. If you fail to withdraw the Complaint within twenty eight (28) days of service of this written demand, an application for sanctions will be made within a reasonable time thereafter. Under R. 1:4-8, sanctions for frivolous conduct may include penalties paid to the Court or attorneys fees, or both.
>
> Ever since the dismissal of your Complaint in 2016, you have continuously attempted to bring Mr. Menas and Cooper Levenson back into this case, under docket number MON-L-3782-15 and now in your new lawsuit filed under docket number MON-L-819-20. In the 2015 case, you continuously argued various alternative theories and allege the discovery of new evidence, to which the Court has denied your claims at each turn. The Court also denied your request to bring Mr. Menas and Cooper Levenson back into this case. However, in your new Complaint, you attempt to make the same arguments before a different Court in an attempt to obtain a different result, which is wholly improper. This instant Complaint is highly improper based on numerous applicable

> doctrines, including the Entire Controversy Doctrine, Law of Case Doctrine, and the Doctrines of Collateral Estoppel and *Res Judicata*.
>
> You continuously seek to challenge the actions and judgments of various Judges in Monmouth County and now seek to apply to a different Court seeking to obtain a different result.
> By your own admission, the 2020 matter involves the same nucleus of facts and circumstances that were at issue in the 2015 case. The issues in the new case all arise out of the previous Orders of this Court and you have failed to follow the procedural norms of the rules of litigation.
>
> Our clients hereby reserve the right to seek sanctions, fees and costs pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. Please be guided accordingly.

(SDa1)

Having lost every single attempt to bring Mr. Menas and Cooper Levenson back in the 2015 case and to consolidate both matters, on April 30, 2020, six days after plaintiffs' Motion to Consolidate was denied, plaintiffs filed an Amended Complaint to add Counts against Timothy Bloh, Esquire, Christopher C. Fallon, Esquire and Fox Rothschild, LLP, counsel of record for defendants, Michael Borini, 322 West Associates, LLC, Theresa Menas, and TNM Development Consulting, LLC. ("Fox Rothschild defendants") (68a) Plaintiffs also added Counts against John L. Slimm, Esquire, Jeremy J. Zacharias, Esquire and Marshall Dennehey Warner Coleman & Goggin, P.C, counsel of record for Mr. Menas and Cooper Levenson. ("Marshall Dennehey defendants")(Id.) In this Amended

Complaint, the counts alleged against the Fox Rothschild defendants and the Marshall Dennehey defendants allege the following:

> Thirteenth Count: Fraudulent Concealment
>
> Fourteenth Count: Conspiracy to Commit Fraudulent Concealment
>
> Fifteenth Count: Aiding and Abetting Fraudulent Concealment
>
> Sixteenth and Seventeenth Counts: Legal Malpractice
>
> Eighteenth and Nineteenth Counts: Negligent Supervision/*Respondeat Superior*

(68a.)

On May 28, 2020, the Cooper Levenson defendants filed their Motion to Dismiss the Amended Complaint, based, *inter alia*, on numerous applicable doctrines, including the Entire Controversy Doctrine, Law of Case Doctrine, and the Doctrine of *Res Judicata*. (144a)

On August 21, 2020, Judge Zazzali Hogan held oral argument on defendants' Motions to Dismiss and on August 28, 2020, the Court issued its Order and Opinion dismissing plaintiffs' Complaint, with prejudice. (148a)

In a comprehensive Opinion, Judge Zazzali Hogan went through a recitation on the law applicable to Entire Controversy Doctrine, *Res Judicata*, and the Law of the Case Doctrine. Additionally, Judge Zazzali Hogan specifically addressed plaintiffs' allegations under fraudulent concealment and the other tort based causes

of action, including legal malpractice. Specifically, the Court addressed plaintiffs' fraudulent concealment claims as follows:

> Here, Plaintiffs seek to assert claims against the Cooper Defendants based upon the same claims, the same factual allegations, and the same transactions at issue in the 2015 case. As the defendants point out, in seeking to consolidate this action with the 2015 case, Plaintiffs have candidly admitted that this case arises from the same transaction or occurrence as the claims asserted in the 2015 case. The fact that the claims may have been framed or pled slightly differently is of no moment. Moreover, the Orders entered in the 2015 case are valid, final, and on the merits, notwithstanding the other ongoing aspects of the case. Finally, the parties to the 2015 case and this action are the same.
> Plaintiffs do not dispute these last two points, or offer any legal authority to establish otherwise. Accordingly, all elements have been met such that the claims asserted against Movants here are barred by both the Entire Controversy doctrine, as well as res judicata.
>
> Plaintiffs argue that the fraudulent concealment claims asserted here are not based upon the same factual allegations and transactions at issue in the 2015 case, because the information that led to the "new" claims was not known to Plaintiffs prior to the exchange of discovery in the 2015 case. However, that argument was rejected by the Court during the oral argument held on March 29, 2018, as well as during the oral argument held on January 24, 2020…Accordingly, the oft-repeated argument that Plaintiffs did not know about the "newly discovered information" until after these claims were adjudicated has already been decided.

(148a).

Additionally, the Court held that the acts complained of and plaintiffs' demand for relief were the same in both the 2015 matter and the 2020 matter. (Id.) The Court found that plaintiffs took issue with defendants' actions in the 2015 case and sought the same relief since their theory of recovery was the same, allege the same causes of action, list the same witnesses and cite to the same documents that would be used at trial. Therefore, since the material facts alleged were identical, the Court held that the entire controversy doctrine applied. (Id. at page 17 of Opinion.)

The Court also acknowledged that plaintiffs have pled their cause of action against the Cooper Levenson defendants numerous times in the 2015 matter. Specifically:

> Plaintiffs have already had at least three bites at the apple taking into account the motions for reconsideration, to reinstate the Complaint, and to amend the Complaint. Again, these efforts run afoul of the purposes of the Entire Controversy Doctrine, which are "to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties and promote fundamental fairness." For the foregoing reasons, the Entire Controversy Doctrine and res judicata bars these claims.

(Id. at page 18 of Opinion.)

