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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-41-22

TIMOTHY J. HARRIS; MEGAN HARRIS LOEWENBERG; and KRISTEN C. HARRIS,

Plaintiffs,

v.

MARY ELLEN HARRIS, individually and as Executrix of the ESTATE OF ROBERT H. HARRIS; JUDITH LOLLI; PAUL PETIGROW; PREMIER TRUST, INC., as Trustee of THE ROBERT H. HARRIS 2011 GRANTOR RETAINED ANNUITY TRUST (GRAT); FIRST REPUBLIC TRUST COMPANY OF DELAWARE, LLC, as Trustee Of THE MARITAL TRUST under THE ROBERT HAROLD HARRIS 2015 DELAWARE LIVING TRUST; JOHN DOES 1-5; ABC TRUSTS 1-5; and XYZ INC. 1-5,

Defendants.

OPINION

Argued February 21, 2024 – Decided March 6, 2024

DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys for plaintiff Timothy J. Harris (Benjamin Clarke, Esq., and Gregory Hazley, Esq.).

Lauletta Birnbaum, LLC, attorneys for plaintiff Megan Harris Loewenberg (Gregory Lomax, Esq.).

Fisher Broyles LLP, attorneys for plaintiff Kristen C. Harris (Joseph Schramm, III, Esq., and Jill A. Guldin, Esq.).

Greenbaum Rowe Smith & Davis, LLP, attorneys for defendant Mary Ellen Harris (Emily A. Kaller, Esq., and Stephanie Reckord, Esq.).

Sills Cummis & Gross PC (Thomas H. Prol, Esq., and Michael S. Carucci, Esq.), and Pashman Stein Walder Hayden (Raymond M. Brown, Esq., and CJ Griffin, Esq.), attorneys for defendant Judith Lolli.

Wilson Elser Moskowitz Edelman & Dicker, LLP, attorneys for defendant Paul Petigrow (Andrew M. Epstein, Esq.).

Marshall Dennehy, attorneys for defendant Premier Trust, Inc. (Gerard J. Kawalski, Esq.).

Wilentz, Goldman & Spitzer, attorneys for defendant First Republic Trust Company of Delaware, LLC (Andrew J. DeMaio, Esq.).

FISHER, P.J.A.D. (t/a, retired on recall)

Plaintiffs Timothy J. Harris, Megan Harris Loewenberg, and Kristen C. Harris commenced this suit alleging, among other things, the tortious interference by their mother, defendant Mary Ellen Harris, and others, with what plaintiffs claim are their vested rights to assets formerly owned by Robert H.

Harris (Dr. Bob[1]), their late father, that were placed into an irrevocable trust. Of note is the fact that the parties here are well-immersed in internecine litigation in the Chancery Court of Delaware concerning Harris FRC, Corp., which was founded by Dr. Bob and Mary Ellen.

There are eleven motions before the court. Both sides have filed either summary judgment motions or motions to dismiss. The five defendants' separate motions for summary judgment present unique and difficult questions about the timeliness of plaintiffs' claims. Plaintiffs' motions to dismiss the counterclaims filed by Mary Ellen and defendant Judith Lolli require in part consideration of whether the "first-filed" doctrine requires a dismissal or a stay of this action because of the prior and still pending Delaware action. The remaining four motions concern discovery and, in particular, a handful of subpoenas issued at plaintiffs' behest for the turnover of Dr. Bob's medical and phone records.

Having considered the moving, opposing, reply and supplemental papers filed in connection with the parties' motions, and having heard extensive oral argument on February 21, 2024, the court concludes that: defendants' motions for summary judgment or dismissal based on questions about the timeliness of plaintiffs' complaint must be denied, although the court does not close the door

[1] The court will utilize this name, which was how decedent's wife referred to him in her papers. The court will also utilize the first names of some of the parties. The court means no respect by doing so.

to considering these questions again once the matter is more fully developed in discovery; plaintiffs' motions to dismiss the counterclaims of Mary Ellen and Judith are denied in part and granted in part, but mostly without prejudice to their right to amend; and Mary Ellen's motions to quash subpoenas that were largely dependent on defendants' position that plaintiffs' complaint was untimely and, thus, any discovery irrelevant, are denied, except the turnover to plaintiffs of some of the information sought in a subpoena issued to AT&T, Inc. will at this time be limited.

In expounding in this opinion on the grounds for all these dispositions, the court will (1) outline the nature and status of other litigation involving the parties, as well as Dr. Bob's estate plan, and (2) discuss the relationship of the parties and the status of this lawsuit. The court will then address: (3) defendants' motions for summary judgment; (4) plaintiffs' motion to dismiss Mary Ellen's and Judith's counterclaims on "first-filed" doctrine grounds; (5) plaintiffs' motion to dismiss Mary Ellen's counterclaim on other grounds; (6) plaintiffs' motion to dismiss Judith's counterclaim on other grounds; and (7) the motions and a cross-motion directed at subpoenas issued by plaintiffs to medical professionals that treated Dr. Bob and directed at a subpoena served on AT&T.

I. THE PARTIES AND OTHER LITIGATION

A. *The Parties, and Dr. Bob's Estate Plan*

In briefly describing how we got here, there appears to be no dispute that the late Dr. Bob and his wife Mary Ellen founded Harris FRC, which holds and markets the licensing rights to Vimpat, an anti-seizure medication. According to Vice-Chancellor Laster's recent opinion concerning some discovery problems in the Delaware matter, the licensing of the patent to a global pharmaceutical company provided Harris FRC with "royalty payments of around $100 million per year." In re Harris FRC Corporation Merger & Appraisal Litigation, C.A. No. 2019-0736-JTL (Feb. 19, 2024) (slip op. at 3).

As part of their estate plans, Dr. Bob and Mary Ellen settled Grantor Retained Annuity Trusts (GRATs) in 2011. Dr. Bob placed 245 shares of Harris FRC,[2] allegedly valued at somewhere between $30,000,000, and $40,000,000 into his GRAT.[3] The parties appear to agree that a GRAT is an estate planning

[2] Each of their five children were given thirty-eight shares of Harris FRC by their parents. Besides the three plaintiffs, and Robert M., who brought his own lawsuits about Dr. Bob's estate plan, Dr. Bob and Mary Ellen had a fifth child, John, who has not been a party to any of the lawsuits involving this family.

[3] The parties' submissions provide values for the stock that vary within the range stated above. The exact value of the stock is immaterial to the issues presented in these motions.

device into which a grantor transfers assets irrevocably[4] and receives income from the trust for an annuity period. On the termination of the annuity period, the trust assets pass in trust to the designated beneficiaries. The GRAT requires that if Dr. Bob survived to the point in time when the annuity period terminates, the assets remaining in the GRAT would cease to be included in Dr. Bob's estate for federal tax purposes. But, if Dr. Bob died during the annuity period, the assets were to be included in his gross estate.

Dr. Bob's GRAT called for him to receive an annual income for a seven-year period of 13.75% of the net value of the assets transferred as of the time of transfer. At the end of the annuity period, the assets were designed to pass in trust for the benefit of one or more of a class consisting of his wife and descendants, a descriptor that does not necessarily limit itself to plaintiffs and their two siblings. The GRAT was designed, however, so those assets would not be distributed outright to the beneficiaries; instead, the trustee of the GRAT was given the discretion as to how to distribute income and principal to class members.

Because of the consequences that would arise if Dr. Bob died before or after the annuity period – that would include the potential of the GRAT assets

[4] To obtain the desired tax benefit, the GRAT must be irrevocable. Dr. Bob's GRAT expressly recognized that he retained "no right whatsoever to alter, amend, revoke or terminate the trust."

going into his estate for tax purposes – the GRAT gave Dr. Bob the ability to cause an estate tax savings if he were to die before the end of the annuity period. In this regard, Dr. Bob was given the power – that could be exercised via will or codicil – to modify the way the assets would pass at the end of the annuity period, if Mary Ellen were then living, of "that fractional part of the trust as would be includible in the grantor's estate for federal tax purposes without regard to the modification power." That is, while alive, Dr. Bob retained the power to designate by will or codicil a defined portion of the GRAT to Mary Ellen or a trust for her behalf so that his estate could obtain a marital deduction under 26 U.S.C.A. § 2056. As originally settled, there would not have been a marital deduction because the transfer of assets on death to the class of one or more was not a passage of assets to Mary Ellen alone, or to a trust for her sole benefit.

B. *The Two Questioned Instruments*

With these circumstances as a backdrop, two instruments that lie at the heart of this lawsuit came into being: a codicil[5] and an amendment[6] to a Living Trust.[7] Both those documents are dated October 6, 2015, although plaintiffs dispute that date's accuracy[8]; indeed, they dispute whether Dr. Bob executed the

[5] Of relevance here is the part of the codicil that declared Dr. Bob "retained a certain modification power pursuant to Section 4.02(B) of the 2011 GRAT," and according to that power, he purported to modify "the disposition under Section 4.02(B), but only with respect to that fractional part of the 2011 GRAT that would be includible in my estate for federal estate tax purposes without regard to the modification power." This codicil section further directed that if he was survived by Mary Ellen, Dr. Bob would "[t]hereby exercise such modification power" to direct that fractional part to the trustee of the Living Trust, "to be administered and disposed of in accordance with" the Marital Trust but if Mary Ellen predeceased him, he expressed that he would thereby "decline to exercise such modification power."

