SURYA P. IRAKAM, M.D. AND ANITHA IRAKAM, M.D., INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTRA EHEALTH, LLC AND AXELIA HEALTH, LLC, Plaintiffs/Appellants, v. DIFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS, LEHRER, & FLAUM, P.C., RICHARD R. AHSLER, ESQUIRE AND JEFFREY W, POMPEO, ESQUIRE, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000074-24T2 CIVIL ACTION ON APPEAL FROM LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-261-22 JUDGMENT ENTERED: July 2, 2024 SAT BELOW: HON. VERONICA ALLENDE, J.S.C.

PLAINTIFFS/APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Plaintiffs/Appellants, Surya P. Irakam, M.D. ("Surya") and Anitha Irakam, M.D. ("Anitha"), Individually and Derivatively on behalf of Astra eHealth LLC ("Astra") and Axelia Health LLC ("Axelia") (collectively, "Plaintiffs"), respectfully submit this Brief in support of their appeal in this legal malpractice action between Plaintiffs and their former attorneys, Defendants DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, P.C. (the "DiFrancesco Firm"), Richard R. Ahsler, Esq. ("Ahsler") and Jeffrey W. Pompeo, Esq. ("Pompeo") (collectively, "Defendants").

Plaintiffs seek this Court's review because the court below granted Defendants summary judgment despite the presence of material issues of fact that should have been resolved by a jury rather than the Court. Specifically, the lower court determined that Defendants did not represent Plaintiffs, and therefore did not owe Plaintiffs a duty, at the time when, Plaintiffs allege, Defendants advised Plaintiffs' then-business partners on a scheme to defraud Plaintiffs in connection with a business venture.

The lower court, however, acknowledged that there is evidence that Defendants were representing Plaintiffs at the time, and even noted that the "motion record has demonstrated a factual dispute over whether Defendants were representing Plaintiffs" during the relevant time period. In short, the lower

court identified the material fact dispute, then resolved it in Defendants' favor, contrary to the properly applicable summary judgment standard.

The lower court nevertheless went further, ruling that, even if Defendants represented Plaintiffs at the relevant time, then Plaintiffs failed to demonstrate by any competent evidence that the duty was breached. In reaching that decision, the lower court cited evidence relied on by Plaintiffs, weighed it, and found that it did not support a finding that Defendants were aware of the scheme to defraud Plaintiffs or that Defendants were part of the scheme. Again, the lower court went beyond the bounds of the summary judgment standard and acted as factfinder rather than finder of material fact issues.

As a result of the lower court's erroneous application of the summary judgment standard, this Court should reverse the Order granting Defendants summary judgment and remand the case to proceed to trial.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint in this action on February 28, 2022. Pa011. On May 16, 2022, Defendants filed an Answer to Plaintiffs' Complaint. Pa559.

On April 23, 2024, Plaintiffs moved for partial summary judgment. Pa546. Also on April 23, 2024, Defendants moved for summary judgment. Pa001. On May 21, 2024, Plaintiffs and Defendants served opposition to the

respective motions. Pa1271, et seq. On June 7, 2024, the lower court heard argument on the parties' summary judgment motions. 1T1.[1] On July 2, 2024, the lower court issued an Order and Opinion granting Defendants' summary judgment motion and dismissing Plaintiffs' Complaint with prejudice. Pa1313.

On July 22, 2024, Plaintiffs filed a motion for reconsideration of the lower court's summary judgment Order. Pa1337. On August 8, 2024, Defendants filed opposition to Plaintiffs' reconsideration motion. Pa1520. On August 16, 2024, the lower court heard argument on the reconsideration motion. 2T1.[2] Also on August 16, 2024, the lower court issued an Order denying Plaintiffs' reconsideration motion. Pa1522.

Plaintiffs filed their Notice of Appeal on September 10, 2024. Pa1524.

STATEMENT OF FACTS

On January 17, 2013, the DiFrancesco Firm entered into an Agreement to Provide Legal Services (the "2013 Agreement") with Nirman Tulsyan, M.D. ("Nirman"), Vasudha Tulsyan, M.D. ("Vasudha"), Surya, Anitha, and a "Corporate Entity To Be Formed." Pa943. Defendants thereafter formed new entities for the Irakams and represented the Irakams in connection with lease

[1] As set forth in the Index to Abbreviations, the transcript of the June 7, 2024, motion hearing is designated as "1T." The transcript of the August 16, 2024, motion hearing is designated as "2T."

[2] As set forth in the Index to Abbreviations, the transcript of the August 16, 2024, motion hearing is designated as "2T."

matters for Apollo/Astra Health Centers, among others, and the attorney-client relationship between Defendants and Plaintiffs continued, both individually for the Irakams and for their businesses. Pa1247-1248. Anitha and Vasudha formed Astra in January 2015, for the purpose of developing a telemedicine, patient registration, insurance verification and upfront payment estimation software system. Pa053. Anitha and Vasudha each had a 50% membership interest in Astra. Pa071. Surya and Nirman managed Astra's operations. Pa036. Ashok Tulsyan ("Ashok" and collectively with Vasudha and Nirman, the "Tulsyans"), who is Nirman's father, served as Astra's Chief Financial Officer. Pa036.

Between 2013 and 2020, Defendants represented Plaintiffs, including Surya and Anitha individually, in many matters, such as lease, loan and employment matters. Pa085-087; Pa013-014; Pa620.

In 2015 and 2016, Astra worked with Inadev Corporation ("Inadev"), which was owned and operated by family of the Tulsyans, to develop certain software. Pa1317-1318. On July 20, 2017, Surya and Anitha and the Tulsyans formed Axelia, which they believed would be a more marketable name for the business being operated as Astra. Pa077. On or about September 28, 2017, Astra, through Surya and Nirman, began working with Niku Trivedi ("Trivedi") and Rajeh Devi ("Devi"), who were officers of Chenoa Information Services, Inc. ("Chenoa"), about a possible joint venture between Astra and Chenoa to

market healthcare software related assets. Pa1316. In furtherance of a potential merger of Astra with Chenoa's healthcare division, Astra provided Chenoa, Trivedi and Devi with various confidential and proprietary information, including domain knowledge concerning the market for its software products. Pa1318. Around this same time, Nirman convinced Surya to have Astra take a loan from Inadev. Pa598. Astra then facilitated several meetings between Inadev's representatives and Chenoa's representatives. Pa1318.

On April 8, 2018, Nirman requested an executed digital copy of Astra's Operating Agreement from Surya, claiming that Nirman wanted to review the Operating Agreement before formalizing any agreement with Chenoa. Pa1253. On April 16, 2018, Ashok forwarded the Operating Agreement to Pompeo, in advance of a meeting to be held at the DiFrancesco Firm on April 17, 2018, ostensibly to discuss the potential dissolution of Astra (without informing the Irakams about the meeting or their plan for Astra's dissolution). Pa1253; Pa764. Pompeo then forwarded the Operating Agreement to Ahsler. Ibid.

Ahsler's timesheet for April 17, 2018, included an entry providing "Attendance at meeting here with Ashok Tulsyan and Jeffrey W. Pompeo re Astra eHealth; review Operating Agreement for Astra eHealth, LLC." Pa1147. Notably, Ahsler's time entry did not mention the reason for the meeting or the purpose of reviewing the Astra Operating Agreement. Ibid. Ahsler testified that

the meeting "was just a discussion about how to go about dissolving Astra eHealth and what was required," which is contradicted by the evidence in the record. Pa770. Pompeo's time entry for the April 17, 2018, meeting, however, described the meeting as: "Conference – Ashok and R. Ahsler re: dispute." Pa1085. Defendants have provided no explanation for why Pompeo characterized the subject matter of the meeting as a "dispute."

Ahsler, however, made handwritten notations and checkmarks on the Astra Operating Agreement. Pa774; Pa1122 et seq. Although Ahsler testified that he could not recall when he marked up the Operating Agreement, his timesheets reflect that he reviewed the Operating Agreement twice, once on April 17, 2018 (the same day as the meeting with Ashok), and again about two weeks later, on May 3, 2018. Pa773. In the Operating Agreement, Ahsler underlined the first "purpose" of the Company, which was "to develop, market and offer for sale computer programs and applications for organizations that provide health care services." Pa1123. Ahsler put a "star" next to the "Other Businesses" section (Section 2.2), which provides:

> This Agreement shall not prohibit any Member from conducting other businesses or activities, whether or not such other business or activity, directly or indirectly, competes with the business of the Company. Further, no Member shall be liable or accountable to the Company or the other Members for failure to disclose or make available to the Company any business opportunity of which a Member becomes aware, whether such awareness occurs in his capacity as a Member or otherwise.

[Pa1123.]

Ahsler admitted that he did not know how dissolution of Astra would be related to "other businesses." Pa774.

Ahsler put a "checkmark" next to Section 3.3 of the Operating Agreement, which provides, in relevant part, that the "Company may offer to sell additional Membership Units, but only if authorized by the approval of a Super Majority Interest Vote of all Members." Pa1124. Ahsler testified that he did not know if Section 3.3 had anything to do with dissolution of a company. Pa774.

Ahsler put another "checkmark" next to Section 5.6 of the Operating Agreement, entitled "Member Indemnification," which provides:

> Each Member (the "Indemnifying Party") shall indemnify, defend and hold the Company, the Manger and each other Member (collectively, the "Indemnified Parties") harmless from and against, any and all liability to any Person incurred by any of the Indemnified Parties by reason of any fraudulent, criminal or grossly negligent act or cost, expense and loss (including reasonable attorneys' fees and disbursements) incurred by any of the Indemnified Parties in connection with the liability.

[Pa1128.]

Similarly with Section 3.3, Ahsler testified that he did not know if Section 5.6 had anything to do with dissolution of a company. Pa774.

Ahsler also put "checkmarks" next to Sections 9.1 and 9.2 of the Operating Agreement, which provide as follows:

> 9.1 General Restriction. No Member may transfer, whether voluntarily or involuntarily, any portion of such Member's Percentage Interest, except as provided in Section 9.2 ("Permitted Transfers") or with the consent of the Company acting by the approval of the Super Majority Interest Vote of the Members, or as otherwise expressly provided for in this Agreement. For purposes of this Agreement, a "transfer" includes, but is not limited to, any sale, assignment, gift, exchange, pledge, hypothecation, collateral assignment or creation of any security interest.
>
> 9.2 Permitted Transfers.
>
> Each Member, and each of their respective estates, spouses and descendants, shall have the right to transfer her, his or its Membership Units to a spouse or descendant who is not prohibited by applicable law from owning Membership Units in the Company, subject only to the transferee executing a Joinder agreeing to be bound by the terms and conditions of this Agreement.
>
> [Pa1133.]

Ahsler testified that Sections 9.1 and 9.2 have nothing to do with dissolution of Astra and he allegedly did not know why he marked those provisions. Pa774.

Ahsler marked Section 10.1 with a star, which provides for "Events Triggering Dissolution," which under that Section requires a "Super Majority Interest Vote of the Members." Pa1137. Ahsler placed a checkmark next to the definition of "Super Majority Interest Vote" in Section 12.7. Pa1140.

Ahsler admitted that he did not tell either Surya or Anitha about the meeting with Nirman to allegedly discuss the dissolution of Astra. Pa775.

Immediately after the April 2018 meeting between Nirman and Defendants, the Tulsyans, as part of a scheme to defraud Plaintiffs, advised

Surya that Astra was insolvent, that Inadev sought a paydown of its loan to Astra, that the deal with Chenoa would be off, and therefore, Nirman pushed to have Astra dissolved. Pa1148-1149. Immediately after the meeting, Nirman and others implemented the scheme. Nirman and Inadev (which, again, was owned and operated by family of the Tulsyans) pressured Surya and Anitha to quickly close and dissolve Astra. Pa1149. Despite these actions and misrepresentations to Surya, Nirman continued the business of Astra without notifying the Irakams.

On April 28, 2018, Ashok emailed Surya concerning Astra's financial condition and Ashok requested that Pompeo draft dissolution documents for Astra. Pa1320. On April 30, 2018, Nirman emailed Surya regarding Astra, stating "I will not be sharing in future costs effective May 1." Ibid. The next day, May 1, 2018, Ashok forwarded to Ahsler and Pompeo Nirman's April 30 message to Surya. Ibid.

Thereafter, Surya naively, not aware of the scheme, consented to the dissolution of Astra and Ashok asked Defendants to prepare the dissolution documents. Pa534. Anitha signed the dissolution documents prepared by Defendants on June 9, 2018, and Defendants submitted the required dissolution documents to the State for filing on June 29, 2018. Pa536. According to Defendants, the "effective date of the dissolution … is May 6, 2018." Pa595.

Plaintiffs were unaware at the time, however, that in April or May 2018, the Tulsyans, Trivedi and Devi had secretly formed a new company, Xenio Health LLC ("Xenio"), to operate in the same line of business as Astra. Pa598-599; Pa538; Pa1322-1323. According to Plaintiffs, Xenio was an "exact replica" of Astra, except without Plaintiffs' involvement, having the same business. Pa1259. On August 12, 2018, Surya discovered a website for Xenio and was understandably shocked. Pa538; Pa1322-1323. At that time, Suryan realized that he and Anitha had been defrauded by the Tulsyans, Trivedi and Devi. Ibid.

On August 13, 2018, Surya emailed Nirman and Ashok and confronted them with his discovery of Xenio. Pa538; Pa598. Ashok then forwarded Surya's August 13 email to Ahsler and requested a meeting with Defendants. Pa314; Pa539. Ahsler met with the Tulsyans and Trivedi on August 20, 2018, and subsequently prepared a Memorandum regarding the meeting (the "August 2018 Memorandum"). Pa594.

All along, simultaneously, through May to September 2018, Ahsler was representing the Irakams and their businesses related to leases, impending litigation related to the leases and reassignment of the leases to a potential buyer of Astra Health Centers. Pa939-940; Pa1427-1519).