Additionally, with regard to the other tort claims alleged against the Cooper Levenson defendants, the Court also properly found that the claims for (1) fraud, (2) tortious interference, (3) conversion, (4) unjust enrichment, (5) violation of

RICO, (6) conspiracy to violate RICO, (7) conspiracy to commit counts 1 through four, and (8) aiding and abetting counts 1 through 4 were all barred by the Entire Controversy Doctrine and the doctrine of *Res Judicata* since these claims were identical to the claims asserted in the 2015 action. (Id. at page 19.)

With regard to plaintiffs' claims for legal malpractice against the Cooper Levenson defendants, the Court properly held:

> To the extent that these Counts are based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case, they are clearly barred by the Law of the Case Doctrine, as the legal malpractice claims asserted in that case were dismissed with prejudice by the Court, and that decision was re-affirmed multiple times.

(Id. at page 20.)

After being dismissed, with prejudice, from the 2020 case, on September 15, 2020, the Cooper Levenson defendants filed their Motion for Fees and Sanctions pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. (186a).

On January 25, 2022, the trial court entered an Order granting the Cooper Levenson defendants' Motion and ordered that counsel for the Cooper Levenson defendants submit a fee application within fourteen (14) days of receipt of the Order. (190a).

The Court also prepared a Statement of Reasons accompanying this January 25, 2022 Order. In the Court's Statement of Reasons, the Court held:

> Here, the court finds that the filing of this litigation was frivolous and that attorney's fees are warranted. Regarding the Cooper Defendants, the record demonstrates the number of times that plaintiffs attempted to relitigate the same issues in the 2015 action through its opposition to the motion to dismiss, which was granted in 2016; motion to reinstate; motion to reconsider, motion for leave to appeal, motion to vacate the order denying the motion to reinstate; and motion for leave to rejoin the Cooper Defendants. To reiterate, the 2020 Amended Complaint involved the same nucleus of facts and circumstances that had previously been rejected on six prior occasions in the 2015 litigation.
> …
> Despite all of those rulings, plaintiffs had the audacity to file the present suit, essentially making all of the same claims…As set forth above, both sets of defendants complied with the rules for asserting a frivolous litigation claim by providing the proper letter and giving plaintiffs the opportunity to withdraw these claims. **This 2020 litigation is the epitome of harassment and bad faith.**
> …
> For the foregoing reasons, sanctions, are awarded against plaintiffs' counsel, Giovanni De Pierro, Esquire and his clients, John Fendt, Alan Wozniak, Monroe Township Development Company, LLC and PCH Associates, LLC as the Court deems just and proper. They shall submit documentation consistent with RPC 1.5(a) so that the court may make a determination regarding the proper amount of fees.

(190a)(emphasis added).

On February 8, 2022, the Cooper Levenson defendants submitted its fee application in the amount of $23,765.50. (206a).

On June 30, 2022, the trial court properly granted the Cooper Levenson defendants' fee application. (211a).

On June 29, 2022, Plaintiffs filed their instant appeal. (233a and 246a).

## ARGUMENT

### I. STANDARD OF REVIEW

The Appellate Division applies a de novo standard of review on appeals from the trial court's dismissal of an action for failure to state a claim upon which relief can be granted. See Stop & Shop Supermarkets Co. v. Cty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017). Moreover, it is "well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp v. City of Rahway, 168 N.J. 191, 199 (2001).

### II. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS-APPELLANTS' AMENDED COMPLAINT IN THE 2020 ACTION FOR FAILURE TO STATE A CLAIM AGAINST THE COOPER LEVENSON DEFENDANTS (148a)

The substance of plaintiffs' allegations against the Cooper Levenson Defendants makes it clear that the trial court properly dismissed the 2020 case when it held that the claims are barred under the Doctrine of *Res Judicata* and the Entire Controversy Doctrine. The trial court properly held that the 2020

case involves the same nucleus of facts and circumstances that were at issue in the 2015 case.

### A. The trial court properly held that Plaintiffs' Amended Complaint was barred by the Entire Controversy Doctrine (148a)

As the trial court properly noted in its August 28, 2020 Statement of Reasons in properly dismissing Plaintiffs' Amended Complaint, the acts complained of and plaintiffs' demand for relief were the same in both the 2015 matter and the 2020 matter. (Id.) The Court found that plaintiffs took issue with defendants' actions in the 2015 case and sought the same relief since their theory of recovery was the same, allege the same causes of action, list the same witnesses and cite to the same documents that would be used at trial. Therefore, the trial court properly held that since the material facts alleged were identical, the entire controversy doctrine applied. (Id. at page 17 of Opinion.)

The entire controversy doctrine requires that a party "litigate all aspects of a controversy in a single legal proceeding." Kaselaan & D'Angelo Assocs. v. Soffian, 290 N.J. Super. 293, 298 (App. Div. 1996) (quoting Leisure Tech.-Ne., Inc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 357 (App. Div. 1975)). "[A]ll claims arising from a particular transaction or series of transactions should be joined in a single action." Archbrook Laguna, LLC v. Marsh, 414 N.J. Super. 97, 105 (App. Div. 2010) (citing Brennan v. Orban, 145 N.J. 282, 290 (1996)). "Non-

joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims . . . ." R. 4:30A.

> The objectives of the entire controversy doctrine are:
> (1) to encourage the comprehensive and conclusive determination of a legal controversy;
> (2) to achieve party fairness, including both parties before the court as well as prospective parties; and
> (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation.

Mystic Isle Development Corp. v. Perski & Nehmad, 142 N.J. 310, 322 (1995).

The doctrine as originally applied to joinder of claims was designed "to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness." Ibid. (quoting Barres v. Holt, Rinehart and Winston, Inc., 74 N.J. 461, 465 (1977) (Schreiber, J., dissenting)).

In considering the entire controversy doctrine's application, courts are guided by the general principle that all claims arising from a particular transaction or series of transactions should be joined in a single action. Brennan v. Orban, 145 N.J. 282, 290 (1996). That mandate encompasses not only matters actually litigated but also other aspects of a controversy that might have been litigated and thereby decided in an earlier action. Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 307 N.J. Super. 48, 52 (App. Div. 1998), aff'd 156 N.J. 580 (1999).

