NISHA SANGER, Plaintiff, v. NEXT LEVEL BUSINESS SERVICES, INC., COGNIZANT TECHNOLOGY SOLUTIONS COMPANY, and NN SRINIVAS, AARTI CHOPRA, AYAN SAHA, SHRUTI SINGH, NIKHIL ANAND, and JOHN AND/OR JANE OES 1-20 (Names Being Fictitious), in their individual and corporate capacities and as aiders and abettors, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-000592-24 DOCKET NO. BELOW: SOM-L-1274-20 SAT BELOW: Hon. John Bruder, J.S.C. LAW DIVISION – SOMERSET COUNTY

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT NISHA SANGER

BRANDON J. BRODERICK, LLC
65 Route 4 East
River Edge, New Jersey 07661
Attorneys for Plaintiff-Appellant Nisha Sanger

Counsel:
Michael K. Fortunato (#037542010)
mfortunato@brandonjbroderick.com

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PRELIMINARY STATEMENT

The Trial Court erred in granting summary judgment in favor of Defendants and resolving this case at the summary judgment stage. This Trial Court's role is well-defined: to determine whether genuine disputes of material fact exist and, if so, deny the motion. This case, with its factual disputes and conflicting evidence, should have been permitted to proceed to trial, where a jury could assess credibility and weigh the evidence.

Plaintiff Nisha Sanger ("Plaintiff"), a technology recruiter with significant experience, was recruited to work under the control and supervision of Defendant Cognizant Technology Solutions ("Cognizant"), directly supervised by Defendant Aarti Chopra ("Chopra"), and Defendant Next Level Business Services, Inc. ("NLB"). While employed, Plaintiff was subjected to sexual harassment. She was propositioned by Defendant Shruti Singh ("Singh"), her primary contact at NLB, to meet Defendant Cognizant's Senior Director, Defendant NN Srinivas ("Srinivas"), at a hotel for a "good time." When Plaintiff refused, Singh warned her that "it will not end well." This harassment was compounded by subsequent calls from NLB's leadership, including Defendant Nikhil Anand ("Anand"), pressuring Plaintiff to reconsider her refusal. Ultimately, after standing firm in her rejection, Plaintiff was terminated.

Defendants claim Plaintiff's termination resulted from a purported "conflict of interest" related to her use of a company partially owned by her husband to source candidates. However, Plaintiff had disclosed this relationship to Defendants well in advance. The alleged conflict of interest served merely as a pretext for retaliation against Plaintiff for rejecting the sexual proposition of Defendants.

The Trial Court erred in holding that Plaintiff was an independent contractor and, thus, not entitled to the protections of the New Jersey Law Against Discrimination ("LAD"). The court improperly emphasized the labels used in contractual agreements over the substance of the employment relationship. Plaintiff worked under the direct control and supervision of Defendants, performing identical tasks as other direct employees, using equipment provided by Cognizant, and adhering to a work schedule set by Defendants. Under the multifactor test established by this Court, the evidence overwhelmingly supports a finding that Plaintiff was Defendants' employee.

In granting summary judgment, the Trial Court also improperly made credibility determinations, disregarding Plaintiff's testimony. For example, the Court relied on perceived "credibility gaps" in Plaintiff's testimony. Similarly, the court accepted Defendants' pretextual justification for Plaintiff's termination without considering her evidence that she disclosed the alleged

"conflict of interest" to Defendants. These credibility determinations were improper at the summary judgment stage, where the evidence must be viewed in the light most favorable to the non-moving party.

In denying Plaintiff's motion for reconsideration, the Trial Court compounded its errors. Moreover, it erred in denying Plaintiff's motion to amend her complaint to assert a claim for discriminatory refusal to contract. This amendment would have aligned Plaintiff's claims with the Court's holding that she was an independent contractor and would not have prejudiced Defendants, as it introduced no new facts and relied on the same evidence already in the record.

The Trial Court's decision deprived Plaintiff of the opportunity to present her claims to a jury. The record contains ample evidence from which a reasonable juror could find in Plaintiff's favor. The Trial Court's decision to grant summary judgment and deny Plaintiff's motions for reconsideration and to amend her complaint should be reversed, and this case should be remanded for trial.

PROCEDURAL HISTORY

Plaintiff filed the Complaint in this action on October 30, 2020. (Pa1 – Pa19.) In her Complaint, Plaintiff alleged violations of the New Jersey Law Against Discrimination and Conscientious Employee Protection Act, including: sexual harassment (First Cause of Action); LAD retaliation (Second Cause of Action); CEPA retaliation (Third Cause of Action); LAD Aiding and Abetting (Fourth Cause of Action); and CEPA Aiding and Abetting (Fifth Cause of Action). (Pa1 – Pa19.)

On April 26, 2024, in two separate motions, Defendants filed for summary judgment on all of Plaintiff's claims, one on behalf of Cognizant, Chopra, and Srinivas (the "Cognizant Defendants") and one on behalf of NLB, Singh, and Anand (the "NLB Defendants"). (Pa78 - Pa81; Pa360 - Pa361.) The Court heard oral argument on Defendants' motions on July 19, 2024, and the same day granted summary judgment to all Defendants.[1] (Pa1240 – Pa1243.)

On August 8, 2024, Plaintiff moved for reconsideration of the Court's July 19, 2024, orders and, in the alternative, to amend the complaint to include a LAD failure to contract. (Pa1244 – Pa1245.) The Court heard oral Argument on September 27, 2024, and on September 30, 2024, the Court entered an Order

[1] Transcript Volume 1, July 19, 2024.

denying Plaintiff's Motion.[2] (Pa1337 – Pa1338.) Plaintiff filed a Notice of Appeal on October 29, 2024. (Pa1339.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standard governing the trial court under R. 4:46. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Generally, it must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c).

Summary judgment is inappropriate if an issue of material fact genuinely exists. See R. 4:46-2(c). An issue of fact is genuine if the evidence submitted on the motion, together with all legitimate inferences favoring the non-moving party, is not so one-sided that it requires submitting the issue to a jury. Summary judgment must also be denied when analyzing a question of fact requires a credibility determination. See Parks v. Rogers, 176 N.J. 491, 502 (2003). Moreover, a summary judgment motion should be denied when an action or defense requires determination of a state of mind or intent. See Wilson v.

[2] Transcript Volume 2, September 27, 2024.

Amerada Hess, 168 N.J. 236, 253-54 (2001). Accordingly, "[a]s a general rule, summary judgment is not a proper vehicle for resolving claims of employment discrimination which often turn on an employer's motivation and intent." Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 707 (D.N.J. 1994).

STATEMENT OF FACTS

A. Plaintiff is a Well Educated Professional With Experience in the Technology Recruiting Field.

Plaintiff has a bachelor's degree from Delhi University, which she obtained in 2000, and a master's degree in business administration (MBA) from Orissa, India. (Pa447, Pa1157). Plaintiff has years of experience in recruiting, calling candidates, matching time with job opportunities and handling the technology recruitment process. (Pa448, Pa1158).

B. Defendants Hired Plaintiff to Perform Recruiting Services After Several Job Interviews to Work Under the Control and Supervision of Defendant Chopra Alongside Other Employees.