Ahsler noted in the August 2018 Memorandum that he advised the Tulsyans and Trivedi that members and managers of an LLC owe each other

duties of loyalty and care. Pa595. Ahsler further noted in the August 2018 Memorandum that Section 2.2 of Astra's Operating Agreement, which Ahsler had "starred" on either April 17 or May 3, 2018 (Pa1123), "somewhat insulated [the Tulsyans] from any obligation to Surya to bring him into Xenio." Pa595. Ahsler noted that the DiFrancesco Firm "might be conflicted out" from the dispute, "since technically we represented the Company in connection with the dissolution." Pa597. Nevertheless, Ahsler noted that he advised Nirman to not respond to Surya's August 13 email and to "not provide any such paperwork" in response to Surya's demand. Pa597.

On October 15, 2018, Plaintiffs filed a Complaint against the Tulsyans, Trivedi, Devi, Inadev, Chenoa and Xenio, among others, alleging that Plaintiffs were defrauded by those parties (the "Underlying Action"). Pa1325. Plaintiffs settled the Underlying Action, receiving $2.9 million and other compensation. Ibid. Plaintiffs incurred legal costs of approximately $1,350,000 in prosecuting the Underlying Action, however. Pa1326.

In this action, Plaintiffs allege that Defendants deviated from the applicable standard of care by, among other things, advising the Tulsyans in connection with their scheme to defraud Plaintiffs while having a conflict of interest based on Defendants' representation of Plaintiffs. Pa024-26.

Plaintiffs procured a 66-page expert report, dated July 28, 2023, from Philip L. Faccenda, Esq. Pa871. Mr. Faccenda concluded that Defendants:

> were professionally negligent in their representation of them, engaged in deviations from the standards of care required of all attorneys, knowing and intentional breach of their fiduciary duties, engaged in misconduct as to Plaintiffs and Astra, engaged in misrepresentation by omission, silence and failure to disclose material facts, aided and abetted the Tulsyans in their breach of fiduciary duties to Astra, and became knowing and active participants in, and willfully and wantonly aided and abetted others in, a scheme to deprive the Plaintiffs of the value of their equity 50% ownership, income, and future economic benefits to be gained from the wrongful dissolution of Astra. The Defendants knowingly facilitated and assisted in the scheme with others to wrongfully dissolve Astra, deprive the Plaintiffs of their economic interests, not only in Astra, but also in other entities that were created by one or more of the Defendants' other clients, who included A. Tulsyan and N. Tulsyan, whose scheme transferred valuable assets and technology from Astra; all to the benefit of the those in the Underlying Action who were part of the scheme, as well as the Defendants herein.
>
> [Pa872.]

Mr. Faccenda opined that, based on Rules of Professional Conduct 1.2(d), 1.3, 1.4, 1.13 and 1.16, Defendants had specific duties to both Astra "and to the Irakams who they represented both in their individual capacity, and in connection with their status within Astra, to inform the Plaintiffs of [the Tulsyans' claims that Astra was without value and should be dissolved] and independently verify them, as they were the primary reasons given to Defendants as the reason to dissolve Astra." Pa873.

Mr. Faccenda supplemented his report on September 13, 2023, after receiving the January 17, 2013, Agreement to Provide Legal Services. Pa39. Mr. Faccenda's supplemental report addressed the issue of Defendants' representation of the Irakams. Ibid. Based on his review of the facts and applicable Rules of Professional Conduct and case law, Mr. Faccenda concluded that "Defendants did represent the Irakams individually, along with Astra, and Nirman and Vasudha Tulsyan during the focus period in 2018, including the dissolution matter." Pa873. Mr. Faccenda further concluded that Defendants committed negligence and breached their fiduciary duties to Plaintiffs in facilitating and actively participating in the Tulsyans' scheme to defraud Plaintiffs. Pa874.

As noted above, on April 23, 2024, Plaintiffs moved for partial summary judgment and Defendants moved for summary judgment. Pa546; Pa001. On July 2, 2024, the lower court issued its Order and Opinion. Pa1313. The lower court noted that

> Defendants Liability expert witness, Stuart Reiser, admitted that the Firm represented the Plaintiffs individually whenever Defendants represented the Astra entities, and the Plaintiffs' personal interests were at stake. Plaintiffs' liability expert witness, Philip Faccenda, testified that the Defendants represented the Plaintiffs' individually whenever Defendants represented the Astra entities, and the Plaintiffs' personal interests were at stake. Mr. Faccenda testified regarding the Agreement between Plaintiffs and Defendants, and that Defendants proceeded to not require any further fee agreements by the Plaintiffs and then provided a succession of representations

> to the Plaintiff in multiple matters individually as well as in relationship to their connection to Astra. Mr. Faccenda also testified that the continuous personal representation of the Plaintiffs individually by Defendants spanned a course of at least nine or more years, between 2013 and 2022. Plaintiff Surya testified that the Firm represented him and his wife, personally, mostly related to Astra entities and on an individual basis in non-Astra matters.
>
> [Pa1328-1329.]

The lower court acknowledged that "[w]hile duty is an issue of law, the motion record has demonstrated a factual dispute over whether Defendants were representing Plaintiffs individually as of April of 2018 to give rise to such a duty when the alleged scheme took place." Pa1333. The court also noted that "[t]he evidence suggests that Defendants represented Plaintiffs in other matters, however, Defendant Ashler [sic] testified that their representation of Plaintiffs as individuals concluded by 2018" and that "the factual record suggests that Defendants, or at least the Firm, represented Plaintiffs in an individual capacity up until 2021 for other legal matters." Pa1333-1334. With respect to the duty of care, the lower court concluded:

> Plaintiff has not sufficiently demonstrated that Defendants owed a duty to Plaintiffs. Plaintiffs rely on the Agreement to demonstrate that Defendants represented them individually. However, the Agreement was executed in 2013, years prior to the advent of Astra. The factual record demonstrates that Defendants were representing Astra as an entity, and not Plaintiffs. The fact that Plaintiffs had a monetary interest in Astra does not establish an attorney-client relationship between Defendants and Plaintiffs as individuals. Because Plaintiffs have not provided any competent evidencce [sic] to demonstrate that there was an attorney-client relationship at the

> time of the dissolution, there was no duty of care owed to Plaintiffs individually by Defendants.
>
> [Pa1334.]

The lower court went further, however, and ruled that "[e]ven if the court found that Defendants did represent Plaintiffs individually at the time of the dissolution, and, consequently did owe a duty of care to Plaintiffs, and even considering the evidence in the light most favorable to Plaintiff, the court finds that Plaintiff has failed to demonstrate by any competent evidence that that duty was somehow breached." Pa1335. The court's reasoning was:

> During oral argument, Plaintiffs' counsel was asked to point to the specific facts in the motion record that demonstrate that Defendants were aware of any alleged scheme to open a new business or that Defendants were part of that scheme, Plaintiffs' counsel was unable to point to any direct evidence suggesting same. No one in attendance at the April 17, 2018 meeting with Ashok and Defendants recalls discussing any other matter than the dissolution of the company. Plaintiffs' counsel relying on some handwritten notes one of the defendants made on a copy of their operating agreement, but during that defendant's deposition, they could not recall why they made those notations. Simply put, no evidence, direct or circumstantial, in the motion record supports a finding that Defendants were aware of any scheme to defraud Plaintiffs or that Defendants were part of any such scheme.
>
> [Ibid.]

Contrary to the lower court's statement in its Statement of Reasons that "no evidence, direct or circumstantial, in the motion record supports a finding that Defendants were aware of any scheme to defraud Plaintiffs," the court

specifically stated during oral argument on the motions that there was "a lot of indirect evidence," but that it was focused on finding "direct" evidence:

> I understand you have a lot of indirect evidence at this point, circumstantial evidence, but what is -- do you have any direct evidence that you can point to in the record that shows that Mr. O'Connor's clients knew about the scheme, if there was a scheme, but there's a settlement in the underlying litigation, that they knew about a scheme to defraud your clients related to the new company? What is the direct evidence of that?
>
> [1T30:1-8]

In short, the lower court acknowledged the substantial circumstantial evidence supporting Plaintiffs' claims (thus requiring a denial of summary judgment) but rejected that evidence and instead improperly ruled on the merits of the case.

As noted above, Plaintiffs moved for reconsideration of the lower court's ruling. Pa1337. During oral argument, the court made the following relevant statements:

> I made it also very, very clear that even if I did find that the parties -- the Defendants, excuse me, did represent the Plaintiffs individually, which I'm still not convinced of, but plead individually, that the really key issue here was that there's no evidence from which a rationale fact finder could conclude that there was a breach of that duty, such that damages are warranted. And let me make that very clear. The only facts that suggest that the Defendants were aware of the plan to start Xenio is the fact that the Xenio company was formulated after the April meeting.
>
> At the April meeting Ashok met with the Defendants. We don't know what happened in that meeting, because nobody can

recall the contents of that meeting. And it's Plaintiffs' burden to be able to prove that there was something untoward happening at the meeting.

The only circumstantial evidence that is set forth for the Court's consideration is the -- this operate -- of regarding that meeting, was the operating agreement that is marked up, that made -- there were certain notations on; a star here, a check mark there. That nobody can explain why those check marks were made.

So a jury is never going to hear why those check marks were made. And there were check marks that were not only made by the parts that were suggested -- that were referenced by Ms. Garber and that we went over here, but then there were other parts that were checked off. Section 9, transfer or sale of membership units, general restrictions. Permitted transfers. You know, does this operating agreement suggest that there were other things, other than the dissolution perhaps, discussed at the meeting? Maybe. Does it demonstrate significantly that the -- or in any real way that the Defendants were aware that Xenio was being formulated unbeknownst to Ashok and Ms. Garber's clients? Not at all.

There's nothing about the markings in this agreement that make that suggestion, even when you combine with with the other circumstantial evidence that Ms. Garber is asking the Court to consider. Which would be that Ashok was billed individually for that meeting, and that it was marked as dispute. Well, nobody can explain what the word dispute means.

I don't know how a rationale fact finder could the leap that dispute means that Ashok is going to be starting this new company, and he wants to make sure that he's getting away with it and there's no problems with it. There's just -- there's no -- I don't think a -- I do not believe that based on what I've reviewed that a rationale fact finder could make that jump.

So we have the Ashok bill. We have the fact that the Xenio company was started 11 days after the meeting. And then we have the memo.

> This legal memo that Ms. Garber purportedly says is damning, but I don't see that at all. The memo, whether it was appropriate for Mr. Ahsler to have that meeting with them or not is a summary of the meeting. It's a summary of the meeting.
>
> She pointed to the first section, where it says the main purpose of the meeting was to strategize on how to respond to the threats of Surya Irakam. By the end of the memo it says that we're probably be conflicted out of this. And the only legal advice that was provided if any, if you can even counsel that, is hey this case, if this goes to litigation isn't going to happen until next year. Also, I just recommend hold tight on the documents for now and make sure you provide -- save them, and then provide them to lawyer. And we're probably going to be out.
>
> He did say that -- he made some advice about duties of loyalty. Just reminding them about, you know, what you're supposed to be doing with the LLC. But to suggest that this memo demonstrates that the Defendants were aware of the Xenio formation, that they had anything to do with it, that they -- affirmatively or even indirectly, is a jump that I don't think a rationale fact finder could make.
>
> [2T35:19 – 38:19. (emphasis added).]

LEGAL ARGUMENT

POINT I

THE LOWER COURT ERRED BY ENTERING SUMMARY JUDGMENT DESPITE THE ACKNOWLEDGED ISSUES OF MATERIAL FACT THAT REQUIRE A TRIAL (Pa1315-1335)

A. Applicable Standard

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The Court's function on a summary judgment motion is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The Court considers whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540 (emphasis added).

"In legal malpractice cases, as in other cases, summary disposition is appropriate only when there is no genuine dispute of material fact." Ziegelheim v. Apollo, 128 N.J. 250, 261 (1992) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954)). "A litigant has a right to proceed to trial 'where there is the slightest doubt as to the facts.'" Ibid. (quoting Ruvolo v. American Casualty Co., 39 N.J. 490, 499 (1963)). All inferences are drawn in favor of the party opposing the motion for summary judgment. Id. at 261-62 (citing Judson, supra, 17 N.J. at 75).

"The slightest doubt as to an issue of material fact must be reserved for the factfinder, and precludes a grant of judgment as a matter of law." Akhtar v.

JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015) (citation omitted). Conflicting versions of events present a credibility issue that "must be left to the finder of fact." Ibid. (citation omitted). "The question of which version is more plausible or believable . . . is not susceptible to summary disposition." Winstock v. Galasso, 430 N.J. Super. 391, 404 (App. Div. 2013) (citing Brill, supra, 142 N.J. at 543).

Furthermore, although Plaintiffs bear the burden of proof on their claims, "'they are not obliged to establish it by direct, indisputable evidence.'" Thorn v. Travel Care, Inc., 296 N.J. Super. 341, 347 (App. Div. 1997) (quoting Kulas v. Pub. Serv. Elec. &Gas Co., 41 N.J. 311, 319 (1964)). Rather, Plaintiff's burden of proof "can be established by circumstantial evidence." Bergquist v. Penterman, 46 N.J. Super. 74, 89 (App. Div. 1957). "'Proof that will justify a reasonable probability as distinguished from mere possibility is all that the law requires.'" Ocasio v. Amtrak, 299 N.J. Super. 139, 153 (App. Div. 1997) (quoting Mazzietelle v. Belleville Nutley Buick Co., 46 N.J. Super. 410, 417 (App. Div. 1957)). "The matter may rest upon legitimate inference, so long as the proof will justify a reasonable and logical inference as distinguished from mere speculation." Beyer v. White, 22 N.J. Super. 137, 144 (App. Div. 1952). A fact may be proved by both direct evidence and circumstantial evidence. State v. Phelps, 96 N.J. 500, 511 (1984). "Both direct and circumstantial evidence

are equally acceptable forms of proof." Newmark–Shortino v. Buna, 427 N.J. Super. 285, 312 (App. Div. 2012) (citations omitted).

B. The Lower Court Erred Under Its Own Analysis

The lower court acknowledged that there is a genuine issue of material fact regarding whether Defendants represented Plaintiffs during April 2018, finding that "the motion record has demonstrated a factual dispute over whether Defendants were representing Plaintiffs individually as of April of 2018 to give rise to such a duty when the alleged scheme took place." Pa1333.