In J-M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447 (App. Div. 2015), the defendants former employee filed a federal qui tam action in California under the False Claims Act, alleging plaintiff defrauded governmental entities. In the California action, plaintiff did not file a counterclaim. While the qui tam action was pending in California, plaintiff sued defendant in New Jersey, seeking damages against the defendant and his attorneys for defendant's investigatory activities, including the removal of confidential documents and other claims breaches of his contractual commitments to plaintiff. Defendant moved for dismissal of the New Jersey case based on the entire controversy doctrine and the trial court dismissed the case. On appeal, the Appellate Division affirmed the trial court's ruling and held that the entire controversy doctrine mandated the dismissal of the New Jersey Complaint because it was based on the same transaction or transactional circumstances as the California proceeding and held that the fact that the cases were being pursued simultaneously did not prevent the application of the entire controversy doctrine.

In the 2015 case, on January 24, 2020, Judge Lucas denied plaintiffs' Motion for Leave to File a Fourth Amended Complaint to add back into this case Mr. Menas and Cooper Levenson, among other aspects. (SDa166). Judge Lucas' ruling in denying plaintiffs' Motion for Leave to File a Fourth Amended Complaint had a direct preclusive effect on the 2020 case and the applicability of

the Entire Controversy Doctrine. See, Du-Wel Products v. U.S. Fire Ins., 236 N.J. 349, 364 (App. Div. 1989). In Du-Wel Products, the Appellate Division unequivocally held that, "[i]t is well settled that an exercise of discretion will be sustained where the trial court refuses to permit new claims and new parties to be added late in the litigation and at a point at which the rights of other parties to a modicum of expedition will be prejudicially affected." Additionally, in Fisher v. Yates, 270 N.J. Super. 458 (App. Div. 1994), the Appellate Division held that a Court's denial of a Motion for Leave to Amend based on its lateness and resulting prejudice to the parties, which is the exact scenario in the 2015 matter, has the preclusive effect of barring plaintiffs from pursuing those proposed amendments in a separate newly filed proceeding.

The situation presented before the Appellate Division in Fisher is controlling in the instant case. Plaintiffs' 2020 action against Mr. Menas and Cooper Levenson asserted the same claims, presented the same factual allegations, and concerned the same transactions that were at issue in the 2015 litigation. Plaintiffs failed to file and serve an Affidavit of Merit to substantiate their claims against Mr. Menas and Cooper Levenson in the 2015 case, which led to their dismissal, with prejudice, on January 19, 2016.

Plaintiffs, in their 2020 Complaint, sought to pour old wine in new bottles, and attempted to make the same arguments before different courts in an attempt to

obtain a different result. At its core, Plaintiffs' Amended Complaint in the 2020 Lawsuit asserted the same claims against Mr. Menas and Cooper Levenson based on the same factual allegations and transactions as in the 2015 Lawsuit. Therefore, it was proper for the trial court to hold that the 2020 Lawsuit was prohibited by the entire controversy doctrine.

Therefore, the trial court's August 28, 2020 Order dismissing the Amended Complaint as to the Cooper Levenson Defendants based on the entire controversy doctrine should be affirmed.

### B. The trial court properly held that Plaintiffs' Amended Complaint was barred by the Doctrine of *Res Judicata* (148a)

In addition to the entire controversy doctrine, the trial court was correct in holding that Plaintiffs' claims were barred by the Doctrine of *Res Judicata*. The doctrine protects litigants from the burden of re-litigating identical issues with the same party or his privity, and promotes judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979). Under 28 U.S.C. §1738, the rulings of State Courts "shall have the same full faith and credit in every Court within the United States . . . as they have by law or usage in the Courts of such state . . . from which they are taken." Thus, in determining the preclusive effect of State Court Judgments, the Court applies the state's law of *res*

*judicata*. See, Marrece v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 380 (1985).

The New Jersey Supreme Court has noted that the purpose of *res judicata* is to require litigants "to bring all possible claims in one proceeding." McNeil v. Legislative Apportionment Comm'n of State, 177 N.J. 364, 395 (2003). Under New Jersey law, claim preclusion will prevent a litigant from re-litigating disputes that have been resolved in an earlier proceeding if three requirements are met: (1) the Judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior actions; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991). With regard to the "transaction or occurrence" prong, the Court elaborated, noting that "[c]laim preclusion applies not only to matters actually determined in an earlier action, but to all relevant matters that could have been so determined." Id.

In this case, plaintiffs, in seeking to consolidate the 2020 action with the 2015 case, candidly admitted that the 2020 case arose from the same transaction or occurrence as the claims asserted in the 2015 case. The trial court properly held that the Orders entered in the 2015 case were valid, final, and on the merits, and

fully applicable to the 2020 case. The trial court also held that the doctrine of res judicata applied since the parties to the 2015 case and the 2020 case were the same.

Therefore, the 2020 Complaint, which involved the same nucleus of facts and circumstances that were at issue in the 2015 case, was properly barred under the Doctrine of *Res Judicata*.

Therefore, based on the applicability of the Doctrine of *Res Judicata*, the trial court's August 28, 2020 Order dismissing Plaintiffs' Amended Complaint, with prejudice, should be affirmed.

### C. The trial court properly held that Plaintiffs' Legal Malpractice Allegations were barred by the Law of the Case Doctrine (148a)

With regard to plaintiffs' claims for legal malpractice against the Cooper Levenson defendants, the trial court properly held:

> To the extent that these Counts are based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case, they are clearly barred by the Law of the Case Doctrine, as the legal malpractice claims asserted in that case were dismissed with prejudice by the Court, and that decision was re-affirmed multiple times.

(148a).

"Under the law of the case doctrine, decisions of law made in a case should be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991). The law of the case is "restricted to preventing re-litigation of the same issue in the same suit." Slowinski v. Valley

Nat'l Bank, 264 N.J. Super. 172, 180-181 (App. Div. 1993). "The law-of-the-case doctrine is a guide for judicial economy based on the sound policy that when an issue is once litigated and decided during the course of a case, that decision should be the end of the matter." Feldman v. Lederle Labs., a Div. of Am. Cyanamid Co., 125 N.J. 117, 132 (1991). "The doctrine is premised upon the desirability of avoiding the re-litigation of an issue that has already been litigated and decided." State v. Downey, 237 N.J. Super. 4, 14 (App. Div. 1989).

