
Superior Court of New Jersey

APPELLATE DIVISION

MOERAE MATRIX, INC.,

Plaintiff-Appellant,

v.

McCARTER & ENGLISH, LLP,
BEVERLY W. LUBIT, ESQ., JOHN
DOES 1-10 and PROFESSIONAL
CORPORATIONS 1-5,

Defendants-Respondents.

Docket no. A-000203-24

Civil Action

ON APPEAL FROM:

LAW DIVISION, MORRIS COUNTY
Docket No. MRS-L-371-22

SAT BELOW:

Hon. Frank J. DeAngelis, P.J. Ch.

CORRECTED BRIEF OF PLAINTIFF-APPELLANT

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**TABLE OF JUDGMENTS, ORDERS AND RULINGS
BEING APPEALED**

7/21/24 Order of Hon. Frank DeAngelis, J.S.C., granting Defendants'/Respondents' Motion for Summary Judgment	Pa0092
9/13/24 Order of Hon. Frank DeAngelis, J.S.C., denying Plaintiff's/Appellant's Motion for Reconsideration	Pa0104

I. PRELIMINARY STATEMENT

Appellant, Plaintiff Moerae Matrix, Inc., is a development-stage biotechnology company. By 2018, Moerae had successfully completed three "Phase I" clinical trials for its lead drug, MMI-0100, a promising treatment for the incurable lung disease known as Idiopathic Pulmonary Fibrosis ("IPF"). But Moerae's pathway toward obtaining approval of MMI-0100 as a treatment for IPF was thwarted *by its own patent counsel*, Respondents McCarter & English and Beverly Lubit, Esq., who unilaterally filed liens against Moerae's entire portfolio of patents and patent applications, without their client's consent and without court approval. Respondents' actions crippled Moerae's fundraising efforts and brought the development of MMI-0100 to a halt.

Appellant had spent nearly ten years and over \$19 million of investor capital to develop MMI-0100. Respondent Lubit was Moerae's IP counsel throughout that period and had recently moved to McCarter & English. Yet by autumn of 2018, after 19 months with McCarter & English, Moerae had paid nearly \$600,000 to the firm but was still in arrears by over \$800,000. On December 7, 2018, Appellant's CEO informed Respondents that Moerae would be moving on to a law firm better suited to its business plan.

Respondents' reaction to this news was to embark upon a brazenly unethical collection strategy: while still representing Moerae, and fully aware of

the impact its actions would have on Moerae's ability to raise investor capital, Respondents filed a UCC-1 and USPTO patent assignment cover sheet against Moerae's patents, without obtaining its client's prior consent, without timely notice to Moerae, and without petitioning for, let alone receiving, the court approval required by the relevant statutory and case law of this State.

McCarter & English then brought collection proceedings against Moerae. Moerae attempted to assert a malpractice counterclaim against Respondents, to recover the damages it sustained from Respondents' liens against its patent portfolio. The law firm opposed that motion, arguing that Moerae's proposed counterclaim was prejudicial and did not arise from the same facts as their collection claims. The trial court denied Moerae's motion to amend and entered judgment for McCarter & English, but indicated that Moerae could assert its malpractice claims in a subsequent proceeding—a conclusion the Appellate Division later acknowledged when it affirmed in 2021.

Moerae then filed this case for malpractice against Respondents. After two years of scorched-earth litigation, involving hundreds of thousands spent on expert fees and e-discovery vendors, a dozen or so depositions, nearly as many motions, and thousands of hours in legal work, the trial court in this matter granted Respondents summary judgment, *solely* on the basis that Moerae's claims are barred by the Entire Controversy Doctrine ("ECD").

In sum, Respondents sabotaged Moerae's ability to raise investment capital; quashed their client's malpractice counterclaim in the Collection Matter; sat on their ECD defense for over two years while defending against Moerae's claims in this case; and, in a final insult, seized Moerae's patents to satisfy their judgment from the earlier proceeding. Respondents have effectively whipsawed Moerae by managing to exclude Appellant's malpractice counterclaim from the initial lawsuit, then doing a '180' to argue that Moerae's malpractice claims were barred from this case by the ECD because they should have been raised the first time around even though, in reality, those claims *were* raised in the first action.

This appeal seeks reversal of the trial court's summary judgment ruling, on the basis that A) absent exceptional circumstances the ECD does not apply to parties who, like Moerae, asserted their claims in an earlier proceeding; B) judicial estoppel altogether precludes Respondents from relying on the ECD; and C) the trial court's decision abuses the ECD Doctrine's core principles of fairness and judicial economy. This appeal provides an opportunity to address the misuse of the ECD as a whipsaw by sharp litigants, who manage to exclude meritorious counterclaims in an initial round of litigation, only to turn around in a subsequent proceeding to argue that the same claims they succeeded in excluding should have been brought earlier, and are now precluded by the Entire Controversy Doctrine.

II. STATEMENT OF PROCEDURAL HISTORY

Appellant filed its Complaint in this action against Respondents, McCarter & English, L.L.P. ("McCarter") and Beverly Lubit, Esq., ("Lubit"), on March 1, 2022. (Pa1). Respondents filed their Answer on April 5, 2022. (Pa26).

Respondents listed the entire controversy doctrine ("ECD") as a potential affirmative defense in their April 5, 2022 Answer. Nevertheless, in the more than two years between filing of Respondents' Answer, and the filing of their Summary Judgment Motion, while the substantive claims and defenses in this case were being intensively litigated, Respondents took no action to enforce their ECD defense, until May 10, 2024, when they inserted it as the first point of a comprehensive summary judgment motion. (Pa1769).

The trial judge (Hon. Frank DeAngelis, J.S.C.), declining to address the numerous substantive issues raised by Respondents' summary judgment motion, by Order dated July 22, 2024 granted Defendants' motion for summary judgment, based *solely* upon the ECD. (Pa92). Appellant moved for reconsideration of the Court's grant of Summary Judgment to Respondents on August 9, 2024. (Pa 2090). The court below denied that Motion on September 13, 2024. (Pa104). Plaintiff timely filed their Notice of Appeal on September 19, 2024. (Pa 116).

III. FACTS

A. Appellant's Initial Attempt To Assert The Claims At Issue Here

Moerae first attempted to assert its claims based on McCarter's unlawful filing of liens against Moerae's patents on February 21, 2020. (Pa657, 2102). It did so by way of Motion for Leave to Amend its Answer to assert those claims as Counterclaims in a lawsuit (the "Collection Case", "Matter" or "Action") filed by McCarter & English to collect past due fees against Moerae. (Pa 669). On March 5, 2020, on the heels of Moerae's motion for leave to file its Counterclaims, McCarter moved for summary judgment on its fee claims and vigorously opposed Moerae's motion for leave to amend. (Pa 2101-2102, 2105). Several months later, on June 5, 2020, the trial judge in the Collection Case denied Moerae's motion to amend and granted McCarter's motion for summary judgment. (Pa685, 701).

Respondents *succeeded* in avoiding litigation of Moerae's claims arising from McCarter's patent lien filings in their Collection Case, at least in part, by arguing that Moerae's proposed claims were *not* related to their collection claims, because they did *not* arise from the same nucleus of operative facts. (Pa2110). But amazingly, when Appellant then attempted to assert the same claims in this case, Respondents took precisely the *opposite* position, arguing to the court below that Appellant should be barred from asserting these same

claims in this case, on ECD grounds, because they *were* related to their collection claims, and they *did* arise from the same nucleus of operative facts giving rise to Respondents' collection claims. (Pa96).

Respondents' change of position on this critical "relatedness" issue, is a classic example of the type of position change that is barred by New Jersey law, under applicable principles of judicial estoppel. See Point I B, infra. The court below refused to apply judicial estoppel principles, however, to prohibit Respondents' change of position on the critical "relatedness" issue. It made that decision in response to Respondents' misquotation of Bhagat v. Bhagat, 217 N.J. 22 (2014). Respondents misquoted that case to the court below as requiring, as a condition to applying judicial estoppel principles, that a litigant demonstrate that its adversary prevailed "on the basis of" the initial, later-jettisoned position. (Pa2214). But, in reality, New Jersey law requires only a showing that the initial position taken "*helped form* the basis for" the favorable decision a party obtained, in order for judicial estoppel principles to apply. See Legal Argument, Point I A., infra. As a result, even if a litigant's initial position did not form "the basis for" a court's final decision, the litigant is still precluded from changing its position on the same issue, if its initial position "*helped form* the basis for" the initial court's final decision. Id.

Appellant brought this subtle, but important distinction to the attention of the court below in its briefing on the Motions for Summary Judgment in the court below, and in its Motion for Reconsideration. But the court below refused to change its initial, erroneous refusal to apply judicial estoppel principles, to preclude Respondents' change of position. (Pa115).

Appellant also contended in the court below, that in the totality of the circumstances the court's application of the ECD doctrine failed to advance either of the core values of efficiency or fairness which the ECD is intended to advance because, since Respondents intensively litigated this case *for more than two years* before moving to enforce their ECD Defense, by the time their ECD Defense was granted, in effect this case had already been fully-litigated except for trial. (Pa103). Ironically, however, implicitly acknowledging the persistence of fact issues on the underlying claims, the trial court insisted that, because its dismissal of Appellant's claims on ECD grounds eliminated the need for pre-trial motions and a trial, fairness and efficiency were still served by dismissing those potentially valid claims completely, and the court still refused to reconsider its summary judgment ruling. (Id.)

That ruling ignored the plainly inefficient and wasteful process that occurred here. Defendants relentlessly litigated the underlying substantive issues in this case, particularly those related to Defendants' central theory; i.e.,

that Moerae's demise was the fault of its own science, laggard investors, and cash flow "problems". That focus inexorably led to a "battle of the experts" in biopharmaceuticals and intellectual property valuation, as well as granular examination of literally thousands of electronic communications among Moerae's directors, existing investors, and prospective investors, creating a huge body of evidence washed down the drain by the ECD, just as the case was approaching a trial on the merits. (See *infra* at 39-44).

To provide this Court with a glimpse of the issues that preoccupied the combatants almost daily *for more than two years* before the case was decapitated, we have set out a brief summary of the underlying facts below.

B. Moerae's Mission As A Development Stage Biotechnology Company, And Its Team Of Scientific And Research Experts

Moerae was founded in 2007 to pursue novel science in diseases driven by inflammation and fibrosis. (Pa1270). "Fibrosis" is a medical condition with profound health consequences. It develops slowly, but eventually leads to tissue degeneration, with devastating consequences for heart, lung, liver, kidney and skin disorders. "Fibrosis: Types, Effects, Markers," IJMS 2023, at 1), ncbi.nlm.nih.gov/pmc/articles/PMC9963026). Because fibrosis is a substantial worldwide healthcare burden, identifying drugs and therapies for human fibrotic disease is a research and development priority in the pharmaceutical industry.

Id.

Moerae's management included a stellar team of research scientists to advance its objective of developing drugs to target fibrotic disease. (Pa1272). Cynthia Lander ("Lander"), a Co-Founder of Moerae and the company's CEO , has a doctorate in neuroscience from Yale, followed by a postdoctoral fellowship at The Rockefeller University, and has particular expertise in neural plasticity. (Pa1288, T31:15-21). Moerae's co-founder, Dr. Alyssa Panitch, the inventor of MMI-0100 (Pa 1291, T42:1-7), the drug that was the lead subject of Moerae's pre-clinical and clinical trials, is a distinguished scientist, a member of the National Academy of Inventors and also has an impressive background in academia, including service as the Edward Teller Professor and Chair of Biomedical Engineering at the University of California, Davis. (Pa1325).

Drs. Lander and Panitch were joined at Moerae by an executive staff, most notably, Chief Medical Officer Colleen Brophy, M.D. (surgeon, research scientist, and co-author of over 90 publications in a broad range of peer reviewed journals), as well as professionals in clinical pharmacology, statistics/analytics, biotech equity investing, and business development. (Pa1272;1374). Moerae's Pulmonary and Bioengineering Advisory Board also included luminaries such as Paul Noble, M.D., Guerin Family Distinguished Chair in Pulmonary Medicine at Cedars-Sinai Medical Center in Los Angeles. (Pa1272; 1377-1378).

C. Facts Relating To MMI-0100

In 2009, Moerae entered into a licensing agreement with Purdue Research Corporation ("Purdue"), the owner of the patents for MMI-0100, and as a result of the promising research performed, MMI-0100 quickly became Moerae's lead drug product. (Pa1346) MMI-0100 exhibited development potential for a number of serious fibrotic conditions, although from the outset Moerae focused on Idiopathic Pulmonary Fibrosis ("IPF"). (Pa1269-1270;1395). IPF, whose cause is not known, is a deadly lung condition which causes lungs to thicken and stiffen, and undergo scarring and serious damage during that process. ("Pulmonary Fibrosis", [mayoclinic.org/diseases-conditions/pulmonary-fibrosis/symptoms-causes](https://www.mayoclinic.org/diseases-conditions/pulmonary-fibrosis/symptoms-causes) (Pa2235, at 2236)). The median survival rate of IPF patients is only 2 to 7 years. See Rajala et al., "End of Life Care of patients with idiopathic pulmonary fibrosis", *BMC Palliat Care* 2016;15:85 (Pa2242). Five-year mortality is 75%, comparable to that for patients with metastatic lung cancer. (Pa1275).

Even as recently as 2019, there were only two approved drugs for IPF: Ofev™ (nintedanib) and Esbriet™ (pirfenidone), both of which have side effects so severe that discontinuation or dose-reduction occurs in a majority of Ofev™ patients, and a third of Esbriet™ patients. (Pa1276;1417;1425). Thus, a new drug, like MMI-0100, was potentially life-changing for IPF victims.

D. Moerae's Preclinical Trials

In 2012, Moerae's scientific and medical teams commissioned independent preclinical trials of MMI-0100, on a variety of animal species. By 2014, Moerae's preclinical studies had demonstrated the safety of MMI-0100 in lab animals. (See Pa1435;1439). By 2014, Moerae had also demonstrated the therapeutic effectiveness of MMI-0100 in twelve distinct animal models of fibrosis, and four different species of fibrotic disease.¹ These results caught the attention of the international scientific community, and led to a proliferation of peer-reviewed publications noting the potential of MMI-0100 for treatment of serious conditions and diseases as varied as graft failure in coronary bypass procedures, acute respiratory distress syndrome, and colitis. (*Id.*)

¹ See, e.g., Muto et al., “Inhibition of Mitogen Activated Protein Kinase Activated Protein Kinase II with MMI-0100 reduces intimal hyperplasia ex vivo and in vivo”, 56 *Vascular Pharmacology*, at 47-55 (2012) (Pa2247-2248); acute respiratory distress syndrome (ARDS) (He et al., “MMI-0100 ameliorates lung inflammation in a mouse model of acute respiratory distress syndrome by reducing endothelial expression of ICAM-1,” *Drug Des Devel Ther*, 2018;12:4253-4260 (Pa2270, at 2271); and colitis (Wang et al., “MMI-0100 Ameliorates Dextran Sulfate Sodium-Induced Colitis in Mice through Targeting MK2 Pathway”, *Molecules* 2019 Aug 3; 24 (15):2832 (Pa2288)).

E. Clinical Trials: Phases

Following preclinical trials, Moerae launched a series of clinical trials, involving human subjects. As explained by Moerae's valuation expert in this litigation, because of the substantial nature of potential revenues generated by newly licensed drugs, the financial value of a development-stage biotechnology company is typically measured by its ability to reach certain "milestones", which correspond to a decrease in the project's risk profile. (Pa 1398). Those milestones are generally defined by the three "phases" which biotechnology companies must navigate to move toward regulatory approval, licensing, and ultimate commercialization of a new drug, or toward partnership with a larger pharmaceutical company. (Pa 1446).

In "Phase 1", the experimental drug is tested in a small group of people who, in most cases are not suffering from the target disease, to evaluate the drug's safety, determine a safe dosage range, and identify potential side effects. (*Id.*). In "Phase 2", the efficacy of the drug is tested by its administration to a larger group of human subjects, ones actually suffering from the disease, typically in double blind studies. Finally, in "Phase 3" additional testing takes place, to determine the efficacy of the drug in administrations to larger groups of individuals suffering from the target disease. (*Id.*)

The profit potential of a new drug can be enormous, and development-stage biotechnology companies often begin to realize values based on that potential long before either FDA or EMA approval. (Pa 1398). In fact, depending upon the nature of the drug under trial, its potential market, and the interest it generates, as early as successful completion of "Phase 1," the patent for a new drug can realize values in the millions, if not hundreds of millions of dollars, through an "up-front" payment from a large pharmaceutical company willing to partner, and/or participate in an outright merger with a development-stage biotechnology company. (Pa1284-1285; 1453).

F. Moerae's Phase 1 Clinical Trials

(i) The Safety of MMI-0100

From 2014 to 2016 Moerae pursued three "Phase 1" placebo-controlled clinical studies of MMI-0100 in healthy human subjects: a Single Ascending Dose study ("SAD"), a multiple ascending dose study ("MAD"), and an exploratory 2-way "cross-over" design study, involving administration of MMI-0100 and Lipopolysaccharide ("LPS") to healthy smokers in alternate treatment periods. (See Pa282; 264; 251). The results of these clinical studies were extremely encouraging. All three studies demonstrated a sterling safety profile: the independent investigative teams in each of these clinical studies specifically concluded that MMI-0100 was safe. See Pa 289; Pa 272; and Pa 257.

(ii) The Efficacy of MMI-0100

In its LPS Challenge Study, Moerae also attempted a preliminary exploration of the efficacy of MMI-0100, something not generally attempted in a Phase 1 study. (Pa 1446). The LPS Challenge study was a randomized double-blind, placebo-controlled, two-way crossover study of MMI and placebo. (Pa 253). Although this process unexpectedly required approximately two years to fully analyze, meticulous reviews of the underlying data by treatment period ultimately revealed that MMI-0100 had a massively statistically significant effect on IL-6, a biomarker of drug activity. (Pa 278; 1441). Dr. Lander was invited to present these findings at a Conference of the American Thoracic Society ("ATS") in May 2018. (*Id.*) The presentation, summarized on an academically designed Poster, stated, inter alia, that MMI-0100 significantly ($p=.006$) decreased serum IL-6 response to LPS challenge in Period 1 ($N=10$ group). (*Id.* & Fig. 3). In his expert report, submitted to the court below, Plaintiff's biotechnology expert, Stephen Harrison, Ph.D., presented his opinion that there was a greater than 50% chance that MMI-0100 would successfully complete Phase 2 of the drug development process, in light of the promising results from this Phase I testing. (Pa1448). For comparison, Dr. Harrison noted that the "probability of success across all drugs examined in autoimmunity and inflammation through phase 3 to the market was 63.7%." (*Id.*)

Shortly after Dr. Lander's presentation at the May 2018 ATS Conference, Defendant Lubit included the results of the LPS Challenge Study (including relevant portions of the Moerae ATS Poster, showing statistically significant effects of MMI-0100), in an application for a provisional patent under the title: "Immunomodulatory Effect of Inhaled Kinase Inhibitor Peptides in Lung", International Publication Date December 20, 2018. (Pa 1498).

G. Formation Of The Moerae-McCarter Relationship

After Lander's presentation to the ATS Conference in May 2018 and Lubit's submission of an application for a patent for the immunomodulatory effects of MMI-0100 in July 2018, Moerae was poised to launch a new round of fundraising, and further development of MMI-0100 through a Phase 2a study. (Pa 1523).

Simultaneously, however, a problem was developing between Moerae and McCarter regarding arrearages in payment of Respondents' fees. Having spent two years overcoming questions raised by initial conclusions in the LPS Challenge report, Moerae was facing a temporary ebb in cash flow such as can typically occur in early-stage biopharmaceutical companies. (Pa 1455-1456). Moerae had retained McCarter in April 2017 only because Respondent Lubit, Moerae's long-standing patent counsel, had moved her practice to McCarter in April 2017. From 2009 up to the events that are the subject of this lawsuit,

Moerae had continuously engaged Lubit as patent counsel, moving with Lubit as she affiliated with at least five different law firms. (Pa 1329-1332, T30:20-31:24; 32:1-33:3; 35:4-5). Hence, when Lubit joined McCarter as a lateral partner in April 2017, Moerae immediately followed her there as well.

In this litigation, Defendants have characterized their April 2017 Engagement Letter with Moerae as their standard engagement letter for patent matters. The Engagement Letter failed to disclose, however - and no one from McCarter told Moerae at the time of engagement - that McCarter has a policy of placing liens on patents belonging to its patent clients, as part of its fee collection practices. (Pa1729-1767). In deposition, Lander testified: "Had [McCarter] told us, either at the engagement letter or at any point along the way, that they would undertake a lien, we would have run in the other direction." (Pa1321, T340:13-16). Such advice at the time of the engagement would have been particularly warranted here, since Respondent Lubit is very familiar with biotech, and knew about Moerae's dependence on investor funding, as opposed to sales, for revenue (Pa1322, T377:23-378:5). Moreover, both Lubit, and the head of McCarter's collection department, Joseph Lubertazzi, admitted they knew when Respondents filed the liens against Moerae's patents that such liens are likely to adversely impact, or completely destroy, the ability of a biotechnology company, like Moerae, to raise funds from investors. (Pa 1643-

1644; Pa1338-1339, T62:4-63:6). In addition, there is no means for the victim of such a lien to quash or expunge an unauthorized UCC-1 Financing Statement such as Respondents filed. (Pa1704, T88:19-22).

H. Financial Features Of Developing Biotechnology Companies And Defendants' Misleading Picture Of Moerae's Financial Condition And Funding Prospects

Developing a new therapeutic drug, such as MMI-0100, represents a labor-intensive and cash-intensive endeavor for a development-stage biotechnology company. (Pa 1395). Such companies typically do not initially have revenue, and look to government grants, investments from high-net-worth investors, big pharma, and venture capital companies for funding. (Pa 1455-1456). Ignoring those facts, Respondents sought to convince the court below that Moerae was on the brink of financial insolvency *before* Respondents filed their unlawful patent liens on 12/17/18. In service of that narrative, Respondents made vastly inaccurate and misleading contentions that, as of 2018, Moerae was at a dead end for equity infusions.

Nevertheless, as demonstrated below, as of year-end 2018, Moerae had a track of record which included \$7.5M in grants comprised of cash and in-kind services, as well as \$19.4M in investment from numerous high net worth investors, and one institutional investor, Privateer Capital Management, LP (Pa 1724; Pa215, T280:5-24). A fuller picture of Appellant's four capital raises

refutes Respondents' tale of diminishing private investment in Moerae in the years leading up to Respondents' unlawful patent lien filings in December of 2018. A review of Moerae's capitalization raises, in investment rounds A through D shows that no such downward trend existed:

<u>Round</u>	<u>Date Closed</u>	<u>Amount Raised (\$M)</u>
Series A	April 21, 2010	1.5
Series B	December 31, 2012	7.4
Series C	May 7, 2015	5.3
Series D	as of 12/31/18	5.2

See Pa1725.

Further, before news of Respondents' patent lien filings began to spread, Moerae attracted private investments throughout 2016 to 2018, despite significantly increasing its share price, based on a \$175M valuation for the "D round," which opened in 2016. Moerae's price per share by "Round" was as follows (*id.*):

Series A - \$.3250 per share
 Series B - \$1.3873 per share
 Series C - \$1.5441 per share
 Series D - \$7.4039 per share

Further attempting to shift the focus from their own unlawful patent lien filings, Respondents made the outlandish claim that, based on Moerae's financial statements, between December 31, 2015 and December 31, 2018, Moerae's net worth declined from \$-9,550,714 to \$-19,220,710. (Pa 131). As explained by the preparer of Appellant 's financial statements, however, under generally

accepted accounting principles Moerae was not permitted to recognize intangible assets, such as the value of the intellectual property it created, in its net worth calculation. Consequently, the increase in value of Moerae's drugs resulting from testing and research is not reflected in the financial statements to which Respondents pointed to, nor is the value of Moerae's patents for MMI-0100 reflected in those statements. (Pa1726-1727) .

Before they learned of Respondents' unlawful lien filings on Moerae's patents, existing investors were actively encouraging other individuals within the existing investors' social and professional circles to become new investors in Moerae. See, e.g. Pa 1549-1557. Moerae's largest, and most important source of referrals and connections was Reagan Reaud, the lead marketing executive of Moerae's only institutional investor as of December of 2018, Privateer, LTCG, LLP ("Privateer"). Apart from Privateer's own approximately \$1.6M investment in Moerae, prior to the filing of Respondents' liens, Privateer's vast network of investors and business contacts was also productive for Moerae in 2018, notably via Reaud's referral of Robert Maxwell, who invested \$300,000 in August 2018. (Pa 208-210; T241:2-14; T248:15-249:14; Pa 230; 246).

Most importantly, however, in March of 2019, Privateer's effort to connect Moerae with an investment bank geared toward innovative early-stage biopharmaceutical companies was "cut off in its tracks," when Moerae found

itself legally and morally obligated to disclose the existence of Respondents' liens. The swift, crushing blow to Moerae dealt by the filing of Respondents' unlawful liens on Moerae's patents, is perhaps most dramatically illustrated by the series of emails exchanged between Privateer, Moerae's only institutional investor, and Lander, during the three-day period from March 5 through 7, 2019. (See Pa 1669-1675). This email series begins on March 5, 2019, with a message from Privateer's principal, Reagan Reaud, connecting his associate, Adam Rodman, with Lander. (Pa1673) In his March 5 email Reaud refers to Moerae as "a compelling investment opportunity," and asks Rodman to facilitate an introduction of Lander to FundRx, an innovative investment platform focused on fundraising from accredited investors for early stage biotech companies. (*Id.*) Rodman follows up immediately, and a rapid series of emails between Rodman and Lander ensues between March 5 and March 7, ending with Rodman's email sent on March 7 at 4:25 p.m. providing Lander with his cell phone number for a call to take place the next day, March 8, 2019, at 11 a.m. (Pa1674).

