Superior Court of the State of New Jersey
Appellate Division

Docket No. A-000506-23

101 HUDSON PROPERTIES, LLC,

Plaintiff-Appellant-Cross-Respondent,

– v –

BIRCH REAL ESTATE SERVICES, LLC,

Defendant-Respondent,

– and –

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,

Defendant-Respondent-Cross-Appellant.

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY

DOCKET NO.: HUD-004227-22

JUDGE BELOW: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF FOR PLAINTIFF-APPELLANT-CROSS-RESPONDENT

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED WITH CITATIONS TO PLAINTIFF'S APPENDIX

(N.J. Ct. R. 2:6-2(a)(2))

TABLE OF CITATIONS

Cases

Rules

PRELIMINARY STATEMENT

Plaintiff-Appellant 101 Hudson Properties, LLC ("Plaintiff") submits this Brief in support of its appeal from a final judgment entered on November 29, 2023, in Superior Court, Hudson County (Hon. Anthony V. De'Elia, J.S.C.), which brings up for review a series of non-final interlocutory orders by which the trial court granted the defendants' separate pre-answer motions to dismiss the Complaint, *with prejudice*, and awarded attorneys' fees to Defendant Birch Real Estate Services, LLC ("Birch").

This case revolves around a dispute between the three parties to a Purchase and Sale Agreement ("PSA"), executed on August 13, 2021, involving certain commercial real estate in Hudson County. At its essence, the PSA provided that, at a closing originally scheduled to take place in October 2021, Plaintiff would take title to the real property directly from the fee owner, and Defendant Birch would take title to the improvements thereon. Plaintiff would then lease back the real property to Birch under a 98-year ground lease. Defendant Old Republic National Title Insurance Co. ("Old Republic") was to serve as the title company and escrow agent for the transaction.

Once the PSA was executed, Plaintiff placed $5 Million in an "Earnest Money Deposit" with Old Republic, in anticipation of an October 2021 closing date. Plaintiff also arranged financing for the purchase price, and paid millions to

keep the financing in place, while Birch extended the closing date again-and-again for almost a year. Throughout this time, Plaintiff was ready, willing, and able to close. In July 2022, ten months after the originally scheduled closing date, when Birch lied to Plaintiff in stating that it could not close this transaction, Plaintiff sought return of the Deposit, while expressly reserving all rights under the PSA.

Birch could have concluded this transaction with Plaintiff, as it was contractually obligated to do. Instead, Birch misled and kept Plaintiff in the dark, while Birch quietly raised additional equity and negotiated a reduction of tens of million in the purchase price with the fee owner. In October 2022, after almost a year of extensions and delays, Birch moved quickly to close this transaction in secret, without Plaintiff's knowledge or participation, denying Plaintiff the ability to file a *lis pendens* or take other steps to enforce its rights under the PSA.

It is undisputed that the transaction contemplated by the terms of the PSA was never consummated. Instead, Birch took title to both the real estate and the improvements thereon, after negotiating a separate deal with the fee owner. The surreptitious closing of that transaction took place mere months after Birch advised Plaintiff that Birch could not perform its obligations and just weeks after Old Republic's representative falsely advised Plaintiff the transaction was "on hold" and that she would keep Plaintiff posted as to any scheduled closing. There would have been no reason for Defendants' deception if, as they later argued, Plaintiff's right to specific performance had terminated with the return of the Deposit.

Plaintiff filed this action, seeking specific performance of the PSA as against Birch and asserting other contractual and common law claims. Defendants each moved separately to dismiss the Complaint with prejudice, pursuant to N.J. Ct. R. 4:6-2(e). Their pre-answer motions were both based upon a central, yet fundamentally flawed premise: namely, that Plaintiff waived its right to seek specific performance of the PSA when it accepted return of its Earnest Money Deposit in mid-July 2022.

Defendants argued that Plaintiff had a choice to "*either*" to seek return of the Deposit "*or*" seek specific performance. Yet, by its terms, Section 13.1 of the PSA expressly permitted Plaintiff to demand return of the Deposit and seek specific performance as an additional and non-exclusive remedy where, as here, Birch proceeded to close on the underlying real estate transaction with the fee owner and without Plaintiff. (Pa115-116, PSA § 13.1). Indeed, the "**in addition to**" language in PSA § 13.1 was expressly written to protect Plaintiff from exactly what transpired here– *i.e.,* Birch proceeded to close but cut Plaintiff out of the deal.

The trial court's pre-answer dismissal of the Complaint, *with prejudice*, as against both Defendants was erroneous. To add insult to injury, the trial court awarded Birch its attorneys' fees, based upon its conclusion that Birch was the "prevailing party" under the contract. The resulting Orders have deprived Plaintiff of its bargained-for exchange and of a remedy for millions of dollars of damages.

PROCEDURAL HISTORY

A. The Complaint and the Defendants' Pre-Answer Motions to Dismiss

Plaintiff filed its Complaint with the Hudson County Superior Court on December 28, 2022, stating claims sounding in contract and tort as against both Birch and Old Republic. (Pa1, Complaint). On April 3, 2023, Old Republic filed a pre-answer Motion to Dismiss Complaint, pursuant to N.J. Ct. R. 4:6-2(e), arguing that Plaintiff failed to state a claim. (Pa27-147). On April 20, 2023, Birch filed its own Rule 4:6-2(e) Motion to Dismiss. (Pa201-337). Plaintiff opposed both motions. (Pa148-187, Pa338-348).

B. The Contradictory Orders Issued by the Trial Court on June 2, 2023, and June 9, 2023

On June 2, 2023, the trial court heard virtual oral argument on Old Republic's motion to dismiss. (June 2 Trans., 1T).[1] At the argument, the trial court properly referenced the liberal standards for pleading under New Jersey law and stated that it was denying Old Republic's motion and would allow the case to proceed to discovery. (1T, at 16-19). Upon Plaintiff's oral request at the end of oral argument for leave to amend the Complaint, the trial court stated that it would, instead, grant Old Republic's motion, *without prejudice and with leave*

[1] The certified transcripts of the proceedings before the trial court are on file with this Court and are referred to herein as follows: "**1T**" - June 2, 2023 Transcript; "**2T**" – June 9, 2023 Transcript; "**3T**" – July 21, 2023 Transcript; "**4T**" – August 25, 2023 Transcript; and "**5T**" – September 22, 2023 Transcript.

to replead. (1T, at 18-19). Accordingly, the trial court issued an Order dated June 2, 2023, granting Old Republic's motion to dismiss, *without prejudice*, for the reasons stated on the record at oral argument. (Pa199-200, "June 2 Order").[2]

A week later, the trial court heard virtual oral argument on Birch's motion to dismiss, with prejudice. (June 9 Trans., 2T). Notwithstanding that it had just denied Old Republic's similar motion a week before, the trial court did a complete "about-face" and ruled from the bench that it would grant Birch's motion to dismiss, *with prejudice*. (2T, at 15-16). In so ruling, the trial court embraced Birch's argument that Plaintiff had no right to insist upon specific performance when Birch surreptitiously closed with the Fee Owner in October 2022, because Plaintiff had accepted the return of the Earnest Money Deposit in mid-July 2022. (2T, at 14-16).

At this argument, the trial court seized upon the word "thereupon" in Section 13.1 of the PSA, interpreting it to mean that Plaintiff could only insist upon specific performance if the initial default by Birch occurred *at or after* the closing in October 2022 (and not before). (2T, at 13-16). The trial court rejected Plaintiff's contention that the "in addition to" and "notwithstanding" language in Section 13.1 expressly permitted Plaintiff to also insist upon specific performance, regardless of the return of any termination or return of the Earnest

[2] The June 2 Order required that Plaintiff file an Amended Complaint within 15 days. That date was later extended on consent.

Money Deposit, in the event that Birch later proceeded to closing with the Fee Owner – which is exactly what happened here. (2T, at 15-16). Thus, in an Order dated June 9, 2023, the trial court granted Birch's motion to dismiss the Complaint, *with prejudice*. (Pa357, "June 9 Order").

C. Plaintiff's Motion for Reconsideration of the June 9 Order is Denied

The June 9 Order was erroneous and based upon a material misapprehension of PSA Section 13.1. It also flatly conflicted with the reasoning and result reached in the June 2 Order, in which the trial court had refused to dismiss with prejudice as against Old Republic. (Pa199-200). Accordingly, Plaintiff moved for reconsideration of the June 9 Order under Rule 4:42-2 and related relief. (Pa358-394). On July 21, 2023, the trial court heard oral argument and denied Plaintiff's motion, adhering to the June 9 Order dismissing the Complaint as against Birch, *with prejudice*. (July 21 Trans., 3T, at 15-16).

D. Old Republic's Motion for Reconsideration of the June 2 Order Was Granted, and the Complaint Was Also Dismissed with Prejudice

On August 3, 2023, Old Republic filed a Motion for Reconsideration of the June 2 Order denying its Motion to Dismiss with Prejudice; Old Republic also sought an award of its attorneys' fees as against Plaintiff. (Pa494-513). Plaintiff opposed that motion. (Pa514-622). At oral argument on August 25, 2023, and in a written Order of the same date, the trial court reconsidered and vacated the June 2 Order, dismissing the Complaint, *with prejudice,* as against

Old Republic. (August 25, 2023 Trans., 4T, at 7-8; Pa651-652 ("August 25 Order")). The trial court later denied Old Republic's motion for an award of attorneys' fees, based on principles of judicial estoppel. (Sept. 22 Trans., 5T, at 3-12, 13; "Sept. 27, 2023 Order," Pa688).

E. Birch's Motion for an Award of its Attorneys' Fees and Costs

Separately, Birch moved for an award of its attorneys' fees and costs, arguing that it was the "prevailing party" and entitled to fees under PSA § 18.2. (Pa395-440). Plaintiff opposed the motion, arguing, *inter alia,* that the June 9 Order (which was, at the time, the subject of Plaintiff's Motion for Reconsideration) had been incorrectly decided and that, even if Birch was the prevailing party, the dollar amount sought by Birch was unreasonable and excessive. (Pa441-474).

Ultimately, the trial court adhered to the June 9 Order, but stated at oral argument on July 21, 2023 that it would not decide Birch's motion for fees without conducting a hearing. (3T, at 16-17). At a subsequent conference on September 22, 2023, the trial court marked Birch's fee motion as denied without prejudice to its renewal, while Birch and Plaintiff worked to stipulate to the amount of such fees. (5T, at 17-20; "Sept. 28, 2023 Order," Pa689).

Thereafter, the trial court entered final judgment as to the stipulated amount of the fees to be awarded to Birch, which judgment finally concluded the action and cleared the way for this direct appeal. (Pa704-705).

F. Plaintiff's Appeal of the Orders Granting Dismissal with Prejudice and the Resulting Award of Legal Fees to Birch as Prevailing Party

Plaintiff filed a Notice of Appeal, which was subsequently amended. (Pa690, 697, 706). Plaintiff seeks appellate review and reversal of so much of the trial court's Orders and Judgment as dismissed the Complaint, with prejudice, as against both Defendants and granted Birch's motion for an award of its legal fees and costs, on the basis that it was a "prevailing party" under PSA § 18.2. Plaintiff requests that this Court reverse the Judgment and Orders appealed from and reinstate the Complaint as against both Defendants. At the very least, Plaintiff should have been afforded the opportunity to amend and/or to explore its claims in discovery.

STATEMENT OF FACTS[3]

A. The Purchase and Sale Agreement

On August 13, 2021, Plaintiff entered into the PSA with Defendants Birch and Old Republic, in connection with a real estate transaction involving certain

[3] The facts recited herein are drawn principally from Plaintiff's Complaint (Pa2-21), which must be presumed to be true and accorded all favorable inferences. *See* Point I, *infra.*

improved real property (the "Real Property") and the improvements thereon (the "Improvements"). (Pa90-128 (PSA)). Per the PSA, Plaintiff was to acquire fee title to the Real Property, by way of a deed directly from the non-party seller (the "Fee Owner") to Plaintiff. (Pa3, Complaint ¶ 9). Title to the Improvements was to be concurrently conveyed by the Fee Owner to Birch. Old Republic was to serve as Escrow Agent and Title Company. (Pa3, Complaint ¶ 8). The PSA also contemplated that, immediately upon Plaintiff taking title to the Real Property, Plaintiff (as landlord) and Birch (as tenant) would enter into a 98-year Ground Lease of the Real Property. (Pa4, Complaint ¶ 9). (This type of real estate transaction – involving bifurcation of the leasehold interest and fee interest, with both to be purchased at a simultaneous closing – has become a common place commercial transaction.)

Although the Fee Owner of the Real Property was not a signatory to the PSA, the Fee Owner *was* a signatory to a separate, related contract with Birch, dated August 12, 2021, whereby Fee Owner had contracted to sell the Real Property and its Improvements to Birch. (Pa34-88). That separate agreement between Fee Owner and Birch was referred to throughout the PSA (and herein) as the "Mack-Cali Agreement." (Pa34-88). The PSA was executed the day after the Mack-Cali Agreement was executed. The PSA contemplated that the closing would occur in October 2021, a date that was "intended to be concurrent with the Closing Date under the Mack-Cali Agreement." (Pa5, Complaint ¶ 16).

Birch affirmatively undertook, in Article VI of the PSA, to "cause Fee Owner to convey directly to [Plaintiff] by bargain and sale deed the Real Property," subject to certain enumerated conditions. (Pa104, PSA § 6.1). Thus, it was Birch's contractual obligation, *among other things,* to ensure that Plaintiff acquired fee title to the Real Property from the Fee Owner at the eventual closing. (Pa104, PSA § 6.1; Pa3-4, Complaint ¶ 9). Stated another way, Birch had no right to take title to the Real Property at the closing with the Fee Owner. Under the PSA, that right belonged exclusively to Plaintiff. (*See id.*).

The purchase price for Plaintiff to acquire the fee interest in the Real Property (excluding the Improvements), was set at $165 Million, subject to adjustment. (Pa5, Complaint ¶¶ 16-17). Among many other pertinent provisions, Section 13.1 of the PSA gave Plaintiff the right to demand specific performance, in the event that Birch breached the PSA by closing title under the Mack-Cali Agreement and thereupon defaulting in its obligation to close title under the PSA with Plaintiff. (Pa5-6, Complaint ¶ 21; Pa115-116, PSA § 13.1 ("Default by Seller")).

Plaintiff was also required to, and did, deposit with the Escrow Agent (Old Republic) the sum of $5 Million, as an "Earnest Money Deposit." Plaintiff secured financing at favorable market rates for the acquisition of the Real Property and, thus, to timely perform its obligations to fund the purchase price at the closing, originally scheduled for October 11, 2021 (the "Bank Financing"). Plaintiff

incurred heavy carrying costs and other expenses associated with such financing. (Pa5-7, Complaint ¶¶ 18-19, 26).

Between November 10, 2021, and March 25, 2022, Plaintiff and Birch executed several amendments to the PSA, postponing the Closing Date and otherwise ratifying and reaffirming the PSA, as modified. (Pa5, Complaint ¶¶ 22-25). To preserve the Bank Financing while simultaneously accommodating Birch's multiple extension requests, Plaintiff incurred millions of dollars in otherwise avoidable interest and related Bank carrying costs. (Pa7, Complaint ¶ 26).

B. The Events Leading up to the Breach of the PSA by Birch and Old Republic

On June 1, 2022, Plaintiff wrote to Birch, requesting assurances that Birch would honor its obligations to Plaintiff under the PSA. Such assurances were requested because Plaintiff had growing concerns, based upon certain discussions with Birch, that the latter might not adhere to the terms of the PSA and honor its obligations to Plaintiff. (Pa7, Complaint ¶ 27). Receiving no response and no written assurances as requested therein, Plaintiff followed up again with Birch by email on June 6, 2022. On June 7, 2022, Birch responded by email, claiming that, because the separate Mack-Cali Agreement had been amended by Birch and the Fee Owner to allow Birch to pursue a potential assumption of the existing loan on the Real Property, Plaintiff would effectively be cut out of the deal. Birch asserted that the parties could not proceed with "the original structure" of the deal, because

of Birch's "inability to secure leasehold financing." Thus, Birch contended that it was no longer bound by the terms of PSA and would proceed to close on the deal with the Fee Owner, without Plaintiff's participation. (Pa8, Complaint ¶¶ 28-29).

Counsel conferred, and Plaintiff rejected the claim that Birch had a right to renege on its obligations to Plaintiff under the PSA. Plaintiff also rejected the notion that Plaintiff had somehow agreed to, or otherwise acquiesced in, being cut out of the deal. (Pa8, Complaint ¶ 30). Birch implicitly acceded to Plaintiff's demand that the PSA was still in place and continued to pursue its contractual obligation to close the transaction. (Pa8, Complaint ¶ 31).

On June 28, 2022 – the last-adjourned "Closing Date," as agreed upon in the Fourth Amendment to the PSA – Birch advised Plaintiff that the closing was not proceeding on that date, and that Birch was in discussions with the Fee Owner to further extend the Closing Date in the Mack-Cali Agreement by one day. Birch forwarded a proposed Fifth Amendment of the Mack-Cali Agreement which, its counsel said, "is extending the closing date for 1 day." (Pa8-9, Complaint ¶ 32).

Plaintiff responded that afternoon, stating that Plaintiff did not object to an extension of the Closing Date by another day "to tomorrow" – but noting that Plaintiff expressly reserved and did not waive all of Plaintiff's "rights and benefits" under the PSA. Later that day, Birch replied: "This confirms the extension to tomorrow for the [Agreement with Plaintiff]," and inquired about the

costs and expenses that had been incurred by Plaintiff to that point in time. (Pa9, Complaint ¶ 33).

On June 29, 2022, Plaintiff advised Birch that, as of that date, Plaintiff had already incurred millions of dollars to maintain the bank financing Plaintiff had secured to fund the acquisition of the Real Property. Once again, Plaintiff expressly reiterated that Plaintiff reserved its rights and benefits under the PSA. (Pa9, Complaint ¶ 34). Later that afternoon, Plaintiff indicated that it did not object to another one-day extension of the Closing Date of the Mack-Cali Agreement but again asked for confirmation that the Closing Date under the PSA was likewise extended by another day. Here, too, Plaintiff expressly reserved and did not waive its rights under the PSA. (Pa9, Complaint ¶ 35). That evening, Birch's counsel wrote an email to Plaintiff's counsel, advising that Birch would not honor or perform its obligations to Plaintiff, under the PSA. While his June 29 email "confirmed" that the Closing Date was extended by another day under both contracts, Birch's counsel went on to state:

> Our respective clients both understand that despite their respective efforts to identify, there is no feasible way to close under the structure contemplated by the [PSA] because of the inability to secure the necessary leasehold financing with the ground lease structure. Accordingly, doing [sic] forward, further requests for consent by [Plaintiff] to extensions under the Mack-Cali [Agreement], and corresponding extensions of the closing date under the [PSA], are not meaningful. I suggest that it is more productive for our clients continue [sic] their discussions to address the fact that our client is unable to close under the terms of [the PSA].

(Pa10, Complaint ¶ 36 (emphasis added)). In reliance on this representation, Plaintiff believed Birch would, in fact, "continue their discussions" to address Birch's failure to close, as required by the PSA. (Pa10, Complaint ¶¶ 36-37). The next day, Plaintiff once again inquired as to the status of the transaction, and received a response from Birch stating, "[n]othing really new, I believe Mack-Cali wants to extend through tomorrow, and we want to extend until Tuesday. Still no agreement on longer extension." (Pa10, Complaint ¶ 38).

C. Plaintiff Signals its Ongoing Intention to Enforce its Rights Under the PSA, Notwithstanding the Return of the Earnest Money Deposit

On July 14, 2022, Plaintiff learned that Birch and the Fee Owner had further amended the Closing Date in the Mack-Cali Agreement, without Plaintiff's consent and without extending the Closing Date in the PSA, in breach of the PSA. Plaintiff wrote to Birch, advising that Birch was in breach of the PSA. Plaintiff also stated that, as a result, Plaintiff would direct the Old Republic to return to Plaintiff the $5 Million Earnest Money Deposit, plus interest – while expressly reserving and without waiving Plaintiff's additional rights, remedies, and claims. (Pa10, Complaint ¶ 39).

The following day, Birch responded by stating that it did not object to the release of the Earnest Money Deposit, while disputing that Birch had breached the PSA. (Pa11, Complaint ¶ 40). Thus, on July 15, 2022, Old Republic was instructed

to release the Earnest Money Deposit to Plaintiff, which it did. (Pa11, Complaint ¶ 41).

Critically, the parties' correspondence during this period reflects that Plaintiff never terminated the PSA and never waived or relinquished its right to insist upon specific performance of the PSA. Quite the contrary, in successive emails, Plaintiff repeatedly advised Birch counsel that Plaintiff reserved all of its rights under the PSA. (Pa320-333). Even when Birch stated in an email of July 15, 2022, that Birch "deemed" Plaintiff's demand for return of the Deposit to be an election to terminate the PSA, Plaintiff immediately rejected this assertion and noted that it was accepting the return of the Deposit without waiving its rights under the PSA (Pa330-331). This reservation of rights included, of course, Plaintiff's right under Section 13.1 to insist upon specific performance if Birch proceeded to close with the Fee Owner.[4]

D. Birch and Old Republic Colluded to Keep Plaintiff in the Dark about the Rescheduled Closing and to Cut Plaintiff Out of the Transaction

[4] In this same time period, the principals of Birch and Plaintiff were in discussions directly, and Birch had offered to pay Plaintiff's expenses, including millions of dollars in interest costs that had been incurred through that date (Pa327; Pa344-345); however, Birch never followed through on that promise and, instead, proceeded to close the deal surreptitiously with Old Republic and the Fee Owner behind Plaintiff's back, in breach of the PSA.

In early August 2022, Plaintiff reached out again to Old Republic and inquired about the anticipated closing. (Pa11, Complaint ¶ 42). On September 7, 2022, Plaintiff contacted Old Republic and requested a copy of the settlement statement for the anticipated closing of the Real Property transaction. (Pa11, Complaint ¶ 43). Old Republic's representative, Susan S. Icklan, acknowledged receipt of that email but, a week later, advised Plaintiff that she had "[j]ust been told the deal is 'on hold.'" (Pa11, Complaint ¶ 43; Pa345, ¶¶ 13-16). Plaintiff responded by email and specifically asked Ms. Icklan to advise him of the status of the transaction and rescheduled closing date. In reply, Ms. Icklan affirmatively agreed to do so, stating "Will do." (Pa11, Complaint ¶ 43; Pa345, ¶¶ 13-16).

Plaintiff reasonably relied upon Ms. Icklan's representation that she would keep Plaintiff apprised of the closing date. (Pa11, Complaint ¶ 44). Plaintiff and its principals had enjoyed a longstanding and well-established relationship with Old Republic and its principals, Susan and Richard Icklan, over the course of approximately 25 years and over 100 transactions. (Pa152-157). They had every reason to believe that Ms. Icklan would not mislead them as to the status of the closing and that she would follow through on her promise to keep Plaintiff apprised of the Closing Date under the PSA if and when it was rescheduled. (Pa152-157).

Ms. Icklan's representations to Plaintiff were false because she knew at that time that Birch was in the process of purchasing the Real Property directly from the Fee Owner under terms that were inconsistent with, and in breach of, the PSA.

(Pa345). Further, Ms. Icklan had no intention of keeping Plaintiff's counsel apprised of the new closing date, despite assuring him by email that she would. (Pa11, Complaint ¶ 45). Indeed, she later admitted that she was acting at the specific instruction of Birch when she failed to keep Plaintiff informed about the impending closing. (Pa345-346, ¶ 15; Pa12, Complaint ¶ 47).

E. Birch and Old Republic Surreptitiously Closed the Deal with the Fee Owner

On or about October 7, 2022, Birch, with the active participation of Old Republic, secretly completed the acquisition of the Real Property and the Improvements from the Fee Owner. In breach of the terms of the PSA, Birch took title to both the Real Property and the Improvements thereon, and Birch and Old Republic failed to facilitate the transfer to Plaintiff of fee title to the Real Property, as contemplated by the PSA. (Pa12, Complaint ¶¶ 49-50). Birch and Old Republic actively colluded to keep Plaintiff in the dark about the transaction, depriving Plaintiff of the opportunity to take immediate, additional steps to protect its legal interests to prevent the closing from going forward in Plaintiff's absence. (Pa11-12, Complaint ¶ 46; Pa345, ¶¶ 13-16).

In fact, Birch and Old Republic were in communication throughout the relevant period, but willfully failed and refused to keep Plaintiff apprised of the status of the transaction, including the date of the scheduled closing and the details of the transaction. Indeed, in early October 2022 (after Birch had closed with the

Fee Owner), Ms. Icklan admitted to Plaintiff that she had intentionally failed to inform Plaintiff of Birch's plan to acquire the Real Property. Ms. Icklan advised Plaintiff via email that "I was instructed [by Birch] that I was not permitted to share details of the transaction at all with [Plaintiff] et al. Uncomfortable situation to be put in." (Pa12, Complaint ¶¶ 47-48). In other words, Ms. Icklan knew she was helping Birch cut Plaintiff out of the deal, and Birch affirmatively instructed her to deceive Plaintiff. Plaintiff only learned of the closing on or about October 20, 2022, from a press release issued by a brokerage firm. (Pa13, Complaint ¶ 52). Plaintiff sustained millions of dollars of damages as a result of Defendants' acts and omissions.

LEGAL ARGUMENT

POINT I

THE PRE-ANSWER MOTIONS TO DISMISS SHOULD HAVE BEEN DENIED, IN LIGHT OF THE LIBERAL STANDARDS GOVERNING MOTIONS TO DISMISS AND PLEADINGS IN NEW JERSEY

(Pa357; Pa651-652; 2T; 3T; 4T)

At the outset, it is worthwhile to recite the familiar, liberal standards governing a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to N.J. Ct. Rule 4:6-2(e). Such a motion is to be "judged by determining 'whether a cause of action is "suggested" by the facts.'" *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989), quoting *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192 (1988)). Under this

deferential standard, a trial court's review "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Id.* (citations omitted). The trial court was obliged to "search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Id*. (citations omitted). Critically, in "this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." *Printing Mart*, 116 N.J. at 746 (citation omitted). Rather, every reasonable inference of fact should be construed in favor of the plaintiff. *See id.; see also Velantzas*, 109 N.J. at 192.

Guided by these principles, the trial court was bound to "treat the [Plaintiff's] version of the facts as uncontradicted and accord it all legitimate inferences." *See Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 166. The court's role was not to judge "the truth of the facts alleged; [it must] accept them as fact only for the purpose of reviewing the motion to dismiss." *See id.* Accordingly, this "examination of [the] complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach." *Printing Mart*, 116 N.J. at 746. A Rule 4:6-2(e) motion to dismiss must be considered "with caution," and granted in "only the rarest [of] instances." *See Banco Popular*, 184 N.J. at 165, citing *Lieberman v. Port Auth. of N.Y. & N.J.*, 132 N.J. 76, 79 (1993) and *Printing Mart*, 116 N.J. at 772.

Based upon these liberal standards, the trial court should have sustained the Complaint, because Plaintiff more-than satisfied New Jersey's liberal pleading standards as to each of the claims against Birch and Old Republic. Moreover, even assuming that there were perceived deficiencies in the Complaint, any order granting Defendants' motions to dismiss should have been *without prejudice* to Plaintiff's right to file an amended complaint. *See Printing Mart,* 116 N.J. at 771-72 ("If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counseled in this opinion, then, barring any other impediment such as a statute of limitation, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint.").

POINT II

THE PSA GAVE PLAINTIFF A RIGHT TO DEMAND SPECIFIC PERFORMANCE IF BIRCH DEFAULTED AND CLOSED WITH THE FEE OWNER

(Pa357; Pa651-652; 2T, 3T, 4T)

A. The PSA Expressly Granted Plaintiff the Right to Demand Specific Performance, "In Addition to" and "Notwithstanding" Termination and/or the Return of the Earnest Money Deposit

As described above, the PSA provided that Plaintiff would take title to the Real Property at the Closing from the Fee Owner. Pursuant to the plain terms of Section 13.1 of the PSA, Plaintiff also had a right to demand specific performance and enforce the transfer of title of the Real Property to Plaintiff if Birch defaulted

on the PSA and proceeded to close on the transaction with the Fee Owner, without Plaintiff. (Pa115-116, PSA § 13.1) ("Default by Seller").

The trial court erred in failing to hold that, under the PSA, this right to insist upon specific performance was "**in addition to**" Plaintiff's right to terminate and demand return of the Earnest Money Deposit upon a default by Birch. *See id.* Specifically, Section 13.1 of the PSA provided:

> Default by Seller. In the event that the Closing and the transactions contemplated hereby do not occur as herein provided by reason of any default of Seller, Purchaser may, as Purchaser's sole and exclusive remedy, elect by notice to Seller within ten (10) Business Days following the Scheduled Closing Date, terminate this Agreement, in which event Purchaser will receive from the Escrow Agent the Earnest Money Deposit, whereupon Seller and Purchaser will have no further rights or obligations under this Agreement, except with respect to the Termination Surviving Obligations. **Notwithstanding the foregoing, in the event Seller [Birch] closes title under, the Mack-Cali Agreement, and thereupon Seller [Birch] defaults in its obligation to close title under this Agreement, Purchaser [Plaintiff] shall, *in addition to its termination right*, shall have the right of specific performance.** Purchaser expressly waives its rights to seek damages in the event of Seller's default hereunder. Notwithstanding the foregoing, nothing contained in this Section 13.1 will limit Purchaser's remedies at law, in equity or as herein provided in pursuing remedies for any breach by Seller of any of the Termination Surviving Obligations.

(Pa115-116, PSA § 13.1) (emphasis added). Hence, Plaintiff had a right to (and actively did) insist upon participating in the rescheduled closing with the Fee Owner, to ensure specific performance under the PSA, such that it would acquire title to the Real Property directly from the Fee Owner, *regardless of* the return of the Earnest Money Deposit. *See id.* Birch and Old Republic deceived Plaintiff

concerning the date of closing and the status of the deal, which prevented Plaintiff from filing a notice of pendency or taking other steps to compel specific performance. Defendants' efforts to deceive Plaintiff would have been unnecessary if, as Defendants later argued, Plaintiff's right to specific performance had been forfeited by the return of the Deposit.

B. The Trial Court's Holding Disregards the "*In Addition To*" and "*Notwithstanding*" Language in Section 13.1 of the PSA

In the trial court, Birch argued that, once Plaintiff requested return of the Earnest Money Deposit in July 2022, Plaintiff had elected its remedy to terminate the PSA and thereby waived any right to demand specific performance when Birch later closed the deal with the Fee Owner in October 2022. In support of this contention, Birch argued that "[t]he second part of Section 13.1 provided Plaintiff with two mutually exclusive remedies: terminate the 101 Agreement and recover Plaintiff's Deposit, or seek specific performance."

In advancing this argument, Birch focused the trial court's attention on the language in the first few lines of Section 13.1, limiting Plaintiff to the termination of the contract and return of the Earnest Money Deposit. Critically, however, that same Section 13.1 goes on to state that:

> "[n]otwithstanding the foregoing, in the event Seller [Birch] closes title under, the Mack-Cali Agreement, and thereupon Seller [Birch] defaults in its obligation to close title under this Agreement, Purchaser [Plaintiff] shall, in addition to its termination right, shall have the right of specific performance."

(Pa115-116, PSA § 13.1) (emphasis added).

The underlined language above directly refutes Birch's argument. This language gave Plaintiff a right to demand specific performance and insist upon transfer of the title to the Real Property to Plaintiff where (as here) Birch proceeded to close upon the transaction with the Fee Owner and defaulted on its obligations to ensure that title to the Real Property was transferred to Plaintiff at that closing. *Id.*

Yet, in dismissing the Complaint with prejudice as against Birch (Pa357), the trial court accepted Birch's reading of Section 13.1 as limiting Plaintiff's remedies to be **either** a termination and return of the Earnest Money Deposit **or** specific performance, even when Birch proceeded to close with the Fee Owner. At oral argument on June 9, the trial court seized upon the word "thereupon" in Section 13.1, concluding that since the closing with the Fee Owner occurred *after* the return of the Earnest Money Deposit, Plaintiff had no right to demand specific performance. (2T, at 13-14). Yet, this conclusion arises from an improper and untenable reading of the contract, which ignores the phrase "*in addition to its termination right…*" in Section 13.1. (Pa115-116, PSA § 13.1)

Contrary to the Court's conclusion, the use of the word "thereupon" in the aforementioned sentence should not be read to impose a temporal limitation on Plaintiff's remedies against Birch. (2T, at 12-16). Such a construction of that sentence would render illusory Plaintiff's right to insist upon specific

performance. Under such a construction, Plaintiff would be faced with the Hobson's Choice of *either* (1) waiting *indefinitely* to see if Birch eventually closes with the Fee Owner and leaving its Deposit in place, even after Birch has signaled its intention not to fulfill its obligations to Plaintiff under the PSA; *or* (2) asking for return of the Deposit when Birch signaled its intention not to fulfill its obligations and thereby forfeiting its rights to pursue specific performance or damages, if and when Birch later closes on the deal with the Fee Owner, cutting Plaintiff out.

Unfortunately, Birch persuaded the trial court to ignore the "notwithstanding" and "in addition to" language, effectively granting Birch a license to breach the PSA with impunity. This ruling not only prevented Plaintiff from obtaining the benefit of its bargain and deprived Plaintiff of the opportunity to recoup millions of dollars in damages, it also creates a dangerous precedent for other similarly structured transactions in the State of New Jersey.

C. Settled Principles of Contract Construction Forbid the Interpretation of Section 13.1 that Birch Espoused and the Trial Court Accepted

It is axiomatic that words in a contract are to be given "their plain, ordinary meaning." *C.L. Div. of Medical Assistance & Health Services*, 473 N.J. Super 591, 599 (Super. Ct. App. Div. 2022) (citations omitted). If the terms are "clear and unambiguous," the court has "no room for construction and . . . must enforce those terms as written." *Id*. (citations omitted). The function of the court

is not "to re-write or distort a contract under the guise of judicial construction." *Caruso v. John Hancock Mut. Life Ins. Co.*, 136 N.J.L. 597, ***4 (E. & A. 1948) (citations omitted). Rather, "[t]he judicial function of a court of law is to enforce the contract as it is written." *Id*. (citations omitted).