[6] This amendment purports to expand the testamentary power of appointment given to Mary Ellen to allow her to direct assets to charity as well as to their children. In other words, Mary Ellen was ostensibly empowered by this amendment to determined which "if any" of her children would receive the residue of the funds held in the living trust or whether, or to what extent, funds from the trust would go to charity.

[7] Dr. Bob's Last Will and Testament called for the pouring of all his probate assets into the Living Trust.

[8] In reliance on certifications submitted in opposition to the summary judgment motions, plaintiffs argue in their opposing brief that "[t]he evidence adduced so far strongly suggests" that changes were made to the documents "well after October 6, 2015, and were backdated to October 6, 2015" (emphasis added).

documents at all, and they also argue that, if he did, he lacked the capacity to know what he was then doing.

Dr. Bob died on April 30, 2017. A few weeks later, a will and codicil were admitted to probate on notice to plaintiffs and others.

C. *Robert M.'s Litigation*

On October 11, 2017, one of Dr. Bob and Mary Ellen's children, Robert M. Harris, commenced an action, on notice to his siblings, in the Probate Part contesting Dr. Bob's will and codicil.[9] Robert M. appears to have alleged in that action that his father lacked mental acuity in 2014 and 2015 and, among other things, Robert M. referred to a text sent to him by Mary Ellen in which she said she "can't talk to him [Dr. Bob] and who wants to bother with someone who can't talk normally," apparently offered as evidence of Dr. Bob's lack of testamentary capacity. No other family member joined in Robert M.'s suit despite knowledge of its existence. Both the probate action and the second shareholder suit commenced by Robert M. were amicably resolved; plaintiffs

[9] By that time, Robert M. had also filed a minority shareholder suit in this vicinage on January 26, 2016. Plaintiffs acknowledge in their brief in opposition to defendants' motions for summary judgment that they learned of this suit the following month. Robert M.'s shareholder suit was voluntarily dismissed without prejudice on May 11, 2016. In September 2016, he filed another minority shareholder suit; plaintiffs here were not named as parties to that action.

assert that those suits were settled in late December 2018 "for consideration worth more than $30 million."

D. *The Delaware Action*

On September 12, 2019, Timothy J. Harris – one of the plaintiffs here – commenced a suit in Delaware's Chancery Court, seeking appraisal remedies; that action appears to have morphed into a broader suit concerning the corporate management of Harris FRC. Two of Dr. Bob and Mary Ellen's other children – Megan and Kristen, also plaintiffs here – joined in the Delaware suit, which seeks relief against their mother, Mary Ellen, and others, including Judith.

The Delaware action is still pending. As plaintiffs observe in one of their submissions on these motions, the Delaware action has been hard fought, as revealed by the fact that, according to plaintiffs' brief in support of their motion to dismiss Judith's counterclaim, a listing of the docket entries, as of a year ago, consisted of 131 pages.

II. THE PARTIES AND THIS LAWSUIT

A. *Plaintiffs and this Lawsuit*

The civil action at hand was commenced in the Law Division[10] on October 1, 2021. In this suit, Timothy, Megan, and Kristen sued: their mother, Mary

[10] The action was transferred to the Chancery Division on March 28, 2022.

Ellen, in her individual capacity and as executrix of Dr. Bob's estate; Judith, Mary Ellen's neighbor and confidant, who witnessed the execution of the codicil, and who is a principal in an entity known as Royce Management, which apparently entered into an agreement to perform services for Harris FRC[11]; Paul Petigrow, who is alleged to be Judith's personal attorney and who, on plaintiffs' information and belief, drafted and oversaw execution of the trust amendment in question; Premier Trust, Inc., the trustee of Dr. Bob's GRAT; and First Republic Trust Company of Delaware, LLC, the trustee of the Living Trust.

By way of this action, plaintiffs seek damages, claiming tortious interference with what they assert were their vested rights in the GRAT by way of defendants' participation in the creation of two forged or fraudulent instruments: the codicil and the amendment to the Living Trust both purporting to be executed by Dr. Bob on October 6, 2015,[12] mentioned above. They claim Dr. Bob never executed the documents or, if he did, that he lacked testamentary

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[11] According to Vice-Chancellor Laster's most recent decision, Royce was formed in 2015 by Judith and another to provide management services to Harris FRC for which it was initially paid more than $200,000 a month, an amount that has since been increased; the Vice-Chancellor observed in his opinion that "Royce received over $20 million from [Harris FRC] between October 2015 and December 2020." In re Harris FRC, slip op. at 5.

[12] We use the date merely to describe the documents and not to suggest the court has found that the document was actually executed on that date, a matter much in dispute. See n. 8, above.

capacity or was unduly influenced. Besides damages, plaintiffs seek a judgment declaring void the codicil and trust amendment.

The complaint consists of ten counts: tortious interference, fraud, conspiracy, the alleged mental incapacity of decedent when the codicil and amendment to the Living Trust were executed, undue influence, misappropriation, conversion, unjust enrichment, and an entitlement to declaratory relief.

B. *Mary Ellen's Counterclaims*

In response to the complaint, Mary Ellen filed a counterclaim, which has been amended and now alleges that plaintiffs have: (1) converted "the assets of their parents"; (2) abused the processes of the Delaware court in pursuing their pending shareholder action; (3) engaged in the waste of estate assets, within the meaning of N.J.S.A. 2A:65-5, by "challenging the validity of Dr. Bob's codicil"; and (4) engaged in various forms of computer-related fraud or misconduct. Beyond damages, Mary Ellen seeks a declaratory judgment.

C. *Judith's Counterclaim*

Judith has also filed a counterclaim in which she alleges plaintiffs breached her employment contract,[13] and its implied covenant of good faith and

[13] It is not entirely clear whether she refers in her pleading to a contract she had with Harris FRC (the motion papers include an employment agreement Judith had with Harris FRC) or whether she was referring to Royce Management's

fair dealing, with Harris FRC, that plaintiffs have maliciously abused the processes of the courts, engaged in civil conspiracies, aided and abetted violations of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and fraudulently concealed evidence.

The motions at hand require the court's consideration of the viability of most if not all the claims asserted in the complaint and in the counterclaims.

III. DEFENDANTS' SUMMARY JUDGMENT MOTIONS

The court first addresses the difficult questions posed by defendants' argument that plaintiffs' complaint is untimely and should be dismissed.

A. *An Overview of The Timeliness Arguments*

Although the meeting or missing of a time bar is usually readily apparent, in this case it is complicated not only by the multiple time bars that may have application but also by the way in which the complaint is characterized or described. That is, on its face, the complaint alleges tortious conduct on the part of the defendants and mostly seeks damages, and, thus, a simplistic view of it would suggest the application of the six-year time bar in N.J.S.A. 2A:14-1. If this approach is correct, then the action would be timely since the tortious

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contract with Harris FRC. If the latter, it is not clear how Judith would have standing to sue on Royce's contract with Harris FRC.

conduct – if couched as fraud, tortious interference with an inheritance or other property rights, or the like – may be redressed so long as the complaint was filed within six years.

But, if the action is one in which plaintiffs – despite the garb in which the complaint is dressed – seek to invalidate a codicil – and then do, in fact, seek that relief – then its timeliness must be examined in the light of Rule 4:85-1, which limits an action to set aside the probating of a will or codicil or similar surrogate judgments "provided . . . the complaint is filed within four months after probate . . . or if the aggrieved person resided outside this State [at the time of the grant of probate] within six months thereafter." Rule 4:85-1 was intended to avoid allowing a later lawsuit to wreak havoc on the timely administration of estates and, to ensure that timeliness, the Appellate Division has held that an aggrieved party cannot avoid this rule-based time bar through a later "independent cause of action for tortious interference with an expected inheritance." Garruto v. Cannici, 397 N.J. Super. 231, 240 (App. Div. 2007). So, if plaintiffs' complaint – despite the tort trappings – might be characterized as an action to undo the surrogate's determination to probate decedent's will or

codicil, then Garruto would counsel in favor of its dismissal since the complaint was filed years after the codicil was admitted to probate.[14]

Putting that question aside for the moment, the court must also consider the fact that the complaint also alleges the fraudulent conduct of defendants and the alleged forgery of an amendment to the revocable Living Trust. That instrument was not something that was probated and, thus, clearly falls beyond Rule 4:85-1's reach. Instead, by viewing the complaint as seeking to set aside an amendment to a revocable trust, defendants argue that the court should find the complaint untimely because it was filed after the time frames set forth in