In the midst of this exchange, Lander disclosed to Privateer, through its President and General Counsel, Tom Washmon, Esq., her understanding at that time that Respondents may have filed a lien against Moerae's patents. (Pa1648). In an email sent from Washmon to Lander at 5:30 p.m. on March 7 (about one hour after the last email from Rodman, scheduling a call with Lander the next

morning and less than 24 hours before the scheduled call between Lander and Rodman), Washmon responded as follows:

"This document reflects a December 17, 2018 filing date and is a public record. It is a problem and I'm surprised that Cooley didn't bring this to your attention earlier. Threatening to file a lien and actually filing a lien are vastly different. While we are not your lawyers, you should immediately deal with this by talking to Cooley and asking them what your legal rights are and what course of action to take because the Company likely has damages arising from the filing of the lien (i.e., no one will likely invest or partner with this type of issue)."

(See Pa1648) (emphasis added).

With that communication between Rodman and Lander, the potentially huge Fund Rx capital-raising opportunity for Moerae, immediately came to an abrupt halt.

I. Respondents' Billings And Moerae's Payments

During the approximately one and one-half years of its representation of Moerae, McCarter's billings to Moerae for fees and disbursements were astronomical. As Lubit summarized the situation in April 2018, Moerae's patent portfolio was costing over \$60,000 per month to maintain (Pa 1559), an underestimate as it turned out. In fact, McCarter's total billings to Moerae, over only 18 months, came to \$1,487,646, from inception of billing in June 2017 to last invoice on January 22, 2019. (Pa 1572-1573). From mid-2017 through 2018 (a period when Defendants picture Moerae as continually near insolvency),

Moerae paid Defendants *close to \$600,000*. (Id.) Between May 2018 through November 11, 2018 alone, a six and a half month period, Moerae paid McCarter \$312,862 in costs and fees. (Pa 1575). And contrary to McCarter's subsequent portrayal of Moerae as a deliberate "deadbeat", because it decided to transfer its patent representation to another law firm with a more appropriate fee structure in December 2018, before its indebtedness to Respondents was satisfied, actually Moerae continued to make good faith payments to Respondents, right up to December 19th, 2018, the last day of Respondents' representation as its patent counsel. (Pa1578-1579).

J. Mounting Payment Issues And The Prepayment Requirement

In February 2018, senior partners at McCarter declared that unless Moerae came up with more than \$328,00 in a week's time, the firm would stop "fronting" disbursements, e.g., payments to foreign agents being paid to pursue and maintain a multiplicity of Moerae patents around the world. (Pa 1564). Instead, Moerae would have to pre-pay estimated costs for specific patent transactions. (Id.). On February 26, 2018, Moerae sent McCarter \$20,000 on account of the arrearages, but since Moerae could not come up with a sum in excess of \$300,000 on such short notice, McCarter implemented the prepayment requirement. (Pa 1563). By email dated February 26, 2018, Moerae advised Lubit that it would be prudent to delay any new filings or incur any expenses

not absolutely necessary to maintain Moerae's patent portfolio (*id.*), but it is unclear whether that request was heeded.

During the fall of 2018, Respondents' treatment of Moerae became increasingly inflexible. In addition to the prepayment requirement for *disbursements*, referred to above, by at least as early as September 6, 2018, McCarter also implemented a requirement that Moerae had to prepay estimated costs of legal *services*, i.e., McCarter's fees for specified tasks, or else Respondents would not perform them. (See, e.g., Pa 1588). Moerae made numerous such prepayments to McCarter during the fall of 2018. (See, e.g., Pa 1579, 1595-1611).

K. Respondents' Attempts To Extract Moerae's Consent To A Lien On Its Patents

Beginning in September 2018, Moerae's Treasurer and CFO, Neal Murakami, and McCarter's Joseph Lubertazzi ("Lubertazzi") attempted to negotiate a resolution of Moerae's arrearages. (Pa1180; 1825-1827). From the outset of those negotiations, Lubertazzi demanded that any resolution must include Moerae's consent to a lien in McCarter's favor on the Moerae patents. (Pa 1180; 1825-1827; 1851). Moerae consistently refused to give its consent, explaining repeatedly that a lien on the patents would severely impair Moerae's ongoing negotiations with potential partners, and adversely impact its ability to raise funds from investors. (Pa1180; 1825-1827; 1852; 1857).

On November 29, 2018, McCarter sent Moerae a proposed promissory note which did not refer directly to a lien, but which contained draconian and ambiguous provisions, most notably a clause permitting McCarter to accelerate or "prepay" principal (by then approximately \$800,000) upon an "equity infusion" of unspecified amount, and a clause giving McCarter the right to "pursue all remedies under law and equity" if McCarter should "deem itself insecure." (Pa 584). Clearly, "all remedies under law or equity" would *include* the right to file a lien against Moerae's patents, something Moerae had consistently refused to agree to.

Significantly, while they were making these hard-nosed demands, Respondents never advised Moerae that they were considering a *unilateral* filing of liens against Moerae's patent portfolio, *regardless* of whether or not Moerae consented to such filings. Respondents also never advised Moerae that it should seek independent counsel with regard to the lien issue, or its proposed promissory note.

L. Moerae's Decision To Transfer Its Patent Representation To The Cooley Firm

During November 2018, as the tension between the parties continued to grow, Lander put out exploratory feelers to find out whether there were alternative patent firms that used a fee structure which provided more flexibility than McCarter's for early stage biotech companies like Moerae. (Pa 1829;

1866,T121:19-122:3). In that process, Moerae learned that the patent department of the firm which had been the company's corporate counsel for a number of years, Cooley, LLC ("Cooley"), was willing to offer such a fee structure. (P1867, T122:4-9). In response to this discovery, on December 4, 2018, Moerae's Board decided to transfer its patent representation from Respondents to the Cooley firm. Toward that end, on December 7, 2018, Moerae sent an email and letter to Respondents, requesting transfer of its patent files to the Cooley firm by December 17, 2018. (Pa 577-587).

M. Defendants' Preparations For, And Filing Of Their Patent Liens

At 3:36 p.m. on December 7, 2018, Lubit received the email from Moerae announcing that Moerae would transfer its patent law work to the Cooley firm. (Pa587). On Monday, December 10, 2018, Lubit, who had no background in debtor/creditor law, dispatched her paralegal (who also had no such experience) to work on a form "Notice of Lien" to file against Moerae's patents in the USPTO. (Pa1882). Then, on December 17, 2018, despite advice from McCarter partner, Curtis Johnson, Esq., an expert in UCC law, that there was no basis under the UCC for filing a UCC Financing Statement (Pa1896), Respondents proceeded to file a UCC-1 Financing Statement against all of Moerae's patents and patent applications with the Delaware Secretary of State and a "Notice of Assignment" of a security interest in Moerae's U.S. patents with the United

States Patent and Trademark Office. ("USPTO"). (Pa 66-68; Pa 80). They made these filings *without* even minimally competent legal research; *without* regard to the contrary warning from McCarter's own chief UCC expert, who advised Respondents there was no legal basis for such patent lien filings under the UCC; *without* consulting McCarter's ethics expert; and *without* any reference to "attorneys' fees" or "attorneys' liens" anywhere in their filings; and without complying with any of their legal obligations under N.J.S.A. 2A:13-5, the New Jersey Attorneys Lien Act. (Pa 1895; Pa 1628-1629, T28:10-31:4; Pa 1183-1187)

**N. Defendants' Representation Of Moerae
During The Week Of December 10, 2018**

Even as Respondents were "urgently" rushing to file liens against Moerae's patents during the week of December 10-14, 2018 (Pa 1882;1884-85; 1887-88) during that same week they were still actively representing McCarter vis-à-vis third party foreign patent agencies, prosecuting patents on Moerae's behalf. (Pa1631-1641). Respondents applied Moerae's *prepayment of fees* to McCarter's performance of that new work, at precisely the same time they were preparing to unilaterally file liens against Moerae's patents. (*Id.*).

O. The Damages Sustained By Moerae

High Net Worth investment in Moerae came to a halt after Respondents filed their liens on Moerae's patents, on December 17th, 2018. Aside from a lone \$12,500 purchase which likely came before Appellant learned of Respondent's liens, not a single existing or new investor purchased Moerae's stock after those filings were made. (Pa 235-249). Not even the most committed, high net worth investors who had put millions of dollars into Moerae were any longer willing to invest in Moerae or encourage others to do so, after learning of Respondents' liens.

As an example, Vernon Nagel, who had invested more than \$2M in Moerae stock in successive purchases from 2012 through 2017, certified that he believed, and continues to believe, that the \$175M valuation in the Series D stock was fair. (Pa962). Nagel explained his attitude toward further investment:

"From my prior experience investing in early stage companies, including biotechnology, I knew that it would be necessary for Moerae to disclose to prospective investors that there was a lien on some or all of its patent interests, and I was virtually certain that the disclosure of the McCarter lien would dissuade prospective investors from investing in Moerae, because the existence of a lien on Moerae's patents would result in it being perceived as a company under duress, massively increasing the risk of investing in Moerae at this stage of its development...(Pa963)

The certification of John MacIntosh ("MacIntosh"), submitted below, also demonstrates the devastating impact of Respondents'

unlawful, unilateral patent liens. In a series of investments in his name, and through another investment vehicle, from 2012 to 2018, MacIntosh invested approximately \$1,122,500 in Moerae. (Pa 957). MacIntosh averred that he gained renewed confidence in MMI-0100 when further analysis showed that MMI-0100 had immunomodulating properties, and that a new patent application had been submitted based on those properties, so that he would likely have invested further in Moerae had it not been for the Respondents' liens. (Pa 958). He explained that:

"Once I learned about the liens put in place by McCarter & English, it became immediately clear to me that any further investment in Moerae would simply be unwise, given the taint on the investment inflicted by the McCarter & English liens. Indeed, the devastating effect of the liens placed on Moerae's patents by McCarter & English, on a sophisticated investor's appetite for further investment in Moerae, is self-evident...(Id.)

A third substantial investor in Moerae, Adam Sackstein, M.D. ("Sackstein"), similarly certified that any interest he might have had in investing further in Moerae, or any encouragement he might have given to family, friends, and associates to invest in Morae, was destroyed when he learned of the McCarter lien on Moerae's patents. (Pa 966).

Moerae's records reflect that Sackstein invested approximately \$820,000 on his own or through other investment vehicles, including a total of \$125,000 *in 2018*. (Pa 229; 246-247; 1728). He certified as follows, in the court below:

"At some point in or around early 2019 I learned through disclosure by Moerae that the company's patent attorneys [McCarter] had filed liens against Moerae's patents, i.e., the company's most valuable asset. I was aware at the time that Moerae needed further funding in order to proceed with the development of its proprietary drug, MMI-0100 and to continue its other operations. Nevertheless, I was dissuaded from making further investments in Moerae because of the massive risk factor created by McCarter's liens against Moerae's patents. Because of the liens, although I had previously done so, I was unwilling to encourage family, friends and business associates to invest in Moerae."(Pa 966).

Deprived of its main source of cash flow, Appellant is currently a dormant company, unable to advance the movement of MMI-0100 toward realization of its enormous medical potential, and unable to continue its advance toward realization of the multi-million dollar business opportunity MMI-0100 also presents. (Pa 901; 905-907).

IV. LEGAL ARGUMENT (Pa100-103; Pa 114-115)

Review of an order granting or denying summary judgment is *de novo*. Schwartz v. Menas, 251 N.J. 556, 570 (2022). The Appellate Division thus applies the same familiar standard governing Rule 4:46 motions for summary judgment as the trial court: judgment should only be granted when the evidence, "viewed in the light most favorable to the non-moving party," is so one-sided that one party must prevail as a matter of law. Brill v. Guardian Life Ins. Co. of

Am., 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

A. DISMISSAL OF MOERAE'S CLAIMS UNDER THE ECD WAS ERRONEOUS BECAUSE MOERAE ATTEMPTED TO JOIN THOSE CLAIMS BY MOTION IN RESPONDENTS' COLLECTION CASE. (Pa100).

In McCarter's earlier Collection Case, Moerae sought to amend its Answer to include a malpractice counterclaim against McCarter and Beverly Lubit, for the unauthorized encumbrances Lubit filed against Moerae's patent portfolio. The presiding judge in that case (the Hon. Thomas Moore, P.J.S.C.), denied Moerae's application. Here, the court below committed plain error because the ECD does not apply to parties who *present* their claims in the initial proceeding, like Moerae did with its motion to amend in McCarter's Collection Matter, in which it asserted its counterclaim arising from Respondents' unlawful patient lien filings. Cf. Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 240 (App. Div. 2002), *certif. den.* 175 N.J. 170 (2002) ("The doctrine requires a litigant to *present* "all aspects of a controversy in one legal proceeding.") (internal citation and quotation marks omitted; emphasis supplied).

The ECD's primary purpose is to prevent litigants from deliberately withholding claims for tactical reasons. See Oltremare v. ESR Custom Rugs, Inc., 330 N.J. Super. 310, 315 (App. Div. 2000) (stating that the doctrine is intended to be applied to prevent a party from "voluntarily electing to hold back a related

component of the controversy in the first proceeding"); and Hobart Bros., 354 N.J. Super. at 240-241 (App. Div. 2002) ("a court must be sensitive to the possibility that a party has purposely withheld claims from an earlier suit for strategic reasons or to obtain 'two bites at the apple' "). Moerae's filing of its motion to amend in the earlier Collection Case, makes it clear it was *not* engaging in the kind of gamesmanship the ECD is intended to prevent. Indeed, at oral argument on summary judgment, counsel for Respondents acknowledged that they could point to no case in which a court had barred claims under the ECD in similar circumstances, *viz.*, where the party had earlier moved to assert its claims, but was denied joinder simply because the new claims might delay disposition of the pending matter. (T5:15-19).

In fact, Moerae's motion to amend in the Collection Case was intended to advance the policies of judicial administration preserved by the ECD. When Moerae attempted to assert its malpractice counterclaim during the pendency of McCarter's Collection Case, it empowered Judge Moore to make an informed decision to manage multiple claims between the parties. The effect of such a motion aligns with the policy articulated in case law, as reflected in Rule 4:5-1(b)(2), favoring use of a trial judge's "case management toolbox" in the context of joinder issues, which is only possible if a party is mindful to bring potentially related claims to the court's attention—precisely what Moerae did in the Collection Case (and as the plaintiff in Dimitrakopoulos v. Borrus, Goldin, Foley, Hyman and Stahl, P.C., 237 N.J. 91

(2019), did *not* do); cf. Oltremare at 317 ("[o]ne of the primary goals of the [ECD] is to permit the trial court an opportunity to manage multiple claims in an effort to foster efficient judicial administration."); Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 584-585 (1997) ("One of the goals of the entire controversy doctrine is the efficient judicial administration of multiple claims. That is better accomplished when courts possess the facts upon which to base case-management decisions"); and Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 324 (1994) ("A trial court is empowered to segregate different claims to assure manageability, clarity and fairness...A plaintiff who fails *to allow the trial court the opportunity to supervise the entire controversy* risks losing the right to bring that claim later.") (italics added).

In the same vein, in Brown v. Brown, 208 N.J.Super. 372, 380 (App.Div.1986) (Pressler, J.), the Court stated that, "[t]he significance of having to seek leave to file a supplemental pleading lies...in the policy reasons for submitting that question to judicial discretion in the first instance."² The Court wrote further that, while judicial

In Brown, the plaintiff's assault claim arose during the pendency of the matrimonial case. On the motion for summary judgment in this case, implicitly conceding that Moerae's claims may have accrued during the pendency of the McCarter's earlier Collection Matter, McCarter argued that Moerae's counsel (Cooley) advised Moerae at least by early *April 2019* (i.e. shortly *after* McCarter filed its complaint on March 22, 2019), that Defendants acted improperly by filing the lien. (Pa 97; 641). The chronology is as follows: In late February 2019, Moerae's CEO (Lander) asked Cooley whether McCarter had actually filed a lien on the patents. (Pa1198;1649). Cooley responded in the affirmative, but then

discretion should ordinarily be exercised in favor of permitting the germane claim to be filed, Rule 4:9-4, by requiring leave, "implicitly recognizes" that "there may be exceptional circumstances in which the filing of a supplemental pleading should not be allowed:

...these competing concerns are...susceptible to fair accommodation. The first predicate of such an accommodation is that the court, rather than a litigant acting unilaterally, must make the determination of whether the supplementary claim is to be joined or reserved....The point is that unless a party *at least attempts* to raise the claim by a supplemental pleading, the court cannot determine whether the interests of substantial justice to the litigants in that controversy are best served by joinder or reservation."

Id. at 381-382 (emphasis supplied).

In this case, Moerae indisputably *did* assert its malpractice counterclaim stemming from Respondents' misconduct in the initial action, allowing the initial court "to determine whether the interests of substantial justice were best served by joinder or reservation"—a factor that significantly distinguishes this case from

proceeded to give Moerae sequentially conflicting advice, first, in March 2019, suggesting that McCarter was in its rights to file the liens (Pa1198-1199;1647;1650), then, on April 2, 2019, advising Moerae that McCarter's engagement letter did not create a security interest, so McCarter "seem[ed] to have mis-stepped..." (Pa1199;1660). Hence, at the earliest, Moerae's claims accrued in April 2019, when, for the first time, Moerae received ambiguous intimations from Cooley that McCarter was at fault in filing the liens. Cf. Viglione v. Farrington, No. A-3912-05T5, 2007 LEXIS 2724, *9-10 (N.J. Super. Ct., App. Div. August 14, 2007) (where the issues were complex, the plaintiff should not have been charged with constructive knowledge of the existence of a legal malpractice claim) (Pa 2230).

Borris. The trial court's application of the ECD to bar Moerae's claims in this case has created a judicial absurdity: a litigant with meritorious claims for legal malpractice has attempted to bring its claims in two courts of competent jurisdiction well within the statute of limitations for doing so, and has twice been denied a fair trial on the merits. Reversing the trial court's application of the ECD in this matter would promote the case management principles facilitated by the Doctrine while still giving real substance to the oft-repeated, lofty phrase that in New Jersey "dismissal is the remedy of last resort." Cf. Vision Mortg. Corp., at 584.

B. THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT ON ECD GROUNDS BECAUSE RESPONDENTS ARE JUDICIALLY ESTOPPED FROM REVERSING COURSE TO ARGUE THAT MOERAE'S CLAIMS AROSE FROM THE SAME SET OF FACTS AS McCARTER'S 2019 COLLECTION CASE. (Pa102-103; 114-115).

When Moerae sought to amend its Answer in McCarter's earlier Collection Matter to include a malpractice counterclaim against McCarter and Beverly Lubit, for their unauthorized encumbrances against Moerae's patent portfolio, McCarter & English argued that Moerae's proposed counterclaim did not arise from the same set of facts as their collection claims (Pa692, T8:7-8). Judge Moore agreed, denied Moerae's motion to amend, and granted summary judgment to McCarter. (Id., T8:15-16). But when Moerae asserted its malpractice claims here, Respondents adopted the *opposite* position and moved for summary judgment on entire controversy grounds: "Moerae's claims clearly

arise out of the same nucleus of facts as those that gave rise to the Collection Action...." (Pa2097).

Respondents are judicially estopped from having it both ways. Because they succeeded the first time around in arguing that Moerae's malpractice claims did *not* arise from the same facts, they are stuck with that position. Respondents cannot contradict themselves on a key element of their ECD defense solely to obtain dismissal of their former client's malpractice claims. Cf., Oltremare, 330 N.J. Super. at 315-316.

New Jersey litigants are judicially estopped from taking positions directly contrary to those they successfully asserted in an earlier proceeding between the same parties. Kimball International, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 607 (App. Div. 2000), *certif. denied*, 167 N.J. 88 (2001); Brown v. Allied Plumbing & Heating Co., 129 N.J.L. 442, 445-446 (1943) ("[W]here a party has prevailed on a litigated point, principles of judicial estoppel demand that such party be bound by its earlier representations."); and see Guido v. Duane Morris LLP, 202 N.J. 79, 94 (2010) (judicial estoppel is "designed to protect the integrity of the judicial process" by "preclud[ing] a party from taking a position contrary to the position he has already successfully espoused in the same or prior litigation") (internal citations omitted).

The principle of judicial estoppel applies even where, as here, litigants

prevail in the prior action, as long as the initial court "accepted" their initial position. As explained in Baghat v. Baghat, 217 N.J. 22, 37 (2014), judicial estoppel may be invoked when "a court has *accepted* the previously advanced inconsistent position and the party advancing the inconsistent position *prevails in the earlier litigation*" (emphasis supplied). New Jersey courts have consistently made clear that, for judicial estoppel purposes, the earlier court has "accepted" a party's previous, inconsistent position if it helped form the basis of the court's earlier decision—even when the party's previous position may not have been the sole basis upon which the earlier court made its determination: "If a court has based a final decision, *even in part*, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position." Cummings v. Bahr, 295 N.J. Super. 374, 387-88 (App. Div. 1996) (emphasis supplied; overruled on other grounds).

As recently as last year, this Court described the rule in this precise manner: "[C]ourts are deemed to have accepted a party's position when the position has *helped form the basis* of the court's final decision." Adams v. Yang, 475 N.J. Super. 1, at 9 n.2 (App. Div. 2023) (citing Cummings, 295 N.J. Super. at 387-88; emphasis supplied). At the very least, McCarter's earlier position on whether Moerae's malpractice claims arose from the same set of facts clearly *helped form* the basis for Judge Moore's decision denying Moerae's motion to

amend, as his language at the time of that ruling reveals:

"...[Moerae] argues that the counterclaim arises out of the same factual allegations that give rise to the [McCarter claims(?)]. The claim was to collect legal fees and expenses. The separate claim is the damage that was allegedly caused by the filing of the UCC1....

[McCarter & English] argue that the claims did not arise out of the same litigation. [McCarter's] claims according to [them] are based on unpaid legal fees incurred long before the UCC filing....

I agree with [McCarter]."

(Pa 691, T7:10-15; Pa 692, T8:7-16) (emphasis added). Judge Moore went on to suggest that Moerae was free to pursue its malpractice theory in a separate action. (Pa700-701, T:16:25-17:4).

After having successfully convinced Judge Moore that their former client's proposed malpractice counterclaim did *not* arise from the same set of facts as their collection claims, Respondents then did an "about face" to argue that Appellant's nearly identical malpractice claims in this matter are so closely related to McCarter's prior Collection Matter that they are now precluded by the ECD. But the court below simply ignored McCarter's self-contradiction, insisting that "the Collection Action court never accepted or denied that argument." (Pa 115; contrast Judge Moore, Pa 692, T8:16: "I agree with [McCarter]."). The trial court's failure to construe any ambiguity about the basis for Judge Moore's decision in Moerae's favor, as the non-movant on Respondents' motion for summary judgment, was plain error. Cf. Globe Motor

Co. v. Igdaley, 225 N.J. 469, 480 (2016). Framed as a legal issue, the trial court's interpretation of the law and legal consequences therefrom "are not entitled to any special deference." Manalapan Realty, Ltd. P'ship v. Twp. Comm., 140 N.J. 366, 378 (1995).

In short, Respondents have been allowed to effectively whipsaw their former client, keeping Moerae's malpractice counterclaim out of the courtroom as an *unrelated* claim during their Collection Case, then brazenly shifting their litigation posture to insulate themselves from their former client's malpractice claims in subsequent litigation by using the ECD as a procedural ruse. The result is a manifest injustice to their former client, Appellant Moerae, and precisely the type of sharp litigation practice the doctrine of judicial estoppel is designed to prevent.

The lower court's refusal to invoke judicial estoppel principles to *bar* Respondents from reversing course and contradicting themselves on a key element of their Entire Controversy defense is plain error and should be reversed. Cf. Oltremare, 330 N.J. Super. at 316.

C. SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS ON ECD GROUNDS CONTRAVENES THE DOCTRINE'S CORE PRINCIPLES OF FAIRNESS AND JUDICIAL ECONOMY. (Pa103).

After two years of intense litigation, complex motion practice,³

³ See, e.g., Pa 1722 to 1821.

depositions of 15 witnesses,⁴ 11 costly experts' reports, thousands of pages of documents exchanged, and a staggering consumption of court and attorney time, Respondents, having managed to exclude Moerae's malpractice claim against them in their earlier Collection Case, moved to dismiss all of Appellant's claims in this case by reason of the ECD—a doctrine whose core principles are judicial economy *and* fairness. Bank Leumi v. Kloss, 243 N.J. 218, 227-228 (2020). In a crowning irony, when Respondents finally moved for dismissal on ECD grounds, *after* two years of intensive litigation, they relied wholly on facts in the record *already available to them* at the time Appellant's Complaint was first filed. (Pa640; Pa1). The inequity is palpable.

Respondents' delay in asserting its entire controversy defense makes this case fundamentally different from Borrus, on which Respondents and the court below so heavily relied. Unlike Borrus, where the defendant law firm moved to assert the ECD immediately upon filing of the client's malpractice case, here Respondents' motion was brought (with grotesque *inefficiency*) after two years of apparently wasted litigation. Further, unlike in Borrus, here the preceding and successive actions were *not* duplicative; by McCarter itself represented to the earlier court, Moerae's malpractice claims centered on matters having nothing

⁴ See, e.g., Pa 156, 183, 379, 395, 567, 795, 809, 1328, 1470, 1493, 1626, 1698, 1923.

to do with McCarter's performance of the patent law services at issue in McCarter's Collection Case, and having nothing to do with the reasonable value of those services. (See pp. 40-47, *infra*).