The "elemental rule of [the contract's] construction" is determined by the parties' intention, which is "demonstrated by the language employed, when read and considered as a whole." *Caruso*, 136 N.J.L. at ***3. A court must give effect "to all parts of the instrument" when possible, as "the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." *Id*. (citations omitted). Here, too, the various parts of Section 13.1 of the PSA must be read in harmony, such that each clause is given a meaning, and none is rendered superfluous.

By focusing exclusively on the word "thereupon" (while altogether disregarding the words "notwithstanding the foregoing" and "in addition to"), the trial court effectively ignored the above well-settled precepts and concluded that Birch's obligations to Plaintiff under the PSA ceased when the Earnest Money Deposit was returned to Plaintiff in July 2022. (2T, at 12-16). In effect, the trial court adopted Birch's *disjunctive* ("either-or") interpretation of highlighted language in Section 13.1 of the PSA. However, the words "in addition to" dictate a *conjunctive* ("and") reading of the clause. In fact, anything but a *conjunctive* reading reduces the aforementioned "notwithstanding the

foregoing" and "in addition to" phrases to be entirely meaningless – a result that is impermissible under New Jersey law. *See id.*

D. The Highlighted Language in Section 13.1 Has a Specific and Plain Meaning That Cannot be Ignored or Construed in an Absurd Manner

As sophisticated business entities, Plaintiff and Birch surely understood the meaning of the words "[n]otwithstanding the foregoing" and the phrase "in addition to" – and they certainly understood the consequential effect that these phrases would have on the parties' rights and obligations, in the event that Birch proceeded to close the transaction with the Fee Owner *without* Plaintiff. Simply put, if the parties intended Birch's self-serving construction, the PSA would not only have omitted the "**in addition to**" language, but it would also have expressly included "**either-or**" language. Stated another way, if Birch wanted the option to cut Plaintiff out of the deal with impunity, it could have negotiated to include such an express clause in the contract. Not surprisingly, no such provision was included in the PSA, as Plaintiff would never have agreed to such a one-sided and illusory contract. *See Oliver v. Autographic Register Co.,* 126 N.J. Eq. 18, 22 (1939).

Even beyond the plain meaning of the phrase "in addition to," common sense also leads to the conclusion that, in the context of this multi-million dollar real estate transaction, Plaintiff would insist upon having a right to demand specific performance of the PSA if Birch attempted to proceed to closing under

the Mack-Cali Agreement, regardless of whether Plaintiff had already demanded return of the Earnest Money Deposit upon Birch's announcement that it had no intention to perform its obligations. Why would Plaintiff be so naïve as to restrict its remedies to receiving only a return of the Deposit, leaving itself without remedy for all of its heavy carrying costs and for the loss of the value of the Real Property? Settled rules of contract construction prohibit an interpretation that would lead to such an absurd result. *See, e.g., Barila v Bd. of Educ. of Cliffside Park,* 241 N.J. 595, 616 (2020).

The trial court's (and Defendants') construction of Section 13.1 of the PSA enabled Birch to cut Plaintiff out of the deal and close with the Fee Owner with total impunity, while leaving Plaintiff without any remedy for the tremendous loss of the contract value and the heavy expenses it had incurred in order to arrange for financing of its end of the deal. (Pa5, Complaint ¶ 19). This construction of the contract rendered entirely illusory Birch's obligations (and Plaintiff's rights) under the PSA. Once again, settled principles of contract construction forbid this result. "A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory. Especially must this be so when a forfeiture will follow." *See Russell v. Princeton Labs., Inc.,* 50 N.J. 30, 38 (1967).

Finally, the trial court's reasoning entirely ignored the Complaint's allegations that, after the return of the Earnest Money Deposit, Birch and Old

Republic took affirmative steps to hide the closing from Plaintiff. Indeed, after the deposit had been returned to Plaintiff, Birch instructed Old Republic to keep Plaintiff in the dark as to the anticipated closing. (Pa11, Complaint ¶¶ 42-44).[5] If Birch and Old Republic truly believed that Plaintiff had no right to participate in the transaction with the Fee Owner, why would it be necessary to keep this information hidden from Plaintiff and to proceed covertly to closing?

POINT III

BIRCH'S ARGUMENTS BASED UPON A THEORY OF "ELECTION OF REMEDIES" ARE ALSO MERITLESS

(Pa357; Pa651-652; 2T; 3T; 4T)

In the court below, Birch also argued that Plaintiff had "elected" its remedy when it demanded the return of the Earnest Money Deposit and that the trial court should enforce this remedy election by dismissing all claims against Birch. This argument, too, fails as a matter of law, based upon the plain terms of the PSA. The doctrine of "election of remedies" has no bearing on this case because, in seeking to enforce the PSA and demanding specific performance, Plaintiff was merely exercising a contractual right.

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[5] As discussed above, in September 2022, after the Earnest Money Deposit had been returned, Ms. Icklan falsely stated to Plaintiff that the deal was "on hold" and promised to apprise Plaintiff when and if it was moving forward. She knowingly failed to do so (Pa12, Complaint ¶ 47).

The doctrine of election of remedies "is the conscious choice, with full knowledge of the facts, of one of two or more inconsistent remedies." *Adams v. Camden Safe Deposit & Tr. Co.*, 121 N.J.L. 389, 394 (1938) (emphasis added); *see also Murphy v. Morris*, 12 N.J. Super 544, 547 (Super. Ct. 1951) (stating "[t]he essential conditions or elements of election of remedies are (1) the existence of two or more remedies; (2) the inconsistency between such remedies, and (3) a choice of one of them"). The doctrine "stems from the principle, rooted in reason and justice, that a party, in seeking legal redress, shall not be at liberty to take irreconcilable and repugnant positions." *Adams,* 121 N.J.L. at 395 (emphasis added). Therefore, in order to properly assert the doctrine of election of remedies, "there must in fact be two inconsistent remedies available to the party seeking enforcement of the claimed right." *Id*. Critically, for present purposes, the doctrine is not "applicable to bar concurrent and consistent remedies." *Id.*

Here, Birch argued – and the trial court held (2T, at 13-16) – that Plaintiff was barred from seeking specific performance because, by terminating the PSA through acceptance of the Deposit, Plaintiff had made its election, and it should be held to its bargain. However, as the *Adams* court discussed, proper invocation of the election of remedies doctrine can occur only where there are two inconsistent and non-concurrent remedies, and a party elects one. Yet, Plaintiff did not elect one of two inconsistent or non-concurrent remedies. Rather, as

discussed at length above, the first two sentences of PSA § 13.1 must be read in tandem, to allow Plaintiff to elect both to demand return of the Earnest Money Deposit and to insist upon specific performance.[6]

Specifically, the first clause of Section 13.1 states that, in the event a closing fails to occur in accordance with the PSA because of a default by Birch, Plaintiff may "terminate this Agreement" through notice to the Seller within ten business days and, in so doing, receive a return of the Earnest Money Deposit. (Pa115-116, PSA § 13.1). However, the sentence immediately thereafter reads "[n]otwithstanding the foregoing, Purchaser [Plaintiff] shall, in addition to its termination right, shall have the right of specific performance" where the Seller (Birch) has defaulted and proceeded to close with the Fee Owner under the Mack-Cali Agreement. (*Id.*) (emphasis added). This is exactly what happened here.

The PSA gave Plaintiff the **concurrent** right to seek return of the Earnest Money Deposit **and** to demand specific performance. These remedies were not in any respect "repugnant" or "inconsistent," so as to invoke the doctrine of election of remedies. *See Adams,* 121 N.J.L. at 395. Accordingly, the trial court

[6] Here, as discussed *supra,* Plaintiff never expressly terminated the contract. However, even if Plaintiff had terminated, this would not change the result, given the "*in addition to its termination right*" language in Section 13.1.

erred in holding that Plaintiff waived its right to seek performance by demanding a return of the Earnest Money Deposit. (Pa357; 2T, at 13-16; 3T, at 15-16).

POINT IV

BIRCH WAS NOT EXCUSED FROM PERFORMANCE BY ITS ALLEGED "INABILITY" TO CLOSE ON THE TERMS IT HAD AGREED TO

(Pa357; 2T; 3T)

Throughout its motion papers in the court below, Birch implied that it acted in good faith and was excused from performing its obligations to Plaintiff under the PSA because it was having difficulty securing favorable financing. Although not directly addressed by the trial court, this line of argument is a red herring and is contrary to New Jersey law.

The defenses of impossibility or impracticability of performance are complete defenses for a party's non-performance *only in the very limited circumstances* "where a fact essential to performance is assumed by the parties but does not exist at the time for performance." *Connell v. Parlavecchio*, 255 N.J. Super 45, 49 (Super. Ct. App. Div. 1992). Impossibility or impracticability "are not defenses where the difficulty is the personal inability of the promisor to perform." *Id*. (emphasis added). In other words, "a party cannot render contract performance legally impossible by its own actions." *Petrozzi v. City of Ocean City*, 433 N.J. Super. 290, 303 (Super. Ct. App. Div. 2013); *see also Duff*

v. Trenton Beverage Co., 4 N.J. 595, 606 (1950) (recognizing that a "promisor's subjective incapacity" does not excuse a breach).

The fact that Birch may have been struggling to find what it considered favorable financing terms did not excuse it from proceeding with the terms of the PSA – even if the deal, as structured, was no longer financially attractive to Birch. *See, e.g., Newark v. N. Jersey Dist. Water Supply Com.*, 106 N.J. Super. 88, 104-105 (Super. Ct. 1968) ("subsequent events which should have been in the contemplation of the parties as possible contingencies when they entered into the contract will not excuse performance.") "New Jersey does not subscribe to the view that a thing is impossible in legal contemplation simply because it is not practicable to perform except at an excessive and unreasonable cost." *Id.*

Here, Birch attempted to back out of its contractual obligations to Plaintiff based upon its contention that it was unable to obtain financing to proceed with the structure contemplated by the PSA. According to Birch's self-serving narrative, it was free to walk away from its obligations to Plaintiff and proceed to closing with the Fee Owner (and without Plaintiff). By then, Birch had apparently negotiated what it considered to be a better, more financially attractive deal, whereby it would assume the existing loan and take title to both the Real Property and the Improvements. (Pa346-347 at ¶¶ 17-21). However, as discussed, Birch had no right to cut Plaintiff out of the deal just because Birch later perceived that the terms of the PSA were more onerous and financially

burdensome than the deal it could cut directly with the Fee Owner, after further negotiation. *See Newark,* 106 N.J. Super. at 105. The trial court did not expressly address this argument in the oral arguments or Orders appealed from.

POINT V

PLAINTIFF ALSO STATED A CLAIM FOR BREACH OF CONTRACT AGAINST OLD REPUBLIC

(Pa651-652; 4T)

Like Birch, Old Republic challenged the sufficiency of Plaintiff's claim against Old Republic for breach of contract (Count III of the Complaint). The familiar elements of a claim for breach of contract under New Jersey law are the existence of a valid contract between the parties; a breach of the contract by one of the parties; and resulting damages. *See, e.g., Murphy v. Implicito,* 392 N.J. Super. 245, 265 (App. Div. 2007) (reciting elements). Here, especially when viewed under the "generous and hospitable approach" applicable to a pre-answer Motion to Dismiss, each of these elements was sufficiently pleaded against Old Republic and the claim should have been sustained. *See Printing Mart*, 116 N.J. at 746. The trial court erred in dismissing this claim with prejudice. (Pa651-652; 4T).

A. Old Republic Affirmatively Aided and Abetted Birch and was Not Merely an Innocent Bystander to the Breach by Birch

Addressing, first, the existence of a contract between the parties, the Complaint alleged (and the documentary proof submitted by Old Republic confirmed) that Old Republic is a party and signatory to the PSA. (Pa3, Complaint

¶ 8; Pa128). In an apparent effort to try to distance itself from the contract and its associated duties to Plaintiff, Old Republic repeatedly referred to the PSA as a contract between Plaintiff and Birch, in its papers in the court below. (*See, e.g.*, Pa32 at ¶ 3). Elsewhere, Old Republic admitted (as it had to) that both the Mack-Cali Agreement and the PSA designated and expressly referred to Old Republic as the "escrow agent" and "title company." (*See*, *e.g.*, Pa93, Pa95; *see also* Pa546-547, Old Republic Mem. at 4, 5). Still, Old Republic asserted that "the signature block of the PSA indicates that Old Republic's involvement and obligations owed under the PSA were limited to 'Articles IV, X, and XVII," and argued that "Old Republic is a title insurer but never executed the PSA in its alleged capacity as a 'Title Company.'" (Pa550, Old Republic Mem. at 8).

Of course, as a signatory to a contract, and absent fraud, Old Republic is presumed to have read, understood, and assented to all of its terms. *See Peter W. Kero Inc. v. Terminal Construction Corp.*, 6 N.J. 361, 368, 78 A.2d 814 (1951); *see also Greenfield v Twin Vision Graphics, Inc.*, 268 F. Supp. 2d 358, 373 (D.N.J. 2003). Particularly where, as here, the signatories are sophisticated parties, represented by counsel, Old Republic must be presumed to have read and understood the terms of the deal and to have known that it was taking on duties to the other parties to the PSA. Moreover, Old Republic's duties under the contract must be construed based upon the whole contract, read in harmony, and not by sole

reference to the small print above the signature block, as Old Republic argued. *See generally Krosnowski v. Krosnowski*, 22 N.J. 376, 387, 126 A.2d 182, 188 (1956).

Here, a perusal of the PSA as a whole reflects that Old Republic undertook various duties, including as an escrow agent and as a title company. More specifically, Old Republic undertook a variety of duties and obligations in its role as Escrow Agent. (Pa90-128, PSA §§ 3.2, 4.2, 4.3, 10.1, 11.1, 11.2, 17.1(a), 17.1(b), 18.14). Contrary to its contentions, Old Republic was also required to act in the role as the Title Company and is expressly defined as such in the PSA. (Pa91-62, PSA § 1.1). In its role as Title Company, Old Republic undertook an additional set of obligations in the PSA. (Pa90-128, PSA §§ 6.3, 9.2, 10.2, 10.3).

Under these circumstances, Old Republic's self-serving efforts to distance itself from the contract and its obligations thereunder were fallacious. Old Republic could not avoid its duties under the contract merely by casting itself as "caught in the cross-fire between these parties following the collapse of their deal." *See* Pa543, Old Republic Mem. at 1. Indeed, Old Republic was to be well-compensated for the performance of its duties. (Pa113-114, PSA, § 10.5). It was not merely an unwitting bystander to the deal, "caught in the cross-fire", as it argued before the trial court.

To the contrary, Old Republic played a material role in the events leading to Plaintiff's damages. Old Republic acted in bad faith, breached its contractual and fiduciary duties to Plaintiff, affirmatively acted with Birch to deceive Plaintiff and

cut Plaintiff out of the deal, and thus played an active role in the "collapse of [the] deal." (Pa15-16, Complaint ¶¶ 68-79). Having colluded with Birch to keep the closing and related details hidden from Plaintiff – particularly after promising to keep Plaintiff apprised of the new date – Old Republic actively aided and abetted Birch and thus breached its contractual duties to Plaintiff. (*See id*.)

Under New Jersey law, "[l]iability for aiding and abetting "is found in cases where one party 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'" *See Shah v. Shroff*, 2023 N.J. Super. Unpub. LEXIS 527, *47-48 (April 2023), citing *McCormac v. Qwest Comm. Int'l Inc.*, 387 N.J. Super. 469, 481, 904 A.2d 775 (App. Div. 2006); *Judson v. Peoples Bank Tr. & Co.*, 25 N.J. 17, 29, 134 A.2d 761 (1957). "To prove such a claim, a plaintiff must show that '(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.'" *See McCormac*, 387 N.J. Super. at 484-85 (quoting *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004)).

> Aiding and abetting liability focuses on "whether a defendant knowingly gave substantial assistance to someone engaged in wrongful conduct, not whether the defendant agreed to join the wrongful conduct." *Podias v. Mairs,* 394 N.J. Super. 338, 353, 926 A.2d 859 (App. Div. 2007). Determining how much assistance is considered substantial is fact-sensitive.

Shah, 2023 N.J. Super. Unpub. LEXIS 527 at 48 (emphasis added).

Here, the factual allegations against Old Republic in the Complaint amply support each of these elements and, thus, adequately stated a claim for breach of contract and aiding and abetting the breach by Birch. *See id.*

B. Section 17.1(b) of the PSA Does Not Present a Bar to Plaintiff's Claims

Old Republic also argued that Section 17.1(b) of the PSA "precludes Plaintiff from asserting any claims against Old Republic other than those for bad faith, gross negligence or willful misconduct." Pa556-559, Old Republic Mem. at 14-17. Old Republic insisted that this clause must be interpreted to preclude all of Plaintiff's claims against Old Republic. (*See id.*)

In making this argument, Old Republic simply ignored the fact that the Complaint did allege that Old Republic acted in bad faith and willfully when it deceived Plaintiff and aided and abetted Birch in its breach of contract. Indeed, in numerous places throughout the Complaint, Plaintiff alleged various acts of bad faith and willful misconduct, including: that Old Republic acted to intentionally deceive Plaintiff; affirmatively engaged in deception in collaboration with Birch; intentionally advised Plaintiff it would keep Plaintiff apprised of the closing, while having no present intention to do so; breached its duties of good faith and fair dealing by working with Birch to frustrate Plaintiff's ability to obtain the benefits of the bargain; and acted covertly and surreptitiously to facilitate the closing between Birch and the third-party seller, with knowledge

that doing so constituted a breach of Old Republic's and Birch's obligations to Plaintiff. (Pa3-21, Complaint ¶¶ 45-51, 73-76, 82, and 86-89). Thus, Section 17.1(b) of the PSA did not provide a valid basis for the dismissal of Plaintiff's causes of action against Old Republic, let alone with prejudice.

C. Old Republic's Contention that the PSA was Terminated by Plaintiff, Thereby Relieving Old Republic of any Further Obligations to Plaintiff, is Contradicted by the Terms PSA § 13.1

Like Birch, Old Republic also argued that it could not be held liable for breaching the contract with Plaintiff because the PSA had already been terminated by the time Ms. Icklan misled Plaintiff and withheld material information about the closing. (Old Republic Mem. at 20, 21 (Pa562-563)). Because Ms. Icklan is alleged to have made false promises and misstatements upon which Plaintiff relied *after the Deposit was returned*, Old Republic argued that it could not be held to have breached "an already breached and terminated agreement." (*Id.* at 21).

This argument rests upon the same distortion of the terms of the PSA that Birch relied upon – and the trial court accepted. (Pa357; Pa651-652; 2T; 3T; 4T). As discussed in Point II, *supra*, Section 13.1 of the PSA gave Plaintiff an express right to demand specific performance and insist upon transfer of the title to the Real Property to Plaintiff, if Birch defaulted on its obligations and proceeded to close upon the transaction directly with the Fee Owner, notwithstanding and in addition to the return of the Deposit. (Pa115-116, PSA § 13.1).

Old Republic's argument also ignores the Complaint's allegations that Ms. Icklan and Old Republic were *well aware* that Plaintiff fully intended to enforce its rights under the PSA, even after the Deposit had been returned. Indeed, as alleged in the Complaint, Plaintiff reached out to Ms. Icklan *after the deposit had been returned* for the very purpose of ensuring that Plaintiff would be kept in the loop as to the anticipated closing. (Pa11, Complaint ¶¶ 42-44). By her own admission in an email in October 2022 (after the surreptitious closing had taken place), Ms. Icklan had intentionally withheld the information from Plaintiff because she was being told by Birch not to communicate with Plaintiff. (Pa12, Complaint ¶ 47). Likewise, Richard Icklan (also a principal of Old Republic) admitted that Old Republic should have kept Plaintiff apprised of the facts – but that Susan Icklan felt "spooked" because she was getting pressure from Birch's principal not to provide any information to Plaintiff about the transaction. (Pa155-157, ¶¶ 14-20).[7]

These admissions from two of the principals of Old Republic reflect that Old Republic intentionally chose to remain silent to accommodate Birch and serve their own financial interests. These admissions are also inconsistent with the

[7] Old Republic's own argument was internally inconsistent. While arguing that the PSA had been terminated and that Old Republic had no further duties under the PSA, Old Republic did not dispute that it continued to actively participate (and was presumably compensated for its services) in the transaction that ultimately closed between Birch and the Fee Owner.

notion that Defendants believed they were free to proceed without Plaintiff's knowledge or participation. If they were fee to proceed, why keep it a secret?

D. Even if the PSA Did Not Impose a Duty on Old Republic to Keep Plaintiff Apprised of the Closing, Old Republic Voluntarily Assumed This Duty and, Thus, Had a Duty to Perform it Carefully and Without Negligence

Old Republic also argued that the actions and omissions complained of in the Complaint refer to the breach by Old Republic of "extra-contractual duties" – *i.e.*, duties or "actions outside the term of the PSA." (Pa562, Old Republic Mem. at 20). In particular, Old Republic asserted that "the PSA has no terms imposing an obligation on obligation on Old Republic to perform or abstain from any of these activities." (*See id.*). Thus, Old Republic argued, these allegations do not support a claim for breach of contract.

This argument fails. Old Republic certainly had a contractual duty to cooperate with Plaintiff and Birch in seeing to it that the terms of the PSA were followed and to ensure that the closing (which was to occur at Old Republic's offices) was not undertaken covertly, without notice to or participation of Plaintiff. Old Republic breached its contractual duties when it aided and abetted Birch and otherwise acted in derogation of Plaintiff's rights to acquire title to the Real Property by affirmatively and willfully cutting off communication with Plaintiff and intentionally misleading Plaintiff about the status of the deal.

In any event, under New Jersey law, a party to a contract may voluntarily assume duties to perform beyond those articulated in their contract. Once those duties are voluntarily assumed, they must be performed with due care. *See, e.g., Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.*, 116 N.J. 517, 541 (1989) (stating the principle that "[n]otwithstanding the essentially contractual nature of the relationship between a title company and its insured, the company could be subject to a negligence action if the 'act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title.'"). Thus, even assuming *arguendo* that the PSA did not obligate Old Republic to speak truthfully about whether (or not) the closing was "on hold" or to follow through on its promise keep Plaintiff apprised of the fact and details of the rescheduled closing, this does not end the analysis. Once Old Republic voluntarily assumed a duty to Plaintiff, knowing that Plaintiff would rely upon Old Republic to perform that duty carefully and honestly, Old Republic had to perform that duty with due care, and without deception. *See id.; see also Coco v. Hamilton*, 2010 N.J. Super. Unpub. LEXIS 1047 * at *32; 2010 WL 2011003 (App Div. 2010).

The trial court did not expressly rule on these arguments, when dismissing the claims against Old Republic with prejudice.

POINT VI

PLAINTIFF'S CLAIM OF BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD HAVE BEEN SUSTAINED

(Pa357; Pa651-652; 2T; 3T; 4T)

The trial court also erred in dismissing Count IV of the Complaint, which states a claim of breach of the implied covenant of good faith and fair dealing as against both Defendants. Birch sought dismissal of this claim, arguing that (1) this claim is an attempt to "circumvent the stipulated remedies clause"; and (2) Plaintiffs have not sufficiently pleaded bad faith or other improper motive, so as to support such a claim against Birch. Old Republic also argued that the Complaint fails to allege that Old Republic acted with bad faith or an improper motive.

These arguments do not withstand analysis. In every contract there is an implied covenant of good faith and fair dealing that demands that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Palisades Props., Inc. v. Brunetti,* 44 N.J. 117, 130 (1965) (quoting 5 WILLISTON ON CONTRACTS § 670, pp. 150-160 (3d ed. 1961)). "The covenant is among the few terms that '[c]ourts have been called upon to supply.'" *Wilson v. Amerada Hess Corp.,* 168 N.J. 236, 244 (2001) (citation omitted). While a covenant will not be implied so as to override an express term of a contract, "a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent

express term." *Id.* The New Jersey Supreme Court has also cited approvingly to the Restatement (Second) of Contracts § 205 (1981), for the proposition that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.'" *Wilson*, 168 N.J. at 245.

Allegations of bad faith or improperly motivated intentions are elements of a claim for breach of the implied covenant of good faith and fair dealing. *See id*. at 251. However, each case is fact-specific, and various forms of conduct have been held to constitute a violation of the covenant. *See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.,* 182 N.J. 210, 225 (2005). Thus, "a plaintiff may get relief if it relies to its detriment on a defendant's intentional misleading assertions." *Id*. at 226 (emphasis added) (citing *Bak-A-Lum Corp. v. Alcoa Building Prods.,* 69 N.J. 123, 129-130 (1976)). "As a general rule, [s]ubterfuges and evasions in the performance of a contract violate the covenant of good faith and fair dealing even though the actor believes his conduct to be justified." *Brunswick Hills Racquet Club*, 182 N.J. at 225 (citations and internal quotes omitted) (emphasis added). This is exactly what is alleged in the Complaint, as against both Birch and Old Republic.

Defendants both argued that Plaintiff failed to allege facts sufficient to state a claim for breach of the implied covenant of good faith and fair dealing. Yet, Plaintiff asserted ample facts to support such a claim. In particular, the Court is referred to the allegations regarding the affirmatively misleading and deceptive way in which Birch and Old Republic actively colluded to keep the facts and details of the rescheduled closing hidden from Plaintiff. (Pa11-13, Complaint ¶¶ 42-53). These are allegations of bad faith and improper motivation. *See id.* In fact, Old Republic asserted in the court below that it was acting at the express direction of Birch when it intentionally misled and withheld material information from Plaintiff in the weeks leading up to the secret closing. (Pa 564, Old Republic Mem. at 22). Under these circumstances, Plaintiff more-than-articulated the specific acts and omissions by Birch and Old Republic, done in an effort to frustrate Plaintiff's reasonable expectations under the PSA – *i.e.*, its expectation that it would take title to the Real Property and that Birch would not go behind its back and make secret arrangements with Old Republic and the Fee Owner to cut Plaintiff out of the deal.

At the very least, Plaintiff should have been given the opportunity to explore Defendants' acts and omissions in discovery. Evidence of bad faith or improper motivations may be established through circumstantial evidence – as "it has been recognized that one's state of mind is seldom capable of direct proof and ordinarily must be inferred from the circumstances properly presented and capable of being considered by the court." *See Wilson,* 168 N.J. at 253-54. Consequently, where, as

here, no discovery has occurred in the action, Defendants' motions to dismiss for failure to adequately allege bad faith or improper motives should have been denied as premature, at best. *See id.*

The trial court did not expressly address this claim, in dismissing the Complaint as against both Defendants, with prejudice – apparently reasoning that, after the return of the Deposit, neither Defendant had any further obligations to Plaintiff under the PSA. For the reasons already discussed, this was erroneous.

POINT VII

PLAINTIFF STATED A CLAIM AGAINST OLD REPUBLIC FOR NEGLIGENT MISREPRESENTATION

(Pa651-652; 4T)

The trial court also erroneously dismissed Count V of the Complaint, wherein Plaintiff sought damages from Old Republic based upon a common law theory of negligent misrepresentation. (Pa651-652; 4T). Contrary to Old Republic's contentions, Plaintiff established a *prima facie* claim for negligent misrepresentation under New Jersey law, which requires allegations of "'[a]n incorrect statement, negligently made and justifiably relied on,' which results in economic loss." *See McClellan v. Feit*, 376 N.J. Super. 305, 313 (App. Div. 2005), quoting *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109 (2000).

Here, Plaintiff alleged incorrect statements by Old Republic's Ms. Icklan regarding the transaction being on hold and regarding her intentions to keep

Plaintiff informed. (Pa18-19, Complaint ¶¶ 86-94). Plaintiff has also alleged that it reasonably relied upon Icklan's statements, believing that Icklan and Old Republic would keep Plaintiff apprised of the progress of the transaction and ensure Plaintiff was notified of the rescheduled closing. (*See id.*). And it is undisputed (even admitted by Old Republic) that Old Republic failed to provide that information to Plaintiff, apparently because it was willing to serve the interests of Birch, its "client," to the detriment of Plaintiff – and because it wanted to earn fees on the transaction. (*See id.*).

Plaintiff also alleged that its reliance on Ms. Icklan's misrepresentations was reasonable under the circumstances, in light of Old Republic's role as title company and escrow agent under the PSA and the parties' long-standing relationship of trust and confidence. (Pa19, Complaint ¶¶ 96-99; Pa152-157). Finally, Plaintiff alleged that it suffered economic loss, as a result of this reliance, since it was effectively cut out of the deal and kept in the dark about the closing and cut out of the deal. Had Ms. Icklan and Old Republic advised Plaintiff that Birch was continuing to pursue the transaction without Plaintiff, or that the closing was in fact rescheduled to occur, then Plaintiff could have taken additional steps to protect its legal interests and ensure that the closing did not proceed without Plaintiff. (Pa11-12, Complaint ¶ 46).

In the court below, Old Republic argued that any reliance upon Ms. Icklan's statements was "unjustified" and should be deemed unreasonable as a matter of

law. *See* Old Republic Mem. at 23-24 (Pa565-566). This argument is unavailing. *First,* Old Republic and Plaintiff had a longstanding and well-established course of dealing with one another, such that Plaintiff had every reason to believe that Old Republic would deal honestly and forthrightly with Plaintiff. (Pa152-157). *Second,* because Old Republic was a party to the PSA, Plaintiff was reasonable in assuming that Old Republic knew that Plaintiff had a right to insist upon specific performance, ***in addition to*** its right to demand return of the Earnest Money Deposit. Plaintiff had no reason to suspect that Old Republic would aid and abet Birch in covertly closing the deal without Plaintiff, in derogation of Plaintiff's right to demand specific performance – let alone that Ms. Icklan would actively participate in the breach by failing to deal forthrightly with Plaintiff. *Third,* Old Republic should not be permitted to escape from its own misrepresentations and deception by arguing that it was unreasonable for Plaintiff to rely upon them. Old Republic certainly knew that Plaintiff was inquiring about a matter of great significance, and that Plaintiff would expect a truthful answer and rely upon it. *Fourth,* and in any event, questions of reasonable reliance are inherently fact-based – and this is not a matter that should have been decided in the context of a pre-answer motion to dismiss.

The trial court did not address these arguments – presumably because it concluded (erroneously) that, after the return of the Deposit, Old Republic had no further duty to Plaintiff. (Pa651-652; 4T).

POINT VIII

PLAINTIFF ADEQUATELY STATED A CLAIM AGAINST OLD REPUBLIC FOR BREACH OF FIDUCIARY DUTY

(Pa651-652; 4T)

Old Republic also attacked the sufficiency of Plaintiff's claim that Old Republic breached its fiduciary duty to Plaintiff, in colluding with Birch to cut Plaintiff out of the deal and in failing to be forthright and honest with Plaintiff. (Pa569-570, Old Republic Mem. at 27-28).

To establish a claim for breach of fiduciary duty under New Jersey law, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care; (b) the defendant breached that duty; (c) the plaintiff was injured as a result of the defendant's breach; and (4) the injury was caused by the defendant. *See generally, McKelvey v. Pierce,* 173 N.J. 26, 57-58 (2002). The duty can arise in a relationship where, as here, one of the parties to the relationship is in a superior position (*i.e.*, based upon knowledge of the material facts), and has a duty to act for or give advice for the benefit of the other, as to matters within the scope of their relationship. *See id.*

Here, the longstanding relationship between the owners of Plaintiff and Old Republic was such that Plaintiff felt justified in reposing its trust and confidence in Old Republic. (Pa152-157). Theirs was a longstanding relationship based upon trust and loyalty – and Plaintiff reasonably expected that Old Republic would deal

with the utmost good faith and honesty, in its dealings with Plaintiff. (*See id.*) It is respectfully submitted that, under these circumstances, there arose between Plaintiff and Old Republic a "special relationship" that went beyond the typical insurance carrier-policyholder relationship that Old Republic referenced before the trial court. Hence, the pre-answer dismissal of this claim, with prejudice, was erroneous. Once again, the trial court failed to address these arguments, while dismissing the Complaint against Old Republic, with prejudice. (Pa651-652; 4T).

CONCLUSION

For all of the foregoing reasons, the Judgment and Orders appealed from by Plaintiff should be reversed. The Complaint should be reinstated in its entirety or, if need be, dismissed *without prejudice and with leave to replead*. Upon such reversal, the Court should also vacate the Order awarding Birch its attorneys' fees and costs, as prevailing party. (3T; 5T; Pa704-705).

Dated: April 15, 2024

RESPECTFULLY SUBMITTED:

BLEAKLEY PLATT & SCHMIDT, LLP
Attorneys for Plaintiff-Appellant
101 Hudson Properties, LLC

By: _____
SUSAN E. GALVÃO (PHV043695)
WILLIAM P. HARRINGTON (PHV003919)
ZAINA S. KHOURY (Bar # 227872017)

101 HUDSON PROPERTIES, LLC, Plaintiff/Appellant/Cross-Respondent v. BIRCH REAL ESTATE SERVICES, LLC, Defendant/Respondent and OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, Defendant/Respondent/Cross-Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION, DOCKET NO. A-000506-23 ON APPEAL FROM PART OF AN ORDER IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-004227-22 JUDGE BELOW: HON. ANTHONY V. D'ELIA, J.S.C. CIVIL ACTION

BRIEF OF CROSS-APPELLANT OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY IN SUPPORT OF ITS CROSS-APPEAL AND IN OPPOSITION TO APPELLANT'S APPEAL

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED WITH CITATIONS TO PLAINTIFF'S APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

PRELIMINARY STATEMENT

Plaintiff 101 Hudson Properties, LLC ("Plaintiff") entered into a real estate purchase agreement with Birch Real Estate Services, LLC ("Birch") pursuant to which Birch was to purchase the subject property and then transfer certain interests to Plaintiff. Before the transaction closed, Plaintiff declared Birch to be in default, demanded and received back its escrow deposit, and by doing so terminated the agreement. Months after the termination, Birch purchased the property. Although Respondent/Cross-Appellant Old Republic National Title Insurance Company's ("Old Republic") only obligation under the agreement was to be the escrow agent, Plaintiff sued Old Republic alleging that its failure to inform Plaintiff of the closing prevented Plaintiff from enforcing its right to purchase the property and caused it monetary losses.