In 2019, an employee of Cognizant, who was familiar with Plaintiff's work, reached out to her and asked Plaintiff if she would be interested in a position at Cognizant. (Pa448, Pa1158). Plaintiff sent her resume and was contacted for several rounds of job interviews by Chopra, Cognizant's Senior Manager. (Pa448, Pa1158). During the interview process, Chopra asked Plaintiff questions about recruitment, and Plaintiff met with one of Chopra's supervisors. (Pa448, Pa1158). Plaintiff did not negotiate pay during these interviews, nor was she asked about her pay expectations. (Pa449, Pa1159). After the interviews, Chopra sent Plaintiff an email offering her a position and directing her to NLB to fill out the paperwork. (Pa449, Pa1159). NLB sent Plaintiff onboarding paperwork, including an agreement with NLB. (Pa449,

Pa1159). Plaintiff did not negotiate her contract with NLB and does not recall making any changes to the proposed contract. (Pa449, Pa1159).

Plaintiff understood that she was being hired by Cognizant, but since they had a vendor, were not hiring her directly, meaning that she would be being paid by NLB while working for Cognizant. (Pa449, Pa1159).

C. Plaintiff Performed the Job Duties of An Employee.

Plaintiff worked for Defendants as a Recruiter. (Pa449, Pa1159). Plaintiff did not work for any other agencies while employed because Chopra directed her not to do so. (Pa449, Pa1159). Plaintiff's role was to recruit candidates for positions, finding candidates for positions, working with other agencies to get candidates hired, and ensuring that once candidates cleared the interview process, an offer would be made for them to work for Cognizant. (Pa449, Pa1159). Whether an employee was hired as a direct Cognizant employee or a contractor was not correlated to their job duties, but rather how the candidate was found; whether through an agency or, for example, through a job board. (Pa450, Pa1160).

Plaintiff began working for Defendants in February. She worked from home for the first week, from February 10 through February 15, prior to being issued a Cognizant laptop computer. (Pa450, Pa1160). Plaintiff was assigned to Chopra's "team." (Pa450, Pa1160). Many of Plaintiff's coworkers were direct

Cognizant employees. (Pa450, Pa1160). Chopra supervised 10 to 14 recruiters, including Plaintiff, some of whom were direct employees of Cognizant and some of whom were designated as "contractors." (Pa450, Pa1160).

Plaintiff was responsible for calling candidates, matching them with job opportunities, and handling the recruitment process. (Pa450, Pa1160). Plaintiff reported to Chopra and was required to send Chopra weekly reports on the status of her work. (Pa450, Pa1160). As Chopra admitted in her deposition, both direct Cognizant employees and "contractors" received the same type of job requests to fill. (Pa450, Pa1160). Plaintiff worked in Cognizant's Bridgewater office twice a week and worked the rest of the week from home, a pattern that was the same as other Cognizant employees. (Pa450, Pa1160).

Plaintiff worked from an available cubicle or conference room while in the Bridgewater office. (Pa451, Pa1161). This was similar to direct Cognizant employees, some of whom did not have assigned workstations. (Pa451, Pa1161). Plaintiff was given a badge or key card to access Cognizant's office. (Pa451, Pa1161). Plaintiff was issued a cell phone by Cognizant. (Pa451, Pa1161). Plaintiff had a Cognizant email address. (Pa451, Pa1161). Singh remained Plaintiff's point of contact with NLB and would regularly interact with her. (Pa451, Pa1161).

At all relevant times, Srinivas was a Senior Director at Cognizant. (Pa451, Pa1161). Plaintiff interacted with Srinivas whenever he came to the Bridgewater office, which was about once per month. (Pa451, Pa1161). Plaintiff made it a professional point to greet him because he was in a leadership position. (Pa451, Pa1161). Srinivas also met with members of Chopra's team during town halls or all-hands meetings, and on at least one occasion, Srinivas invited the Bridgewater recruitment team to lunch. (Pa451, Pa1161).

D. Plaintiff Disclosed the Benefits of Using Her Husband's Company to Her Managers to Save Costs for Defendants.

Plaintiff, during her employment, sourced candidates from Salt Corporation and found new vendors for Cognizant to work with, such as IT Analytics. (Pa452, Pa1162). Plaintiff also worked with "pass-through vendors" like Net2Source and NLB. (Pa452, Pa1162). A pass-through vendor is an intermediary agency that handles paperwork for workers being hired by Cognizant and keeps a portion of the fees for their services. (Pa452, Pa1162). During her employment, Cognizant was paying 20 percent to the Salt Corporation for agency fees for candidates hired, which was higher than the 10 percent fees being charged by other agencies for full-time retention. (Pa452, Pa1162). Chopra advised Plaintiff that she had been receiving pushback from Cognizant's leadership for the high fees charged by Salt. (Pa452, Pa1162).

Plaintiff made Chopra aware that her husband was running a company called Staffing Idea Factory ("Staffing Idea"). (Pa452, Pa1162). Defendant Chopra was supportive of the idea of using Staffing Idea as a vendor, as long as it helped Cognizant avoid paying 20 percent commissions to the Salt Corporation. (Pa452, Pa1162). Defendant Chopra was, at all times, aware of the fact that Plaintiff's husband was operating Staffing Idea. (Pa452, Pa1162). Staffing Idea was also able to provide Plaintiff and Cognizant with a higher level of volume, providing approximately 10 profiles per week, more than other agencies like NLB and Net2Source. (Pa452, Pa1162). Plaintiff also disclosed the use of Staffing Idea to Singh, and that her husband held an interest in it. (Pa453, Pa1163).

Defendant Singh testified in her deposition that Staffing Idea Factory was "introduced" to the company by Plaintiff during her tenure and that Plaintiff's husband had discussions with someone from NLB regarding work with Cognizant. (Pa453, Pa1163).

E. Plaintiff Was Sexually Harassed by Cognizant's Senior Director and Propositioned to Meet Him in a Hotel Under the Threat of Termination.

Plaintiff does not recall ever being trained on, or provided with, harassment or discrimination policies by Defendants. (Pa453, Pa1163). On one occasion at the Bridgewater office, Srinivas approached Plaintiff during a

meeting and rubbed his leg against hers. (Pa455, Pa1165). Plaintiff observed that the touching of her leg appeared to be intentional because Defendant Srinivas forced himself into a space where there was no room to walk and did not apologize after touching her leg. (Pa455, Pa1165).

Cognizant's Bridgewater office typically held parties for the Indian festival of the Diwali holiday. (Pa455, Pa1165). Diwali normally takes place in October or November. (Pa455, Pa1165). In October 2019, during the final couple of minutes of a thirty-minute telephone phone call where they were discussing work, Singh advised Plaintiff that Srinivas "wanted to meet." (Pa455, Pa1165). Singh stated how arrangements could be made for a meeting with Srinivas where the company will book a room in a hotel and pay for it. (Pa455, Pa1165). The hotel room was going to be ordered so that several men and women from the company could "have a good time." (Pa455, Pa1165). Singh told Plaintiff it would be kept "between us" and that the company had done this in the past. (Pa455, Pa1165). Plaintiff refused Defendants' proposition and told Singh to "forget about it." (Pa455, Pa1165). Singh told Plaintiff to "take her time" and then come back to her with a response. (Pa456, Pa1166).