1. The ECD's Core Objective Of Judicial Economy Was Disserved By Application Of The ECD In This Case.

What Respondents' two-year delay in asserting the ECD defense produced, in context of the specific circumstances of this case, was a monstrosity of wasted judicial, attorney and litigant time and resources—precisely the *opposite* of the judicial economy and efficient use of judicial resources the ECD is designed to achieve. See Joel v. Morroco, 147 N.J. 546, 548 (1997). McCarter's conduct in this litigation, leaving no stone unturned, effectively amounted to a waiver of their ECD defense. Cf. Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986) ("...section 226(1)(a) of the Restatement, Judgments 2d...exempts from the claim splitting bar those claims as to which '[t]he parties have agreed in terms *or in effect* that the plaintiff may split his claim, *or the defendant has acquiesced therein*") (emphasis supplied).

From the outset of this litigation, Respondents knew *all* of the facts necessary to attempt to enforce their ECD defense. Respondents had represented themselves in the Collection Action and were, therefore, thoroughly familiar with that proceeding's facts and procedural history. (Pa 641). At the same time, the Complaint in this case laid out Moerae's claims in detail. (Pa 1). Thus, everything Respondents

needed to know to move for enforcement of their alleged ECD defense was known to them when this case began. But instead of moving immediately for dismissal on ECD grounds, Respondents launched an expensive and time-consuming, "no holds barred" litigation of the substantive issues raised by Appellant's Complaint.

The centerpiece of Respondents' defense was their causation theory, which led to a tsunami of discovery demands and expensive expert input, including, but not limited to, McCarter's demand for several years' worth of emails between and among Moerae's directors and investors, filling thousands of pages; analyses of complex pre-clinical and clinical studies of MMI-0100 (Pa 251, 264, 282); reports and depositions of Appellant's biopharmaceutical expert (Harrison, Pa1444, 1488), Respondents' medical expert (Frykman, Pa297), Appellant's early stage biotech financing expert (Paseltiner, Pa 890), the patent valuation experts Pa 898, 900) of both Appellant and Respondents (Pellegrino, Pa 898, and Hoberman, Pa 900, respectively)—in addition to reports and depositions of each party's malpractice experts (Wasserman, Pa847 and Usatine, Pa1694) and a report by plaintiff's UCC expert (Shur, Pa 1932). Complex motion practice further multiplied this massive pretrial litigation process. (See Pa1772-1821). By the time the dust had cleared, and the parties had filed their respective summary judgment motions, this case had been effectively litigated to completion, save for *in limine* motions and the trial.

The court simply ignored Moerae's argument that *technically* pleading the ECD at the outset, McCarter ran up the litigation tab for two years, wasting the thousands of hours of judicial, attorney, expert and client time, Respondents had waived their ECD defense by acquiescing litigation of the substantive issues in this case. Cf. Brown at 384. The court below did, however, make one glancing reference to Moerae's argument that dismissal did nothing to promote judicial economy, however. (Pa103). Ironically, the court implicitly acknowledged that the substantive issues would otherwise necessitate a trial on the merits, but dismissal pursuant to the ECD would save judicial resources otherwise needed for "an expected lengthy trial" and *in limine* motions—a breathtaking inversion of the deeply embedded principle that preclusion of meritorious claims under the ECD should be a "remedy of last resort." Olds v. Donnelly, 150 N.J. 424, 446 (1997). As the Supreme Court observed in Gelber v. Zito Partnerships, 147 N.J. 561 (1997), the ECD "is not to be used as a means of calendar clearance." Id. at 567.

2. This Case Is Not "Duplicative" Of Any Party's Efforts In The Prior Collection Case.

As noted above, in sharp contrast to typical attorney collection/client malpractice matters, the two different sets of claims at issue here involved entirely separate and distinct factual and legal issues. Hence, there was *none* of the "duplication" that the ECD was designed to prevent—precisely the position McCarter itself took in its earlier Collection Matter.

At issue in McCarter's Collection Case was: (i) the amounts billed by Respondents for the patent prosecution services they performed *on behalf of Moerae*; (ii) the reasonable value of the patent prosecution services Respondents performed *on behalf of Moerae*; and (iii) the amount of the unpaid balance of Respondents' billings, for the services they performed *on behalf of Moerae*. By contrast, the issues in this case are (i) whether Respondents breached the standard of care owed a client by filing, without client permission, a UCC lien and USPTO assignment notice *on their own behalf* against Moerae's patents and related intellectual property; (ii) if so, whether those encumbrances, unilaterally asserted by the Respondents *on their own behalf*, caused injury to Moerae's business; and (iii) if so, what was the quantum of Moerae's damage from the filings made by Respondents *on their own behalf*. Indeed, that was the very point McCarter & English made in the Collection Case, when it argued in opposition to Moerae's motion to amend that Moerae's proposed malpractice claim did not arise from the same set of facts. (See Pa2110; Pa0692, T8:7-8).

Neither the quality of the patent prosecution services Respondents had been retained to perform on Moerae's behalf, nor the reasonable value of those services – the core issues of McCarter's Collection Case – were *ever* in issue in the instant case. Indeed, in arguing to Judge Moore in their Collection Case, that Moerae's proposed malpractice counterclaim did not arise from the same set of facts as McCarter's

collection claims, defense counsel admitted that Moerae had been pre-paying Respondents' legal fees since at least September 2018; as a result, the fees which McCarter was seeking to collect had been incurred *months before* Respondents undertook their unlawful, unethical collection efforts against Moerae's intellectual property, in December 2018. (Pa 2128, T13:9-21; 2144, T29:19-30:8).

The absence of a factual nexus between the issues addressed in McCarter's Collection Case and the claims brought by Moerae here is one of several factors that dramatically distinguishes this case from Borris. Borris involved a garden variety malpractice claim, brought in response to an attorney's collection suit. The client asserted that the law firm negligently performed the very services for which the firm was attempting to recover unpaid fees; the client's malpractice allegations were therefore inextricably intertwined with the reasonable value of those services, which had already been determined in the firm's Collection Case. See Borris at 104 (noting the client claimed improper conduct of discovery, failure to obtain an adequate expert report, and like criticisms of the law firm's conduct of the matter for which it had been retained). The Supreme Court noted that the ECD was appropriate in that specific context because "the attorney's handling of the client's case is directly at issue" in determining the reasonable value of the services performed. Id. at 114.

Here, in direct contrast to Borris, Respondents' filing of their liens in this case had *nothing to do* with the contentions at issue in McCarter's earlier Collection

Matter, *viz.*, the quality or value of the patent prosecution services Respondents provided to Moerae. Respondents' patent prosecution services on behalf of Moerae were never at issue here; it was the Respondents' actions *on their own behalf*—unethically filing liens against client intellectual property without authorization to do so, for purposes of collecting an outstanding balance—that were at issue. Thus, in all meaningful respects, this case produced no duplicative efforts on the part of the court or counsel. The ECD's core objectives of judicial economy and efficiency of resources have ironically been disserved by the lower court's entry of summary judgment in favor of Respondents and the continued abeyance of Appellant's meritorious claims.

3. The Trial Court Erred In Failing To Identify Any Prejudice To Either Party, And In Failing To Give Proper Weight To The Prior Court's Reservation Of Moerae's Right To Pursue A Subsequent Action.

The trial court in McCarter's Collection Case referred directly to Moerae's right to assert its claims in a later action such as this one. (See Pa690, T6:11-14; Pa691, T7:13-15; Pa693, T9:10-14). This very court adopted the same determination in a related appeal: "As the trial court [in McCarter's Collection Case] made clear, defendant [Appellant Moerae] retains the ability to file an independent action for damages flowing from that allegedly improper filing." McCarter & English v. Moerae Matrix, No. A-3775-19, 2021 LEXIS 1576, at *32 n.17 (N.J. Super. Ct., App. Div. July 27, 2021) ("2021 Appeal").

It has long been recognized that the entire controversy doctrine does not apply "[w]here, as here, *the court has expressly reserved the plaintiff's right to maintain the second action or where its rulings on related issues indicate it was likely to have reserved that right[.]*" DiIorio v. Structural Stone & Brick Co., Inc., 368 N.J. Super. 134, 139 (App. Div. 2004) (emphasis supplied).

The inconsistency that has developed as a result of the trial court's facile reliance on the ECD to dismiss Moerae's claims threatens judicial integrity generally, and has created the very type of inefficiency that Doctrine is meant to avoid: The first trial court said a claim could be filed later; the Appellate Division agreed. Yet Moerae filed its complaint in this action only to have a third court effectively disagree with both the first trial court and the Appellate Division, after two years of apparently wasted court and attorney time. This Court should adopt a bright line rule that "mixed signals" by a trial court, which can be reasonably construed as allowing for subsequent litigation, altogether preclude application of the ECD.

Finally, neither Respondents, nor the court below, ever identified *any* prejudice that would befall either McCarter or Beverly Lubit. There was never any contention that a witness had died, or a document available in early 2020 had later gone missing. Facing a trial on Appellant's meritorious claims for malpractice that had been left open for resolution by an earlier court in a

previous matter is not prejudice. The ECD "is not to be used as a means of calendar clearance." Gelber, 147 N.J. at 567. The Court should also make it clear that the conduct of a litigant, in connection with the time and manner it seeks *enforcement* of an ECD defense, must be considered by a trial court weighing the propriety of an ECD defense, not just the conduct of the party *against* whom the defense is being asserted.

D. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S CLAIMS AGAINST BEVERLY LUBIT, BECAUSE THE ECD DOES NOT BAR NEW CLAIMS AGAINST A NEW PARTY. (Pa 102).

The ECD does not preclude related claims against a new party. Hobart Bros. at 242; see also Pressler & Verniero, *Current N.J. Court Rules*, Rule 4:30A, comment 1 ("There is no mandatory party joinder requirement under the [ECD].")

Respondent Lubit was *not* a party to the prior action, and her motives were distinct from those that catalyzed Respondent McCarter's Collection Action.⁵

⁵ Lubit's relationship with Moerae had a significantly different dimension than the legal/business relationship between Moerae and McCarter. Lubit and Moerae's CEO, Cynthia Lander, had been best friends for at least 15 years before the events here at issue in December 2018. (Pa 1334, T35:4-8). At a deposition in 2020, Lubit testified that she felt "ambushed" when Moerae's Board elected to transfer the matter to new counsel (Pa 1336, T39:16). On December 10, 2018, at the very moment when she had begun preparing to file the liens against Moerae's patents, Lubit texted to Lander that she [Lubit] felt "sad", "lost", "hurt", "used", "betrayed" (Pa1625). The personal aspect of Lubit's and Lander's relationship is

Assuming *arguendo* that Appellant's claims against Respondent McCarter were properly dismissed under the ECD, Appellant's claims against Lubit should nonetheless proceed. Lubit was not a party to the earlier Collection Case, and she had her own personal motives for Defendants' misconduct against Moerae, based upon her personal relationship with Cindy Lander. Fn. 7, above. Again, the court below overlooked these factors, or simply ignored them. If the ECD's core objective is the avoidance of *duplicative* litigation—and *not* to avoid the litigation of potentially valid, unresolved claims—then the trial court's ruling was clearly erroneous with respect to Moerae's claims against Beverly Lubit.

directly relevant to the malice element of Moerae's claims for slander of title and malicious interference.

V. CONCLUSION.

On the basis of the foregoing, the ruling of the court below, dismissing Appellant's claims in this case on ECD grounds, was erroneous, at best an abuse of discretion, and should be reversed.

Respectfully submitted,

LAW OFFICES OF G. MARTIN MEYERS, P.C.
Gary Martin Meyers, Esq.

Dated: Jan. 23, 2025 By: /s/ Gary Martin Meyers, Esq.
GARY MARTIN MEYERS, ESQ.

MOERAE MATRIX, INC.,

Plaintiff-Appellant,

v.

MCCARTER & ENGLISH, LLP;
BEVERLY LUBIT, ESQ.; JOHN
DOES 1-10 AND PROFESSIONAL
CORPORATIONS 1-5,

Defendant-Respondents.

NEW JERSEY SUPERIOR COURT:
APPELLATE DIVISION

Docket No.: A-000203-24 T1

Civil Action

Sat Below: Hon. Frank J. DeAngelis,
P.J. Ch.

Trial Court Docket No.:
MRS-L-371-22

**BRIEF OF DEFENDANT-RESPONDENTS MCCARTER & ENGLISH,
LLP AND BEVERLY LUBIT, ESQ. IN OPPOSITION TO APPEAL OF
PLAINTIFF-APPELLANT MOERAE MATRIX, INC.**

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PRELIMINARY STATEMENT

The primary issue in this case concerns application of well-settled legal principles regarding the entire controversy doctrine (“ECD”).

Moerae Matrix, Inc. (“Plaintiff”) retained McCarter & English, LLP (“McCarter”) and Beverly Lubit, Esq. (“Lubit”) (collectively “Defendants”) for its patent work. After Plaintiff ran up an outstanding balance of over \$837,000 (consisting of fees plus \$383,000 in out-of-pocket expenses) and refused to pay, McCarter filed a UCC-1 financing statement and a submission to the United States Patent and Trademark Office (“USPTO”) to provide notice of its attorney charging lien against Plaintiff’s patents (the “Notices”). McCarter then filed a collection action. Eleven months later, one month after the extended discovery end date for the collection action, and on the eve of McCarter’s summary judgment motion, Plaintiff moved to amend its pleadings to assert affirmative claims against Defendants based on the Notices. The trial court denied the motion as untimely and prejudicial, and entered judgment in favor of McCarter. Plaintiff then asserted the same claims against Defendants in a new proceeding – this case. The trial court determined that Plaintiff’s claims are barred by the ECD, and entered summary judgment in favor of Defendants (the “SJ Order”).

There was nothing unfair, novel or surprising about application of the ECD in this case. Plaintiff’s claims were barred by application of two well-

settled principles. First, a litigant will be denied leave to amend if the amendment is untimely and prejudicial. In the prior proceeding, the trial court determined that Plaintiff knew all of the facts necessary to timely assert its claims but failed to do so, and therefore denied its motion to amend. This Court affirmed. Second, the ECD bars a litigant in a subsequent proceeding from asserting a claim arising from the same factual nexus as a prior proceeding if it had a fair and reasonable opportunity to litigate the claim. Where a litigant *attempts* to assert a claim in the first proceeding, but its motion is denied as untimely, the ECD may preclude assertion of the claim in a subsequent proceeding. The trial court and this Court both recognized that as a result of the denial of Plaintiff's motion to amend in the prior proceeding, the ECD may bar its claims in a subsequent proceeding. In the SJ Order, the court below applied the ECD to the factual circumstances of this case and determined that Plaintiff's claims are barred. The SJ Order, and the trial court's denial of Plaintiff's motion for reconsideration of the SJ order, should both be affirmed.

Apart from the ECD, the SJ Order can be affirmed on independent grounds because Plaintiff cannot as a matter of law establish proximate causation between the Notices and the injury it has alleged – i.e., the failure of its business. The actual cause of Plaintiff's failure – an inability to raise investor capital, likely the result of disappointing clinical trials and investor fatigue – predated

the Notices. Plaintiff similarly cannot establish that the Notices were false or otherwise improper, or that Defendants acted maliciously in filing them. Defendants were entitled to summary judgment for these reasons as well, and although the trial court did not reach them, they provide alternative and additional grounds for affirmance.

PROCEDURAL HISTORY¹

Plaintiff commenced this action against Defendants through the filing of a complaint on March 1, 2022. (Pa0001). Plaintiff's original complaint asserted claims for legal malpractice, breach of fiduciary duty, defamation of title to property, and tortious interference with prospective economic advantage. (Pa0008-13). Defendants filed an answer on April 5, 2022, which asserted, *inter alia*, that Plaintiff's claims were barred by the ECD. (Pa0026; Pa0031). Plaintiff thereafter filed an amended complaint on February 2, 2024, asserting additional claims – violation of the UCC, and a claim for imposition of a constructive trust and equitable lien. (Pa0035). Defendants answered Plaintiff's amended complaint on February 20, 2024, once again asserting that Plaintiff's claims were barred by the ECD. (Pa0077; Pa0084).

¹ “Pb” and “Pa” refer to Plaintiff's brief and appendix.

“Da” refers to Defendants' appendix.

“1T” refers to the transcript of the July 19, 2024 oral argument on the cross-motions for summary judgment.

Defendants moved for summary judgment on all claims on May 10, 2024. (Pa0123). On the same date, Plaintiff moved for partial summary judgment, as to liability only, on its legal malpractice and fiduciary duty claims. (Pa1822). The Honorable Frank J. DeAngelis, P.J. Ch., heard argument on both motions on July 19, 2024. (1T). On July 22, 2024, Judge DeAngelis entered orders, accompanied by a statement of reasons, granting Defendants' motion for summary judgment (Pa0092), and denying Plaintiff's motion.

Plaintiff moved for reconsideration on August 9, 2024. (Pa2090). On September 13, 2024, Judge DeAngelis denied that motion. (Pa0104). Plaintiff filed this appeal on September 19, 2024. (Pa0116).

STATEMENT OF FACTS²

A. Defendants' Representation of Plaintiff

Lubit, an attorney specializing in intellectual property law with a PhD and background in research science, began representing Plaintiff, a bio-technology

² In deviation from Rule 2:6-2(a)(5), Plaintiff's brief contains a "Facts" section that is replete with improper legal argument, clear misrepresentations, and purported facts that are not part of the record on appeal, not supported by references to the record, and otherwise not material to the issues on appeal. E.g., Pb5-6 (improper legal argument); Pb6 (claiming that Defendants "misquoted" a case to the trial court, referring to a sentence that did not contain a quote); Pb10-11 (medical articles that are not part of the record on appeal); Pb21-22 (discussion of McCarter's fees relating to its representation of Plaintiff, which are not at issue on this appeal, and which have been deemed fair and reasonable by the trial court in the earlier case and this Court on appeal (Pa0700; Pa0489; Pa0732)). Defendants respectfully submit that these portions of Plaintiff's brief should be disregarded by the Court.

company, in 2007. (Pa0125; Pa0160). When Lubit joined McCarter as a lateral partner in April 2017, Plaintiff followed. (Pa0160). Plaintiff retained McCarter, pursuant to the firm's engagement letter, to represent it "in connection with patent matters." (Pa0179). Plaintiff agreed to pay McCarter's statements "promptly" upon receipt. (Pa0180). McCarter represented Plaintiff in pursuing U.S. and foreign patents for drugs it was attempting to develop. (Pa1153). In the case of foreign patents, McCarter worked closely with foreign attorneys and agents and advanced funds to pay them. (Pa1153).

B. Overview of Plaintiff's Business³

Plaintiff sought to develop new pharmaceutical products, primarily to treat Idiopathic Pulmonary Fibrosis ("IPF"), as well as other fibrotic and inflammatory diseases. (Pa0126). Dr. Cynthia Lander ("Lander"), its founder, served as its CEO and Chair of its Board of Directors ("Board"). (Pa0185-86). Plaintiff was developing and conducting Phase 1 clinical trials on MMI-0100, a drug intended to treat IPF and inflammation. (Pa0126). Plaintiff was incorporated in Delaware and its only office was a mail drop in New Jersey, where it was not authorized to do business as of 2018, when the Notices were

³ Although not necessary for determination of the ECD issue, Defendants include certain background information regarding Plaintiff and its operations as relevant to the alternative bases to affirm set forth in Section II, *infra*, and to rebut Plaintiff's suggestion throughout its brief that its economic prospects were favorable in 2018.

filed. (Pa0191; Pa0599). It had no employees, and relied exclusively on part-time consultants, who worked remotely. (Pa0193).

Plaintiff had no meaningful cash flow from operations because it was in the process of developing products and relied on investors to provide the funds to pay its expenses, including attorneys' fees. (Pa0192). It had never sold any products or generated a profit. (Pa0215). Its investors consisted of high net worth ("HNW") individuals who invested varying amounts in Moerae. (Pa0192). It had only one institutional investor, Privateer Capital Management, certain principals of which also invested in Plaintiff individually. (Pa0226; Pa0230). Plaintiff had been having serious problems raising money since at least 2016, long before McCarter filed the Notices in December 2018. (Pa0235-39; Pa0397).

C. Plaintiff's Phase 1 Human Clinical Trials

Plaintiff conducted its Phase 1 human clinical trials of MMI-0100 between 2014 and 2016 in Europe. (Pa0194).

In 2015, an LPS Challenge Study was conducted with a group of healthy smokers in order to study the efficacy of MMI-0100 in comparison to a placebo ("LPS Challenge Study"). (Pa0251). The lead investigator for the LPS Challenge Study reported in 2016 that there was no statistically significant difference between subjects who had received the drug and those who had

received a placebo with respect to most of the primary biomarkers measuring the drug's efficacy. (Pa0255; Pa0397). Plaintiff disputed this finding, contending the investigator had misinterpreted the results. (Pa0195-198). However, no final report on the LPS Challenge Study was ever prepared or filed with any regulatory agency. (Pa0195-196). According to Lander, posters were prepared in 2018 as an alternative to a final report of the LPS Challenge Study, but the posters were not filed either. (Pa0196).

MMI-0100 was also evaluated through a single ascending dose (SAD) study (Pa0282) and a multiple ascending dose study (MAD) study (Pa0264). The MAD study assessed tolerance and safety. (Pa0264). The investigator reported that MMI-0100 was well-tolerated by the study subjects and that no safety concerns were identified. (Pa0272). Defendants' scientific expert, Gregory K. Frykman, M.D., disagrees with these conclusions, and has opined that the Phase 1 trials of MMI-0100 did in fact identify safety concerns. (Pa0316-317, Pa0341).

Dr. Frykman also analyzed the likelihood that MMI-0100 would complete all three phases of required clinical trials and enter the market – i.e., overall likelihood of success. (Pa0297; Pa0341). He determined that the overall likelihood of success for a drug such as MMI-0100 was generally around 13% (Pa0325), and that based on MMI-0100's actual clinical results to date, its overall likelihood of success was closer to 4% or 5%. (Pa0367). Plaintiff's

scientific expert, Stephen Harrison, Ph.D., who was previously employed by Plaintiff (Pa1445), admitted that Dr. Frykman's 13% conclusion was not unreasonable, but said he believes the overall likelihood of success for MMI-0100 was somewhere between 10% and 30%. (Pa1150-51).⁴

D. Plaintiff's Fundraising Problems

Following the disappointing results of the LPS Challenge Study, Plaintiff had problems raising capital. (Pa0397; Pa1310-1311; Da4-5).⁵ Its fundraising steadily declined after 2015, hitting a low point in 2018, when (prior to the filing of the Notices in mid-December) it raised less than \$670,000. (Pa0235-49; Pa0397). To fund the Phase 2 trials, which were necessary for regulatory approval of MMI-0100, Plaintiff needed to raise millions of dollars – as much as \$40 million, according to Lander. (Pa0194).

In 2017, Moerae hired an investment banking firm, Janney Montgomery Scott ("JMS"), to help it raise \$40 million for Phase 2 trials. (Pa0389; Pa0401).

⁴ Plaintiff's discussion of this issue is misleading. (Pb14). Dr. Harrison did opine that there was a greater than 50% chance that MMI-0100 would successfully complete a *Phase 2* clinical trial, as Plaintiff notes. (Pa1448). But this does *not* equate to a 50% or greater *overall likelihood of success*. Dr. Harrison clarified at deposition that the determination of overall likelihood of success requires multiplication of the likelihood of success for each individual phase of clinical trials. (Pa1150). He did not offer an opinion, within a reasonable degree of scientific certainty, regarding the *overall likelihood of success* for MMI-0100. (Pa1150-51).

⁵ Plaintiff's appendix omits a portion of Exhibit 4 to Defendants' summary judgment motion (the excerpted transcript of the Lander deposition). The omitted portion (pp. 209-232 of the transcript) is included in Defendants' appendix (Da1-6).

The focus of the fundraising was on institutional investors, rather than HNW individuals. (Pa0401). JMS, however, was not able to raise any money. (Pa0201; Pa0204). JMS reported to Plaintiff that institutional investors were not interested in investing because of the manner in which Plaintiff was organized (i.e., it was a virtual company with only part-time consultants and no office), and because they believed the company was overvalued. (Pa0385-386; Pa0388).

After failing to raise money from institutional investors, Plaintiff turned its focus back to HNW individuals. (Pa0247). However, by April 2017, investors had become skeptical of management's claim that the science behind MMI-0100 was strong. (Pa0408; Pa0385). They were asking, if that was true, why other pharmaceutical companies were passing on Plaintiff. (Pa0407 - 414). Plaintiff did not raise remotely sufficient funds to pay for Phase 2 trials. (Pa0242-49).⁶

As cash became dangerously low in the Summer and Fall of 2018, Plaintiff's management made special efforts to raise money from its existing investors but, as noted above, raised less than \$670,000 for the entire year. (Pa0246-49). In early August 2018, Board member Scott Paseltiner wrote two of Plaintiff's larger investors, advising them that "desperate times need desperate measures" and "the company is in a very tenuous cash bind that may

⁶ The suggestion in Plaintiff's brief that Plaintiff was "poised" to begin a Phase 2 clinical trial in 2018 is without any support in the record. (Pb15).

very negatively impact the IP portfolio.” (Pa0465). Pasetiner said that Plaintiff needed \$100,000 “to be wired preferably today, tomorrow at the latest.” (Pa0465). Neither of these investors, however, agreed to contribute any additional funds. (Pa0245-49). Lander admitted that by Fall 2018, she was not finding new HNW investors and that she had possibly raised as much money as she could from Plaintiff’s existing investors. (Pa0213).