In this case, plaintiff's 2020 Complaint was nothing more than an attempt to re-litigate the issue of the dismissal of Mr. Menas and Cooper Levenson, which had been already been litigated and decided in the 2015 case. "It has been generally stated that the law of the case doctrine applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974). Despite numerous attempts by plaintiffs in the 2015 suit and the 2020 case, Judge Gummer's January 19, 2016 decision dismissing Mr. Menas and Cooper Levenson with prejudice has never been reversed.

Plaintiffs' 2020 Amended Complaint and the allegations presented against Menas and Cooper Levenson were clearly in violation of the Law of the Case Doctrine and the trial court correctly dismissed Plaintiffs' claims based on this

doctrine and based on the clear history of bad faith conduct by Plaintiffs. The history in this case is clear: In the 2015 case, Judge Gummer dismissed the claims against Mr. Menas and Cooper Levenson, with prejudice, over four years before the filing of the 2020 Complaint. Judge Gummer's Order dismissing Mr. Menas and Cooper Levenson from the 2015 case was the law of the 2020 case and could not be changed simply by filing a new complaint, over four years later under a different docket number. Plaintiffs' tactic of filing the 2020 case was nothing more than their latest attempt to circumvent the 2015 Court's dismissal of the claims against Mr. Menas and Cooper Levenson and was properly found to be sanctionable conduct.

Therefore, pursuant to the Law of the Case Doctrine, the trial court's August 28, 2020 Order dismissing Plaintiffs' Amended Complaint, with prejudice, should be affirmed.

## III. THE TRIAL COURT PROPERLY SANCTIONED PLAINTIFFS FOR THE FILING OF THE 2020 COMPLAINT AND PROPERLY AWARDED THE COOPER LEVENSON DEFENDANTS' ATTORNEYS' FEES (190a-203a; 209a-232a)

After being served with plaintiffs' frivolous 2020 Complaint, the Cooper Levenson defendants issued a R. 1:4-8 letter to plaintiffs' counsel on April 24, 2020 demanding the withdrawal of the Complaint filed before this Court. (SDa 1).

However, plaintiffs refused to do so, leading to the proper dismissal of the 2020 Complaint and the granting of attorneys' fees and sanctions.

In the 2020 case, the trial court, on January 25, 2022, properly entered an Order granting the Cooper Levenson Defendants' Motion and ordered that counsel for the Cooper Levenson defendants submit a fee application within fourteen (14) days of receipt of the Order. (190a).

In the trial court's January 25, 2022 Statement of Reasons, the trial court properly held:

> Here, the court finds that the filing of this litigation was frivolous and that attorney's fees are warranted. Regarding the Cooper Defendants, the record demonstrates the number of times that plaintiffs attempted to relitigate the same issues in the 2015 action through its opposition to the motion to dismiss, which was granted in 2016; motion to reinstate; motion to reconsider, motion for leave to appeal, motion to vacate the order denying the motion to reinstate; and motion for leave to rejoin the Cooper Defendants. To reiterate, the 2020 Amended Complaint involved the same nucleus of facts and circumstances that had previously been rejected on six prior occasions in the 2015 litigation.
> …
> Despite all of those rulings, plaintiffs had the audacity to file the present suit, essentially making all of the same claims…As set forth above, both sets of defendants complied with the rules for asserting a frivolous litigation claim by providing the proper letter and giving plaintiffs the opportunity to withdraw these claims. **This 2020 litigation is the epitome of harassment and bad faith.**
> …

> For the foregoing reasons, sanctions, are awarded against plaintiffs' counsel, Giovanni De Pierro, Esquire and his clients, John Fendt, Alan Wozniak, Monroe Township Development Company, LLC and PCH Associates, LLC as the Court deems just and proper. They shall submit documentation consistent with RPC 1.5(a) so that the court may make a determination regarding the proper amount of fees.

(190a)(emphasis added).

After the Cooper Levenson defendants filed their fee application, the trial court properly entered an Order on June 30, 2022 ordering the following:

> IT IS on this 30th day of June, 2022,
>
> ORDERED that Plaintiffs and their counsel filed the 2020 litigation against the Cooper Levenson defendants in bad faith and for the sole purposes of harassment; and
>
> IT IS FURTHER ORDERED that Plaintiffs' counsel, Giovanni De Pierro, Esquire and his clients, John Fendt, Alan Wozniak, Monroe Township Development Company, LLC and PCH Associates, LLC, are hereby sanctioned in the amount of $23,765.50 to be paid within thirty (30) days of the date of this Order;

(211a).

In the trial court's comprehensive Statement of Reasons, the trial court held:

> Regarding the Cooper Defendants, the record demonstrates the number of times that plaintiffs attempted to relitigate the same issues in the 2015 action through its opposition to the motion to dismiss, which was granted in 2016; motion to reinstate; motion to reconsider, motion for leave to appeal; motion to vacate the order denying the motion to reinstate; and motion for

> leave to rejoin the Cooper Defendants. To reiterate, the 2020 Amended Complaint involved the same nucleus of facts and circumstances that had previously been rejected on six prior occasions in the 2015 litigation. The court did not err under the reconsideration standard set forth in Cummings when it found that the litigation was frivolous and warranted an award of attorney's fees. To be clear, the Cooper Defendants were already brought in and dismissed from the underlying litigation on purely legal grounds – the lack of an affidavit of merit. No facts can change that. Even if the court were to apply the "interests of justice" standard set forth in Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021), the court finds that it would be manifestly unjust to reconsider its prior decision regarding the Cooper Defendants.

(215a).

Rule 1:4-8 is designed to ensure that attorneys do not initiate or pursue litigation that is frivolous. First, the Rule imposes an obligation on the attorney or *pro se* party to certify, based on a reasonable inquiry, that the pleading "is not being presented for any improper purpose," that the assertions "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and that there is "evidentiary support" for the allegations being made. R. 1:4-8(a)(1), (2), (3). Second, the Rule imposes a continuing duty on the attorney or *pro se* party who filed the pleading to correct or withdraw the allegations or the denials contained therein based upon further investigation and discovery. R. 1:4-8(a)(3), (4). Third, the Rule creates an enforcement mechanism by which a party who believes that a

pleading or filing violates the Rule may so advise the adversary, giving the adversary the opportunity to withdraw the pleading without penalty, failing which, that party may seek or the court may impose a variety of sanctions. R. 1:4-8(b)(1). See LoBiondo v. Schwartz, 199 N.J. 62 (2009).