Plaintiff felt harassed when Singh made the proposition. (Pa456, Pa1166). Singh and Plaintiff had a follow up call, in which Singh asked Plaintiff to "make a decision." (Pa456, Pa1166). They spoke several times thereafter, and Singh

consistently asked whether Plaintiff had made a decision about the proposition. (Pa456, Pa1166). When Plaintiff refused the proposition, Singh told Plaintiff that "it will not end well," which Plaintiff understood to mean that she would be terminated if she did not give into the demand, and they would make it difficult for her to get another job. (Pa456, Pa1166).

Following Plaintiff's discussions with Singh, Plaintiff spoke with Anand, Defendant NLB's Senior Vice President of Operations, who asked if she had "thought about what [Singh] told you." (Pa456, Pa1166). Anand emphasized the importance of NLB's business relationship with Cognizant. (Pa456, Pa1166). Plaintiff consistently refused to meet Srinivas in a hotel during conversations with Singh and Anand. (Pa456, Pa1166).

F. After Plaintiff Refused Defendants' Proposition, Defendants Retaliated Against Her.

Plaintiff was terminated two weeks after refusing the proposition made by Singh on behalf of Srinivas for an alleged "conflict of interest" related to Staffing Idea. (Pa457, Pa1167). Singh claims that in November 2019, she found it "unusual" that so many of Plaintiff's candidates were sourced through Staffing Idea. (Pa457, Pa1167). Singh claims to have googled Staffing Idea, identified that Plaintiff's husband was associated with it, spoke to Anand and Sachin Alug ("Alug"), NLB's CEO and then sent them an email. (Pa457, Pa1167).

Anand, during his deposition, had no recollection of receiving a phone call from Singh about this matter. (Pa457, Pa1167). Singh also claims to not have discussed her concerns about Staffing Idea with either Plaintiff or Chopra before Googling the company and elevating the issue. (Pa457, Pa1167). Anand testified that he had no objection to Plaintiff using Staffing Idea as what he called a "pass through window." (Pa457, Pa1167). Anand is not aware of Plaintiff having violated any policies of NLB by way of using Staffing Idea for onboarding candidates. (Pa457, Pa1167). Anand testified that he discussed the issue with Alug but had no recollection of how many times they discussed it or what was discussed. (Pa457, Pa1167).

Singh did not have another conversation with anyone about Plaintiff until after she had been terminated. (Pa457, Pa1167). Singh was never interviewed in connection with any investigation by either NLB or Cognizant in connection with Plaintiff's alleged conflict of interest. (Pa458, Pa1168). Srinivas testified that he received a call from Alug and Anand. (Pa458, Pa1168). According to Srinivas, Cognizant made the determination to terminate Plaintiff within one hour of this phone call with NLB. (Pa458, Pa1168).

On November 6, 2019, the same day, Srinivas wrote in an email, attempting to justify Plaintiff's termination, that Plaintiff "used her husband's organization to charge Cognizant over $86,000." (Pa458, Pa1168). Srinivas

testified that he believed Cognizant was being defrauded. (Pa458, Pa1168). However, Srinivas did not perform any review of this alleged "fraud" and has no knowledge if anyone at Cognizant conducted any investigation into this "fraud." (Pa458, Pa1168). Srinivas was unaware of anyone at Cognizant taking any steps to verify the authenticity or accuracy of what was being told to them. (Pa458, Pa1168). Srinivas admitted in his deposition that when he sent the email, he had no understanding of whether there had been any financial loss to Cognizant and, in fact, still had no knowledge of whether there was any financial loss to Cognizant as he was deposed over three years later. (Pa458, Pa1168).

Srinivas and other members of Cognizant's management had a call with Chopra where they instructed her to bring Plaintiff to the office to terminate her and collect Cognizant property on the basis that she had violated the Cognizant Code of Conduct. (Pa459, Pa1169). Chopra testified that she was not given the "exact details" of why Plaintiff was being terminated. (Pa459, Pa1169).

On November 6, 2019 (the same day as Singh's purported initial telephone call to Anand and Alug raising the conflict-of-interest issue), Chopra called Plaintiff and asked her to come into the office the next day. (Pa459, Pa1169). Upon arriving to the office on November 7, 2019, Plaintiff was escorted by IT to a conference room where Chopra was waiting. (Pa459, Pa1169). Defendant Chopra instructed the IT personnel present to take Plaintiff's Cognizant phone

and laptop. (Pa459, Pa1169). Chopra told Plaintiff that Srinivas had called and told her that her employment was being terminated. (Pa459, Pa1169). Chopra told Defendant Srinivas was working from home and was willing to come in and talk to her if Plaintiff was willing. (Pa459, Pa1169).

Plaintiff refused to meet with Defendant Srinivas. (Pa459, Pa1169). Three months later, Defendant Srinivas was terminated for violations of Cognizant's Code of Conduct. (Pa774, Pa1482).

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED ON PLAINTIFF'S CLAIMS AGAINST THE COGNIZANT DEFENDANTS.

(Pa1242-Pa1243)

The Trial Court erred in granting summary judgment. Plaintiff presented sufficient evidence to preclude summary judgment on her claims against Defendants under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq*. ("LAD").[3] The record supports that Plaintiff was subjected to sexual harassment, resulting in a hostile work environment that altered the terms and conditions of her employment. Additionally, Plaintiff presented evidence that her rejection of sexual advances led directly to her termination, demonstrating actionable retaliation under the LAD. Summary judgment is inappropriate because material issues of fact exist regarding Defendants' conduct, and the credibility of their stated reasons for Plaintiff's termination, all of which must be resolved by a jury.

A. Plaintiff Has Established a Claim of Sexual Harassment Under the LAD.

There is sufficient evidence in the record to demonstrate that Plaintiff was

[3] As there is substantial overlap between Plaintiff's CEPA claims and LAD claims, Plaintiff elects to limit this appeal to her LAD claims based on CEPA's election of remedies provision.

subjected to a hostile work environment during her employment by Defendants. To show a claim of hostile work environment due to gender-based harassment, Plaintiff must show: (1) the complained-of conduct would not have occurred but for her status as a woman, (2) the conduct was severe or pervasive enough to make (3) a reasonable woman believe that (4) her conditions of employment were altered and the working environment had become hostile or abusive. See Lehmann v. Toys R Us, Inc., 132 N.J. 587, 603-04 (1993). In considering whether a hostile work environment exists, the court must use a "totality of the circumstances" analysis that examines the "character of the work environment" as a whole. Id. at 611; see also Mancini v. Tp. of Teaneck, 349 N.J. Super. 527, 559- 62 (App. Div. 2002). Here, Plaintiff meets all four prongs of *Lehmann*.

1. The Alleged Conduct Clearly Constitutes Sexual Harassment Which Would Not Have Occurred but For Her Gender.

To satisfy the first prong of Lehmann, Plaintiff must only show that the conduct was sexual. Specifically, "[w]hen the harassing conduct is sexual or sexist in nature, the but-for [sex] element will automatically be satisfied. Lehmann, 132 N.J. at 605; see also Woods–Pirozzi, 290 N.J. Super. 252, 266 (App. Div. 1996).

Here, the conduct alleged by Plaintiff against Defendants is sexual in nature. Plaintiff alleges that upon meeting Srinivas at Cognizant's Bridgewater office, he inappropriately touched her leg during a meeting. (Pa455, Pa1165.)