Two other individuals that declined to invest further in Plaintiff in 2018 were John MacIntosh and Vernon Nagel. (Pa0957-63; Pa0247-49)). MacIntosh, whose last investment was in 2015 (Pa0957), was among several investors who questioned the viability of Plaintiff as it struggled to attract investments or pharmaceutical partnerships, long before the Notices were filed. (Pa0413). Nagel, whose last investment was in 2017 (Pa0962), had expressed his concerns regarding MMI-0100 in even starker terms, suggesting that either “the technology is suspect or the valuation is too high.” (Pa0819). In the carefully-worded certifications submitted by MacIntosh and Nagel, upon which Plaintiff relies (Pb27-28), neither actually states that they would have invested further in Plaintiff had the Notices not been filed. (Pa0957-63). Only one of Plaintiff’s investors – Adam Sackstein – has made that claim. (Pa0965-66). According to Sackstein, he “would have made an additional investment . . . in the \$50,000 to \$100,000 range.” (Pa0966).

In addition to seeking funds from individual investors, Plaintiff tried unsuccessfully to attract pharmaceutical companies to partner with it or license its patents. Plaintiff approached approximately sixty (60) pharmaceutical companies, but not one chose to invest, partner or license. (Pa0207). According to Lander, some of these companies were reluctant to commit to Plaintiff or MMI-0100 without further clinical trials. (Da3-6; Pa0207). Lander thought the pharmaceutical industry, especially large pharmaceutical companies, were not willing to invest in or partner with Plaintiff because they did not understand the science behind MMI-0100. (Pa0212; Pa0426-29).

As a result of Plaintiff's inability to raise capital, its financial condition deteriorated significantly *before* the Notices were filed. (Pa0483). Between December 31, 2015 and December 31, 2018, Plaintiff's cash balance decreased from \$1,568,512 to \$100,395, and its net worth declined from (-\$9,550,714) to (-\$19,220,710). (Pa0473; Pa0483). Plaintiff, citing to a certification of its Treasurer/Controller, argues that these numbers do not account for "the increase in value of [Plaintiff's] drugs resulting from testing and research." (Pb19; Pa1727). But Plaintiff cites no support for the notion that MMI-0100 or any other drug in its portfolio increased in value during this period. Plaintiff also cites to statements by its Treasurer/Controller to suggest that private investment was not actually diminishing between 2015 and 2018. (Pb17-18). But the facts

are in the record in black and white – of the roughly \$19 million in total investments, less than \$1.3 million was raised in 2017, and less than \$670,000 in 2018. (Pa0235-49). Plaintiff’s board member, Paseltiner, acknowledged that the majority of the \$19 million was raised prior to 2015, and that private investment decreased between 2015 and 2018 because of the finding in the LPS Challenge Study that MMI-0100 did not demonstrate a statistically significant effect on study participants, and because of “investor fatigue.” (Pa0397; Pa1709; Pa0383-84).

E. Plaintiff’s Outstanding Fees and Expenses to McCarter

Over the course of McCarter’s 19-month representation, Plaintiff ran up an outstanding balance of over \$837,000 in unpaid fees and expenses. (Pa0489). This included a substantial amount of out-of-pocket expenses (\$383,000), consisting primarily of payments McCarter advanced to attorneys and agents in foreign countries to prosecute Plaintiff’s patents and then billed to Moerae for reimbursement. (Pa1153-54). As Plaintiff fell substantially behind on payments, McCarter contacted Plaintiff to try to resolve the outstanding balance. (Pa0529-538). As it had done in the past, Plaintiff repeatedly promised to pay the outstanding balance, claiming that additional significant investments were imminent. (Pa0540; Pa0172). Unfortunately, the promised payments were never made, except for small payments, which did not meaningfully address the

underlying debt. (Pa0170).

By late September 2018, McCarter attorney Joseph Lubertazzi became involved in the effort to resolve Plaintiff's outstanding balance. (Pa0553). Moerae submitted a proposed promissory note containing a payment schedule for the outstanding fees and expenses. (Pa0558-565). Lubertazzi spoke to Plaintiff's Treasurer/Controller, Neil Murakami, about a 25-month payment schedule, and requested a security interest in Plaintiff's patents to secure Plaintiff's obligation. (Pa0569; Pa0572). Plaintiff's long-time corporate counsel, Cooley LLP, advised Plaintiff regarding McCarter's request for a security interest, payment schedule and terminating McCarter. (Pa0216). Plaintiff refused to agree to a security interest or offer any collateral. (Pa0572). McCarter then proposed a revised promissory note with a new payment schedule and without reference to a security interest. (Pa0582-585).

However, as McCarter was insisting on a written commitment to a payment schedule, Plaintiff failed to persuade its investors to contribute toward paying off Plaintiff's debt to McCarter. In a November 2018 email to an investor, Paseltiner admitted that Plaintiff was in need of "interim financing very soon or, in my opinion, it very well may not make it." (Pa0416). Later that same month, Lander emailed Plaintiff's approximately 70 investors to ask that they each contribute \$10,000 in order "to get us through mid-January." (Pa0419).

Only \$70,000 was raised in response to this appeal from Lander, \$30,000 of which came from Lander and Paseltiner. (Pa0247; Pa0470).

F. Plaintiff's Termination of McCarter

A week after McCarter submitted a proposed promissory note (Pa0582) and while McCarter thought negotiations were continuing, Plaintiff sent a letter to Lubit on December 7, 2018, terminating McCarter effective immediately, and replacing it with Cooley (the "Termination Letter"). (Pa0587-90). The Termination Letter requested that McCarter transfer all patent-related electronic data and physical files to Cooley, provide Cooley with a report regarding upcoming filing deadlines, and instruct all foreign attorneys to begin directing invoices to Cooley. (Pa0587-90). McCarter later learned during discovery that Plaintiff had been discussing its termination with Cooley for at least a month prior to the Termination Letter (Pa0216), and that Cooley had in fact sent Plaintiff a signed engagement letter on November 10, 2018. (Pa0607).⁷

G. The Notices

After receiving the Termination Letter, Lubit consulted with attorneys within McCarter, conducted research on relevant law relating to charging liens, and spoke to the office of the Secretary of State of Delaware regarding

⁷ These facts disprove Plaintiff's claim that McCarter was "still representing" Plaintiff when it filed the Notices on December 17, 2018. (Pb1).

McCarter's options. (Pa0593).⁸ After Lubit explained that McCarter wanted to place an attorney's lien against a client's patents, the Delaware representative advised her that McCarter could file a UCC-1, which would provide a security interest in the patents for notice but not enforcement purposes. (Pa0161-62). Based on this advice and her research, Lubit believed she could also file a notice with the USPTO. (Pa0593; Pa0599).

On December 17, 2018, Lubit filed the Notices – a UCC-1 with the Delaware Secretary of State as to Plaintiff's patents and patent applications (the "Patents"), and a notice with the USPTO regarding the UCC-1. (Pa0617-625). By filing the Notices, Lubit sought to give public notice of McCarter's charging lien in the Patents. (Pa0170). McCarter stated in the UCC-1 that it had a security interest in Plaintiff's Patents for unpaid attorneys' fees and expenses. (Pa0618).⁹ The Notices had no impact on Moerae's ownership and use of the Patents. (Pa0631). McCarter notified Plaintiff within ten days after it had filed the

⁸ Plaintiff argues that Lubit filed the Notices "despite advice" from one colleague, Curtis Johnson, Esq. (Pb25). In reality, Johnson expressed a view regarding rights under the UCC, and referred Lubit to another colleague, Lisa Bonsall, Esq., who had experience with attorney's liens. (Pa1896). Bonsall advised that the Notices should be filed to protect McCarter's right to payment. (Pa1892).

⁹ Although not reflected on the face of the UCC-1, a contemporaneous e-mail from a McCarter paralegal confirms that the following statement was entered into the "Miscellaneous" data field when the UCC-1 was electronically filed: "For outstanding unpaid legal fees and disbursements for all US and foreign patent matters in the amount of \$873,435.97." (Pa0619).

Notices. (Pa0628).

On January 18, 2019, Lander sent an email to McCarter asserting that the Notices were interfering with fundraising efforts, and asking that they be withdrawn. (Pa0836). McCarter rejected the request but expressed its willingness to continue discussions regarding Plaintiff's indebtedness. (Pa0835-36). Plaintiff promptly sought advice from Cooley on the issue. (Pa0960). On February 8, 2019, Cooley advised Plaintiff that there was "nothing that legally prevent[ed]" McCarter from proceeding with the Notices. (Pa0950). Two months later, in an April 2, 2019 email exchange, Cooley appears to have changed its advice. (Pa0844).

H. Notices Not Disclosed to Prospective Investors or Partners

Plaintiff did not disclose the Notices, or the underlying McCarter lien, to prospective investors, partners or licensees, except for one prospective partner, whom Lander admitted did not partner with Moerae because it had other projects on which it wanted to focus. (Pa206; Da1-3). Lander did not know if any prospective investor was aware of the lien. (Pa0215). She claimed that Plaintiff disclosed its debt to McCarter to some prospective investors, but could not remember which ones. (Da3). She admitted that no prospective investor or partner ever told Plaintiff that it did not invest in Plaintiff because of the McCarter lien or the collection proceeding commenced by McCarter. (Pa0214).

As to existing investors, Lander claimed that she notified some by telephone in early 2019 (Pa0200), but Plaintiff did not provide written notice to all existing investors until August 16, 2019. (Pa0468-71). Lander also was not able to identify any individual or entity that refused to do business with Plaintiff because of the Notices. (Pa0217). Although Plaintiff now claims that its disclosure of the Notices to its institutional investor, Privateer, caused the loss of a “potentially huge . . . capital-raising opportunity” with an investment company (Fund Rx), to which it was introduced by Privateer (Pb20-21), there is no evidence that Fund Rx was going to invest in Plaintiff, nor is there evidence that the Notices caused it not to invest.

Plaintiff took no action to remove the Notices until February 2020, when its attorney filed a UCC-5 statement with the Delaware Secretary of State contending that the UCC-1 was improper, a procedure available to it from the outset. (Pa0635). There is no evidence that it ever took any action to remove the notice filed with the USPTO.

I. McCarter Recovers Judgment Against Plaintiff

On January 28, 2019, McCarter served Plaintiff with a pre-action notice offering it the opportunity to arbitrate the fee dispute. (Pa0638-39). Plaintiff did not elect arbitration. (Pa0713). On March 20, 2019, McCarter sued Plaintiff in the Superior Court, Essex County (the “Collection Action”). (Pa0641). Plaintiff

filed an answer, without any affirmative claims, on June 24, 2019. (Pa0649). Eight months later, on February 21, 2020, Plaintiff filed a motion for leave to assert a counterclaim against McCarter and third-party complaint against Lubit in relation to the Notices. (Pa0658-73). Plaintiff's proposed amended pleading included claims for tortious interference, violation of the UCC, and breach of fiduciary duty, but did *not* include claims for malpractice or slander of title. (Pa0669-73). Plaintiff's motion for leave was filed one month *after* the extended discovery end date. (Pa0658; Pa0690; Pa0713). Two weeks later, McCarter moved for summary judgment. (Pa0687).

The trial court heard oral argument on Plaintiff's motion for leave and McCarter's motion for summary judgment on June 5, 2020. (Pa0685). In opposition to Plaintiff's motion, McCarter argued that it was a belated and futile attempt to protract litigation that was coming to an end, and that Plaintiff had failed to justify its decision to wait until February 2020 to raise the claims, when it had been aware of the Notices in December 2018. (Pa2111; Pa0692). Responding to Plaintiff's argument that McCarter would not be prejudiced because the proposed claims arose from the same facts as McCarter's claim for unpaid fees, McCarter noted that its claims arose from services rendered *before* the Notices were filed, and Plaintiff's proposed claims related to damages purportedly sustained *after* the Notices were filed. (Pa2111; Pa0692).

In rendering its decision on Plaintiff's motion to amend, the trial court recited the positions advanced by the parties and expressed its agreement with McCarter's position that its claims and Plaintiff's claims arose from distinct time periods. (Pa0692). This was not, however, the basis upon which Plaintiff's motion for leave was denied.¹⁰ The court denied Plaintiff's motion because it was untimely – "I just feel that this was too late in the action after this action effectively was decided." (Pa0693). The court noted that Plaintiff could pursue its allegations in a new lawsuit against McCarter and Lubit, in which event the court in the new lawsuit would determine whether Plaintiff's claims were barred by the ECD, res judicata, or the statute of limitations.¹¹ (Pa0693). The court granted McCarter's motion for summary judgment in the amount of \$837,524.19, together with pre- and post-judgment interest, and fees and costs (the "Judgment"). (Pa0700; Pa0489).

¹⁰ Attempting to argue otherwise, Plaintiff quotes misleadingly from the oral argument transcript. (Pb37). Plaintiff truncates the quote to suggest that the trial court's expression of agreement followed immediately after its statement that McCarter argued "that the claims did not arise out of the same litigation [sic]," when in fact, it followed McCarter's explanation of the time period in which fees were incurred. (Pa0692). Plaintiff also implies that the quoted language was contained in the trial court's decision, but it was actually contained in the trial court's summary of the parties' arguments, which preceded its decision. (Pa0692-93).

¹¹ Plaintiff asserts throughout its brief that the trial court and this Court recognized its right to file a new action against Defendants, but in each instance, fails to acknowledge that such right was expressly conditioned upon a determination regarding the ECD. (Pb2; Pb37; Pb45; Pb46).

This Court affirmed both orders. (Pa0704). The Court determined that it was “proper for the motion court to rely on [Plaintiff’s] inexplicable delay in asserting its claim, and the untimeliness of [Plaintiff’s] application, in denying the motion to amend to add the counterclaim.” (Pa0741). Further, this Court noted that “[a]lthough it is a significant factor [if] the pleader will lose a cause of action under the entire controversy doctrine if the motion for leave to amend is . . . denied, it is ‘not necessarily the dispositive consideration, particularly where the assertion is so late as to prejudice other parties.’” (Pa0736 (citations omitted)). The Court affirmed the summary judgment order because McCarter established a *prima facie* showing that its fees were fair and reasonable, and Plaintiff presented no competent evidence to the contrary. (Pa0732).

At McCarter’s request, on September 22, 2021, the Collection Action court appointed a receiver to assemble Plaintiff’s Patents and sell them to satisfy the Judgment. (Pa0743). The receiver levied on the Patents, gave notice and conducted an auction on December 20, 2022. (Pa0754). McCarter, the only bidder, purchased the Patents for \$100. (Pa0757).

J. Current Status of Plaintiff

According to Lander, Plaintiff is “defunct.” (Pa0220). It has not been dissolved, but shareholders have been notified that it is being wound down and the Board has approved a resolution to dissolve the company. (Pa0763-79).

Several of Plaintiff's shareholders formed a litigation funding company to fund the present litigation. (Pa2311). Although all shareholders were invited to participate, only a small subset chose to do so. (Pa0788-93). In addition, two of Plaintiff's attorneys were given an equity interest in the litigation funding company as payment for legal services. (Pa0790-91; Pa0798).

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS BASED ON THE ECD. (Pa0092).¹²

Plaintiff is incorrect that the applicable standard of review is de novo. (Pb29). Although the de novo standard is generally applied for the grant of summary judgment, a "mixed standard of review" applies in this case, where the summary judgment was based on the ECD. Francavilla v. Absolute Resolutions VI, LLC, 478 N.J. Super. 171, 178 (App. Div. 2024). The Court applies de novo review to "the *law* guiding the trial court's determination as to the entire controversy doctrine." Id. (emphasis added). However, because the doctrine is

¹² In addition to granting Defendants' summary judgment motion, the trial court denied Plaintiff's partial summary judgment motion (the "Denial Order"). Although Plaintiff referred to the Denial Order in its Appellate Division Case Information Statement, it is not specifically identified in Plaintiff's Notice of Appeal (Pa0116), addressed in Plaintiff's appellate brief, or included in Plaintiff's Appendix. To the extent that Plaintiff intended to appeal from the Denial Order, Plaintiff has abandoned that aspect of its appeal. See 539 Absecon Blvd., LLC v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div. 2009) (an issue identified in a notice of appeal, but not subsequently briefed, is abandoned).

an equitable principle “left to judicial discretion,” the Court applies an abuse of discretion standard for the trial court’s decision to apply the ECD based on the factual circumstances of a particular case. Id. The Court will disturb this discretionary determination only if it is “manifestly unjust” under the circumstances. Id. For the reasons set forth in Section I(A), infra, the SJ Order should be affirmed because the trial court correctly identified the applicable law and appropriately exercised its discretion in applying the ECD to this case.

A. Plaintiff’s Claims are Barred by the ECD. (Pa0101).

The ECD requires litigants to “present all affirmative claims and defenses arising out of a controversy” in a single lawsuit. Olds v. Donnelly, 150 N.J. 424, 431 (1997); accord Smith v. Red Top Taxicab Corp., 111 N.J.L. 439, 440-41 (1933) (“No principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon.”). When a litigant fails to adhere to this requirement by attempting to assert a related claim in a subsequent lawsuit, the omitted claim is precluded. R. 4:30A. “The doctrine reflects a basic concept of judicial administration that is of constitutional dimension.” DiTrollo v. Antiles, 142 N.J. 253, 267 (1995) (citing N.J. Const. (1947), art. VI, § 3, ¶ 4).

The ECD is intended to “encourage comprehensive and conclusive litigation determinations,” K-Land Corp. No. 28 v. Landis Sewerage Auth., 173

N.J. 59, 70 (2002) (quotation marks omitted), “avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy,” William Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super. 277, 292-93 (App. Div. 1977) (quoting Ajamian v. Schlanger, 14 N.J. 483, 485 (1954)), and promote party fairness, judicial economy, and judicial efficiency, Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 114-15 (2019). An equitable doctrine, it is applied to the particular facts of each case in a manner consistent with these objectives. Id.

In determining whether an omitted claim is barred by the ECD, the “central consideration is whether the claims . . . arise from related facts or the same transaction or series of transactions.” DiTrollo, 142 N.J. at 267. For the doctrine to apply, the claims must be part of “a single larger controversy,” and “arise from interrelated facts,” but they need not share “common legal issues.” Dimitrakopoulos, 237 N.J. at 109 (quoting DiTrollo, 142 N.J. at 271).

In addition, courts consider whether the litigant had a “fair and reasonable opportunity” to litigate the omitted claim in the first proceeding. Id. at 99-100. The ECD therefore does not bar unknown or unaccrued claims, id. at 99, nor claims over which the first court lacked jurisdiction, Watkins v. Resorts Int’l Hotel & Casino, 124 N.J. 398, 413 (1991). For purposes of the ECD, a claim accrues “when a plaintiff knows or, through the exercise of reasonable diligence,

should know of the basis for a cause of action against an identifiable defendant,” Dimitrakopoulos, 237 N.J. at 116 (quoting The Palisades at Fort Lee Condo. Ass’n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 447 (2017)), or for legal malpractice actions, the date upon which “the essential facts of the malpractice claim are reasonably discoverable.” Id. at 115-16 (quoting Vastano v. Algeier, 178 N.J. 230, 242 (2003)).

However, if a claim is known, accrued, and not subject to a jurisdictional barrier in the first proceeding, and is nonetheless not asserted in the first proceeding, then the ECD will bar its assertion in a subsequent proceeding. DiTrollo, 142 N.J. at 274. The fact that a litigant did not realize that their failure to assert the claim in the first proceeding would bar them from asserting it later does not alter this outcome. See, e.g., Kozyra v. Allen, 973 F.2d 1110, 1113 (3d Cir. 1992) (doctrine barred a litigant’s personal injury claim because she did not assert it in earlier action relating to the same motor vehicle accident, even though she never consulted with an attorney or participated in the earlier action). If a litigant *attempts* to assert the omitted claim in the first action by seeking leave to amend its pleadings, but is denied leave because its motion is untimely, the ECD precludes the litigant from asserting the omitted claim in a subsequent proceeding. Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

In Fisher, the plaintiff commenced the first proceeding for a declaratory

judgment regarding an easement. Id. at 463. Eighteen months later, she moved for leave to amend her complaint to assert new claims based on new information relating to the easement, obtained through a title search. Id. at 465. The trial court denied the motion because the information revealed through the title search was available to her and should have been obtained earlier in the litigation. Id. The plaintiff commenced a second proceeding relating to the easement while the first was still pending. Id. at 466. The trial court dismissed the second proceeding and this Court affirmed, holding that the subsequent claims were barred by the ECD because they arose from the same transaction at issue in the first proceeding, and the plaintiff had a fair and reasonable opportunity to assert them then. Id. at 469-70. The fact that the plaintiff was not actually permitted to litigate the claims in the first proceeding was the result of her failure to obtain a title search and file a timely motion to amend; it did not shield the claims from application of the ECD. Id. at 470-71. Addressing the trial court's denial of leave to amend in the first proceeding, the Court explained:

Although it is a significant factor that the pleader will lose a cause of action under the entire controversy doctrine if the motion for leave to amend the pleadings is denied, it is not necessarily the dispositive consideration, particularly where the assertion is so late as to prejudice other parties.¹³

¹³ This language from Fisher was cited by this Court in affirming the denial of Plaintiff's motion for leave in the Collection Action (Pa0736), further illustrating that the trial court's dismissal of Plaintiff's claims based on the ECD in this action was not in any way an unforeseen or unfair result.

Id. at 467 (quotation marks omitted).

Similarly, in William Blanchard Co. v. Beach Concrete Co., the trial court was presented with various applications that were, “as a matter of substance . . . motions to amend.” 150 N.J. Super. 277, 298-99 (App. Div. 1977). The court concluded that the motions were untimely, and that they would be barred by the ECD if asserted in any subsequent proceeding, and therefore dismissed the claims with prejudice. Id. at 290-91. Judge Pressler, writing for a unanimous panel of this Court in affirming, explained that although the ECD determination was typically made in the subsequent proceeding, the outcome was “eminently correct.” Id. at 283, 298.

Finally, and of particular import to this appeal, a client’s failure to assert legal malpractice claims in an earlier collection action brought by its attorney will result in preclusion under the ECD if the claim had accrued at the time of the collection action, and the client had a fair and reasonable opportunity to litigate the claim in the collection action. Dimitrakopoulos, 237 N.J. at 119-20. In Dimitrakopoulos, the attorney filed a collection action and, sixteen months later, secured a judgment against the client. Id. at 103-04. Three years after the judgment, the client asserted legal malpractice claims. Id. at 104. The attorney moved to dismiss on the basis that the claims were barred by the ECD. Id. The trial court granted the motion and this Court affirmed. Id. at 104-05. The

Supreme Court determined that the record was inadequate to resolve a dispute between the parties regarding the accrual date of the malpractice claim, and to determine whether the client had a fair and reasonable opportunity to litigate the claim, and therefore remanded for further proceedings. Id. at 119-21.

Here, the summary judgment record establishes definitively that Plaintiff's claims against Defendants (1) arose from the same occurrence as the claims litigated in the Collection Action, (2) accrued prior to the Collection Action, and (3) could have been litigated in the Collection Action. The trial court correctly identified controlling precedent regarding the ECD (Pa0100-01), and Plaintiff does not argue otherwise. The *de novo* standard of review therefore does not apply. Francavilla, 478 N.J. Super. at 178. Plaintiff's arguments are each directed to the trial court's *application* of the ECD to the particular facts of this case (Pa010-03), which is an exercise of judicial discretion reviewed under the abuse of discretion standard. Id. For the reasons set forth below, the trial court did not abuse its discretion, or otherwise err, in determining that the ECD bars Plaintiff's claims.

First, Plaintiff's claims in this action plainly arise from the same nucleus of facts as the Collection Action, and Plaintiff has previously conceded this point. (Pa0662) (wherein Plaintiff stated, in moving for leave to amend in the Collection Action, that its proposed claims against Defendants "[arose] out of

the same factual allegations that give rise to [McCarter's] claim").¹⁴ Plaintiff's present (revised) position to the contrary is in direct conflict with Dimitrakopoulos, wherein the Court observed that "legal malpractice counterclaims are frequently asserted as counterclaims in attorney collection actions," and concluded that the collection and malpractice claims before it "clearly" arose from the same factual nexus – the firm's representation of the client. 237 N.J. at 113, 119. Plaintiff attempts to distinguish Dimitrakopoulos as involving a "garden variety" legal malpractice claim (Pb44), but the Court made no such distinction. Plaintiff argues that the post-engagement filing of the Notices was a distinct factual occurrence from the legal services provided by Defendants, but forgets that its malpractice and fiduciary duty claims against Defendants in this action encompass allegations of misconduct beginning at the *outset* of Defendants' engagement in 2017 (Pa0044), and that it contends (albeit incorrectly) that the Notices were filed *during* the representation (Pb1-2). The trial court correctly concluded that these claims all "arise out of the same transaction or occurrence, [Defendants'] representation of Plaintiff." (Pa0101).

Second, as this Court previously concluded in affirming the denial of Plaintiff's motion to amend, Plaintiff's claims accrued months before the

¹⁴ Plaintiff also argues that this case raises distinct "legal issues" from those raised in the Collection Action (Pb42), but commonality of legal issues is not required for the ECD to apply. Dimitrakopoulos, 237 N.J. at 109.

Collection Action was commenced:

. . . [Plaintiff] was aware [McCarter] filed the UCC-1 months prior to the filing of [McCarter's] complaint in March 2019, the filing of [Plaintiff's] answer in June 2019, and Lubit's January 30, 2020 deposition. [Plaintiff] knew [McCarter] intended to file the UCC-1 and [Plaintiff] believed it would sustain damages from the filing, as early as September 2018 . . .