[14] To add to the complexity, Rule 4:85-1 – and Garruto's holding that tortious interference claims ought to be funneled into the rule's time bar – does not mean there is an insurmountable bar for wronged parties once the four-month (or six-month with respect to out-of-state claimants) has elapsed. An aggrieved party may also seek relief from the probate judgment if the requirements of Rule 4:50 are met. If Rule 4:85-1 has application here, plaintiffs could still seek relief from the probating of the codicil if they are able to show that one of Rule 4:50-1's categories have been met. See, e.g., In re Estate of Thomas, 431 N.J. Super. 22, 30 (App. Div. 2013). Reading the complaint broadly does not preclude that possibility, since plaintiffs have alleged the fraudulent conduct of defendants that would support, if proven, relief from the probate judgment. But, even if fraud could be proven, plaintiffs would also have to demonstrate that they sought relief within a reasonable time as required by Rule 4:50-2 and that may be an insurmountable hurdle considering the time that elapsed since they were aware of the probating of the will and codicil, let alone Robert M.'s suit. In any event, the question raised by the motions at hand is not to determine whether plaintiffs may obtain relief in this fashion but whether they have presented the fundament of such a demand for relief, and a liberal view of the complaint requires a denial of the motion when viewed as a purely "Rule 4:85-1/Garruto/Rule 4:50" problem.

N.J.S.A. 3B:31-45(a),[15] and argues further that the time limits imposed by that statute should be viewed in the same way the Appellate Division has viewed the time limits set forth in Rule 4:85-1; that is, they argue that even if a complaint alleges tortious conduct, a court should determine whether the complaint deliberately attempted to avoid the time-bar by dressing the claim or claims in different garb. On the other hand, the court is mindful of the fact that N.J.S.A. 3B:31-45(a) was based on section 605 of the Uniform Trust Code, which does not view a "contest" to the validity of a revocable trust as encompassing an action for intentional interference with the benefits of the trust. See Uniform Trust Code § 604 (recognizing that "[a] 'contest' is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee" and that "[a]n action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section"); Sacks v. Dissinger, 178 N.E.3d 388, 394 (Mass. 2021) (holding that a "contest" within the meaning of a statutory time bar similar to N.J.S.A. 3B:31-45(a) must be "a

[15] N.J.S.A. 3B:31-45(a) states that "a person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of: (1) Three years after the settlor's death; or (2) Four months, in the case of a resident, or six months, in the case of a nonresident, after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding."

determination of a trust's validity, not the personal liability or even culpability of the settlors, beneficiaries, or trustees").

Even if N.J.S.A. 3B:31-45(a) has some applicability here, there remains the question about when the time limit is triggered. While the statute provides definite triggering times – three years from the death of the settlor or four months (or six months for nonresidents) from the date the claimant was sent a copy of the trust instrument, both definitive times and not accrual-based – the question remains whether the discovery rule would or wouldn't apply when this time bar is presented as an obstacle. Defendants argue that N.J.S.A. 3B:31-45(a) is a statute of repose and, therefore, is not the type of time bar that would allow for application of the discovery rule principles announced in the landmark decision in Lopez v. Swyer, 62 N.J. 267 (1973). As a review of the only case on which defendants rely to support such an argument, when the discovery rule or equitable tolling may apply to a time bar is hardly so simple as to be determined by whether a statute is labeled a statute of repose or a statute of limitations. See R.A.C. v. P.J.S., Jr., 192 N.J. 81, 98-99 (2007). Instead, resort to the discovery rule depends on the legislative intent underlying the time bar. Indeed, rather than draw such an artificial distinction, the Court recognized, in its reliance on Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 557-58 (1974), that "a 'substantive' limitation period may appropriately be tolled in a particular set of circumstances

if the legislative purpose underlying the statutory scheme will thereby be effectuated." R.A.C., 192 N.J. at 99. Plaintiffs argue there is no evidence to suggest N.J.S.A. 3B:31-45(a) is a statute of repose or, if it is, that the discovery rule would not apply and limit the triggering of the time frames in the statute until a claimant knew or had reason to know that the instrument in question is the product of forgery or fraud.

These are novel questions and should await the clarification that might be provided by further development of the record. See Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99, 111 (App. Div. 2006). To consider whether the discovery rule is applicable and, if so, whether it would save a challenge to the amendment here is to expect too much for what a Rule 4:6-2(e) motion might accomplish, since that rule requires only the pleading of a fundament of a cause of action.

Lastly, it should be noted that defendants recognize that N.J.S.A. 3B:31-45(a) applies only to revocable trusts, as the statute plainly states. They therefore appear to concede that an attack on the viability of, or a claim of tortious conduct regarding the rights conferred by an irrevocable trust, would be governed by N.J.S.A. 2A:14-1.

B. *The Standard Applicable To the Timeliness Aspects Of the Motions*

Before considering the impact of these time bars on plaintiffs' complaint, the court should also ascertain the standard to be applied to defendants' motions. Although those motions are labeled as summary judgment motions – and indeed there are aspects about the motions that warrant the application of Rule 4:46's standards[16] – the time bar arguments require the application of Rule 4:6-2(e)'s standards. The time bar arguments are governed by Rule 4:6-2(e) because they require only an examination of the complaint's allegations and the legal standards that govern the timeliness of the claims contained in the complaint. The other aspects of the defense motions – by which the movants argue that they did nothing of which they've been accused – are based on matters outside the pleadings. By way of example, defendant Petigrow's motion asserts in part that the complaint should be dismissed as to him because it is time barred, but he also argues that the court should enter summary judgment in his favor through reliance on his certification that he was not involved in the creation of either the codicil or the amendment to the Living Trust. The first aspect of his motion is governed by Rule 4:6-2(e), but the second aspect is governed by Rule 4:46.

[16] Those aspects of the defense motions governed by Rule 4:46 are discussed below in Section III(E) of this opinion.

C. *The Standard Applicable To Other Aspects Of Defendants' Motions*

As noted, the court must look to Rule 4:6-2(e) in determining whether the complaint should be found, in whole or in part, time barred. That rule "poses a very low bar for pleaders to hurdle." Robey v. SPARC Grp. LLC, 474 N.J. Super. 593, 599 (App. Div. 2023), appeal pending, A-50-22. Faced with such a motion, a court must take "a generous and hospitable approach" and search the pleading "in depth and with liberality to ascertain whether the fundament of a cause of action can be gleaned even from an obscure statement of claim." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); see also AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co., __ N.J. __, __ (Jan. 24, 2024) (slip op. at 17). The court must assume that the pleader's "allegations are true and give [the pleader] the benefit of all reasonable inferences." NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 365 (2006). The court may not require pleaders to prove their allegations. Woodmont Props., LLC v. Twp. of Westampton, 470 N.J. Super. 534, 540 (App. Div. 2022); Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). Because the rule requires that the motion court hospitably approach the pleading, it is the pleading itself that guides the court's examination, not the moving party's interpretation of the

pleading's meaning or intent. And, lastly, the court must exhibit even greater caution before granting a motion to dismiss "when the legal basis for the claim emanates from a new or evolving legal doctrine." Perkins, 383 N.J. Super. at 111; Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002).

And so, the court should examine the complaint as plaintiffs crafted it, see, Leon, 340 N.J. Super. at 471-72, and must avoid defendants' invitation to characterize the pleading as something else.

D. *Analysis of the Timeliness Question*

Indeed, the court's application of the standards described immediately above may begin and end with the recognition that plaintiffs have alleged defendants' tortious interference with an inheritance or a prospective economic advantage, as well as other similar and familiar causes of action, that, on their face are governed by the six-year statute of limitations, N.J.S.A. 2A:14-1. See Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998). That is, plaintiffs' opposing brief describes the essence of their claim as having taken place "or rather commenced, on October 6, 2015, when defendants orchestrated the execution of two purported trust amendments, at a time when the grantor of the trust . . . was non compos mentis – i.e., at a time, when the trust could no longer be lawfully amended" with the "combined effect, or purported effect, of the two trust amendments – which recently obtained evidence indicates were actually

drafted and executed well after the date that appears on them (October 6, 2015) – was to deprive plaintiffs, who were residuary beneficiaries of an irrevocable trust established by [Dr. Bob] in December 2011, of their already-vested interest in the trust corpus, a divestment that, by a conservative estimate, caused plaintiffs no less than $48 million in damages."