The lower court also acknowledged that, if Defendants owed Plaintiffs a duty of care, then there is a genuine issue of material fact regarding whether Defendants breached that duty by either being a part of, or being aware of, the scheme to defraud Plaintiffs. Specifically, the court found that the "only facts that suggest that the Defendants were aware of the plan to start Xenio is the fact that the Xenio company was formulated after the April meeting." 2T36:1-4. The lower court also found other circumstantial evidence, including "the operating agreement that is marked up," (2T36:12-13) that "Ashok was billed individually for that meeting, and that it was marked as dispute" (2T37:9-10), that "the Xenio company was started 11 days after the meeting" (2T37:20-21), and that, in the August 2018 Memorandum, Ahsler gave the Tulsyans "some advice about duties of loyalty" (2T38:12-13). After laying out these items of

circumstantial evidence, however, the lower court erroneously required "direct evidence" supporting Plaintiffs' claims, and ruled that there "was no direct evidence of the Defendant's knowledge of the scheme." 2T40:4-5.

As noted above, however, "direct evidence" is not a requirement to defeat a summary judgment motion. The factual record, as outlined above, sufficiently supports the existence of genuine issues of material fact regarding both (i) Defendants' duty to Plaintiffs and (ii) Defendants' breach of that duty. Under the properly applicable summary judgment standard, Plaintiffs were entitled to all favorable inferences that flow from the evidence – both direct and circumstantial. After recognizing the material fact issues, the lower court nevertheless erroneously entered summary judgment in Defendants' favor – after improperly weighing the evidence and determining the merits of the matter. Accordingly, this Court should reverse the lower court's Order and remand this case to proceed to trial.

POINT II

THE LOWER COURT ERRED BY FAILING TO RECOGNIZE THAT THE MATERIAL FACT ISSUE REGARDING DEFENDANTS' REPRESENTATION OF PLAINTIFFS REQUIRES A TRIAL TO RESOLVE THE DISPUTE (Pa1331-1335)

There is sufficient evidence in the record supporting the proposition that Defendants represented Plaintiffs, and therefore had a duty of care and ethical

obligations to Plaintiffs. Accordingly, the lower court erred by ruling that Plaintiffs have "not sufficiently demonstrated that Defendants owed a duty to Plaintiffs." Pa1334.

Legal malpractice suits are grounded in negligence law and require three elements: "(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff." McGrogan v. Till, 167 N.J. 414, 425 (2001); Jerista v. Murray, 185 N.J. 175, 190-91 (2005).

Whether a defendant owes a duty of care to another is a question of law to be determined by the trial court. Carvalho v. Toll Bros. & Devs., 143 N.J. 565, 572 (1996). Courts must analyze a defendant's duty of care to an individual based on the totality of the circumstances, and considerations of public policy and fairness. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993); see also Acuna v. Turkish, 192 N.J. 399, 414 (2007). There are four factors that must be analyzed when determining whether an individual owes a duty of care toward another: "the relationship of the parties[;] the nature of the attendant risk[;] the opportunity and ability to exercise care[;]" and public policy considerations. Hopkins, supra, 132 N.J. at 439. This "analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly

resolve the specific case and generate intelligible and sensible rules to govern future conduct." Ibid. (emphasis added).

Here, there are multiple facts supporting Defendants' representation of Plaintiffs such that there was at least sufficient evidence of a material fact dispute worthy of a trial on the issue.

The 2013 Agreement is between Defendants and Surya and Anitha individually. Pa943. There is no other written engagement agreement between Plaintiffs and Defendants. Nevertheless, between 2013 and 2020, Defendants undisputably represented Surya and Anitha and Astra in multiple matters beyond the scope of the 2013 Agreement. These matters included multiple representations during the key time period in 2018 when Defendants admittedly were representing Astra in connection with the dissolution and were conferring with the Tulsyans about a "dispute" and the Astra Operating Agreement, which, according to Plaintiffs, was actually Defendants advising the Tulsyans on setting up Xenio and removing the Irakams from the business developed by Astra. See Pa1427-1519; Pa1085. This evidence supports the proposition that Defendants were representing Plaintiffs and accordingly owed them a duty of care.

There is also direct testimonial evidence supporting the representation. According to Surya, Defendants represented Plaintiffs, including Surya and Anitha individually, in many matters, such as lease, loan and employment

matters, from 2013 through 2018 and into 2020. Pa085. Surya's testimony that Defendants were representing the individual Plaintiffs during the key time period, which was even acknowledged by the lower court (Pa1328-1329), should have been sufficient on its own for the court to find a fact issue regarding the representation warranting a trial. The lower court instead erroneously discounted that evidence and adopted Defendants' position.

Ahsler even admitted that the DiFrancesco Firm "represented the Company in connection with the dissolution." Pa597. Given these facts alone, the lower court erred in finding that there was no representation and therefore no duty of care owed by Defendants to Plaintiffs. Instead of allowing a jury to find the facts, the lower court improperly weighed the evidence and determined the matter in Defendants' favor, contrary to the summary judgment standard.

The expert opinions served by the respective parties also support Plaintiffs' position. Plaintiffs' expert, Mr. Faccenda, based on his review of the extensive factual record cited in his report (see, e.g., Pa1427-1519), and on the applicable Rules of Professional Conduct and case law, concluded that "Defendants did represent the Irakams individually, along with Astra, and Nirman and Vasudha Tulsyan during the focus period in 2018, including the dissolution matter." Pa873. Additionally, as noted by the lower court, "Defendants Liability expert witness, Stuart Reiser, admitted that the Firm

represented the Plaintiffs individually whenever Defendants represented the Astra entities, and the Plaintiffs' personal interests were at stake." Pa1328-1329.

Even if the respective expert opinions conflict on the duty of care issue, however, that is even more evidence of a genuine issue of material fact that makes summary judgment inappropriate and warrants a trial. See, e.g., Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14-16 (App. Div.), certif. denied, 188 N.J. 489 (2006) ("the expert's opinion was based on the facts of record, to which he applied generally accepted standards of care" thus allowing the claims made to "adequate support in the record to demand a trial on all issues respecting [the defendant's] representation of plaintiff"); Davin, LLC v. Daham, 327 N.J. Super. 54, 71 (App. Div. 2000) (holding that summary judgment on a legal malpractice claim should have been denied when there were conflicting expert certifications).

In sum, there is sufficient evidence in the factual record supporting the proposition that Defendants represented Plaintiffs during the critical time period in 2018, and thus that there was a duty of care from Defendants to Plaintiffs, such that entering summary judgment on this basis was erroneous. The lower court's ruling on that issue should therefore be reversed.

POINT II

THE LOWER COURT ERRED BY FAILING TO RECOGNIZE THAT THE MATERIAL FACT ISSUE REGARDING WHETHER DEFENDANTS WERE EITHER A PART OF OR AWARE OF THE SCHEME TO DEFRAUD PLAINTIFFS REQUIRES A TRIAL TO RESOLVE THE DISPUTE (Pa1335)

There is voluminous evidence in the record, including expert opinions, supporting Plaintiffs' allegations that Defendants knew of and participated in the Tulsyans' scheme to defraud Plaintiffs, and therefore Defendants breached their duty of care and ethical obligations to Plaintiffs. Accordingly, the lower court erred by ruling that Plaintiffs "failed to demonstrate by any competent evidence that that duty was somehow breached." Pa1335.

Where "'the duties a lawyer owes to his client are not known by the average juror,' expert testimony must necessarily set forth that duty and explain the breach." Buchanan v. Leonard, 428 N.J. Super. 277, 288 (App. Div. 2012) (quoting Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007)). When there are competing expert opinions, summary judgment is inappropriate because "a trial court should never decide on its merits a dispute on which a rational jury could go either way." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.2 on R. 4:46-2 (2019); Davin, supra, 327 N.J. Super. at 71 (summary judgment on a legal malpractice claim should have been denied when

there were conflicting expert certifications). Here, the facts in the record, as relied on by Plaintiffs' expert witness in his report, and disputed by Defendants' expert witness, require that the summary judgment order be reversed. The most relevant facts, and the reasonable inferences flowing therefrom, are as follows.

On April 8, 2018, Nirman requested an executed digital copy of Astra's Operating Agreement from Surya, claiming that Nirman wanted to review the Operating Agreement before formalizing any agreement with Chenoa. Pa1253. On April 16, 2018, Ashok forwarded the Operating Agreement to Pompeo, in advance of a meeting to be held at the DiFrancesco Firm on April 17, 2018, ostensibly to discuss the potential dissolution of Astra. Pa1253; Pa764. Pompeo then forwarded the Operating Agreement to Ahsler. Ibid. Thus, it is clear that the Tulsyans planned to meet with Defendants in mid-April 2018, and a topic of discussion was to be the Astra Operating Agreement. Despite the fact that Anitha was a member and Surya a manager of Astra, neither the Tulsyans nor Defendants notified them of the meeting. Pa775. The inference from these facts is that the Tulsyans and Defendants purposely excluded Plaintiffs from the meeting, because the Tulsyans were seeking advice on the scheme to defraud Plaintiffs.

The meeting proceeded on April 17, 2018, as noted by both Ahsler and Pompeo's respective timesheets. Pompeo's entry for April 17, 2018, described

the meeting as: "Conference – Ashok and R. Ahsler re: dispute." Pa1085. Defendants could not explain why Pompeo characterized the subject matter of the meeting as a "dispute." The logical inference, however, is that the meeting constituted a discussion of the provisions of Astra's Operating Agreement that would apply should a dispute between the Tulsyans and Irakams arise relating to Astra. Considering that Defendants admittedly represented Astra, they never should have had even a cursory discussion with the Tulsyans on that topic, because of the clear conflict of interest.

Ahsler's notes on the Operating Agreement lend additional support to Plaintiffs' allegation that Defendants were consulting with the Tulsyans on ousting the Irakams and forming a new business to replace Astra. Ahsler underlined the first "purpose" of the Company, which was "to develop, market and offer for sale computer programs and applications for organizations that provide health care services." Pa1123. As it turned out, that was Xenio's business, too.

Ahsler put a "star" next to the "Other Businesses" section (Section 2.2), which specified that the Astra Operating Agreement did not prohibit any Member from conducting other businesses or activities, even if directly or indirectly competing with Astra. Pa1123. That provision also exempts Members from liability to Astra or its other Members for failure to disclose other

business opportunities. Ibid. Notably, the Tulsyans were aware of the opportunity to form a new company to take Astra's business, based on their involvement with Astra and discussions with Chenoa and its principals. Pa1318. Ahsler had no explanation for how this provision could relate to a dissolution of Astra. Thus, the natural inference is that these provisions do not relate to a dissolution – but they would certainly relate to establishing a new business to compete with or steal Astra's business.

Ahsler put "checkmarks" next to Sections 3.3, 9.1 and 9.2 of the Operating Agreement. Section 3.3 provides, in relevant part, that the "Company may offer to sell additional Membership Units, but only if authorized by the approval of a Super Majority Interest Vote of all Members." Pa1124. Sections 9.1 and 9.2 deal with permitted and restricted transfers of membership interests. Pa1133. Ahsler again did not know how these provisions would relate to dissolving a company. They would be relevant, however, if a Member was considering how to best deal with the Irakams – by, for example, removing Anitha as a Member or reducing the Irakams' role, rather than setting up a new company.

Ahsler put another "checkmark" next to the Operating Agreement's "Member Indemnification" provision, which requires that Members "indemnify, defend and hold the Company, the Manager and each other Member . . . harmless from and against, any and all liability to any Person incurred . . . by reason of

any fraudulent, criminal or grossly negligent act." Pa1128. Again, Ahsler had no explanation for the relevance of this section to Astra's dissolution. This provision would be important, however, if a Member were planning to defraud Astra or another Member – which then occurred when the Tulsyans established Xenio.

In sum, Ahsler's notes on the Operating Agreement are a roadmap of the provisions that are relevant to the scheme to defraud the Irakams. If the notes are not "direct" evidence merely because Ahsler (understandably)[3] did not admit to assisting the Tulsyans in breaching their fiduciary duties and defrauding the Irakams, then the notes are certainly circumstantial evidence entitled to the reasonable inference that Defendants were aware of, and advised the Tulsyans on, their scheme.

Events after the April 2018 meeting further support Plaintiffs' claim that Defendants advised the Tulsyans on the scheme. Immediately after the April 2018 meeting the Tulsyans pressured the Irakams to dissolve Astra and advised Surya that: (i) Astra was insolvent; (ii) Inadev sought a paydown of its loan to Astra; and (iii) the deal with Chenoa would be off. Pa1148-1149. The obvious

[3] As raised to the lower court multiple times, including in both the summary judgment motions and reconsideration motion, Ahsler falsely testified in this deposition (Pa1251) and his statements are inherently untrustworthy (see, e.g., Pa1256-1263).

inference is that, immediately after the April 2018 meeting, armed with Defendants' advice, the Tulsyans put their plan to defraud Plaintiffs in motion and commenced pressuring Plaintiffs to dissolve Astra.

On April 30, 2018, Nirman advised Surya in an email that Nirman would not share in Astra's future costs, and then forwarded that email to Ahsler and Pompeo on May 1, 2018. Pa1322. The inference from that sequence is that Nirman was keeping Defendants advised that the scheme was moving forward. At this very same time, just days after the April 2018 meeting with Defendants, the Tulsyans, Trivedi and Devi formed Xenio to operate in the same line of business as Astra, without advising the Irakams. Pa538; Pa598; Pa1320.

In August 2018, when the Irakams discovered Xenio's website and realized that they had been defrauded, Surya emailed Nirman and Ashok and confronted them. Pa538; Pa598. Ashok then forwarded Surya's August 13 email to Ahsler and requested a meeting with Defendants. Pa315; Pa539. A week later, Ahsler met with the Tulsyans and Trivedi, and subsequently prepared the August 2018 Memorandum to memorialize what was discussed during the meeting. Pa594. Apart from the August 2018 Memorandum, the mere fact that Ashok kept Ahsler apprised of Surya's communications and scheduled an immediate meeting when Surya threatened legal action is glaring evidence –

even if 'only' circumstantial evidence – that Defendants were aware of and advising the Tulsyans on the scheme.