The trial court granted Old Republic's motion to dismiss the claims against it with prejudice on the ground that Plaintiff did not have the right to enforce the contract after declaring default and receiving back its deposit. That decision was correct and should be affirmed. Moreover, Old Republic completed its duties as escrow agent when it returned the escrow to Plaintiff and owed Plaintiff nothing more. Finally, the agreement requires Plaintiff to indemnify Old Republic for all losses including those incurred from its first-party claims.

Accordingly, Old Republic respectfully submits that this Court should affirm the trial court's dismissal of Plaintiff's Complaint against Old Republic and reverse the trial court's decision denying reimbursement of Old Republic attorneys' fees and litigation costs that it incurred in this matter.

PROCEDURAL HISTORY

Plaintiff filed its Complaint on December 28, 2022, alleging claims against Birch and Old Republic. (Pa1). On April 3, 2023, Old Republic filed a Motion to Dismiss Complaint, pursuant to Rule 4:6-2(e), arguing that Plaintiff failed to state a claim. (Pa27-147). On April 20, 2023, Birch filed a Rule 4:6-2(e) Motion to Dismiss. (Pa201-337).

On June 2, 2023, the trial court heard argument on Old Republic's motion to dismiss. (June 2 Trans., 1T).[1] At the end of oral argument and on Plaintiff's request, the trial court stated that it would grant Old Republic's motion, without prejudice and with leave to replead. (1T19:10-24) The trial court issued an Order dated June 2, 2023 (the "June 2 Order"), granting Old Republic's motion to dismiss for the reasons stated on the record at oral argument, however, without prejudice and with leave to replead. (Pa199).

A week later, the trial court heard argument on Birch's motion to dismiss. (2T). The trial court ruled from the bench that it would grant Birch's motion to dismiss with prejudice. (2T15:1-16:20). In so ruling, the trial court concluded that Plaintiff had no right to insist upon specific performance under an Agreement of

[1] The certified transcripts of the proceedings before the trial court were purportedly provided to the Court by Plaintiff and are referred to herein as follows: "1T" - June 2, 2023 Transcript; "2T" – June 9, 2023 Transcript; "3T" – July 21, 2023 Transcript; "4T" – August 25, 2023 Transcript; and "5T" – September 22, 2023 Transcript.

Purchase and Sale between the Plaintiff and Birch after Birch closed the purchase of the property from a non-party seller in October 2022, because Plaintiff had accepted the return of its earnest money deposit in mid-July 2022, thus terminating its contract with Birch. (2T15:18-16:12). The trial court rejected Plaintiff's contention that the "in addition to" and "notwithstanding" language in Section 13.1 of the Purchase and Sale Agreement expressly permitted Plaintiff to also insist upon specific performance, regardless of any termination or return of the deposit. (Id.). Thus, by Order dated June 9, 2023 (the "June 9 Order"), the trial court granted Birch's motion to dismiss the Complaint with prejudice. (Pa357). Plaintiff moved for reconsideration of the June 9 Order and related relief under Rule 4:42-2. (Pa358-394). At argument on July 21, 2023, the Court denied Plaintiff's motion, adhering to the June 9 Order dismissing the Complaint as against Birch, with prejudice. (3T15:5-16:21).

On August 3, 2023, Old Republic filed a Motion for Reconsideration of the June 2 Order denying its Motion to Dismiss with prejudice and also sought an award of its attorneys' fees against Plaintiff. (Pa494-530). At argument on August 25, 2023, the trial court reconsidered and vacated the June 2 Order. It dismissed the Complaint, with prejudice, as against Old Republic for the reasons that it granted Birch's motion to dismiss on June 9, 2023. (4T7:22-8:17; Pa651). This decision was memorialized in an order dated August 25, 2023 (the "August 25 Order"). (Pa651).

The court held an additional hearing regarding Old Republic's entitlement to attorneys' fees on September 22, 2023, and denied Old Republic's request. (5T12:9-17; Pa688). In so doing, the court incorrectly interpreted the PSA, stating that "with regard to Paragraph 17.1(b) and 17.1(c) both -- both of those paragraphs are intended to limit to escrow agents liability and require the other parties to the PSA, that's the plaintiff and Birch, to indemnify or hold harmless the escrow agent, that's Old Republic, against claims, I read it to mean by third parties[.]" (5T7:21-8:2). The Court continued that " Indemnity provisions similar to those in this place, generally are held . . . not to apply, to a party through a contract to recover from it[]s fees from another party to the same contract and a dispute between them." (5T8:17-21). The trial court also held that the fee shifting provision in the §18.2 of the Purchase and Sale Agreement was not applicable to Old Republic. (5T10:8-19). The trial court's decisions on Old Republic's fee request was memorialized in an order dated September 27, 2023 (the "September 27 Order"). (Pa688).

Separately, Birch moved for an award of its attorneys' fees and costs, arguing that it was the "prevailing party" and entitled to fees under PSA §18.2. (Pa395-440). The trial court adhered to the June 9 Order, but stated at oral argument on July 21, 2023 that it would not "decide [Birch's motion] on the papers[]" and would conduct an "attorney billing hearing." (3T16:22-19:6). Thereafter, the trial court entered a consent judgment as to the amount of the fees to be awarded to Birch. (Pa704).

Plaintiff filed a Notice of Appeal, which was subsequently amended. (Pa690, Pa697, Pa706). Thereafter, Old Republic filed a Notice of Cross-Appeal, which was also subsequently amended, seeking correction of the trial court's decision to deny Old Republic's request for attorneys' fees (ODa1, ODa6).[2]

STATEMENT OF FACTS

Because this is an appeal of a motion to dismiss, the following facts are taken from the Plaintiff's Complaint and/or the documents referenced therein.

I. THE MACK-CALI AGREEMENT BETWEEN BIRCH AND THE SELLER

On August 12, 2021, Birch and non-party 101 Hudson Realty LLC ("the Seller") entered into an "Agreement of Sale and Purchase" (the "Mack-Cali Agreement") under which Birch agreed to "purchase and accept" the Seller's interest in real property located at 101 Hudson Street in Jersey City, New Jersey (the "Property"). (Pa1, ¶11; Pa34) The Mack-Cali Agreement provided that Birch had the right to convey its right to purchase title to the land to a third party, in which event the Seller would convey the improvements on the Property to Birch. (Pa34, 41-42). The Mack-Cali Agreement named Old Republic as both the designated "escrow agent" and "title company" for purposes of the transaction. (Pa3, ¶¶15,18;

[2] For the sake of clarity, "ODa" refers to the appendix submitted by Old Republic in connection with its Opposition and Cross-Appeal.

Pa36, 40).

II. THE PURCHASE AND SALE AGREEMENT BETWEEN BIRCH AND PLAINTIFF

On the following day, August 13, 2021, Plaintiff and Birch entered into a Purchase and Sale Agreement (the "PSA") regarding the Property. (Pa1, ¶7). As described by Plaintiff, this was a "complex, 39-page contract (plus voluminous exhibits), which was heavily negotiated by and between sophisticated parties and their counsel and is binding under applicable law." (Pa5, ¶20).

Per the PSA, Birch "agree[d] to sell, convey[,] and assign to [Plaintiff]" title to the Property "exclusive of the Improvements." (Pa96, §2.1). Thus, post transaction, Plaintiff would hold title to the Property itself, with Birch holding title to the actual structures present, as envisioned in the Mack-Cali reservation quoted above. (Pa96). Like the Mack-Cali Agreement, the PSA named Old Republic as the "escrow agent" and "title company." (Pa1 ¶8; Pa93, 96).

The PSA contained the following provisions regarding escrow, an earnest money deposit and Old Republic's liability:

> Section 4.1 The Earnest Money Deposit. Within two (2) Business Days after the Effective Date of this Agreement, [Plaintiff] shall deposit with [Old Republic], by Federal Reserve wire transfer of immediately available funds, the sum of Five Million Dollars ($5,000,000.00) as an earnest money deposit on account of the Purchase Price. . . .
>
> Section 4.2 Escrow Instructions. The Earnest Money Deposit shall be held in escrow by [Old Republic] in an

interest-bearing trust account . . . In the event this Agreement is terminated by [Plaintiff] under any express right of termination entitling [Plaintiff] to a refund of the Earnest Money Deposit as provided herein, the Earnest Money Deposit shall be refunded to [Plaintiff] in accordance with, and subject to the provisions of Article XVII. …

* * *

Section 17.1 Escrow

(a) Escrow Agent will hold the Earnest Money Deposit in escrow in an interest-bearing account of the type generally used by Escrow Agent for the holding of escrow funds ***until the earlier of (i) the Closing, or (ii) the termination of this Agreement in accordance with any right hereunder.*** . . . In the event the Closing occurs, the Earnest Money Deposit will be released to Seller, and Purchaser shall receive a credit against the Purchase Price in the amount of the Earnest Money Deposit. ***In all other instances, Escrow Agent shall not release the Earnest Money Deposit to either party until Escrow Agent has been requested in writing by Seller or Purchaser to release the Earnest Money Deposit*** and has given the other party five (5) Business Days to dispute, or consent to, the release of the Earnest Money Deposit.

(b) ***[Old Republic] shall not be liable to any party for any act or omission, except for bad faith, gross negligence or willful misconduct, and the parties agree to indemnify [Old Republic] and hold [Old Republic] harmless from any and all claims, damages, losses or expenses arising in connection herewith, except to the extent arising out of the bad faith, gross negligence or willful misconduct of [Old Republic]*** . . . .

(c) [Old Republic] shall not be required to defend any legal proceeding which may be instituted against it with respect to the Escrowed Funds, the Real Property or the subject

> matter of this Agreement unless requested to do so by [Plaintiff] or [the] Seller and unless [Old Republic] is indemnified to its satisfaction against the cost and expense of such defense. [Old Republic] shall not be required to institute legal proceedings of any kind and shall have no responsibility for the genuineness or validity of any document or other item deposited with it or the collectability of any check delivered in connection with this Agreement. [Old Republic] shall be fully protected in acting in accordance with any written instructions given to it hereunder and believed by it to have been signed by the proper parties.

(Pa118-119 (emphases added)).

The PSA also contained an Article VI regarding "Title and Survey Matters" which provided as follows:

> Section 6.1 Title and Survey. [Plaintiff] acknowledges that, at Closing, ***[Birch] shall cause [the Seller] to convey directly to [Plaintiff] by bargain and sale deed the Real Property*** in the form attached hereto as Exhibit J (the "Deed") . . . .
>
> * * *
>
> Section 6.3 Deed for the Improvements. At the closing under the Mack-Cali Agreement, ***[Birch] shall cause [the Seller] to execute and deliver to [Birch] a deed for the Improvements in the form of Exhibit K attached hereto (the "Improvements Deed"). Promptly following Closing, [Old Republic] shall cause the Deed and the Improvements Deed to be duly recorded*** in the Office of the Register of Deeds and Mortgages of Hudson County, New Jersey.

(Pa104-105 (emphases added)).

The PSA informed all parties of the existence of the Mack-Cali Agreement and required that the closing component of the transaction was to be "held concurrently with the closing under the Mack-Cali Agreement." (Pa110, §10.1). The Mack-Cali Agreement provided that its closing was to be "sixty (60) days after the Effective Date" of the agreement, or at a later rescheduled date agreed to by both Birch and Plaintiff. (Pa39, "Scheduled Closing Date").

Regarding remedies for breach and default, Section 13.1 of the PSA provides in relevant part:

> Section 13.1 Default by [Birch]. ***In the event the Closing and the transactions contemplated hereby do not occur as herein provided by reason of any default of [Birch], [Plaintiff] may, as [Plaintiff]'s sole and exclusive remedy, elect by notice to [Birch] within ten (10) Business Days following the Scheduled Closing Date, terminate this [PSA] Agreement, in which event [Plaintiff] will receive from [Old Republic] the Earnest Money Deposit,*** whereupon [Birch] and [Plaintiff] will have no further rights or obligations under this [PSA] Agreement, except with respect to the Termination Surviving Obligations. Notwithstanding the foregoing, in the event [Birch] closes title under[] the Mack-Cali Agreement, and thereupon [Birch] defaults in its obligation to close title under this [PSA] Agreement, [Plaintiff] shall, in addition to its termination right, shall have the right of specific performance. [Plaintiff] expressly waives its rights to seek damages in the event of [Birch]'s default hereunder.

(Pa115-116 (emphasis added)).

Old Republic's involvement and obligations owed under the PSA Agreement were limited to "Articles IV, X, and XVII," as can be seen reproduced below:[3]

As to Articles IV, X and XVII:

ESCROW AGENT:

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Florida corporation

By:
Name: SUSAN ECKLAND
Title: SENIOR VICE PRESIDENT

(Pa128). Plaintiff admitted this in its Complaint. (Pa3, ¶3 (noting that Old Republic was a party and signatory "to certain provisions" of the PSA)).

III. THE ATTEMPTED CLOSINGS AND PLAINTIFF'S TERMINATION OF THE PSA

After execution of the PSA, Plaintiff made the $5 million earnest money deposit (the "Deposit") as required. (Pa5, ¶5). The originally-scheduled closing date for the transactions was October 11, 2021. (Pa5, ¶16; Pa95). However, this date fell through, causing Plaintiff and Birch to execute November 10, 2021, December 10, 2021, January 31, 2022, and March 25, 2022 closing date amendments, with the March 25, 2022 amendment revising the closing to June 28,

[3] Regarding these three articles: (1) Article IV addresses the earnest money deposit, escrow instructions, and regulatory compliance regarding escrow; (2) Article X regards the closing, both Plaintiff and Birch's closing obligations, and closing proration; and (3) Article XVII is focused only upon escrow agent duties.

2022. (Pa7, ¶¶22-25). Other than rescheduling the closing date, each of these amendments "otherwise ratif[ied] and reaffirm[ed]" the agreements. (Pa7, ¶25).

On June 1, 2022, Plaintiff's counsel wrote to Birch's counsel, "requesting assurances that Defendant Birch would honor its obligations to Plaintiff under the [PSA] Agreement," as Plaintiff had "growing concerns" that, based upon prior conversations between those parties, Birch may have no longer intended to "adhere to the terms of the Agreement." (Pa7, ¶27). On June 7, 2022, Birch's counsel responded, advising Plaintiff that the Mack-Cali Agreement "had been amended by [Birch] and [the Seller] to allow [Birch] to pursue a potential assumption of the existing loan" on the Property, thereby acquiring *all* rights to the Property, not just the rights to the "improvements." (Pa8, ¶29). Birch's counsel explained that this amendment was necessary because Birch was unable to "secure leasehold financing" and the "original structure" of the deal was no longer feasible. (Id.) Birch "took the position that it was no longer bound by the terms of the [PSA] and would proceed to close on the deal without Plaintiff's participation." (Id.)

On June 28, 2022, however, trying to salvage the deal, Birch and Plaintiff agreed to a one-day extension of the closing dates for both the Mack-Cali Agreement and PSA. (Pa8-9, ¶¶32-35). On June 29, 2022, the closings were extended for an additional day. (Id.) That evening Birch's counsel emailed Plaintiff's counsel the following:

> Our respective clients both understand that despite their respective efforts to identify, ***there is no feasible way to close under the structure contemplated by the [PSA Agreement] because of the inability to secure the necessary leasehold financing with the ground lease structure***. . . . I suggest that it is more productive for our clients continue their discussions to address the fact that ***[Birch] is unable to close under the terms of the [PSA Agreement]***.

(Pa10, ¶36 (emphases added)). On June 30, 2022, Plaintiff's counsel contacted Birch's counsel seeking a status update, and was advised that: "[n]othing really new, I believe Mack-Cali wants to extend through tomorrow, and we want to extend until Tuesday. Still no agreement on [a] longer extension." (Pa10, ¶38).

On July 14, 2022, "Plaintiff learned that [Birch] had further amended the [c]losing [d]ate in the Mack-Cali Agreement[] without Plaintiff's consent and without extending the [c]losing [d]ate in the [PSA] Agreement," by Plaintiff's own contention thereby placing Birch "***in breach of the terms of the [PSA] Agreement.***" (Pa10, ¶39 (emphasis added).) Plaintiff's counsel then "wrote to [] Birch's counsel, ***notifying them that they were in breach of the [PSA] Agreement***" and advising that "Plaintiff would direct [Old Republic] to return to Plaintiff the [Deposit]." (Id. (emphasis added)). On July 15, 2022, Birch's counsel responded by stating that Birch did "not object to the . . . return of the [D]eposit to [Plaintiff]" and that Birch "deeme[ed] the request . . . for the return of the Deposit to constitute an election by [Plaintiff] under Section 13.1 of the [PSA] of its remedy to terminate the [PSA] and

receive the return of the Deposit." (Pa331; Pa11, ¶40 (specifically referencing and discussing content of the 7/15/22 e-mail)). Thereafter, on July 15, 2022, Plaintiff instructed Old Republic to return the funds, "which it subsequently did." (Pa11, ¶41).

A. Plaintiff's Post-Termination Actions

Plaintiff alleges that sometime "[i]n early August, Plaintiff reached out to [Old Republic] and signaled its intention and readiness to proceed with the transaction. . . ." (Pa11, ¶42). Plaintiff, however, fails to provide an explanation of *what* provision or language in the PSA permitted it to "proceed with the transaction." (Id.) On September 7, 2022, Plaintiff contacted Old Republic and requested a copy of the settlement statement for the upcoming Mack-Cali closing. (Pa11, ¶43). An Old Republic representative responded by stating that she was told that the deal was "on hold." (Id.) On September 13, 2022, Plaintiff and Old Republic then engaged in the following email exchange:

From: Icklan, Susan <SIcklan@OldRepublicTitle.com>
Sent: Tuesday, September 13, 2022 3:46 PM
To: 'Sanford Cohen'
Cc: 'Darla Carlisle'; 'Jed Manocherian'; 'Mike Meagher'; 'Eric Lipper'
Subject: RE: Wire - Old Republic HUD-17348-21/254671NJ

Will do.

-Susan

Susan S. Icklan
Senior Vice President | Old Republic National Title Insurance Company

Direct: 201.748.7337 | Main: 201.610.9455 | Mitel: 37337
sicklan@oldrepublictitle.com
Old Republic National Commercial Title Services | Old Republic Insurance Group
2 Hudson Place | 5th Fl | Hoboken | New Jersey 07030

From: Sanford Cohen <scohen@wkpz.com>
Sent: Tuesday, September 13, 2022 3:45 PM
To: Icklan, Susan <SIcklan@OldRepublicTitle.com>
Cc: Darla Carlisle <dcarlisle@wkpz.com>; Jed Manocherian <jed@woodbranch.com>; Mike Meagher <mmeagher@woodbranch.com>; Eric Lipper <elipper@hirschwest.com>
Subject: [EXTERNAL] RE: Wire - Old Republic HUD-17348-21/254671NJ

Susan thank you for your email. Kindly keep us apprised when if at all the "hold" is lifted and you may have visibility on a projected Closing Date. Thanks.

Sanford G. Cohen W K P Z

(Pa11, ¶44; Pa130). Plaintiff alleges "upon information and belief" that Old Repulic knew at the time that Birch was in the process of purchasing the Property and that it "had no intention" apprising counsel of the new closing date. (Pa11, ¶ 45).

On October 7, 2022, Birch and the Seller completed a revised transaction under the Mack-Cali Agreement, via which Birch acquired *all* rights to the Property, rather than just title to the "improvements." (Pa12, ¶49). Plaintiff was not told of the closing and learned of "the closing on or about October 20, 2022 from a press release." (Pa13, ¶52). Old Republic provided closing services to Birch as part of the revised Mack-Cali transaction was instructed by its client to not disclose the

transaction to Plaintiff, and did not do so. (Pa12, ¶47; Pa15, ¶73).[4] Old Republic's work on the Mack-Cali transaction was not inconsistent with the termination of the PSA because the Mack-Cali Agreement named Old Republic as the escrow agent for that transaction. (Pa36, 40). Plaintiff states that had Old Republic not failed to keep Plaintiff informed about the transaction, Plaintiff "would have [taken] immediate steps to protect its legal interest to prevent the closing from going forward in Plaintiff's absence." (Pa12, ¶ 46). As set forth below, however, Plaintiff had no "legal interest" in the transaction because it had already terminated the PSA by receiving back its deposit.

[4] In its appellate brief, Plaintiff makes a number of factual assertions in support of its appeal that are not actually alleged in the Complaint. (See, e.g., Pb15-17 (citing affidavit of Plaintiff's representative and emails attached thereto)). The assertions in Plaintiff's brief that were not made in the Complaint include: (1) a statement without any citation to the Complaint regarding Plaintiff's "reservation of rights" in response to the July 15, 2022 9:27 AM e-mail from Birch's counsel (Pa331) referenced in paragraph 40 of the Complaint that stated that the return of the Deposit was an election of remedies. (Compare Pb15 and Pa330 (July 15, 2022 11:37 AM e-mail not referenced in the Complaint) with Pa11, ¶40-41); (2) statements without any citation to the Complaint regarding the number of years and transactions Plaintiff had done business with Old Republic and its alleged "principals," the Icklans.(Compare Pb16 (citing Pa152-Pa157 (affidavit from Plaintiff's representative)) with Pa19, ¶96); and (3) statements without any citation to the Complaint regarding reasons for Plaintiff's beliefs. (See Pb16 (citing Pa152-157 (affidavit from Plaintiff's representative). These factual statements were not relied on by the trial court in rendering its decision and should not be considered on appeal because they were not alleged in the Complaint or made in a document referenced therein.

LEGAL ARGUMENT IN OPPOSITION TO PLAINTIFF'S APPEAL

I. STANDARD OF REVIEW

The interpretation of a contract is subject to de novo review by an appellate court. See Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011). Appellate review of a trial court's granting of a motion to dismiss is also de novo. Seidenberg v Summit Bank, 348 NJ Super 243, 250 (App Div 2002). Pursuant to Rule 4:6-2, a defendant is entitled to the dismissal of all or part of a complaint whenever that complaint "fail[s] to state a claim upon which relief can be granted. . . ." When faced with such a motion, Courts should dismiss the complaint – or the specific counts being challenged – if they "fail[] to articulate a legal basis entitling [the] plaintiff to relief." Milford Mill 128, LLC v. Borough of Milford, 400 N.J. Super. 96, 109 (App. Div. 2008) (quoting Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005)). Additionally, beyond the "allegations in the complaint," our courts can also consider the "exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Teamsters Local 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)). A motion to dismiss "may ***not*** be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [a] plaintiff[']s claim ***must*** be apparent from the complaint itself." Edwards v.

Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202, certif. denied, 176 N.J. 278 (2003) (emphasis added).

Simply put, dismissal will be mandated wherever it is found that the challenged allegations are "palpably insufficient" to support a claim. Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987). A plaintiff cannot defeat a motion to dismiss by filing conclusory allegations as the basis of its complaint, but must instead present the "essential facts supporting [their] cause of action . . . in order for the claim to survive. . . ." Scheidt v. DRS Tech,, Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) ("conclusory allegations are insufficient" to defeat a motion); see also Miller v. Bank of Am. Home Loan Servicing, LP, 439 N.J. Super. 540, 552 (App. Div. 2015) (a complaint containing "conclusory allegations" parroting the language of the cause of action are "mere generalizations devoid of specified factual support[,]" insufficient under Rule 4:5-8(a).

Here, the trial court properly applied the motion to dismiss standard to dismiss with prejudice all claims against Old Republic. (Pa199; Pa651). Further, even if this Court disagrees the trial court's reasoning, it should affirm the dismissal on alternative grounds. Hayes v. Delamotte, 231 N.J. 373, 387 (2018) ("A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.") (citing Isko v. Planning Bd., 51 N.J. 162, 175 (1968)); Do-

Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("[A]ppeals are taken from orders and judgments and not from . . . reasons given for the ultimate conclusion.").

II. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS AGAINST OLD REPUBLIC BECAUSE PLAINTIFF TERMINATED THE PSA

The Complaint's allegations and the plain language of the PSA demonstrate that Plaintiff terminated the PSA by electing to take back its deposit after declaring Birch in default. The language of the PSA further makes clear that, even if the PSA were not terminated, Plaintiff was not entitled to seek specific performance under the circumstances. As such, the trial court was correct in holding that Plaintiff was precluded from seeking specific performance under the PSA. All of Plaintiff's causes of action against Old Republic therefore fail because the Complaint makes clear that they all hinge on the Plaintiff's continued ability to enforce its right under the PSA to purchase the Property, which did not exist.

A. Plaintiff Terminated The PSA By Electing To Take Back Its Deposit

The allegations of the Complaint demonstrate as a matter of law that Plaintiff terminated the PSA. Plaintiff admits that on July 14, 2022, it declared Birch in breach of the PSA and demanded the return of Plaintiff's deposit from Old Republic, and then received back that deposit. (Pa10-11, ¶¶39-41). In that context, the plain language of several provisions of the PSA demonstrates that the *only* possible way that Plaintiff could have received back its deposit was upon the termination of the

PSA by Plaintiff. Specifically, Section 13.1 gave Plaintiff the right to elect as its sole remedy to receive back its deposit if it terminated the PSA:

> In the event the Closing and the transactions contemplated hereby do not occur as herein provided by reason of any default of [Birch], [Plaintiff] may, as [Plaintiff]'s sole and exclusive remedy, elect by notice to [Birch] within ten (10) Business Days following the Scheduled Closing Date, terminate this [PSA] Agreement, **in which event** [Plaintiff] will receive from [Old Republic] the Earnest Money Deposit, whereupon [Birch] and [Plaintiff] will have no further rights or obligations under this [PSA] Agreement, except with respect to the Termination Surviving Obligations.

(Pa115-116 (emphasis added)). The phrase "in which event" that follows the phrase "terminate this [PSA] Agreement" and precedes the phrase "will receive from [Old Republic] the Earnest Money Deposit" makes clear that the return of the deposit was conditioned on Plaintiff's termination of the PSA. (Id.) Stated differently, Plaintiff's termination of the PSA was the "event" that predicated the return of the Earnest Money Deposit to it.

Section 17.1(a) of the PSA expressly required Old Republic in its capacity as the escrow agent to hold the escrow deposit until either the closing or the termination of the PSA when it stated that:

> 17.1(a) Escrow Agent will hold the Earnest Money Deposit in escrow in an interest-bearing account of the type generally used by Escrow Agent for the holding of escrow funds ***until the earlier of (i) the Closing, or (ii) the termination of this Agreement in accordance with any right hereunder***…Escrow Agent shall not release the

> Earnest Money Deposit to either party until Escrow Agent has been requested in writing by Seller or Purchaser to release the Earnest Money Deposit…

(Pa118 (emphasis added)). Section 4.2 further confirms that the escrow deposit was conditioned on the termination of the PSA when it states that:

> Section 4.2 Escrow Instructions. … In the event this Agreement is terminated by [Plaintiff] under any express right of termination entitling [Plaintiff] to a refund of the Earnest Money Deposit as provided herein, the Earnest Money Deposit shall be refunded to [Plaintiff] in accordance with, and subject to the provisions of Article XVII.

(Pa97).

These provisions must be read in a manner assigning them their "plain and ordinary meaning," M.J. Paquet, Inc. v. New Jersey Department of Transportation, 171 N.J. 378, 396 (2002), because the "plain language of [a] contract [remains] the cornerstone of [any] interpretive inquiry[,]" Barila v. Board of Education of Cliffside Park, 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). The plain language of each of these provisions individually demonstrates that the return to Plaintiff of the escrow deposit could not have occurred unless the PSA was terminated. Moreover, when these individual provisions of the PSA are "construed as a whole" and "considered in connection with the rest of the agreement," as they must be, there can be no doubt that termination of the PSA occurred when Plaintiff demanded its deposit back. Washington Const. Co. v.

Spinella, 8 N.J. 212, 217 (1951) (quoting 9 Williston on Contracts (Rev. ed.), § 46, p. 64); see also Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014) ("Contracts should be read 'as a whole in a fair and common sense manner.'") (quotation omitted).

This commonsense interpretation of the PSA is consistent with numerous New Jersey cases that have interpreted similar language in the same way. See, e.g., Sugarman v. Gabriel Bldg. Grp., Inc., No. A-4438-12T1, 2014 N.J. Super. Unpub. LEXIS 1892, at *24 (App. Div. Aug. 4, 2014) (election of remedies clause that allowed the buyer to either terminate the contract and receive back the deposit or to seek specific performance or to extend the closing date was not violative of public policy and was not unenforceable); Net 2 Funds, LLC v. Hartz Mt. Indus., No. A-0223-15T1, 2018 N.J. Super. Unpub. LEXIS 1081, at *6 (App. Div. May 9, 2018) (upholding a lower court's determination that a contract had been terminated and that respondent was entitled to the escrowed funds that it demanded); 135 Route 73 S., LLC v. Schafer, No. A-3060-09T3, 2010 N.J. Super. Unpub. LEXIS 2540, at *5 (App. Div. Oct. 20, 2010) (affirming the lower court's finding that plaintiff properly terminated the contract and as such was entitled to release of $50,000 which escrow agent held in escrow). Thus, as matter of law, Plaintiff terminated the PSA by requesting and receiving back its deposit.

B. Plaintiff's Purchase Right Did Not Survive The Return Of The Escrow And Termination Of The PSA

Plaintiff's argument that it could still seek specific performance after it terminated the PSA is illogical and legally incorrect for several reasons.

1. Termination and Specific Performance Are Mutually Exclusive Remedies

Plaintiff could not chose to both receive back its deposit by terminating the PSA and then later seek specific performance of the PSA. Those are inconsistent remedies that cannot be exercised at the same time. Where a contract contains two inconsistent options, a party cannot exercise both of them. See Lizak v. Rottenbucher, 140 N.J. Eq. 76, 81 (Ch. Div. 1947) (holding that this "principle supports the reasonable, entirely just, and pragmatical regulation that a party, in search of legal redress, shall not be at liberty to assume irreconcilable and repugnant positions"); Bankers' Tr. Co. v. Greims, 115 N.J. Eq. 102, 108 (Ch. Div. 1934) (holding that a party to a contract with conflicting options has an "obligation… to cho[o]se between two inconsistent or alternative rights or claims, in cases, where there is a clear intention of the person, from whom he derives one, that he should not enjoy both.") (quoting 2 Story Eq. Jur. (5th ed.) § 1075). Indeed, it is black letter law that when a party chooses one alternative in a contract, he is foreclosed from exercising other inconsistent alternatives. See, e.g., Melcer v. Zuck, 101 N.J. Super. 577, 583–84 (App. Div. 1968) (enforcing clause limiting buyer's remedy to the

return of the deposit and the payment of title search fees); Sugarman, 2014 N.J. Super. Unpub. LEXIS 1892, at *24 (enforcing clause limiting buyer's damages to the return of the deposit, plus some incidental expenses).

Plaintiff admits that a party cannot seek to enforce inconsistent remedies. (See Pb29). It argues that because the contract contains remedies for termination and specific performance, these remedies are not consistent. (See Pb30). That the same contract contains two alternative remedies does not mean that they are consistent, however. Contracts often contain alternative rights/options that the parties have to choose between. See, e.g., Alliance Healthcare, Inc. v. Jersey City Bergen, LLC, 2016 N.J. Super. Unpub. LEXIS 2304, *11 (Ch. Div. Oct. 18, 2016) (finding that a similar contract provision gave a party the right to terminate a contract "*or* demand specific performance) (emphasis in the original); Rothstein v. Harstad, Civil Action No. 10-1421 (MCA), 2014 U.S. Dist. LEXIS 138482, at *14 (D.N.J. Sep. 30, 2014) ("'Rescission and damages are alternative remedies,' and a party can only elect one.") (citing Fablok Mills, Inc. v. Cocker Mach & Foundry Co., 125 N.J. Super. 251, 260 (App. Div. 1973)).

In this vein, it is black letter law that the contractual right to terminate is inconsistent with the contractual right to seek specific performance. 2 Corbin on Contracts § 65.33 ("since 'specific performance requires parties to perform their contractual promises, specific performance is inconsistent with termination of [an]

agreement"). One seeking specific performance seeks to enforce a valid and existing contract. Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598 (App. Div. 2005) ("[T]o establish a right to the remedy of specific performance, a plaintiff must demonstrate that the contract in question is valid and enforceable at law."); Jackson v. Manasquan Sav. Bank, 271 N.J. Super. 136, 144 n.8 (Law Div. 1993); see also 25 Williston, Contracts (Lord ed., 2002), § 67:2 at 186. Once a contract is terminated, however, it is voided and a party no longer has rights or obligations under it. Mossberg v. Standard Oil Co., 98 N.J. Super. 393, 405 (Law Div. 1967) ("It is basic contract law that when a contract is terminated the rights and obligations under that contract are also terminated.") (citation omitted); Subaru of Am. v. Ddb Worldwide Communs. Grp., 812 F. Supp. 2d 650, 658 (D.N.J. 2011) ("Under New Jersey law, '[t]ermination . . . causes the contract to cease existing' and the parties' respective obligations under the contract are extinguished.") (citing Nickels Midway Pier, LLC v. Wild Waves, LLC (In re Nickels Midway Pier, LLC), 450 B.R. 58, 63 (D.N.J. 2011)). Simply put, "[a] party will not be permitted to carry water on both shoulders . . . a contract cannot be entirely valid at the same time in which it is entirely void ab initio." Ray v. Beneficial Fin. Co. of N. Jersey, 92 N.J. Super. 519, 535 (Ch. Div. 1966).

To this end, when a party to a real estate contract elects to seek the return of its deposit by terminating or rescinding a contract, it cannot seek specific

performance. "Where the wronged party has elected to terminate the contract, he cannot subsequently maintain a suit for the specific performance thereof." Levy v. Mass. Accident Co., 124 N.J. Eq. 420, 431 (Ch. Div. 1938) (Plaintiff "could not consistently expect to get back the consideration he paid and at the same time or thereafter, obtain performance of the contractual obligations assumed by defendant in exchange for the receipt of that consideration."). This is because, a party seeking to recover a deposit and thereby "elect[ing] to be no longer bound by the contract is not privileged to again choose to be bound. Having committed itself to a recovery of the deposit, its right to have the property is forever gone." Blum Bldg. Co. v. Ingersoll, 99 N.J. Eq. 563, 568 (Ch. Div. 1926) ("And where a man has an election between several inconsistent causes of action he will be confined to that which he first adopts."), affirmed, 101 N. J. Eq. 291 (E. & A. 1927).