Viewing these allegations against the time limits established by Rule 4:85-1 and Garruto's rule interpretation, which permits a disregard of an action's tort trappings, coupled with the different time bar for attacks on revocable trusts in N.J.S.A. 3B:31-45(a), as well as defendants' novel argument that the Garruto approach should be taken when the validity of a revocable trust is challenged – a novel argument that appears to run counter to other authorities that would suggest a contrary review of the statute, see Sacks, 178 N.E.2d at 394 – reveals the difficult questions posed by the complaint and its timeliness. That is, plaintiffs have alleged tortious conduct but, in alleging the mechanics of the tortious conduct, plaintiffs at least partially question the validity of a codicil[17] (thus suggesting a limitation of the action in light of Rule 4:85-1 and Garruto)

[17] Plaintiffs also question whether the codicil is, in fact, a codicil. In other words, and the court agrees, the mere labeling of a document as a codicil does not make it so; a court of equity must look beyond labels and adjudicate the issues based on the substance of the document. See Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 348-49 (Ch. Div.), aff'd o.b., 33 N.J. 72 (1960); Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., L.L.C., 413 N.J. Super. 513, 524 (App. Div. 2010).

and the validity of an amendment to a revocable trust (thus suggesting the application of N.J.S.A. 3B:31-45(a) and the extending of Garruto to that part of the claim). Yet, the thrust of the tortious interference claim is the damage done to plaintiffs' alleged vested interest in the irrevocable GRAT, to which it would appear that the six-year limitations bar of N.J.S.A. 2A:14-1 might apply. In short, while one or more aspects of the alleged tortious conduct might present a manageable disposition of the applicable time bar, the confluence of all these parts presents a most perplexing question.

Stating the problems presented reveals the proper outcome of the timeliness aspect of these motions. So, too, the factual circumstances that may bear on the timeliness questions, counsel against a dismissal based solely on the pleadings, see, e.g., In re Estate of Mosery, 349 N.J. Super. 515, 520-24 (App. Div. 2002), and may further suggest the possibility that the discovery rule may be applicable and expand the more limited view of N.J.S.A. 3B:34-45(a) urged by defendants. And on top of all this is plaintiffs' own view – as supported by their specific allegations – that it isn't so much the validity of the instruments that is in question here, although they do allege that they should be declared void, but the damage done by the alleged conduct of the defendants, separately or in concert, to deprive them of the benefits of the GRAT, an irrevocable trust to which no time bar other than N.J.S.A. 2A:14-1 would apply. In other words,

it may not so much matter whether plaintiffs could obtain a determination that the instruments are void or invalid but whether, if they were the product of forgeries or frauds, their existence has caused damage to plaintiffs for which one or more defendants should be held accountable.

In short, while further discovery and development of the case and the evidence might greater illuminate whether the time bars relied on by defendants have any applicability here, a disposition on the timeliness of the complaint cannot be based on the fragile foundation offered. See Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450 N.J. Super. 1, 94 (App. Div. 2017) (quoting Petition of Bloomfield S.S. Co., 298 F. Supp. 1239, 1242 (S.D.N.Y. 1969), aff'd, 422 F.2d 728 (2d Cir. 1970)). And, even if a challenge to the continued existence of the instruments may ultimately be held time barred, the case has not developed to a point where it can be safely said that plaintiffs may not maintain a claim for damages notwithstanding their inability to undo the instruments.

E. *The Remainder of Defendants' Motions*

As noted above, there are aspects of defendants Petigrow's and Premier Trust's motions that are governed by Rule 4:46, not Rule 4:6-2(e), because they invite consideration of materials outside the scope of the pleadings. Both these defendants claim entitlement to summary judgment because they claim they

played no role in the crafting or execution of the instruments that formed the basis for plaintiffs' fraud and tortious interference claims.

Their involvement, if there was involvement, is something known to them and likely outside the ken of plaintiffs. "When 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educational Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)). Instead, as held in Bilotti v. Accurate Forming Corp., 39 N.J. 184, 193 (1963), "[s]ince this suit is in an early stage and still not fully developed, we ought to review a judgment terminating it now from the standpoint of whether there is any basis upon which plaintiff should be entitled to proceed further."

There having been no discovery yet, and it not having been shown by defendants that questions about their involvement would not be illuminated in discovery, see Friedman v. Martinez, 242 N.J. 449, 472-73 (2020); Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015), summary judgment is not presently available. Plaintiffs are not obligated to accept movants' word that they had nothing to do with the creation of either the codicil or the amendment to the revocable trust. They are entitled to question and examine that assertion

in discovery before Rule 4:46 principles may provide a basis for a summary adjudication.

One aspect of the defense motions – mostly presented by Mary Ellen – is the contention that there is no evidence that Dr. Bob lacked the capacity to execute the instruments that form some of the framework of plaintiffs' complaint. For example, Mary Ellen argues that the certifications and documents offered by plaintiffs in opposition to the defense summary judgment motions – that she characterizes as information that Dr. Bob "acted badly when he went to see his Mother at Bayshore Hospital, was quiet when he went out to dinner with colleagues, and attended his Anniversary Party but allegedly left early because it was too much for him" – do not establish a lack of testamentary capacity. Mary Ellen asserts that this would only suggest the conceded fact that Dr. Bob had "trouble communicating as the result of his aphasia," and she relies, in seeking summary judgment, on the comment of Megan – one of the three plaintiffs – shortly before the alleged execution of the instruments that Dr. Bob's intellect was very much "intact."[18] Mary Ellen argues that what plaintiffs have

[18] The record contains an April 21, 2015 email – four months before the purported date of the two instruments in question – sent from Megan to Mary Ellen recognizing that Dr. Bob's medical condition "affects the language part of the brain . . . [but] [h]is above average intelligence is very much still intact, [although] he has difficulties with all areas of language, which causes him to get frustrated."

offered in support of their claim that Dr. Bob lacked testamentary capacity is merely evidence of how "it was difficult and frustrating for a man who was a brilliant scientist with a keen intellect to accept the fact that his ability to communicate was impaired."

Certainly, in the absence of discovery, it would be quite inappropriate for the court to attempt to determine from the snippets presented whether Dr. Bob possessed or lacked testamentary capacity. The court's sole function at this stage is to ascertain whether there is a genuine dispute of material fact on that question. There is.

Defendants' motions for dismissal or for summary judgment are denied in their entirety.

IV. PLAINTIFFS' MOTIONS TO DISMISS AND THE "FIRST-FILED" DOCTRINE

Both Mary Ellen and Judith filed counterclaims, both of which are the subject of plaintiffs' separate motions to dismiss. The court will address plaintiffs' arguments that the first two counts of Mary Ellen's counterclaim (those that allege conversion and abuse of process), and all of Judith's counterclaim, should be dismissed or stayed under the "first-filed" doctrine.

The "first-filed" doctrine, which is a general rule that calls for "courts of sister states, when appropriate, [to] extend comity to one another," Sensient

Colors Inc. v. Allstate Ins. Co., 193 N.J. 373, 378 (2008), so that, "when substantially similar suits are filed in separate jurisdictions, the court that first acquires jurisdiction takes precedence in the absence of special equities," Continental Ins. Co. v. Honeywell Intern., Inc., 406 N.J. Super. 156, 164 (App. Div. 2009). To obtain a dismissal or a stay under this doctrine, the moving party is "required to establish (1) the existence of a first-filed action in another state, (2) that both cases involve substantially the same parties, the same claims, and the same legal issues, and (3) that plaintiff will have the opportunity for adequate relief in the prior jurisdiction." Am. Home Prods. Corp. v. Adriatic Ins., 286 N.J. Super. 24, 37 (App. Div 1995).

It is not surprising that plaintiffs would seek this relief. There is a first-filed action in another state, the parties here are parties there, and Mary Ellen's allegations in support of her conversion and abuse of process claims are replete with references to the Delaware action and plaintiffs' use of the Delaware processes to injure her by alleging that one or more of the plaintiffs have:

- "perverted and abused the legitimate purposes of the Delaware lawsuit in order to seize control of Harris FRC, seize control of Mary Ellen's personal assets and charitable foundation";
- used the Delaware suit to "harass";

- "used the Delaware action to gain information about Mary Ellen's personal finances, her Estate planning and her private charitable foundation";
- have served, in the Delaware action, "invasive and inappropriate discovery demands";
- have "weaponized the litigation process" in Delaware;
- have made in the Delaware action "scandalous and gratuitous allegations."