Ahsler then specifically noted in the August 2018 Memorandum that he advised the Tulsyans and Trivedi that members and managers of an LLC owe each other duties of loyalty and care. Pa595. If Defendants had no knowledge of the scheme, then there would have been no apparent reason for Ahsler to give that advice, because Astra had been dissolved, and therefore moving forward there were no fiduciary obligations between the Irakams and the Tulsyans. Ahsler further noted in the Memorandum that Section 2.2 of Astra's Operating Agreement, which Ahsler had "starred" either immediately before or after the April 2018 meeting, "somewhat insulated [the Tulsyans] from any obligation to Surya to bring him into Xenio." Pa595. Ahsler noted that the DiFrancesco Firm "might be conflicted out" from the dispute, "since technically we represented the Company in connection with the dissolution." Pa597. Nevertheless, Ahsler noted that he advised Nirman to not respond to Surya's August 13 email and to "not provide any such paperwork" in response to Surya's demand. Ibid. At the very minimum, Ashok's direction to "not provide any such paperwork" in response to Surya's demand is an admission that Defendants provided Nirman with at least some advice and guidance on how to proceed in the dispute with the Irakams – in clear breach of their ethical and professional duties to Plaintiffs.

Any advice given Ashok as to how to defend against the claims of Plaintiffs (who were Defendants' other clients) was a clear breach of duty, that in and of itself justified the denial of Defendants' summary judgment motion.[4]

Based on these facts and voluminous other materials as set forth in his extensive report, Plaintiffs' expert concluded that "Defendants knowingly facilitated and assisted in the scheme with others to wrongfully dissolve Astra" and "deprived the Plaintiffs of their economic interests." Pa872. Obviously, Defendants' expert disagreed. Pa646-653.

With these facts in the record, and the material disputes of fact as outlined by the parties' respective expert witnesses, the lower court clearly committed error by ruling that Plaintiffs "failed to demonstrate by any competent evidence that that duty was somehow breached." Pa1335. The existence of this dispute requires a trial.

Contrary to the lower court's decision, there is more than sufficient competent and admissible evidence in the record to have a jury determine the

[4] It should also be noted, which the lower court was well aware of, that Defendants went to great efforts to shield the August 2018 Memorandum from disclosure, only producing it when ordered to do so by the court, implying in and of itself that Defendants knew the August 2018 Memorandum was damaging circumstantial evidence that supports Plaintiffs' claims. Furthermore, in the underlying litigation, the DeFrancesco Firm's lawyers supported the defendants' efforts to prevent Plaintiffs from obtaining discovery from Defendants. During his deposition in the underlying litigation, Ahsler admitted that he was simultaneously representing the Irakams and the Tulsyans.

issue of whether Defendants breached a duty of care to Plaintiffs. Accordingly, this Court should reverse the lower court's summary judgment order and remand the case for trial.

CONCLUSION

For these reasons and any Plaintiffs may submit in further briefing and/or oral argument, Plaintiffs respectfully request that the Court reverse the lower court's Order granting Defendants summary judgment and remand the case to proceed to trial.

Respectfully submitted,

McANDREW VUOTTO, LLC
Attorneys for Plaintiffs

By: */s/Jonathan P. Vuotto*
Jonathan P. Vuotto

Dated: December 10, 2024

	:SUPERIOR COURT OF NEW JERSEY
SURYA P. IRAKAM, M.D. AND ANITHA IRAKAM, M.D., INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTRA EHEALTH, LLC AND AXELIA HEALTH, LLC	:APPELLATE DIVISION :DOCKET NO.: A-000074-24 : :CIVIL ACTION
Plaintiffs/Appellants,	:ON APPEAL FROM: :
v.	:SUPERIOR COURT OF NEW JERSEY :LAW DIVISION: SOMERSET :COUNTY :DOCKET NO.: SOM-L-261-22
DIFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS, LEHRER & FLAUM, P.C., RICHARD AHSLER, ESQUIRE AND JEFFREY W. POMPEO, ESQUIRE	: :SAT BELOW: :HON.VERONICA ALLENDE, J.S.C.
Defendants/Respondents.	:

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS DIFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS, LEHRER & FLAUM, P.C., RICHARD AHSLER, ESQ., AND JEFFREY W. POMPEO, ESQ. IN OPPOSITION TO THE APPEAL FILED BY PLAINTIFFS/APPELLANTS SURYA P. IRAKAM, M.D. and ANITHA IRAKAM, M.D., INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTRA EHEALTH, LLC AND AXELIA HEALTH, LLC

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PRELIMINARY STATEMENT

Defendants-Respondents, DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum P.C., Richard R. Ahsler, Esq., and Jeffrey W. Pompeo, Esq. (hereinafter, collectively, "Defendants"), submit this brief in opposition to the appeal filed by Plaintiffs-Appellants, Surya P. Irakam, M.D. and Anitha Irakam, M.D. (hereinafter, "Plaintiffs").

Plaintiffs allege legal malpractice against Defendants with respect to the dissolution of Astra eHealth, LLC as a business entity. After the conclusion of discovery, the trial court entered summary judgment in favor of Defendants because Plaintiffs proffered no material evidence sufficient to raise a genuine issue of material fact regarding their assertion that Defendants owed them a duty of care or breached any such duty. Plaintiffs have now filed the instant appeal, which is premised upon the mistaken belief that they need not present any actual proof to support their allegations in order to avoid summary judgment. Plaintiffs' appeal is meritless. The trial court's grant of summary judgment to Defendants was unassailably correct because the applicable case law clearly holds that Plaintiffs' unsupported allegations, without competent evidence, cannot prevent the entry of summary judgment.

Defendants respectfully request that the Court affirm the trial court's grant of summary judgment to Defendants for the same

reasons set forth by the trial judge. Namely, in finding that: 1) Defendants did not represent Plaintiffs individually in connection with the dissolution of Astra eHealth, LLC, and therefore owed Plaintiffs no duty of care, and 2) in finding that even if a duty of care did exist, there is no competent evidence that Defendants were aware of any scheme to defraud Plaintiffs in connection with the dissolution of Astra eHealth, LLC.

STATEMENT OF THE FACTS

A. THE FORMATION OF ASTRA AND PLAN TO MERGE ASTRA WITH CHENOA INFORMATION SERVICES, INC.

Anitha Irakam ("Anitha") and Vasudha Tulsyan ("Vasudha") formed Astra eHealth, LLC, a New Jersey limited liability company ("Astra"), in January 2015 for the purpose of developing a telemedicine software system. (Pa33). Anitha and Vasudha each held a 50% membership interest in Astra.[1] (Pa49). The law firm Fox Rothschild, LLP formed and organized Astra, served as Astra's registered agent and drafted documents relating to Astra's operations, including the Operating Agreement dated January 5, 2015 (the "Astra Operating Agreement"). (Pa49). Fox Rothschild also served as personal counsel for plaintiffs Anitha and Surya Irakam since 2003 or 2004. (Pa75, T45:17-46:14).

[1] At some point, the membership interests of both A. Irakam and V. Tulsyan were reduced to 48.25% each, with the following transfers having been made – 2% to Drs. Lee and Kim, 0.25% to Dr. Moskowitz and 1.25% to Dr. Varma.

Anitha's husband, Surya Irakam ("Surya"), and Vasudha's husband, Nirman Tulsyan, ("Nirman"), held no membership interests in Astra. (Pa49). Section 4.1 of the Astra Operating Agreement provided that Astra was to be managed by the members and was to act by way of super majority interest vote. (Pa49). Though not members or managers, Surya and Nirman managed the day-to-day operations of and were the *de facto* managers/officers of Astra. (Pa33, ¶11). Ashok Tulsyan ("Ashok"), who was Nirman's father, had taken on key financial and operational duties in Astra and served as its Chief Financial Officer. (Id. at ¶13).

Section 2.2 of the Astra Operating Agreement provided, in relevant part, that:

> **2.2 Other Businesses.** This Agreement shall not prohibit any Member from conducting other businesses or activities, whether or not such other business or activity, directly or indirectly, competes with the business of the Company. Further, no Member shall be liable or accountable to the Company or the other Members for failure to disclose or make available to the Company any business opportunity of which a Member becomes aware, whether such awareness occurs in his capacity as a Member or otherwise.
>
> [Pa49, ¶2.2.]

Astra worked with another entity, Inadev Corporation ("Inadev"), in the 2015 to 2016 timeframe to develop its software, including telemedicine, patient registration, insurance

verification and patient upfront payment estimation software. (Pa33, ¶14).

On July 20, 2017, the Irakams and the Tulsyans formed Axelia Health, LLC ("Axelia"), which they believed was a more marketable name for Astra. (Id. at ¶12).In October/November 2017, Astra, through Surya and Nirman, began working with Niku Trivedi ("Trivedi") and Rajesh Devi ("Devi"), both officers of Chenoa Information Services, Inc. ("Chenoa"), about a possible joint venture between Astra and Chenoa to market healthcare-software related assets. (Id. at ¶15). In furtherance of the parties' plan to merge Astra with Chenoa's healthcare division, Astra provided Chenoa, Trivedi and Devi with various confidential and proprietary information, including domain knowledge concerning the market for its software products. (Id. at ¶17). Astra facilitated several meetings between Inadev's representatives and Chenoa's representatives. (Id. at ¶18).

B. ASTRA IS FINANCIALLY INSOLVENT BY APRIL 2018.

Ashok, who served as the Chief Financial Officer of Astra, testified that Astra's debt was so extreme by the end of 2017, his primary function in the latter part of 2017 into 2018 was to dodge calls from creditors. (Pa129, T33:11-33:13, 47:16-48:18, 88:21-89:8). The financial statements prepared by Astra's accountants for the year ended December 31, 2017, reflected total liabilities of $571,450.00 and assets of 437,817.00. (Pa202, Exh. G, TUL516).

The company's total operating expenses for 2017 were $914,452.00. (Id. at TUL517). The Astra Balance Sheet for the period ending March 31, 2018, reflects total assets of $37,865.92. (Id. at TUL509). The Astra Balance Sheet for the period ending March 31, 2018, reflects total outstanding loans of $542,690.86. (Id.) The Astra Balance Sheet for the period ending March 31, 2018, reflects total liabilities of $658,985.91. (Id.)

The Profit & Loss Statement for Astra for March 2018 reflects total income of $456.15 and expenses of $13,860.70. (Id. at TUL508). The Profit & Loss Statement for Astra for January through December 2018 reflects total income of $456.15. (Id. at TUL512). Surya testified in his deposition that he is unaware of any other balance sheets profit/loss statements for Astra. (Pa33, T49:6-9). Surya testified that Astra had only two customer contracts as of April 2018 and that Astra had no income whatsoever in 2018. (Pa224, T14:6-17:18; 21:1-3).

C. THE APRIL 17, 2018 MEETING BETWEEN DEFENDANTS AND ASHOK TULSYAN.

Given Astra's dire financial situation, Ashok – Astra's Chief Financial Officer – advised Surya that the company was insolvent and suggested it should be dissolved. (Pa129, T31:24-33:21). Ashok did not believe there was any choice but to dissolve Astra given its financial condition. (Id. at T100:22-101:11).

In mid-April 2018, Ashok asked to meet with Jeffrey Pompeo, Esq. to discuss potentially dissolving Astra. (Pa236). The DiFrancesco Firm had previously provided legal services to other medical-related business entities affiliated with the Irakams and Tulsyans and had previously represented the Irakams in matters unrelated to Astra eHealth. (Pa 292, No. 18). On April 16, 2018, Ashok e-mailed Pompeo the Astra Operating Agreement and simply stated: "This is the operating agreement for eHealth I want to talk to you about. Please let me know when we can meet. Thanks." (Pa236).

Pompeo reviewed the Astra Operating Agreement in advance of an April 17, 2018, meeting with Ashok at the Firm's offices in Warren. (Pa239). Pompeo forwarded the Operating Agreement to Ahsler, a transactional lawyer in the Firm, but Ahsler did not review the Operating Agreement before the April 17, 2018, meeting. (Id.). Pompeo, Ahsler and Ashok met at the DiFrancesco Firm's offices on April 17, 2018. (Id.). Neither Surya nor Anitha attended the April 17, 2018 meeting and have no personal knowledge about what occurred at the April 17, 2018, meeting. (Pa75, T60:17-61:14; Pa115, T29:8).

At the April 17, 2018 meeting, the only topic discussed was what would be needed legally to dissolve the company in accordance with the Astra Operating Agreement and New Jersey law in the event the members agreed to dissolve the company. (Pa244, T22:15-23:17,

28:23-29:1; Pa129, T99:2-100:3). There was no discussion at the meeting about anyone involved with Astra engaging in other business activities or wanting to start another venture. (Pa244, T22:1-14; Pa129, T99:19-22).

Later that day, Nirman sent an email to Surya explaining that he was dropping out of Astra due to its dire financial situation: "[T]o be clear, I will no longer be participating in Astra eHealth." (Pa263). Surya responded: "I fully understand and as you know we don't have better options. But let's not make quick decisions. Let's see what Inadev finally says." (Id.) Nirman responded to Surya's e-mail by stating "Thank you for understanding Surya. I spoke with Inadev ... they will not change their position. They have sent a letter (or called) Chenoa to redact the code base already." (Id.)

On April 27, 2018, Ashok sent a text message to Surya suggesting that it would be cheaper to have the DiFrancesco Firm draft the dissolution documents than Fox Rothschild. (Pa265). The following day, on April 28, 2018, Ashok e-mailed Surya about the financial condition of Astra and dissolution, stating:

> Its slow bleeding with all kind of charges occurring. We will get rid of all these outstanding balances with upcoming Astra funds. There are other expenses also occurring. No body will want to pay for it after Astra settlement.
>
> I strongly feel to get this dissolved. This way Astra and EHealth accounting and

> dissolution can be done simultaneously. Otherwise no one will want to spend time and money for this.
>
> Please let me know if I should get Jeff Pompeo to draft the dissolution document.
>
> [Pa270.]

E. ASHOK REQUESTS THAT DEFENDANTS PREPARE THE APPROPRIATE DISSOLUTION DOCUMENTS ON BEHALF OF ASTRA TO BE FILED WITH THE STATE OF NEW JERSEY.