Plaintiff testified that she was then propositioned by Singh on behalf of Srinivas, and (over a two-week period) pressed to meet him in a hotel. (Pa455, Pa1165.) Singh told Plaintiff that Srinivas "wanted to meet" and arrangements could be made where the company would pay for a hotel room. (Pa455, Pa1165.) Singh further told Plaintiff that this had been done in the past. (Pa455, Pa1165.) Singh also stated that other women may be involved and that they were going to "have a good time" in the hotel room that was to be ordered for them. (Pa455, Pa1165.)

When Plaintiff told Singh to "forget it," Singh followed up with her and asked her to "make a decision." (Pa455 – Pa456, Pa1165 – Pa1166.) Singh further told Plaintiff that her refusal "will not end well." (Pa456, Pa1166.) When she refused again, Anand spoke to Plaintiff and asked if she had "thought about" what Singh had told her and emphasized the importance of the relationship between Cognizant and NLB. (Pa456, Pa1166.) Plaintiff consistently refused to entertain the proposition, which she considered to be sexual. (Pa455 – Pa456, Pa1165 – Pa1166.) Any reasonable juror would, indeed, conclude that being pressed to go to a hotel room with a company executive "for a good time," is harassing conduct that is sexual in nature.

2. The Harassment Created a Hostile Work Environment for Plaintiff and Objectively Altered the Terms and Conditions of Her Employment Because Her Refusal Resulted in Her Termination.

Defendants' sexual propositions of Plaintiff also satisfy the remaining

three prongs of the Lehmann test because a reasonable woman could have believed that it was severe or pervasive enough to alter her working environment. These prongs are "interdependent" and are analyzed together based on all the circumstances. See Lehmann, 132 N.J. at 604. The reasonable woman standard "includes women who fall toward the more sensitive side of the spectrum of reasonableness." Woods-Pirozzi, 290 N.J. Super. at 267 (citing Lehmann, 132 N.J. at 613).

In determining whether these prongs are satisfied, the law directs the Court to examine all the circumstances, including the frequency of the harassing conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Lehmann, 132 N.J. at 607; see also Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 19-20 (2002). These prongs "can be met through a single incident of harassment if it is sufficiently severe such that a reasonable woman would consider the work environment hostile or abusive." Velez v. City of Jersey City, 358 N.J. Super. 224, 234 (App. Div. 2003); see also Taylor v. Metzger, 152 N.J. 490 (1998).

With regard to these prongs, a reasonable juror could again determine a reasonable woman would consider the terms of her employment to have been altered. Plaintiff was called by Singh, told that Srinivas wanted to meet her at

a hotel, and that it would be a "good time." (Pa455, Pa1165.) Plaintiff interpreted it as any normal person would have, that she was being propositioned to engage in sexual conduct with Srinivas. (Pa455, Pa1165.) Plaintiff considered the telephone conversations to be harassing. (Pa456, Pa1166.) Further, the terms and conditions of her employment were, in fact, altered. Shortly after Plaintiff refused Defendants' proposition, she was terminated. (Pa456, Pa1166.)

3. The Conduct Also Constitutes Quid Pro Quo Sexual Harassment.

Moreover, the harassing conduct at issue, in addition to giving rise to a hostile work environment, constitutes quid pro quo harassment where an "an employer attempts to make an employee's submission to sexual demands a condition of his or her employment." Lehmann, at 601; see also J.T.'s Tire Servs., Inc. v. United Rentals N. Am., Inc., 411 N.J. Super. 236, 241 (App. Div. 2010). Here, for the same reasons set forth previously (i.e. the evidence in the record that Plaintiff rejected a sexual proposition from Defendants and was fired for doing so) that support the contention that Plaintiff's workplace was altered, also support a claim of *quid pro quo* sexual harassment.

B. Plaintiff Establishes a Claim for Retaliation in Violation of the LAD.

Plaintiff also provided evidence of retaliation under the LAD. Under the LAD's anti-retaliation provision, an employee engages in protected activity when they "oppose any practices or acts forbidden under this act" See N.J.S.A.

10:5-12(d). Here, there is sufficient record evidence to preclude summary judgment. Plaintiff was sexually propositioned, rejected the advance, and was terminated because of it.

1. Retaliation Under the LAD Is Examined Using the McDonnell Douglas Burden Shifting Framework.

To show a claim of retaliation under the LAD, Plaintiff must meet the McDonnell Douglas three-part "burden-shifting" test. See Kluczyk v. Tropicana Products, 368 N.J. Super. 479, 493 (App. Div. 2004). New Jersey has adopted the procedural burden-shifting methodology articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to address the difficulty of proving retaliatory or discriminatory intent. Under McDonnell Douglas, a plaintiff in a retaliation case must first prove a *prima facie* case of retaliation by demonstrating that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal connection between the two. See Kluczyk, 368 N.J. Super. at 493.

Plaintiff's evidentiary burden at the *prima facie* stage is low, which acknowledges that requiring greater proof would prevent a plaintiff from accessing the tools – evidence of the employer's motivation – necessary to even begin to assemble a case. See Zive v. Stanley Roberts, 182 N.J. 436, 448 (2005). Such a result would be inconsistent with "the complex evidentiary edifice constructed by the Supreme Court and [would] impose on plaintiff the very

burden that McDonnell Douglas sought to avoid – that of uncovering a smoking gun." Marzano v. Computer Sci. Corp., 91 F.3d 497, 510 (3d Cir.1996); Zive, 182 N.J. at 446-47 (quoting Marzano). "The *prima facie* case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence." Zive, 182 N.J. at 448.

As both the Third Circuit and the New Jersey Supreme Court have observed, circumstantial evidence is crucial in prosecution of employment discrimination cases:

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare….It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. …
>
> Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled…because of crabbed notions of relevance or excessive mistrust of juries."

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3d Cir. 1996); see also Zive, 182 N.J. at 446.

The matter then moves to the second stage of the McDonnell Douglas analysis when the burden of production shifts to Defendant to articulate a

legitimate, non-retaliatory reason for its action. See Kluczyk, supra., N.J. 368 at 494. If Defendant satisfies that burden, then in the third stage the burden of production shifts back to Plaintiff to prove by a preponderance of the evidence that the reason articulated by Defendant is merely a pretext for discrimination or retaliation and not the true reason for the employment decision. Id.

Plaintiff may use the same evidence that she used to show causation in her *prima facie* case to demonstrate pretext under the third prong of McDonnell Douglas. "There is neither logic nor case law which would counsel that the same evidence may not support both plaintiff's initial burden of proving a causal connection for purposes of making a *prima facie* case and the plaintiff's final burden of casting doubt on the employer's proffered legitimate reason." Bowles v. City of Camden, 993 F. Supp. 255, 264 (D.N.J 1998). A plaintiff, therefore, proves retaliation through circumstantial evidence by demonstrating "such weaknesses, implausibilities, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence" and is a pretext for discrimination. See DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005) [emphasis in original]; see also Greenberg v. Camden County, 310 N.J. Super. 189 (App. Div. 1998) (evidence that employer who failed to hire a teacher was "not providing the whole story" and whose words were contradicted by its acts was sufficient

to require reversal of summary judgment).

A plaintiff need not meet the ultimate burden of persuasion to avoid summary judgment, but she must cast such serious doubt on the veracity of the employer's articulated legitimate reason as to allow a jury to reasonably conclude that the employer was motivated to act for the retaliatory reason alleged by plaintiff. See Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 432 (App. Div. 1995). There are no "exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997).