The New Jersey Supreme Court in LoBiondo discusses the limitations of Rule 1:4-8: The Supreme Court noted that the Rule permits a court to award are not unbounded, but describes the sanctions as "a sum sufficient to deter repetition of such conduct." Id. Particularly, the Rule describes the permissible sanction in terms of "pay[ment of] a penalty into court, . . . payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation, or both." Id. As a means to ensure the Rule does not become an avenue for the routine award of attorney's fees, the Rule requires the court, as part of its order, to "describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed." Id. Moreover, the Appellate Division notes the Rule imposes a temporal limitation on any fee award, holding a court may award reasonable fees only from that point in the litigation at which it becomes clear that the action is frivolous. DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 229-30 (App. Div. 2000) (interpreting impact of obligation to withdraw based on further discovery pursuant to R. 1:4-8(a)(3) upon award of fees).

Here, the trial court properly awarded reasonable attorneys' fees and sanctions in the amount of $23,765.50. The trial court properly assessed the reasonableness of the fee under the RPC 1.5 factors and held that the RPC 1.5 factors weigh in favor of the Cooper Levenson defendants. Specifically:

> First, counsel provided a detailed and specified account of the time expended in this matter. Notably, the time spent by the Cooper Defendants' counsel on this matter precluded them from working on other matters. As for the third factor, the legal invoices attached to the moving brief and the requested rates, $215.00 for partner time and $200.00 for associate time, are reasonable when compared to similar firms in the surrounding area and for attorneys with similar skills. In fact, to some, they may be considered low. Moreover, a review of those records reveal that none of the hours counsel spent working on this matter appear to be excessive, redundant or otherwise unnecessary. Regarding the results, this litigation resulted in a complete victory to the Cooper Defendants. Given the multitude of pleadings, the fees being request in the amount of approximately $26,000 are reasonable. The last three factors have no direct bearing on this case other than to say that the experience and reputation of the attorneys representing the Cooper Defendants are solid. For the foregoing reasons, the request for fees and costs in the amount of $23,765.50 is granted.

(215a).

For years, Plaintiffs have harassed the Cooper Levenson defendants, misusing the legal system without regard to the supporting facts or supporting law, all to the detriment of Cooper Levenson and Menas in terms of, among other things, incurring significant legal fees and costs. Plaintiffs' refusal to withdraw

their Amended Complaint and litigate this matter in bad faith without any basis other than to harass the Cooper Levenson defendants entitles the Cooper Levenson defendants to reasonable attorneys' fees and costs.

Therefore, based on the correct and well-reasoned decision of the trial court, the January 25, 2022 Order granting the Cooper Levenson defendants' Motion for Fees and Sanctions and the June 30 2022 Order granting the Cooper Levenson defendants fee application in the amount of $23,765.50 should be affirmed.

## CONCLUSION

For the reasons expressed above, the Cooper Levenson Defendants ask this Court to affirm various Orders of the trial court, including the following:

1. Order of August 28, 2020 Dismissing Plaintiffs' Complaint against Defendants Nicholas Menas, Esquire and Cooper Levenson (164a-185a);

2. Order of Order of January 25, 2022 Granting Sanctions Against Plaintiffs and Awarding Counsel Fees to Defendants Nicholas Menas, Esq., and Cooper Levenson (190a-203a);

3. Order of June 30, 2022, Denying Plaintiffs' Motion to Reconsider the Order of January 25, 2022, with respect to Defendants Nicholas Menas, Esq. and Cooper Levenson (209a-232a); and

4. Order of June 30, 2022 Granting Defendants Nicholas Menas, Esq. and Cooper Levenson's Motion for Attorney Fees (209a-232a)

MARSHALL DENNEHEY
Attorneys for Defendants/Respondents, Nicholas Menas, Esquire & Cooper Levenson April Niedelman & Wagenheim, P.A.

/s/ John L. Slimm
BY:_____
JOHN L. SLIMM

Dated: August 3, 2023

| | |
|---|---|
| JOHN FENDT, ALAN WOZNIAK MONROE TOWNSHIP DEVELOPMENT COMPANY, LLC, and PCH ASSOCIATES, LLC,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>NICHOLAS MENAS, ESQ., COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.C., TNM DEVELOPMENT CONSULTING, LLC, ERIC FORD, PULTE HOMES, KDL REALTY MANAGEMENT, LLC, THERESA MENAS, JAMES WALLS, MICHAEL BORINI, 322 WEST ASSOCIATES, LLC, JOSEPH ROCCO, ESQ., PEPPER HAMILTON, LLC, TIMOTHY J. BLOH, ESQ., CHRISTOPHER C. FALLON, III, ESQ., FOX ROTHSCHILD, LLP, JOHN L. SLIMM, ESQ., JEREMY J. ZACHARIAS, ESQ., MARSHALL DENNEHEY WARNER COLEMAN GOGGIN,<br><br>Defendants/Respondents. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003660-21<br><br>ON APPEAL FROM:<br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MONMOUTH COUNTY<br>Docket No. Below: MON-L-819-20<br><br>Sat Below:<br>Hon. Mara Zazzali-Hogan, J.S.C. |

# PLAINTIFFS-APPELLANTS' REPLY BRIEF

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## THE TRIAL COURT ERRED IN DISMISSING THE FIRST COUNT THROUGH THE EIGHTH COUNT OF PLAINTIFFS' COMPLAINT AGAINST DEFENDANTS PURSUANT TO RES JUDICATA AND THE ENTIRE CONTROVERSY DOCTRINE (182a)