After requesting and receiving Surya's consent to dissolve Astra, Ashok asked Defendants to prepare the appropriate documentation needed to dissolve Astra. (Pa239). Surya admitted in his deposition that knew Ashok was going to ask the DiFrancesco Firm to prepare dissolution documents. (Pa75, T72:7-22). Based on Ashok's request, Ahsler prepared a Certificate and Plan of Dissolution and completed the State of New Jersey's form Certificate of Dissolution and Termination, both of which were e-mailed to Ashok on May 4, 2018. (Pa272). Defendants' e-mail to Ashok states "Attached are two documents to be signed by Drs. Tulsyan and Irakam… Please have both these documents signed, dated and returned for filing with the New Jersey Division of Revenue." (Id.)

That same day, May 4, 2018, Ashok sent forwarded the dissolution documents prepared by Ahsler to Surya via e-mail, which stated: "Hello Surya. This is eHealth dissolution documents. I will have it signed by Vasudha and get to you for Anitha's

signature. Subsequently, Rick Ahsler will arrange to file it." (Pa272). One week later, on May 13, 2018, Ashok followed up on his May 4 e-mail with a text message to Surya about the status of the dissolution papers. (Pa 265). Surya responded by saying, "Yes uncle, we will get it done. But possibly we need to tell Tom Lee and Raghu that we are dissolving the company, though we don't need their permission officially. *I need to tell Fox Rothschild about it also.*" (Id. (emphasis added)).

Although he was aware in May 2018 that the DiFrancesco Firm had prepared the dissolution documents, Surya never contacted any of the lawyers at the DiFrancesco Firm to discuss the dissolution papers. (Pa75, T76:17-77:4). Anitha never contacted any attorneys from the DiFrancesco Firm or the Fox Rothschild firm to discuss the dissolution documents. (Pa115, T32:11-33:13, 38:15-23). Anitha did not even discuss the documents with her husband, Surya. (Id. at T33:14-16)("Q: Did you discuss these documents with your husband? A: No.").

Ashok called Ahsler on May 14, 2018, and relayed a concern expressed by Surya about notifying. (Pa277). Ahsler prepared a draft of a notice to be sent to the minority members by Anitha and Vasudha, which stated that there was a super majority interest vote of Astra's members to dissolve the company and commence the process of winding up and liquidating it in accordance with the Astra Operating Agreement and applicable law. (Id.)

E. THE MAJORITY MEMBERS OF ASTRA SIGN THE DISSOLUTION DOCUMENTS AND DEFENDANTS FILE THE PAPERWORK WITH THE STATE OF NEW JERSEY AT THEIR CLIENT'S DIRECTION.

On June 9, 2018 Anitha signed the dissolution documents. (Pa115, T36:12-14; Pa282). Vasudha had signed the documents on May 6, 2018. (Pa282). Ashok sent a text message to Surya on June 11, 2018, indicating that he would pick up the dissolution documents that day. (Pa265). That same day, June 11, 2018, Ashok e-mailed Defendants and advised that he had the fully executed dissolution papers, which he then dropped off at the DiFrancesco Firm on June 12, 2018. (Pa279). Ahsler submitted the Certificate of Dissolution and Certificate of Dissolution and Termination to the State for filing on June 20, 2018. (Pa282).

The Certificate of Dissolution and Certificate of Dissolution and Termination were filed as of August 3, 2018. (Pa288). The Certificate of Dissolution prepared by the Defendants, which was signed by Anitha, expressly stated that the "Company has elected to dissolve" and further provided that "[t]he dissolution of the Company was authorized by the unanimous consent of the Members of the Company." (Id.). The Certificate of Dissolution also provided for a plan of dissolution, which provided as follows:

> 1. The Managing Members of the Company shall sell any and all of the assets of the Company on the terms and conditions, and for such consideration, that the Managing Members deem reasonable or expedient, and shall execute all instruments that are necessary to transfer title to the assets.

> 2. The Company shall first pay and discharge all liabilities and obligations of the Company.
>
> 3. The Company shall comply with all conditions of any tax exemption applicable to the Company.
>
> 4. The Company shall distribute and dispose of its remaining assets in the following manner and order.
>
> (a) Return, transfer or convey all assets that were held by the Company on the condition that such assets be returned, transferred, or conveyed upon dissolution of the Company; and
>
> (b) Distribute, transfer or convey all assets held by the Company to the Members in proportion to their respective percentage ownership interests.
>
> [Id.]

Section 10.3 the Astra Operating Agreement (prepared by the Fox Rothschild firm) also provided:

> **10.3 Liquidation**. Upon dissolution of the Company in accordance with Section 10.1, the Company shall be liquidated. The Managing Member shall wind up the Company and shall have the authority to conduct the liquidation of the Company. The Managing Member shall pay all liabilities of the Company and establish reasonable reserves for unknown or contingent liabilities. Any remaining assets of the Company (including cash) shall be distributed to the Members in accordance with the Members' relative Membership Units.
>
> [Pa49, ¶10.3.]

Defendants did not participate in or assist with the process of winding up Astra's affairs or liquidating Astra's assets. (Pa239).

F. PLAINTIFFS ALLEGEDLY DISCOVER A "SCHEME" TO DEFRAUD THEM, WHICH THEY CLAIM WAS CARRIED OUT BY THE TULSYANS AND OTHERS.

Subsequent to the dissolution of Astra, on August 12, 2018, Surya discovered a website for a company called Xenio Health LLC, which had apparently been formed by Trivedi and Devi in May 2018. (Pa10, ¶20; Pa75, T96:23–97:1). Plaintiffs have asserted that Xenio operates in the same line of business as Astra, has Astra's confidential and proprietary information and essentially functions as a successor to Astra. (Pa33, ¶29). Plaintiffs have also asserted that Nirman and Ashok secretly formed Xenio with Trivedi and Devi and made numerous misrepresentations to Plaintiffs to convince them to dissolve Astra. (Id. at ¶30).

Surya testified that he was "shocked" when he learned about the existence of Xenio. (Pa75, T97:6–13). Surya admitted in his deposition in this case that he has no idea whether Defendants had anything to do with the formation of Xenio. (Id. at T97:24–98:2). Surya also testified that once he learned about Xenio, he realized that he and Anitha had been defrauded by the Tulsyans, Trivedi and Devi. (Id. at T98:3–7, 102:20–24).

On the morning of August 13, 2018, Surya e-mailed Nirman and Ashok with the reference of "Xenio discussion." (Pa314). The e-mail generally accuses Nirman and Ashok of scheming behind to

defraud Surya and Anitha out of their investment in Astra and forming Xenio with Chenoa's officers. (Id.) Two (2) hours later, Nirman e-mailed Devi and Trivedi, with a copy to Surya, stating "Surya would like to meet and discuss the launch of Xenio and his involvement. Let's coordinate based on everyone's availability." (Id.) After several failed meetings with Nirman, Devi and others, Surya contacted Fox Rothschild in late August 2018 to obtain advice concerning his and Anitha's legal options. (Pa75, T102:4-105:11).

G. THE AUGUST 20, 2018, MEETING AT THE DIFRANCESCO FIRM.

After Surya threatened legal action in his August 13, 2018, e-mail, Ashok requested to meet with the attorneys at the DiFrancesco Firm to discuss their legal options. (Pa314). Ahsler met with Ashok, Nirman and Trivedi on August 20, 2018, to discuss Surya's threats. (Pa317). At that meeting, Ahsler advised them that they should meet with the Irakams to try to reach a resolution. (Id.) Ahsler also advised them that the DiFrancesco Firm would likely not be able to represent them in any litigation because the Firm had prepared the dissolution documents on behalf of Astra, thereby creating a potential conflict of interest. (Id.). Defendants had no further contact with the Tulsyans or Trivedi about their dispute with the Irakams after the August 20, 2018, meeting and did not participate in any negotiation or litigation-related discussions or activities between the parties thereafter. (Pa239).

On August 27, 2018, Ahsler prepared a comprehensive memorandum detailing the August 20, 2018, meeting. (Pa317). The memorandum recounts the background to the transaction, stating in part:

> The Company proved to be a complete failure, in large part, because it could not pay for the source codes that were critical to its operation. It owed tens of thousands of dollars to the company that owned the source codes (Andy Slater and Eligible.com), never paid that company ($10,000 per month for multiple months), and, therefore, Eligible.com pulled the deal off the table. Basically, eHealth was left with no assets (other than a few accounts receivable) and some negligible liabilities. But, the Company had no prospects, no revenue, and no future.
>
> [Id.]

The memorandum also recounts that Ahsler advised Ashok Tulsyan, Nirman and Trivedi "about the duties of loyalty and care that members and managers owe to each other in an LLC, as set forth in the New Jersey Limited Liability Company Act." (Id.). Ahsler also reminded Ashok and Nirman that the procedures for dissolution in Section 10 of the Astra Operating Agreement needed to be complied with:

> I also mentioned that Section 10 of the operating agreement contains the procedures that have to be followed upon the dissolution of the Company. Ashok indicated that they would be followed but, given the fact that there were no real assets, there really was not much to do.
>
> [Id.]

Finally, the memorandum notes that while Nirman and Trivedi had agreed to provide Ahsler with an update of what was discussed at the meeting with Surya, Ahsler heard nothing from them after the meeting. (Id.).

On September 18, 2018, the DiFrancesco Firm issued invoice no. 150655 to Ashok for its representation of Astra in the dissolution matter. (Pa239). The client reference on the invoice is "ASTRA EHEALTH: DISSOLUTION." (Id.) The Irakams did not pay the DiFrancesco Firm's legal fees for the Astra dissolution matter. (Pa224, T229:2-24; Pa239).

H. THE UNDERLYING ACTION AND THE SETTLEMENT THEREOF.

On October 15, 2018, Plaintiffs filed a Complaint against the Tulsyans, Ashok, Trivedi, Devi, Inadev, Chenoa and Xenio, among others, in the Superior Court of New Jersey, Chancery Division, Somerset County, bearing docket number SOM-C-12054-18 (the "Underlying Action"). (Pa33). Plaintiffs alleged that the defendants fraudulently induced them to agree to dissolve Astra "without informing Surya Irakam of the efforts by the remaining defendants to transition Astra's business to a successor entity." (Id. at ¶60).

Plaintiffs later reached a settlement in the Underlying Action, which was memorialized in an e-mail dated July 20, 2021. (Pa322). Under the terms of the settlement, the defendants agreed, among things, to pay Plaintiffs **$2.9 million** and 10% of all gross

consideration received from a sale of Xenio expected to happen within sixty (60) days or, in the absence of such a sale, a combined 10% membership interest in Xenio within such sixty (60) days. In addition, Plaintiffs became members of Xenio as of September 18, 2021. (Id.) On December 3, 2021, Plaintiffs filed another action against the Underlying Action's settling defendants in the Superior Court of New Jersey, Chancery Division, Somerset County, bearing docket number SOM-C-12050-21 (the "Enforcement Action), in which the Irakams claim the defendants therein breached the settlement agreement entered in the Underlying Action. (Pa329).

I. PLAINTIFFS' LEGAL MALPRACTICE ACTION AND THEIR DAMAGES CLAIMS IN THIS CASE.

Plaintiffs allege in this matter that the Defendants deviated from the standard of legal care by: 1) preparing the dissolution documents following the April 17, 2018, meeting with Ashok, and 2) subsequently agreeing to meet with the Tulsyans in August 2018. (Pa10). On June 3, 2022, the Honorable Margaret Goodzeit, P.J.Ch., entered an Order in the Enforcement Action dismissing any and all claims "regarding the transfer of telemedicine technology from AstraeHealth, LLC to Xenio." (Pa371).

In addition to the facts set forth herein, Defendants hereby adopt and rely upon the findings of fact made by the trial court in its July 2, 2024 written opinion dismissing this matter. (Pa1316 – 1330).

PROCEDURAL HISTORY

Defendants hereby adopt the procedural history as set forth in Plaintiffs' Brief (Pb8 – Pb9).

LEGAL ARGUMENT

A. THE TRIAL COURT CURRENTLY CONCLUDED THERE WERE NO GENUINE ISSUES OF MATERIAL FACT ON THE THRESHOLD ISSUE OF WHETHER DEFENDANTS OWED A DUTY OF CARE TO PLAINTIFFS.

Rule 4:46-2 provides that a Court shall grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

In order to defeat an adversary's motion for summary judgment, a party must offer facts in opposition that are *material*. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Disputed issues that are of an insubstantial nature cannot overcome a motion for summary judgment. Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005) ("Neither fanciful arguments nor disputes as to irrelevant facts will make an issue such as will bar a summary decision."). A plaintiff's self-serving assertion alone against an otherwise barren record will not create a question of material fact. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). Accordingly, summary judgment should be granted *where the evidence presented is so one-sided* that the moving party must prevail as a

matter of law. BOC Group, Inc. v. Chevron Chemical Co., LLC, 359 N.J. Super. 135, 149–50 (App. Div. 2003). That is the case here.

Here, Plaintiffs argue that the Trial Court erred in granting summary judgment by requiring Plaintiffs to present direct evidence of their claims and failing to identify material fact issues which would prevent summary judgment. (Pb at 21–35). However, Plaintiffs' argument focuses upon immaterial facts, which are only tenuously related to the threshold question of whether Defendants owed a duty to the Irakams *individually* in connection with the dissolution of Astra. The undisputed material facts and evidence presented to the trial court confirmed that Astra was Defendants' client in the dissolution – *not the Irakams.* Plaintiffs have not proffered a single piece of material evidence which shows that Defendants provided legal representation to Plaintiffs in the dissolution of Astra or that Defendants conspired with non-parties to defraud Plaintiffs.

The determination of the existence of a duty is a question of law for the court to decide. Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991); see also Carvalho v. Toll Bros. and Developers, 143 N.J. 565, 572 (1996). The issue is to be resolved by the Court as a matter of fairness and policy and by "weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 529 (1988). To meet the threshold to establish a

claim for legal malpractice, a plaintiff must prove that both a duty existed on the part of defendant and that said duty was breached. Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996). An attorney will not be held liable to third parties for alleged negligence in the performance of his or her professional duties Stewart v. Sbarro, 142 N.J. Super. 581, 593 (App. Div. 1976), certif. denied, 72 N.J. 459 (1976). In the absence of an actual written agreement or the payment of fees, the "duty" requirement may be imposed by a court only in limited instances.