2. Plaintiff Engaged in Protected Activity.

Plaintiff establishes the first prong of a LAD retaliation case, because she engaged in protected activity. The refusal to submit to sexual propositions falls within the scope of opposing practices forbidden by the LAD. See Farrell v. Planters Lifesavers Co., 22 F. Supp. 2d 372, 392 (D.N.J. 1998) (holding that a plaintiff's pushing of her co-worker's hand off her leg constituted protected activity), rev'd on other grounds, 206 F.3d 271 ("We note that the District Court held that the rejection of a sexual advance was a protected activity. . ."); see also Little v. National Broadcasting Co., *Inc.*, 210 F. Supp. 2d 330, 385 (S.D.N.Y. 2002) (noting that the "majority of courts in other district have held that an employee's refusal to submit to sexual advances constitutes 'protected activity."

. . . Sexual harassment by an employer or a supervisor is an unlawful practice, and an employee's refusal is a means of opposing such unlawful conduct.")

3. Defendants Terminated Plaintiff Because She Rejected Their Sexual Proposition and Their Stated Reasons for Her Termination Are Pretextual.

Plaintiff also satisfies the second and third prong of a LAD retaliation claim. She was undisputedly terminated by Defendants on November 7, 2019. (Pa457, Pa459, Pa1167, Pa1169.) Record evidence also causally connects Plaintiff's termination to her protected activity. There are many factual circumstances that could create the requisite causal connection by direct evidence or circumstantial evidence, such as temporal proximity, a pattern of antagonism, and/or pretext. See Kachmar v. SunGard Data Sys., 109 F.3d 173, 177 (3d Cir. 1997) (explaining that proof of a causal connection between a protected activity and an adverse employment action involves a highly specific inquiry into the motives of an employer and may be established in a number of ways).

a. Plaintiff presents Direct Evidence of Causation.

First, Plaintiff may evidence causation by direct evidence – a statement made by a decisionmaker associated with the decision-making process actually bore on the employment decision at issue and communicated proscribed animus. See McDevitt v. Good Bill Builders, 175 N.J. 519, 528 (2003). Here, Singh's

comments to Plaintiff, telling her things will not "end well," are direct evidence that Plaintiff's termination was tied to her protected activity because Singh played a pivotal role in her termination.

b. Plaintiff's Termination Was in Close Temporal Proximity to Her Protected Activity.

Plaintiff may also demonstrate causation through circumstantial evidence. Plaintiff can establish a causal connection because her termination quickly followed her protected activity. Causation may be demonstrated by the temporal proximity, or the time elapsed, between the employee's protected activity and the adverse employment action. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.1989), cert. denied, 493 U.S. 1023 (1990) (causal link established where "discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim");see also Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) ("temporal proximity between the protected activity and the termination is sufficient to establish a causal link").

Plaintiff testified that the first communication from Defendant Singh occurred about two weeks prior to her November 7, 2019, termination. (Pa455 – Pa456, Pa1165 – Pa1166.) During the intervening two weeks between the proposition and her termination, there were multiple follow-up calls made by Defendant Singh and/or Anand to try to sway Plaintiff to reconsider her stance and comply with their demands. (Pa455 – Pa456, Pa1165 – Pa1166.) Plaintiff

testified that she rejected the proposal several times during that two-week period. (Pa455 – Pa456, Pa1165 – Pa1166.) The rapid sequence of these events— from the initial proposition and subsequent follow-up calls to the swift decision to terminate her employment —demonstrates a clear pattern of cause and effect. Such proximity, particularly when measured in a span of days or a few weeks, strongly suggests retaliation. See generally Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597, 612 (D.N.J. 2003) (causal connection shown in CEPA case when employee terminated two weeks after protected activity)

c. Defendants' Reasons for Plaintiff's Termination Do Not Withstand Scrutiny and Are Evidence of Pretext.

In addition to the inference of causation created by the termination's temporal proximity to the protected activity, the record contains evidence that the reasons provided for Plaintiff's termination (that she was terminated for an undisclosed conflict of interest for using a staffing agency affiliated with her husband) was pretextual. Notably, Plaintiff can demonstrate pretext when circumstantial evidence of retaliation demonstrates such "weaknesses, implausibilities, or contradictions in [Defendants'] proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence." DeWees, 380 N.J. Super. at 528. Here, this pretext is established by: 1) the record evidence that Plaintiff disclosed her husband's interest in Staffing Idea; and 2) Defendants' rush to terminate Plaintiff without even

gathering basic factual information regarding this alleged conflict of interest.

Defendants' reasons for termination are factually disputed by Plaintiff's testimony that she disclosed her husband's interest in Staffing Idea. Plaintiff testified that she discussed using Staffing Idea with Chopra and disclosed that her husband was involved in the company. (Pa452, Pa1162.) Plaintiff also testified that she made a similar disclosure to Singh. (Pa453, Pa1163.) If Plaintiff disclosed the relationship (which must be presumed at the summary judgment phase), then the termination (which Defendants contend was predicated upon Singh Googling the company shortly before Plaintiff's termination) is pretextual and unworthy of credence.

The circumstances surrounding the way Plaintiff's termination itself was handled (even according to Defendants' version of events) provide more evidence it was pretextual. It seems more like a hastily seized opportunity to fabricate a rationale for an already intended outcome rather than a genuine concern for conflict of interest.

According to Defendants, the discovery was initiated by Singh who decided to conduct an internet search on Staffing Idea and saw that it was connected to Plaintiff's husband. (Pa457, Pa1167.) From there, Defendants apparently moved rapidly to termination without doing any investigation whatsoever. Singh claims to have had a conversation with Anand and the

company's CEO on November 6, 2019 and sent a follow up email. (Pa457, Pa1167.) Anand, in his deposition, had no recollection of the alleged conversation with Defendant Singh. (Pa457, Pa1167.) Singh, who was Plaintiff's primary contact with NLB and had allegedly set this termination in motion, did not bother to discuss what she found with Plaintiff. (Pa457, Pa1167.) Nor did Singh discuss what she found with Chopra, who was Plaintiff's direct supervisor at Cognizant. (Pa457, Pa1167.) In fact, Singh testified that, after the initial call, she never discussed the matter with anyone again prior to Plaintiff's termination. (Pa457, Pa1167.)

Srinivas sent an email on November 6, 2019 stating that there had been a potential "fraud" and that Plaintiff and her husband had charged Cognizant over $86,000. (Pa458, Pa1168.) Defendants claim that Srinivas made the decision to terminate Plaintiff, which he testified was due to her breach of Cognizant's Code of Conduct. (Pa458, Pa1168.) He apparently made this decision within one hour of a phone call with members of NLB. (Pa458, Pa1168.) It is undisputed that Plaintiff was terminated within 24 hours. (Pa 771, Pa459, Pa1167, Pa1169.)