Judith's counterclaim also reflects a strong nexus between her allegations here and those pursued in the earlier filed Delaware action. For example, Judith alleges in her counterclaim that "[b]y filing the Delaware [a]ction as minority shareholders and derivative of Harris FRC, [p]laintiffs intentionally violated a material term of Judith Lolli's agreement for their own selfish purposes and have thereby breached the contract in bad faith." Judith's first three counts – alleging a breach of contract, a breach of the implied covenant of good faith and fair dealing, and the right to declaratory relief – seem based substantially if not exclusively on a link between those allegations and the Delaware action. The same can be said for Judith's fourth count, which alleges plaintiffs' abusive conduct of commencing and pursuing "litigation/civil actions" – apparently in reference to the Delaware action – against her and Mary Ellen to cause them damage. The fifth (conspiracy), sixth (aiding and abetting a conspiracy), and

seventh (conspiracy to commit conversion) counts of Judith's counterclaim seem to rest on the allegation that Timothy Harris "engaged in predicate criminal acts and a pattern of racketeering on multiple occasions as the ringleader of the conspiracy" – which is alleged to include the other two plaintiffs – "to seize and convert his mother's assets and vast wealth." The overall sense and tenor of the counterclaim would suggest that this alleged "conspiracy" is that which Judith believes has prompted and is spearheaded by the Delaware action. The eighth count alleges that plaintiffs aided and abetted a violation of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49. And her ninth count alleges that plaintiffs have fraudulently concealed evidence relevant to this suit and the Delaware action. Other than the eighth count, which does not suggest a relationship to the Delaware action but clearly possesses a substantial link to a prior action in our courts, the remaining counts of Judith's counterclaim exhibit a strong nexus with or a dependency on her positions in or view of the Delaware action. Judith's joinder to the Delaware action occurred in September 2021 and plaintiffs' suit here was commenced the following month, so if there is a substantial nexus between the Delaware action and her counterclaim, the former would be the "first-filed" of the two.

To be sure, the action first filed in this longstanding feud was filed in Delaware, and that action includes all the parties to the counterclaims. The focus

of this dispute about the application of the first-filed doctrine is on the similarities between the two suits and whether those asserting the counterclaims – Mary Ellen and Judith – would be able to obtain adequate relief in Delaware through those claims already asserted or if their pleadings in the Delaware action were amended to include the claims asserted in the counterclaims here.

Much like what the court has said about the nature of the complaint – that a true understanding of the essence of the claims cannot be attained until the matter is further amplified or illuminated through further discovery and development – informs this court's view of the first-filed motion. At present, the counterclaims are so substantially colored by the diatribes those pleaders have hurled toward their adversaries as to preclude an understanding of whether they are claims that can be said to already be encompassed or subsumed in what has already been asserted in the Delaware action.

Having said that, however, the court cannot help but believe that there may be available remedies in Delaware for some of those things asserted in the counterclaims. For example, Mary Ellen and Judith complain of plaintiffs' expansive or intrusive pursuit of discovery in the Delaware action. Certainly, the Delaware court is empowered and quite capable of redressing any party's excesses in the pursuit of discovery. See Del. Ch. Ct. R. 26(c). And to the extent any part of the two counterclaims constitutes an indirect attempt to have this

court indirectly intervene in the discovery proceedings in Delaware, that would present a circumstance that would truly warrant application of the first-filed doctrine, which is firmly based on notions of comity.[19] But it is difficult – on the pleadings alone – to determine whether allowing some or all the counterclaims to proceed here would interfere with the Delaware court, a circumstance that this court will not allow.

In short, while there is a very real potential that the first-filed doctrine will warrant the court's prevention of further proceedings on some of the counts of the counterclaims, it cannot now be said that this court's intervention in that regard is appropriate. The better practice is to allow further discovery, including the repleading of some of the counts of the counterclaims, as is necessary for other reasons to follow.

V. THE OTHER ASPECTS OF PLAINTIFFS' MOTION TO DISMISS MARY ELLEN'S COUNTERCLAIM

Having moved past the first-filed arguments, the court must now address the sufficiency of the other counts of Mary Ellen's counterclaim in light of plaintiffs' arguments that: (a) the first count (civil conspiracy to convert her

[19] Comity is a principle of both "courtesy and expediency," Canadian Filters Harwich v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969), that "grows out of a predilection toward abstention," Exxon Research & Eng'g Co. v. Industrial Risk Insurers, 341 N.J. Super. 489, 505 (App. Div. 2001).

assets) fails to state a cognizable cause of action; (b) the second count (abuse of process) does not assert all the requisite elements or should otherwise be barred by the litigation privilege; (c) the third count (a violation of N.J.S.A. 2A:65-5) fails to state a claim on which relief may be granted; (d) the fourth count (containing a demand for a declaratory judgment) is "duplicative and pure legal surplusage"; and (e) counts five through seven, which respectively allege violations of the Computer Fraud and Abuse Act, The Stored Communications Act, and the New Jersey Computer Related Offenses Act, do not state claims on which relief may be granted. The court will consider these arguments in that order.

A. *Conversion*

To briefly repeat, Mary Ellen's first count alleges that plaintiffs have conspired "to convert the assets of their parents and . . . to assert . . . dominion and control over those assets" by filing and pursuing the Delaware action. If this is the true essence of the conversion claim,[20] it not only suggests the potential

[20] In responding to the motion, Mary Ellen has more specifically defined what property she claims was converted. For example, she refers to "$25,000 in cash which Mary Ellen posted as bail for Timothy Harris"; "documents related to Harris FRC and to Mary Ellen's personal transactions"; and "documents and information which was accessed and may have been removed from Mary Ellen's personal residences, including Mary Ellen's testamentary documents." She goes on to assert that plaintiffs "conspired to convert" "their parents' stock in Harris FRC," "their parents' personal assets and funds," and "the funds in their parents' private charitable foundation." Like the more general allegations in the

for the application of the first-filed doctrine, already discussed, but also raises questions about Mary Ellen's standing to sue at least in part: that is, how does she have standing on her individual basis to complain about the conversion of assets of Dr. Bob? These allegations do not clearly assert – as the tort of conversion requires – that plaintiffs have, without authorization, assumed and exercised ownership over goods or property belonging to another "to the alteration of their condition or the exclusion of an owner's rights." Barco Auto Leasing Corp. v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988); see also Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div. 2009). In short, read literally, the first count alleges only an attempt to convert, not conversion itself. The court has not been made aware of the law's recognition of such a civil action, although it is not closed to considering same upon more extensive briefing on that point that has yet to occur.

Viewed more broadly, the count may be alleging that Mary Ellen's assets have already been converted through the commencement and prosecution of the Delaware action. This too seems a novel theory. In both instances, because of the novelty of the question about whether these allegations would give rise to a cause of action, see Perkins, 383 N.J. Super. at 111, and because of the

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complaint, these assertions – at least in part – raise questions about Mary Ellen's standing and suggest as well that plaintiffs may have attempted to convert some of the property but not necessarily that they have actually done so.

uncertainty about what it is that Mary Ellen has attempted to assert, the better outcome is to allow Mary Ellen to amend her first count. To ensure clarity about her claims, she should – if she chooses to continue to pursue what is contained in the first count – set forth separate counts that address the theory or theories that appear now to be contained in a single count. She should also define whose assets she claims have been diverted, with additional clarity about how she could have standing to assert a claim for damages for the conversion of her late husband's assets.

For these reasons, Mary Ellen's first count is dismissed but without prejudice so that she may file an amended pleading.

B. *Malicious Abuse of Process*

The second count appears to allege only the malicious abuse of process, not a claim of malicious use of process or malicious prosecution. Judge Havey explained the distinction:

> The gist of the tort of malicious abuse of process is not commencing an action without justification, as in malicious use of process (or malicious prosecution). Rather, it is the misuse, or "misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance."
>
> [Baglini v. Lauletta, 338 N.J. Super. 282, 293 (App. Div. 2001) (quoting Prosser & Keeton on Torts (5th ed.

1984) § 121 at 897); see also Ash v. Cohn, 119 N.J.L. 54, 58 (E. & A. 1937).]

That distinction has relevance here.

Mary Ellen cannot presently allege a malicious use of process or malicious prosecution in the commencement and prosecution of the Delaware action because that action has not ended, let alone ended in a manner favorable to her. See Penwag Property Co. v. Landau, 76 N.J. 595, 598 (1978). Instead, she contends that plaintiffs have committed the tort of malicious abuse of process, that plaintiffs have engaged in processes in the Delaware action that constitute a perversion or abuse.

The law does not favor the tort of malicious prosecution or malicious use of process. As then Chancery Judge (later Justice) Francis said in Mayflower Industries v. Thor Corp., 15 N.J. Super. 139, 153 (Ch. Div. 1951), aff'd, 9 N.J. 605 (1952), the reason for this disfavor "is embedded deeply in our jurisprudence. The courts must be freely accessible to the people. Extreme care must be exercised so as to avoid the creation of a reluctance on their part to seek redress for civil or criminal wrongs for fear of being subjected to a damage suit if the action results adversely." For that reason, the claimant is required to demonstrate a "special grievance." Penwag, 76 N.J. at 598.

For the same reasons, the law does not favor claims of malicious abuse of process. The essence of that claim is that actions taken in furtherance of a prior

or pending suit were so abused or perverted as to cause damage. But, as has already been mentioned, there is no reason to conclude that the counterclaimant cannot present those concerns to the other court to avoid the alleged damaging nature of plaintiffs' actions in using the processes of that other court. If, for example, Mary Ellen is complaining here that plaintiffs have made unreasonable and invasive discovery requests, it would seem that those excesses may be redressed and an appropriate protective order entered by the Delaware court.