[McCarter] did not file the UCC-1 until December 2018, and [Plaintiff] was aware of the filing on or prior to January 18, 2019 . . .¹⁵

Additionally, whether [McCarter] held a proper security interest in [Plaintiff's] intellectual property presented an issue of law, which [Plaintiff] had the ability to address at any time after it learned [McCarter] filed the UCC-1.

(Pa0737-38). Plaintiff knew, at a minimum, “the essential facts” of its claims against Defendants by no later than January 2019, and was in fact receiving advice from Cooley regarding the Notices by early February 2019. (Pa0950). Its claims had therefore accrued at the time the Collection Action was commenced in March 2019. Even if the claims did not accrue until *April 2019*, as Plaintiff implausibly suggests (Pb32-33), they still accrued early on *during* the Collection Action, two months *before* Plaintiff filed its answer in June 2019 (Pa0734), and the ECD exception for unaccrued claims does not apply. DiTrollo, 142 N.J. at 273-74 (explaining that the ECD will not apply if the claim accrued or became

¹⁵ In fact, Defendants informed Plaintiff of the filing of the UCC-1 a month earlier, on December 27, 2018. (Pa0628).

known *after* the first proceeding).

Third, despite its failure to do so, Plaintiff had a “fair and reasonable opportunity” to litigate these claims in the Collection Action. The claims were fully known and accrued, and there was no jurisdictional barrier. Plaintiff nonetheless chose not to assert the claims in its June 2019 answer to the complaint in the Collection Action, or at any time between then and its untimely motion to amend in February 2020, which was filed one month *after* the extended discovery end date. (Pa0658; Pa0690). Plaintiff’s contention that the ECD does not apply if a litigant *tried* to assert the claims through an unsuccessful motion to amend is simply wrong. Fisher, 270 N.J. Super. at 467-70 (ECD barred claims that were the subject of an unsuccessful motion to amend in earlier proceeding); William Blanchard Co., 150 N.J. Super. at 298-99 (same). Application of the ECD in Fisher, where the plaintiff’s untimely motion was based on her belated discovery of *previously unknown facts*, removes any doubt that it was properly applied here, where Plaintiff’s delay in asserting its claims based on *known facts* was, as this Court previously observed, “inexplicable.” (Pa0741). The possibility that denial of Plaintiff’s motion to amend would result in the claims later being barred by the ECD was expressly contemplated by the Collection Action court (Pa0693), and by this Court in affirming the denial (Pa0736). That possibility did not require the Collection Action court to grant

Plaintiff's motion, nor did the Collection Action court's denial of the motion require the trial court in this case to waive application of the ECD.

Further, the fact that the Collection Action court expressly held that Plaintiff's right to assert these claims in a subsequent proceeding would be *subject to* the ECD (Pa0693), and that this Court acknowledged that the ECD may ultimately bar the claims (Pa0736), distinguishes this case from Dilorio v. Structural Stone & Brick Co., relied upon by Plaintiff. 368 N.J. Super. 134 (App. Div. 2004). In that case, the ECD did not apply because the trial court denied a motion to amend in the first proceeding, and "expressly preserved" the plaintiff's right to assert the claim in subsequent litigation. *Id.* at 139. The Collection Action court did no such thing; to the contrary, it made clear that the issue of whether Plaintiff's claims would be barred by the ECD was to be decided in the subsequent proceeding. (Pa0693).

Plaintiff also argues that application of the ECD in this case did not promote certain underlying objectives of the doctrine – specifically, to prevent litigants from withholding claims for tactical reasons, and judicial economy. First, Plaintiff cites no support for its claim that preventing gamesmanship is the "primary purpose" of the ECD. (Pb30). The ECD "has three fundamental purposes":

- (1) the need for complete and final disposition through the avoidance of piecemeal decisions;
- (2) fairness to parties to the

action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay.

Francavilla, 478 N.J. Super. at 179 (quotation marks omitted). Evidence of gamesmanship, though relevant to the “fairness” purpose, is neither required nor dispositive. Here, Plaintiff argues that its motion to amend in the Collection Action shows that it was not engaging in gamesmanship, but that is not so. As in Fisher and William Blanchard Co., Plaintiff elected to sit on its known and accrued claims for an unreasonably long period of time – *eleven months* – before moving for leave to amend. Plaintiff’s motivations for doing so, as this Court has previously noted, are unknown. (Pa0736).

Second, Plaintiff’s claim that application of the ECD in this case did not promote judicial efficiency because the parties had already participated in two years of litigation is without merit. See Oliver v. Ambrose, 152 N.J. 383, 403 (1998) (dismissing claims based on the ECD, where the defendant did not move for summary judgment based upon the ECD until nearly *four years* into the litigation, and explaining that “judicial economy is only one consideration, and such concerns cannot override the doctrine’s overall objective of fairness to litigants”). Discovery in this case revealed further information pertinent to Defendants’ ECD defense – e.g., that Plaintiff consulted with Cooley regarding the Notices in early 2019 – and created a more complete record upon which the trial court could analyze the ECD. As the trial court correctly recognized, the

fact that judicial and party resources were devoted to two years of litigation does *not* mean, once it is determined that the ECD applies, that further resources should be spent on a lengthy and unnecessary trial. (Pa0103). Had the trial court declined to apply the ECD and allowed this matter to proceed to trial, the result would have been a clear disservice to the goal of judicial economy.

Finally, even if Plaintiff's belated attempt to assert claims against Defendants in the Collection Action could immunize those claims from application of the ECD, the malpractice, slander of title and constructive trust/equitable lien claims would still be barred by the ECD, as they were not included in Plaintiff's proposed amended pleading. (Pa0669-73).

B. Plaintiff's Claims Against Lubit Are Barred by the ECD. (Pa0102).

Plaintiff argues that the trial court erred in dismissing the claims against Lubit because she is a "new party" for whom the ECD does not apply. But the claims asserted in this case against McCarter and Lubit are identical, and they are barred as to *both parties* for the same reason – i.e., they arise from the same nucleus of facts that was at issue in the Collection Action.¹⁶ See Kidd v. Stebbins, No. A-1329-05T1, 2007 WL 461011, at *1 (N.J. Super. Ct. App. Div.

¹⁶ Plaintiff's allegation that its relationship with Lubit "had a significantly different dimension" than its relationship with McCarter is legally irrelevant. (Pb47). The ECD bars Plaintiff's claims against both parties because they arise from the same factual nexus, regardless of the alleged "dimension" of any particular relationships.

Feb. 14, 2007) (ECD barred plaintiff's subsequent claims against three doctors, who were not parties to first proceeding against hospital and other doctors, because the claims arose from the same factual nexus) (Da9); In re Est. of Gabrellian, 372 N.J. Super. 432, 444 (App. Div. 2004) ("It is the factual circumstances giving rise to the controversy itself, rather than the commonality of claims, issues or parties, that triggers the requirement of joinder to create a cohesive and complete litigation." (quotation marks omitted)); Maertín v. Armstrong World Indus., Inc., 241 F. Supp. 2d 434, 456 (D.N.J. 2002) ("[T]hough the parties and the claims in the second suit may be different than those in the first suit, the second suit may still be barred if it concerns the series of transactions that are already at issue in the first suit.").¹⁷ The ECD bars the claims against Lubit not based on non-joinder of parties, but based on non-joinder of *claims*. The trial court therefore correctly determined that the ECD bars the claims against Lubit. (Pa0102).

In arguing for a contrary result, Plaintiff misconstrues the import of the

¹⁷ Although the issue was not specifically addressed in Dimitrakopoulos, the client in that case asserted claims in a subsequent proceeding against the law firm that brought the earlier collection action, as well as individual partners who were not parties to the collection action. 237 N.J. at 102-04. In remanding for further proceedings to determine the accrual date of the client's claim and other issues, the Court appears to have assumed that if the ECD barred the claims against the law firm, it would bar the claims against the partners as well. Id. at 120-21. And in fact, upon remand, the trial court dismissed the claims against all parties. (Da7).

elimination of mandatory party joinder under Rule 4:30A. The 1998 amendment to the Rule, limiting the reach of the ECD to non-joinder of claims, means that a litigant is no longer required to include *related claims* against *different parties* in a single proceeding. C.P. v. Governing Body of Jehovah’s Witnesses, 477 N.J. Super. 129, 140 (App. Div. 2023) (ECD did not bar negligence claim against religious organization where plaintiff previously asserted related but distinct claims against her family members for sexual abuse); Hobart Bros. Co. v. Nat’l Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div. 2002) (ECD did not bar environmental insurance coverage claim against insurance companies where plaintiff previously asserted related but distinct claims against different parties). It does *not* mean that a litigant can assert the *same claim* in successive suits against different parties, as Plaintiff has done here. This would invite precisely the type of gamesmanship that the ECD forbids – a litigant could sue a law firm or hospital for malpractice, strategically hold back its claim against the individual attorney or doctor, and assert the same claim against the individual in a second proceeding if it is unhappy with the results of the first.

Finally, even if the ECD permitted a litigant to assert the same claim in successive suits against different parties, the ECD would still require dismissal of Plaintiff’s claims against Lubit because she and McCarter are, in all relevant respects, the same party. See Eule v. Eule Motor Sales, 34 N.J. 537, 542 (“[I]t

is elementary that each partner is the agent of the other and of the partnership.”). In applying preclusive doctrines, New Jersey courts have consistently recognized that a law firm and its members, and agents and principals generally, are in effect a single party. Feinberg v. Stasilitis, 98 N.J.L. 74, 76 (1922) (applying res judicata to bar the plaintiff attorney’s collection action against a client because the issue was litigated in an earlier action involving plaintiff’s law partner and they were “substantially the same parties”); Larken Assocs., L.L.C. v. P&H Clinton P’ship, No. A-4164-09T4, 2012 WL 1537421, at *17 (N.J. Super. Ct. App. Div. May 3, 2012) (applying collateral estoppel to bar subsequent claims against a law firm because the plaintiff asserted the same claims against the law firm’s client in a prior proceeding and the law firm and the client were “virtually the same party”) (Da11).

C. Defendants Are Not Judicially Estopped from Invoking the ECD. (Pa0103).

The ECD was never briefed or argued in the Collection Action. McCarter never took a position on the ECD, and neither the Collection Action court nor this Court on appeal ever ruled on the ECD. Nonetheless, Plaintiff argues that Defendants are judicially estopped from invoking the ECD defense in this case. The trial court correctly rejected this argument. (Pa0103).

Judicial estoppel is an “extraordinary remedy, which should be invoked only when a party’s inconsistent behavior will otherwise result in a miscarriage

of justice.” Ali v. Rutgers, 166 N.J. 280, 288 (2000) (quotation marks omitted); accord Adams v. Yang, 475 N.J. Super. 1, 9 (App. Div. 2023) (explaining that judicial estoppel is “not a favored remedy, because of its draconian consequences,” and is to be “invoked only in limited circumstances”). “A threat to the integrity of the judicial system sufficient to invoke the judicial estoppel doctrine only arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding.” Ali, 166 N.J. at 287 (quotation marks omitted). For judicial estoppel to apply, it is necessary for a court to have “accepted” the inconsistent position, or for the inconsistent position to have “helped form the basis” of the court’s decision. Adams, 475 N.J. Super. at 9-10, n.2.

Plaintiff’s judicial estoppel argument is based on McCarter’s opposition to Plaintiff’s motion to amend in the Collection Action. Plaintiff’s motion was governed by Rule 4:9-1, requiring the Collection Action court to consider whether the amendment would (a) cause prejudice or (b) be futile. Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010). Plaintiff argued that McCarter would not be prejudiced by the amendment because its proposed counterclaims and third-party complaint arose from the same factual nexus that gave rise to McCarter’s collection claim. (Pa0662). In response, McCarter argued that Plaintiff’s position was disingenuous insofar as the

collection claim arose during its representation of Plaintiff and the proposed claims arose after its representation. (Pa2167). McCarter argued that it would be prejudiced by the lateness of the motion, insofar as discovery was concluded and Plaintiff had been aware of the Notices all along. (Pa2167).

The Collection Action court denied Plaintiff's motion to amend because it was untimely and therefore prejudicial – "I just feel that this was too late in the action after this action effectively was decided." (Pa0693). Although the court expressed agreement with McCarter's observation that the proposed claims arose from a distinct time period than McCarter's collection claim (Pa0692), that was not the basis for its decision, nor it could have been, as the bases for denial of a motion to amend are prejudice and futility. The Collection Action court expressly *did not rule* on the ECD, noting that the issue would need to be resolved in a subsequent lawsuit. (Pa0693). This Court affirmed, restating the principle that a motion to amend can be denied where it "is so late as to prejudice other parties," and holding that it was "proper for the motion court to rely on [Plaintiff's] inexplicable delay in asserting its claim, and the untimeliness of [Plaintiff's] application, in denying the motion to amend to add the counterclaim." (Pa0736; Pa0741).

Defendants are not barred from advocating a position regarding the ECD in this case because McCarter did not advocate any position regarding the ECD

in the Collection Action, and because the Collection Court did not rule on the ECD. McCarter argued that Plaintiff's proposed amendment was untimely and would cause prejudice, and *that position* was accepted by the Collection Action court. There is thus no basis to invoke the extraordinary remedy of judicial estoppel to bar Defendants from invoking the ECD in this case.

D. Defendants Did Not Waive the ECD. (Pa0103).

Plaintiff's argument that Defendants waived their ECD defense was correctly rejected by the trial court because Defendants pled the defense in their answers to Plaintiff's original and amended complaints. (Pa0103; Pa0031; Pa0084). The sole case relied upon by Plaintiff on this point is one in which the defendant did *not* plead the ECD in its answer and engaged in over three years of litigation before moving for summary judgment on that basis. Brown v. Brown, 208 N.J. Super. 372, 376-77, 384 (App. Div. 1986). In contrast, where defendants plead the ECD defense in their answers, the defense is fully preserved. E.g., Oliver v. Ambrose, 152 N.J. 383, 403 (1998) (dismissing claims based on the ECD where the defendant asserted the ECD defense in his answer and moved for summary judgment nearly four years after the filing of the complaint); Kozyra v. Allen, 973 F.2d 1110, 1115 (3d Cir. 1992) (dismissing claims based on the ECD where the defendants asserted the ECD defense in their answer and moved to dismiss over a year later); see also Hulmes v. Honda Motor

Co., 924 F.Supp. 673, 680 (D.N.J. 1996) (rejecting claim that defendant waived ECD where it was pled in answer and defendant moved for summary judgment on that basis several years later).

II. THE SJ ORDER MAY BE AFFIRMED ON ALTERNATE GROUNDS. (Raised Below But Not Addressed By Trial Court).

If the Court were to determine that the trial court abused its discretion in applying the ECD, the SJ Order should nonetheless be affirmed on alternate grounds. See Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (“[I]f the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance.”); Liebeskind v. Mayor & Mun. Council of Bayonne, 265 N.J. Super. 389, 400 (App. Div. 1993) (disagreeing with the trial court’s summary judgment based on *res judicata*, but affirming on the basis that the claim could not “succeed on the merits”).

Here, in moving for summary judgment, Defendants identified additional reasons that Plaintiff’s claims fail as a matter of law: (a) for the absence of proximate causation; and (b) on the merits of the claims asserted. The trial court did not reach these issues due to its determination regarding the ECD, but they present an alternate basis upon which this Court can affirm the SJ Order.

A. Plaintiff Cannot Establish as a Matter of Law that Defendants’ Alleged Misconduct Proximately Caused its Injuries. (Raised Below But Not Addressed By Trial Court).

Although proximate causation is ordinarily left to the factfinder, it may be

decided as a matter of law when no reasonable jury can find that the alleged misconduct caused the alleged injury. Townsend v. Pierre, 221 N.J. 36, 60 (2015); see, e.g., Fluehr v. City of Cape May, 159 N.J. 532, 543-45 (1999) (reinstating summary judgment in favor of defendant because dangerous ocean conditions and a surfer's conduct, rather than lifeguard negligence, caused plaintiff's injury); Froom v. Patel, 377 N.J. Super. 298, 313 (App. Div. 2005) (reversing jury verdict and entering judgment dismissing legal malpractice claim because of insufficient evidence that the misconduct proximately caused plaintiff's injury).

Here, all five of Plaintiff's primary causes of action (excluding its claim for a constructive trust and equitable lien, addressed in Section II(B)(6), infra) were rooted in the allegation that the Notices caused Plaintiff's failure by preventing it from raising sufficient capital to conduct Phase 2 trials and continue as a viable company. (Pa0044-52). Although Plaintiff's malpractice claim encompasses other forms of alleged misconduct (see Section II(B)(1), infra), the harm alleged by Plaintiff is the same across each of Plaintiff's claims – i.e., the Notices were filed, and they caused Plaintiff's failure.

However, there is no evidence upon which a reasonable jury could conclude that the Notices caused Plaintiff's inability to raise the funds necessary for Phase 2 trials. As to *prospective* investors or partners, Plaintiff did not

identify a single one who would have invested or partnered but for the Notices. Plaintiff identified only one prospective partner to whom it disclosed the McCarter lien, but concedes it did not partner with Plaintiff because it had other projects upon which it wanted to focus. (Pa0206; Da1-3). As to *existing* investors, who had largely stopped investing long before the Notices were filed (see Section I(E)(1), *infra*), Plaintiff identified only one – Sackstein – who claims he would have invested an additional \$50,000 to \$100,000 but for the Notices. (Pa0966). That single investment would have fallen far short of the millions – as much as \$40 million, according to Lander (Pa0194) – necessary to fund Phase 2 trials.

More fundamentally, the assumption underlying Plaintiff's causation theory is that the Notices caused its inability to raise capital because they alerted investors to the debt Plaintiff owed to McCarter. But Plaintiff concedes that absent the Notices, it would have been obligated to disclose that debt to any individual or entity considering investment or partnership. (Da2). The debt was publicly disclosed through the lawsuit that McCarter filed three months after the Notices. (Pa0641). The Notices did not create the debt; it was created by Plaintiff's failure to pay McCarter's invoices. As Plaintiff's board member and Treasurer/Controller acknowledged in April 2019 emails, the lawsuit was "the bigger challenge," and it would ultimately entitle McCarter to file a judgment

lien. (Pa0839). This \$837,000 debt – determined by the trial court in the prior action and affirmed by this Court – existed regardless of the Notices.

In contrast to the dearth of evidence that the Notices prevented Plaintiff from raising capital, the record is replete with evidence that its inability *predated* the Notices, and was caused by matters wholly unrelated to Defendants. It is undisputed that Plaintiff’s fundraising steadily declined after 2015 and hit a low point in 2018, prior to the filing of the Notices. (See Section I(E)(1), infra). Paseltiner, Plaintiff’s board member, admitted that “two words” explained the post-2015 decline: “statistically insignificant.” (Pa0397). The finding in the LPS Challenge Study that MMI-0100 had a statistically insignificant effect on study participants “threw up a curtain or a wall for investment.” (Pa0397). Lander confirmed this. (Da4-5). In addition to the unfavorable finding relating to efficacy, the LPS Challenge Study also revealed a concerning safety risk involving bronchoconstriction, or decreased airflow through the lungs. (Pa0316-317). Here again, although Plaintiff disputes that a safety risk was identified, the study results were available to investors. Dr. Frykman concluded that the safety risk, coupled with the finding regarding the lack of efficacy, “tarnished MMI-0100 as a pharmaceutical asset to prospective investors, strategic partners, and/or acquirers.” (Pa0325).

Although Plaintiff claims to have rebutted this “statistically insignificant”

finding in May 2018 (Pb14),¹⁸ it nonetheless had a clear impact on Plaintiff's ability to raise capital from investors or partners between 2016 and 2018. (Pa0397). When Plaintiff hired JMS to raise \$40 million for Phase 2 trials in 2017, JMS was unable to raise a penny. (Pa0401; Pa0201; Pa0204). Plaintiff's own attempts in 2018 were similarly unsuccessful – Paseltiner was unable to persuade two of Plaintiff's larger investors to invest \$100,000 in August 2018 (Pa0465; Pa0235), and Lander's attempt three months later to raise \$700,000 from all investors yielded only \$70,000. (Pa0419; Pa0247; Pa0470). Despite contacting approximately 60 pharmaceutical companies about partnership, not a single one agreed to partner with Plaintiff. (Pa0207). Only one of these pharmaceutical companies knew about the Notices, and it chose not to partner with Plaintiff because it had other projects on which it wanted to focus. (Pa0206; Da1-3).

In addition, “investor fatigue” contributed to Plaintiff's difficulties in raising capital between 2016 and 2018. (Pa0397; Pa1709; Pa0383-84). According to Paseltiner, a number of Plaintiff's investors were “tired” of waiting for a return on their investment in Plaintiff and were looking “to get out of the deal” rather than put more money in. (Pa0383-84). This sentiment existed in

¹⁸ Dr. Frykman disagrees that the unfavorable finding was ever rebutted, and believes that the Smokers Study demonstrated that MMI-0100 had limited to no pharmacological effect. (Pa0317-319).

2017, long before the Notices were filed. (Pa0383).

In sum, there is *no* evidence in the record that the Notices prevented Plaintiff from raising capital, and significant evidence that Plaintiff's inability was caused by factors predating the Notices, including unfavorable results of clinical trials, lack of interest on the part of prospective investors and partners, and "fatigue" on the part of existing investors. No reasonable jury could find that the Notices caused Plaintiff's failure, and Defendants are for that reason entitled to judgment in their favor, as a matter of law, with respect to Plaintiff's claims for malpractice, breach of fiduciary duty, defamation of title, tortious interference, and violation of the UCC.

B. Plaintiff Cannot Prevail as a Matter of Law on its Causes of Action. (Raised Below But Not Addressed By Trial Court).

In addition, each of Plaintiff's causes of action fail as a matter of law, for the reasons set forth below.

1. Legal Malpractice.

Plaintiff's first cause of action alleges that Defendants committed legal malpractice by: (a) filing the Notices; (b) failing to advise Plaintiff to seek independent counsel regarding McCarter's request for a lien; and (c) failing to advise Plaintiff of the collection methods it would pursue if Plaintiff did not pay its invoices, or of the possibility that other attorneys would represent it without insisting upon prompt payment for services. (Pa0038-47). To sustain a legal

malpractice claim, a plaintiff must establish the existence of an attorney-client relationship creating a duty of care, a breach of that duty; and resulting damages. Conklin v. Hannoeh Weisman, 145 N.J. 395, 416 (1996). Plaintiff cannot as a matter of law sustain this burden as to the four allegations of misconduct.

(a) Filing the Notices.

Plaintiff's claim that Defendants committed malpractice by filing the Notices on December 17, 2018 fails because the attorney-client relationship ended when Plaintiff terminated Defendants on December 7, 2018. (Pa0587-90).¹⁹ "The existence of an attorney-client relationship is an essential element of a cause of action for legal malpractice." Abreu v. Mackiewicz, No. A-2828-09T3, 2012 WL 6027701, at *3 (N.J. Super. Ct. App. Div. Dec. 5, 2012) (Pa0968). Upon termination, Defendants' duties to Plaintiff were limited to those set forth in RPC 1.9, identifying duties to former clients, and RPC 1.16(d), identifying duties upon termination of representation.

Apart from the absence of an attorney-client relationship, Plaintiff cannot

¹⁹ Although Plaintiff has attempted to dispute the fact that Defendants were terminated on December 7, 2018, there is no dispute that the Termination Letter was sent on that date, and that it stated Cooley was taking over as Plaintiff's patent counsel, and that Defendants were to send all files to Cooley within ten days. Because these predicate facts are undisputed, the Court may conclude as a matter of law that the attorney-client relationship ended on December 7, 2018. Abreu v. Mackiewicz, No. A-2828-09T3, 2012 WL 6027701, at *4 (N.J. Super. Ct. App. Div. Dec. 5, 2012) (Pa0968).

establish as a matter of law that Defendants breached any duty by filing the Notices, or that the Notices were in any way improper. New Jersey common law has long recognized that a charging lien arises in favor of an attorney performing legal services for a client. Norrell v. Chasan, 125 N.J. Eq. 230, 236-37 (1939). The common law charging lien was not abrogated or otherwise modified by adoption of the Attorney's Lien Act of 1914 (the "Act"). Id.; see, e.g., U.S. v. Arlington Arms, Inc., 151 F. Supp. 957, 959 (D.N.J. 1957) (holding that while the Act did not apply where attorneys reduced a client's municipal tax liability, the attorneys had a common law lien against the tax refund that had priority over a judgment that had been levied against the proceeds). Delaware, where Plaintiff was incorporated and the UCC-1 was required to be filed, likewise recognizes a common law attorney charging lien. Katten Muchin Rosenman LLP v. Sutherland, 153 A.3d 722, 726-28 (Del. 2017).

A common law charging lien attaches not only to proceeds of litigation, but extends to other value an attorney may create for its client. See, e.g., Arlington Arms, 151 F.Supp. at 958 (wherein a charging lien attached to the proceeds of a tax refund secured by the attorneys). Although New Jersey courts have not yet addressed the issue of whether an attorney's charging lien attaches to patents and patent applications, courts in other states have answered in the affirmative. E.g., Ropes & Gray LLP v. Jalbert, 910 N.E.2d 330, 338-39 (Mass.

2009) (holding that a charging lien attaches to a patent application when the attorney first appears before the USPTO and is inchoate until proceeds are derived from the sale of the patent or patent application); Schroeder, Siegfried, Ryan & Vidas v. Modern Elecs. Prods., 295 N.W.2d 514, 516 (Minn. 1980) (holding that attorneys who performed services before the USPTO relating to patents had a charging lien against the patents).