Court after court have recognized this principle. See Krisher v. Murphy, 11 N.J. Super. 231, 235 (App. Div. 1951) (finding that plaintiff was barred from enforcing a sale agreement by specific performance where plaintiff made an election to demand the return of the deposit, which constituted an irrevocable election to rescind the contract); Claron v. Thommessen, 96 N.J. Eq. 650, 653 (E. & A. 1924) (when respondent "instituted suit against [appellant] to recover the deposit money of $1,000, he irrevocably committed himself in solemn form to a repudiation of all obligation under the agreement. Having taken this step in rescission of the contract,

he will not now be permitted to seek its enforcement in a court of conscience."); Maturi v. Fay, 98 N.J. Eq. 377, 379 (E. &A. 1925) (citing Claron); Rose v. Buckley, 98 N.J. Eq. 685, 686 (E. &A. 1925) (same); In re Nickels Midway Pier, LLC, 450 B.R. at 63 (finding because plaintiff repudiated a contract between it and defendant, defendant was not required to perform under the contract); Faysen Lake, Inc. v. Miller, 130 N.J.L. 289, 290–91 (1943) (by electing to rescind the sale contract, that party lost its right to sue for specific performance of the contract).

Here, the PSA required that the Deposit be made within 2 days after the date of the Agreement (Pa97,§4.1) and that it be held until either the closing of the transaction or termination by 101 Hudson. (Id.) As noted above, the only way Plaintiff could receive back its deposit is if it terminated the PSA. (See Pa115-116, §13.1). This remedy is wholly inconsistent with Plaintiff's ability to seek specific performance, which would have been based on the Plaintiff's desire to continue to comply with its obligations under the PSA, including the obligation to keep the Deposit in escrow. Allowing Plaintiff to seek specific performance without maintaining the Deposit required by Section 4.1 of the PSA would be tantamount to allowing Plaintiff to pick and choose which of the PSA provisions it did and did not wish to comply with. This is impermissible under New Jersey law. See Morgan St. Developers Urban Renewal Co. v. City of Jersey City, No. A-2025-14T3, 2016 N.J. Super. Unpub. LEXIS 1984, at *14 (App. Div. Aug. 30, 2016) (declining to allow a

litigant to "claim the benefits" of a contract "while refusing its obligations"); Menorah Chapels at Millburn v. Needle, 386 N.J. Super. 100, 110 (App. Div. 2006) (a party may not repudiate one part of a non-divisible contract and claim the benefit of the residue, because to do so "would amount to unjust enrichment and would bind the parties 'to a contract which they did not contemplate.'") (quoting Cty. of Morris v. Fauver, 153 N.J. 80, 97, 707 A.2d 958 (1998)).

2. The words "notwithstanding" and "in addition to" in of Section 13.1 of the PSA Did Not Give the Plaintiff the Right to Seek Specific Performance After Terminating the Contract

Plaintiff is incorrect in arguing that the words "notwithstanding" and "in addition to" in the second sentence in Section 13.1 gives it the right to seek specific performance despite terminating the contract by receiving back the escrow funds. This sentence reads:

> Notwithstanding the foregoing, in the event [Birch] closes title under[] the Mack-Cali Agreement, and thereupon [Birch] defaults in its obligation to close title under this [PSA] Agreement, [Plaintiff] shall, in addition to its termination right, shall have the right of specific performance.

(Pa115-116). This provision merely provides "the right," if certain conditions are met, to elect to seek specific performance as an *alternative* remedy, i.e., "in addition" and "notwithstanding" the right to elect the different, inconsistent remedy of receiving back its deposit by terminating the PSA. The words "notwithstanding"

and "in addition to" in Section 13.1 cannot reasonably be read to provide Plaintiff the rights to both terminate the PSA (the only way it could get its Deposit back) and to seek specific performance at the same time. (Pa115-116).

Contrary to Plaintiff's assertion, the interpretation of Section 13 of the PSA as setting forth alternative exclusive remedies does render the words "notwithstanding" and "in addition to" meaningless. These words simply indicate that specific performance is *one* remedy that Plaintiff could elect if certain conditions were met. On the other hand, Plaintiff's interpretation of this provision as allowing both the return of the deposit by termination and specific performance *would* render meaningless the language of Section 13.1, which states that the return of the deposit and termination were to be a "sole and exclusive" remedy. A contract "should not be interpreted to render one of its terms meaningless." Cumberland County Improvement Auth. v. GSP Recycling Co. Inc., 358 N.J. Super. 484, 497 (App. Div.), certif. denied, 177 N.J. 222 (2003).

3. The PSA Did Not Define Birch's Obligation To Sell the Property Pursuant to a Claim of Specific Performance As A "Termination Surviving Obligation"

New Jersey law recognizes that where a contract designates some provisions as being intended to survive the contract's termination, other provisions that are not so designated do not survive such termination. Foster Wheeler Passaic, Inc. v. Cty. of Passaic, 266 N.J. Super. 429, 439 (App. Div. 1993). Here, specific performance

was not deemed a "Termination Surviving Obligation" under the PSA. Section 13.1 states that if 101 Hudson chose to terminate the PSA and receive back the escrow funds, that remedy would be its "sole and exclusive remedy" and that the parties would have "no further rights or obligations under" the PSA except for those obligations the PSA referred to as "Termination Surviving Obligations." (Pa115-116). Section 11.1 of the PSA defined "Termination Surviving Obligations" as the obligations under the Agreement that were "expressly provided to survive termination." (Pa114). To this end, various sections of the PSA expressly provide that certain obligations will survive the termination of the PSA. (See Pa101, §5.3(b) (purchaser indemnity obligation with respect to inspections); Pa101, §5.4 (covenant not to sue for environmental conditions); Pa115, §12.1 (confidentiality); Pa118, §16.1 (agreement to indemnify as to claims by brokers)). Notably, the obligation to sell Plaintiff the Property or the right of Plaintiff to specific performance was not designated anywhere in the PSA as a "Termination Surviving Obligation." Consequently this right did not and could not survive the termination of the PSA.

4. There is Nothing Unfair About Enforcing the Contractual Terms Agreed to by the Parties

Parties to a contract may agree to limit their liability, including precluding specific performance under certain conditions, and contrary to Plaintiff's claims there is nothing unfair about that. See Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 252 (1994). To that end, it is well recognized in New Jersey that stipulated

remedies clauses, such as Section 13.1 here, are reasonable and enforceable. See Naporano Assocs., L.P. v. B & P Builders, 309 N.J. Super. 166, 177-78 (App. Div. 1998); Melcer v. Zuck, 101 N.J. Super. at 583–84 (holding that remedies clause providing that if title was unmarketable sellers' obligation to buyer was limited to return of deposit and payment of title search fees). Indeed, in upholding a clause similar to Section 13.1 of the PSA, the Appellate Division has stated:

> We see nothing inherently unreasonable about the buyer's remedies provision on its face. It gives the buyer the choice of allowing the seller extra time to complete the transaction, seeking to compel compliance with the requirements of the contract, or terminating the contract and receiving the return of the deposit. We do not find those choices inherently punitive, particularly given the right to seek specific performance.

Sugarman, 2014 N.J. Super. Unpub. LEXIS 1892, at *24. Thus, Plaintiff cannot now be heard to argue that this type of commonplace provision in the PSA is somehow unfair or unreasonable. In essence, Plaintiff is seeking to have this Court rewrite the PSA. However, as the trial court recognized, a reviewing court accordingly cannot "rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument," Rahway Hosp. v. Horizon Blue Cross Blue Shield of N.J., 374 N.J. Super. 101, 111 (App. Div. 2005) (quoting E. Brunswick Sewerage Auth. v. E. Mill Assocs., 365 N.J. Super. 120, 125, (App. Div. 2004)), nor can the court "make a better contract for either party, or supply terms that have not been agreed upon." Rahway Hosp., 374 N.J.

Super. at 111 (quoting Bar on the Pier, Inc. v. Bassinder, 358 N.J. Super. 473, 480 (App. Div. 2003)); (T215:5-7).

The fact that Plaintiff claims to have "reserved all of its rights" when demanding back its Deposit (see Pb15) does not change this. Plaintiff could not "reserve" a right that it did not have. As set forth above, Plaintiff did not have the right to both secure the return of its deposit and to seek specific performance. (See Pa115-116, §13.1 and supra Section II). Moreover, Birch made it clear that Plaintiff's request for a return of the Deposit was an election of the remedy to terminate the PSA, and Plaintiff proceeded take back the deposit nonetheless. (Pa331; Pa11, ¶40 (specifically referencing and discussing content of the 7/15/22 e-mail)).

C. The Right To Specific Performance In The PSA Was Contingent On Conditions That Were Not Met

Even if Plaintiff did not terminate the PSA, it still was not entitled to specific performance of the PSA because, as the trial court properly found, the conditions upon which the right to specific performance was contingent never occurred. Section 13.1 of the PSA unambiguously states that "**in the event** [Birch] closes title under[] the Mack-Cali Agreement, **and thereupon [Birch] defaults** in its obligation to close title under this [PSA] Agreement, [Plaintiff] shall . . . have the right of specific performance." (Pa115-116 (emphasis added)). The trial court correctly interpreted this language as providing that the right to specific performance only

arose if two conditions were met: (1) Birch *first* closed title under the Mack-Cali Agreement; and (2) Birch *then* defaulted in its obligation to close title under the PSA. (2T13:5-12; 2T14:4-11). In doing so, the court correctly noted that the word "thereupon" means "as a consequence" of something. (2T14:21-24). To hold that these two conditions did not need to be met in the sequence set forth in the PSA would render the word "thereupon" meaningless. These conditions were never met. As Plaintiff acknowledges, Plaintiff declared Birch to be in default under the PSA and received back its deposit *before* the closing of the Mack-Cali transaction. (Pa10-11, ¶¶39-41) Thus, Plaintiff never had the right to specific performance.

D. Because The PSA Was Terminated, Dismissal Of All Of 101 Hudson's Claims Must Be Upheld

The trial court's decision must be upheld because Plaintiff's termination of the PSA (by demanding the return of its deposit in July 2022) and its inability to otherwise seek specific performance (because the conditions precedent to doing so were not met) renders it unable as a matter of law to state any of the claims against Old Republic asserted in the Complaint. This is so for at least two reasons.

First, Plaintiff's claims fail because they each depend on the proposition that Plaintiff had the ability to enforce the obligation of Birch to sell the Property to Plaintiff at the time of the Mack-Cali transaction. Indeed, Plaintiff repeatedly conceded before the trial court that the way Old Republic damaged Plaintiff was by preventing it from exercising its right under the PSA to purchase the Property after

it received back its deposit. (1T7:15-8:6;1T10:16-23; 1T11:24-12:12). Specifically, Plaintiff's counsel admitted to the Court the following:

> [PLAINTIFF'S COUNSEL:] The claim against Republic Title is that when we were in touch with them to say we were are pursing this, and as I said it had been adjourned a number of times already, we were told by Old Republic Title that she'd been informed that the deal was on hold, which was different than rescheduling the closing date. She was suggesting perhaps that it was held in abeyance or that -- and so it was in response to Old Republic Title telling us that –
>
> THE COURT: Was that representation made before or after the breach was declared?
>
> [PLAINTIFF'S COUNSEL:] It was made after the breach was declared, so Old Republic Title was therefore aware that we were pursuing our rights under the contract and intended – fully intended to be involved at the closing to pursue our rights, we had also put it in writing numerous times.
>
> * * *
>
> [PLAINTIFF'S COUNSEL:] we were relying on [Old Republic's representative] to tell us when the deal was rescheduled because she told us it was on hold and at which point–and she knew we were looking to pursue our rights with Birch under the contract. She also, having been a party to the contract, was aware that Section 13.1 gave us a right to pursue not only the return of the earnest money deposit but to pursue specific performance under the contract. . . ."
>
> * * *
>
> THE COURT: So, what did they not do because of this e-mail in September? What did they not do?...

> [PLAINTIFF'S COUNSEL:] Our client, had we known about the scheduled -- that the closing was not on hold but, in fact, was in the works and was being covertly done behind our backs, could have and would have reached out to Mack-Cali and/or put a lis pendens on the property. Our client had an interest in seeing this whole thing through rather than throwing a lis pendens down right away because that could have -- THE COURT: Now -- I got you. MS. GALVAO: -- thrown out the whole deal. . . ."

(1T7:15-8:6; 1T10:16-23; 1T11:24-12:12). These admissions echo the allegation in the Complaint that:

> Had [Old Republic] not participated in Defendant Birch's breach of contract by failing and omitting to keep Plaintiff informed about the transaction, Plaintiff would have [sic] immediate steps to protect its legal interest to prevent the closing from going forward in Plaintiff's absence

(Pa11-12, ¶ 46). However, because the PSA had been terminated, Plaintiff was not permitted to seek specific performance at the time the Mack-Cali transaction closed. Therefore, it cannot be said as a matter of law and logic that it was Old Republic's conduct that prevented Plaintiff from it going forward with the purchase of the Property.

Second, Plaintiff's claims against Old Republic also fail because they depend on alleged conduct by Old Republic *after* Plaintiff terminated the contract and received back its deposit thereby relieving Old Republic of any obligations to Plaintiff under the Contract or otherwise. Specifically, Old Republic's alleged non-disclosure of the date of the Birch closing did not take place until months after the

Plaintiff received back the Deposit. Thus, as a matter of law, Plaintiff cannot claim that Old Republic owed any Plaintiff any contractual or other obligation.

Breach of Contract. In order to state a claim for breach of contract, Plaintiff must allege facts that show that Plaintiff incurred damages as the result of a breach. See Wright v. United Food & Commer. Workers Local 152, No. A-4464-14T3, 2016 N.J. Super. Unpub. LEXIS 2057 at *6 (App. Div. Sep. 9, 2016) ("Without damages, there is no breach of contract.") (citing Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985)). Here, the Complaint demonstrates that Plaintiff's breach of contract count again depends on its continued ability to enforce the PSA when it alleges that Old Republic "actively participated in Defendant Birch's breach of the Agreement" (Pa15, ¶69), "frustrated Plaintiff's ability to perform and enjoy the benefits of the bargain" (Pa15, ¶71), "aided, abetted and participated in [Birch's] breach of the Agreement and, in doing so, frustrated Plaintiff's ability to perform and enjoy the benefits of the bargain." (Pa15, ¶72).

Moreover all the allegations as to Old Republic's alleged breaches of contract took place after the July 15, 2022 termination of the PSA and the return of Plaintiff's deposit. (See, e.g., Pa15, ¶70, 73). As a matter of law, these actions could not be considered a breach of contract for two principal reasons. *First*, breach of contract only occurs where "[a] party violates the terms of a contract by failing to fulfill a requirement enumerated in the agreement" itself. See Woytas v. Greenwood Tree

Experts, Inc., 237 N.J. 501, 512 (2019). Once Plaintiff terminated the Contract, none of the other parties had any further obligations except for those specifically designated as "Termination Surviving Obligations" – none of which applied to Old Republic. Matter of Cty. of Atl., 230 N.J. 237, 254 (2017) (stating "contractual obligations will cease, in the ordinary course, upon termination" of the contract) (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 193 (1991)); 715 Partners, Ltd. Liab. Co. v. GS Assignment, Ltd. Liab. Co., No. A-2527-15T3, 2018 N.J. Super. Unpub. LEXIS 1219, at *24 (App. Div. May 25, 2018) ("Once plaintiff caused the termination of the Agreement, . . . Seller was free to sell the Property to anyone"). *Second*, even if the PSA as a whole had not been terminated, once Old Republic returned the Deposit at Plaintiff's request, Old Republic had no further contractual duties because Old Republic's obligations under the PSA were limited to those in Sections IV, X and XVII of the PSA which related to its role as an escrow agent. (Pa128); see Ex parte McNaughton, 728 So. 2d 592, 595 (Ala. 1998) ("When one party proposes a standard contract to another party, the parties may, of course, agree to be bound by certain of the clauses in the proposed contract and not to be bound by others"). Once the escrow funds were returned, Old Republic no longer had any duty per the PSA. See 28 Am Jur 2d Escrow § 22 ("the escrow agent's duty is limited by the terms of the escrow agreement").

Breach of the Covenant of Good Faith. In order to state a claim for breach of the covenant of good faith, Plaintiff must allege, among other things, the existence of a contract and that Old Republic's bad faith conduct denied it the benefit of its bargain. See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005) (stating that plaintiff must prove "conduct that denied the benefit of the bargain originally intended by the parties.") (quotation omitted); Wade v. Kessler Inst., 343 N.J. Super. 338, 345 (App. Div. 2001); Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div. 1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing"). The Complaint makes clear that Plaintiff's breach of covenant claim depends on Plaintiff's ability to enforce the PSA when it alleges that Old Republic had a duty "not to act in a manner so as to frustrate Plaintiff's ability to perform under the Agreement. . . ." (Pa15, ¶77). However, Plaintiff cannot state a claim for breach of the covenant of good faith because Plaintiff did not have the ability to enforce the PSA because the PSA was terminated and/or right to specific performance never arose.

As such, even had Old Republic done what Plaintiff asserts it should have done, it cannot be said as a matter of law that Old Republic's conduct denied Plaintiff the benefit of its bargain. See, e.g., Ross v. Annunziata, Nos. A-2806-10T, A-3520-10T1, 2012 N.J. Super. Unpub. LEXIS 453 *21-22 (App. Div. Feb. 29, 2012)

(dismissing a breach of good faith claim where a purchase contract was terminated by the return of funds, and the defendant later purchased the subject property without the involvement of the plaintiff, and stating that "even if one assumes for argument's sake that defendants withheld information from [plaintiff] and otherwise failed to cooperate, [plaintiff] was unable to demonstrate that defendants' actions materially contributed to his failure to satisfy the condition precedent."); Sackman Enters., Inc. v. 309 Asbury Corp., No. A-2723-04T2, 2006 N.J. Super. Unpub. LEXIS 1126, at *17 (App. Div. June 2, 2006) ("Seller's obligation to Buyer ceased when Buyer exercised its right to terminate the Contract of Sale under the due diligence clause. Accordingly, Seller had no obligations to perform under the Contract of Sale, and no covenant of good faith and fair dealing applied."). Thus, this case is unlike cases where the failure to disclose information involved existing contractual rights. See, e.g., Brunswick Hills, 182 N.J. at 225 (breach by withholding vital information from plaintiff that contributed to plaintiff's failure to exercise option timely) (quotation omitted); Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 130 (1976) (breach where contracting party withheld information of intention to terminate). Here, Plaintiff elected to terminate the contract without relying on anything Old Republic did.

Negligence Misrepresentation. In order to state a claim for negligent misrepresentation, Plaintiff must allege facts pleading that its justifiable reliance on

a misrepresentation that caused it to incur damages. Carroll v. Cellco P'ship, 313 N.J. Super. 488, 502 (App. Div. 1998). Here, the alleged "misrepresentation" (the single email from Old Republic's Susan Icklan and subsequent failure to disclose) occurred in and after September 2022 – months after Plaintiff had already terminated the PSA. (See Pb17-18). Ignoring this indisputable fact, Plaintiff's negligent misrepresentation claim depends on Plaintiff's ability to enforce the PSA when it alleges that Old Republic chose to ignore Plaintiff's inquiries about the closing and its efforts to proceed with the transaction, per the [PSA]." (Pa18, ¶89). In essence, as admitted by its attorney, Plaintiff alleges that because Old Republic did not inform it of the date of the Mack-Cali closing, Plaintiff was unable to "pursue [its] rights" under the PSA. (1T7:15-8:6; 1T10:16-23). As a matter of law, however, none of these things can be said to have prevented Plaintiff from obtaining the Property, because Plaintiff no longer had the right to purchase the Property at the time of the Mack-Cali transaction.

As such, there can thus be no claim of "justifiable reliance" by Plaintiff upon a representation by Old Republic relating to Plaintiff's decision to not exercise its rights under the PSA because the PSA was not in effect at the time the "misrepresentation" occurred. Arcand v. Brother Int'l Corp., 673 F. Supp. 2d 282, 305-06 (D.N.J. 2009) ("A party reasonably relies on a misrepresentation where the 'facts to the contrary were not obvious or did not provide a warning'" of the issue

underlying the alleged misrepresentation) (quoting Nappe v. Anschelewitz, Barr, Ansell & Bonello, 189 N.J. Super. 347, 355 (App. Div.1983)).

Breach of Fiduciary Duty. In order to state a claim for breach of fiduciary duty, Plaintiff must allege that a breach of duty caused it to incur damages. Namerow v. Pediatricare Assocs., LLC, 461 N.J. Super. 133, 146 (Ch. Div. 2018). Here, Plaintiff's fiduciary duty claim demonstrates that its viability depends on Plaintiff's continued ability to enforce the PSA when it alleges that Old Republic "breached its duty through the deceptive misconduct alleged above," i.e., its failure to inform Plaintiff about the closing of the Mack-Cali transaction. As with the other causes of action, this cannot be said to have caused Plaintiff any damages because Plaintiff no longer had the right to purchase the Property at the time of the Mack-Cali transaction. Moreover because the PSA (and Old Republic's obligations as an escrow agent) had terminated, it cannot be said that Old Republic owed any duty to Plaintiff.

Consequently, as a matter of law, Plaintiff cannot state a claim against Old Republic and it would be futile to allow Plaintiff to amend the Complaint. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (finding amendment is "futile" when "the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor"); Johnson v. Glassman, 401 N.J. Super. 222, 247 (App. Div. 2008) (finding a motion to dismiss under R. 4:6-2(e) should

be with prejudice if any further attempts at amendment of the complaint would be futile).

III. THE COURT'S ORDER DISMISSING THE CLAIMS AGAINST OLD REPUBLIC CAN BE SUSTAINED ON OTHER GROUNDS

Even if this Court does not affirm the dismissal because the PSA was terminated and Plaintiff did not otherwise have a right to specific performance, it should still affirm the dismissal based on a number of other grounds.

A. Plaintiff Fails to Allege Breach of Contract

Dismissal of Plaintiff's breach of contract claim should be sustained when Plaintiff's Complaint does not identify *any* specific provision of the contract that was breached. A breach of contract occurs only where "[a] party violates the terms of a contract *by failing to fulfill a requirement* ***enumerated in the agreement***" itself. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019) (emphasis added). Demonstrating that this occurred requires Plaintiff to show, among other things, "that the parties entered into a contract containing certain terms" and that "defendant *did not* do what the contract required the [the defendant] to do, *defined as a breach of the contract*. . . ." Id. (emphasis added and alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). Thus, in order to allege breach to avoid motion to dismiss, Plaintiff must identify the contract provision breached.

Here, the Complaint does not identify any specific provision of the PSA imposing a duty that Old Republic breached. (Pa15-16, ¶¶ 70, 73-75). This is especially obvious because Old Republic's PSA obligations were limited to those in sections IV, X and XVII. (Pa128). As such, Old Republic's obligations under the PSA ended when it returned the Deposit to Plaintiff.

Unable to rebut the above, Plaintiff claims that the PSA obligated Old Republic to ensure that fee title to the Property was conveyed to Plaintiff. (Pa15, ¶70). Any contractual dispute must be guided by the express terms of the agreement, interpreted and enforced as written. Namerow, 461 N.J. Super. at 140. In this instance, contrary to Plaintiff's assertions, the PSA clearly states: "[Plaintiff] acknowledges that, at Closing, ***[Birch] shall cause [the Seller] to convey directly to [Plaintiff] by bargain and sale deed the Real Property*** in the form attached hereto as Exhibit J (the "Deed"). (Pa104, § 6.1 (emphases added)). Promptly following Closing, [Old Republic] shall cause the Deed and the Improvements Deed to be ***duly recorded*** in the Office of the Register of Deeds and Mortgages of Hudson County, New Jersey." (Pa105, §6.3 (emphases added)). Plainly, the PSA imposed an obligation on Birch, not Old Republic to ensure that title was conveyed to Plaintiff.

Plaintiff's remaining allegations all have one fatal defect in common: Plaintiff cannot point to any "requirement enumerated in the agreement" itself that required Old Republic to do what Plaintiff claims it should have done. Woytas, 237 N.J. at

512. Plaintiff contends that Old Republic failed to monitor and update Plaintiff regarding the rescheduled closing dates of other matters, failed to communicate regarding these rescheduled dates in a manner satisfactory to Plaintiff, and participated in the revised Mack-Cali closing. (Pa15-16, ¶73). However, the PSA has no terms imposing an obligation upon Old Republic to perform or abstain from any of these activities. Moreover, Plaintiff's general allegations about Old Republic impeding Plaintiff's ability to perform under the agreement do not specify exactly what contractual obligation Plaintiff had. Thus, these allegations, even if true, cannot sustain a claim for breach of contract.

B. Plaintiff Fails to Allege Breach of the Covenant of Good Faith

Even if the PSA was not terminated, dismissal of Plaintiff's breach of the implied covenant of good faith claim should be upheld for at least two reasons. *First*, Plaintiff cannot maintain a such a claim "when the conduct at issue is governed by the terms of an express contract or the cause of action arises out of the same conduct underlying the alleged breach of contract." See Hahn v. OnBoard, LLC, No. 09-03639, 2009 U.S. Dist. LEXIS 107606, at *15 (D.N.J. Nov. 16, 2009) (citing Wade, 172 N.J. at 340-41). Here, the conduct alleged to form the basis for Plaintiff's breach of good faith claim is the very *same* conduct that is alleged in support of its breach of contract claim. (Compare Pa17, ¶¶81-82 (breach of covenant of good faith claim based on Old Republic's duty not to "frustrate Plaintiff's ability to perform under

the [PSA], to assist another party in breaching the [PSA], and to avoid taking measures designed to cut Plaintiff out of the transaction.")) with Pa15-16, ¶¶71-72, 74 (breach of contract claim based on claim that Old Republic "frustrated Plaintiff's ability to perform and enjoy the benefits of the bargain," "aided, abetted and participated in [Birch's] breach of the [PSA], and "acquiesced and participated in [Birch's] decision to cut Plaintiff out of the deal")). Thus, Plaintiff's breach of good faith claim is duplicative of its breach of contract claim and should be dismissed.

Second, to plead a violation of a breach of the duty of good faith and fair dealing, Plaintiff must allege the existence of a "bad motive or intention" behind a purported wrongful action. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007) (quotation omitted); see also Wade, 172 N.J. at 341 (an "allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent an improper motive"). Plaintiff admits that this is the law. (See Pb43). To allege bad faith or improper motive, requires an allegation of a "malice-like" state of mind, which is more than something that is simply "unfair, not decent or reasonable, or dishonest." Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001) (citation and quotation omitted).

Here, Plaintiff's Complaint is entirely silent regarding the motives and intentions of Old Republic. In its brief, Plaintiff cites to paragraphs 42 to 53 of the Complaint as containing allegations of bad faith and improper motive. (Pb44).

However, nowhere in these paragraphs is "improper motive," "malice" or "bad intention" on the part of Old Republic alleged. (See Pa11-13, ¶¶42-53). Allegations that Old Republic "intentionally withheld" information, communicated with Birch, "refused to keep Plaintiff apprised," assisted Birch in closing a separate transaction and the like do not plead bad intention, bad motive or malice. Moreover, the count in the Complaint alleging breach of the covenant of good faith does not allege bad motive or malice either. It merely pleads that Old Republic breached its duty to not "frustrate Plaintiff's ability to perform under the [PSA], to assist another party in breaching the [PSA], and to avoid taking measures designed to cut Plaintiff out of the transaction." (Pa17, ¶¶81-82).

Far from pleading bad motive or malice, the Complaint pleads the exact opposite, clearly indicating that "Old Republic (through Susan Icklan)" only made allegedly false representations to Plaintiff regarding advisement of a rescheduled closing date "*because she had been asked by Defendant Birch not to share any information with Plaintiff*." (Pa18, ¶90 (emphasis added)). This is not a preexisting, malice-like, personally held, bad motive or intention – it is simply acting pursuant to the wishes and direction of a client in connection with a separate transaction *after* Plaintiff had terminated the PSA and received back its deposit.[5]

[5] Contrary to Plaintiff's assertion (Pb44), the trial court should not have denied the motion to dismiss so that Plaintiff could conduct additional discovery. Edwards, 357 N.J. Super. at 202 (motion to dismiss may not be denied "on the possibility that

C. Plaintiff Cannot State A Claim for Negligent Misrepresentation

To sustain a claim for negligent misrepresentation, a plaintiff is required to demonstrate that: (1) an incorrect statement; (2) was negligently made; and (3) *justifiably* relied upon with resulting economic loss or injury. Carroll, 313 N.J. Super. at 502 (citation omitted) (emphasis added). There can be no justifiable reliance by a party on statements made in connection with a transaction in which the party was represented by legal counsel and should have made a reasonable investigation of the facts on its own. See Berman v. Gurwicz, 189 N.J. Super. 89, 103 (Ch. Div. 1981) (citing John Hancock Mut. Life Ins. v. Cronin, 137 N.J.Eq. 586, 589 (E. & A. 1946)). In such instances, parties represented by counsel incur an obligation to exercise reasonable diligence, as explained thusly:

> Plaintiffs who were represented by counsel either made or should have made an independent investigation of the facts through their attorneys. *That was the purpose of employing counsel*. The exercise of reasonable diligence by these attorneys required them to make appropriate inquiries which would have disclosed all of the [] details. Had these been known to plaintiffs, they could not now claim reliance. Under the reasonable diligence rule they must be treated as though the details were known. *Consequently, they have not proved reliance*.

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discovery may establish the requisite claim"). This case is unlike Wilson v. Amerada Hess Corp., because that case involved whether discovery should have been allowed before summary judgment was granted and did not address a complete failure to plead bad motive in the Plaintiff's complaint. 168 N.J. at 252.

Id. Moreover, where a party already possesses prior knowledge regarding the existence of a given issue, that party is not justified in burying its head in the sand, ignoring and failing to investigate the issue, and attempting to foist the obligation to address the issue upon another party. See Nappe, 189 N.J. Super. at 355 (in fraud context,[6] "reliance must have been justifiable, for example, when facts to the contrary were not obvious or did not provide a warning making it patently unreasonable that plaintiff not pursue further investigation"), aff'd in part and rev'd in part on other grounds 97 N.J. 37 (1984); Nat'l Premium Budget Plan Corp. v. Nat'l Fire Ins. Co., 97 N.J. Super. 149, 211 (Law Div. 1967) ("But in many cases where the plaintiff's reliance and good faith are unquestioned, it may still be held that his conduct was so foolish as to bar his recovery") (quoting Prosser, Torts (2d Ed. 1955 § 89); Barry L. Kahn Defined Ben. Pension Plan v. Twp. of Moorestown, 243 N.J. Super. 328, 336-37 (Ch. Div. 1990) (because Plaintiff was a "sophisticated purchaser" he "did not justifiably rely upon the failure of [a] municipality to disclose the condition of" a property he was purchasing); Mel Realty, LLC v. Bayonne Oval, LLC, 2019 N.J. Super. Unpub. BER-L-7752-17, LEXIS 1069, at *28 (Law Div. 2019) ("[T]he burden was on Plaintiffs to satisfy themselves as to what information they needed to confirm before finalizing the [contract]. . . . Plaintiffs cannot now be

[6] The "element of reliance is the same for fraud and negligent misrepresentation," and thus a court assessing these claims can be guided by case law regarding either doctrine. See Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000).

permitted to attack the Broker Defendants because of their own oversight, as their reliance was unjustifiable.").

Here, the allegation of the Complaint demonstrates as a matter of law that Plaintiff was not justified in relying on either the two-word e-mail from Old Republic's representative or Old Republic's alleged failure to inform it of Birch's revised closing date. The Complaint alleges that the PSA was a "complex" agreement that "was heavily negotiated by and between sophisticated parties and their counsel." (Pa5, ¶20). It admits that in June 2022, it began having "growing concerns" about Birch's intentions and ability to perform under the PSA; sought reassurances from Birch; and was told in writing that Birch no longer saw any "feasible way" to close under the terms of the PSA and was exploring alternate deal structures including the direct purchase of all rights to the Property, and no longer believed itself to be "bound by the terms of the [PSA] Agreement." (Pa7-8, ¶¶27-29). The Complaint further alleges that Plaintiff knew Birch was in default as of July 14, 2022, declared Birch to be so and demanded the return of its Deposit. (Pa10-Pa11, ¶39-¶41). These allegations demonstrate that Plaintiff knew or had reason to believe that Birch was going to move forward with its closing and that Old Republic's obligations in connection with the PSA were concluded. Given these facts, it was not justifiable for Plaintiff to rely on a single two-word e-mail from Old

Republic's representative or on Old Republic's alleged failure to inform it of closing date of the Birch transaction.

Moreover, the Complaint made clear that Plaintiff and its attorneys had an obligation to conduct their own reasonable diligence to monitor and keep informed of Birch's activities, including whether Birch was actively pursuing alternative deals. Like the defendant in Berman, the very "purpose of [Plaintiff] employing counsel" was to have that counsel exercise "reasonable diligence" to stay appraised of Birch's actions and protect its interests. Berman, 189 N.J. Super. at 103. Thus, Plaintiff cannot avoid the obligation of it and its attorneys to monitor, investigate, and keep in regular contact with Birch (who it claimed was in breach), by attempting to shift this responsibility to Old Republic. Any allegation that Plaintiff elected to place itself in a position where it was entirely reliant upon Old Republic's representative to alert it to Birch's actions demonstrate an unreasonable and unjustifiable choice in light of the magnitude of the overall deal in question, which was a sophisticated, $165 million deal, involving an overall $380 million parcel. Plaintiff's assertions that that Old Republic knew that Plaintiff would rely on it, that Old Republic was a party to the PSA, and that Old Republic had a business relationship with Plaintiff (Pb47) do not negate these facts alleged in the Complaint that clearly show that any reliance on Old Republic was not justified under the circumstances.