Srinivas, though, in his deposition, testified that he had very little understanding of the issues that prompted such swift action. He testified that he believed Cognizant had been the victim of fraud. (Pa458, Pa1168.) However,

despite accusing Plaintiff of supposedly defrauding Cognizant of "over $86,000," Srinivas admitted that he has no knowledge of whether there was any financial loss to Cognizant whatsoever and had no knowledge of whether Cognizant had suffered a financial loss at the time he sent his email accusing Plaintiff of $86,000 in fraud. (Pa458, Pa1168.) Moreover, despite taking such a swift move to terminate Plaintiff for this alleged "fraud," Srinivas testified that he was unaware of anyone at Cognizant doing any investigation into the fraud, and that he himself did not direct any investigation. (Pa458, Pa1168.) It is absurd Srinivas was so concerned about fraud he fired Plaintiff immediately and then could not be bothered to figure out (even out of curiosity) whether this fraud had actually cost his company any money.

Surprisingly, Srinivas did not even discuss the potential "fraud" with Plaintiff's supervisor Chopra (who might actually have information about the circumstances of any alleged fraud) – instead telling her to terminate Plaintiff. (Pa459, Pa1169.) Indeed, Anand's testimony echoes the weaknesses in the testimony of Srinivas. Defendant Anand testified that he had no objection to Plaintiff using Staffing Idea as what he referred to as a "pass through window." (Pa457, Pa1167.) He also testified that he is not aware of any NLB policies that Plaintiff was violating by doing so. (Pa457, Pa1167.)

The decision to terminate Plaintiff was made within an extraordinarily

short timeframe, and without any deliberative process. The rush to terminate hints strongly at an ulterior motive, reinforcing the argument that the stated reasons for the termination were pretext. A reasonable juror could determine that Defendants' actions are suspect and that they have something to hide. Given the direct testimony evidence that Plaintiff disclosed the nature of Staffing Idea prior to her termination, the temporal proximity of the termination to her protected activity, and the evidence of pretext, there is sufficient evidence to preclude summary judgment with regard to Plaintiff's LAD retaliation claim.

C. The Individual Defendants Are Liable for Aiding and Abetting.

Plaintiff's LAD aiding and abetting claims should also proceed to trial. Indeed, the LAD holds individuals liable for their LAD violations "through the awkward route of aiding and abetting." See DeSantis v. New Jersey Transit, 103 F. Supp.3d 583, 590-91 (D.N.J. 2015) (citing Cicchetti v. Morris Cnty. Sheriff, 194 N.J. 563, 594 (2008)). The LAD's express text as well as its interpretation by the Supreme Court of New Jersey confers individual liability on "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [under the LAD] . . . ." *See* N.J.S.A. 10:5-12(e). That implies the availability of personal liability for a violation of the LAD." DeSantis, 103 F.3d at 591; see also O'Toole v. Tofutti Brands, 203. F. Supp.3d 458, 467-68 (D.N.J. 2016). Here, the Cognizant-related individual

Defendants, Srinivas and Chopra aided and abetted the LAD violations against Plaintiff, based upon their roles in her harassment and termination.

POINT II

SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED ON PLAINTIFF'S CLAIMS AGAINST THE NLB DEFENDANTS.

(Pa1240-Pa1241)

The Trial Court should also have denied the summary judgment motion of the NLB Defendants, who filed a separate motion on similar grounds. For all the reasons set forth in Point I, Plaintiff set forth evidence of sexual harassment and retaliation against all Defendants. The NLB Defendant individuals Singh and Anand are also liable for aiding and abetting because, as set forth above, they played a central role in the harassment and retaliation Plaintiff endured.

POINT III

THE TRIAL COURT ERRED IN ITS ANALYSIS OF PLAINTIFF'S EMPLOYMENT RELATIONSHIP WITH DEFENDANTS.

(Pa1240-Pa1243)

In granting Defendants' Motions, the Trial Court held that, as a threshold issue, Plaintiff was not an "employee" and therefore not entitled to the LAD's protection. However, there is ample evidence in the record for a jury to determine that Plaintiff's working relationship with Defendants was, indeed,

that of an employee. For the purpose of a LAD claim, an employment relationship is analyzed under the factors set forth by the New Jersey Supreme Court in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998). The Pukowsky factors are:

> (1) The employer's right to control the means and manner of the worker's performance; (2) The kind of occupation—whether supervised or unsupervised; (3) The skill required in the particular occupation; (4) Who furnishes the equipment and workplace; (5) The length of time the individual has worked; (6) The method of payment; (7) The manner of termination of the work relationship (8) Whether there is provision for annual leave; (9) Whether the work is an integral part of the business of the employer (10) Whether the worker accrues retirement benefits; (11) Whether the employer pays social security taxes; (12) The intention of the parties.
>
> At 182-83.

A. Defendants' Designations are Meaningless in Practice.

First, the record provides evidence that the designation of Plaintiff as an Plaintiff's "independent contractor" status was functionally arbitrary within Defendants' business. Part of Plaintiff's job was to recruit candidates for positions at Cognizant. (Pa449, Pa1159.) As she testified, the criteria used to determine whether someone was hired as a direct employee, or a contractor were not based on the nature or substance of the job duties performed but were instead based on the source of the lead that brought the candidate to Cognizant. (Pa450,

Pa1160.) This was consistent with Plaintiff's own hiring and role at Cognizant, where she worked alongside direct Cognizant employees performing the same job. (Pa450 – Pa451, Pa1160 Pa1161.)

B. The Most Important Pukowsky Factor is Control.

In analyzing a potential employment relationship under Pukowsky, the most important factor "is the first, the employer's right to control the means and manner of the worker's performance. See Chrisanthis v. Cnty. of Atl., 361 N.J. Super. 448, 456 (App. Div.), certif. denied, 178 N.J. 31 (2003).

For example, in D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110 (2007), the New Jersey Supreme Court emphasized that the label used in a contract does not determine the worker's status if the actual circumstances of the work relationship suggest otherwise. In D'Annunzio, the Court held that the plaintiff had presented evidence of an employment relationship because he "pointed to many facts that support the creation of an employment relationship for CEPA purposes, notwithstanding that his agreement described him as an independent contractor." At 127. The New Jersey Supreme Court affirmed this Court's reversal of the trial court because the test "must hinge more on the degree of 'control and direction' exercised by the employer over the professional worker under the circumstances, and less on the lack of financial arrangements indicative of a traditional employee." Id., at 118.

In Hoag v. Brown, 397 N.J. Super. 34, 38 (App. Div. 2007), the plaintiff worked as a social worker for inmates in a state prison but was an employee of a contractor providing services at the facility and not an employee of the Department of Corrections (DOC). Id. at 40. However, because the DOC exercised significant control over her, the court reversed the trial court's summary judgment order and held that a jury could find the first factor favored LAD employee status and that the "the character of the relationship between the DOC and plaintiff could be considered that of an employer/employee for purposes of the LAD." Id. at 48-49.

C. There is Sufficient Record Evidence that Plaintiff Was an Employee Under a *Pukowsky* Analysis.

An analysis under the Pukowsky factors establishes Plaintiff's employment by Defendants, primarily because Defendants asserted the requisite control. Cognizant directed the specifics of her day-to-day activities and monitored how she performed her recruitment duties with periodic reports from Plaintiff to Chopra. (Pa449-Pa451, Pa1159-Pa1161.) The level of control mirrored the control exerted over direct Cognizant employees. (Pa449-Pa451, Pa1159-Pa1161.) She followed a work schedule similar to other Cognizant employees, working part of the week from Cognizant's Bridgewater office and part from home. (Pa450-Pa451, Pa1160-Pa1161.) Moreover, Plaintiff did not have the freedom typically associated with independent contractors to dictate

the terms of her work or engage with other companies, as Chopra advised her against it. (Pa449, Pa1159.)