A charging lien under common law and the Act arises upon either the retention of counsel or the performance of services benefitting the client. See Schepisi v. McLaughlin, P.A. v. LoFaro, 430 N.J. Super. 347, 358 (App. Div. 2013); 7A C.J.S. Attorney & Client § 526. Applications to a court for approval of a charging lien are made when the attorney seeks to *enforce* the lien. E.g., H&H Ranch Homes, Inc. v. Smith, 54 N.J. Super. 347, 350 (App. Div. 1959) (attorney petitioned the court to approve his charging lien because he sought “to impress an attorney’s lien under [the Act] upon a judgment recovered by [the client]” against a third party); Musikoff v. Jay Panino’s The Mint, LLC, 172 N.J. 133, 136 (2002) (attorney filed a petition to “acknowledge and enforce” his attorney’s lien under the Act and an order that settlement funds be deposited in a trust); Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, 292 N.J. Super. 453, 461 (App. Div. 1996) (law firm attempted to attach charging lien to client’s real property).

There is no authority in support of the proposition, raised by Plaintiff below, that judicial approval is necessary for a charging lien to *arise*, or as a precondition for the holder of the lien to provide notice thereof. There is no such requirement for analogous liens. N.J.S.A. 2A:44A-6 (permitting contractors to file construction liens without judicial approval); N.J.S.A. 2A:44-2 (permitting an aircraft-services provider to file a lien without judicial approval). There is also no support for Plaintiff's claim that a pre-action notice must precede a charging lien. An attorney is required to send a pre-action notice to a client, *prior to filing a lawsuit to recover a fee*, to notify the client of its right to request fee arbitration. R. 1:20A-6. There is no dispute that McCarter sent a pre-action notice prior to commencing the Collection Action, and that Plaintiff elected not to arbitrate. There is no support for Plaintiff's claim that McCarter was required to seek a statutory lien, under the Act, before exercising its rights under its common law charging lien.

The purpose of the Notices was not to *enforce* McCarter's charging lien against the Patents, but to provide public notice of it. Lubit determined – based on research, consultation with colleagues, and specific guidance from the office of the Delaware Secretary of State – that the Notices were appropriate mechanisms for such notice. Although New Jersey courts have not addressed this issue, attorneys in other states utilize UCC-1s to provide public notice of

attorney charging liens. See, e.g., Kasmin v. Joseph, No. 152213/2020, 2023 WL 4663007, at *7-8 (N.Y. Sup. Ct. July 19, 2023) (rejecting claim that attorney acted improperly by filing a UCC-1 to provide notice of her charging lien based on unpaid fees) (Pa1074), aff'd as modified, 212 N.Y.S.3d 608 (App. Div. 1st Dep't 2024) . In fact, in Minnesota, an attorney is *statutorily required* to file a UCC-1 to provide public notice of an attorney's lien. Minn. Stat. § 481.13(2)(b); see also Bohlke v. Giebel, 745 N.W.2d 878, 881 (Minn. App. 2008) (attorney filed UCC-1 to provide notice of an attorney's lien, and court denied application to vacate the lien because attorney's liens are outside the scope of the UCC). Even if this Court were to determine that New Jersey does not permit the filing of a UCC-1 to provide notice of an attorney's charging lien, Defendants' contrary conclusion would not amount to legal malpractice. Procanik ex rel. Proncanik v. Cillo, 226 N.J. Super. 132, 150 (App. Div. 1988) (in the context of an unsettled legal issue, an attorney is "not required to be correct . . . but only to exercise an informed judgment based on a reasoned professional evaluation").

(b) Advice Regarding Independent Counsel.

Plaintiff, relying upon RPC 1.8(a), alleges that Defendants committed malpractice by failing to advise it to seek independent counsel when Defendants requested a promissory note and a lien on the Patents. RPC 1.8(a) provides that a lawyer shall not enter into a business transaction with a client, or knowingly

acquire an interest adverse to the client, unless (1) the terms are fair and reasonable and adequately disclosed, (2) the client is advised of the desirability of obtaining independent counsel, and (3) the client consents in writing. RPC 1.8(i) specifically *permits* an attorney to acquire a lien granted by law to secure the lawyer's fees or expenses, so Defendants' charging lien is not at issue.

Plaintiff's RPC 1.8(a) claim is therefore confined to Defendants' request for a promissory note and lien. By its express terms, however, RPC 1.8(a) applies to circumstances in which an attorney and client *enter into a business transaction*. Plaintiff rejected Defendants' request for a promissory note and lien; there was no business transaction. (Pa0572). Moreover, even if there had been agreement on a promissory note and/or lien, it was *Plaintiff* that initially proposed a promissory note (Pa0558-565), and Plaintiff *was obtaining independent counsel* from Cooley on the issue (Pa0216). Indeed, the draft promissory note that McCarter provided to Plaintiff in November 2018 included a provision whereby Plaintiff would affirm that it had "secured independent advice on the terms of this Note and proceeding with this transaction." (Pa0584-85).

Even if Plaintiff and Defendants *had* entered into a business transaction without strict compliance with the three prongs of RPC 1.8(a), it likely would not be deemed a "violation" of RPC 1.8(a). See Milo Fields Tr. v. Britz, 378 N.J. Super. 137, 154 (App. Div. 2005) (rejecting a client's attempt to void a

transaction with its attorney based on RPC 1.8(a) because client was sophisticated and had affirmatively proposed the transaction, which was fair and reasonable). Even if a violation of RPC 1.8(a) were to have occurred, that fact alone would not sustain a malpractice claim. Johnson v. Shragger, Lvine, Nagy & Krasny, 340 N.J. Super. 84, 90 (App. Div. 2001).

Plaintiff also has not and cannot establish any damages resulting from a business transaction with McCarter that never occurred.

(c) Advice Regarding Fees and Collection Efforts.

Plaintiff's third allegation of legal malpractice is that Defendants did not warn it at the outset of the representation that McCarter would pursue its legal rights as a creditor if it failed to pay invoices, or that other firms might not insist on prompt payment for services. (Pa0038-39; Pa0044-45). Plaintiff has never identified any legal authority in support of this claim, and it is also factually unsupportable. Plaintiff and its management were sophisticated and familiar with the process of retaining counsel. Plaintiff's primary and long-time counsel, Cooley, is one of the largest law firms in the country. (Pa0929). Lander, Plaintiff's CEO, has run her own consulting business for over two decades and has retained attorneys for a multitude of services. (Pa0188). Another board member, Paseltiner, is an attorney by training, who has extensive experiencing working with attorneys. (Pa0382). In the unlikely event that Plaintiff was not

already familiar with the requirement to pay invoices for legal services, McCarter’s engagement letter clearly described the basis for McCarter’s fees, the requirement for prompt payment, and McCarter’s right to bring a collection action in the event of nonpayment. (Pa0179). Plaintiff cannot, as a matter of law, establish any breach in relation to this third theory of recovery.

2. Breach of Fiduciary Duty.

Plaintiff’s second cause of action, alleging a breach of Defendants’ fiduciary duties, fails, in part, because it is duplicative of its malpractice claim. Amboy Bancorp. v. Bank Advisory Grp., 432 F. App’x. 102, 111 (3d Cir. 2011) (plaintiff may not assert a breach of fiduciary duty claim that is “redundant” of its legal malpractice claim); Cohen v. Horn, No. 3:19-cv-05604, 2022 WL 1718051, at *7 (D.N.J. May 27, 2022) (fiduciary duty is not an alternative theory of recovery for a malpractice claim), aff’d 2022 WL 17546950 (3d Cir. Dec. 9, 2022) (Pa1002). There is no daylight between Plaintiff’s malpractice and fiduciary duty claims – both are based entirely on Defendants’ alleged failure to provide advice regarding risks associated with nonpayment of invoices, and subsequent filing of the Notices. (Pa0044-49).

Apart from being impermissibly duplicative, Plaintiff’s fiduciary duty claims also fail on the merits. As to the “failure to advise” claim, which focuses on Defendants’ conduct *during* the attorney-client relationship, Plaintiff cannot

show that Defendants breached any duty to it. (See Section II(B)(1)(c), supra). As to the Notices claim, which pertains to conduct *after* the attorney-client relationship, Defendants' duties to Plaintiff were at that time governed by RPC 1.9 and 1.16(d). Abreu, 2012 WL 6027701 at *12. (Pa0968). Plaintiff has argued that Defendants violated RPC 1.9, which prohibits the misuse of a former client's information, by "leveraging their knowledge of [Plaintiff's] patents and related intellectual property" in filing the Notices. (Pa0048). However, the only patent information contained in the Notices was publicly available information, accessible through the USPTO database. Plaintiff has never identified any evidence in support of its claim that Defendants in any way misused confidential client information in filing the Notices. It is well settled that an attorney may protect their right to payment after termination. In re Simon, 206 N.J. 306, 317 (2011) ("[A]ttorneys have the right to sue in a court of law on a contract basis for a fee owed and also have recourse [to common law and statutory] liens to secure a fee." (quotation marks omitted) (alterations in original)).

3. Slander of Title.

Plaintiff's third cause of action, slander of title, would require Plaintiff to prove that Defendants "falsely published an assertion concerning [its] title which caused special damages . . . and that [Defendants] acted out of malice, which was express or implied." Lone v. Brown, 199 N.J. Super. 420, 426 (App.

Div. 1985). “Malice” means “the intentional commission of a wrongful act without just cause or excuse.” Id. Plaintiff cannot meet this burden.

First, there was no “false” statement contained in the Notices, which asserted simply that McCarter obtained a charging lien against the Patents as the result of Plaintiffs’ failure to pay McCarter’s fees. (Pa0618-19; Pa0621-25). There is no question that McCarter had the right to be paid its reasonable fees and expenses. That was a fact determined by the court in the Collection Action, affirmed on appeal, and never at issue in this case. Second, even if it were ever adjudicated that McCarter did *not* have a charging lien against the Patents, there was no malice. Where a defendant publishes a statement regarding property based upon a *bona fide* claim, asserted in good faith, there can be no finding of malice even if it is ultimately determined that the defendant’s position was wrong. Rogers Carl Corp. v. Moran, 103 N.J. Super. 163, 168 (App. Div. 1968). Third, Plaintiff cannot establish “special damages,” which means “harm of a material or pecuniary nature.” Biondi v. Nassimos, 300 N.J. Super. 148, 153 (App. Div. 1997) (quotation marks omitted). As set forth in Section I(E)(1), supra, Plaintiff is unable to establish that its claimed damages were proximately caused by the Notices.

4. Tortious Interference.

Plaintiff’s fourth cause of action, tortious interference, would require

Plaintiff to prove it had “a reasonable expectation of advantage from a prospective contractual or economic relationship, that [Defendants] interfered with this advantage intentionally and without justification or excuse [i.e., malice], that the interference caused the loss of the expected advantage, and that the injury caused damage.” Patel v. Soriano, 369 N.J. Super. 192, 242 (App. Div. 2004). Here again, Plaintiff cannot establish any of these elements.

First, as with its slander of title claim, Plaintiff cannot establish that Defendants acted with malice. In the context of tortious interference, malice means much more than “ill-will,” Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 204-06 (App. Div. 1995); it refers to conduct that is “transgressive of generally accepted standards of common morality or of law,” LaMorte Burns & Co. v. Walters, 167 N.J. 285, 306 (2001) (quotation marks omitted). “A party’s actions in its own interest and for its own financial benefit will not rise to the level of malice.” Cargill Glob. Trading v. Applied Dev. Co., 706 F. Supp. 2d 563, 576 (D.N.J. 2010). Mere violation of rules or regulations will not suffice. McLaughlin v. Weichert Co. Realtors, 218 N.J. Super. 63, 67 (App. Div. 1987). And as with slander of title, a party’s assertion of a legal claim based on a good faith belief regarding its merit does not constitute malice. Baldassarre v. Butler, 132 N.J. 278, 295 (1993). Here, there is no dispute that, as this Court affirmed in the Collection Action, Plaintiff owed a

debt to McCarter for its legal fees. Defendants filed the Notices to protect McCarter's legitimate business interest in securing payment of its fees, based upon a good faith belief, supported by research and specific guidance from the office of the Delaware Secretary of State, that the Notices were an appropriate mechanism to provide notice of McCarter's charging lien. This conduct cannot, as a matter of law, be deemed malice.

Second, Plaintiff cannot establish a *reasonable* expectation of economic advantage. A plaintiff must show there was a "reasonable probability" that it would have received the anticipated economic benefit underlying its tortious interference claim. Patel, 369 N.J. Super. at 242. "[M]ere hope" will not suffice. Mu Sigma, Inc. v. Affine, Inc., No. 12-CV-01323, 2013 WL 3772724, at *3 (D.N.J. July 17, 2013) (Pa1096).²⁰ Here, the "expected economic advantage" underlying Plaintiff's tortious interference claim is that it would have obtained the funding necessary for Phase 2 clinical trials and ultimately secured FDA approval for MMI-0100. (Pa0050). However, there is no evidence that Plaintiff

²⁰ See, e.g., Deborah Heart & Lung Ctr. v. Virtua Health, LLC, No. A-2307-17T1, 2019 WL 3162362, at *8 (N.J. Super. Ct. App. Div. July 16, 2019) (plaintiff hospital did not have reasonable expectation of receiving referrals for cardiac patients) (Pa1013); Dooley v. La Padula, No. A-5796-11T4, 2014 WL 1647140, at *3-7 (N.J. Super. Ct. App. Div. Apr. 25, 2014) (plaintiff attorney did not have reasonable expectation of continued engagement by client) (Pa1023); Times Sys. Int'l Co. v. Datamatics Mgmt. Servs., Inc., No. A-6225-07T1, 2009 WL 2455799, at *5-6 (N.J. Super. Ct. App. Div. Aug. 12, 2009) (plaintiff software developer did not have reasonable expectation of selling software to certain potential customers) (Pa1126).

would have been able to fund Phase 2 had the Notices not been filed. (See Section I(E)(1), supra). And even if it had, its own expert has conceded that it was more likely than not that MMI-0100 would *fail*. (Pa1150-51 (estimating overall likelihood of success between 10 – 30%)).

Third, Plaintiff cannot establish causation. On a tortious interference claim, a plaintiff must show that “had there been no interference,” there would have been a reasonable probability of the anticipated economic benefit. LaMorte, 167 N.J. at 306; see, e.g., Ross v. Annunziata, No. A-2806-10T, 2012 WL 653840, at *6-7 (N.J. Super. Ct. App. Div. Feb. 29, 2012) (rejecting plaintiff’s tortious interference claim, alleging that defendant stole his opportunity to be part of a real estate venture, because the actual cause of plaintiff’s non-participation was his inability to satisfy financing obligation) (Pa1117). Here, as set forth in Section I(E)(1), supra, there is no credible evidence upon which a reasonable jury could conclude that the Notices – the “interference” alleged in Plaintiff’s tortious interference claim – prevented Plaintiff from raising funds for Phase 2 trials or caused its failure.

5. UCC Violation.

Plaintiff’s fifth cause of action, alleging that Defendants violated Article 9 of the UCC by filing the UCC-1 and refusing Plaintiff’s demand to terminate it (Pa0051-52), suffers from six fatal defects.

First, Article 9 expressly “does not apply” to liens “given by statute or other rule of law for services or materials.” N.J.S.A. 12A:9-109(d)(2). Although New Jersey courts have not specifically addressed the issue, every other court that has done so, based on identical UCC text, has held that Article 9 does not apply to attorney’s liens.²¹ The fact that Article 9 does not *govern* attorney’s liens does not deprive an attorney of the ability to file a UCC-1 to provide public notice of an attorney’s lien. Indeed, in Minnesota, which recognizes that attorney’s liens are not governed by Article 9, attorneys are statutorily *required* to file UCC-1 statements to provide public notice. Minn. Stat. § 481.13(2)(b). Because Article 9 does not apply to McCarter’s charging lien, or the UCC-1 providing public notice thereof, Plaintiff’s claim that Defendants violated Article 9 by filing the UCC-1 and refusing to withdraw it is without merit.

Second, even if Article 9 were to apply, Defendants did not violate it by filing the UCC-1. Lubit filed the UCC-1 to provide notice of McCarter’s charging lien based on her research and consultation with the office of the Delaware Secretary of State. Plaintiff has not identified any support for the proposition that this conduct is violative of the UCC.

Third, Plaintiff has failed to identify any recoverable damages. Plaintiff’s

²¹ E.g., Bohlke v. Giebel, 745 N.W.2d 878, 880-81 (Minn. App. 2008) (Article 9 does not apply to attorney’s liens); Bd. of Cnty. Comm’rs of Adams Cnty. v. Berkley Vill., 580 P.2d 1251, 1256-57 (Colo. App. 1978) (same).

Article 9 claim is based on N.J.S.A. 12A:9-625(b) (Pa0051), which provides for damages “in the amount of any loss caused by a failure to comply” with Article 9, which “may include loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing.” It entitles a successful claimant to actual damages necessary to restore it to “the position that it would have occupied had no violation occurred.” N.J.S.A. 12A:9-625 cmt. 3. It does not provide for consequential damages. The UCC does not allow for consequential damages unless specifically provided. N.J.S.A. 12A:1-305(a). Plaintiff seeks exclusively consequential damages resulting from the alleged UCC violation, consisting of profits it allegedly would have realized had it not failed. (Pa1386 (Plaintiff’s valuation expert calculated “the future operating profit that [Plaintiff] would likely have earned if operations continued and [it] launched a product into the market”)). Under New Jersey law, lost profits are a form of consequential damages. In re Gloria T. Mann Revocable Tr., 468 N.J. Super. 160, 177 (App. Div. 2021).²²

²² New Jersey courts have not specifically addressed whether a plaintiff may recover lost profits under Section 625(b) of Article 9, but other courts have held that lost profits are not recoverable. E.g., Forthill Constr. Corp. v. Blue Acquisition, LLC, No. 17-CV-05367, 2020 WL 1878192, at *3-7 (S.D.N.Y. Jan. 28, 2020) (Pa1031) (finding a violation of Section 625(b), but denying claim for lost profits and earnings), report & recommendation adopted by 2020 WL 949256 (S.D.N.Y. Feb. 27, 2020); Proactive Techs., Inc. v. Denver Place Assocs. Ltd. P’ship, 141 P.3d 959, 960 (Colo. App. 2006) (same).

Fourth, Plaintiff failed to mitigate its alleged damages by not promptly filing a UCC-5, which informs third parties searching the UCC public records of any inaccuracies in the UCC-1 to which it pertains. Plaintiff did not file a UCC-5 until February 2020, over a year after it received notice of the UCC-1. The UCC does not address the duty to mitigate, but common law principles supplement its provisions unless specifically displaced. N.J.S.A. 12A:1-103b. Under New Jersey common law, parties to commercial transactions are required to mitigate their damages. Sean Wood, LLC v. Hegarty Grp., Inc., 422 N.J. Super. 500, 519-20 (App. Div. 2011).

Fifth, Plaintiff's UCC claim is time-barred. Section 625(b) does not include a statute of limitations, and in such cases, New Jersey courts apply the statute of limitations governing the analogous cause of action. Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 181 (App. Div. 2002). New Jersey does not recognize a common law cause of action for the improper filing of a UCC-1, but this precise claim has been deemed cognizable as a "false light" tort claim. Reilly v. Vivint Solar, No. 1:18-CV-12356, 2021 WL 261084, at *11 (D.N.J. Jan. 26, 2021) (Pa1106). False light claims are subject to a one-year statute of limitation. Id. Plaintiff's UCC claim is barred because it was not asserted within one year of Defendants' filing of the UCC-1 on December 17, 2018, or even within one year of McCarter's refusal to terminate on January 18,

2019. Plaintiff did not attempt to assert the claim until February 21, 2020, when it moved for leave to amend its pleading in the Collection Action. (Pa0658-73).

Sixth, Plaintiff has no UCC claim against Lubit because McCarter is the “secured party” on the UCC-1. Section 625(b) is titled “Remedies for *secured party’s* failure to comply with Chapter.” N.J.S.A. 12A:9-625 (emphasis added). Section 625(b) remedies are available only for non-compliance by a secured party. N.J.S.A. 12A:9-625 cmt. 2. New Jersey courts have not addressed this issue, but a Nebraska court – interpreting identical text – held that Section 625(b) imposes liability upon secured parties only. Fjellin ex rel. Leonard Van Liew Living Tr. v. Penning, 41 F. Supp. 3d 775, 778-780 (D. Neb. 2014).

6. Constructive Trust and Equitable Lien.

Plaintiff’s final cause of action, for a constructive trust and equitable lien on the Patents or proceeds (Pa0052), fails because McCarter’s acquisition of the Patents was not wrongful. A constructive trust is an equitable remedy imposed to prevent unjust enrichment when a party has wrongfully acquired another’s property. Thieme v. Aucoin-Thieme, 227 N.J. 269, 288-89 (2016). An equitable lien is imposed to prevent unjust enrichment, or where there is an express agreement to grant a lien against specific property. EnviroFinance Grp. v. Env’t Barrier Co., 440 N.J. Super. 325, 350 (App. Div. 2015).

Plaintiff’s claim for these equitable remedies is based on the assertion that

they are necessary “to prevent Defendants from profiting from their own wrongdoing.” (Pa0053). However, McCarter acquired the Patents through a legal process directed by the Collection Action court in furtherance of satisfying the Judgment. (Pa0743; Pa0754; Pa0757). Plaintiff has not alleged any basis upon which McCarter could be deemed unjustly enriched by its possession of the Patents, or any agreement by McCarter to grant Plaintiff a lien against the Patents. (Pa0052-53). To the extent that Plaintiff sought these remedies as a form of pre-judgment attachment, Plaintiff has not pled and is not eligible for that “extraordinary remedy, the availability of which is narrowly circumscribed by statute.” In re Est. of Balgar, 399 N.J. Super. 426, 439 (Law Div. 2007).

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFF’S MOTION FOR RECONSIDERATION. (Pa0104).

Plaintiff has abandoned its appeal from the trial court’s September 13, 2022 order denying its motion for reconsideration (the “Reconsideration Order”). Although Plaintiff identified the Reconsideration Order (by date) in its Notice of Appeal, it did not present any argument relating to the Reconsideration Order in its appellate brief. 539 Absecon Blvd., LLC, 406 N.J. Super. at 272 n.10 (an issue identified in a notice of appeal, but not subsequently briefed, is abandoned). To the extent the Court elects to consider this aspect of Plaintiff’s appeal, it should affirm the Reconsideration Order.

The Court’s standard of review for the denial of a motion for

reconsideration is “deferential”; the determination of the trial court will not be disturbed absent “a clear abuse of discretion.” Dennehy v. E. Windsor Reg’l Bd. of Educ., 469 N.J. Super. 357, 363 (App. Div. 2021) (quotation marks omitted), aff’d, 252 N.J. 201 (2022). A motion for reconsideration under Rule 4:49-2 is appropriately granted

only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.

Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). This stringent standard applies to prevent “repetitive bites at the apple” because “motion practice must come to an end at some point.” D’Atria, 242 N.J. Super. at 401.

Here, Plaintiff identified two purported “errors” by the trial court in its motion for reconsideration: (1) it misstated, by a period of two weeks, the sequence of motions in the Collection Action (Pa0107); and (2) it misapplied the law regarding judicial estoppel (Pa0109). As to the first issue, the trial court acknowledged a mistake in its recitation of the sequence of motions, but stated that it had no impact on its analysis or conclusion regarding the ECD, and was therefore not grounds for reconsideration. (Pa0114-15). As to the second issue, the trial court reiterated its conclusion that judicial estoppel did not bar

Defendants from invoking the ECD because the Collection Action court did not deny Plaintiff's motion for leave to amend – "in part or in whole" – based on any position taken by McCarter regarding whether the proposed claims arose from the same factual nexus. (Pa0115).

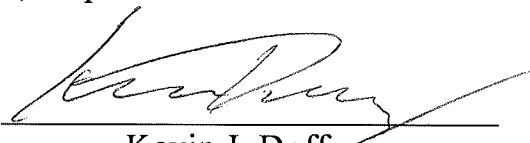
The Court should affirm the Reconsideration Order because the SJ Order was not based upon a palpably incorrect or irrational basis, nor a failure to consider competent evidence.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should affirm the trial court's entry of summary judgment in their favor.

Respectfully submitted,

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By: 
Kevin J. Duffy
A Member of the Firm

Dated: March 20, 2025

Superior Court of New Jersey

APPELLATE DIVISION

MOERAE MATRIX, INC.,

Plaintiff-Appellant,

v.

McCARTER & ENGLISH, LLP,
BEVERLY W. LUBIT, ESQ., JOHN
DOES 1-10 and PROFESSIONAL
CORPORATIONS 1-5,

Defendants-Respondents.

Docket No. A-000203-24

Civil Action

ON APPEAL FROM:

LAW DIVISION, MORRIS COUNTY
Docket No. MRS-L-371-22

SAT BELOW:

Hon. Frank J. DeAngelis, P.J. Ch.

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May 5, 2025

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PRELIMINARY STATEMENT

Defendants' Responding Brief fails to provide any basis for denying this Appeal. Instead, it only serves to underscore what is at stake: The Defendants knowingly created a conflict of interest with their own client by taking deliberate, adverse actions against their client's intellectual property in order to collect a bill. In the process, they brought the development of a promising pharmaceutical treatment for a deadly lung condition to a halt. The business opportunities Plaintiff lost as a result of Defendants' misconduct have substantially diminished its economic value.