A legal malpractice claim generally requires the existence of an attorney–client relationship. A client is a "person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal services or advice from [the lawyer] in [the lawyer's] professional capacity." N.J.S.A. 2A:84A–20(3)(a); N.J.R.E. 504. The attorney–client relationship is governed by the Rules of Professional Conduct (RPC) and the Supreme Court. Kamaratos v. Palias, 360 N.J. Super. 76, 84 (App. Div. 2003). Critically, when a limited liability company retains an attorney, such as Astra, the attorney represents "the [company] *as distinct from its directors, officers, employees, members, shareholders, or other constituents*." RPC 1.13(a) (emphasis added).

In support of their argument, Plaintiffs highlight a 2013 retainer agreement between Surya and Anitha on one side and the DiFrancesco Firm on the other relating to a lease for 93-95 Hudson Street in Hoboken, NJ. (Pb24; Pa943). However, the 2013 agreement was entered into prior to Astra being formed and for an unrelated purpose. Clearly a retainer agreement for Defendants to represent Plaintiffs individually regarding a lease agreement, unrelated to the dissolution of Astra, cannot somehow confer a duty owed to Plaintiffs with respect to the dissolution of Astra.

Plaintiffs' Brief also contains the unfounded assertion that the trial court identified evidence relating to Defendants' alleged representation of the Irakams individually during "April 2018" (Pb21). Plaintiffs' arguments are completely unsupported by the record as no evidence exists showing that Defendants provided legal representation to Plaintiffs in the spring and summer of 2018 other than the dissolution of Astra.

Plaintiffs argue that Surya Irakam's opinion testimony that the Firm represented him and his wife continuously from 2013 to 2021 compelled the trial court's denial of summary judgment. (Pb24 – 25). However, Surya's subjective opinion that he considered Defendants to be his counsel for a number of matters through 2020 is not, standing alone competent evidence. Unfortunately for Plaintiffs, simply saying something does not make it true. The competent evidential material before the trial court confirmed

that while Defendants had previously provided legal services to other medical-related business entities affiliated with the Irakams and Tulsyans, and had previously represented the Irakams in matters unrelated to Astra eHealth, none of those matters was ongoing during the timeframe legal services were being provided for the dissolution of Astra. (Pa292, No. 18).

Plaintiffs also repeatedly cite to and rely upon the Supplemental Expert Report of Philip Faccenda, Esq., dated September 12, 2023. (Pb25 – 26). Putting aside the fact that an expert report is not evidence in and of itself, the Faccenda report is a net opinion which does not competently support the existence of an attorney client relationship between Plaintiffs and Defendants. For instance, Mr. Faccenda says Defendants were counsel for Astra eHealth beginning in 2013. However, that claim is impossible: Astra eHealth did not exist until 2015. Thus, there was not and could not have been a "continuous routine practice and course of dealing" in which Defendants represented Astra eHealth *and its members*. There was not one piece of evidence presented to the trial court showing that Defendants represented Astra eHealth prior to April 2018 on any matter. Moreover, Faccenda cites to a number of documents listed on "Exhibit A" to his report that he claims show that the Firm represented the Irakams between April and August 2018. *None of the documents shows any such thing*. Instead, they involve the following matters: 1) negotiation of a

lease for a property in Hoboken and a property in Lyons in 2013 unrelated to Astra eHealth; 2) representation in litigation unrelated to Astra eHealth that concluded in 2017; and 3) representation in litigation unrelated to Astra eHealth that commenced in 2021 and concluded in 2022. (Pa939, Exh. A). Faccenda's naked, conclusory opinion that the Firm owed a duty to the Irakams *indefinitely* beginning in 2013 with the retainer agreement concerning a lease for 93-95 Hudson Street in Hoboken, NJ is an inadmissible opinion lacking any legal or factual basis.

There was no competent evidential material presented showing that Defendants represented the Irakams individually on any other matters during the dissolution of Astra eHealth. Plaintiffs have not submitted any before this Court either.

In fact, all of the competent evidence showed that Defendants represented Astra *and only Astra* related to the dissolution. As the trial court correctly stated,

> Plaintiffs have not sufficiently demonstrated that Defendants owed a duty to Plaintiffs. Plaintiffs rely on the Agreement to demonstrate that Defendants represented them individually. However, the Agreement was executed in 2013, years prior to the advent of Astra. The factual record demonstrates that Defendants were representing Astra as an entity, and not Plaintiffs. The fact that Plaintiffs had a monetary interest in Astra does not establish an attorney-client relationship between Defendants and Plaintiffs as individuals. Because Plaintiffs have not provided competent evidence to demonstrate that there was an attorney-client relationship at the time of the dissolution, there was no duty of care owed to Plaintiffs individually by Defendants.

[Pa1313.]

Accordingly, the trial court correctly held that Plaintiffs had not sufficiently demonstrated that Defendants owed a duty to Plaintiffs and granted Defendants summary judgment on that basis.

The undisputed facts presented to the trial court demonstrated that Plaintiffs never retained the DiFrancesco Firm to represent them personally in the Astra eHealth dissolution process. Plaintiffs never signed a retainer agreement with Defendants in connection with the dissolution. Plaintiffs never paid any of Defendants' bills for any legal work that the attorneys performed to dissolve Astra. (Pa224, T229:2-24; Pa239). It is clear the Irakams themselves did not believe they had personally retained the Firm to represent them. Surya admitted in his deposition that Fox Rothschild had served as their personal counsel since 2003 or 2004. (Pa75, T45:17-46:14). Further, although he was aware in May 2018 that the Firm had prepared the dissolution documents, Surya never contacted any of the lawyers at the Firm to discuss the dissolution papers. (Id. at T76:17-77:4). Similarly, Anitha never contacted any attorneys from the Firm to discuss the dissolution documents. (Pa115, T32:11-33:13, 38:15-23). Therefore, Plaintiffs and the Defendants never had an express attorney-client relationship in the dissolution process that would give rise to

any duty of care. The only duty of care owed by the Defendants was to Astra. See RPC 1.13.

On the contrary, Ashok, who served as the Chief Financial Officer of Astra, advised Surya that the company was insolvent and suggested it should be dissolved. (Pa129, T31:24–33:21). Following his meeting with Defendants on April 17, 2018, a meeting at which the only topic discussed was what would be required to dissolve the company, Ashok sent a text message to Surya suggesting that *the company* retain the Firm to draft the dissolution documents. (Pa265). Ashok again sought Surya's consent on April 28, 2018, in an e-mail to Surya about the financial condition of Astra, stating:

> Its slow bleeding with all kind of charges occurring. We will get rid of all these outstanding balances with upcoming Astra funds. There are other expenses also occurring. No body will want to pay for it after Astra settlement.
>
> *I strongly feel to get this dissolved. This way Astra … EHealth accounting and dissolution can be done simultaneously*. Otherwise no one will want to spend time and money for this.
>
> *Please let me know if I should get Jeff Pompeo to draft the dissolution document*.
>
> [Pa270 (emphasis added).]

Surya agreed, and Ashok then requested that Defendants prepare the appropriate documentation needed to dissolve Astra. (Pa239). Surya admitted in his deposition that he knew Ashok was going to ask the Firm to prepare dissolution documents for the company. (Pa75, T72:7–22).

It is clear that the requirements of RPC 1.13 and the facts presented to the trial court on summary judgment compelled summary judgment in favor of Defendants. Plaintiffs never manifested any intent that the Defendants represent them individually with regard to the dissolution of Astra. In fact, their conduct reveals the opposite intent. On May 4, 2018, Ashok forwarded the dissolution documents to Surya via e-mail, which stated: "Hello Surya. This is eHealth dissolution documents. I will have it signed by Vasudha and get to you for Anitha's signature. Subsequently, Rick Ahsler will arrange to file it." (Pa272). Plaintiffs then sat on the documents for *more than one month*. During that time, neither Surya nor Anitha contacted any of the lawyers at the Firm to discuss the dissolution papers. (Pa75, T76:17-77:4; Pa115, T32:11-33:13, 38:15-23). Plaintiffs had no communications with Defendants during this timeframe. Furthermore, it is undisputed that Fox Rothschild had been and was the Plaintiffs' personal counsel at this time. (Pa75, T45:17-46:14). Clearly, Plaintiffs never manifested any intent that Defendants represent their personal interests in connection with the Astra dissolution.

Plaintiffs in their Brief do not even bother analyzing RPC 1.13(a), which expressly states, "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." If Plaintiffs' position is

correct, favoring Plaintiffs over the interests of the other members of Astra itself would have been a violation of the ethical requirements governing the Defendants' conduct. See RPC 1.7(a). Additionally, RPC 1.16(a)(1) provides:

> Declining or Terminating Representation
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law.

If Defendants had counselled Plaintiffs to further their own interests, Defendants would have violated their fiduciary duty to Astra. Thus, the Defendants cannot be charged with failing to counsel Plaintiffs to take actions to personally benefit themselves at the expense of the company or its creditors.

Plaintiffs have utterly failed to make any showing that the trial court erred in granting Defendants summary judgment. Plaintiffs continue to offer no actual evidence or case law precedent which supports the notion that Defendants owed Plaintiffs an individual duty of care related to the dissolution of Astra. For that reason, the trial court's July 2, 2024, Order granting summary judgment should be affirmed.

B. THE COURT CORRECTLY HELD THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER DEFENDANTS BREACHED A DUTY OF CARE TO PLAINTIFFS AND THE TRANSCRIPT FROM ORAL ARGUMENT AND THE COURT'S OPINION CONFIRM THAT THE COURT CONSIDERED ALL

DIRECT AND CIRCUMSTANTIAL EVIDENCE IN CONCLUDING THAT DEFENDANTS HAD NO KNOWLEDGE OF ANY ALLEGED "SCHEME".

Generally, Plaintiffs' argue that Defendants were aware of a "scheme" to defraud Plaintiffs and assisted with same. However, the trial court correctly held that "even considering the evidence in the light most favorable to Plaintiffs, the Court finds that Plaintiffs failed to demonstrate by **any** competent evidence" that Defendants breached any duty owed under the circumstances. (Pb1313, Opinion at 21)(emphasis added). Plaintiffs argue now on appeal that the trial court improperly focused on *direct* evidence and ignored the *indirect evidence* that the Defendants were aware of the alleged "scheme" at the time of the April 2018 and August 2018 meetings at the DiFrancesco Firm's offices. (Pb at 27-35). Plaintiffs argue that sufficient circumstantial evidence existed in the form of notes in an Astra eHealth Operating Agreement, a memorandum drafted by Mr. Ahsler, and correspondence from Nirman Tulsyan, all of which, according to Plaintiffs, demonstrate Defendants' indirect knowledge of this so-called "scheme." (Id.). These arguments are directly contrary to the Transcript from oral argument, the Court's opinion, and the undisputed facts in the summary judgment record.

The Transcript from oral argument confirms that the trial court was well-aware of and considered the supposed circumstantial evidence relied on by Plaintiffs but was also focused on

ascertaining what, if any, direct evidence Plaintiffs were relying upon to show Defendants' involvement in what Plaintiffs refer to as the "scheme." Specifically, at oral argument the trial court repeatedly advised counsel that it was aware of the *indirect* evidence proffered by Plaintiffs but inquired as to whether there was *direct* evidence of knowledge of the scheme on the part of the Defendants:

> THE COURT: Well, let me put aside the duty issue for just a moment. What is the direct evidence that you can point to in the record, Ms. Garber, that demonstrates –
>
> Miss Garber: Yes.
>
> THE COURT: *-- I understand you have a lot of indirect evidence at this point, circumstantial evidence, but what is – do you have any direct evidence that you can point to in the record* that shows that Mr. O'Connor's knew about the scheme, if there was a scheme, but there's a settlement in the underlying litigation, that they knew about a scheme to defraud your clients related to the new company? What is the direct evidence of that?
>
> [T29:21–30:8 (emphasis added).]
>
> * * * *
>
> THE COURT: No, no, no. But what about the scheme, but about the scheme, because right, the –
>
> Miss Garber: First of all –
>
> THE COURT: Mr. Surya did not realize that there was a problem until August when they discovered that the website was open for this new company. So, if the meeting is happening in April, *what is the direct evidence demonstrating that the attorneys in that equal meeting knew about any plans of the Tulsyans to start the new company*? *What's the direct evidence of that?*
>
> [T30:18–31:2 (emphasis added).]

* * * *

THE COURT: *I understand what you're asking the court to imply from the facts or infer from the facts, and I understand the argument that you're making, but I'm asking you to point to something specific in the record that demonstrates that the attorneys knew about this Tulsyans plan to start the new company and X out Surya, the Irakams. What is the direct evidence of that*?

[T31:16-22 (emphasis added).]

* * * *

THE COURT: But he doesn't - what -- - Ashok never said, I had a meeting with the attorneys specifically to discuss the opening of a new company that we're starting, and, correct? He never said that, right?

Miss Garber: No, you're correct.

THE COURT: Okay. So I've asked I think three times what the direct evidence is and I'm not getting any answers as to pointing in the record what the direct evidence is. *You're asking to infer, based on circumstantial evidence, but I'm asking you whether there is direct evidence that the defendants knew about the plan to start the new company and to X out the Irakams. If the answer is no, the answer is no.*

[T32:12-25 (emphasis added).]

* * * *

THE COURT: So is there *any* evidence leading up to the formation of the new company that demonstrates affirmatively that the lawyers knew, the lawyers in this firm, and the individual lawyers Mr. Ahsler and Mr. Pompeo knew about the plans to open the new company?

[T33:15-24 (emphasis added).]