Cognizant initiated the recruitment process, conducted several interviews, and ultimately decided to hire Plaintiff. (Pa448-Pa449, Pa1158-Pa1159). Plaintiff reported to Chopra, who acted as her supervisor. (Pa450, Pa1160.) Cognizant directed the specifics of her day-to-day activities, and monitored how she performed her recruitment duties with periodic reports from Plaintiff to Chopra – the same as direct Cognizant employees. (Pa449-Pa451, Pa1159-Pa1161.)

Though Plaintiff worked at Cognizant, NLB exerted control over her workplace through Singh's oversight as Plaintiff remained in contact with her during her employment. (Pa451, Pa1161.) In addition, Plaintiff was onboarded by NLB, was paid by NLB, and NLB played a substantial part in her termination. (Pa449, Pa457, Pa1159, Pa1167.)

Other Pukowsky factors also weigh in favor of employment. As to the second factor, Plaintiff was supervised in her work by Chopra. As to the fourth factor, Cognizant furnished the equipment and workplace. Plaintiff was provided with a Cognizant email address and required credentials to access Cognizant's facilities and worked at a workstation at the Bridgewater office. (Pa450-Pa451, Pa1160-Pa1161.) There is also evidence in the record that the

work performed by Plaintiff, recruiting for positions within the company, is integral to Defendants' business (the ninth factor), as it was also performed by Cognizant employees. (Pa449-Pa450, Pa1159-Pa1160.)

Regarding the seventh factor, Plaintiff was terminated consistent with the termination of an employee. In addition to her termination, Plaintiff's hiring process also indicates that she was a potential employee applying for a job, rather than an independent contractor seeking to enter into a commercial transaction with Defendants. Cognizant initiated the recruitment process, conducted several interviews, and ultimately decided to hire Plaintiff. (Pa448-Pa449, Pa1158-Pa1159.) Plaintiff's compensation and the terms of the "contract" were set by Cognizant and NLB, without negotiation on Plaintiff's part, which aligns more closely with traditional employment structures (Pa449, Pa1159.)

Based on the above, there is more than enough evidence in the record for a reasonable juror to determine that Plaintiff was Defendants' employee.

D. The Court Relied Too Heavily on the Purported "Intent" of the Parties, Overlooking the Significance of Control.

The Court, in rendering its opinion, placed dispositive weight upon the "intention of the parties," holding essentially that Plaintiff was an independent contractor because the parties understood her to be an independent contractor. Specifically, the Court cited to the following portions of the record:

> Let's start first with the intention of the parties. The plaintiff, in her deposition testimony, acknowledged that she is an independent contractor.
>
> (T1:30:5-7.)
>
> **********
>
> And did you understand what -- like whether you were being offered a contract or to come on as an employee? 'Answer: Yeah.' 'Question: Okay. 'Answer: As a contractor.' 'Question: A contractor? 'Answer: Yeah.
>
> (T1:30:12-19.)
>
> **********
>
> Plaintiff went on to state, and I believe it says even in her complaint, that she was anticipating becoming an employee of Cognizant at a point in time in the future. That never materialized. . .
>
> (T1:31:5-8.)
>
> **********
>
> Even in Miss Sanger's own mind, she clearly knew that she was there as an independent contractor . . .
>
> (T1:32:7-9.)
>
> **********
>
> She executed a consultant agreement with Cognizant specifying she would be an independent contractor. . .
>
> (T1:35:4-6.)

Ultimately, the Court determined that the intention of the parties was controlling and a sufficient basis on which to grant summary judgment:

> " . . . plaintiff indicates that there is ample evidence in the record for a jury to determine that plaintiff's working relationship with defendants was that of an employee and not an independent contractor, notwithstanding any paper contracts that were signed. That's, in essence, asking the Court to disregard the specific contracts that the plaintiff herself signed, which identified her as an independent contractor. And the Court's not willing to look -- look and push those documents to the side."
>
> (T1:35:10-20.)

The intention of the parties, however, is the twelfth Pukowsky factor, as the Trial Court acknowledged when it admitted that, for the purpose of the Pukowsky test, that it started "in reverse." (T1:32:4-6.) In doing so, the Court gave improper weight to this factor. The Trial Court should have held that Plaintiff was an employee based on a proper Pukowsky analysis.

POINT IV

THE TRIAL COURT ERRED BY MAKING CREDIBILITY DETERMINATIONS.

(Pa1240-Pa1243)

Beyond holding that Plaintiff was not entitled to the LAD's protections because the Trial Court held that she was an independent contractor, the Trial Court further stated that summary judgment would have been appropriate in any event but relied on credibility determinations in doing so. Credibility, though, is for the factfinder to determine. See generally Ferdinand v. Agric. Ins. Co. of

Watertown, N.Y., 22 N.J. 482, 492 (1956). If there are materially disputed facts, a motion for summary judgment may not be granted. See Brill, supra., 142 N.J. at 540.

The Trial Court's role at summary judgment is not to resolve contested factual issues; it may only determine whether there are any genuine factual disputes. See Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). Indeed, if reviewing the evidence to determine whether material facts are in dispute includes a credibility evaluation of evidence, a court should deny summary judgment. See Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011) (citing Parks v. Rogers, 176 N.J. 491, 502 (2003)); see also In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013) (It is improper to grant summary judgment when a party's "credibility is at issue.")

This case revolves around the allegation that Plaintiff was sexually propositioned by Defendants. (Pa455 - Pa456, Pa1165 - Pa1166.) Another pivotal issue in this case is whether Ms. Sanger disclosed her husband's ownership of Staffing Idea Factory and its use as a vendor for Cognizant. (Pa452 - Pa453, Pa1162 - Pa1163.)

Though the Trial Court relied on the employee / independent contractor issue in its decision, it also set forth that even if Plaintiff were an employee, it did not believe that Plaintiff had introduced enough record evidence to sustain

her claims of LAD hostile work environment or retaliation. However, the Court's reasoning was based upon the "credibility gaps" it identified in her testimony, leading it to discount critical portions of her testimony.

The Court identified that credibility played a part in its evaluation of the testimony:

> There was an entire -- I would call it throughout what I -- a lot of what I read of the plaintiff's testimony, there appears to be substantial credibility gaps. But, again, this Court is not hanging its hat, so to speak, on a credibility assessment of -- of the -- of the parties. The Court is not -- the Court is not doing that.
>
> (T1:41:10-16.)

These so-called "substantial credibility gaps" appear to have been used to disregard her testimony. For example, the Court took the position that Plaintiff and Srinivas had either "never met" or met only in the incident where Plaintiff alleges he inappropriately brushed her leg. Specifically, the Court stated:

> What she's describing there is a far cry from the I'm going to be told I need to go to a hotel room and have sex with Mr. Srinivas, who has never met me before.
>
> (T1:46:20-23.)
>
> **********
>
> Moving on, the third contention of a sexual conduct or sexual harassment is the allegation that Miss -- at a certain point, Miss Singh called the plaintiff and essentially invited her to go to a hotel room with Mr. Srinivas, whom she'd never met other than -- and,

> perhaps, again, we don't know before or after the one time that he bumped into her leg in a room -- in an office where there were other people.
>
> (T1:40:14-21.)