The First Count through the Eighth Count of Plaintiffs' Amended Complaint allege Fraud, Tortious Interference, Conversion, Unjust Enrichment, Violation of New Jersey RICO, and Aiding and Abetting and Conspiracy to commit said intentional torts, against Nicholas Menas ("Menas"). Said Counts arise solely from Plaintiffs' newly discovered evidence in the 2015 Action that Menas was the Sole Member of TNM and controlled and operated PCHA as a sham entity, and the newly discovered claims arising therefrom. None of these facts nor claims were alleged in the complaint that was dismissed against Menas in the matter of Fendt et al. v. Menas, et al., MON-L-3782-15, currently also on appeal (hereinafter the "2015 Action"), as said facts were only discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole basis for dismissing said Counts against Menas is Res Judicata and the Entire Controversy Doctrine. The Trial Court stated: "These claims are barred by the Entire Controversy Doctrine and res judicata, as they are identical to the claims asserted in the 2015 action…" 182a. The Trial Court did not explain how claims that are entirely new, arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity –

facts and claims which were not pled before the dismissal of the complaint against Menas in the 2015 Action, since they were unknown by Plaintiffs at the time – could possibly be "identical" to the claims that were dismissed. Defendants' opposition briefs repeatedly echo the Trial Court's conclusive statement, but like the Trial Court offer no rationale whatsoever, since none exists.

The New Jersey Supreme Court in DiTrolio v. Antiles, 142 N.J. 253, 273–74, 662 A.2d 494, 505 (1995) held that "[T]he entire controversy doctrine does not apply to unknown or unaccrued claims." It is a well-established principle of justice and fairness that the Entire Controversy Doctrine is inapplicable to, and does not apply to bar, component claims either unknown, unarisen, or unaccrued at the time of the original action. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70, 800 A.2d 861, 868 (2002). See Zaromb v. Borucka, 166 N.J.Super. 22, 27, 398 A.2d 1308 (App.Div.1979) (holding that slander claim was not precluded by Entire Controversy Doctrine because the party was not aware of its existence).

There is no rule or case law prohibiting a party from seeking to bring a new claim, previously unknown and unknowable, against parties who were previously dismissed with prejudice prior to the discovery of said new claim. Instead, a dismissal only applies to known or knowable claims at the time of the dismissal. Plaintiffs' new claims against Menas and Cooper Levenson ("M&C") were not

known, could not have been known, and therefore were not pled at the time of the dismissal of Plaintiffs' previous claims.

In addition, when "considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant has had a fair and reasonable opportunity to have fully litigated that claim in the original action." Gelber v. Zito P'ship, 147 N.J. 561, 565, 688 A.2d 1044, 1046 (1997). In the context of this matter and these new claims, there can be no doubt that Plaintiffs' claims arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity *after* the dismissal of the complaint in the 2015 Action, were unknown, unarisen, and therefore unaccrued at the time of the filing of the original complaint in the 2015 Action, as well as at the time of dismissal of certain claims in the 2015 Action. These new claims arose *after* they were uncovered by Plaintiffs during the course of litigation in the 2015 Action, overcoming years of Defendants' concerted efforts to fraudulently conceal them. It is inconceivable to conclude that Plaintiffs' mere efforts to bring these new claims in the 2015 Action by way of a motion to amend constitutes Plaintiffs' fair and reasonable opportunity to have fully litigated these new claims in the 2015 Action, especially considering the fact that The Honorable Lourdes Lucas, J.S.C., did not deny Plaintiffs' motion to amend in the 2015 Action for substantive reasons related to the merits of Plaintiffs' new claims. Instead, Judge Lucas solely denied

Plaintiffs' motion to amend because Her Honor did not want to delay the trial and found that Plaintiffs would not be barred from filing these new claims in a new action, where they would then be given a fair and reasonable opportunity to be fully litigated. (885a – 886a;1T, 81:18 – 82:5).

Judge Lucas specifically and unequivocally held:

> "[A]s counsel for plaintiffs acknowledge during oral argument, there is nothing that would prevent the plaintiff to the extent that there are newly discovered claims that were not knowable…prior to now against parties, counsel's free to file a complaint."

(884a – 885a; 1T, 79:22 – 80:2).

In Judge Lucas's conclusion, which the Trial Court and all of the opposition briefs entirely ignored, Judge Lucas's stated the following:

> When I balance that prejudice against these defendants and their interests and their right to have this case expeditious – expeditiously decided, to have this case expeditiously go to trial, which already has not been too expeditious, ***balanced against the interest of the plaintiff in this case, which would not be foreclosed from bringing these claims, they would just have to bring it in a different procedural posture***, the Court is not persuaded that allowing an amendment to the complaint at – complaint at this late stage of the case when we have a trial date looming in March would not be in the interest of justice to the parties in this case at this point.

(885a – 886a; 1T, 81:18 – 82:5, emphasis added).

It is obvious that in denying Plaintiffs' motion to amend in the 2015 Action, Judge Lucas never inculpated Plaintiffs or held that Plaintiffs should have attempted to file their Motion to Amend earlier in time, and certainly did not find that the new claims were barred by the dismissal of the previous claims. Indeed,

Judge Lucas specifically stated: "And so again, and that is by no way should be interpreted as in -- as an indication that the Court is casting any type of critique against the plaintiffs. The case evolved as the case evolved. And to the extent that new claims are discovered during discovery, well, they are discovered." (885a; 1T, 80:19-24). A plain reading of the plain language of the transcript demonstrates that Judge Lucas denied Plaintiffs' motion to amend the complaint solely because she was swayed by the finding that there would be no prejudice to Plaintiffs as they would not lose, under any doctrine, case law, or court rule, their right to bring these newly discovered claims in a new action.

Yet, somehow, the Trial Court misinterpreted Judge Lucas as finding that "Plaintiffs could be barred from asserting these claims in a separate action" and nevertheless "denied the motion to amend and assert these "new" causes of action". 181a. Based on this blatant misinterpretation of Judge Lucas's clear statement to the contrary, the Trial Court erroneously concluded that "the prejudice to Plaintiffs has already been evaluated by the Court, and it was decided that these …claims could have been asserted earlier but are not allowable now". 181a. It is difficult to understand how the Trial Court could have so blatantly misread and misinterpreted Judge Lucas's holding that in evaluating the prejudice against Plaintiffs in denying the motion to amend, Plaintiffs "would not be foreclosed from bringing these claims, they would just have to bring it in a different procedural

posture." 885; 1T, 81:23-25. Judge Lucas held and did the opposite of what the Trial Court misinterpreted; Judge Lucas evaluated the prejudice of whether Plaintiffs would be barred from bringing these new claims in a new action, and found that there would be *no* such prejudice because they would *not* be barred.