D. Plaintiff Does Not State A Claim for Breach of Fiduciary Duty

Plaintiff's claim for breach of fiduciary duty must be dismissed because Plaintiff has not alleged any facts supporting the existence of a fiduciary relationship between it and Old Republic. A fiduciary relationship is one in which a "party places trust and confidence in another who is in a dominant or superior position" and arises "when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." F.G. v. MacDonell, 150 N.J. 550, 563 (1997). Plaintiff alleges no facts that establish that Old Republic was 'in a dominant or superior position" to Plaintiff or had a duty to give advice within the scope of an existing relationship.

Indeed, the only basis that Plaintiff asserts for a fiduciary relationship is "a longstanding business relationship" pursuant to which "Plaintiff retained Defendant Old Republic to provide title insurance and related services" for "multiple prior real estate transactions" (Pa19, ¶96) and that "Plaintiff selected Defendant Old Republic Title as the title insurance company to be involved in the [this] transaction". (Pa19, ¶97).[7] However, these allegations are insufficient to plead a fiduciary relationship. The law in New Jersey is clear that "the relationship between [a title] company and the insured is essentially contractual," and that a title insurer does not owe a non-

[7] Notably, the Complaint does not allege any breach of fiduciary duty with respect to Old Republic's handling of the Deposit as an escrow agent. (See Pa19, ¶¶96-99; Pb48).

contractual duty unless it voluntarily assumes one. Walker-Rogge, Inc. v. Chelsea Title & Guaranty, 116 N.J. 517, 540 (1989); see also Zielinski v. Professional Appraisal Assocs., 326 N.J. Super. 219, 226 (App. Div. 1999) (finding that an appraiser's duty was consistent with, and limited to, the scope of their undertaking); United Jersey Bank v. Kensey, 306 N.J. Super. 540, 551 (App. Div. 1997) ("[T]here is no presumed fiduciary relationship between a bank and its customer."). For a fiduciary duty to arise in title insurer-insured context, the relationship must go beyond that of a normal title insurer-insured relationship. Kosce v. Liberty Mutual Ins. Co., 152 N.J. Super. 371, 379-82 (Law Div. 1977) (Where insurer and insured "are merely dealing with one another as they would in a normal contractual situation" then "the company is only required to fulfill the ordinary contractual duties imposed by the insurance agreement."); Ellmex Constr. Co., Inc. v. Republic Ins. Co., 202 N.J. Super. 195, 206 (App. Div. 1985) (explaining that a fiduciary duty only arises where there is some "special relationship" that goes beyond the typical insurance carrier-policyholder relationship). This is true, even if the insurer and insured have had a longstanding business relationship. Indeed, Plaintiff has failed to cite to any authority demonstrating that a pre-existing business relationship is grounds for the imposition of a fiduciary duty. Thus, the Complaint fails to allege any facts that would give rise to a fiduciary relationship.

E. Plaintiff Cannot Plead a Claim for Aiding and Abetting a Breach of Contract

In apparent recognition of the deficiencies in the Complaint, Plaintiff argues that it should be allowed to maintain a novel cause of action for "aiding and abetting" a contractual breach. (Pb36-37). This argument has no merit for several reasons.

First, Plaintiff's Complaint does not contain a count for "aiding and abetting a breach of contract" – it merely alleges this as a basis for its breach of contract claim. (Pa12, ¶51; Pa15, ¶72; Pa18, ¶87).

Second a cause of action for "aiding and abetting" a breach of contract has never been recognized in New Jersey, as evidenced by Plaintiff's failure to cite any cases suggesting as much. The only civil causes of action for "aiding and abetting" that have been recognized in New Jersey are those for the aiding and abetting torts, namely: (1) the aiding and abetting a corporate breach of fiduciary duty; and (2) the aiding and abetting the commission of civil fraud. McCormac v. Qwest Commc'ns Intern., Inc., 387 N.J. Super. 469, 481 (App. Div. 2006) (discussing cases involving fraud, such as issuing false financial statements and concealing corporate economic conditions, and corporate fiduciary breaches, such as bribing agents); In re Integrity Ins. Co., 240 N.J. Super. 480, 502-03 (App. Div. 1990) (aiding and abetting fraud by preparing and disseminating materially false financial statements); Franklin Med. Assocs. v. Newark Pub. Schs., 362 N.J. Super. 494, 510 (App. Div. 2003) (bribing an agent of a principal was aiding and abetting breach of fiduciary duty of loyalty to

the principal); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 170 N.J. Super. 334, 368 (Law Div. 1979) (involving fiduciary duties and bribery). Every case on which Plaintiff relies in putting forth this claim involves one of these two scenarios, which are not applicable here.[8]

Third, the law is clear that a civil cause of action for aiding and abetting requires an allegation of the commission of an underlying tort. McCormac, 387 N.J. Super. at 482-83 (explaining that a claim for aiding the commission of a tort requires proof of the underlying tort); Shah v. Shroff, No. CAM-L-2934-20, 2023 N.J. Super. Unpub. LEXIS 527, at *47-48 (Law Div. Apr. 6, 2023) (illustrating that aiding and abetting requires proof of the underlying *tort* of breach of fiduciary duty); Judson v. Peoples Bank & Tr. Co., 25 N.J. 17, 29 (1957) (same). Here, Plaintiff has not alleged any tort claims against Birch; it only alleges a breach of contract and breach of good faith claim. (Pa15-16, ¶¶67-79; Pa17, ¶80-84). As such, no cause of action against Old Republic for "aiding and abetting" Birch can lie.

Fourth, even if a cause of action were created that mirrored the ones recognized for fraud and breach of fiduciary duty, it would be inapplicable here, as

[8] This Court should not create a new claim for "aiding and abetting" a breach of contract because it is "inappropriate" for any court other than our Supreme Court "to recognize a cause of action . . . heretofore never recognized." Filgueiras v. Newark Pub. Sch., 426 N.J. Super. 449, 474-75 (App. Div. 2012); Riley v. Keenan, 406 N.J. Super. 281, 297 (App. Div. 2009) (noting our courts "should normally defer to the Supreme Court . . . with respect to the creation of a new cause of action").

the law is settled that to satisfy the standard for sustaining this claim : "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." McCormac, 387 N.J. Super. at 484-485. Here, Plaintiff has made no allegation in the Complaint that Old Republic was "aware of role as part of an overall illegal or tortious activity" and that it "knowingly and substantially assist[ed] the principal violation".

F. Plaintiff Does Not Plead a Claim for the Violation of an Extra-Contractual Duty

Plaintiff argues that because Ms. Icklan sent Plaintiff an e-mail saying "will do" in response to its request that Plaintiff inform it of the Birch closing, Old Republic undertook an extra-contractual duty to "keep Plaintiff apprised of the fact[s] and details of the rescheduled closing" that was later breached. (See Pb41). This argument has no merit for several reasons. *First*, the Complaint again does not allege that Old Republic assumed an extra-contractual duty. *Second*, the Complaint concedes that sending of the September 13, 2022 e-mail and failure to inform Plaintiff of the Birch closing was not an extra-contractual duty because it alleges that these things constituted a breach of the PSA. (Pa11-12, ¶46; Pa15-16, ¶¶73-74). *Third*, the Complaint does not assert a claim against Old Republic for negligence, which is the theory on which Plaintiff would need to seek to recover outside of a

contractual setting. See Walker Rogge, 116 N.J. at 541 (stating that if an extra-contractual duty were assumed, such a duty would support a potential claim for negligence, and not breach of contract). Plaintiff's negligent misrepresentation claim does not allege an extra-contractual duty because it expressly pleads that Old Republic's duty arose from the Contract. (See Pa17, ¶86 ("By virtue of [Old Republic's role as the Escrow Agent *under* the Agreement, it owed a contractual and fiduciary duty") (emphasis added); Pa18, ¶87 (Old Republic . . . participated in [Birch's] breach of the [PSA]"); Pa18, ¶88 (Old Republic "failed and refused to perform its obligations under the [PSA]"); Pa19, ¶94 (Plaintiff is entitled to recover . . . its damages . . . arising form and proximately caused by [Old Republic's] negligent misrepresentations, in breach of its contractual duties to Plaintiff")). Such pleading makes clear that any duty Old Republic had arose under the PSA. *Fourth*, while the "determination of whether a duty exists is generally considered a matter of law to be decided by the court," in determining whether a duty will be imposed, the "foreseeability of harm is a significant consideration," and it is only where the "foreseeability of an [injury] is established" that "considerations of fairness and policy [will] then govern whether the imposition of a duty is warranted." Zielinski, 326 N.J. Super. at 226. Plaintiff does not allege any facts establishing that it was foreseeable that Plaintiff would be harmed if assuming an alleged duty to advise Plaintiff of closing dates, Ms. Icklan could be held to have undertaken tens of

millions of dollars' worth of liability and, essentially, all liability for the successful performance of the property transaction, especially where Plaintiff never informed Ms. Icklan of the potential alleged ramifications of any failure to carry through on this obligation.

G. The Language Of The PSA Bars Plaintiff's Claims

Plaintiff's claims against Old Republic should be dismissed because they are all barred by the PSA. Specifically, 17.1(b) of the PSA states that "[Old Republic] shall not be liable to any party for any act or omission, except for bad faith, gross negligence or willful misconduct." (Pa118). This provision is "clear and unambiguous" in providing that Old Republic shall not have any liability for any act or omission except for those arising from bad faith, gross negligence or willful misconduct, and as such, the Court "must enforce those terms as written." Namerow, 461 N.J. Super. at 140.

Court's routinely uphold waivers or contractual limitation of liability provisions within the commercial context. See Chem. Bank of N.J. Nat'l Ass'n v. Bailey, 296 N.J. Super. 515, 526-27 (App. Div. 1997) (noting ability of parties to apportion risk of loss through contractual limitation of liabilities). When assessing the enforceability of such a limitation/waiver provision, the court will pay attention to two "leading principle[s]": (1) the equality of the parties' bargaining power; and (2) whether the limitation is still sufficient to provide the party a "realistic incentive

to act diligently." Lucier v. Williams, 366 N.J. Super. 485, 492 (App. Div. 2004). Here, Old Republic, as a title insurer who was not a direct party to the transactions at issue, was clearly in a subservient role to both Plaintiff and Birch and possessed less bargaining power than both parties. Moreover, the limitation above also leaves Old Republic with ample "incentive to act diligently," as a large variety of claims can still be pursued in connection with its services – just none of the claims Plaintiff endeavors to raise. Lucier, 366 N.J. Super. at 492.

Plaintiff cannot seek to avoid the plain meaning of this section by arguing that Old Republic acted with bad faith, gross negligence or willful misconduct. The Complaint is bereft of any allegation that Old Republic acted with an improper or malicious motive. Indeed, Plaintiff fails to cite a single paragraph of the Complaint where this type of conduct was alleged. It merely points to allegations of actions taken by Plaintiff, which it then characterizes in its brief. (See Pb37-38 (Pa1112, ¶¶ 45-51) (which alleges the alleged failure to alert of a new closing date and the occurrence of the rescheduled closing), Pa15-16, ¶¶ 73-76 (alleging only actions relating to communications concerning notice of the closing date and the performance of the closing), and Pa17, ¶¶82, 86-89 (consisting of nothing but legal conclusions)).

Plaintiff's reliance on Section 13.1 of the PSA to avoid the application of Section 17.1(b) is also misplaced. As noted above, Section 13.1 addresses what was

to happen if Birch defaulted under the PSA, provides for the return of the escrow funds, and gives Plaintiff the right to bring an action for specific performance against Birch. (Pa115-116). Nothing in this provision has anything to do with the limitation of Old Republic's liability set forth in Section 17.1(b).

LEGAL ARGUMENT IN SUPPORT OF OLD REPUBLIC'S CROSS-APPEAL (Pa688; T5)

I. STANDARD OF REVIEW

The interpretation of a contract is subject to de novo review by an appellate court. See Kieffer, 205 N.J. at 222-23.

II. THE TRIAL COURT IMPROPERLY DENIED OLD REPUBLIC'S MOTION FOR ATTORNEYS' FEES (Pa688; T5)

The trial court incorrectly denied Old Republic's motion for an award of attorneys' fees by ignoring the plain and unambiguous language of the PSA and relying on cases that applied the law of other jurisdictions inconsistent with New Jersey law and/or that are factually distinguishable from this case. (5T; Pa688).

A. New Jersey Law Allows For Contractual Indemnification For First-Party Claims (Pa688; T5)

New Jersey Courts regularly uphold indemnity provisions contained in a contract. See Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 198 (App. Div. 1997), certif. denied, 151 N.J. 466 (1997). Moreover, Courts routinely award legal fees pursuant to indemnity provisions. Bethlehem Steel Corp. v. K. L. O. Welding Erectors, Inc., 132 N.J. Super. 496, 500 (App. Div. 1975); see also Serpa v. N.J.

Transit, 401 N.J. Super. 371, 382 (App. Div. 2008) (holding that indemnification provision allowing counsel fees entitled defendant to counsel fees for its efforts in enforcing the indemnification provision).

No New Jersey Supreme Court or Appellate Division case has held that contractual indemnifications provisions automatically do not apply to first party claims. See Boyle v. Huff, Nos. A-1965-21, A-2046-21, 2023 N.J. Super. Unpub. LEXIS 85, at *16 (App. Div. Jan. 20, 2023) ("[n]either the New Jersey Supreme Court nor this court has ever held that indemnification provisions will not apply to first-party claims."); Travelers Indem. Co. v. Dammann & Co., Inc., 594 F.3d 238, 255 (3d Cir. 2010) ("[W]e cannot hold that first-party indemnification claims . . . are categorically barred as a matter of law in New Jersey absent direct authority to that effect."). Moreover, no New Jersey Supreme Court or Appellate Division case has required a contract to contain specific language in order for a first-party indemnification obligation to arise. See Boyle, 2023 N.J. Super. Unpub. LEXIS 85, at *16 ("Neither the Court nor this court has required an indemnification provision to include express language covering a first-party claim for the indemnification obligation to be triggered.").

To the contrary, New Jersey Courts have applied contractual indemnity provisions to require one party to a contract to indemnity another party for first-party claims. See Boyle, 2023 N.J. Super. Unpub. LEXIS 85 at *14-15; Fid. & Deposit

Co. of Md. v. Stamateris, No. A-5407-09T3, 2011 N.J. Super. Unpub. LEXIS 2015, at *17 (App. Div. July 25, 2011).

B. The Plain Language Of The PSA Requires That 101 Hudson Indemnify Old Republic (Pa688; T5)

Because there is no prohibition under New Jersey law of first party contractual indemnity claims, whether indemnification is required in this case depends on the interpretation of the indemnity provisions of the PSA. "A contract of indemnity is to be interpreted in accordance with the rules governing the construction of contracts generally." Bethlehem, 132 N.J. Super. at 499. Thus, Courts interpret the intent of a contractual indemnification provision based on its plain language. Quinn, 225 N.J. at 45, 54 (upholding the terms of a divorce settlement that were "clear, unambiguous, and mutually understood"); Barila, 241 N.J. at 616 (quoting Quinn and stating that "plain language of the contract is the cornerstone of the interpretive inquiry"); JPC Merger Sub LLC v. Tricon Enters., Inc., 474 N.J. Super. 145, 167 (App. Div. 2022) (reversing lower court's contract interpretation that was counter to the plain language of the contract). While ambiguity in indemnification provisions are construed against a party being indemnified, see, e.g., Pepe v. Township of Plainsboro, 337 N.J. Super. 209, 216 (App. Div. 2001), a Court may not rewrite the parties' contract. Rahway Hosp, 374 N.J. Super. at 111; Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595, 602 (2001) (declining to rewrite an insurance policy because it contained "no ambiguity, inconsistency, or contradiction").

Here, the plain language of the Section 17(b) of the PSA requires 101 Hudson to indemnify it for the fees that Old Republic expended in defending against the claims brought by 101 Hudson. Section 17.1(b) states in pertinent part that:

> [Old Republic] shall not be liable to any party for any act or omission, except for bad faith, gross negligence or willful misconduct, and the parties agree to indemnify [Old Republic] and hold [Old Republic] harmless from any and all claims, damages, losses or expenses arising in connection herewith, except to the extent arising out of the bad faith, gross negligence or willful misconduct of [Old Republic].

(Pa118). This unambiguous language demonstrates in multiple ways that the parties intended that Old Republic would be indemnified for claims asserted by 101 Hudson.

First, the word "indemnify" in the phrase "the parties agree to indemnify" in Section 17.1(b) is not limited to third-party claims, but refers to all claims. " Dansko Holdings, Inc. v. Ben. Tr. Co., 991 F.3d 494, 502 (3d Cir. 2021) ("The plain, unambiguous meaning of 'indemnify' is not 'to compensate for losses caused by third parties,' but merely 'to compensate.'") (quoting Atari Corp. v. Ernst & Whinney, 981 F.2d 1025, 1032 (9th Cir. 1992)); Dammann, 594 F.3d at 255 (defining the "expansive meaning" of indemnity as "[a] duty to make good any loss, damage, or liability incurred by another" when allowing a first-party indemnification claim) (quoting Black's Law Dictionary 783 (8th ed. 2004)); Indemnify, Black's Law Dictionary (11th ed. 2019) ("To reimburse (another) for a loss suffered because of a third party or one's own act or default") (emphasis added).

Second, the use of the words "any and all" in the phrase "to indemnify [Old Republic] and hold [Old Republic] harmless from any and all claims, damages, losses or expenses" demonstrates that the obligation to indemnify Old Republic in Section 17.1(b) is not limited to third-party claims. See Isetts v. Borough of Roseland, 364 N.J. Super. 247, 256 (App. Div. 2003) (holding that "that the phrase 'any and all' [in a release] allows for no exception," except with regard to specific types of claims that were clearly enumerated in the release); Atlantic Cas. Ins. Co. v. Interstate Ins. Co., 28 N.J. Super. 81, 91 (App. Div. 1953) ("[t]he word 'any; clearly may and should be interpreted as meaning 'all or every'"); In re Ordinance 04-75, 192 N.J. 446, 461 (2007) (holding in the context of statutory interpretation that "any" was synonymous with "all" and that for that reason, the term "any ordinance" could not mean only one of a small subdivision of ordinances). Indeed, the U.S. District Court for the District of New Jersey recently agreed with this interpretation of similar language when it held that an indemnification provision stating that defendant would indemnify plaintiff for costs arising from "any claims from anybody that result from or relate to . . . your breach of any representation, warranty or obligation under this Agreement" required indemnification for first-party claims because this "indemnification language is very broad." See Cem Bus. Sols., Inc. v. BHI Energy, Civil Action No. 21-18543, 2022 U.S. Dist. LEXIS 62724 (D.N.J. Apr. 4, 2022). Had the parties to the PSA intended that Old Republic was

not to be indemnified for first-party claims, they would not have used the words "any and all" to describe the claims that were subject to indemnification.

Third, the language "arising in connection herewith" clearly indicates that Section 17.1(b) applies to all claims related to the PSA – not just to third-party claims. Di Filippi v. Target Corp., No. A-6050-05T2, 2008 N.J. Super. Unpub. LEXIS 1549, at *9 (App. Div. Jan. 16, 2008) ("[i]n the indemnification context, the words 'arising out of or resulting from" are given 'their common and ordinary meaning as referring to a claim 'growing out of' or having its 'origin in' the subject matter" of the parties' underlying agreement (citing Leitao, 301 N.J. Super. at 193). For a claim to "arise out of" a contract, "there need be shown only a substantial nexus between the property damage or injury alleged in the claim and the activities encompassed in the . . . contract." Vitty v. D.C.P. Corp., 268 N.J. Super. 447, 453 (App. Div. 1993); Leitao, 301 N.J. Super. at 193 ("In similar contexts, we have construed the words 'arising out of' in accordance with their common and ordinary meaning as referring to a claim 'growing out of' or having its 'origin in' the subject matter of the [party to the contract's] work duties"). Obviously, a dispute as to the parties' rights and duties under the PSA "arises out of" the PSA. The injury that 101 Hudson alleges – its perceived loss of its rights under the PSA – are necessarily within the subject matter of same.

Fourth, Section 17.1(b) of the PSA carves out an exception to the indemnification clause – that Old Republic should not be indemnified in the event that a claim is brought "arising out of the bad faith, gross negligence or willful misconduct of [Old Republic]." (Pa118-119). This carve-out shows that the parties agreed to exceptions to Old Republic's indemnifications rights, but did not agree that first-party claims would be among the exceptions. See Dansko Holdings, 991 F.3d at 502 ("[T]he parties contemplated exceptions to the indemnity when they carved out Non-Indemnity Loss' from the indemnity and reimbursement provisions. But that carve-out does not extend to all first-party claims. So we will not read in that exception when the parties negotiated none.").

Fifth, the use of the phrase "any party" – instead of "third-party" – in the phrase "[Old Republic] shall not be liable to any party" makes clear that the indemnity obligation that follows this phrase was meant to cover liability to 101 Hudson or Birch. Chairperson v. Freedom of Info. Comm'n, 77 A.3d 121, 129 (Conn. 2013) (noting that Black's Law Dictionary defined "party" as "'[o]ne by or against whom a lawsuit is brought,' or in the context of contracts, 'one who takes part in a transaction'"). Thus, it is clear that the parties agreed that Old Republic would not just have no liability to third parties, but that it would also have no liability to the parties to the PSA. Had they intended otherwise, the parties would have

drafted this provision to state that Old Republic was only not to be liable to third parties. They chose not to do so.

Old Republic's right to indemnity from 101 Hudson contained in Section 17.1(b) of the PSA is confirmed and reiterated by Section 17.1(c), which reads:

> ***[Old Republic] shall not be required to defend any legal proceeding which may be instituted against it*** with respect to the Escrowed Funds, the Real Property or the subject matter of this Agreement unless requested to do so by [Plaintiff] or [the] Seller and ***unless [Old Republic] is indemnified to its satisfaction against the cost and expense of such defense.*** . . . [Old Republic] shall be fully protected in acting in accordance with any written instructions given to it hereunder and believed by it to have been signed by the proper parties.

(Pa119). This provision does not except legal proceedings brought by 101 Hudson from its terms. Instead it demonstrates that suits brought by 101 Hudson are not excluded by its use of the phrase "any legal proceeding." Moreover, Section 17.1(b) explicitly states that the legal proceedings to which it applies include those that relate to the Property and the PSA, both of which are central to 101 Hudson's claims in this matter. Moreover, Section 17.1(b) is consistent with Section 18.2 of the PSA, which states that:

> In the event a party hereto files any action or suit against another party hereto by reason of any breach of any of the covenants, agreements or provisions contained in this Agreement, then in that event the prevailing party will be entitled to have and recover certain fees from the other party including all reasonable attorneys' fees and costs resulting therefrom.

(Pa119). While Old Republic maintains that Section 18 of the PSA does not apply to it by virtue of language contained in the PSA's signature block, this language nonetheless indicates that the parties intended that parties who lose a lawsuit against each other should have fees paid. It thus supports the interpretation of Section 17.1 (b) as requiring Plaintiff to indemnify Old Republic for the fees incurred as a result of Plaintiff's claims. Thus, when the PSA is read as a whole, it makes clear that it was always intended that Old Republic could be indemnified by 101 Hudson for the legal fees it incurred in defending a suit brought by 101 Hudson against Old Republic arising out of the PSA.

C. The Trial Court Incorrectly Relied On Distinguishable Out-Of-State Law (Pa688; T5)

Neither the trial court nor 101 Hudson (in its briefing below) relied on any case that applied New Jersey law in support of the proposition that the PSA does not allow a first-party indemnification claim. The case law relied on applied out of state law that is easily distinguishable from the facts here. (5T8:24-10:7).

In rendering its decision, the trial court relied explicitly on the unpublished decision in Allison-Williams Co. v. Viasource Funding Grp., LLC, NO. A-1720-08T1, 2010 N.J. Super. Unpub. Lexis 1260 (App. Div. June 9, 2010), (see 5T8:24-10:7), which is distinguishable from this case in several ways. *First*, Allison-Williams applied *New York* law – not New Jersey law. Unlike New Jersey law, in New York a "promise to pay another's fees in [an] indemnification agreement "must

be exclusively or unequivocally referable to claims between parties on the contract rather than claims of third parties." Id. at *29 (citingJMD Holding Corp. v. Congress Fin. Corp., 828 N.E.2d 604, 613 (N.Y. 2005). As noted above, however, this is not the law in New Jersey. *Second*, Allison-Williams held that the contractual indemnity provision at issue there did not allow the plaintiff to recover the fees that the *plaintiff* incurred in bringing a breach of contract action against another party to its contract. Id. at 29-30 (the contract did not give Plaintiff the "right to claim fees from defendant for litigation that they have initiated against defendant on the contract itself"). Allison-Williams did not deal with a first party claim for contractual indemnification by a defendant for the fees incurred as the result of another party to the contract asserting claims against the defendant. *Third*, the contract in Allison-Williams was a complex, intricate contract that required Plaintiffs to introduce Defendants to numerous third parties from whom Defendants sought financing. Id. at *6-9 (describing at least three of the third-party financing providers (including another of the named plaintiffs) who were necessarily involved in the parties business arrangement). The contract in Allison-Williams was not a closed-universe real estate transaction that involved clearly defined parties as is the case here. *Fourth*, the Court in Allison-Williams held that other provisions of the contract indicated that there was no intent for first party indemnification. Id. at *29 (stating the surrounding language of the indemnification agreement "does not

establish plaintiffs'' right to claim fees from defendant for litigation that they have initiated against defendant on the contract itself."). *Fifth*, and critically, the Allison-Williams Court made no finding as to whether first-party claims might ever be covered by an indemnification provision to a contract. It merely stated that, based on the provision at issue, Plaintiffs did not have a "right to claim fees from defendant for litigation that they have initiated against defendant on the contract itself" and that "the parties' indemnification agreement was not the equivalent of a contractual fee-shifting agreement and did not require defendant to pay plaintiffs' expenses in [that] litigation." Id. at 29-30.

In support of its position below, Plaintiff relied on several other out-of-state cases that are not applicable to this matter. Among these is Hooper Associates v. AGS Computers, Inc., 548 N.E.2D 903, 905 (N.Y. 1989), where the court applied New York law and held that an indemnity provision did not apply to first-party claims because the agreement did "not contain language clearly permitting plaintiff to recover from defendant the attorney's fees incurred in a suit against defendant." Id. As was pointed out by the District of New Jersey in Rhodia Inc. v. Bayer Cropscience Inc., Hooper required that the defendant indemnify Plaintiff in the event of the occurrence of claims relating to one of a number of clearly enumerated subjects. No. 04-6424 (GEB) (MF), 2007 U.S. Dist. LEXIS 82582, at *32 (D.N.J. Nov. 5, 2007). Here, the indemnification provision broadly applies to "any and all

claims, damages, losses or expenses arising in connection herewith" and to legal proceedings pertaining to "the Escrowed Funds, the Property or the subject matter of [the PSA]." (Pa118-119, §17.1(b)-(c)). The PSA did not limit Old Republic's indemnification to claims brought only pursuant to specific aspects of the contractual relationship as in Hooper. See Rhodia Inc. 2007 U.S. Dist. LEXIS 82582, at *32 (holding that language similar to that at issue in the PSA was broader than the language in Hopper and allowed for a first-party claim under New Jersey law). In addition, the Hooper Court pointed out that the subject indemnification provision only applied to third-party claims because of surrounding language – including a claim notice provision – that made this intent clear. Hooper, 548 N.E.2D at 905. Here, the PSA contains no such notice provision.

Oscar Gruss & Son, Inc. v. Hollander, 337 F.3D 186, 199-200 (2d Cir. 2003) is also distinguishable. In Oscar, the contract provision allowing for the recovery of legal fees "in connection with the enforcement of th[e] Agreement and indemnification obligations set forth" appears in a parenthetical, thus simply clarifying the preceding language. Id. Moreover, the indemnification provision was followed by another provision that refers to reimbursement of expenses in connection with third-party claims and provided Plaintiff with a right to separate counsel in connection with any matters in which indemnification is sought. Id. Such is not the case here. The indemnification provision in this matter is not limited to

third-party claims. Moreover, like Hooper, the indemnification provision in Oscar Gruss was followed by a provision giving defendant the right to notice of any indemnification claim and an opportunity to assume Plaintiff's defense thereof, and a provision requiring that defendant obtain the prior written consent of Plaintiff before settling any lawsuits. The inclusions of these provisions indicated to the court that the claims contemplated by the subject indemnification provisions contemplate only third-party claims. Such is not the case in this matter.

The other cases that 101 Hudson cited in support of its proposition that Old Republic may not collect its attorney's fees pursuant to litigation brought by the parties to the contract are similarly unavailing. JMD Holding Corp., 828 N.E.2d at 613 (in case addressing whether a loan provider could permissibly hold back funds remaining in a loan account so as to fulfill payment of contingent obligations of the borrower, the Court expressed "no opinion whether [Defendant] may recoup any of its attorneys' fees by way of counterclaim or in a separate action for indemnification."); Canopy Corp. v. Symantec Corp., 395 F. Supp.2d 1103, 1105-06, 1116 (D. Utah 2005) (out of state case where the professional services agreement between a software company and a product assembly and order fulfillment company clearly contemplated third-party actions); Estate of Pearson v. Interstate Power & Light Co., 700 N.W.2D 333, 344-45 (Iowa 2005) (out of state case holding that "the terms 'indemnify' and 'hold harmless' indicates an intent to refer only to claims

brought by third-parties" based on the language of the contract in that case); Bourne Co. v. MPL Commc'ns, Inc., 751 F. Supp. 55, 57-58 (S.D.N.Y. 1990) (the language of the indemnification clause of a music copyright agreement was "typical of the type which contemplates indemnification for third-party claims").

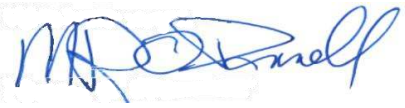
CONCLUSION

For the reasons stated, Old Republic respectfully requests that the Court deny Plaintiff's appeal and affirm the dismissal of its claims against Old Republic, and that the Court reverse the trial court's denial of Old Republic's application for attorney's fees in defending this action against Plaintiff.

Respectfully submitted,

RIKER DANZIG LLP

Attorneys for Old Republic National Title Insurance Company



By: _____
Michael R. O'Donnell (No. 030491988)
Ronald Z. Ahrens (No. 021012002)

Date: May 15, 2024
4894-9621-9557, v. 13

Superior Court of New Jersey

Appellate Division

Docket No. A-000506-23

101 HUDSON PROPERTIES, LLC, *Plaintiff-Appellant-Cross-Respondent,* vs. BIRCH REAL ESTATE SERVICES, LLC, *Defendant-Respondent,* – and – OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, *Defendant-Respondent-Cross-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-004227-22 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

This action arises out of what Plaintiff-Appellant 101 Hudson Properties, LLC ("Plaintiff") itself concedes was a complex, 39-page contract that was heavily negotiated by and between sophisticated parties and their counsel and is binding under applicable law, which is essentially a complicated structured finance agreement. That agreement — the asserted basis of Plaintiff's claims in this action — contained a stipulated limited remedies clause, between Plaintiff and Defendant-Respondent Birch Real Estate Services, LLC ("Birch") under which, after acquiring a property from a third-party fee owner, 101 Hudson Realty LLC ("Mack-Cali") in a separate transaction, Birch would retain ownership of the building and improvements on the property, convey the fee interest in the land to Plaintiff and Plaintiff would ground lease the land back to Birch. Despite making diligent efforts, Birch was ultimately unable to consummate the two transactions as originally contemplated. In order to avoid defaulting under its purchase and sale agreement with Mack-Cali, Birch agreed to assume Mack-Cali's existing loan, the terms of which prevented Birch from conveying the mortgaged land to Plaintiff. As a result, Birch notified Plaintiff that it could not feasibly convey title to the land to Plaintiff, as contemplated by their agreement. In accordance with the stipulated remedies clause in the parties'

agreement, Plaintiff elected to terminate the agreement with Birch and, with Birch's cooperation, obtain a refund of its $5 million earnest money deposit.

Through their respective counsel, Birch advised Plaintiff that its request for a refund of the deposit constituted an election of remedies under the parties' agreement. Under the express terms of the stipulated remedies clause in the parties' agreement, as soon as Plaintiff received a refund of its deposit, Plaintiff relinquished all rights to the acquisition of the land, Birch no longer had an obligation to convey an interest in the land to Plaintiff and Plaintiff forfeited any right to seek specific performance of the parties' purchase and sale agreement. Several months after Plaintiff terminated the agreement, Birch closed title on a restructured transaction with Mack-Cali.

Despite the express terms of the stipulated remedies clause in the parties' agreement, and even though it opted to terminate the agreement and obtain a refund of its deposit, Plaintiff now brings this suit against Birch in which it purports to seek specific performance of the terminated purchase and sale agreement and an award of $30 million in monetary damages for alleged breach of the agreement and breach of the implied covenant of good faith and fair dealing.

Plaintiff's claims against Birch are barred by the terms of the express stipulated remedies clause in the parties' agreement. Plaintiff's cause of action

for breach of implied covenant of good faith and fair dealing also fails as a matter of law because Plaintiff failed to plead any bad motive or intent by Birch, or that Birch's conduct was not permitted by the express terms of the parties' agreement. To the contrary, as Plaintiff alleged in its complaint, Birch made a good faith effort to consummate the parties' transaction as contemplated, and was transparent with Plaintiff concerning its inability to obtain the necessary financing that would have enabled Birch to pay off Mack-Cali's existing mortgage, which was necessary for Birch to be able to convey the land to Plaintiff, an integral part of the deal. Accordingly, each of the causes of action asserted against Birch were properly dismissed with prejudice. Further, Birch was appropriately awarded its reasonable attorneys' fees and costs, as the prevailing party in this action. The motion court's correct rulings should be affirmed by this Court.

PROCEDURAL HISTORY

On December 28, 2022, Plaintiff commenced this action in the Law Division by filing the complaint against Birch and the escrow agent, Defendant-Respondent Old Republic National Title Insurance Company ("Old Republic"). (Pa1). As against Birch, Plaintiff asserted three causes of action: (1) specific performance of the purchase and sale agreement; (2) breach of contract arising out Birch's alleged failure to consummate the transaction contemplated by the

purchase and sale agreement; and (3) breach of the implied covenant of good faith and fair dealing by allegedly "taking measures designed to cut Plaintiff out of the transaction." (Pa13-Pa17, at ¶¶54-66, 80-84). In addition to specific performance, Plaintiff sought an award of money damages in excess of $30 million. (Pa14, at ¶65; Pa17, at ¶83).