In her opposing brief, Mary Ellen has asserted that plaintiffs' conduct has gone beyond what may be redressed through the Delaware rules applicable to confining discovery to that which is proper in that pending action. She contends that plaintiffs have "misuse[d] . . . the discovery process" in Delaware to: "invade her privacy, monitor her communications with her friends and colleagues and facilitate [plaintiffs'] conspiracy to further convert her assets, including gaining information regarding her personal bank accounts, charitable foundation and access to her testamentary intent," and "attempt to isolate her from her friends and colleagues by invading their privacy through invasive and overreaching discovery demands, including obtaining confidential documents relating to their personal real estate transactions, personal bank account records and personal telephone records, some of which [plaintiffs] then caused to be publicly filed." These assertions may be suggestive of other types of causes of

action, but they only tangentially suggest a link between discovery processes in the Delaware action and any damage to Mary Ellen who cannot obtain insulation from the alleged conduct through the issuance of a protective order in the Delaware proceedings.[21]

The court's examination of this count and the parties' arguments about what it does or doesn't entail need not exhaust all their arguments. It suffices to say that the court has doubts about the viability of a cause of action for malicious abuse of process when another court has the power and authority to govern and limit, at the present moment, any discovery processes that allegedly are causing Mary Ellen damage. But, without a better understanding of the specific abuses

[21] There are also aspects of Mary Ellen's claim – as described in her opposing brief – that call into question whether she lacks standing for some of her allegations. For example, she argues about a subpoena, issued through the Delaware court, that was served in New Jersey on Charles Grinnell, a principal of Royce Management who was described as "a long-time friend and colleague of Dr. Bob's and Mary Ellen's, who had been solicited to assist with the operation of Harris FRC after their older son's resignation had been accepted" and by which plaintiffs "demanded production of [Grinnell's] personal financial information, including his personal income tax returns." Mary Ellen contends that this discovery request had "no logical relation" to the Delaware action, but she has not demonstrated why a court would find she had standing to complain about the alleged unwarranted intrusion into someone else's personal information, see Tedards v. Auty, 232 N.J. Super. 541, 549 (App. Div. 1989) (suggesting that the claim may be asserted only by the person injured by the abuse), let alone why the Delaware court could not provide protection if the subpoena exceeded the proper scope of discovery in that matter.

alleged and whether they should be dealt with elsewhere, the matter ought not be finally adjudicated by way of a Rule 4:6-2(e) motion to dismiss.

Plaintiffs further argue that even if the allegations could, if sustained, support a claim of malicious abuse of process, the litigation privilege would bar redress. This privilege, however, applies to "communications" and not necessarily actions or conduct outside the proceedings or outside the courtroom that are not designed to achieve the objects of the litigation. See Hawkins v. Harris, 141 N.J. 207, 216 (1995); Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 585 (2006); Brown v. Brown, 470 N.J. Super. 457, 463-64 (App. Div. 2022). Because the particulars of Mary Ellen's allegations are not known, it cannot be said that any of the communications or conduct of which she complains would fit within the litigation privilege. That analysis must await further development of the record.

In the final analysis, and in the same spirit in which the court ruled on the motion concerning the first count, the second count will be dismissed but without prejudice to Mary Ellen's right to amend this count in the expectation that her amendment – if she chooses to continue to pursue this claim – will provide sufficient specificity that the court will be able to address any of the particular arguments that suggest her claim or claims of malicious abuse of process may be further pursued.

C. *Waste*

Mary Ellen's third count alleges waste within the meaning and scope of N.J.S.A. 2A:65-5, which provides that "[a]ny heir may maintain a civil action for the waste or destruction of his inheritance, whether such waste occurred in the lifetime of his ancestor or thereafter," and allows that the judgment in such an action "shall be for the recovery of the inheritance waste or its money value if such recovery is impossible, and treble damages." Although this statute has been part of our statutory law for a long time – plaintiffs claim "[t]his statute, or some version of it, has been on the books for more than 150 years" – there is not a single reported decision that cites it. Perhaps the mere fact that the assertion of a claim based on this statute would appear unusual is enough to withhold an adjudication of the viability of Mary Ellen's third count pending further development of the record. See Perkins, 383 N.J. Super. at 111.

But the concept of waste – at least in the context of waste committed by someone holding property in trust or otherwise possessing a fiduciary duty to protect property for the benefit of others – is not unusual or uncommon. See Alfred C. Clapp, Wills and Administration, New Jersey Practice, Vol. 5A, § 453 (3rd ed., 1982). The term is often used to describe the failure of a personal representative of an estate or a trustee to properly care for entrusted funds and assets. See N.J.S.A. 3B:14-21(c) (declaring that a court "may remove a fiduciary

from office when the fiduciary . . . [e]mbezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary" (emphasis added)); see generally Silverstein v. Last, 156 N.J. Super. 145 (App. Div. 1978). So, while N.J.S.A. 2A:65-5 does not suggest where or how it might apply neither does it identify the class of persons who may pursue a claim. The allure for a claimant in employing N.J.S.A. 2A:65-5, of course, is that it allows for an award for treble damages, a factor which alone causes one to wonder why N.J.S.A. 2A:65-5 has not been invoked more often.

In determining whether Mary Ellen possesses a claim of waste insofar as it is based on N.J.S.A. 2A:65-5 should at least be colored by the more common application of the term. Drilling down into her allegations, the court uncovers the same theme common to her other counts: that by engaging in the Delaware litigation, plaintiffs are causing an expenditure of estate assets and thereby causing a waste of their father's estate. If that is the upshot of this count, then consideration should be given to whether there are other parties who are indispensable, such as the other beneficiaries of Dr. Bob's estate, who may not be parties here.

It also again puts into question whether this action should be stayed under the first-filed doctrine or at least stayed pending the outcome of the Delaware

action because a finding of waste – if Mary Ellen's theory that the commencement of litigation may constitute a "waste or destruction of [an] inheritance" constitutes a valid cause of action – is dependent on the validity of plaintiffs' Delaware claims. Indeed, if plaintiffs' Delaware claims prove valid and are sustained, would that not – if Mary Ellen's theory is correct – give rise to a claim by Dr. Bob's heirs that it is Mary Ellen who "waste[d]" estate assets by resisting plaintiffs' Delaware claims?

These and other similar questions cannot be resolved through application of Rule 4:6-2(e) here.

D. *Declaratory Judgment Act*

Mary Ellen's fourth count repeats and reasserts some of the allegations in her other counts and demands relief under the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62. Plaintiffs' argument in support of their motion to dismiss this count seems based solely on the contention that this count is "duplicative and pure legal surplusage." That may be true, but it doesn't mean the count should be dismissed. The Declaratory Judgment Act has broad application and relief is often warranted as the means of vindicating a right to which some other remedy may not be available. And in this case, what Mary Ellen seeks by way of this count is duplicative of what she has asserted elsewhere in her counterclaim. If that is so, however, doesn't mean the claim is

without merit. Parties may plead alternative or duplicative claims. See R. 4:5-6; Shankman v. State, 184 N.J. 187, 205-06 (2005). Ultimately, only one theory may be sufficient or it may even be that a claimant must at some point elect the direction in which the claim will go. But this is not a ground for dismissal at this early stage and the fact that plaintiffs have only offered an over ten-year-old, unreported federal district court decision to support its position that a declaratory judgment claim that constitutes mere surplusage must be dismissed demonstrates the lack of substance in this aspect of plaintiffs' motion to dismiss.

E. *Computer-Related Offenses*

In a single point, plaintiffs urge the dismissal of Mary Ellen's three computer-related claims. In her fifth count, Mary Ellen alleges that plaintiffs engaged in conduct that is violative of the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(2)(C), (g), which creates a cause of action for those "who suffer[] damage or loss" when someone "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." in her sixth count, she alleges violations of the federal Stored Communications Act (SCA), 18 U.S.C. § 2701(a), which occur when a person "intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility; and

thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." In re Nickelodeon Consumer Privacy Litigation, 827 F.3d 262, 277 (3d Cir. 2016). And Mary Ellen's seventh count is based on violations of the New Jersey Computer Related Offenses Act (NJCROA), N.J.S.A. 2A:38A-1 to -6, which makes it unlawful and permits a private cause of action against someone who alters, damages, accesses or obtains data from a computer without authorization, N.J.S.A. 2A:38A-3.

The CFAA requires a showing of "damage or loss." In re Google Inc. Cookie Placement Consumer Privacy Litigation, 806 F.3d 125, 148 (3d Cir. 2015). The CFAA defines "damage" to mean "any impairment to the integrity or availability of data, a program, a system, or information," 18 U.S.C. § 1030(e)(8), and "loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service," 18 U.S.C. § 1030(e)(11).

Plaintiffs argue that this Act of Congress is inapplicable, claiming that Mary Ellen has failed to allege that she has suffered "damage" or "loss." But she has. In her fifth count, Mary Ellen has alleged a violation of the CFAA and

claims that she "has been damaged." While plaintiffs may question or doubt whether or the extent to which she has been damaged, that assertion goes beyond the scope of this motion. Here, the court is only concerned with whether the pleader has alleged the elements of the claim, not whether the pleader can prove them. The motion to dismiss the CFAA claim contained in Mary Ellen's fifth count is denied.