The trial court's Opinion also reflects the trial court's consideration of both direct **and** circumstantial evidence of Defendants' alleged knowledge of the so-called scheme:

> During oral argument, Plaintiffs' counsel was asked to point to specific facts in the motion record that demonstrate that Defendants were aware of any alleged scheme to open a new business or that Defendants were part of that scheme. Plaintiffs' counsel was unable to point to any direct evidence suggesting same. No one in attendance at the April 17, 2018, meeting with Ashok and Defendants recalls discussing any other matter than the dissolution of the company. Plaintiffs' counsel rel[ied] on some handwritten notes one of the defendants made on a copy of their operating agreement, but during defendant's deposition, they could not recall why they made those notations. *Simply put, no evidence, direct or circumstantial, in the motion record supports a finding that Defendants were aware of any scheme to defraud Plaintiffs or that Defendants were part of any such scheme*.
>
> [Pa1313, Opinion at 21 (emphasis added).

The trial court's finding that no rational fact finder could conclude that Defendants breached any duty toward Plaintiffs was well-supported by the law and the evidence in the record. RPC 1.13(b) provides, in pertinent part:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the

> responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

The key to the duty here is knowledge – if the lawyer "knows" a person associated with the organization engages or intends to act in violation of a legal obligation to the company – then the lawyer shall proceed as is reasonably necessary in the best interest of the organization, including compliance with the safeguards set forth in RPC 1.13(b).

The evidence presented confirms that the trial court's conclusion was correct: there was no evidence – direct or circumstantial – that the Defendants knew of any so-called "scheme" by the Tulsyans to defraud the Plaintiffs or of any nefarious purpose in seeking to dissolve an insolvent company. All of the competent evidence demonstrates that Defendants were never aware of any scheme being perpetrated by the Tulsyans. The facts are that Defendants initially took a meeting with Astra's Chief Financial Officer. At that meeting, the only topic discussed was what would be needed legally to dissolve the company in accordance with the Astra Operating Agreement and New Jersey law. (Pa244, T22:15-23:17, 28:23-29:1; Pa129, T99:2-100:3). There was no discussion at the meeting about anyone involved with Astra engaging in other business activities or wanting to start another venture. (Id. at T22:1-14; T99:19-22).

After some back-and-forth, Surya consented to the Firm preparing the dissolution papers. (Pa75, T72:7-22). Based on Ashok's request, Ahsler prepared a Certificate and Plan of Dissolution and completed the State of New Jersey's form Certificate of Dissolution and Termination, both of which were e-mailed to Ashok Tulsyan on May 4, 2018. (Pa239; Pa272). Anitha signed the dissolution documents on June 9, 2018. (Pa115, T36:12-14; Pa282, DB097). Vasudha had signed the documents on May 6, 2018. (Pa282). Ahsler submitted the Certificate of Dissolution and Certificate of Dissolution and Termination to the State for filing on June 20, 2018. (Pa282). The Certificate of Dissolution and Certificate of Dissolution and Termination were filed as of August 3, 2018. (Pa288). Critically, the Certificate of Dissolution prepared by the Defendants, which was signed by Anitha, expressly stated that the "Company has elected to dissolve" and further provided that "[t]he dissolution of the Company was authorized by the unanimous consent of the Members of the Company." (Id., DB101).

Defendants, who had no knowledge of any purported wrongdoing by anyone, were simply charged with advising about dissolution and preparing the appropriate documents, which they did. Neither Plaintiffs nor their expert has criticized the documents themselves. Even if the Defendants questioned the prudence of the Chief Financial Officer's direction to prepare dissolution documents following the lone meeting of April 17, 2018, such doubt

would have been eliminated when the dissolution papers were returned to Defendants, with the signatures of both majority members, signifying their assent to the dissolution.

Absent knowledge of wrongdoing, an attorney is permitted to follow the direction imparted to it by management:

> In the organizational context, therefore, the lawyer must ordinarily accept the decisions of management personnel having the authority over a given area. Only when those decisions appear to be contrary to the organization's best interests, must the lawyer take the steps outlined in RPC 1.13(b), such as advising reconsideration of the matter, suggesting a second legal opinion, or referring the matter to a higher organizational authority.

Michels, New Jersey Attorney Ethics, Cmt. 14:4-3 at pp. 212 (Gann 2023). The comments to the Model Rules support this view, stating:

> When constituents of the organization, make decisions for it, the decisions ordinarily, must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer **knows** that the organization may be substantially injured by action of a constituent that is in violation of law. (emphasis added).

Michels, New Jersey Attorney Ethics, Cmt. 14:4-3 at pp. 212 (Gann 2023) (citing, ABA Model Rule 1.13 comment).

Here, there was no indication to Defendants that Ashok or the other Tulsyans were acting in a manner that was contrary to the best interest of Astra, its members or its creditors. In addition, the dissolution of Astra could not have occurred without the consent of the Plaintiffs, and, therefore, when Anitha executed

the dissolution documents prepared by Defendants, it was reasonable for them to assume that dissolution was the course chosen by Astra's members.

Likewise, the best interest of Astra eHealth may have been to dissolve based on the circumstances as explained to the Defendants, namely, its insolvency. Specifically, while one may question the appropriateness of dissolving and terminating a business, that is not so where the business is not a going concern. Under such circumstances, when the company is insolvent or in the zone of insolvency, different legal duties are imposed on the shareholders and members, namely those to the entity's creditors when the company is insolvent. Specifically, the entity has a duty to its minority members and creditors to, among other things, not deepen its insolvency or to continue to incur debt when the company does not have a reasonable prospect to satisfy the same. Portage Insulated Pipe Co. v. Costanzo, 114 N.J. Super. 164, 166 (App. Div. 1971) (providing that when a corporation becomes insolvent, the directors assume a fiduciary or quasi-trust duty to its creditors).

Thus, based on the financial condition of Astra, as explained to the Defendants and as appeared in the company's books and records in 2018, it was reasonable to assume that dissolution was in the best interest of Astra, its members and creditors. It was not a breach of any duty for the company's attorneys to render an

opinion and provide advice on the process of dissolution of the company and prepare the requisite paperwork.

Further, Defendants did not make any representations to the Plaintiffs about the propriety of dissolution, nor did the Defendants do anything to induce the Plaintiffs to consent to the dissolution and sign the dissolution documents. Rather, the Defendants simply prepared the appropriate dissolution paperwork and left it to the members to decide whether to dissolve Astra and whether dissolution was in the company's best interests. The consent to dissolution was relayed to Defendants when they received the dissolution documents signed on behalf of Plaintiffs. Indeed, the mere act of advising an organization's officer about the process of dissolution and preparing the paperwork at the direction of the officer was not a breach of a duty to its members, namely the Plaintiffs, especially where the Plaintiffs consented to the dissolution by executing the dissolution paperwork.

Plaintiffs argue that the trial court did not give appropriate weight to the August 2018 meeting and the notes made by Mr. Ahsler. (Pb at 28–31). However, that assertion is completely belied by the record. The only evidence in this matter reflecting what transpired during the August 2018 meeting makes clear that the Defendants provided no advice that was materially adverse to the client (Astra) or dealt with any matter relating to a prior representation of Plaintiffs. Rather, as evidenced by Mr. Ahsler's August 27,

2018, memorandum documenting what occurred at the meeting, he reviewed the history of the transactions in question, was provided a recap of the events between April 2018 and August 2018, advised the Tulsyans of the duties they owed the Plaintiffs, and rendered an opinion as to potential liability. While the memorandum discusses the opinions reached by Ahsler concerning the potential for liability, it does not reference that any significant legal advice was rendered, let alone advice materially adverse to the Plaintiffs. Rather, Ahsler suggested that there was no need to respond in writing to Surya at this time and that they should sit down with Plaintiffs to discuss the issues.

Additionally, consistent with his duty as Astra's counsel and the attorney who prepared the dissolution documents, Ahsler reminded Ashok and Nirman that the procedures for dissolution set forth in Section 10 of the Astra Operating Agreement needed to be complied with. (Pa49). Thus, there was no violation of the RPCs with respect to the August 20, 2018, meeting.

Moreover, the mere occurrence of the August 2018 meeting in and of itself is immaterial. Surya testified that he discovered the alleged fraud on August 12, 2018. (Pa75, T97:6–102:24). ***At that moment in time, the proverbial damage had already been done.*** Nothing that happened thereafter could have been a substantial factor in causing Plaintiffs' alleged damages. This includes the

August 20, 2018, meeting, which took place more than one (1) week after Plaintiffs discovered the purported fraud.

Beyond that fact that the damage was done by August 20, 2018, there is not a scintilla of evidence here that the Defendants were advised of Xenio or an alleged scheme to deceive the Plaintiffs into dissolving Astra for the nefarious purposes suggested by Plaintiffs. Indeed, up until the August 12, 2018, discovery of the fraud, the Defendants' only involvement was advising Astra's Chief Financial Officer as to what was required to dissolve Astra, and then preparing and filing the appropriate dissolution documents at the request of the company – nothing more. Thus, the August 20, 2018, meeting was not a substantial factor in causing Plaintiffs' loss.

Indeed, the alleged damage was caused when, according to Plaintiffs, the Tulsyans breached their duty to the Plaintiffs and misappropriated Astra's assets. The Tulsyans did not need a dissolution in order to misappropriate the assets. In fact, the dissolution was not actually filed with the State until August 3, 2018 – less than ten (10) days before Plaintiffs had discovered the completion of the fraud – including the alleged misappropriation of Astra's assets. Thus, the damage had been done by the time Astra was dissolved and, in any, event, the formal dissolution of Astra had no relevance to the damage caused by the Tulsyans' alleged fraud.

For all of these reasons, the trial court did not overlook or ignore any evidence in concluding that Defendants did not breach a duty toward Plaintiffs.

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that this Court affirm the trial court's July 2, 2024, Order and Opinion.

Respectfully submitted,

MCELROY, DEUTSCH & MULVANEY & CARPENTER, LLP
Attorneys for Defendants/Respondents, DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum P.C., Richard R. Ahsler, Esq., and Jeffrey W. Pompeo, Esq.

/s/ William F. O'Connor, Jr.
William F. O'Connor, Jr.

Dated: January 9, 2025

SURYA P. IRAKAM, M.D. AND ANITHA IRAKAM, M.D., INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ASTRA EHEALTH, LLC AND AXELIA HEALTH, LLC, Plaintiffs/Appellants, v. DIFRANCESCO, BATEMAN, COLEY, YOSPIN, KUNZMAN, DAVIS, LEHRER, & FLAUM, P.C., RICHARD R. AHSLER, ESQUIRE AND JEFFREY W, POMPEO, ESQUIRE, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000074-24T2 CIVIL ACTION ON APPEAL FROM LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-261-22 JUDGMENT ENTERED: July 2, 2024 SAT BELOW: HON. VERONICA ALLENDE, J.S.C.

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiffs[1] respectfully submit this Reply Brief in further support of their appeal in this legal malpractice action against Defendants. Defendants request that this Court affirm a summary judgment order that was entered using an incorrect standard and despite the lower court's open acknowledgement of the existence of multiple fact issues. Defendants request that this Court, like the lower court, accept Defendants' version of the facts, ignore the evidence supporting Plaintiffs' allegations, not give Plaintiffs the favorable inferences owed, and serve as the jury to resolve the claims. Plaintiffs submit that allowing the summary judgment order to stand in clear view of the fact disputes would be improper under the law and would impose a severe injustice on Plaintiffs. Accordingly, we respectfully request that the Court reverse the summary judgment Order and remand the case to proceed to trial.

POINT I

THERE IS SUFFICIENT EVIDENCE SUPPORTING A DUTY OF CARE

Defendants advance numerous arguments, claiming varyingly that Plaintiffs either have "no evidence" supporting a duty of care from Defendants to Plaintiffs, or that Plaintiffs' evidence is not "material," or that the evidence is "so one-sided" that Defendants must prevail. These arguments are incorrect, however, because the record contains substantial material evidence supporting the duty of care.

[1] Plaintiffs use the same abbreviations in this Reply as they did in their initial Brief.

The applicable summary judgment standard is worth repeating here. Under Rule 4:46-2(c), a summary judgment motion should be granted only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The Rule further provides that an "issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

A 'genuine issue of material fact' must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid.

Here, Plaintiffs have much more than "fanciful arguments," and the issues of whether there is a duty of care running from Defendants to Plaintiff and whether Defendants breached that duty are the two most material issues – the resolution of those issues will determine this case's outcome. With respect to the duty of care,

Defendants are obviously wrong that Plaintiffs have "no evidence" that Defendants represented Plaintiffs during the key time period of April 2018 through August 2018.

First, Surya testified that Defendants represented Plaintiffs, including Surya and Anitha individually, in many matters from 2013 through 2018 and into 2020. Pa085. Defendants attempt to discount Surya's testimony, but his understanding that Defendants were representing Plaintiffs is well-supported by the other evidence. Plaintiffs' expert, based on his review of the extensive factual record cited in his report (see, e.g., Pa1427-1519), concluded that Defendants represented Plaintiffs individually, along with Astra, and Nirman and Vasudha Tulsyan, during the key period in 2018, including in the dissolution matter. Pa873. Defendants' expert witness also admitted that Defendants represented the Plaintiffs individually whenever Defendants represented the Astra entities and Plaintiffs' personal interests were at stake – and the lower court acknowledged this evidence. Pa1328-1329. Defendants admitted that they represented Astra in the dissolution (Pa597), and clearly Plaintiffs' interests were at stake in the dissolution.

Defendants nevertheless try to eliminate their admission and the admission of their own expert and argue that Plaintiffs "have not proffered a single piece of material evidence which shows that Defendants provided legal representation to Plaintiffs in the dissolution of Astra." Db19. Defendants go on to modify that position later, by stating that "no evidence exists showing that Defendants provided

legal representation to Plaintiffs in the spring and summer of 2018 other than the dissolution of Astra." Db21 (emphasis added). Apparently, Defendants' current position aligns with that of their expert – that Defendants were representing Plaintiffs while representing Astra in a matter in which Plaintiffs' individual interests were at stake. In fact, from May to September 2018, Defendants represented Plaintiffs on various matters involving Astra-related businesses. In any event, whether these circumstances give rise to a duty is a genuine issue of material fact. Contrary to Defendants' attempt to gaslight the Court by repetitively stating that no evidence exists, the record contains substantial evidence that Defendants represented Plaintiffs, individually, many times between 2013 and 2020, including during the key 2018 period. See Pa1427-1519.