On April 20, 2023, Birch filed a motion under Rule 4:6-2(e) seeking the dismissal of Plaintiff's complaint, as against Birch. Plaintiff opposed the motion. (Pa201-337). On June 9, 2023, the motion court heard oral arguments on Birch's motion. (2T).[1] After hearing arguments, the motion court ruled from the bench, granting Birch's motion and dismissing all claims against Birch, with prejudice. (2T, at 15-16). The motion court interpreted the plain language of the agreement to determine that, once Plaintiff declared Birch in default and recovered its deposit, Birch had no further obligations to Plaintiff and Plaintiff's rights under the agreement had been terminated. (2T, at 13-16). Accordingly, the motion court found that Birch could not be held liable for conduct that allegedly occurred well after the termination of the agreement. (*Id.*). The motion court entered an order granting Birch's motion in its entirety. (Pa357).

[1] The certified transcripts of the proceedings before the motion court were provided to the Court by Plaintiff. For ease of reference, this brief uses the same abbreviations as Plaintiff's brief for the cited transcripts. Accordingly, the transcript of the proceedings held on June 9, 2023 is referred to as "2T" and the transcript of the proceedings held on July 21, 2023 is referred to as "3T."

On June 29, 2023, Plaintiff filed a motion, by order to show cause, under Rule 4:42-2 seeking reconsideration of the motion court's order dismissing the complaint as against Birch, with prejudice. (Pa391-394). On July 21, 2023, the motion court heard oral arguments on Plaintiff's motion for reconsideration. (July 21 Trans., 3T). After hearing arguments, the motion court ruled from the bench, denying Plaintiff's motion. (3T, at 13-16). The motion court determined that, for the reasons stated on the record on June 9, 2023, its ruling on Birch's motion to dismiss was correct, and it would not be in the interests of justice to vacate the prior ruling. (3T, at 15).

On June 29, 2023, Birch filed a motion for an award of attorneys' fees and costs. (Pa395-440). Birch asserted that it was entitled to recover its reasonable attorneys' fees and costs as the prevailing party in this action. Plaintiff opposed the motion. (Pa441-474). On September 29, 2023, the motion court entered an order granting the motion in part as to Birch's entitlement to attorneys' fees as the prevailing party, and denying the motion in part, without prejudice, as to the amount of the award of fees to allow the parties to attempt to resolve the motion on consent. (Pa689). On November 29, 2023, upon the parties' agreement as to the amount of reasonable attorneys' fees and costs incurred by Birch, the motion court entered a consent judgment pursuant to the parties' agreement granting Birch an award of attorneys' fees and costs in the amount of $111,000. (Pa705).

On October 18, 2023, Plaintiff filed a Notice of Appeal seeking reversal of the motion court's orders granting Birch's motions to dismiss and for an award of attorneys' fees and denying Plaintiff's motion for reconsideration. (Pa690-692). Subsequently, Plaintiff filed an Amended Notice of Appeal to reflect the entry of the consent judgment. (Pa706-708). Plaintiff also seeks review of the motion court's separate interlocutory order, on reconsideration, granting Old Republic's motion to dismiss, with prejudice. (Pa706-708).

STATEMENT OF FACTS

On August 12, 2021, Birch entered into an agreement (the "Mack-Cali Transaction") to acquire fee simple interest in land located at 101 Hudson Street in Jersey City, New Jersey (the "Land") and improvements thereon (the "Improvements"). (Pa4, ¶11). On August 13, 2021, Plaintiff and Birch entered into a separate agreement (the "PSA") whereby Birch agreed to, concurrently with the closing of title under the Mack-Cali Transaction, sell to Plaintiff the fee interest in the Land, while Birch would retain ownership of the Improvements. (Pa3, ¶¶ 5,9). The PSA further provided that, concurrently with the closing of the purchase and sale transaction, Plaintiff and Birch would enter into a ground lease whereby Birch would lease the Land back from Plaintiff for 98 years. (Pa4, at ¶10). The PSA, a "complex" contract, was "heavily negotiated by and

between sophisticated parties and their counsel and is binding under applicable law." (Pa5, at ¶20).

In accordance with the terms of the PSA, Plaintiff deposited with Old Republic, as escrow agent, an earnest money deposit in the amount of $5 million (the "Deposit"). (Pa5, ¶18). Section 4.2 of the PSA provided that the Deposit is "non-refundable" except in the event the PSA is "terminated by [Plaintiff] under any express right of termination entitling [Plaintiff] to a refund of the Earnest Money Deposit as provided herein . . . ." (Pa97). Section 13.1 provided that, if Birch defaulted before the Mack-Cali Transaction closed, Plaintiff's sole and exclusive remedy is to terminate the PSA, in which event Plaintiff is entitled to receive a refund of the Deposit. (Pa115). In Section 13.1, Plaintiff expressly "waive[d] its rights to seek damages in the event of [Birch's] default . . . ." (*Id.*).

The PSA provided that the closing of the transaction between Plaintiff and Birch would occur concurrently with the closing of the Mack-Cali Transaction. (Pa110, §10.1). If the closing date for the Mack-Cali Transaction was extended, then the closing date under the PSA would be automatically extended to the new closing date for the Mack-Cali Transaction. (Pa123, §18.16). However, Birch was required to obtain Plaintiff's consent before adjourning the Mack-Cali Transaction closing date. (*Id.*). With Plaintiff's consent, Birch entered into several amendments to adjourn the Mack-Cali Transaction closing date, with the

final amendment adjourning the closing to June 30, 2022. (Pa7-10, at ¶¶22-25, 32-36).

On June 29, 2022, through counsel, Birch advised Plaintiff that it was not able to obtain leasehold financing to close the transaction as contemplated. (Pa10, at ¶36). Considering the inability to close, Birch further advised that additional extensions of the closing date would not be meaningful. (*Id.*). The transaction did not close on June 30, 2022. (Pa10, ¶38).

On July 14, 2022, Plaintiff alleged that Birch had adjourned the Mack-Cali Transaction closing date, this time without Plaintiff's consent. (Pa10, ¶39). Plaintiff declared Birch in default for failing to seek Plaintiff's consent to the adjournment and demanded the refund of the Deposit. (*Id.*). On July 15, 2022, through counsel, Birch advised Plaintiff that the request by Plaintiff for the return of the Deposit constituted an election under Section 13.1 of Plaintiff's remedy to terminate the PSA. (Pa331). On or about July 15, 2022, Old Republic released the Deposit to Plaintiff, without objection from Birch. (Pa11, ¶¶40-41).

On or about October 7, 2022, several months after Plaintiff terminated the transaction and recovered its Deposit, Birch allegedly closed on the Mack-Cali Transaction. (Pa12, ¶49). Plaintiff filed this action demanding that the motion court compel Birch to convey title to the Land to Plaintiff, award Plaintiff

damages in excess of $30 million and award Plaintiff attorneys' fees and costs. (Pa13-17).

LEGAL ARGUMENT

I. THE STANDARD ON A MOTION TO DISMISS

Appellate review of a motion court's ruling on a motion to dismiss is *de novo*. *Seidenberg v. Summit Bank*, 348 N.J. Super. 243, 250 (App. Div. 2002). Rule 4:6-2(e) permits a court to dismiss claims for "failure to state a claim upon which relief can be granted . . . ." In deciding a motion to dismiss, the Court must "review[] the complaint to determine whether the allegations suggest a cause of action." *In re Reglan Litig.,* 226 N.J. 315, 324 n.5 (2016) (citing *Printing Mart-Morristown v. Sharp Elecs. Corp.,* 116 N.J. 739, 746 (1989)). The Court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Printing Mart,* 116 N.J. at 746. That includes considering documents referenced in the complaint that form the basis of the claims, as well as documents in the public record. *See Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005). "It is the existence of the fundamental of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." *Id.* In reviewing a motion to dismiss, "a court may consider documents specifically referenced in the complaint without converting the motion into one for summary judgment." *Myska v. New Jersey*

Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (internal citations omitted).

The Court "must 'assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor.'" *Id.* (quoting *Velantzas v. Colgate–Palmolive Co.*, 109 N.J. 189, 192 (1988)). Unsupported conclusions, legal assertions and unwarranted inferences, however, are not entitled to an assumption of truth. *See Glass v. Suburban Restoration Co.,* 317 N.J. Super. 574, 582 (App. Div. 1998) ("[P]leadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit."). "When a plaintiff fails to allege facts sufficient to support a claim for relief, the complaint should be dismissed." *B.R. v. Vaughan,* 427 N.J. Super. 487,490 (L. Div. 2012). Here, the motion court properly applied the standard on a motion to dismiss to find that Plaintiff's claims fail as a matter of law.

II. THE MOTION COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR SPECIFIC PERFORMANCE AND BREACH OF CONTRACT

A. Plaintiff Cannot Compel Specific Performance After Electing to Irrevocably Abandon the Transaction

As common in complex real estate purchase and sale agreements, the PSA contained a stipulated clause limiting the parties' remedies in the event of a default. *See Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 252 (1994).

"Sophisticated parties acting under the advice of counsel often negotiate stipulated damages clauses to avoid the cost and uncertainty of litigation." *Id.* Section 13.1 of the PSA provided Plaintiff, a counseled and sophisticated party, with the right to abandon the deal if Birch defaulted in its obligations under the PSA. In Section 13.1, Plaintiff agreed that, should Birch default prior to closing title under the Mack-Cali Transaction, Plaintiff's sole remedy was termination of the agreement with the refund of its Deposit. Upon Plaintiff's valid election to terminate the transaction, the PSA was deemed irrevocably terminated and all obligations to close the transaction permanently ceased.

Plaintiff's contrary interpretation of Section 13.1 violates the canons of contract construction. Indeed, such an interpretation directly contradicts the express terms of the clause. If applied, Plaintiff's construction would render swaths of the PSA meaningless. "A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it will, if possible, be given effect a court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other."

Washington Const. Co. v. Spinella, 8 N.J. 212, 217–18 (1951) (internal citation omitted).

In its totality, Section 13.1 of the PSA provided as follows:

> Section 13.1 **Default by Seller**. In the event the Closing and the transactions contemplated hereby do not occur as herein provided by reason of any default of Seller, Purchaser may, as Purchaser's sole and exclusive remedy, elect by notice to Seller within ten (10) Business Days following the Scheduled Closing Date, terminate this Agreement, in which event Purchaser will receive from the Escrow Agent the Earnest Money Deposit, whereupon Seller and Purchaser will have no further rights or obligations under this Agreement, except with respect to the Termination Surviving Obligations. Notwithstanding the foregoing, in the event Seller closes title under, the Mack-Cali Agreement, and thereupon Seller defaults in its obligation to close title under this Agreement, Purchaser shall, in addition to its termination right, shall have the right of specific performance. Purchaser expressly waives its rights to seek damages in the event of Seller's default hereunder. Notwithstanding the foregoing, nothing contained in this Section 13.1 will limit Purchaser's remedies at law, in equity or as herein provided in pursuing remedies for any breach by Seller of any of the Termination Surviving Obligations.

(Pa115).

Section 13.1 consists of three sentences, each addressing separate scenarios based on the circumstances of Birch's default. The first sentence described the "sole and exclusive" remedy available to Plaintiff if Birch defaulted prior to the closing of the Mack-Cali Transaction. In that

circumstance, Plaintiff's exclusive remedy was to terminate the contract and receive the return of its Deposit. The exercise of this stipulated termination right eliminated all further obligations owed to either party, with the exception of defined "Termination Surviving Obligations," none of which are relevant to this action.

The second sentence of Section 13.1 granted Plaintiff a second, mutually-exclusive remedy of specific performance if Birch defaulted after the closing of the Mack-Cali Transaction, and only in the event the PSA still remained effective at that time. The second sentence did not modify the termination right provided in the first sentence. Rather, it added another remedy that Plaintiff could choose to elect as an alternative to termination. However, if Plaintiff determined to exercise the termination right, and take back the Deposit, then Plaintiff lost its right to compel specific performance.

Plaintiff declared Birch in default on July 14, 2022, **prior to** the closing of the Mack-Cali Transaction. In paragraph 39 of the complaint, Plaintiff alleged that it took the following actions in response to the alleged default:

> On or about July 14, 2022, Plaintiff learned that Defendant Birch had further amended the Closing Date in the Mack-Cali Agreement, without Plaintiff's consent and without extending the Closing Date in the Agreement — in breach of the terms of the Agreement. Plaintiff's counsel wrote to Defendant Birch's counsel, notifying them that they were in breach of the Agreement. Plaintiff's counsel also advised that, as a

> result, Plaintiff would direct the Title Company to return to Plaintiff the $5 Million Earnest Money Deposit, plus interest — while reserving and without waiving their rights, remedies, and claims.

(Pa10). The following day, Old Republic released the Deposit to Plaintiff. (Pa10, at ¶ 41).

By noticing a default prior to the closing of the Mack-Cali transaction, Plaintiff exercised its "sole and exclusive remedy" to terminate the PSA under the first sentence of Section 13.1 and receive a refund of the Deposit. Plaintiff's election constituted an irrevocable election to terminate the PSA. *See Krisher v. Murphy*, 11 N.J. Super. 231, 235 (App. Div. 1951) (when buyer agreed to the return of the purchase deposit, such "action constituted an election to rescind the agreement of sale, and the election was irrevocable").

B. The Motion Court's Contractual Interpretation was Sound, and Should Be Affirmed

In its brief, Plaintiff asserts that the motion court's interpretation of Section 13.1 ignores the words "notwithstanding" and "in addition to" as provided in the second sentence of the clause. However, Plaintiff's argument — truly a case of pot calling teakettle black in that Birch's, and the motion court's, interpretation of the contract gives full effect to the words "in addition to" and "notwithstanding the foregoing" while Plaintiff's interpretation would read the word "thereupon" entirely out of the contract — still fails. The motion court

reached a well-reasoned ruling — indeed, the only possible one — based on the express terms of the PSA. (*See* 2T, at 15) ("I'm granting the motion to dismiss based upon a plain meaning of contract language [Section] 13.1. I will not rewrite the contract."). As the motion court found, Plaintiff irrevocably abandoned the deal when it opted to terminate the PSA in July 2022 and declare Birch in default, before Birch could close title under the Mack-Cali Transaction.

After careful examination, the motion court correctly interpreted Section 13.1 to bar Plaintiff's specific performance remedy where the PSA was not previously terminated by Plaintiff. Section 13.1 provided, in part: "Notwithstanding the foregoing, in the event Seller closes title under, the Mack-Cali Agreement, and thereupon Seller defaults in its obligation to close title under this Agreement, Purchaser shall, in addition to its termination right, shall have the right of specific performance." The motion court correctly focused on the plain meaning of the word "thereupon" in holding that the specific performance remedy provided in this clause would only become available if Birch defaulted on the PSA after closing title under the Mack-Cali Transaction, not months earlier.

The motion court appropriately relied on the dictionary definition of the term "thereupon" to determine that "the chronology of what happen[ed] takes the sentence that the plaintiff was relying upon out of the equation . . . ." (2T, at

14, 16). *See M.J. Paquet, Inc. v. N.J. Dep't of Transp.*, 171 N.J. 378, 396 (2002) (using Webster's Dictionary to determine the "plain and ordinary meaning" of the terms of an agreement). Plaintiff opted to declare Birch in default in July 2022, before Birch closed title under the Mack-Cali Agreement in October 2022. Accordingly, under the plain language of Section 13.1, the specific performance remedy never sprang into existence after Plaintiff terminated the PSA and recovered its deposit in July 2022. (*See* 2T, at 15) ("The remedies that the plaintiff had were limited by [Section] 13.1 to a return of the deposit money as of July [2022] which they got."). Indeed, as the first part of Section 13.1 provided, prior to the closing of the Mack-Cali Transaction, Plaintiff's sole and exclusive remedy was the termination of the PSA and the return of Plaintiff's deposit.

The motion court's correct interpretation of Section 13.1 is consistent with the rest of the PSA. In several clauses, the parties made it clear that the Deposit was non-refundable unless the PSA was validly terminated. Section 4.2 provided that the Deposit was non-refundable except in the circumstance where Plaintiff terminated the PSA. (Pa97). Further, Section 17.1(a) of the PSA provided that the Escrow Agent must hold the Deposit "until the earlier of (i) the Closing, or (ii) the termination of this Agreement in accordance with any right hereunder." (Pa118). Accordingly, Plaintiff's cramped reading of the PSA to allow it to

recover the Deposit without effecting the termination of the contract is contrary to the express terms of the PSA.

As provided in Section 13.1, upon Plaintiff's exercise of its termination right, both Plaintiff and Birch "have no further rights or obligations under [the 101] Agreement." (Pa115). As a result, Plaintiff was no longer obligated to purchase the Land for $165 million. Likewise, Birch was no longer obligated to close title under the PSA. Nor was Birch obligated to keep Plaintiff apprised of changes with the Mack-Cali Transaction.

Birch's pre-termination obligation to keep Plaintiff informed of the Mack-Cali Transaction was addressed in Section 18.16 of the PSA. Section 18.16 required Birch to promptly provide Plaintiff with all material notices concerning the Mack-Cali Transaction. Notably, Section 18.16 did not expressly survive termination of the PSA. Indeed, there was no longer a need to keep Plaintiff apprised of the Mack-Cali Transaction once Plaintiff exercised its right to irrevocably abandon the transaction.

Critically, upon Plaintiff's irrevocable election to terminate the PSA, Birch was free to proceed with any form of transaction, with or without Plaintiff's further involvement. Such a result is consistent with applicable New Jersey law. *See, e.g., 715 Partners, LLC v. GS Assignment, LLC*, A-2527-15T3,

2018 WL 2372800, at *8 (N.J. Super. Ct. App. Div. May 25, 2018)[2] ("Once plaintiff caused the termination of the Agreement, . . . Seller was free to sell the Property to anyone"). Under Plaintiff's warped interpretation of the PSA, Birch would have been obligated to Plaintiff in perpetuity, while, at the same time, Plaintiff had no obligation to continue to have its Deposit held in escrow; indeed, while Plaintiff claims to want a judgment of specific performance, that would be impossible after it took back its $5 million deposit because the PSA required Plaintiff to post a $5 million deposit until closing.

Plaintiff's interpretation of the contract is not only commercially unreasonable, but indeed lacks any common sense. For example, in Plaintiff's view, if Birch resurrected the Mack-Cali Transaction in ten years with an inflation-adjusted purchase price, Birch would still be required to convey the Land to Plaintiff at the old purchase price stated in the PSA, without Plaintiff having to post any deposit.

Plaintiff attempts to contort the plain meaning of the remedies clause to avoid the consequences of the business decision it made to abandon the transaction, rather than wait to see if the Mack-Cali Transaction would close. Yet, it tries to find some way to both have its cake even after having consumed

[2] A copy of this unpublished opinion is included in Cross-Appellant Old Republic's appendix at Oda14.

it, by opting to terminate the PSA early and get its deposit back, while still claiming that it maintained the right to sue for both specific performance – without a deposit in place that the contract it claims it wants to enforce requires – and damages, despite expressly waiving all claims to damages in the PSA. And it has the temerity to nevertheless argue that Birch's construction of Section 13.1 somehow enabled Birch to cut Plaintiff out of the deal with total impunity, which Plaintiff asserts would make the PSA illusory. That is not the case. Plaintiff had the option to seek specific performance to enforce its deal with Birch, but only if Plaintiff kept the Deposit in escrow and waited. By receiving the return of the Deposit, Plaintiff irrevocably abandoned the transaction under the express terms of the PSA. The motion court properly held Plaintiff to that business decision and its consequences, to which Plaintiff expressly agreed when it signed the PSA.

Moreover, the motion court's enforcement of the express terms of the parties' stipulated remedies clause is consistent with settled New Jersey law. "Sophisticated parties acting under the advice of counsel often negotiate stipulated damages clauses to avoid the cost and uncertainty of litigation. Such parties can be better situated than courts to provide a fair and efficient remedy." *Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 253 (1994). Under settled New Jersey law, by demanding the recovery of its deposit, Plaintiff made

an irrevocable election to terminate the contract. *See, e.g., Faysen Lake, Inc. v. Miller*, 130 N.J.L. 289, 290–91 (1943) (by electing to rescind the sale contract, that party lost its right to sue for specific performance of the contract); *Krisher v. Murphy*, 11 N.J. Super. 231, 235 (App. Div. 1951) (return of deposit "constituted an election to rescind the agreement of sale"); *Levy v. Massachusetts Acc. Co.*, 124 N.J. Eq. 420, 431 (Ch. 1938) ("Where the wronged party has elected to terminate the contract, he cannot subsequently maintain a suit for the specific performance thereof"); *Blum Bldg. Co. v. Ingersoll*, 99 N.J. Eq. 563, 568 (Ch. 1926), *aff'd*, 101 N.J. Eq. 291 (1927) ("Having committed itself to a recovery of the deposit, its right to have the property is forever gone. The election is irrevocable.").

In its brief, Plaintiff argues that no party would agree to restrict its remedies to receiving the return of its deposit, even though it expressly did so based on the language of this PSA, as the motion court correctly found. First, Plaintiff also had the remedy of specific performance available, but only if it waited to exercise the remedy until the Mack-Cali Transaction closed and only if it chose to keep its Deposit with the escrow agent. Second, this type of stipulated remedies clause is not uncommon in real estate transactions. Indeed, similar clauses have been enforced by New Jersey courts. *See, e.g., Melcer v. Zuck*, 101 N.J. Super. 577, 583–84 (App. Div. 1968) (enforcing clause limiting

buyer's remedy to the return of the deposit and the payment of title search fees); *Sugarman v. Gabriel Bldg. Grp., Inc.*, No. A-4438-12T1, 2014 WL 3798785, at *8 (N.J. Super. Ct. App. Div. Aug. 4, 2014)[3] (enforcing clause limiting buyer's damages to the return of the deposit, plus some incidental expenses). "We see nothing inherently unreasonable about the buyer's remedies provision on its face. It gives the buyer the choice of allowing the seller extra time to complete the transaction, seeking to compel compliance with the requirements of the contract, or terminating the contract and receiving the return of the deposit. We do not find those choices inherently punitive, particularly given the right to seek specific performance." *Id.*

C. The Equitable Doctrine of Election of Remedies Supports the Motion Court's Ruling

Plaintiff's references to the equitable doctrine of election of remedies is inapplicable here.[4] In dismissing the complaint, the motion court did not need to rely on this equitable defense because the PSA contained a valid and enforceable contractual remedies clause, which supersedes the equitable defense. However,

[3] A copy of this unpublished opinion is included in Cross-Appellant Old Republic's appendix at Oda144.

[4] Plaintiff's references to other potential equitable defenses, such as impracticability and frustration of purpose, are also inapplicable to the appeal. Plaintiff's complaint was dismissed as a matter of law based on the express terms of the PSA.

even if the election of remedies doctrine was applicable, the doctrine supports the motion court's ruling. Applying the equitable doctrine, Plaintiff is barred from pursuing the specific performance remedy. Plaintiff made a conscious choice to accept the return of the Deposit, which constituted an intentional abandonment of the transaction, making the PSA null and void. Plaintiff's decision to terminate the PSA is inconsistent with the remedy of specific performance. "A party will not be permitted to carry water on both shoulders . . . a contract cannot be entirely valid at the same time in which it is entirely void Ab initio." *Ray v. Beneficial Fin. Co. of N. Jersey*, 92 N.J. Super. 519, 535 (Ch. Div. 1966); *see also Krisher v. Murphy*, 11 N.J. Super. 231, 235 (App. Div. 1951) (finding that plaintiff was barred from enforcing a sale agreement by specific performance where plaintiff made an election to demand the return of the deposit, which constituted an irrevocable election to rescind the contract). For similar reasons, Plaintiff's argument that it expressly "reserved" its abandoned right to specific performance, while simultaneously accepting the return of the Deposit, is not only barred by the express terms of the PSA, but also by the equitable doctrine of election of remedies. Plaintiff cannot "reserve" rights that it forfeited by seeking and receiving the return of its Deposit.

D. Plaintiff Fails to Address Its Express Waiver of Claims for Damages

In addition to limiting Plaintiff's remedies to the return of the Deposit, Section 13.1 also bars all claims for the recovery of damages. Specifically, the clause provided that "[Plaintiff] expressly waives its rights to seek damages in the event of [Birch's] default hereunder." It is well settled that parties to a contract may agree in that contract to limit their liability and that our courts must enforce such limitations. *See Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 252 (1994). In its appeal, Plaintiff completely ignores the unequivocal waiver. Yet, the complaint sought an award of damages in excess of $30 million. (Pa14, ¶ 65). The contract explicitly limited Plaintiff's monetary remedy to the return of the Deposit. Plaintiff's claim for damages was properly dismissed. *See Guaclides v. Kruse*, 67 N.J. Super. 348, 364 (App. Div. 1961), *certif. den.* 36 N.J. 32 (1961) ("plaintiff is limited in her recovery of damages to those fixed by the parties in their agreement").

III. THE MOTION COURT PROPERLY DISMISSED PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Once Plaintiff Elected to Abandon the Transaction, It Released Birch From Any Implied Duties

Plaintiff's appeal fails to set forth a meritorious basis to sustain its claim for breach of the implied covenant of good faith and fair dealing. In an improper

attempt to circumvent the stipulated remedies clause, Plaintiff erroneously suggests that Birch can be liable for breaching the implied covenant based on the same conduct that would form a breach of the express terms of the PSA. "Every contract contains an implied covenant of good faith and fair dealing. Under such a covenant, neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Wade v. Kessler Inst.*, 172 N.J. 327, 340–41 (2002) (internal citations omitted). "[A] party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." *Id.* (internal citations omitted). However, "these implied terms do not override express, inconsistent terms." *Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J.Super. 278, 287 (App. Div. 2007). "The law continues to prohibit the enforcement of an implied contract or an implied provision that conflicts or is inconsistent with the parties' express contract . . . ." *Id.*

As a matter of law, the PSA was validly terminated upon the return of the Deposit to Plaintiff on July 15, 2022. Under the express terms of the PSA, upon termination, Birch "will have no further rights or obligations under this Agreement." (PSA, Section 13.1). By imposing a post-termination implied duty upon Birch, Plaintiff seeks to circumvent Section 13.1's release of Birch from all further obligations.

"In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing." *Noye v. Hoffmann-La Roche Inc.*, 238 N.J. Super. 430, 434 (App. Div. 1990), *certif. denied*, 122 N.J. 146 (1990). The allegedly wrongful conduct that forms Plaintiff's implied covenant claim is not actionable because the conduct occurred after the PSA became null and void by Plaintiff's termination. Plaintiff asserts the bad faith conduct was Birch's alleged collusion with Old Republic to conceal the closing of the Mack-Cali Transaction. The Complaint alleges that the concealment effort started in September 2022, when Old Republic allegedly made a false representation to Plaintiff that it would keep Plaintiff apprised of the status of the Mack-Cali Transaction. Accordingly, by the time the allegedly bad faith conduct occurred, the PSA had already been terminated by Plaintiff. Birch's obligations to act in good faith ceased when Plaintiff terminated the PSA. *See also 715 Partners, LLC v. GS Assignment, LLC*, A-2527-15T3, 2018 WL 2372800, at *8 (N.J. Super. Ct. App. Div. May 25, 2018) (finding that plaintiff failed to show a breach of the implied duty of good faith and fair dealing when the underlying agreement was deemed terminated); *Sackman Enterprises, Inc. v. 309 Asbury Corp.*, A-2723-04T2, 2006 WL 1507668, at *6 (N.J. Super. Ct. App. Div. June

2, 2006) [5] ("Seller's obligations to Buyer ceased when Buyer exercised its right to terminate the Contract of Sale under the due diligence clause. Accordingly, Seller had no obligations to perform under the Contract of Sale, and no covenant of good faith and fair dealing applied."). Accordingly, Plaintiff cannot hold Birch liable for an implied covenant for conduct that occurred after the parties' contract was terminated.

B. Birch's Allegedly Deceptive Conduct is Not Actionable under New Jersey Law

Even if Birch's duties to Plaintiff did not end with the termination of the PSA, the allegations set forth in the Complaint do not rise to an actionable claim. In asserting a breach of the implied covenant claim, "an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent improper motive." *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001) (internal citations omitted). "Bad motive or intention is essential, for . . . contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper." *Id.* (internal citations omitted). In the Complaint, Plaintiff fails to allege any bad motive or intention. Birch's alleged refusal to keep Plaintiff apprised of the Mack-Cali Transaction after Plaintiff abandoned its deal with Birch cannot rise

[5] A copy of this unpublished opinion is included in Cross-Appellant Old Republic's appendix at Oda122.

to the level of bad motive required by *Wilson*. Absent any allegations of bad motive, Plaintiff cannot sustain a claim for breach of the implied covenant of good faith and fair dealing.

IV. THE MOTION COURT CORRECTLY DISMISSED PLAINTIFF'S CLAIMS WITH PREJUDICE

The motion court properly granted Birch's motion to dismiss, with prejudice, reasoning that Plaintiff would not be able to add any allegations that would state a viable claim against Birch based on the express terms of the PSA. (2T, at 16). Based on the undisputed facts and the unambiguous terms of the PSA, Plaintiff's claims against Birch fail as matter of law. Plaintiff cannot rely on discovery to uncover evidence of wrongdoing. *See Nostrame v. Santiago*, 213 N.J. 109, 128 (2013).

In its appeal, Plaintiff does not present any possible facts that would alter the chronology or the express terms of the contract. Accordingly, Plaintiff has effectively conceded that it has no further facts to plead that would form a viable claim against Birch. Under these circumstances, dismissal, with prejudice, was appropriate. *See Id.* (affirming Appellate Division's reversal of order denying motion to dismiss without prejudice where plaintiff conceded he had no further facts to plead without discovery).

Given the remedy limitations to which Plaintiff stipulated in the PSA, no form of discovery could allow Plaintiff to circumvent those express terms.

"Dismissal is the appropriate remedy where the pleading does not establish a colorable claim and discovery would not develop one." *State ex rel. Com'r of Transp. v. Cherry Hill Mitsubishi, Inc.*, 439 N.J. Super. 462, 467 (App. Div. 2015) (reversing order denying motion to dismiss); *see also Camden Cnty. Energy Recovery Associates, L.P. v. N.J. Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd*, 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory").

V. THE MOTION COURT PROPERLY GRANTED BIRCH AN AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to the terms of the PSA, in the event either party commences an action for breach of the agreement, the prevailing party is entitled to recover its reasonable attorneys' fees and costs. Since the motion court properly granted Birch's motion to dismiss the complaint, Birch is the prevailing party in the action. In the PSA, Plaintiff and Birch stipulated to the following fee-shifting provision in the event that either party brought an action for breach of the PSA:

> Section 18.2 **Recovery of Certain Fees**. In the event a party hereto files any action or suit against another party hereto by reason of any breach of any of the covenants, agreements or provisions contained in this Agreement, then in that event the prevailing party will be entitled to have and recover certain fees from the other party including all reasonable attorneys' fees and costs resulting therefrom. For the purpose of this Agreement, the term "attorneys' fees" or attorneys'

> fees and costs" shall mean the fees and expenses of counsel to the parties hereto, which may include printing, photocopying, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals and other persons not admitted to the bar but performing services under the supervision of an attorney, and the costs and fees incurred in connection with the enforcement or collection of any judgment obtained in any such proceeding. The provisions of this Section 18.2 shall survive the entry of any judgment, and shall not merge, or be deemed to have merged into any judgment.

(Pa119).

Under New Jersey law, attorneys' fees are recoverable "if they are expressly provided for by statute, court rule or contract." *Packard-Bamberger & Co., Inc. v. Collier,* 167 N.J. 427, 440 (2001). The decision to award attorneys' fees rests within the sound discretion of the motion court. *Maudsley v. State,* 357 N.J. Super. 560, 590 (App. Div. 2003). New Jersey motion courts routinely award such fees if the parties' contract expressly provides for such an award. *Litton Industries, Inc. v. IMO Industries, Inc.,* 200 N.J. 372 (2009) (affirming the award of attorneys' fees provided for by a purchase and sale agreement); *Kellam Assoc., Inc. v. Angel Projects, LLC,* 357 N.J. Super. 132 (App. Div. 2003) (finding prevailing party should have been awarded attorneys' fees and costs where the action was covered by a lease term providing for attorneys' fees and costs). "When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed." *Litton,* 200 N.J. at 385

(2009). In interpreting a contract, the court should implement the intentions of the parties. *Quinn v. Quinn,* 225 N.J. 34, 35 (2016). "[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." *Id.* at 45.

Here, the plain language of the PSA entitled Birch, as the prevailing party in this action for breach of the PSA, to recover the reasonable attorneys' fees and costs it incurred in defending against the complaint. In *Litton,* 200 N.J. 372, the buyers of business assets, who prevailed against sellers in a breach of contract and fraud action, applied to the motion court for attorneys' fees pursuant to the express terms of the underlying agreement between the parties, which provided that in the event of a breach by the sellers, the buyers would be entitled to recover any and all "losses", including attorneys' fees. *Id.* The motion court awarded, among other things, recovery of buyers' attorneys' fees pursuant to the agreement between the parties, and the sellers appealed. *Id.* The Appellate Division affirmed buyers' entitlement to its attorneys' fees, and, following sellers' petition for certification, the Supreme Court affirmed that attorneys' fees were recoverable losses under the parties' agreement. *Id.* The Supreme Court found that the plain language of the inclusion of attorneys' fees in the definition of "losses" provided "the intent in the Agreement that attorneys'

fees and costs would be recoverable as part of [sellers'] losses." *Id.* at 387. Similarly, here, the plain language of the PSA provided for Birch to recover its reasonable attorneys' fees and costs, and such agreement was appropriately enforced by the motion court.

Once the motion court dismissed the complaint, with prejudice, Birch was appropriately deemed to be the prevailing party. Accordingly, reasonable attorneys' fees and costs were properly awarded to Birch in accordance with the express terms of the PSA. Furthermore, by entering into the consent judgment, Plaintiff conceded that the amount of fees awarded to Birch were reasonable. (Pa704-705).