Defendants offer little more than clever wordsmithing to explain how they managed to unlawfully assert liens over Plaintiff's property, *without* Pre-Action Notice to Plaintiff, *without* judicial review or approval, and *without* Plaintiff's authorization; then managed to hermetically seal the courthouse door against Plaintiff's malpractice claims, while directly contradicting themselves in two separate court proceedings. Defendants appear to labor under the misconception that there are two sets of ethics codes for New Jersey attorneys—one for themselves, and one for everyone else.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DISMISSED THIS CASE ON ECD GROUNDS, AND DEFENDANTS HAVE FAILED TO DEMONSTRATE OTHERWISE.

Defendants misstate the standard of review. Francavilla v. Absolute Resolutions VI, LLC, 478 N.J. Super. 171 (App. Div. 2024), was an appeal from a *motion to dismiss*. Id. at 177 (“plaintiff argues that the trial court erred in dismissing her complaint...”). In contrast, on appeal from *summary judgment*, even when judgment is granted on ECD grounds, this panel is “subject to the same standard employed by the trial court.” Bauer v. Nesbitt, 198 N.J. 601, 605 n.1 (2009). In other words, when application of the ECD is presented on appeal from a dispositive motion under Rule 4:46-2, the standard remains *de novo* and plenary. Cf. Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 604-605 (2012); see also Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) (“A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.”).

A. Respondents Were Judicially Estopped From Asserting Their ECD Defense In The Court Below.

In response to Plaintiff’s judicial estoppel argument, Defendants beat a hasty retreat from their arguments before Judge Moore, whereby they succeeded in excluding Plaintiff’s proposed counterclaims as effectively *unrelated* to their Collection Action. Defendants’ Brief in the Collection Action, opposing

Moerae's motion to amend, stated that:

“McCarter's claims are based on unpaid legal fees and expenses incurred *long before* McCarter's UCC filing, and which are indisputably due and owing from Moerae. Moerae's alleged claims, on the other hand, are based on purported damages (i.e., inability to maintain patents) caused by a UCC filing *after* (i) the legal fees and expenses were incurred”

(Pa2167) (emphasis in the original). Judge Moore agreed, explaining that:

“[McCarter & English] argue that the claims did not arise out of the same litigation. [McCarter's] claims according to [them] are based on unpaid legal fees incurred long before the UCC filing.... I agree with [McCarter].”

(Pa692, T8:7-16). Yet before Judge DeAngelis, in the court below, Defendants directly contradicted themselves by arguing precisely the *opposite* position:

“Here, Moerae's claims clearly arise out of the same nucleus of facts as those that gave rise to the Collection Action”

(Pa2097) (underlining added).

The trial court erred when it failed to judicially estop Defendants from doing an ‘about face’ on a key element of the Entire Controversy Doctrine. The ECD does not bar *unrelated* claims in a subsequent proceeding: “[T]he central consideration [of the ECD] is whether the claims against the different parties arise from related facts or the same transaction or series of transactions.” Ditrollo v. Antiles, 142 N.J. 253, 267 (1995). McCarter chose to argue that Moerae's fiduciary duty claims did *not* arise from the same facts or transactions

at issue in their Collection Action, and they prevailed. Judicial estoppel precludes the Defendants from reversing course on the “central consideration” of the ECD in this case, because they prevailed after taking the *opposite* position on that very issue before Judge Moore. Cf. Kimball International, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 606-607(App. Div. 2000), *certif. denied*, 167 N.J. 88 (2001) (judicial estoppel applies when a party adopts a position contrary to one it successfully asserted in a prior proceeding).

McCarter did not refer directly to the ECD in their Collection Case, but instead made a strategic decision to sacrifice a key element of their ECD defense, the “relatedness” requirement, presumably to put off Moerae’s fiduciary duty claim to another day. They are stuck with that choice. By allowing Defendants a ‘180’ to now argue that Moerae’s claims did arise from the matters litigated before Judge Moore, they have effectively muscled payment from their former client using self-help collection efforts, whiling shielding themselves from their client’s malpractice claims using a procedural whipsaw. Cf. In re Simon, 206 N.J. 306, 318 (2011) (adverse collection efforts by a lawyer are subject to careful scrutiny).

The polestar of the Entire Controversy Doctrine is fairness. See, e.g., Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015). At the close of McCarter’s Collection Case, Plaintiff’s only recourse was to proceed with its

legal malpractice theories in a subsequent action, and it had every reason to believe that such action would *not* be barred by the ECD. Indeed, Defendants had expressly adopted the position that Plaintiff’s counterclaim did *not* arise from the same set of facts as their collection claims, and for good reason—Plaintiff’s claims in this case stem from malicious conduct implicating entirely *different* issues and proofs than those involved in the Collection Case, and are therefore *not* precluded by the ECD at all.

B. Defendants Fail To Cite Analogous Precedent Applying The ECD Where The Omitted Claim Was Raised In The Prior Proceeding.

Part I(A) of Defendants’ Brief tries to dismiss Plaintiff’s argument that its previous efforts to assert its claims in their Collection Case strongly weigh against application of the ECD here. Defendants ignore the *policy* implications of a party’s attempt to assert its claims in the preceding action: asserting a related claim during the pendency of the prior litigation enables the court to use case management tools like joinder, severance, or reservation while remaining true to the principle that “preclusion is a remedy of last resort.” Olds v. Donnelly, 150 N.J. 424, 446 (1997). “The purpose of the [ECD] is not to bar meritorious claims, but to encourage litigants to bring to the attention of trial courts persons [or claims that] should be joined in a proceeding.” Id., 150 N.J. at 447; see also Brown v. Brown, 208 N.J. Super. 372, 382 (App. Div. 1986) (discussed at Pb32-33).

Grasping for *any* case that might have applied the ECD *after* the court in the preceding litigation denied a motion to file the omitted claim, Defendants cite two that are profoundly distinguishable: Fisher v. Yates, 270 N.J. Super. 458 (App. Div. 1994) and William Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277 (1977) (“Blanchard”). Neither case involves claims that were precluded from the earlier action because of *timeliness*. And neither involves the extraordinary situation of a law firm using artful litigation procedure to keep its former client’s malpractice claims out of the courthouse altogether.

In Fisher v. Yates, the plaintiff moved to amend his complaint *one week before trial* to assert facts that directly contradicted his original pleadings. Id. at 465. The trial court denied the motion to amend on grounds of judicial estoppel—*not* on grounds of timeliness, as in McCarter’s Collection Matter. After a bench trial on the merits resulted in judgment for the defendants, the plaintiff filed a new case (“Fisher II”), alleging different defendants and a brand new legal theory. This Court affirmed dismissal of Fisher II under the ECD, explaining that:

“In both cases plaintiff sought essentially the same relief, restoration of the original easement location. . . . [B]oth claims arose out of the same transaction or occurrence.”

Id., at 458. In short, the plaintiff in Fisher v. Yates sought two bites of the same apple *after* an adverse result following a merits trial. Here, Plaintiff

was *never* afforded any merits trial at all on its counterclaim.

Blanchard, also cited by Defendants, is equally inapposite. Blanchard was a complex construction lawsuit involving six parties with interdependent claims which, at the time of the trial court's decision, had already been pending for over five years. 150 N.J. Super. at 283-84. During pretrial litigation, the parties agreed to a consent order in which they waived their rights to arbitration and submitted the dispute to a consolidated chancery proceeding. Id., at 288-89. Nevertheless, at a later settlement conference, the owner indicated that after conclusion of the lawsuit, it would be filing unasserted claims for delay, claims the other parties assumed had already been abandoned. Id., at 289. The owner (and the general contractor) believed that the consent order only reached claims pending *at that time*, and insisted they had every right to withhold their remaining claims until they arbitrated their claims separately. Id. at 286-87. The result would have been "arbitration, followed by litigation, followed by arbitration, in virtually infinite sequence." Id., at 291. Eventually, the court denied all claims asserted after the settlement conference. Id., at 291.

The Appellate Panel affirmed, writing that the owner's "assertion of the right to withhold its claims, purportedly against [the general contractor] but actually against the others, constitutes an unacceptable imposition upon the other parties, the court, and the entire justice system." Id. at 295. Once the

parties had agreed to waive their rights to arbitration, they submitted the entire controversy to the court and were therefore subject to all of its rules, including the ECD and mandatory counterclaim rule. Id., at 292. Any claims not asserted in compliance with Rule 4:7-1 were thus barred by the Entire Controversy Doctrine. Id., at 295.

In effect, Blanchard is the polar opposite of this case. Here, the Plaintiff asserted its claims by filing a motion to amend, whereas in Blanchard, the parties *expressly refused* to amend their pleadings for years, until ordered to do so by the trial court. Ibid. None of the extraordinary circumstances that created the kind of prejudice at work in Blanchard have been alleged here. There was never any prospect of interminable litigation that might prejudice other parties and the judicial system itself.

C. Dismissal Of This Case On ECD Grounds Did Not Advance The Underlying Purposes Of The Doctrine; It *Undermined* Them.

Defendants describe the purposes of the ECD as, *inter alia*, encouraging conclusive litigation, avoiding waste and delay, and promoting party fairness and judicial economy. See Db23. But it defies reason to conclude that dismissal based on the ECD promoted “judicial economy” here, when this case was in effect fully litigated, following a relentless discovery process (described in detail at Pb8, 39, 41-42), and at significant cost to the court and both parties; all to be wasted by dismissal *on the brink of trial*. Relying on Oliver v. Ambrose,

152 N.J. 383 (1998), in which there was a four-year gap between Plaintiff's assault complaint and summary judgment based on the ECD, Defendants myopically frame the issue in terms of the sheer quantity of clocked time between Complaint and dismissal here (approx. two and a half years). Db32. That framing of the issue misses the point. There is no indication whatsoever that the four years in Oliver were consumed by anything remotely comparable to the massive waste of resources in this case.¹

Echoing the court below, Defendants also argue that dismissal of this case on ECD grounds promotes efficiency by obviating the need for a trial. That argument embraces the lower court's implicit concession that this case presents triable issues. In a nutshell then, Defendants' Kafkaesque notion is that justice "triumphed" by allowing Defendants to "run up the tab" with intensive litigation and then, at the very end, save everyone the trouble of a trial on the merits for *meritorious* claims. That is neither efficiency nor justice. It is a waste of resources, and a cavalier *disregard* for the interests of justice.

¹ Oliver is clearly distinguishable for other reasons: (i) unlike here, the plaintiff in Oliver never asserted her tort claim against her ex-husband in the preceding divorce matter, but instead deliberately chose to withhold it while the custody action was pending. Id., at 399. The defendant husband settled the custody dispute believing by doing so, all outstanding issues were resolved. Id., at 402. Furthermore, the later tort claim was inextricably intertwined with the child support issues in the divorce proceeding, id. at 398-99, whereas here, McCarter itself represented to the court that the matters giving rise to its Collection Case were *not* related to Moerae's breach of fiduciary duty claim.

Critically, Defendants ignore the cautionary guidance from our Supreme Court that “[b]ecause the polestar for the application of the [ECD] is judicial fairness, a court must apply the doctrine in accordance with equitable principles, with careful attention to the facts of a given case.” Borrus at 114 (citing K-Land Corp. No. 28 v. Landis Sewerage Auth. 173 N.J. 59, 74 (2002)) (internal quotation marks omitted). Contrary to that principle, neither Defendants’ Brief nor the trial Court’s Statement of Reasons, ever actually *examined* the issue of judicial fairness – a concept which, of necessity, must consider the interests of *all* parties, not just the Defendants. Defendants obviously believed they would benefit from deferring litigation over Plaintiff’s counterclaims to a later date. They have never identified *any* concrete prejudice to anyone, either in the way of spoliation of evidence, or reliance, or duplicative efforts, or interminable litigation, or surprise. Nor is there any inherent prejudice in asserting a legal malpractice claim three years *after* the putative accrual date: When pretrial discovery was completed, and summary judgment entered in July 2024, the six-year limitation period on Plaintiff’s malpractice claims had yet to expire.

On the other hand, when the particularized interests of the Plaintiff are considered to understand why Moerae did not present its breach of fiduciary duty claim at the outset, the conclusion is an entirely different story: The legal issues surrounding McCarter’s lien on Moerae’s patents are esoteric, and some

remain unsettled. This very court, in reviewing the denial of Plaintiff's motion to amend, observed that New Jersey has yet to decide whether an attorney's lien, charging or otherwise, can attach to patents. Pa2005 (at n.17).²

D. The Non-Duplicative Nature of the Preceding and Succeeding Actions Also Militates *Against* Application Of the ECD.

At Db28, Defendants discount a key difference between Borrus and this case: Borrus involved a malpractice claim in which the client alleged the attorneys had negligently performed the very services that formed the basis for, and were inextricably intertwined with, the reasonability of the fees for the services at issue in the attorney's collection suit. In contrast, the malpractice here arises from Defendants' adverse collection efforts.

Defendants also claim that this distinction is irrelevant because Moerae's allegations overlap in time with some of the issues in the Collection Case. That argument misses the point: The operative issues in McCarter's earlier collection proceeding—the amount and reasonability of the fees for patent services which McCarter sought payment—were separate and distinct from the validity of

² At Db29, Defendants quote from this Court's affirmance of the denial of Moerae's motion to amend to the effect that Moerae knew McCarter "intended" to file a UCC-1 as early as September 2018. That *ipse dixit* is simply contrary to the facts of record. It is undisputed that during the fall of 2018, the parties were negotiating a payment plan which McCarter demanded should include a lien on the patents. Plaintiff steadfastly refused those demands. See Pa1845 (excerpt from Defendants' answers to Plaintiff's Interrogatories) and Pa572.

Defendants’ unauthorized lien filings and their impact on Moerae’s fundraising efforts. Since the controversy here involves entirely *different proofs*, no time was, or would be, wasted in this case “re-litigating” the amount, or reasonability, of Defendants’ fees for their patent services.

In other words, the ECD’s purpose of preventing duplicative effort was not served by dismissal here *because there is no duplication*—a point that weighs even more heavily in Plaintiff’s favor, in light of McCarter’s previous assertion that Moerae’s proposed fiduciary duty counterclaim was *unrelated* to its Collection Matter. See Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 328 (1995) (citing avoidance of duplication as one of the purposes of the ECD). This case is more like Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 584 (1999) (holding that the ECD did not apply where the “court would not have to retry the same issues; the testimony in each of the trials would undoubtedly differ.”). The Supreme Court’s reasoning in Vision Mortg. equally obtains here: because application of the ECD fails to advance the Doctrine’s core purposes (*viz.*, avoidance of judicial waste and duplication of effort), it should not bar Plaintiff’s claims in this case.

For all of these reasons, the ruling of the court below, granting Defendants’ Summary Judgment Motion on ECD grounds, should be reversed.

II. THE SUMMARY JUDGMENT ORDER SHOULD NOT BE AFFIRMED ON ALTERNATE GROUNDS.

Obviously recognizing the weakness of their efforts to defend summary judgment on ECD grounds, Defendants contend there are “other grounds” that could have formed the basis for the trial court’s ruling. In fact, however, Defendants are wrong.

A. Plaintiff Has Presented Overwhelming Evidence And Authority In Support Of Its Claims For (1) Legal Malpractice, (2) Breach Of Fiduciary Duty, (3) Slander of Title, (4) Tortious Interference, (5) UCC Violation, And (6) Constructive Trust And Equitable Lien.

1. Plaintiff’s Legal Malpractice Claim.

(a) Attorney/Client Relationship

Defendants contend that there was no attorney-client relationship at the time Beverly Lubit filed the unauthorized liens against Plaintiff’s “patents and patent applications” without its consent because Moerae had previously directed Defendants, by way of letter dated Dec. 7, 2018, to transfer their file to another law firm within ten days. Db46. But there is overwhelming evidence to establish that from Dec. 10 through Dec. 14, while Lubit was frantically scheming to encumber her client’s property (Pa1183-1187), she was *simultaneously* representing Moerae’s interests before foreign patent agencies—precisely the same kind of patent law work she had been performing from inception of the attorney-client relationship. Pa1631, 1635-36, 1640; 1187-1190. The result was a glaring concurrent conflict of interest

in violation of RPC 1.7(a), *inter alia*, and a breach of her fiduciary duties to her client. See In re Simon, 206 N.J. at 319 (“Nor shall an attorney seek any remedy against a client which results in a conflict under our RPCs.”).

In the context of the deadline-saturated patent practice Defendants’ representation entailed (Pa1583-1591), it would be the reasonable expectation of the parties that such representation would continue until the *actual* file transfer. Furthermore, even assuming *arguendo* that the attorney-client relationship had abruptly ended on Dec. 7, Defendants still breached the standard of care by failing to take reasonably practicable steps necessary to protect Moerae’s interests upon termination, thereby running afoul of RPC 1.16(d). “These responsibilities [under RPC 1.16(d)] apply even if the lawyer has been unfairly discharged by the client.” Michels, *New Jersey Attorney Ethics*, 16:5-1.

In fact, Defendants’ conduct amounted to the very opposite of “protecting” their client’s interests upon termination and transfer of the file. Rather, Defendants willfully filed what they now characterize as a ‘charging’ lien against client property, unilaterally and without timely notice to the client, and fully aware that their lien filings would likely jeopardize Moerae’s fundraising efforts—all the while knowing that the company relied almost exclusively on investor financing. See Pa1338; 1644; cf. Restatement 3d of the Law Governing Lawyers, §33(2)(d) (following termination of a representation a lawyer must “take no advantage of a former client by abusing

knowledge or trust acquired by means of the representation”).

Defendants’ insinuation that whatever responsibilities they owed Plaintiff evaporated after Dec. 7 is the very same argument rejected by this Court in Atl. Research Corp. v. Robertson, Freilich, Bruno & Cohen, L.L.C., 2016 N.J. Super. Unpub. LEXIS 373, at *19 (App. Div. Feb. 22, 2016) (Pa2331). There, the law firm argued that its duties under RPC 1.16 were limited to just ensuring that the case file went to a competent law firm. Id., at *19. Citing RPC 1.16 as a “learned treatise” to establish the standard of care, this Court rejected that theory, and held that a lawyer handing off a client file has a fiduciary duty to ensure the matter makes a “safe landing” at the new firm. Id., at *17.

Moerae could not even rely on Defendants to fulfill their “safe landing” obligations insofar as RPC 1.16(d) was concerned. Plainly, the requirement under 1.16(d) that a lawyer “protect a client’s interests upon termination” would include *avoiding* the creation of a conflict of interest by using information obtained during the representation to disadvantage the client, whether current or former, in violation of RPC 1.8(b) or 1.9(c), respectively. Instead, Defendants used the information they obtained about their client’s patent registry to assert a lien over intellectual property they knew was the focus of Plaintiff’s efforts, thereby putting their own interest in getting paid in direct conflict with their client’s fundraising and business plans.

(b) Breach of the Standard of Care

Defendants further contend that the UCC-1 Financing Statement and Patent Assignment Cover Sheet they filed *ex parte* against Moerae's patents on December 17, 2018 was a common law "charging" lien. Db47. Throughout their Brief, Defendants appear to have confused the concepts of "charging lien", statutory "attorney's lien", and "equitable lien." For example, U.S. v. Arlington Arms, Inc., 151 F. Supp. 957 (D.N.J. 1957), does not involve the application of a *charging* lien at all, but rather an *equitable* lien asserted by a law firm against a client's tax refund to establish priority over a delinquency judgment in favor of the U.S. Id., at 958. Although a charging lien is an equitable *remedy*, an equitable lien is *not* a charging lien, and is unavailable to the Defendants here because it requires, *inter alia*, evidence of a promise to pay a debt from the proceeds of specific property. See Michels, New Jersey Attorney Ethics, 37:1-5. And Ropes & Gray LLP v. Jalbert, 910 N.E.2d 330 (Mass. 2009), relied upon so heavily by Defendants, involved a *statutory attorney's lien* arising under Mass. Gen. Law ch. 221, § 50, the plain language of which is far *broad*er than our Attorney's Lien Act (N.J.S.A. 2A:13-5).

Whatever their argument happens to be at the moment, the simple fact is that *none* of the instruments Defendants filed with the Delaware Secretary of State or USPTO ever mentioned the words "attorney's lien," "charging lien," or any variation thereof. Pa618; 621-625. And whether construed as a common law "charging lien"

or “attorney’s lien” under 2A:13-5, Defendants’ lien filings transgressed the entire body of New Jersey statutory law, case law and court rules governing the assertion of liens by attorneys against client property. There is nothing in either the Attorney’s Lien Act or common law authorizing an attorney to file, *ex parte*, notice of a charging lien, or any other kind of lien, *without* prior judicial review or approval, and *without* providing the client with Pre-Action Notice as required by R. 1:20A-6.

Defendants also failed to comply with the procedural requirements of H. & H. Ranch Homes, Inc. v. Smith, 54 N.J. Super. 347 (App. Div. 1959) (“H. & H. Ranch”), and relevant caselaw: “[W]here the *determination or enforcement* of an attorney’s lien is sought,” the attorney must file a petition with the court with supporting facts and ask the court for scheduling of an answer, pretrial discovery and trial, following which the matter shall proceed as a plenary suit. Id. at 353-354 (italics added) (and see Matteo v. Matteo, 281 N.J. Super. 73, 79-80 (App. Div. 1995) (specifically holding that R. 1:20A-6 applies not just to actions commenced by attorneys for collecting fees, but also to petitions for liens under N.J.S.A. 2A:13-5); see also Rosenfeld v. Rosenfeld, 239 N.J. Super. 77, 78-79 (Ch. Div. 1989), cited with approval in Mateo; accord Schepisi v. McLaughlin, PA v. Lofaro, 430 N.J. Super. 347, 357 (App. Div. 2013) (“The Pre-Action Notice requirement applies to a petition to establish an attorney’s lien as well as to a complaint for attorney’s fees.”)).

In an effort to rationalize the extra-judicial filing of their so-called “common

law charging lien,” Defendants have fabricated an artificial distinction without support in New Jersey case law, *viz.*, that the Pre-Action Notice Rule, not to mention the procedures required by N.J.S.A. 2A:13-5 and the relevant case law, apply only when an attorney attempts to *enforce* a lien, not when the attorney asserts the lien by filing a UCC-1 or USPTO notice. Defendants have simply gussied up their pig with cheap lipstick: As soon as an attorney has given notice “to the world” of its putative lien by filing a UCC-1 or other instrument against client property, the law firm has taken legal action to *enforce* it. By doing so here, Defendants undoubtedly intended to have a *real* effect on Plaintiff’s fundraising strategy by establishing the *priority* of their claims to Moerae’s assets over those of other potential creditors. Finally, Defendants’ artificial distinction between “enforcement” and “notice” would render the client protections afforded by Rule 1:20A-6 and H. & H. Ranch moot.

Ignoring that contradiction, Defendants contend that there is “no support for Plaintiff’s claim that a Pre-Action Notice must precede a charging lien.” Db49. Defendants are wrong. To name just one example, in Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, this Court invalidated an attorney’s lien when a law firm filed a *lis pendens* to give notice of “the imposition of a lien instead of filing a complaint or giving the Pre-Action Notice.” 292 N.J. Super. 453, 459 (App. Div. 1996). Another example is In Re Rapid Freight Sys., 2011 Bankr. LEXIS 1328, *7-*9 (D.N.J. 2011), where the Bankruptcy Court held that an attorney *forfeited* his

“common law charging lien” because he never filed a statutory petition where, as here, he could have easily done so. And most importantly, this Court noted in Martin v. Martin, 335 N.J. Super. 212 (App. Div. 2000), that “[N.J.S.A. 2A:13-5] *embodies* the so-called charging lien that existed at common law[.]” Id., at 222 (italics added).

Defendants cite Kasmin v. Josephs, 2023 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. July 19, 2023) (Pa1073), a New York trial court decision, in support of their contention that their unilateral lien filings were valid. Db34-34. Kasmin is clearly inapposite, however, because the attorney asserting the alleged “common law charging lien” in that case had the prior agreement of his client granting a security interest in an insurance company payment from which the attorney’s fees would be paid. Id., at *22-*23. Defendants had no such agreement with the Plaintiff here.

Defendants’ *post hoc* rationalizations appear to be driven by this Court’s acknowledgement that the Attorney’s Lien Act may not have provided for a lien against Plaintiff’s intellectual property.³ Obviously aware that they failed to comply with *any* of the procedural requirements associated with a statutory lien, during pre-trial litigation Defendants concocted the theory that they had a common law charging lien. But our courts have consistently described the common law charging lien as

³ See McCarter & English v. Moerae Matrix, Inc., 2021 N.J. Super. Unpub. LEXIS 1576, fn.17 (App. Div. 2021) (Pa1994) (noting that whether N.J.S.A. 2A:13-5 authorizes a lien against patents remains unresolved).

“only a claim or right to ask for the *intervention* of the Court for the attorney’s protection when, *having obtained a judgment for [the] client*, there is a probability of the client depriving [the attorney] of his costs.” Norell v. Chasan, 125 N.J. Eq. 230, 236 (E&A 1939) (italics added; internal quotation marks omitted). It would certainly be anomalous if attorneys had a freer hand to assert a common law charging lien against client property than under N.J.S.A. 2A:13-5, when the Supreme Court has made clear that 2A:13-5 not only codified the charging lien, but expanded it because the common law lien “had attached only to a judgement.” Musikoff v. Jay Parrino’s the Mint, LLC, 172 N.J. 133, 139 (2002), quoting from Martin v. Martin, 335 N.J. Super. 212, 222 (App. Div. 2000) (same).