Defendants then shift their argument to assert that this evidence supposedly does not "show any such thing" because the representations were "unrelated to Astra." Db22-23. This argument is off base. The issue here is whether Defendants represented Plaintiffs individually and if Plaintiffs reasonably understood that Defendants were representing Plaintiffs. The documents submitted support Plaintiffs' understanding, and the fact that the representations were unrelated to Astra is not relevant. Furthermore, even if there was not another specific representation of Plaintiffs at the very same time that Defendants were representing Astra in the dissolution, Surya's understanding that Defendants were Plaintiffs'

attorneys for individual and Astra matters requires the issue to go to a jury for resolution. Despite Defendants' contrary feeble argument, Surya's testimony that Defendants represented Plaintiffs is direct evidence that creates a genuine fact issue that is material to whether Defendants owed Plaintiffs a duty, and therefore the issue should not have been resolved by the lower court.

Second, Defendants appear to argue that the absence of a retainer agreement between Plaintiffs and Defendants relating to Astra's dissolution somehow supports their argument that Defendants did not have a duty to Plaintiffs. This argument ignores, however, the seven-year course of dealing between Plaintiffs and Defendants, during which there were admittedly multiple representations without a written retainer agreement. This argument also ignores the fact that there was no retainer agreement between Defendants and Astra relating to the dissolution. Defendants do not provide any evidence or reason why the dissolution representation would be any different than that of all the other representations of Plaintiff and Astra without a retainer agreement. After the initial 2013 retainer agreement, Defendants never required another retainer and never sent Plaintiffs any form of notice that Defendants were terminating their representation of Plaintiffs. The logical inference that must be afforded to Plaintiffs on a summary judgment motion is therefore that Defendants were representing Plaintiffs.

Defendants' argument is made even more specious by the fact that there was never a retainer agreement between Defendants and Astra. If Defendants represented "Astra and only Astra" related to the dissolution, then they, as the attorneys, should have provided a written agreement specifying that qualification.[2] Indeed, while Defendants' fault Plaintiffs for not "bothering" to analyze RPC 1.13(a) (see Db26), RPC 1.13(d) provides that an attorney who is "[d]ealing with an organization's . . . members, . . . shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part." RPC 1.13(d). It is undisputed that Defendants were dealing with Astra's members for the dissolution, but Defendants did not "bother" to provide any clarification to Astra's members of who Defendants were representing for the matter. Based on Defendants' actions, there is a natural inference that the representation was of both Astra and its members, because its members' interests were at stake.

The lack of a retainer agreement for the dissolution matter leaves it to the parties' respective intent and understanding of who was being represented. Questions of intent are factual determinations that should not be made on a motion for summary judgment. Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988); McBarron v. Kipling Woods L.L.C., 365 N.J. Super. 114, 117 (App. Div. 2004).

[2] The Court should also note that, in the litigation between Plaintiffs and the Tulsyans, the Tulsyans took the position that Defendants represented the Tulsyans, not Astra.

Defendants also argue that Plaintiffs "did not believe they had personally retained" Defendants to represent them, because Plaintiffs were represented by Fox Rothschild in various matters. Db24. This argument is insufficient to resolve the issue in Defendants' favor. Parties are permitted to have multiple attorneys, and it is common for a client to have several attorneys providing different types of legal services (i.e., a real estate lawyer and a litigator). There is no evidence that Fox Rothschild represented Plaintiffs in connection with the dissolution of Astra. The fact that Plaintiffs retained Fox Rothschild for some work and Defendants for other work is simply not relevant to the analysis of whether Defendants owed Plaintiffs a duty of care. The fact that Plaintiffs did not retain Fox Rothschild for the dissolution matter contradicts Defendants' position that Fox Rothschild was the only firm representing Plaintiffs – Plaintiffs did not retain Fox Rothschild because Plaintiffs trusted Defendants to represent Plaintiffs' interests.

Plaintiffs have sufficient evidence supporting their position that Defendants were representing Plaintiffs during the relevant time to allow the issue to go to a jury. The lower court committed error by granting Defendants summary judgment, while also acknowledging Plaintiffs' 'indirect' evidence supporting a duty of care.

POINT II

THERE IS SUFFICIENT EVIDENCE SUPPORTING A BREACH

Defendants admit in their Brief that the lower court was "well-aware of and considered the supposed circumstantial evidence relied on by Plaintiffs." Db28. Defendants ask this Court, however, to ignore the various items of circumstantial evidence supporting Plaintiffs' claims,[3] and to find that "no rational fact finder could conclude that Defendants breached any duty toward Plaintiffs." Db30. This request is without merit, because there is sufficient evidence that would allow a rational fact finder to find that Defendants breached their duty to Plaintiffs.

Defendants first assert that RPC 1.13(b) provides some support for their position. It does not. First, Defendants ask the Court to assume that Defendants were representing only Astra and not Astra's members. As noted, this faulty assumption is contrary to both sides' expert opinions (Pa873; Pa1328-1329) and there is no retainer agreement between Astra and Defendants. The invoice for the dissolution work was sent to Ashok Tulsyan at his personal address – not to Astra. Pa1085. Thus, there is a material issue as to who Defendants were representing in the matter.

[3] The lower court acknowledged this evidence, specifically noting: "I understand **you have a lot of indirect evidence** at this point, circumstantial evidence, but … do you have any direct evidence"? (1T30:1-8) (emphasis added); and "I saw what she was saying circumstantially. … [t]here was no direct evidence of the Defendant's knowledge of the scheme" (2T40:2-5).

Second, RPC 1.13(b) requires a lawyer to proceed as is reasonably necessary in the best interest of an organization if the lawyer knows that an officer intends to take action that could result in substantial injury to the organization. Defendants argue that "there was no evidence – direct or circumstantial – that the Defendants knew of any so-called 'scheme' by the Tulsyans to defraud the Plaintiff or of any nefarious purpose in seeking to dissolve an insolvent company." Db32. Defendants ignore the evidence repeatedly set forth by Plaintiffs and ask the Court to assume that Defendants' version of the facts is correct. Defendants' argument also assumes that, had Defendants known about the Tulsyans' scheme, then they would have disclosed it to Plaintiffs or took other action in Astra's best interest and therefore would have complied with RPC 1.13(b). Alleging that Defendants could not have breached a duty to Plaintiffs because it would have violated an RPC is not logical and is contrary to the countervailing facts, which support that Defendants violated both their professional and ethical duties to Plaintiffs.

Similar to how the lower court weighed the evidence and decided in Defendants' favor, Defendants ignore the fact disputes and adopt their own positions as if they are the only possible "facts." For example, Defendants assert that "the only topic discussed [at the April 2018 meeting] was what would be needed legally to dissolve the company in accordance with the Astra Operating Agreement and New Jersey law" and that there "was no discussion at the meeting about anyone involved

with Astra engaging in other business activities or want to start another venture." Db32. These assertions, however, ignore the irrefutable evidence to the contrary, such as:

(i) Defendants and the Tulsyans intentionally excluded Plaintiffs from the meeting (Pa775), the inference from which is that the Tulsyans were seeking advice on the scheme to defraud Plaintiffs;

(ii) Defendants' description of the meeting as a conference to discuss a "dispute" – not a dissolution (Pa1085); if there was a "dispute" and/or if there was going to be a "dispute" between Plaintiffs and the Tulsyans, then Defendants should not have met with the Tulsyans to discuss it in the first instance, because there was a clear conflict of interest;

(iii) Ahsler's underlining of the first "purpose" of Astra in the Operating Agreement, which was "to develop, market and offer for sale computer programs and applications for organizations that provide health care services," which was also Xenio's business – and without any explanation of why Astra's "purpose" could be related to its dissolution (Pa1123);

(iv) Ahsler's unexplained "star" next to the "Other Businesses" section of the Operating Agreement (Section 2.2), which specified that the Astra Operating Agreement did not prohibit any Member from conducting other businesses or activities, even if directly or indirectly competing with Astra (Pa1123) – which

the Tulsyans were planning; this provision has no relevance whatsoever to a dissolution of Astra, but would certainly relate to establishing a new business to steal Astra's business;

(v) Ahsler's unexplained "checkmark" next to the Operating Agreement's "Member Indemnification" provision, which requires that Members "indemnify, defend and hold the Company, the Manager and each other Member . . . harmless from and against, any and all liability to any Person incurred . . . by reason of any fraudulent, criminal or grossly negligent act" (Pa1128), which is also not relevant to a dissolution but very relevant to a plan to defraud another member of Astra;

(vi) Immediately after the April 2018 meeting, i.e., immediately after receiving Defendants' advice, the Tulsyans put their scheme in motion and pressured the Irakams to dissolve Astra (Pa1148-1149);

(vii) Subsequent to the April 2018 meeting, the Tulsyans kept Defendants apprised of communications with Plaintiffs (Pa315; Pa539; Pa1322);

(viii) Days after the April 2018 meeting with Defendants, the Tulsyans formed Xenio to operate in the same line of business as Astra, without advising the Irakams (Pa538; Pa598; Pa1320);

(ix) Immediately after Surya threatened legal action against the Tulsyans, the Tulsyans scheduled a meeting with Defendants (Pa594), raising a natural

inference that the Tulsyans were receiving advice from Defendants in connection with the scheme;

(x) Ahsler's admission in the August 2018 Memorandum that he advised the Tulsyans and Trivedi that members and managers of an LLC owe each other duties of loyalty and care (Pa595), which Defendants would have had no reason to discuss during the meeting if Defendants had no knowledge of the scheme;

(xi) Ahsler's admission in the August 2018 Memorandum that he advised Nirman to not respond to Surya's August 13 email and to not provide any paperwork in response to Surya's demand (Pa597) – which clearly contradicts Defendants' statements that they were representing only Astra and not the Tulsyans.

These facts and the timing of the sequence of events could certainly lead a reasonable person to find that Defendants knew about and advised the Tulsyans on their scheme to defraud Plaintiffs. Defendants nevertheless repeatedly ask the Court to assume that Defendants did not know about the Tulsyans' scheme ("there was no indication to Defendants that Ashok or the other Tulsyans were acting in a manner that was contrary to the best interest of Astra, its members or its creditors" (Db34)) – when Plaintiffs' evidence, as outlined above and in Plaintiffs' opening Brief, directly contradicts that proposition.

Instead of providing any substantive contrary arguments, Defendants focus on items that are mere distractions. For example, Defendants rely on the fact that

Anitha signed the Certificate of Dissolution to argue that Plaintiffs consented to the dissolution. Anitha signed the Certificate of Dissolution, however, two months before Plaintiffs were aware that they were being duped by the Tulsyans. Therefore, although Plaintiffs consented to the dissolution, this was clearly not fully-informed consent. Defendants also assert that neither Plaintiffs nor their expert "criticized the [dissolution] documents themselves." Defendants do not disclose any complicated issues that they had to deal with in the dissolution; the preparation of the documents was ministerial at best and the 'good form' of the documents is completely irrelevant to any substantive issue in this case.

Defendants also assert that they did no wrong in dissolving Astra because Astra was allegedly insolvent and therefore "it was reasonable to assume that dissolution was in the best interest of Astra, its members and creditors." Db35. Defendants admit that they received their information about Astra's alleged "insolvency" from the Tulsyans – who were in the process of setting up a separate company to steal Astra's business – and provide no evidence that they independently verified Astra's financial condition. Nor do they explain how a dissolution would provide any benefit whatsoever to either Astra or its members.

Defendants go on to argue that "the mere act of advising an organization's officer about the process of dissolution and preparing the paperwork at the direction of the officer was not a breach of a duty to its members, namely the Plaintiffs." Db36.

Plaintiffs' claims, however, have nothing to do with Defendants' paperwork on the dissolution. As Defendants admit, the "Tulsyans did not need a dissolution in order to misappropriate the assets." Db38. Plaintiffs' claims are based on their well-supported allegations that Defendants knew about and advised the Tulsyans on the scheme to defraud Plaintiffs. The dissolution was a step in the scheme, but not the beginning and end of the matter.

Finally, Defendants admit that they represented the Tulsyans individually in August 2018, by advising them "of the duties they owed the Plaintiffs" and rendering "an opinion as to potential liability." Db37. Even under Defendants' own faulty analysis, however, if Defendants owed Plaintiffs a duty of care, then Defendants did not comply with the RPCs and breached the duty of care. Clearly and admittedly, based on the August 2018 Memorandum, Defendants were representing the Tulsyans adverse to Plaintiffs. Had Defendants been representing Astra, as they allege, then they should not have been representing the Tulsyans without a written conflict waiver from "an appropriate official of the organization other than the individual who is being represented." RPC 1.13(e). In other words, Defendants needed a conflict waiver from Plaintiffs to properly advise the Tulsyans in accordance with the RPCs. Defendants do not even attempt to argue that they first sought Plaintiffs' consent to the representation of the Tulsyans, which is additional evidence that Defendants were attempting to, and did, conceal the representation.

Instead, Defendants attempt to minimize the effect of their improper and unethical representation, arguing that, by August 2018 "the proverbial damage had already been done." Db37. This argument is without merit. The combination of Defendants' meetings with the Tulsyans, the obvious advice given to the Tulsyans based on Defendants' mark-up of the Astra Operating Agreement, the lack of any retainer agreement with any of the parties, the timing of Defendants' advice and the Tulsyans' demand to dissolve Astra and formation of Xenio, and the other circumstances support Plaintiffs' claim that Defendants breached the standard of care. Astra's final dissolution document is dated August 3, 2018. Surya discovered Xenio's existence on August 12, 2018. The Tulsyans forwarded Surya's August 13 email asking about Xenio to Defendants on the same day. Thus, approximately ten days after formally dissolving Astra, Defendants clearly knew about the scheme. Had Defendants alerted Plaintiffs, it could have changed the course of the dispute and, at the minimum, Plaintiffs would not have incurred millions of dollars in legal fees in the litigation with the Tulsyans.

Plaintiffs respectfully request that the Court reverse the lower court's Order granting Defendants summary judgment and remand the case to proceed to trial.

Respectfully submitted,

McANDREW VUOTTO, LLC

By: */s/Jonathan P. Vuotto*
Jonathan P. Vuotto

Dated: February 5, 2025