CONCLUSION

For the foregoing reasons, Defendant-Respondent Birch Real Estate Services, LLC respectfully requests that this Court affirm the motion court's order dismissing, with prejudice, Plaintiff-Appellant 101 Hudson Properties, LLC's complaint and affirm the motion court's order awarding Respondent-Defendant Birch Real Estate Services, LLC reasonable attorneys' fees and costs.

Dated: East Brunswick, New Jersey
July 15, 2024

MEISTER SEELIG & FEIN PLLC

By: */s/Jeffrey Schreiber*
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Attorneys for Defendant-Respondent
Birch Real Estate Services, LLC

Superior Court of the State of New Jersey
Appellate Division

Docket No. A-000506-23

101 HUDSON PROPERTIES, LLC,

Plaintiff-Appellant-Cross-Respondent,

– v –

BIRCH REAL ESTATE SERVICES, LLC,

Defendant-Respondent,

– and –

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,

Defendant-Respondent-Cross-Appellant.

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY

DOCKET NO.: HUD-004227-22

JUDGE BELOW: HON. ANTHONY V. D'ELIA, J.S.C.

COMBINED BRIEF IN REPLY ON APPEAL AND IN OPPOSITION TO CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

PRELIMINARY STATEMENT

Plaintiff-Appellant 101 Hudson Properties, LLC submits this combined brief: (1) in reply and further support of its appeal from a final judgment entered on November 29, 2023, in Superior Court, Hudson County (Hon. Anthony V. D'Elia, J.S.C.), which brings up for review a series of non-final interlocutory orders by which the trial court vacated its own prior ruling on one motion and then granted the two defendants' pre-answer motions to dismiss the Complaint, *with prejudice*, and awarded attorneys' fees to Defendant Birch Real Estate Services, LLC ("Birch"); and (2) in opposition to the cross-appeal by Defendant Old Republic National Title Insurance Co. ("Old Republic"), from an order denying Old Republic's motion for an award of attorneys' fees.

As discussed in Plaintiff's opening brief, the trial court erred in concluding that Plaintiff waived its right to seek specific performance of the Purchase and Sale Agreement ("PSA") when it accepted return of its Earnest Money Deposit in mid-July 2022, which happened only after Birch misinformed and deceived Plaintiff, claiming it was not able to close the transaction as required by the PSA. To make matters worse, Birch then instructed Old Republic not to inform Plaintiff of Birch's plan to secretly close the transaction with the Fee Owner on better financial terms – thereby frustrating Plaintiff's ability to file a *lis pendens* and/or to appear for the closing and ensure that the real property was conveyed to Plaintiff as

required by the PSA. The transaction was supposed to close in October 2021, but Birch delayed the closing for ten months, while Plaintiff's Deposit was held in escrow with Old Republic and while Plaintiff was paying hundreds of thousands of dollars each month to keep its financing in place. (Pa5, Complaint, ¶16; Pa7-9, Complaint, ¶¶ 22-34)[1].

The trial court's conclusion that Plaintiff had a choice to "*either*" seek return of the Deposit after being advised by Birch in July 2022 that it would not close this transaction, "*or*" seek specific performance when Birch later closed the transaction with the Fee Owner in early October 2022 was unreasonable, unfair, and contrary to the plain language of Section 13.1 of the PSA (Pa115). That provision expressly allowed Plaintiff to pursue *both* remedies, in the event that Birch defaulted on its obligations to Plaintiff under the PSA and proceeded to close on the real estate transaction with the Fee Owner, without Plaintiff – which is exactly what happened here. (Pa115).

In their briefs opposing Plaintiff's appeal, Defendants Birch and Old Republic seek to uphold the trial court's reasoning, by reference to cases (unlike this one) where the contractual terms allowed for an "either-or" election of remedies. Yet, by its terms, Section 13.1 of the PSA expressly permitted Plaintiff

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[1] Unless separately defined here, all references to the Appellant's Appendix on Appeal ("Pa"), the Transcripts ("T"), and to other capitalized terms herein shall be to those terms defined in Plaintiff-Appellant's Brief, filed with this Court on April 15, 2024 ("opening brief").

to terminate and demand return of the Deposit and seek specific performance as an additional and non-exclusive remedy where, as here, Birch proceeded to close on the underlying real estate transaction with the Fee Owner and without Plaintiff. (Pa115-116, PSA § 13.1). Indeed, the "**notwithstanding**" and "**in addition to**" language in PSA § 13.1 was expressly written to protect Plaintiff from exactly what transpired here. (Pa115 (emphasis added)).

Accordingly, the trial court's pre-answer dismissal of the Complaint*, with prejudice,* as against both Defendants was erroneous. The Complaint should be reinstated in its entirety. Upon such reversal, the Court should also vacate the Order awarding Birch its attorneys' fees and costs, as prevailing party. (3T; 5T; Pa704-705).

Contrary to the arguments raised by Old Republic on its cross-appeal from the order denying its motion for attorneys' fees, the trial court correctly determined that Old Republic should not be awarded its attorneys' fees incurred in this action. The recent decision of the New Jersey Supreme Court in *Boyle v. Huff,* 257 N.J. 468 (2024), establishes beyond doubt the correctness of the trial court's decision denying an award of attorneys' fees to Old Republic. Accordingly, the cross-appeal by Old Republic must be rejected and that order affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Court is respectfully referred to Plaintiff-Appellant's opening brief for a detailed recitation of the facts, the claims alleged in the Complaint, and the procedural history, leading up to the instant appeal by Plaintiff-Appellant and the cross-appeal by Defendant Old Republic.

LEGAL ARGUMENTS IN REPLY AND FURTHER SUPPORT OF PLAINTIFF-APPELLANT'S APPEAL

POINT I

DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT WITH PREJUDICE SHOULD HAVE BEEN DENIED

(Pa357; Pa651-652; 2T; 3T; 4T)

The familiar, liberal standards governing a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to N.J. Ct. Rule 4:6-2(e), were outlined in Plaintiff's opening brief, at Point I, and are not generally disputed by Birch or Old Republic in their respective opposition briefs. Under these well-settled standards, a Rule 4:6-2(e) motion to dismiss must be considered "with caution," and granted in "only the rarest [of] instances." *See Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 165 (2005), citing *Lieberman v. Port Auth. of N.Y. & N.J.*, 132 N.J. 76, 79 (1993); *see also Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 772 (1989).

The trial court should have sustained the Complaint because Plaintiff more-than satisfied New Jersey's liberal pleading standards as to each of the claims against Birch and Old Republic. Even assuming that there were perceived deficiencies in the Complaint, any order granting Defendants' motions to dismiss should have been *without prejudice* to Plaintiff's right to file an amended complaint. *See Printing Mart,* 116 N.J. at 771-72.

POINT II

THE PSA EXPRESSLY ALLOWED PLAINTIFF TO DEMAND SPECIFIC PERFORMANCE IF BIRCH PROCEEDED TO CLOSE WITH THE FEE OWNER – AND THIS RIGHT EXISTED "*IN ADDITION TO ITS TERMINATION RIGHT*"

(Pa357; Pa651-652; 2T, 3T, 4T)

A. Section 13.1 of the PSA Expressly Granted Plaintiff the Right to Demand Specific Performance, "*in Addition to* its Termination Right"

Defendants argue – and the trial court held – that, by demanding a return of the Deposit in mid-July 2022, after Birch unambiguously announced that it would not abide by its contractual obligations, Plaintiff elected an exclusive remedy and terminated the PSA, such that it had no right to insist upon specific performance when, a few weeks later, Birch proceeded to close on the real estate with the seller and failed to convey title to Plaintiff. According to Defendants, Birch and Old Republic owed no duties to Plaintiff after the Deposit was returned.

Yet, as discussed in Plaintiff's opening brief (Points II and III), Section 13.1 of the PSA gave Plaintiff the *additional and non-exclusive* right to demand specific

performance in the event that Birch proceeded to close title under the Mack-Cali Agreement without Plaintiff. Moreover, this right of Plaintiff to insist upon specific performance was expressly devised to be "**in addition to its termination right,**" which by its terms included return of the Earnest Money Deposit. (Pa5-6, Complaint ¶ 21; Pa115-116, PSA § 13.1 ("Default by Seller") (emphasis added)).

Specifically, Section 13.1 of the PSA provided:

> Default by Seller. In the event that the Closing and the transactions contemplated hereby do not occur as herein provided by reason of any default of Seller, Purchaser may, as Purchaser's sole and exclusive remedy, elect by notice to Seller within ten (10) Business Days following the Scheduled Closing Date, terminate this Agreement, in which event Purchaser will receive from the Escrow Agent the Earnest Money Deposit, whereupon Seller and Purchaser will have no further rights or obligations under this Agreement, except with respect to the Termination Surviving Obligations. **Notwithstanding the foregoing, in the event Seller [Birch] closes title under, the Mack-Cali Agreement, and thereupon Seller [Birch] defaults in its obligation to close title under this Agreement, Purchaser [Plaintiff] shall, *in addition to its termination right*, shall have the right of specific performance.** Purchaser expressly waives its rights to seek damages in the event of Seller's default hereunder. Notwithstanding the foregoing, nothing contained in this Section 13.1 will limit Purchaser's remedies at law, in equity or as herein provided in pursuing remedies for any breach by Seller of any of the Termination Surviving Obligations.

(Pa115-116, PSA § 13.1 (emphasis added)).

Hence, Plaintiff had a contractual right to (and actively did) insist upon participating in the rescheduled closing with the Fee Owner, to ensure specific performance under the PSA, such that it would acquire title to the Real Property

directly from the Fee Owner, *regardless of* and *in addition to* the termination and return of the Earnest Money Deposit. (*See id.*).

As outlined in Plaintiff's opening brief (at pages 15-17), the parties' correspondence during this period reflects that Plaintiff never waived or relinquished its right to insist upon specific performance of the PSA. To the contrary, in successive emails, Plaintiff repeatedly advised Birch's counsel that Plaintiff reserved all of its rights under the PSA. (Pa320-333). Even when Birch stated in an email of July 15, 2022, that Birch "deemed" Plaintiff's demand for return of the Deposit to be an election to terminate the PSA, Plaintiff immediately rejected this assertion and noted that it was accepting the return of the Deposit without waiving its rights under the PSA. (Pa330-331). This reservation of rights included, of course, Plaintiff's right under Section 13.1 to insist upon specific performance, notwithstanding the return of the Deposit, if Birch proceeded to close with the Fee Owner – which it did, just a short time later.

In their briefs on this appeal, both Defendants argue that, once a party demands the return of a security deposit, he or she generally is considered to have terminated the contract and may not thereafter compel specific performance. (*See, e.g.,* Birch Br., at 10, 14, 17-23; Old Republic Br., at 23-28). However, none of the cases cited by Defendants include the particular "notwithstanding…" and "in addition to its termination right" language that is included in Section 13.1 of the PSA.

New Jersey has a strong public policy in favor of allowing parties the freedom to contract – and contracts must be enforced according to their terms, unless doing so would violate some public policy. *See generally Rodriguez v. Raymours Furn. Co., Inc.*, 225 N.J. 343, 360-61 (2016). This language distinguishes the instant case from the run-of-the-mill real estate contract case – and it must be construed as giving Plaintiff an additional remedy of specific performance, notwithstanding the return of the security deposit, if and when Birch proceeded to close with the Fee Owner.

Defendants also insist that, after the Deposit was returned to Plaintiff, it would be impossible to obtain specific performance, since the Deposit was part of the purchase price to be paid by Plaintiff. (*See* Birch Br., at 18, 22; Old Republic Br., at 26-27). This argument presents a red herring. In exercising its contractual right to compel specific performance of the transaction contemplated by the PSA, Plaintiff would naturally be required to pay the full purchase price (including the amount that comprised the Deposit). As alleged in the Complaint, Plaintiff was prepared to proceed with the transaction, had informed Defendants of that, and had spent hundreds of thousands of dollars to get the financing in place for the purchase price. (Pa5; Complaint, ¶ 19; Pa7, Complaint, ¶ 26).

B. The "Either-Or" Hobson's Choice Construction of the Contract Advanced by Both Defendants and Embraced by the Trial Court is Contradicted by the Language of Section 13.1

As discussed, the trial court accepted the Defendants' arguments that Section 13.1 of the PSA provided Plaintiff with two mutually exclusive remedies, once Birch announced its intention not to perform its obligations under the PSA. According to Defendants, once Birch stated it could not or would not perform its duties under the contract, Plaintiff had to choose between the following two mutually exclusive options: ***either*** (1) "irrevocably abandon the deal," terminate the PSA, and recover the Deposit and forfeit any other rights under the PSA, ***or*** (2) leave the Deposit in place *indefinitely* and then seek specific performance of the PSA *if and when* Birch later proceeded to close the deal with the Fee Owner. Birch describes Section 13.1 as presenting "alternative" remedies. (*See*, *e.g.*, Birch Br., at 13-15).

Yet, this "either-or" construction of Section 13.1 contradicts the plain language of that provision. Such construction is untenable for a number of other important reasons. *First,* this interpretation renders illusory Birch's contractual obligations to cause the Fee Owner to convey the real property directly to Plaintiff at closing and to lease back the real property from Plaintiff pursuant to a long-term ground lease. (Pa111-112, PSA § 10.3). Under the trial court's interpretation, Birch had the ability to negotiate a better deal for itself and cut Plaintiff out of the real estate deal with total impunity, notwithstanding the clear

terms of the PSA and the fact that Plaintiff had invested millions of dollars to obtain and sustain financing necessary to close the deal under the PSA. (Pa5, Complaint, ¶ 19; Pa7, Complaint, ¶ 26).

Settled principles of contract construction forbid this result. "A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory. Especially must this be so when a forfeiture will follow." *See Russell v. Princeton Labs., Inc.,* 50 N.J. 30, 38 (1967). Here, the trial court's construction of Section 13.1 not only prevented Plaintiff from obtaining the benefit of its bargain and deprived Plaintiff of the opportunity to recoup millions of dollars in damages, it also creates a dangerous precedent for other similarly structured transactions in the State of New Jersey, allowing parties to breach contracts with impunity. (*See* Plaintiff's Opening Brief, at Point II(B)).

Second, the trial court's construction of Section 13.1 renders illusory Plaintiff's right to insist upon specific performance (as expressly stated in Section 13.1) because it presents Plaintiff with the Hobson's Choice of *either* (1) waiting indefinitely to see if Birch eventually closes with the Fee Owner, while leaving its Deposit in place, even after Birch plainly signaled its intention not to fulfill its obligations to Plaintiff under the PSA; *or* (2) asking for return of the Deposit and thereby forfeiting its rights to pursue specific performance or damages, if and when Birch later closes on the deal with the Fee Owner, cutting

Plaintiff out. (*See* Plaintiff's Opening Brief, at Point II(B); *see also* Birch Br., at 18 (stating that Plaintiff had to "wait and see if the Mack-Cali transaction would close," leaving the Deposit in place indefinitely, if it wanted to preserve its right to demand specific performance)).

Given that Birch had misinformed and deceived Plaintiff by claiming it was unable to close and unambiguously signaled its intention not to perform under the PSA, Plaintiff had a right to demand the immediate return of its deposit, while preserving its express right under the PSA, to also demand specific performance, if and when Birch ultimately closed on the transaction with the Fee Owner (which it did). The trial court's construction incorrectly gave Birch supremacy and unilateral control, and nullified Plaintiff's contractual right to compel Birch's specific performance of the PSA, even though Birch is the party who reneged upon its contractual obligations under the PSA by announcing its intention not to perform. (Pa7-8, Complaint, ¶¶ 27-30). Once again, this is an untenable construction of the parties' contract. *See Russell,* 50 N.J. at 38. "A contractual term that rewards a defaulting party by placing it in a better pecuniary position than it would have been had it performed its promise defeats common sense and encourages unreasonable economic waste." *Saxon Const. & Mgmt. Corp. v. Masterclean of N. Carolina, Inc.,* 273 N.J. Super. 231, 238 (App. Div. 1994).

Third, the trial court's reading of PSA Section 13.1 is also inconsistent with settled canons of construction, which prohibit a reading of a contract that renders one or more of its terms meaningless. As noted, the trial court adopted Defendants' *disjunctive* ("either-or") interpretation of highlighted language in Section 13.1. However, the words "in addition to its termination right" dictate a *conjunctive* ("and") reading of the remedies clause. Defendants urge that, once Plaintiff terminated, they owed Plaintiffs no further duties, but the phrase "in addition to its termination right" eviscerates this argument. In fact, anything but a *conjunctive* reading reduces the aforementioned "notwithstanding the foregoing" and "in addition to its termination right" phrases to be entirely meaningless, depriving Plaintiff of the benefit of the bargain – a result that is impermissible under settled principles of contract construction. *See* cases cited in Plaintiff's opening brief, at Point II(C).

C. The Use of the Word "Thereupon" in Section 13.1 Should Not Have Been Interpreted to Mean that Plaintiff Could Seek Specific Performance Only if Birch's Default Happened *After* the Closing with the Fee Owner

In dismissing the Complaint with prejudice, the trial court fixated on the word "thereupon" in Section 13.1 – opining that it limited Plaintiff's right to specific performance to a situation where Birch's default happened only *after* the closing with the third-party seller. (*See* 2T, at 12-16). Because, here, the Deposit was returned when Birch reneged on the deal in mid-July 2022, the trial

court determined (erroneously) that Plaintiff's right of specific performance was unavailable when Birch proceeded to close on the deal with the seller just weeks later, in early October 2022. (*See id*.).

Contrary to the trial court's conclusion (2T, at 12-16) and to the Defendants' arguments (*see*, *e.g.*, Birch Br., at 14-16), the use of the word "thereupon" in Section 13.1 should not be read to impose a temporal limitation on Plaintiff's right to seek specific performance as against Birch. The terms of the PSA contemplated that the title to the real property would be conveyed directly to Plaintiff at the closing – and not to Birch. (Pa104, PSA § 6.1; Pa111, PSA § 10.3; Pa3-4, Complaint, ¶ 9). Hence, read logically and in context, the use of the word "*thereupon"* in that clause simply establishes that Plaintiff's ability to seek specific performance is triggered if and when Birch proceeds to close the transaction with the Fee Owner and "*thereupon*" fails to ensure that title to the real property is conveyed directly to Plaintiff. (Pa115-116, PSA § 13.1). *See Republic Bus. Credit Corp. v. Camhe-Marcille,* 381 N.J. Super. 563, 568-69 (App Div. 2005) ("[w]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probate intent and purpose.").

By giving undue emphasis to the word "thereupon" (while altogether disregarding the phrases "notwithstanding the foregoing" and "in addition to its termination right" in the same sentence), the trial court ignored well-settled

precepts of contract construction and concluded that Birch's obligations to Plaintiff under the PSA totally ceased when the Earnest Money Deposit was returned to Plaintiff in July 2022 – regardless of the fact that Birch went ahead and closed on the transaction with the Seller and "thereupon" failed and refused to arrange for the Fee Owner to convey title to Plaintiff, as contemplated by the PSA. (2T, at 12-16; Pa104, PSA § 6.1; Pa111, PSA § 10.3).

This flawed construction of Section 13.1 of the PSA enabled Birch to cut Plaintiff out of the deal and close with the Fee Owner with total impunity, while leaving Plaintiff without any remedy for the tremendous loss of the contract value and the heavy expenses it had incurred in order to arrange for financing of its end of the deal. (Pa5, Complaint, ¶ 19). This interpretation of the contract is unsound and inconsistent with the public policy against rewarding a party for breaching its contractual duties. *See Saxon Const. & Mgmt. Corp.,* 273 N.J. Super. at 238.

Finally, the trial court's reasoning entirely ignored the Complaint's allegations that, after the return of the Earnest Money Deposit, Birch and Old Republic took affirmative steps to conceal the closing from Plaintiff. Indeed, after the deposit had been returned to Plaintiff, Birch instructed Old Republic not to tell Plaintiff of the anticipated closing. (Pa11-12, Complaint, ¶¶ 42-48).[2] Old

[2] As discussed above, in September 2022, after the Earnest Money Deposit had been returned, Ms. Icklan of Old Republic falsely told Plaintiff that the deal

Republic informed Plaintiff that the transaction was "on hold" and that it would advise Plaintiff if that changed. (Pa11-12, Complaint, ¶¶ 42-48). If Birch and Old Republic truly believed that Plaintiff had no right to participate in the transaction with the Fee Owner, they would have had no reason to collude and affirmatively work to deceive and conceal the details of the transaction from Plaintiff.

POINT III

PRINCIPLES OF "ELECTION OF REMEDIES" DO NOT BAR PLAINTIFF'S CLAIMS, IN LIGHT OF THE LANGUAGE OF THIS PARTICULAR CONTRACT, WHICH ALLOWED PLAINTIFF TO EXERCISE CONCURRENT REMEDIES

(Pa357; Pa651-652; 2T; 3T; 4T)

Defendants argue that the Orders appealed from should be sustained because, they claim, Plaintiff "elected" its exclusive remedy when it demanded the return of the Earnest Money Deposit and could not, thereafter, seek additional relief for Defendants' acts and omissions. (*See* Birch Br., at Point II(C); Old Republic Br., at Point II). This argument, too, fails as a matter of law, based upon the plain terms of Section 13.1 of the PSA. The doctrine of "election of remedies" has no bearing on this case because, in seeking to enforce the PSA

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was "on hold" and promised to apprise Plaintiff when and if it was moving forward. She knowingly failed to do so (Pa12, Complaint ¶ 47) – and later admitted that she had been instructed by Birch not to disclose any of the details to Plaintiff, and that she was uncomfortable with this, but complied (Pa12, Complaint ¶¶ 47-48).

and demanding specific performance, Plaintiff was merely exercising a cumulative contractual right.

As argued in Point III of Plaintiff's opening brief, the doctrine of election of remedies "is the conscious choice, with full knowledge of the facts, of one of two or more inconsistent remedies." *Adams v. Camden Safe Deposit & Tr. Co.*, 121 N.J.L. 389, 394 (1938) (emphasis added); *see also Murphy v. Morris*, 12 N.J. Super 544, 547 (Super. Ct. 1951) (stating "[t]he essential conditions or elements of election of remedies are (1) the existence of two or more remedies; (2) the inconsistency between such remedies, and (3) a choice of one of them"). The doctrine "stems from the principle, rooted in reason and justice, that a party, in seeking legal redress, shall not be at liberty to take irreconcilable and repugnant positions." *Adams,* 121 N.J.L. at 395 (emphasis added). Therefore, in order to properly assert the doctrine of election of remedies, "there must in fact be two inconsistent remedies available to the party seeking enforcement of the claimed right." *Id*. Critically, for present purposes, the doctrine is not "applicable to bar concurrent and consistent remedies." *Id.*

Here, the trial court held (2T, at 13-16) that Plaintiff was barred from seeking specific performance because, by terminating the PSA through acceptance of the Deposit, Plaintiff elected an exclusive remedy and could not insist on specific performance thereafter (2T, at 15). Proper invocation of the election of remedies doctrine can occur only where there are two inconsistent

and non-concurrent remedies, and a party elects one. Plaintiff did not elect one of two inconsistent or non-concurrent remedies. Rather, as discussed at length above and in Plaintiff's opening brief, the first two sentences of PSA § 13.1 must be read in tandem, to allow Plaintiff to elect both to demand return of the Earnest Money Deposit and to insist upon specific performance where Birch proceeds to close with the Fee Owner.[3]

Specifically, the first clause of Section 13.1 states that, in the event a closing fails to occur in accordance with the PSA because of a default by Birch, Plaintiff may "terminate this Agreement" through notice to the Seller within ten business days and, in so doing, receive a return of the Earnest Money Deposit. (Pa115-116, PSA § 13.1). However, the sentence immediately thereafter reads "[n]otwithstanding the foregoing, Purchaser [Plaintiff] shall, in addition to its termination right, [] have the right of specific performance" where the Seller (Birch) has defaulted and proceeded to close with the Fee Owner under the Mack-Cali Agreement. (*Id.* (emphasis added)). This is exactly what happened.

The PSA gave Plaintiff the **concurrent** right to seek return of the Earnest Money Deposit **and** to demand specific performance. These remedies were not in any respect "repugnant" or "inconsistent," so as to invoke the doctrine of

[3] Here, as discussed *supra,* Plaintiff never expressly terminated the contract. However, even if Plaintiff had terminated, this would not change the result, given the "*in addition to its termination right*" language in Section 13.1.

election of remedies. *See Adams,* 121 N.J.L. at 395. Accordingly, the trial court erred in holding that Plaintiff waived its right to seek performance by demanding a return of the Earnest Money Deposit. (Pa357; 2T, at 13-16; 3T, at 15-16).

POINT IV

THE ORDER AWARDING ATTORNEYS' FEES TO BIRCH, AS "PREVAILING PARTY" UNDER THE PSA, SHOULD BE REVERSED

(Pa 689; Pa 704-705; 5T)

Plaintiff-Appellant also appeals from the trial court order granting Birch's motion for an award of its attorneys' fees, as the "prevailing party" within the meaning of Section 18.2 of the PSA. The determination that Birch was the "prevailing party" under the contract is, naturally, contingent upon the trial court's decision to dismiss the Complaint, with prejudice, as against Birch. (Pa357). If the Complaint is reinstated, then Birch cannot be considered to be the "prevailing party" – particularly at this early, pre-answer stage of the action.

For the reasons discussed above and in Plaintiff's opening brief, the Orders appealed from should be reversed and the Complaint should be reinstated as against both Defendants. Plaintiff respectfully submits that that Order awarding fees to Birch must likewise be reversed. With the reinstatement of the Complaint (or dismissal *without prejudice and with leave to replead)*, it is premature to conclude who will be the "prevailing party" in this contract dispute,

entitled to an award of attorneys' fees under Section 18.2 of the PSA – Birch or Plaintiff.

POINT V

PLAINTIFF ALSO STATED A CLAIM AGAINST OLD REPUBLIC FOR BREACH OF CONTRACT AND AIDING AND ABETTING A BREACH

(Pa651-652; 4T)

Old Republic also argues that it could not be held liable for breaching the contract with Plaintiff because the PSA had already been terminated by the time Old Republic's representative, Susan Icklan, affirmatively misled Plaintiff and withheld material information about the scheduled closing. (*See* Old Republic Br., at Point II (D)). Because Ms. Icklan is alleged to have made false promises and misstatements upon which Plaintiff relied after the Deposit was returned (but before the transaction between Birch and the Fee Owner closed), Old Republic argues that it could not be held to have breached its duties to Plaintiff under the PSA. (*See id.*).

The trial court implicitly accepted this argument, in dismissing the Complaint as against Old Republic, with prejudice. (Pa651-652; 4T, at 7-8). However, this argument rests upon the same distorted reading of Section 13.1 of the PSA that was discussed above. (Pa357; Pa651-652; 2T; 3T; 4T). Section 13.1 of the PSA gave Plaintiff an express right to demand specific performance and insist upon transfer of the title to the Real Property to Plaintiff, if and when Birch

defaulted on its obligations and proceeded to close upon the transaction directly with the Fee Owner, notwithstanding and "in addition to its termination right" and return of the Deposit. (Pa115-116, PSA § 13.1 (emphasis added)). This argument has already been addressed in Plaintiff's opening brief and in Points II and III above and, thus, will not be restated here.

Old Republic's argument also effectively ignores the Complaint's allegations that Ms. Icklan and Old Republic were *well aware* that Plaintiff fully intended to enforce its rights under the PSA, even after the Deposit had been returned. Indeed, as alleged in the Complaint, Plaintiff reached out to Ms. Icklan *after the Deposit had been returned* for the very purpose of ensuring that Plaintiff would be kept apprised if Birch planned to close on the property with the Fee Owner. (Pa11, Complaint ¶¶ 42-44). By her own admission in an email in October 2022 (after the surreptitious closing had taken place), Ms. Icklan intentionally withheld the information from Plaintiff because she was told by Birch not to communicate with Plaintiff. (Pa12, Complaint ¶ 47). Likewise, Richard Icklan (also a principal of Old Republic) admitted that Old Republic should have kept Plaintiff apprised of the facts – but that Susan Icklan felt "spooked" because she was pressured by Birch's principal not to provide any information to Plaintiff about the transaction. (Pa155-157, ¶¶ 14-20). These admissions from two of the principals of Old Republic reflect that Old Republic intentionally breached its contractual obligations to Plaintiff when it chose to

remain silent to accommodate Birch and serve their own financial interests. These admissions are also inconsistent with the notion that Defendants believed they were free to proceed to the closing without Plaintiff's knowledge or participation.

A. Old Republic Affirmatively Aided and Abetted Birch and was Not Merely an Innocent Bystander to the Breach by Birch

Old Republic also argues that it did not breach any contractual duties to Plaintiff because its duties were very narrowly confined, as per the small print above the signature block on the PSA. (*See* Old Republic Br., at 11). Yet, a review of the PSA as a whole reflects that Old Republic undertook various duties, including as an escrow agent and as the title company, and those duties ran to both Plaintiff and Birch. (Pa90-128, PSA §§ 3.2, 4.2, 4.3, 10.1, 11.1, 11.2, 17.1(a), 17.1(b), 18.14; Pa91-62, PSA § 1.1; Pa90-128, PSA §§ 6.3, 9.2, 10.2, 10.3). Old Republic's duties under the PSA must be construed based upon the whole contract, read in harmony. *See generally Krosnowski v. Krosnowski*, 22 N.J. 376, 387 (1956). Old Republic could not avoid its duties under the PSA merely by casting itself as "caught in the cross-fire between these parties following the collapse of their deal," as it argued in the trial court. Indeed, Old Republic was to be well-compensated for the performance of its contractual duties – which were designed to benefit both Plaintiff and Birch, and not just Birch as happened here. (Pa113-114, PSA § 10.5).

As alleged in the Complaint, Old Republic played a material role in the events leading to Plaintiff's damages. Old Republic acted in bad faith, breached its contractual and fiduciary duties to Plaintiff, affirmatively acted with Birch to deceive and circumvent Plaintiff, and thus played an active role in the "collapse of [the] deal." (Pa15-16, Complaint, ¶¶ 68-79).

The PSA contemplated that Plaintiff would take fee title to the real property directly from the Fee Owner, and Birch was to take title only to the improvements at the site. (Pa104, PSA § 6.1; Pa111, PSA § 10.3). As title agent and escrow agent and as a signatory to the PSA, Old Republic was fully aware that Plaintiff was entitled to take title in its name, and that Birch had no right under the PSA to take title to both the real property and the improvements – which is what it ultimately did, after breaching its obligations to Plaintiff and covertly proceeding to close without Plaintiff. Old Republic was also on notice that, under Section 13.1 of the PSA, Plaintiff retained a right of specific performance if Birch proceeded to close on the deal with the Fee Owner.

Having colluded with Birch to keep the closing with the Fee Owner and related details hidden from Plaintiff – particularly after promising to keep Plaintiff apprised of the new date – Old Republic actively aided and abetted Birch and breached its contractual duties to Plaintiff.

Under New Jersey law, "[l]iability for aiding and abetting "is found in cases where one party 'knows that the other's conduct constitutes a breach of duty and

gives substantial assistance or encouragement to the other so to conduct himself.'" *See Shah v. Shroff*, 2023 N.J. Super. Unpub. LEXIS 527, *47-48 (April 2023) (Pa158-176), citing *McCormac v. Qwest Comm. Int'l Inc.*, 387 N.J. Super. 469, 481 (App. Div. 2006); *Judson v. Peoples Bank Tr. & Co.*, 25 N.J. 17, 29 (1957). "To prove such a claim, a plaintiff must show that '(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.'" *See McCormac*, 387 N.J. Super. at 484-485 (quoting *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004)).

> Aiding and abetting liability focuses on "whether a defendant knowingly gave substantial assistance to someone engaged in wrongful conduct, not whether the defendant agreed to join the wrongful conduct." *Podias v. Mairs,* 394 N.J. Super. 338, 353, 926 A.2d 859 (App. Div. 2007). Determining how much assistance is considered substantial is fact-sensitive.

Shah, 2023 N.J. Super. Unpub. LEXIS 527 at 48 (emphasis added).

Here, the factual allegations against Old Republic in the Complaint amply support each of these elements and, thus, adequately stated a claim for breach of contract and aiding and abetting the breach by Birch. *See id.*[4]

[4] To the extent (if any) that aiding and abetting liability was not sufficiently pleaded in the Complaint, Plaintiff should have been given an opportunity to amend the Complaint – rather than a dismissal *with prejudice*.

B. Section 17.1(b) of the PSA Does Not Present a Bar to Plaintiff's Claims

Old Republic also argues that Section 17.1(b) of the PSA precludes Plaintiff from asserting any claims against Old Republic other than those for bad faith, gross negligence, or willful misconduct. (*See* Old Republic Br., at 57-58). Old Republic insists that this clause must be interpreted to preclude all of Plaintiff's claims against Old Republic. (*See id.*). However, in making this argument, Old Republic glosses over the fact that the Complaint did allege that Old Republic acted in bad faith and willfully when it deceived Plaintiff and aided and abetted Birch in its breach of contract. Indeed, in numerous places throughout the Complaint, Plaintiff alleged various acts of bad faith and willful misconduct, including: that Old Republic acted to intentionally deceive Plaintiff; affirmatively engaged in deception in collaboration with Birch; intentionally advised Plaintiff it would keep Plaintiff apprised of the closing, while having no present intention to do so; breached its duties of good faith and fair dealing by working with Birch to frustrate Plaintiff's ability to obtain the benefits of the bargain; and acted covertly and surreptitiously to facilitate the closing between Birch and the third-party seller, with knowledge that doing so constituted a breach of Old Republic's and Birch's obligations to Plaintiff. (Pa3-21, Complaint, ¶¶ 45-51, 73-76, 82, and 86-89). Accordingly, Section 17.1(b) of the PSA did not provide a valid basis for the dismissal of Plaintiff's causes of action against Old Republic, let alone with prejudice.

C. Even if the PSA Did Not Impose a Duty on Old Republic to Keep Plaintiff Apprised of the Closing, Old Republic Voluntarily Assumed This Duty and Had to Perform it With Care

Old Republic asserts that the PSA has no terms imposing an obligation on Old Republic to perform or abstain from the acts and omissions alleged in the Complaint. (*See* Old Republic Br., at 42-44).