In asserting her SCA claim, Mary Ellen generally argues that plaintiffs gained unauthorized access to her emails, telephones, computers, books, and records, as well as those of Dr. Bob and Harris FRC. At this stage, it cannot be said that this is not sufficient to support a claim under the SCA since, as one federal court has held, "facilities under the SCA are network service providers, which include 'telephone companies, internet or e-mail service providers, and bulleting board services,'" Walker v. Coffey, 956 F.3d 163, 168 (3d Cir. 2020). Barring a more nuanced understanding of this claim and what it is that plaintiffs are alleged to have done, it cannot be said that Mary Ellen has not set forth the fundament of a cause of action under the SCA.

The motion to dismiss the SCA claim set forth in the sixth count is denied.

The seventh and last count of Mary Ellen's counterclaim alleges a violation of the NJCROA. The court's view of plaintiffs' motion to dismiss is similar to that expressed regarding the CFAA: Mary Ellen has alleged that

damage was caused through plaintiffs' use of information or data accessed by plaintiffs from her computer devices and, as well, that that information or data has been used by plaintiffs to cause other damage to her.

In moving to dismiss, plaintiffs recognize that Mary Ellen has asserted she has been damaged by the alleged violative conduct but that this is not enough, that she must allege more than conclusory allegations about her damage and that she has not pleaded "specific facts" "regarding any damage done to the stored information." There is no need for Mary Ellen, at this pleading stage, to allege specifically how she was damaged or to provide evidence of the damage allegedly sustained.

The motion to dismiss Mary Ellen's seventh count is denied.

VI. THE OTHER ASPECTS OF PLAINTIFFS' MOTION TO DISMISS JUDITH'S COUNTERCLAIM

Beyond their contention that the first-filed doctrine requires dismissal or a stay of Judith's counterclaim that the court has already dealt with, see section IV above, plaintiffs also challenge the sufficiency of Judith's pleading of each of the counts of her counterclaim.

A. *Breach of Contract and Related Claims*

The first count alleges breach of contract, the second alleges breach of the implied covenant of good faith and fair dealing, and the third seeks a declaratory

judgment concerning the contractual claims. Plaintiffs' motion rests on the simple assertion that Judith has no contract with plaintiffs, who therefore cannot be found to be in breach of contract, that plaintiffs do not owe Judith their good faith and fair dealing in the absence of a contractual relationship from which such a covenant may emanate, and that the declaratory judgment claim must fail because it rests on the sufficiency of the first or second counts. There is logic to what plaintiffs argue.

Judith has not alleged that she has a contractual relationship with plaintiffs. Replete throughout her counterclaim is her claim of a contractual relationship with Harris FRC, which is not a party and is a separate entity from any or all of plaintiffs. In the absence of an existing contract with plaintiffs, the breach of contract claim must fail. In Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 188 (App. Div. 2017), the court provided the black letter elements of a breach of contract action, observing that "[t]o establish a breach of contract claim, [the claimant] must prove . . . the parties entered into a contract . . ." (citing Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). The counterclaim alleges only that Judith entered into a contract with Harris FRC, not plaintiffs. And, without a contract with plaintiffs, the implied covenant of good faith and fair dealing, which lies at the heart of the second count, must also fail, since the existence of that covenant is dependent on a contract between the

claimant and the alleged breaching party or parties. Wade v. Kessler Institute, 172 N.J. 327, 345 (2002); see also Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 434 (App. Div. 1990) (holding that "[i]n the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing").

Neither the first, second or third counts state a claim on which relief may be granted and must be dismissed but they will be dismissed without prejudice in order to provide Judith with the opportunity to amend. See Printing Mart-Morristown, 116 N.J. at 746; Liberty Mut., 413 N.J. Super. at 524.

B. *Malicious Abuse of Process*

Judith's fourth count asserts that plaintiffs have maliciously abused the processes emanating from the Delaware action to cause her damage in much the same way that Mary Ellen has so alleged. Indeed, it is not clear whether Judith's alleged damages are different from those alleged by Mary Ellen as evidenced by paragraph 114, in which Judith alleges that "[p]laintiffs have demonstrably used the legal process as a means to coerce Mary Ellen and Judith Lolli." While Judith certainly has standing to pursue claims for the damage she has allegedly sustained for any wrongful conduct alleged, she does not have standing to seek damages for injuries incurred by others.

Putting aside these questions about the nature of this count, the court reaches the same conclusion on this count that it did with Mary Ellen's malicious

abuse of process claim. It will be dismissed but without prejudice to Judith's right to amend her counterclaim.

C. *Conversion*

Like Mary Ellen, Judith also has asserted claims alleging a conspiracy, the aiding and abetting of the conspiracy, and a conspiracy to commit conversion, in her fifth, sixth, and seventh counts. Like Mary Ellen's similar claims, Judith's also warrant dismissal but with the opportunity for Judith to amend her pleading. Beyond the problems associated with Mary Ellen's similar claims, it is not clear from her counterclaim whether Judith is claiming that plaintiffs have converted her property. Judith certainly has no standing to claim damages for the conversion of Mary Ellen's property; that claim belongs only to Mary Ellen. See Jersey Shore Med. Ctr. – Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 144 (1980) (holding that "[o]rdinarily, a litigant may not claim standing to assert the rights of a third party"); Spinnaker Condo. Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 110-11 (App. Div. 2003) (recognizing that our courts "have set a fairly low threshold for standing," but that "a litigant does not have standing to assert the rights of a third party").

Along with the other problems that are no different from those recognized in the disposition of the motion to dismiss Mary Ellen's malicious abuse of process claim, Judith's conversion counts are further clouded by the conflating

of damage allegedly done to Mary Ellen and any claimed damage done to Judith. These counts are dismissed but without prejudice to Judith's right to amend her counterclaim if she wishes to pursue these claims further.

D. *LAD Claim*

Judith's eighth count alleges that plaintiffs were "decision makers" at Harris FRC and that they aided and abetted Harris FRC's LAD violations. This count and plaintiffs' motion to dismiss raise peculiar problems different from those asserted in the other aspects of the motion.

That is, Judith previously filed an action in the Law Division in this vicinage against Harris FRC alleging LAD violations. Her complaint in that matter asserted claims against three "John Does" and, although she concedes that she knew the identities of the John Does to whom she was referring – namely, the three plaintiffs here – she chose not to expressly name them in her suit. Instead, the case was quickly settled – plaintiffs suggest that the absence of plaintiffs from the suit enabled the settlement, which was nothing more than the means for Harris FRC to convey funds to Judith without plaintiffs' presence to object – and dismissed with prejudice. Only with plaintiffs' commencement of this action did Judith then take the opportunity to seek to reopen her LAD action so as to replace the John Does with the names of plaintiffs. That motion was denied by a Law Division judge on February 2, 2023, but without prejudice to

Judith's right to pursue those claims here and without prejudice to plaintiffs' right to argue that issue or claim preclusion concepts ought to preclude such relief.[22]

Oral argument on the viability of the eighth count in light of the dismissal of the prior Law Division LAD case sharpened the focus on the collateral estoppel concerns raised by Judith's manner of pursuing LAD relief. Her attorney was given the opportunity to address this issue further by way of a supplemental brief, and plaintiffs were given the opportunity to respond. Both sides have accepted the invitation to provide more on that issue and those papers have been considered by the court.[23]

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[22] The Law Division judge's February 2, 2023 order stated that Judith could "re-file a new action asserting the allegations in the [a]mended [c]omplaint and [d]efendant[s] retain[] all affirmative defenses" while also observing that nothing in the order "shall affect any of the claims asserted in the pending Chancery Division action." The court interprets this as simply a matter of the Law Division judge leaving to this court all questions about both the merits of the allegations in the proposed amended complaint and the propriety of allowing them to be asserted. In short, the court does not view the Law Division order as allowing for the assertion and maintenance of the LAD counterclaim if, as this court now holds, it is barred by Judith's failure to assert it in the Law Division LAD action up until that action's dismissal.

[23] Actually, Judith's supplemental brief exceeded the invitation and, concerned that the court may consider the other matters discussed in Judith's supplemental brief, plaintiffs' joint response addressed those additional matters. The court has not considered anything in the parties' supplemental papers but the legal arguments that addressed whether Judith is barred by res judicata, collateral estoppel or any other similar legal doctrine in her attempt to pursue the LAD claim pleaded in her counterclaim here.