Certain oppositions irrelevantly focus on the erroneous decision, currently under appeal, of The Honorable Katie Gummer, J.S.C., who dismissed the claims against M&C in the 2015 Action, but fail to recognize that Judge Gummer's decision explicitly held that every single claim pled by Plaintiffs against M&C in the 2015 Action, however labeled, was a legal malpractice claim. 284a. Indeed, Judge Gummer dismissed all of Plaintiffs' claims against M&C in the 2015 Action due to the lack of an affidavit of merit. 284a. Accordingly, in dismissing all of the prior claims against M&C in the 2015 Action, it necessarily follows that Judge Gummer ruled that all of Plaintiffs' prior claims against M&C were legal malpractice claims. Therefore, the Court in the 2015 Action held that Plaintiffs never filed a non-legal malpractice claim against M&C in the 2015 Action. As such, there is no way the Trial Court in this matter could now find that Plaintiffs' new, non-legal malpractice claims in this matter against Menas arising solely from the discovery that he was Sole Member of TNM and controlled and operated PCHA as a sham entity, and not arising out of his capacity as a lawyer, were

previously dismissed – because, again, Judge Gummer explicitly found that all of Plaintiffs' previous claims against M&C were legal malpractice claims.

Finally, the timing and circumstances of this Amended Complaint cannot be understood in a vacuum, disconnected from the reality of what occurred for years in the 2015 Action and was pled in this matter. As pled in Plaintiffs' Amended Complaint, for years Defendants went above and beyond, and oftentimes into the realm of bad-faith delay tactics, obstruction, perjury, and fraudulent concealment, in order to keep Plaintiffs from obtaining the factual predicates for their new claims. Had Defendants cooperated in good faith with the discovery process in the 2015 Action instead of requiring Plaintiffs to overcome never-ending motion practice in order to obtain the depositions and documents that the Court ultimately granted, and had Defendants refrained from committing perjury, falsifying documents, and producing false documents to conceal evidence, Plaintiffs would have been able to complete the puzzle years earlier, discover these new claims years earlier, and file a motion to amend in the 2015 Action years earlier. For the same Defendants who created this situation with their fraudulent conduct to then claim that they are prejudiced if Plaintiffs are allowed to state the claims they discovered overcoming Defendants' fraudulent conduct, is a profanation of any sense of fairness and justice.

Here, Plaintiffs uncovered necessary evidence of claims against M&C and other Defendants that was intentionally hidden. While Plaintiffs uncovered the new evidence in the underlying litigation, the Court in the 2015 Action explicitly denied Plaintiffs' attempt to amend their complaint to bring these new claims by holding that Plaintiffs could do so in a new action, and nothing would foreclose them from doing so. Plaintiffs acted pursuant to Judge Lucas's holding, and the Trial Court in this matter misinterpreted said holding and precluded Plaintiffs from seeking the remedies provided by the Supreme Court of New Jersey in Rosenblit v. Zimmerman, 166 N.J. 391 (2001). This grave injustice must be reversed.

## POINT II
## THE TRIAL COURT ERRED IN DISMISSING THE NINTH COUNT THROUGH THE ELEVENTH COUNT OF PLAINTIFFS' COMPLAINT FOR LEGAL MALPRACTICE AGAINST M&C (183a)

The Ninth Count through the Eleventh Count of Plaintiffs' Amended Complaint allege legal malpractice against M&C. The legal malpractice alleged in said Counts arises solely from Plaintiffs' newly discovered evidence and newly discovered claim in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. The legal malpractice claimed against M&C arises solely from Menas's failure to advise Plaintiffs of said facts during the course of his representation. None of these facts nor claims were alleged in the complaint that was dismissed against M&C in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole basis for dismissing said Counts against M&C was expressed by the Trial Court as follows:

> To the extent these Counts are based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case, they are clearly barred by the Law of the Case Doctrine, as the legal malpractice claims asserted in that case were dismissed with prejudice by the Court…

183a.

Neither the Trial Court nor the opposition briefs explain how claims that are entirely new, arising out of the discovery that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity – facts and claims which were *not* pled before the dismissal of the complaint against M&C in the 2015 Action, since they were unknown by Plaintiffs at the time – could possibly be "based on the same factual predicates underlying the legal malpractice claims asserted in the 2015 case."

The new legal malpractice claims against M&C were not and could not have been known or pled prior to the dismissal of the previous claims, because they arise solely out of Menas's ownership of TNM and control and operation of PCHA as a sham entity, which are facts that could not have been known and were not previously known or alleged at the time of the original complaint in the 2015 Action. The new legal malpractice claims against M&C have absolutely no connection to the prior, dismissed legal malpractice claims, and share absolutely no

factual predicates. Instead, the prior dismissed claims, as M&C so forcefully argued and Judge Gummer held, were all legal malpractice claims arising out of Menas's legal work on behalf of Plaintiffs with respect to the transaction. The new legal malpractice claims against M&C, on the other hand, are solely supported by the previously unknown and unknowable fact that Menas was the Sole Member of TNM and controlled and operated PCHA as a sham entity, and therefore committed malpractice by failing to advise Plaintiffs of these facts.

It is self-evident that the previously dismissed claim for legal malpractice in the 2015 Action had absolutely none of the factual predicates of the legal malpractice claim in the Amended Complaint in this matter, and for obvious reason: Plaintiffs did not know and could not have known at the time of the filing of the complaint in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. These facts only emerged during the course of discovery in the 2015 Action, after the dismissal of Plaintiffs' prior claims. For the Trial Court to state that the present legal malpractice claims against M&C, predicated solely on the discovery of Menas's ownership of TNM and operation of PCHA as a sham entity, have the "same factual predicates" as Plaintiffs' previously dismissed legal malpractice claim which did not and could not have alleged any of these predicate facts because they were unknown, is a confounding error that must be reversed. 183a.