This argument also fails. Old Republic certainly had a contractual duty to cooperate with Plaintiff and Birch in seeing to it that the terms of the PSA were followed and to ensure that the closing (which was to occur at Old Republic's offices) was not undertaken covertly, without notice to or participation of Plaintiff. Old Republic also had a contractual duty not to take steps that would interfere with another party's rights under the contract. Old Republic breached its contractual duties when it aided and abetted Birch and otherwise acted in derogation of Plaintiff's rights to acquire title to the Real Property by affirmatively and willfully cutting off communication with Plaintiff and intentionally misleading Plaintiff about the status of the deal.

In any event, under New Jersey law, a party to a contract may voluntarily assume duties to perform beyond those articulated in their contract. Once those duties are voluntarily assumed, they must be performed with due care. *See, e.g., Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.*, 116 N.J. 517, 541 (1989) (stating the principle that "[n]otwithstanding the essentially contractual nature of the relationship between a title company and its insured, the company could be

subject to a negligence action if the 'act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title.'"). Hence, even assuming *arguendo* that the PSA did not obligate Old Republic to speak truthfully about whether (or not) the closing was "on hold" or to follow through on its promise keep Plaintiff apprised of the fact and details of the rescheduled closing, this does not end the analysis. Once Old Republic voluntarily assumed a duty to Plaintiff, knowing that Plaintiff would rely upon Old Republic to perform that duty carefully and honestly, Old Republic had to perform that duty with due care, and without deception. *See id.*; *see also Cocco v. Hamilton*, 2010 N.J. Super. Unpub. LEXIS 1047, *32; 2010 WL 2011003 (App. Div. 2010) (Pa177-198). As to Old Republic's argument (at pages 55-56) that this assumption of duty claim was not adequately pleaded in the Complaint, this should not have led to a dismissal with prejudice, but rather, Plaintiff should have given the opportunity to replead.

POINT VI

PLAINTIFF'S CLAIM OF BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD HAVE BEEN SUSTAINED AS AGAINST BOTH DEFENDANTS

(Pa357; Pa651-652; 2T; 3T; 4T)

The trial court also erred in dismissing Count IV of the Complaint, which states a claim of breach of the implied covenant of good faith and fair dealing as against both Defendants. In every contract there is an implied covenant of good

faith and fair dealing that demands that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Palisades Props., Inc. v. Brunetti,* 44 N.J. 117, 130 (1965) (quoting 5 WILLISTON ON CONTRACTS § 670, pp. 150-160 (3d ed. 1961)). "The covenant is among the few terms that '[c]ourts have been called upon to supply.'" *Wilson v. Amerada Hess Corp.,* 168 N.J. 236, 244 (2001) (citation omitted). While a covenant will not be implied so as to override an express term of a contract, "a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." *Id.*

The New Jersey Supreme Court has also cited approvingly to the Restatement (Second) of Contracts § 205 (1981), for the proposition that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.'" *Wilson*, 168 N.J. at 245.

Allegations of bad faith or improperly motivated intentions are elements of a claim for breach of the implied covenant of good faith and fair dealing. *See id*. at 251. However, each case is fact-specific, and various forms of conduct have been held to constitute a violation of the covenant. *See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.,* 182 N.J. 210, 225 (2005). Thus, "a

plaintiff may get relief if it relies to its detriment on a defendant's intentional misleading assertions." *Id*. at 226 (emphasis added) (citing *Bak-A-Lum Corp. v. Alcoa Building Prods.,* 69 N.J. 123, 129-130 (1976)). "As a general rule, [s]ubterfuges and evasions in the performance of a contract violate the covenant of good faith and fair dealing even though the actor believes his conduct to be justified." *Brunswick Hills Racquet Club*, 182 N.J. at 225 (citations and internal quotes omitted) (emphasis added). This is exactly what is alleged in the Complaint, as against both Birch and Old Republic.

Defendants both argue that Plaintiff failed to allege facts sufficient to state a claim for breach of the implied covenant of good faith and fair dealing. (*See* Birch Br., at 23-26; Old Republic Br., at 44-46). Yet, Plaintiff asserted ample facts to support such a claim. In particular, the Court is referred to the allegations regarding the affirmatively misleading and deceptive way in which Birch and Old Republic actively colluded to keep the facts and details of the rescheduled closing hidden from Plaintiff. (Pa11-13, Complaint, ¶¶ 42-53). These are allegations of bad faith and improper motivation. *See id.* In fact, Old Republic admitted that it was acting at the express direction of Birch when it intentionally misled and withheld material information from Plaintiff in the weeks leading up to the secret closing. (*See, e.g.,* Old Republic Br., at 15-16; *see also* Pa12, Complaint, ¶ 47; Pa15, Complaint, ¶ 73).

Under these circumstances, Plaintiff more-than-articulated the specific acts and omissions by Birch and Old Republic, done in an effort to frustrate Plaintiff's reasonable expectations under the PSA – *i.e.*, its expectation that it would take title to the Real Property and that Birch would not go behind its back and make secret arrangements with Old Republic and the Fee Owner to cut Plaintiff out of the deal.

POINT VII

PLAINTIFF STATED A CLAIM AGAINST OLD REPUBLIC FOR NEGLIGENT MISREPRESENTATION

(Pa651-652; 4T)

The trial court also erroneously dismissed Count V of the Complaint, wherein Plaintiff sought damages from Old Republic based upon a common law theory of negligent misrepresentation. (Pa651-652; 4T). Contrary to Old Republic's contentions, Plaintiff established a *prima facie* claim for negligent misrepresentation under New Jersey law, which requires allegations of "'[a]n incorrect statement, negligently made and justifiably relied on,' which results in economic loss." *See McClellan v. Feit*, 376 N.J. Super. 305, 313 (App. Div. 2005), quoting *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109 (2000).

Plaintiff alleged false statements by Old Republic's Ms. Icklan regarding the transaction being on hold and regarding her intentions to keep Plaintiff informed. (Pa18-19, Complaint, ¶¶ 86-94). Plaintiff also alleged that it reasonably relied upon Icklan's statements, believing that Icklan and Old Republic would keep

Plaintiff apprised of the progress of the transaction and ensure Plaintiff was notified of the rescheduled closing. (*See id*.). Old Republic failed to provide that information to Plaintiff, apparently because it was willing to serve the interests of Birch to the detriment of Plaintiff – and because it wanted to earn fees on the transaction. (*See id*.).

Plaintiff also alleged that its reliance on Ms. Icklan's misrepresentations was reasonable under the circumstances, in light of Old Republic's role as title company and escrow agent under the PSA and the parties' long-standing relationship of trust and confidence. (Pa19, Complaint, ¶¶ 96-99; Pa152-157). Finally, Plaintiff alleged that it suffered economic loss, as a result of this reliance, since it was effectively cut out of the deal and kept in the dark about the closing. Had Ms. Icklan and Old Republic advised Plaintiff that Birch was continuing to pursue the transaction without Plaintiff, that the closing was in fact rescheduled to occur, or simply that Birch had instructed Old Republic not to communicate with Plaintiff, then Plaintiff could have taken additional steps to protect its legal interests and ensure that the closing did not proceed without Plaintiff. (Pa11-12, Complaint, ¶ 46).

Old Republic also argues that any reliance upon Ms. Icklan's statements was "unjustified" and should be deemed unreasonable as a matter of law. (*See* Old Republic Br., at 39-40). This argument is unavailing.

First, Old Republic and Plaintiff had a longstanding and well-established course of dealing with one another after more than 20 years of doing business together, such that Plaintiff had every reason to believe that Old Republic would deal honestly and forthrightly with Plaintiff. (Pa152-157). In fact, it was Plaintiff that chose Old Republic as the Title Company for this transaction. (Pa153-54, Solomon Aff., ¶¶ 7-11).

Second, because Old Republic was a party to the PSA, Plaintiff was reasonable in assuming that Old Republic knew that Plaintiff had a right to insist upon specific performance, ***in addition to*** its right to demand return of the Earnest Money Deposit. Plaintiff had no reason to suspect that Old Republic would aid and abet Birch in covertly closing the deal without Plaintiff, in derogation of Plaintiff's right to demand specific performance – let alone that Ms. Icklan would actively participate in the breach by failing to deal forthrightly with Plaintiff.

Third, Old Republic should not be permitted to escape from its own misrepresentations and deception by arguing that it was unreasonable for Plaintiff to rely upon them. Old Republic certainly knew that Plaintiff was relying upon Old Republic and inquiring about a matter of great significance, and that Plaintiff would expect a truthful answer and rely upon it. *Fourth,* and in any event, questions of reasonable reliance are inherently fact-based – and this is not a matter that should have been decided in the context of a pre-answer motion to dismiss. *See Richie & Pat Bonvie Stables, Inc. v. Irving*, 350 N.J. Super. 579, 589 (App.

Div. 2002) ("We note that whether plaintiffs' reliance upon Irving's statement was reasonable is a jury question…").

POINT VIII

PLAINTIFF ADEQUATELY STATED A CLAIM AGAINST OLD REPUBLIC FOR BREACH OF FIDUCIARY DUTY

(Pa651-652; 4T)

The trial court also dismissed Count VI in the Complaint, whereby Plaintiff alleged that Old Republic breached its fiduciary duty to Plaintiff, in colluding with Birch to cut Plaintiff out of the deal and in failing to be forthright and honest with Plaintiff, to Plaintiff's detriment. (Pa19-20).

Here, the longstanding relationship between the owners of Plaintiff and Old Republic was such that Plaintiff felt justified in reposing its trust and confidence in Old Republic. (Pa152-157). Theirs was a relationship based upon trust and loyalty – and Plaintiff reasonably expected that Old Republic would deal with the utmost good faith and honesty. (*See id*.). It is respectfully submitted that, under these circumstances, there arose between Plaintiff and Old Republic a "special relationship" that went beyond the typical insurance carrier-policyholder relationship that Old Republic referenced before the trial court. Hence, the pre-answer dismissal of this claim, with prejudice, was erroneous.

In opposition to Plaintiff's appeal, Old Republic asks this Court to disregard the allegations about the longstanding history between Plaintiff and Old Republic

and the reasons why Plaintiff was justified in relying upon Susan Icklan's statements, arguing that they were not included in the Complaint or relied upon by the trial court in its decision. (*See* Old Republic Br., at 16, n. 4.) However, this argument is inaccurate and misleading.

Evidence supporting these allegations was absolutely included in the record before the trial court, in the context of Defendants' motions to dismiss. *See* Pa152-157.[5] Contrary to Old Republic's argument, there is no reason to conclude that the trial court did not consider these points in its decisions dismissing the Complaint with prejudice. The trial court issued its rulings on the motions to dismiss from the bench (2T, 4T) and did not issue written decisions to accompany either of the Orders of dismissal. (Pa357; Pa651). In any event, at worst, Plaintiff should have been given the opportunity to replead its Complaint to include these factual allegations, to the extent that they were not fully articulated in the Complaint itself. *See Printing Mart*, 116 N.J. at 771-72.

[5] Old Republic also takes issue with Plaintiff's reference in its opening brief to certain email exchanges that occurred between Plaintiff's and Birch's counsel. (*See* Old Republic Br., at 16, n. 4). Yet, these documents were placed into the record by Defendants, in support of their motions to dismiss the Complaint. (Pa130; Pa321-333). Here, too, there is no basis for Old Republic's argument that these documents were not considered by the trial court.

PLAINTIFF'S ARGUMENTS IN OPPOSITION TO CROSS-APPEAL

POINT I

THE TRIAL COURT PROPERLY DECLINED TO AWARD OLD REPUBLIC ITS ATTORNEYS' FEES AND EXPENSES

On its cross-appeal, Old Republic has challenged the Order of the trial court denying Old Republic's motion for an award of its attorneys' fees and expenses, as against Plaintiff. (Pa688; 5T, at 5-12). For the reasons discussed below, this Order should not be disturbed and must be affirmed.

A. The Trial Court Denied Old Republic's Motion for an Award of Attorneys' Fees Pursuant to Both PSA Section 17.1 and 18.2

The trial court denied Old Republic's motion for attorneys' fees for the reasons articulated on the record on September 22, 2023. (Pa688; 5T, at 5-12). Specifically, the court held that the indemnification provisions set forth in Section 17.1 of the PSA were intended only to address claims by third-parties as against Old Republic, and were not designed to act as a fee-shifting provision in first-party disputes between the parties to the contract itself. (*See* 5T, at 7-10). The court cited a series of decisions from New Jersey and other jurisdictions, supporting its correct conclusion that PSA Section 17.1 did not grant Old Republic a right to recover its attorneys' fees in any first-party disputes between and among the parties to the PSA. (*See id.*).

In addition, the court properly ruled that Old Republic could not claim the benefit of the fee-shifting provisions set forth in Section 18.2 of the PSA because Old Republic was judicially estopped from relying upon that provision of the PSA. Indeed, Old Republic had repeatedly argued in submissions before the trial court that it was not a signatory to, nor bound by, any provisions of the PSA other than Articles IV, X, and XVII. (*See* 5T, at 10-12). The court reasoned, "Section 18.2 does not fall within any of those three articles which Old Republic has repeatedly asserted to form the basis of its rights and obligations under the PSA. They can't rely upon that for any right." (5T, at 12). Allowing Old Republic to change its tune in order to take advantage of Section 18.2 would be "inequitable," according to the trial court. (5T, at 11). Hence, the court stated: "it would be inequitable for Old Republic to now all of a sudden switch in midstream from their arguments, and conveniently forget that argument to try to argue that now Section 18.2, which is not part of Articles 4, 10 or 17, now would apply to Old Republic and Old Republic is entitled to any rights given to a quote, unquote, party under Section 18.2." (5T, at 11).

Accordingly, the trial court properly denied Old Republic's motion for an award of attorneys' fees, under either Section 17.1 or Section 18.2 of the PSA.

On its cross-appeal, Old Republic argues that pursuant to PSA Section 17.1, it should have been awarded its fees and expenses after the Complaint was dismissed, with prejudice. (Old Republic Brief, at 59-72). Notably, Old

Republic's cross-appeal arguments focus entirely on the language of PSA Section 17.1 –abandoning any claim for an award of fees under PSA Section 18.2. (*See id.*).

For the reasons discussed below – most notably, based upon the reasoning of the New Jersey Supreme Court's very recent decision in *Boyle v. Huff,* 257 N.J. 468 (2024) – the trial court's decision denying Old Republic an award of attorneys' fees under Section 17.1 was in all respects correct. Old Republic's arguments in support of its cross-appeal should be rejected.

B. Upon Reversal of the Orders Dismissing the Complaint, the Issue of *Any* Parties' Entitlement to an Award of its Attorneys' Fees Will be Rendered Academic – or, at Least, Premature

Before addressing the substance of Old Republic's arguments for attorneys' fees, it should be noted that, for the reasons discussed above, the Orders dismissing the Complaint with prejudice as against both Defendants should be reversed, and the Complaint should be reinstated. Assuming that this Court does reverse those Orders, then there will be no basis for an award of attorneys' fees to *any* of the parties, at this early pre-answer juncture of the action. The Complaint will be reinstated, the Defendants will answer, and the case will proceed as usual. The issue of who (if anyone) may ultimately be entitled to an award of attorneys' fees will be rendered academic, until such time as the case is disposed on its merits. For this reason alone, the Order denying Old Republic's motion for attorneys' fees should not be disturbed.

C. Old Republic's Motion for an Attorneys' Fees was Properly Rejected by the Trial Court

As discussed above, the trial court rejected Old Republic's attempts to recover its fees under both Section 17.1 and 18.2 of the PSA. On its cross-appeal, Old Republic limits its arguments to Section 17.1, abandoning its arguments as to Section 18.2. (*See* Old Republic Brief, at 59-72).

At the outset, it is necessary to refer the Court to the entirety of Section 17.1 of the PSA, as it is well-settled that the language of the contract must be read as a whole, and in context. *See Boyle v Huff,* 257 N.J. 468, 478 (2024); *Caruso v. John Hancock Mut. Life Ins. Co.,* 136 N.J.L. 597, ***3 (E. & A. 1948).

Section 17.1 of the PSA reads, in its entirety, as follows:

> **Section 17.1 Escrow.**
>
> (a) Escrow Agent will hold the Earnest Money Deposit in escrow in an interest bearing account of the type generally used by Escrow Agent for the holding of escrow funds until the earlier of (i) the Closing, or (ii) the termination of this Agreement in accordance with any right hereunder. All interest earned on the Earnest Money Deposit shall be paid to the party entitled to the Earnest Money Deposit. In the event the Closing occurs, the Earnest Money Deposit will be released to Seller, and Purchaser shall receive a credit against the Purchase Price in the amount of the Earnest Money Deposit. In all other instances, Escrow Agent shall not release the Earnest Money Deposit to either party until Escrow Agent has been requested in writing by Seller or Purchaser to release the Earnest Money Deposit and has given the other party five (5) Business Days to dispute, or consent to, the release of the Earnest Money Deposit. Purchaser and Seller each represents that its tax identification number, for purposes

of reporting the interest earnings, is shown next to its signature below.

(b) Escrow Agent shall not be liable to any party for any act or omission, except for bad faith, gross negligence or willful misconduct, and the parties agree to indemnify Escrow Agent and hold Escrow Agent harmless from any and all claims, damages, losses or expenses arising in connection herewith, except to the extent arising out of the bad faith, gross negligence or willful misconduct of Escrow Agent. The parties acknowledge that Escrow Agent is acting solely as stakeholder for their mutual convenience. In the event Escrow Agent receives written notice of a dispute between the parties with respect to the Earnest Money Deposit and the interest earned thereon (the "**Escrowed Funds**"), Escrow Agent shall not release or deliver the Escrowed Funds to either party and shall (i) continue to hold the Escrowed Funds until otherwise directed in a writing signed by all parties hereto or (ii) deposit the Escrowed Funds with the clerk of any court of competent jurisdiction. Upon such deposit, Escrow Agent will be released from all duties and responsibilities hereunder. Escrow Agent shall have the right to consult with separate counsel of its own choosing (if it deems such consultation advisable) and shall not be liable for any action taken, suffered or omitted by it in accordance with the advice of such counsel.

(c) Escrow Agent shall not be required to defend any legal proceeding which may be instituted against it with respect to the Escrowed Funds, the Real Property or the subject matter of this Agreement unless requested to do so by Purchaser or Seller and unless Escrow Agent is indemnified to its satisfaction against the cost and expense of such defense. Escrow Agent shall not be required to institute legal proceedings of any kind and shall have no responsibility for the genuineness or validity of any document or other item deposited with it or the collectability of any check delivered in connection with this Agreement. Escrow Agent shall be fully protected in acting in accordance with any written instructions given to

> it hereunder and believed by it to have been signed by the proper parties.

See PSA Section 17.1 (emphasis added) (Pa118-119).

As the trial court properly noted at oral argument on September 22, 2023, Old Republic initially cited only Section 17.1(c) and Section 18.2 of the PSA, in support of its claim for an award of attorneys' fees. (*See* 5T, at 5). According to Old Republic's initial strained arguments, sub-paragraph (c) of Section 17.1 entitled Old Republic to recover its legal fees, just by making a demand for same upon being sued by Plaintiff, whether or not it prevailed in the lawsuit.

In opposing Old Republic's motion for fees, Plaintiff pointed out that Old Republic's reliance upon Section 17.1(c) was misplaced and, frankly, absurd. That sub-paragraph plainly envisioned indemnification of Old Republic in connection with defense of legal proceedings commenced against Old Republic by third parties, and *not* by the other parties to the PSA. Specifically, Section 17.1(c) states in pertinent part, "[Old Republic] shall not be required to defend any legal proceeding which may be instituted against it… unless [Old Republic] is indemnified to its satisfaction against the cost and expense of such action." (*See* PSA Section 17.1(c) (emphasis added) (Pa119)). The notion that this language would allow Old Republic to demand, *in the context of a first-party suit by another party to the PSA*, an automatic award of its fees "by right, with no requirements imposed other than making a request for indemnification 'to its satisfaction'" is

implausible. Yet, that is precisely what Old Republic first argued before the trial court.

When faced with these arguments in opposition to its motion for attorneys' fees, Old Republic changed its tune to introduce a new argument based upon Section 17.1(b), in reply papers. Apparently recognizing the futility of its reliance upon Section 17.1(c) as a basis to demand an award of its attorneys' fees in the first-party context, Old Republic adjusted its argument in its Reply Memorandum to assert, for the first time, that the language in Section 17.1(b) supported its claim for an award of its fees. (*See* 5T, at 6-7 (trial court noted that Old Republic only raised issue of applicability of Section 17.1(b) for the first time on reply)).

However, the trial court properly concluded that Old Republic's new arguments based upon Section 17.1(b) fared no better than its arguments based upon Section 17.1(c). Again, the whole provision must be read in its full context. Broadly stated, Section 17.1(a) establishes the Escrow Agent's (Old Republic's) duties with respect to holding in escrow and later releasing the Earnest Money Deposit, upon certain things happening. (*See* PSA Section 17.1(a) (Pa118)). Together, Sections 17.1(b) and 17.1(c) purport to limit the Escrow Agent's liability and require the other parties to the PSA (Plaintiff and Birch) to "indemnify" and/or "hold harmless" the Escrow Agent (Old Republic) as against claims by third parties, except to the extent those claims arise out of the Escrow Agent's bad faith, gross negligence, or willful misconduct. (*See* PSA § 17.1(b) and (c) (Pa118-119)).

D. The Supreme Court's Recent Decision in *Boyle v. Huff* Establishes the Correctness of the Trial Court's Decision Denying Old Republic Fees

Contrary to Old Republic's arguments, the indemnification and hold harmless language in Section 17.1(b) simply has no application in present context, where the parties to the PSA have sued one another for an alleged breach of the contract and related common law duties.

In common parlance, the concept of "indemnification" generally refers to an undertaking by one party (the indemnifying party) to compensate the other party (the indemnified party) for certain costs and expenses, typically stemming from third-party claims. More to the point, in keeping with the "American Rule" that applies to attorneys' fees applications in New Jersey and many other states, indemnity provisions such as those involved here are generally held not to allow a party to a contract to recover its fees from another party to that same contract, in a first-party dispute between them; instead, these provisions are generally construed to apply only to indemnity against claims brought by third-parties, unless the language of the provision is unambiguous in expressly referencing first-party claims. *See Boyle v. Huff,* 257 N.J. 468, 478 (2024).

Indeed, as the New Jersey Supreme Court recognized in its very recent decision in *Boyle v. Huff,* "[i]ndemnity provisions … differ from other contractual provisions in one important respect: when the meaning of the clause is ambiguous,

an indemnification provision will be 'strictly construed against the indemnitee.'" 257 N.J. at 478 (citation omitted). The Supreme Court explained:

> We have previously acknowledged that this construction has "two apparent reasons." "One is that a party is ordinarily responsible for its own negligence, and shifting liability to an indemnitor must be accomplished only through express and unequivocal language." The second is that "under the American Rule, absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorneys' fees."

Id. at 478-479 (internal citations omitted).

Boyle involved the very question that is presented here – *i.e.*, whether an indemnification clause providing for the recovery of attorneys' fees applied to first-party claims, or just to claims brought by third parties. *See id.* at 479. The Court in *Boyle* studied the language of the provision at issue (in the bylaws of a condominium association) and concluded that – although certain language in the indemnification provision could be read broadly to suggest coverage for both first party and third party claims – a review of the entire provision, in context, led to the conclusion that the provision was only intended to allow for the recovery of attorneys' fees incurred in connection with third-party claims. *See id.* at 480-82. Going further, the Court stated:

> At a minimum, the indemnification provision is ambiguous and must therefore be construed against Boyle as the indemnitee. Contrary to the conclusion reached by the Appellate Division, we cannot presume first-party coverage in the absence of language precluding it; rather, there must be affirmative indicia of the intent to indemnify to overcome the presumption that parties will each pay their own way.

Id. at 482 (emphasis added).

To be sure, the *Boyle* Court did not hold that first party claims can never be covered by indemnification clauses; however, it did hold that first-party claims will be covered only where the parties' "clear intent" to cover first party claims is expressed "by their deliberate word choices." *See id.* at 482-483. Stated another way, in the absence of such clearly expressed, deliberate language covering first-party claims, indemnification contracts should not be construed to cover first-party claims and should only be construed to cover third-party claims. *See id.* Hence, in *Boyle*, the Supreme Court actually encouraged "parties seeking to permit indemnification of first-party claims to include express language to do so. Otherwise, any ambiguity will continue to be construed against the indemnitee." *Id.* at 483 (emphasis added).

This Court need look no further than *Boyle v. Huff* to uphold the trial court order challenged by Old Republic on its cross-appeal. In *Boyle,* the Supreme Court held that the American Rule will generally apply to require parties to bear their own expenses, in the absence of a clear, unambiguous language to the contrary – and that any ambiguity in the language must be interpreted *against* the indemnitee (here, Old Republic). Section 17.1 of the PSA does not contain any language that expressly and unambiguously encompasses indemnity for first-party claims. Thus, it is clear that the trial court in the instant action reached the

right result, in refusing to award Old Republic its attorneys' fees under Section 17.1 of the PSA.

The trial court's order denying Old Republic's motion for an award of attorneys' fees pre-dated the decision in *Boyle v. Huff,* which was just issued in May 2024. However, even before *Boyle* was decided, the trial court's decision denying Old Republic an award of fees under PSA 17.1 was well-founded. *See, e.g., Allison-Williams Co. v. Viasource Funding Grp., LLC*, No. A-1720-08T1, 2010 N.J. Super. Unpub. LEXIS 1260, at *29-30 (App. Div. June 9, 2010) (Pa667-687), holding that "the parties' indemnification agreement was not the equivalent of a contractual fee-shifting agreement and did not require defendant to pay plaintiffs' expenses in this litigation."

There, as here, one of the parties to a contract argued that a contractual indemnification clause (which used broad indemnity language *very similar* to language in Section 17.1 of the PSA) required the other party to the contract to pay its attorneys' fees and expenses for litigation between them, arising from the contract. The New Jersey Appellate Division soundly rejected this argument, concluding that the indemnification clause in the contract related only to third-party claims against the plaintiff – and was not intended to apply to claims as between the parties to the contract. *See id.*, citing *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989); *Oscar Gruss & Son, Inc. v.*

Hollander, 337 F.3d 186, 200 (2d Cir. 2003); *JMD Holding Corp. v. Congress Fin. Corp.*, 828 N.E.2d 604, 613 (N.Y. 2005).

Notably, in the *Allison-Williams* case, the party seeking a fee award made the additional argument (just as Old Republic does here) that the duty to indemnify *must* be construed to extend to litigation between the parties to the contract, because the contractual provision included certain language limiting that party's liability to bad faith or gross negligence; according to its argument, the clause *must* have been referring to litigation between the parties to the contract. The party seeking fees also emphasized that there was no language expressly limiting the clause to disputes with third-parties. *See Allison-Williams Co.,* 2010 N.J. Super. Unpub. LEXIS 1260 at *29.

The *Allison-Williams* court rejected these arguments as well, stating: "The sentence quoted, however, refers to a demand for indemnification or contribution … based on claims brought by third parties. It does not establish plaintiffs' right to claim fees from defendant for litigation that they have initiated against defendant on the contract itself." *See id.* Thus, the court refused to read the indemnity clause as applying to disputes between parties to the contract. So it is here. The indemnification and hold harmless language in Section 17.1(b) of the PSA – much like the indemnification language in Section 17.1(c) – is strikingly similar to the language at issue in *Allison-Williams* and the cases cited therein.

Here, as in *Boyle* and *Allison-Williams,* the clauses must be strictly construed against the indemnitee, consistent with the "American Rule" governing awards of attorneys' fees in civil litigation. *See Boyle,* 257 N.J. at 478, 482. Especially when viewed in this light, the language in Section 17.1(b) and 17.1(c) must be understood to impose a duty to defend, indemnify, and hold harmless the Escrow Agent *only* as against claims by third-parties. *See id.* The trial court properly concluded that neither Section 17.1(b), nor 17.1(c) extends to situations like the present one, where the dispute is between the parties to the contract itself. (5T, at 7-10).

As Old Republic points out in its Brief before this Court, the New Jersey Appellate Division in *Allison-Williams* was applying New York law to the contract at issue there. However, the Supreme Court's decision in *Boyle* makes it abundantly clear that the analysis applies equally under New Jersey law which– like New York – follows the "American Rule." *Boyle,* 257 N.J. at 478, 482. That rule provides that a successful litigant is, as a general principle, not entitled to the payment of his or her counsel fees. *See id.*; *see also N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.,* 158 N.J. 561, 569 (1999). As such, contractual fee-shifting provisions are strictly construed in light of that policy. *Boyle,* 257 N.J. at 478-479.

Numerous other cases have construed clauses like those at issue here as imposing a duty to indemnify only as to third-party claims, and not as to claims between the parties to the contract itself. (5T, at 9-10). *See, e.g., JMD*

Holding, 828 N.E.2d at 613 (promise to pay another's fees in indemnification agreement "must be exclusively or unequivocally referable to claims between parties on the contract rather than claims of third parties"); *Oscar Gruss & Son, Inc.*, 337 F.3d at 200 (2d Cir. 2003) ("Examining the parenthetical language in light of the surrounding provisions, it can apply only to a situation where Hollander refuses to indemnify OGSI from a third party action and not to an action commenced by OGSI against Hollander"); *Bourne Co. v. MPL Commc'ns, Inc.*, 751 F. Supp. 55, 58 (S.D.N.Y. 1990) ("It follows that where, as here, the parties' intentions to provide indemnification for claims between the parties is not 'unmistakably clear' from the language of the promise, this Court cannot infer an intent to waive the benefit of the rule that parties are responsible for their own attorneys' fees."); *see also Canopy Corp. v. Symantec Corp.*, 395 F. Supp.2d 1103, 1115 (D. Utah 2005) (applying Utah law and holding that the use of the word 'defend' in an indemnification provision reflected the parties' intent that the provision only apply to third-party claims); *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 344-45 (Iowa 2005) (holding that the use of the terms "indemnify" and "hold harmless" indicates an intent to refer only to claims brought by third-parties).

The cases cited by Old Republic in its Brief before this Court do not dictate a different result, particularly as they all predate *Boyle*, which is dispositive here. Indeed, in its Brief, Old Republic cited to the Appellate Division decision in *Boyle*

for the proposition that New Jersey courts have not "required an indemnification provision to include express language covering a first-party claim for the indemnification obligation to be triggered." (*See* Old Republic Br., at 60, citing, among others, *Boyle v. Huff,* 2023 N.J. Super. Unpub. LEXIS 85, at *16 (App. Div. Jan. 20, 2023) (Oda43-49)).

Yet, as noted, the Appellate Division decision in *Boyle* was subsequently overturned by the Supreme Court (257 N.J. 468 (2024)) – in a decision which, quite frankly, guts Old Republic's argument on this point. In fact, as discussed above, in *Boyle,* the Supreme Court held that, if the parties want an indemnification provision to be construed as covering first-party claims, they must say so expressly, with clear, deliberate, and unambiguous language. Otherwise, the American Rule will apply and any ambiguities in the provision will be construed *against* the indemnitee. *Boyle*, 257 N.J. at 483.

Based upon *Boyle* and all of the other above-mentioned authorities – and upon a reading of PSA Section 17.1 in its entirety – Old Republic's arguments for an award of attorneys' fees based upon either subparagraph (b) or (c) of Section 17.1 are fatally flawed and were properly rejected by the trial court.

E. Old Republic's Bid to Recover its Fees Under Section 18.2 of the Contract Was Also Properly Rejected by the Trial Court – and That Argument Has Been Abandoned on the Cross-Appeal in any Event

As noted above, before the trial court, Old Republic also sought to recover its attorneys' fees by casting itself as a "prevailing party" under Section 18.2 of

the PSA. (Pa119). In its Brief before this Court, Old Republic has abandoned its reliance upon PSA Section 18.2 – reiterating its contention that "Section 18 of the PSA does not apply to it" and focusing exclusively on Section 17.1 as a basis to recover fees. (*See* Old Republic Brief, at 66-67; *see also id.* at 37, 43.[6]).

Where, as here, a party abandons an argument on appeal, the Court need not consider it further. *See State v. Shangzhen Huang,* 461 N.J. Super. 119, 125 (App. Div. 2018), *aff'd,* 240 N.J. 56 (2019) (observing that claims that have not been brief are deemed abandoned on appeal and will not be addressed). Accordingly, this Court should not consider Old Republic's now-abandoned arguments about PSA Section 18.2. In any event, as discussed above, the trial court properly held that Old Republic could not recover its fees under Section 18.2 of the PSA because Old Republic had repeatedly disavowed any rights or obligations to Plaintiff under the PSA, beyond the specific articles referenced in the signature block.

The trial court properly concluded that Old Republic was judicially estopped from taking a different position on this argument, simply in order to recover fees. (5T, at 10-12). *See Brown v. Allied Plumbing & Heating Co.*, 129 N.J.L. 442, 446 (Sup. Ct. 1943); *see also Cummings v. Bahr*, 295 N.J. Super. 374, 388 (App. Div. 1996). Thus, there is no basis for this Court to disturb the trial court's decision

[6] Old Republic makes passing reference to PSA Section 18.2 in its Brief – but only in an effort to bolster its argument that the parties contemplated fee shifting. *See* Old Republic Br., at 66-67.

denying fees, based upon PSA Section 18.2 – an argument which Old Republic has abandoned this issue on appeal in any event.

CONCLUSION

For all of the foregoing reasons, the Judgment and Orders appealed from by Plaintiff should be reversed. The Complaint should be reinstated in its entirety or, if need be, dismissed *without prejudice and with leave to replead*. Upon such reversal, the Court should also vacate the Order awarding Birch its attorneys' fees and costs, as prevailing party. (3T; 5T; Pa704-705).

As to the Cross-Appeal by Old Republic, there was no error in the trial court's decision denying Old Republic's motion for an award of its attorneys' fees. Accordingly, even if the Complaint is not reinstated against the Defendants, the Cross-Appeal by Old Republic should be denied and the Order declining to award fees to Old Republic should be affirmed.

Dated: August 21, 2024

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