The court concludes that the eighth count must be dismissed with prejudice. Our court rules provide considerable opportunities for claimants to not only sue the wrongdoers they know but also those they don't know. See R. 4:26-4. That liberal process, however, is abused when a pleader engages in a tactic of withholding the joinder of known parties. It's not something one would expect would ordinarily be employed because in most cases there would be no advantage in choosing not to join alleged wrongdoers known to the pleader. For whatever reason, Judith chose not to name plaintiffs in her earlier suit even though her description of the John Does she did name were quite obviously the three plaintiffs here.

Now, Judith would revive her claims by asserting them against plaintiffs after deliberately choosing not to name them in the earlier suit. While the court can cite no authorities that would specifically support this conclusion, it probably requires no other citation except the well-accepted underlying principles of our court rules that justice is to be fairly and expeditiously administered, R. 1:1-2; Tumarkin v. Friedman, 17 N.J. Super. 20, 26-27 (App. Div. 1951) (recognizing that the court rules are designed to promote "just and expeditious determinations between the parties on the ultimate merits"), as well as the overarching principles in favor of the joinder of claims and parties that concern the same operative facts.

Whether Judith's conduct in attempting to bring a second action to gain some sort of advantage, windfall or double recovery, was deliberate or whether plaintiffs' filing of this action provided a convenient avenue to pursue the claim again is of no moment. The bottom line is that this is not a situation where the claimant did not know the identities of all the wrongdoers, resolved a claim against the known wrongdoers, and attempted to continue to pursue those not known. Judith knew who the John Does were at all times and consciously chose not to add them to the first action either at the outset or prior to the entry of final judgment once she settled with Harris FRC. Judith had her opportunity to pursue her claims against plaintiffs and, either through negligence or some sort of three-dimensional chess move, declined the opportunity. She cannot escape the consequences of that decision. With the settlement of the LAD claim she brought against Harris FRC and its dismissal with prejudice, see A.T. v. Cohen, 231 N.J. 337, 351 (2017) (holding that a "dismissal specifying that it is with prejudice constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial") (cleaned up), Judith was thereafter barred from pursuing claims arising out of the same operative facts by way of a counterclaim here, see Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322 (1995) (holding that it is "the factual circumstances giving rise to the controversy itself, rather than the commonality of claims, issues or parties, that triggers the

requirement of joinder to create a cohesive and complete litigation"). See also In re Estate of Gabrellian, 372 N.J. Super. 432, 444-47 (App. Div. 2004) (applying these principles in rejecting an argument that a settlement bars applicability of res judicata principles).

The eighth count of Judith's counterclaim will be dismissed with prejudice.

E. *Fraudulent Concealment Of Evidence*

Judith's ninth and last count of her counterclaim alleges the fraudulent concealment of evidence. Our courts recognize the viability of such a claim, holding that it requires proof of "a legal obligation to disclose" the evidence to the plaintiff, that the evidence was "material" to the plaintiff's case, that the plaintiff could not have "readily learned of the concealed information" a disclosure from the defendant, that defendant "intentionally failed to disclose" the evidence to the plaintiff, and that the plaintiff was harmed by relying on the nondisclosure. Rosenblit v. Zimmerman, 166 N.J. 391, 406 (2001) (quoting Hirsch v. General Motors Corp., 266 N.J. Super. 212, 238 (Law Div. 1993)).

Judith's pleading covers these elements and the factual allegations must be assumed to be true at the present time. Whether Judith will be able to prove her claim is not a relevant consideration at this stage. The motion to dismiss the eighth count will be denied.

VII. DISCOVERY MOTIONS

With these dispositions, the court turns to the pending discovery motions. They are: Mary Ellen's motion for a protective order and for an order quashing plaintiffs' subpoenas seeking the turnover of medical records concerning Dr. Bob in the possession of Robert J. Gialanella, Noah R. Gilson, Aristotelis E. Vlahos, Brendan J. Mulholland, Kenneth Rubin, and Red Bank Eye; Mary Ellen's motion for a protective order and to quash plaintiffs' subpoenas seeking the turnover of medical records concerning Dr. Bob in the possession of Bayshore Medical Center, Horizon NJ Health/Horizon Blue Cross/Blue Shield of New Jersey, Daniel A. D'Andrea, University Radiology, and Kenneth Rubin; plaintiffs' cross-motion to compel Mary Ellen's execution of a Health Insurance Portability and Accountability Act (HIPAA) release form; and Mary Ellen's motion for a protective order and to quash plaintiffs' subpoena of records possessed by AT&T, Inc.

Mary Ellen's argument consisted nearly entirely of her contention that the claims to which testamentary capacity or undue influence relate are time-barred. For the reasons discussed earlier in this opinion, the court presently rejects that contention. So, without reaching plaintiffs' argument that Mary Ellen has waived any right to confidentiality "by placing it in issue in earlier judicial proceedings," Mary Ellen's motions for a protective order or to quash

subpoenas served on Dr. Bob's medical professionals or institutions will be denied. And, for the same reason, plaintiffs' motion to compel execution of a HIPAA release is granted to the extent it remains necessary for her to do so in order to allow plaintiffs to pursue relevant medical evidence.

This leaves the motion that relates to a subpoena served by plaintiffs on AT&T. In seeking the court's intervention into this discovery matter, Mary Ellen argues that the subpoena must be quashed and a protective order entered because: (1) "AT&T is prohibited from releasing electronic communications without consent pursuant to" SCA; (2) "the information sought is irrelevant, oppress[s]ive and overly broad"; and (3) communications between Mary Ellen and Dr. Bob are privileged and confidential.

The court starts by considering the accepted notion that "discovery rules 'are to be construed liberally in favor of broad pretrial discovery,' . . . because '[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties [may become] conversant with all the available facts.'" Capital Health Sys. Inc. v. Horizon HealthCare Servs., Inc., 230 N.J. 73, 80 (2017) (quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997), and Jenkins v. Rainner, 69 N.J. 50, 56 (1976)).

The court finds no merit in most of Mary Ellen's arguments. There is no doubt that any of the information that might reflect communications between Dr. Bob and the other parties, their relevance is clear. The only concerns relate to the nature and time frame of the information sought. For example, Mary Ellen argues that the SCA precludes AT&T's compliance, but the SCA is triggered only by a request for the content of communications not information about whether communications may have occurred. So, the SCA provides no impediment to AT&T's turnover of "documents, logs and/or [sic] records reflecting communications" (emphasis added). To the extent the subpoena seeks the actual content of any such communications, there should be no turnover to plaintiffs prior to the court's opportunity to examine the records in camera. In the same vein, if the content of communications between Dr. Bob and Mary Ellen are encompassed by the subpoena, they too should not be turned over to plaintiffs until there is the opportunity for an examination in camera.

This leaves for resolution the dispute about the subpoena's scope. Mary Ellen argues that the subpoena is not limited by time. The court agrees that the time frame should be limited, and – pending further court order – AT&T should not be compelled to provide any records or other information about communications occurring earlier than January 1, 2015, and the moment of Dr.

Bob's death. In that way, plaintiffs will have access to information about the communications made for a substantial time prior to the purported execution of the October 6, 2015 instruments up until Dr. Bob's death. All other documents called for in the subpoena that fall outside that time frame should nevertheless be produced by AT&T but held by Mary Ellen's counsel pending further order of the court.

Mary Ellen also objects to the subpoena insofar as it seeks records concerning phone numbers that may have been used by individuals other than Dr. Bob. That is, the subpoena identifies three phone numbers: Dr. Bob's personal cell phone; a phone in Dr. Bob and Mary Ellen's residence; and a phone number belonging to Harris FRC. The court will impose no limits on the turnover of documents relating to the use of Dr. Bob's personal cellphone other than that already stated. Records relating to the other two phones are to be turned over by AT&T but held by Mary Ellen's counsel pending further order of the court that will turn on what the material provided to plaintiffs may reveal.

* * *

To summarize, the court has denied defendants' motions for summary judgment, which also may be viewed as motions to dismiss under Rule 4:6-2(e). Plaintiffs' motions to dismiss the counterclaims of Mary Ellen and Judith on

first-filed grounds are denied without prejudice and may be renewed upon further development of the issues.

Plaintiffs' motion to dismiss Mary Ellen's counterclaim is granted in part but without prejudice to her right to file an amended of her first and second counts, and denied as to the third, fourth, fifth, sixth and seventh counts. Plaintiffs' motion to dismiss Judith's counterclaim is granted but without prejudice to her right to file an amended pleading as to her first, second, third, fourth, fifth, sixth, and seventh counts, granted with prejudice as to the eighth count, and denied as to the ninth count.

Mary Ellen's motion for a protective order or to quash the subpoenas issued to medical providers is denied, and plaintiffs' cross-motion to compel Mary Ellen to provide a HIPAA release is granted. Mary Ellen's motion to quash the subpoena to AT&T is denied but her motion for a protective order in that regard is granted in part.

An order has been entered memorializing all these dispositions except for the court's disposition of the motion for a protective order or to quash the AT&T subpoena. As for that ruling, counsel for Mary Ellen is directed to provide a proposed order, in conformity with this opinion, under the five-day rule.