## POINT III

## THE TRIAL COURT ERRED IN DISMISSING THE THIRTEENTH COUNT THROUGH THE FIFTEENTH COUNT OF PLAINTIFFS' COMPLAINT PURSUANT TO RES JUDICATA AND THE ENTIRE CONTROVERSY DOCTRINE (179a)

The Thirteenth Count through the Fifteenth Count of Plaintiffs' Amended Complaint allege Fraudulent Concealment, and Aiding and Abetting and Conspiracy to commit same, arise solely from Defendants' fraudulent concealment of the newly discovered evidence in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity, and the new claims arising therefrom. None of these facts nor claims were alleged in the complaint that was dismissed against Menas in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court's sole bases for dismissing said Counts are Res Judicata and the Entire Controversy Doctrine. The Trial Court stated: "Plaintiffs seek to assert claims against [Defendants] based upon the same claims, the same factual allegations, and the same transactions at issue in the 2015 case…" 179a. The Trial Court did not explain how claims that are entirely new, arising out of the discovery that Defendants fraudulently concealed evidence that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity – facts and claims which were not pled before the dismissal of the complaint against M&C in the 2015

Action, since they were unknown by Plaintiffs at the time – could possibly be "the same factual allegations" as the claims that were dismissed.

In their opposing brief, Defendants Rocco and Pepper Hamilton ("R&P) egregiously misrepresent the holding of Viviano v. CBS, 251 N.J. Super. 113, by purposely failing to fully cite the Court's holding. R&P argues that false testimony does not constitute fraudulent concealment. First, this erroneous argument is irrelevant because Plaintiffs do not claim that R&P fraudulently concealed evidence by way of false testimony only. Instead, Plaintiffs allege that R&P fraudulently concealed that PCHA was a sham entity by way of letters, notices in Releases, the meeting with Plaintiff Wozniak in their law office, and by their failure to produce their file in discovery. Second, R&P's mischaracterization of the holding of Viviano is fatal to their argument.

The Court in Viviano at 125, specifically held the following:

> *The present case differs from those in which courts recognized an absolute privilege for germane statements made in the course of litigation because in this case false testimony is not the gravamen of plaintiff's claim. The wrong for which she seeks redress is the concealment of evidence — the Brandt memorandum. That the Brandt memorandum existed, that it was material to the plaintiff's personal injury action, and that the defendants did not disclose it are all facts whose proof did not depend on defendants' testimony. The testimony which defendants gave during the discovery proceedings in the personal injury action was material only because it tended to prove that the defendants' concealment of the Brandt memorandum was willful.*

Viviano clearly established an exception which R&P's opposition brief entirely ignored. The facts in this case are perfectly analogous to the Viviano exception. The false testimony of Rocco and others is not the gravamen of Plaintiffs' fraudulent concealment claim. The wrong for which Plaintiffs seek redress is the concealment of evidence that Menas owned TNM and that Menas and Ford operated PCHA as a sham entity in furtherance of Defendants' conspiracy to steal Plaintiffs' money. That these facts are true, that these facts were material to Plaintiffs' claims, and that Defendants did not disclose or concealed said facts, do not depend on Rocco's and others' false testimony. Rather, the false testimony of Rocco and others in the 2015 Action is only material because it proves that Defendants' concealment of these facts was willful. The Viviano exception is perfectly met here, and the Trial Court's decision must be reversed.

## POINT IV

## THE TRIAL COURT ERRED IN DISMISSING THE SIXTEENTH COUNT THROUGH THE NINETEENTH COUNT OF PLAINTIFFS' COMPLAINT FOR LEGAL MALPRACTICE AGAINST THE MARSHALL DEFENDANTS (184a -185a)

The Sixteenth Count through the Nineteenth Count of Plaintiffs' Amended Complaint allege legal malpractice against the Marshall Defendants arising solely from the Marshall Defendants' fraudulent concealment in the 2015 Action that Menas was Sole Member of TNM and controlled and operated PCHA as a sham entity. None of these facts nor claims were alleged in the complaint that was

dismissed against M&C in the 2015 Action, as said facts were discovered in the course of the 2015 Action following said dismissal.

The Trial Court does not explain how claims for legal malpractice arising from an attorney's fraudulent concealment of evidence would "chill the adversarial process." 185a. Instead, the Trial Court's holding is deeply disconcerting, as it necessarily implies that fraudulent concealment is an acceptable tool for attorneys in the adversarial process. The Trial Court's erroneous holding necessarily implies that attorneys may lie, cheat, forge, and conceal in litigation simply because they owe no duty to opposing parties to refrain from fraudulent conduct.

Moreover, the Marshall Defendants repeatedly make the argument that they could not commit fraudulent concealment because they were not Defendants in the 2015 Action and their clients did not engage in discovery in the 2015 Action. What the Marshall Defendants ignore is the fact that in opposition to Plaintiffs' Motion to Vacate the Order of November 10, 2016, in the 2015 Action, M&C, by way of their counsel, the Marshall Defendants, presented a certain Collateral Assignment that later discovery proved to be a forgery. M&C and the Marshall Defendants, repeatedly fraudulently concealed evidence and obstructed discovery in motion practice in the 2015 Matter, irrespective of their status as non-parties in the matter. Plaintiffs must be permitted to state a claim for fraudulent concealment against the Marshall Defendants, and the Trial Court's erroneous holding must be reversed.

## POINT V

## THE TRIAL COURT ERRED IN SANCTIONING PLAINTIFFS FOR FILING THE COMPLAINT AND GRANTING DEFENDANTS M&C ATTORNEY FEES (190a – 203a; 209a – 232a)

The Trial Court contradicted the clear case law precedent on the granting of attorney fees outlined in Plaintiffs' initial brief. Judge Zazzali-Hogan abused her discretion in finding bad faith under the facts of this case. It is impossible to find that there was *no* rational argument, *no* support of credible evidence, and *no* reasonable person who could have expected Plaintiffs' Amended Complaint to succeed, when Plaintiffs did precisely what Judge Lucas said Plaintiffs could do. To the extent the Trial Court believed Plaintiffs were mistaken in their good faith beliefs, mistaken in their optimism in seeking a remedy, mistaken in their reliance on Judge Lucas's holding, or even mistaken in their understanding of Judge Lucas's holding, none of that justifies a holding that Plaintiffs acted in bad faith. The Trial Court's error must be reversed.

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