Defendants also forfeited their rights to a common law “charging lien” for yet another reason: As noted above, litigants are required to demonstrate that they have no adequate remedy at law *before* seeking to invoke an equitable remedy. Woods v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 578 (2011) (“[O]nly the party who cannot obtain a sufficient remedy at law may enlist the aid of equity.”). Given the uncertainty as to whether N.J.S.A. 2A:13-5 provides for patent liens, Defendants’ failure to pursue a statutory lien *at all*, having neither petitioned the court nor giving appropriate Pre-Action Notice to the client, again throws cold water on their “charging lien” theory. In short, Defendants cannot escape the conclusion that they breached the standard of care when they asserted, *ex parte*, their unauthorized liens against Plaintiff’s patents,

without seeking judicial intervention and without giving appropriate notice to the client beforehand.

Defendants maintain that their egregious misconduct is excusable as advice about an unsettled area of law, under Procanik v. Procanik, 226 N.J. Super. 132 (App. Div. 1988). But this case has nothing to do with an attorney *giving a potential client* advice about an “unsettled area of the law.” Id., at 150. This case involves willful, adverse actions taken by attorneys against client property, in complete disregard of the ethical and fiduciary obligations inherent in an *existing, ongoing* attorney-client relationship. See Da870, et seq.

The reckless manner in which Lubit rushed to obtain support for her desired result reveals the self-interest driving the process. Aside from ignoring client instructions, Lubit also disregarded the opinion of Curtis Johnson, Esq., McCarter’s UCC expert, that there was *no* basis under the UCC to file a UCC-1 financing statement against Moerae’s intellectual property. See Pa1873. At her deposition, Lubit admitted that she did not look at *any* case law dealing with procedures for filing a lien under the Attorney’s Lien Act. Pa1873. The *only* New Jersey case Lubit read was the Supreme Court’s *per curiam* opinion in Granata v. Broderick, 231 N.J. 135 (2017), which holds that attorney’s fees can be collateralized under Article 9; but she admitted that she did not read the appellate decision in Granata, 446 N.J. Super. 449 (App. Div. 2016) (quoting H. & H. Ranch at length regarding the

procedures for asserting an attorney's lien) because she "was not interested in knowing what all the different parts of this [Granata] case...." Pa1909-1910.

McCarter & English's in-house General Counsel (William Reilly, Esq.) is readily available to McCarter attorneys for consultation on ethics matters. Lubit chose *not* to consult with him about the ethics of her plan to unilaterally file liens against Moerae's patents. Pa1628. Instead, she relied on a phone call with a "person" in the Delaware Secretary of State's office, whose name she could not recall, whose title she did not know, and whose status as an attorney she could not confirm. Pa1906; Pa1916. Lubit is a sophisticated, experienced attorney. Pa151-154. Her conduct preceding the filing of Defendants' UCC and USPTO liens against Moerae's patents on December 17, 2018 can, at best, be described as recklessness, spiked with personal animus against Cindy Lander (Moerae's CEO) whom she felt "ambushed" her when Lander announced that Moerae was moving to a new firm. Pa1182-83.

(c) Proximate Causation

Finally, Defendants insist that Moerae cannot demonstrate that their breach of the standard of care was the proximate cause of any harm to Plaintiff. Db40-45. Defendants simply ignore the irrefutable damage to Moerae's ownership of its intellectual property, which they continue to benefit from because they own Moerae's patents – patents that Plaintiff Moerae developed over a decade of research and at a cost of *over \$20 million*. Pa1727. Instead, Defendants embark on a causation

“narrative” that can be distilled to three contentions: (i) the results of the LPS Challenge study published in 2016 were “disappointing” (Db8); (ii) the “disappointing” results led to investor “fatigue” and consequent cash flow problems, so Moerae would have failed regardless of Defendants’ misconduct (Db44-45). That narrative, however, is the subject of intense factual dispute. While much of that dispute was already set forth in the Facts section of Plaintiff’s initial Appeal Brief, at Pb13-14, 17-21, and 27-29, Plaintiff offers a brief response to Defendants’ argument below.

i. The Science Behind MMI-0100

The three clinical tests of MMI-0100, Plaintiff’s lead drug, conducted by independent investigators, produced impeccable safety results. Pa289, 272, 257. Only Defendants’ paid medical expert, Dr. Frykman, opined that there was a safety issue, and that opinion was thoroughly demolished by Plaintiff’s expert, Dr. Harrison. Pa1482-1486.

As to potential efficacy, the results of the LPS Challenge study were in fact very promising. After two years of meticulous analysis, Moerae proved (and presented at the June 2018 ATS Conference) that the LPS Challenge data showed that MMI-0100 had a massive statistically significant effect on IL-6, a biomarker of drug activity on inflammation. Pb14; Pa1441. At Db6, Defendants mischaracterize the statistical significance of the LPS data as presented at the 2018 ATS Conference

as Plaintiff's "disagreement" with the 2016 findings of an independent investigator, Dr. Leaker. But Dr. Leaker was one of the *authors* of the 2018 ATS Conference presentation of statistically significant results. Pa197, 1441, 1472-1473. Lubit herself was sufficiently confident in those results to make an application on Plaintiff's behalf for a patent based on them. Pb15; Pa1498.

Plaintiff's scientific expert, Dr. Stephen Harrison, is a biotechnology research scientist with substantial experience shepherding prospective new drugs through the entire FDA regulatory process, right through commercialization. In his opinion, there was a more than 50% chance that MMI-0100 would successfully complete Phase 2 of the drug development process, in light of the promising results from the Phase 1 testing that had already been completed by 2018. Pa1448; 1495. Dr. Harrison also noted that the "probability of success across all drugs examined in autoimmunity and inflammation through phase 3 to the market was 63.7%." Pa1496; and see Pa1472-73 (concession by Defendants' expert, Dr. Frykman, at Tr.129:12-130:21 that MMI-0100's effect on the IL-6 biomarker, shown by the LPS Challenge Study as reported at the ATS conference, was favorable, and warranted further testing).

At Db8, fn. 4, Defendants belittle the opinion of Plaintiff's bioscience expert that there was a greater than 50% chance that MMI-0100 would successfully complete a Phase 2 clinical trial, since that does not equate to ultimate regulatory

approval, through Phase 3 and commercialization. But successful completion of a Phase 2 clinical trial *does* equate to an exponentially *higher* valuation for an experimental drug compound like MMI-0100, and therefore a substantially *greater* prospect for partnership with a major pharmaceutical company. See Pa1384; 1393 (Report of Plaintiff's biopharmaceutical valuation expert, Michael Pellegrino, assessing Plaintiff's present value of future operating profits as of its successful completion of Phase 1 on December 17, 2018 (\$6,249,038) versus \$42,231,600 after successful completion of Phase 2 and commencement of Phase 3).

Defendants insinuate that because Moerae had approached a large number of pharmaceutical companies to establish a partnership, without securing a deal, there was something wrong with MMI-0100. Db11. But, in fact, several major pharmaceutical companies showed great interest in MMI-0100, engaging in deep analysis of the data, and even interfacing with Lubit for due diligence on Moerae's patent portfolio. Pa1507-1521. The companies Moerae's CEO approached about partnering simply wanted to see data from additional clinical trials, *i.e.*, a "Phase 2a" study, before moving forward. Ibid.; see also Pa1507-1508 (email from Solid Bio to Cindy Lander, Moerae's CEO: "Overall, this is an impressive program... We remain very interested in this program and believe it could play a complementary role in DMD [Duchenne muscular dystrophy] treatment...."). And in 2018, Moerae had, in hand, a written proposal from PRA Health Sciences for a Phase 2a clinical trial.

Pa1542.

ii. Financial History and Investor Sentiment

Moerae had a track record at year-end 2018 of raising \$7.5M in grants and \$19.4M in investments from high net-worth investors and an institutional investor, Privateer. Pa1724; Pa215, Tr.280:5-24. Contrary to Defendants' image of Moerae's supposedly inevitable collapse, the data show relatively equal capital raises for the company's "C Round" of stock sales between 1/1/2013 and 5/7/2015 (\$5.3M) versus the "D round" between 5/8/2015 and 12/31/2018 (\$5.2M). Pa1725. Further, Moerae sold shares from 2016 until 2018 at consistently higher valuations, increasing its price from \$1.5441 in Round C, ending 5/7/2015, to \$7.4039 in Round D, ending 12/31/2018. Ibid.

At Db42, Defendants contend that existing investors had largely stopped investing long before its patent liens were filed on December 17, 2018. Not true: Twenty-two of the approximately 70 existing shareholders made additional investments in Moerae during 2017 and 2018. Pa242-249. Notably, several of those re-investors made large investments in Moerae in 2017 and/or 2018, ranging from \$25,000 to as much as \$200,000 from Vern Nagel. Ibid. Significantly, Nagel further stated, *in an email to Cindy Lander (Moerae's CEO) dated Dec. 4, 2018*, that he would invest another \$100,000 but he chose not to do so once McCarter filed its liens. Pa818, 1193-1194.

Contradicting Defendants' image of a moribund investor base, in November 2018, Moerae raised \$180,000 from twelve existing shareholders following an appeal for bridge financing to carry Moerae to its next fundraising round (planned for early 2019). Pa247-248. And the estimated cost of a Phase 2a clinical trial of MMI-0100 was \$2.8 million, not \$40M as Defendants contend. Pa1542. As still another example, Defendants' misleading portrayal of Moerae's financial net worth as having declined from \$-9.6m to \$-19.2m was contradicted by Moerae's accountant, Neal Murakami, who certified that Generally Accepted Accounting Principles ("GAAP") *prohibit* companies from including the value created by their intellectual property, when reporting net worth on a financial statement. Pa1726-1727.

To establish causation for the damage to its business prospects, Plaintiff need not show that Defendants' malpractice was the 'sole' cause, the 'predominant' cause, or even the 'primary' cause of the precipitous decline in fundraising after Defendants filed their liens. See Model Jury Charge 5.51, at pp. 1-2. At this stage, Plaintiff need only establish that a reasonable jury could find that one or more of Defendants' alleged deviations from the standard of care was a 'substantial factor' in causing Plaintiff to suffer injury to its business prospects. Cf. Gilbert v. Stewart, 247 N.J. 421, 448-449 (2021) (reversing summary judgment where attorney's negligence caused a "domino effect"

leading to adverse employment action, including demotion and suspension).

Significantly, in its recent ruling in Schwartz v. Menas, 251 N.J. 556 (2022), the Supreme Court rejected a *per se* rule barring a new business from claiming ‘lost profits’ damages, and reversed judgment dismissing plaintiff’s claims relating to the loss of an opportunity to develop affordable housing. Id., at 577. Like here, the plaintiff in Schwartz planned to rely on an experienced partner to navigate zoning ordinances and affordable housing regulations. Id., at 565. A New Jersey District Judge recently cited Schwartz in rejecting a defense motion to exclude a lost profits claim by a development stage drug company that had gotten no further than initial Phase 2 development. See Techfields Pharma Co. v. Covance, Inc., 2024 U.S. Dist. LEXIS 86719, at *40-*41 (D.N.J. 5/14/24) (Pa2342). And a California appeals court recently applied the same reasoning to uphold a unanimous verdict awarding lost profits to a development stage drug company in Asahi Kasei Pharma Corp. v. Actelion Ltd., 222 Cal. App. 4th 945 (Dec. 18, 2013), noting that regulatory approval is *not* a bar to recovering lost profits because “the standard of proof is *reasonable*, not absolute, certainty.” Id., at 971.

Schwartz also recognized the validity of alternative damages models (251 N.J. at 564-5) similar to the “Monte Carlo” statistical analysis provided by Plaintiff’s economic expert in this case, Michael Pellegrino. In Schwartz, the expert employed a similar analysis to provide a range of different outcomes,

much like Pellegrino has done here. Ibid; see also Telluride Resort & Spa v. Brunjes, 2022 Colo. Dist. LEXIS 355, *11 (D. Colo. 5/3/22) (Pa2357) (implicitly recognizing widespread use of “Monte Carlo” simulation to calculate, with “reasonable certainty,” Plaintiff’s damages from loss of new investor funds, and citing cases); and Lyondell Chem. Co. v. Occidental Chem. Corp., 608 F.3d 284, 294 (5th Cir. 2010) (same).

Defendants insist that their UCC-1 was intended only to provide public notice of their common law charging lien. Db49. But in the same breath they insist there is no evidence showing that any particular investor had actual notice of the lien. Db42. Defendant’s self-contradictory position should be rejected. “The primary purpose of a financing statement is to put a searcher on notice that an underlying security agreement may be outstanding.” Pinkerton's, Inc. v. John A. Roebling Steel Corp., 186 N.J. Super. 10, 13 (1982). Having chosen to contend that their UCC-1 was mere ‘notice’ of McCarter’s lien, Defendants are estopped from denying the *effect* that their ‘notice’ had on Plaintiff’s fundraising efforts, simply because there may be uncertainty as to the *extent* of the damages Plaintiff suffered: “[T]he risk of the uncertainty should be thrown upon the wrongdoer, instead of upon the injured party.” Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) (internal citation omitted).

2. Plaintiff's Breach of Fiduciary Duty Claim

During the week of December 10, 2018, while still representing Moerae in patent matters (Pa1187-1191), Lubit donned the role of advocate for McCarter's collection department in a way that was directly adverse to her client. Pa1183-1187. Acting entirely on behalf of McCarter, Lubit furiously sought a way to grab a security interest in Moerae's patents, all while Defendants kept their intentions to file liens against Moerae's intellectual property to themselves. See id. The result was a gross conflict of interest and violation of her fiduciary duties to the Plaintiff. Even if the attorney-client relationship had ended on Dec. 7th, Defendants nevertheless violated their fiduciary obligations to a *former* client, as codified in RPC 1.9(a).⁴

Defendants further suggest that Plaintiff's breach of fiduciary duty claim is duplicative of its malpractice claim. Db53. Defendants' reasoning defies simple logic. While a breach of fiduciary duty will typically give rise to a claim for malpractice, the converse is not always true: "Stated plainly, an attorney who intentionally violates the duty of loyalty owed to a client commits a more egregious offense than one who negligently breaches the duty of care." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427 (2001). For example, in Fink v. Kirchner, 2013 U.S.

⁴ A breach of fiduciary duty claim does not require that the misconduct occur in the midst of the client's representation. See, e.g., Estate of Spencer v. Gavin, 400 N.J. Super. 220, 242 (App. Div. 2008) (noting that a lawyer's duty of loyalty can extend beyond the end of the representation and citing cases).

Dist. LEXIS 66018 (D.N.J. May 8, 2013) (Pa2058), the court acknowledged that the plaintiff spelled out separate allegations for malpractice (professional negligence) versus the more substantial allegations for breach of fiduciary duty (an intentional tort), and allowed both theories to proceed simultaneously. Id., at *8.

A jury here might conclude that Lubit was negligent in failing to properly research New Jersey law addressing the procedures for filing attorneys' liens (Pa1872-1873), or by relying on "advice" from an unnamed clerk in the Delaware Secretary of State's office. At the same time, the jury might conclude that Lubit breached her fiduciary duties to Moerae by acting with deliberate indifference to the ethical ramifications of her lien filings, and in disregard of Plaintiff's repeated, emphatic refusal to offer a lien against their patents. Those are distinctly *different*, not duplicative, theories of liability.

Curiously, Defendants cite In re Simon, 206 N.J. 306, 317 (2011), for the blanket proposition that attorneys have a right to sue former clients to collect a fee. Db54. But Defendants ignore the Supreme Court's overriding caveat: A collection remedy permitted at law is unavailable to an attorney if it will result in a violation of the Rules of Professional Conduct. See id., at 317-18; and see Pa861-63, 869-71, 875 (Report of Plaintiff's malpractice expert, Benett J. Wasserman, J.D., noting numerous potential violations of those Rules by Defendants).

3. Plaintiff's Slander of Title Claim

Defendants simply cherry-pick legal authorities to support their arguments in opposition to Plaintiff's slander of title claim. However, Defendants ignore Andrew v. Deshler, 45 N.J.L. 167 (E&A, 1883), a century-old legal authority directly on point, and one which, like here, dealt with a false description of the defendant's ownership interest in a patent. In Deshler, the defendant's allegedly libelous statement was made by way of a "notice" published in a widely circulated newspaper. Id., at 168. The notice falsely stated that the defendant had obtained a federal appeals court injunction recognizing their controlling ownership interest in the patents at issue, id. at 172 (much like Defendants' lien filings in this case misidentified McCarter & English as the holder of a "security agreement" and "patent assignment"). The court concluded that, even if the defendant believed, in good faith, that their false statements were true, whether they were made *with malice* was a question for the jury: "If there be any evidence of malice, the authorities almost universally hold that the question of malice should be submitted to the jury. . . ." Id., 45 N.J.L. at 171-172. Defendant's "good faith" defense was unavailing because "the best means of ascertaining the truth" were within his reach when they published the notice. Id. at 172. "The fact that a man makes an unwarranted and libelous charge when he holds in his hand complete evidence of its falsity, is a strong circumstance to go to a jury on the question of the *bona fides* of the statement." Ibid.

Even if Defendants actually believe their *post hoc* theory that they were entitled to a common law ‘charging lien’ (despite never having used that terminology in their lien filings), evidence of malice abounds. Plaintiff repeatedly refused to provide a security interest in its patents, and McCarter’s own Curtis Johnson, Esq., warned that the law firm did not have a right to unilaterally file a UCC-1 financing statement. Lubit simply ignored his advice. The breakdown in the personal relationship between Lubit and Moerae’s CEO, Cindy Lander, beginning in December 2018; the concurrent conflict of interest created by scheming to file the liens while still representing Moerae, and while wrapping up the engagement under RPC 1.16(d); and evidence that they were concealing their disloyalty from the Plaintiff, are all facts from which a jury can infer malice.

Finally, Plaintiff’s slander of title claim in this case is more analogous to a “trade libel” claim than a “false light” claim (for which the statute of limitations is one year), because the damage arising from Defendant’s unauthorized lien filings was to Moerae’s business property, specifically its patents and patent applications. Cf. Henry v. Vaccaro Constr. Co. v. A. J. De Pace, Inc., 137 N.J. Super. 512, 518 (Super. Ct. 1975) (one-year statute under N.J.S.A. 2A:14-3 does not apply to slander of title because the “gist of the instant action is for damages to plaintiff’s business by virtue of the failure of others to deal or contract with the plaintiff.”).

Rogers Carl Corp. v. Moran, 103 N.J. Super. 163, 169 (App. Div. 1968), and Lone v. Brown, 199 N.J. Super. 420 (App. Div. 1985), both cited by the Defendants, are equally unpromising for them. In Rogers, the Appellate Division found that evidence of malice precluded summary judgment, and remanded for trial. Id., at 169. Lone v. Brown, 199 N.J. Super. 420 (App. Div. 1985), merely holds that a *lis pendens*, giving notice of a complaint for specific performance with respect to real property, is shielded by the litigation privilege. Id., at 428.

4. Plaintiff's Tortious Interference Claim

In light of the arguments set forth above, the factual and legal issues precluding summary judgment in Defendants' favor, with respect to Plaintiff's claim for tortious interference, are so patently obvious that Plaintiff will not waste this Court's time reviewing them. Defendants' reliance on Ross v. Annunziata, where the plaintiff's prospective economic advantage was dashed by its own inability to raise the \$2 million required for participation in a joint venture, underscores how Defendants have misconstrued the facts here. See 2012 N.J. Super. Unpub. LEXIS 453, at *4 (App. Div. Feb. 29, 2012) (Pa1116). Unlike Annunziata, here it was the Defendants' *own actions* that substantially contributed to Plaintiff's inability to obtain the fundraising needed to continue developing MMI-0100; and again unlike Annunziata, here Defendants did so while in an attorney-client relationship.

5. Plaintiff's UCC Claim

Defendants' UCC-1 Financing Statement, filed with the Del. Sec. of State on Dec. 17, 2018, was never authorized by the client and has no basis in law as a "charging lien" or attorney's lien under N.J.S.A. 2A:13-5. UCC Sec. 9-509(a) provides that:

"A person may file an initial financing statement...only if '(1) the debtor authorizes the filing in an authenticated record pursuant to subsection (b) or (c).'" [emphasis added]

Section 9-509(b) further provides that:

"By authenticating or becoming bound as a debtor by a security agreement, a debtor authorizes the filing of an initial financing statement...." [emphasis added]

And Section 9-102(74) defines a "security agreement" as: "an agreement that creates or provides for a security interest."

In their Answer, Defendants have admitted that "there was no formal written security or collateralization agreement between the parties." Pa28. Thus, it is undisputed that Plaintiff never authenticated any security agreement. Nevertheless, the Financing Statement filed by Defendants lists the "Secured Party" in Moerae's patents as "McCarter & English, LLC". Pa618. Sec. 9-102(a)(72)(A) defines a "secured party" as "a person in whose favor a security interest is created or provided for under a *security agreement*." (italics added). Because there was no consensual *security agreement* (the only predicate available to McCarter being a secured party),

that statement is false. Defendants had no authority to file what amounted to a false UCC-1 Financing Statement against their client's intellectual property.

Defendants argue that UCC Article 9 does not, by its own terms, govern attorney's liens. Of course Article 9 does not govern attorneys' liens—in New Jersey, attorneys' liens are governed by N.J.S.A. 2A:13-5, and the related judicial decisions. But that does not mean that a law firm is free to file a UCC-1 financing statement against client property without a lawful basis for doing so under Sec. 9-509(a), or otherwise misrepresent itself as a “secured party” vis à vis client property.

Worse still, Defendants did not just misrepresent McCarter as a “secured party” in an official document filed with the Del. Sec. of State. They incorporated that very same misrepresentation into the Patent Assignment Cover Sheet filed by Defendants with the USPTO the same day. Defendants also violated UCC Section 9-513(c) when they failed, and have continued to fail, to withdraw their UCC-1 financing statement within twenty days, *despite* having received a valid request from Moerae to do so. Pa1679.

Defendants construe Plaintiff's claims for damages under UCC Section 9-625 as “consequential damages” for “lost profits.” Db59-60. That is not correct. First, lost profits are not *necessarily* “consequential” damages; lost profits can constitute direct, general damages in circumstances like those present here, when they are the object of and inducement to a contract. See Educ. Logistics, Inc. v. Laidlaw Transit,

Inc., 935 F. Supp. 2d 1038, 1047 (D. Mont. 2013). In fact, it is up to a jury to decide whether damages for lost profits are “reasonably calculated” to put Moerae in the position it would have been had McCarter not asserted its unlawful lien under the UCC. Cf. Educ. Logistics, Inc. v. Laidlaw Transit, Inc., 583 F. App'x 624, 625 (9th Cir. 2014) (upholding jury award for loss of annual maintenance fees where evidence showed the lost fee was the probable result of defendant’s breach).

Secondly, Defendants fail to account for the fixed statutory damages available to the Plaintiff under Section 9-625(e)(4). The objective of the relationship between Moerae and Defendants, as their patent law attorneys, was to assist Moerae in its efforts to develop MMI-0100, and ultimately commercialize the product. Defendants cannot deny they were aware that this was the object of the engagement. Moerae’s claim for “lost profits” from the loss of fundraising opportunities that would have accrued were it not for Defendant’s invalid UCC financing statement is an element of damages “reasonably calculated” to put Moerae in the position it would have been had no violation occurred. Id. Punitive damages can also be awarded in cases presenting an aggravated set of facts, like the betrayal of a fiduciary relationship. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 449 (App. Div. 1976); Osborne v. Keeney, 399 S.W.3d 1, 23 (Ky. 2012) (a legal malpractice plaintiff may seek punitive damage from the attorney for grossly negligent conduct rising to the level of oppression, fraud or malice).

Finally, Defendants also violated UCC Section 9-513(c) when they failed to withdraw their UCC-1 financing statement within twenty days, despite having received valid requests from Moerae in January 2019 that they do so. To this day, Defendants maintain their refusal to do so. Defendants' explanation for obstructing Plaintiff's efforts to mitigate the damage caused by Defendants' misconduct is that Plaintiff should have filed a UCC-5 information statement sooner. Defendants' theory implies that a UCC-5 somehow erases their uninvited, unauthorized, and ultimately unlawful liens against Plaintiff's entire U.S. patent portfolio. As Plaintiff's UCC expert stated (Pa1953), and as Defendants' own legal malpractice expert admitted (Pa1704-05), there appears to be no means for the victim of a bogus lien to completely remove or expunge an unauthorized UCC-1 financing statement. Brown v. Thompson, 2009 N.Y. Misc. LEXIS 798, *12 (Sup. Ct. Queens Cty. 2009). In fact, the UCC-5 filed by Moerae's former counsel in February 2020 has yet to fully dispel the cloud created by Defendants over Moerae's title to its own patents. See also Pa957 (certification of John MacIntosh, discussing the impact McCarter's lien will have on his decision to further invest in Moerae).

6. Plaintiff's Claims for Constructive Trust and Equitable Lien

Defendants argue for dismissal of Moerae's claims for a constructive trust and/or equitable lien on the proceeds of any future sale of patents, or income generated from the patents, are based upon factual issues that only a jury can decide.

Whether Defendants acquired the patents lawfully is one of the substantial issues at stake in this litigation. That alone should be grounds for this Court to deny Defendants' demand that Plaintiff's claims for a constructive trust be rejected. They misconstrue the record when they suggest that the trial court and the Appellate Division approved of the way in which McCarter went about encumbering its client's intellectual property. This Court has never made any such finding, and Plaintiff's right to assert its claims against Defendants for damages have thus far been denied.

Defendants' invitation to affirm summary judgment on the bases set forth at Part II of Defendants' Opposition Brief should therefore be denied, for the reasons set forth above.

III. CONCLUSION

For the reasons set forth above, Plaintiff's appeal seeking reversal of the trial court's ruling below should be granted, and Defendant's application for affirming summary judgment on alternative grounds should be denied in its entirety.

Respectfully submitted,

LAW OFFICES OF G. MARTIN MEYERS

Dated: May 5, 2025

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