However, this is consistent only with Defendant Srinivas' testimony, and not Plaintiff's. Plaintiff testified that Defendant Srinivas visited the Bridgewater office approximately once per month, and that she made a point of greeting him because he was in a leadership position. (Pa451, Pa1161.) In essence, the Trial Court chose to "believe" Defendant Srinivas, rather than to believe Plaintiff, improperly assessing credibility.

Similarly, regarding Plaintiff's LAD retaliation claim, the Court made credibility assessments as to the purported legitimate business reason for her termination.

> It's clear to this Court that there was no pretextual conduct, but, instead, there was a rational and legitimate reason, meaning, there was -- and this Court's not finding fraud, but -- but there was the perception and, certainly, sufficient factual reason for the employer -- not -- excuse me, not employer -- of the two companies to conclude, and more specifically Cognizant to [conclude] that in fact this defendant was engaging in what could be perceived as fraudulent conduct.
>
> (T1:50:1-11.)

Again, the Court disregarded record evidence from Plaintiff's testimony. Plaintiff specifically contended that she had disclosed her husband's

involvement in Staffing Idea to both Chopra and Singh. (Pa452 - Pa453, Pa1162 -Pa1163.) If that is true, and for the purpose of a summary judgment motion it should be considered true, then there is clear evidence of pretext in that if the Defendants knew of the relationship, then all their testimony regarding Defendants "discovering" the conflict and acting is unworthy of credence.

These credibility determinations were improper at the summary judgment stage, where all inferences should be drawn in favor of the non-moving party, Plaintiff. The Trial Court's approach effectively weighed the credibility of the evidence, which should be the purview of the jury.

POINT V

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION.

(Pa1337-Pa1338)

The Trial Court also erred in denying Plaintiff's Motion for Reconsideration. A motion for reconsideration is within the sound discretion of the Court, to be exercised in the interest of justice. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration is to be used in those cases in which either (l) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent

evidence. Id.; R. 4:49-2. As set forth above, the Trial Court overlooked the record evidence that established that there was an employment relationship for the purpose of the LAD and weighted the intention of the parties disproportionately to the control exerted, inconsistent with the case law. The Trial Court further made credibility determinations that were improper on summary judgment. Therefore, the Court should have reconsidered its July 19, 2024 orders granting summary judgment.

POINT VI

THE TRIAL COURT ERRED IN DENYING PLAINITFF'S MOTION TO AMEND THE COMPLAINT.

(Pa1337-Pa1338)

Plaintiff should have been permitted to amend her Complaint to comport with the Trial Court's holding regarding her employment status. New Jersey courts have consistently emphasized that amendments should be allowed with great liberality to ensure that a litigant has the opportunity to present their case on the merits. Plaintiff moved to amend with a proposed Amended Complaint adding a discriminatory failure to contract under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(l). (Pa1244-Pa1245, Pa1276-Pa1288). The proposed Amended Complaint introduced no new facts and was consistent with Defendants' own legal position, that Plaintiff was an independent contractor.

Trial Courts should liberally grant motions for leave to amend pursuant to R. 4:9-1 "without consideration of the ultimate merits of the amendment." See Notte v. Merchants Mut. Ins. Co., 185 N.J. 490 (2006). The Court's analysis is two-fold: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile. Notte, supra., 185 N.J at 501. The burden of showing why leave to amend should not be granted also rests entirely with the non-moving party. See Coastal Group, Inc. v. Dryvit Systems, Inc., 274 N.J. Super. 171 (App. Div. 1994).

Whether an amended pleading would be futile is analyzed under the same standard that governs motions to dismiss under R. 4:6-2(e). See Notte, supra. 185 N.J., at 501; see also Mustilli v. Mustilli, 287 N.J. Super. 605, 607 (Ch. Div. 1995) (stating that an amendment is "futile" when "a subsequent motion to dismiss must be granted.") Defendants moved for summary judgment based upon N.J.S.A. 10:5-12(a), which makes it unlawful discrimination for an "employer, because of the . . . sex, gender identity or expression. . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." See N.J.S.A. 10:5-12(a)(emphasis added). However, the same statute, N.J.S.A. 10:5-12(l) also makes it unlawful discrimination for "any person to refuse to buy from, sell to, lease from or to,

license, contract with . . . or otherwise do business with any other person on the basis of . . . sex, gender identity or expression." See N.J.S.A. 10:5-12(l).

Courts have held that this provision of the LAD prohibits refusals to enter contracts based on protected characteristics. See Rubin v. Forest S. Chilton, 3rd, Mem'l Hosp., Inc., 359 N.J. Super. 105, 110-11 (App. Div. 2003) ("To distinguish between a refusal to enter into a contract and the termination of a contract where the motivation is illegal discrimination would mock the beneficial goals of the LAD, remedial legislation which should be liberally construed to advance its beneficial purposes.")

In the proposed amendment to the Complaint, which was factually similar to her claims for LAD retaliation, Plaintiff contends that Defendants terminated her contract based upon her refusal to engage in sexual activities and in retaliation for refusal of Defendants' sexual harassment. (Pa1276 – Pa1288.) For the same reasons that it would be a violation of the LAD if she were deemed to be an employee, it is a violation of N.J.S.A. 10:5-12(l) in the event the Court determines her to be an independent contractor. See J.T.'s Tire Servs., Inc. v. United Rentals N. Am., Inc., 411 N.J. Super. 236, 238 (App. Div. 2010) ("Plaintiffs also allege that because she refused the manager's advances, United ceased contracting with J.T. We hold that plaintiffs' complaint states a cause of

action for a discriminatory refusal to do business, under the Law Against Discrimination (LAD)")

Through this proposed amendment, Plaintiff was not changing any facts or denials but was simply incorporating a legal theory, consistent with the Trial Court's holding. There would be no prejudice to Defendants. In this case, the facts underlying the complaint remain unchanged, and the Defendants have already argued that the Plaintiff is an independent contractor. In Notte, supra., the amendment to the complaint was sought after the close of discovery. 185 N.J. at 496-97. The plaintiff was permitted to replead his time-barred claims as common law wrongful discharge and LAD claims. *Id*. at 501 (agreeing with the Appellate Division's holding that "[d]efendants have no cause to complain of the late assertion against them of claims grounded on the same conduct already alleged in the complaint" because "no cognizable prejudice will inure" from of the amendment.) Here, even if the Trial Court incorrectly held, as it did, that Plaintiff was an independent contractor, it should have permitted her to amend her Complaint in the absence of prejudice.

CONCLUSION

Plaintiff respectfully requests that this Court reverse the Trial Court's Order granting summary judgment to Defendants and remand the matter for trial.

Respectfully submitted,

s/Michael K. Fortunato

Michael K. Fortunato

Dated: January 22, 2025

NISHA SANGER, Plaintiff, vs. NEXT LEVEL BUSINESS SERVICES, INC., COGNIZANT TECHNOLOGY SOLUTIONS COMPANY, and NN SRINIVAS, AARTI CHOPRA, AYAN SAHA, SHRUTI SINGH, NIKHIL ANAND, and JOHN AND/OR JANE does 1-20 (Names Being Fictitious), in their individual and corporate capacities and as aiders and abettors. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-000592-24 DOCKET NO: SOM-L-001274-20 Appeal From Summary Judgment Entered by Superior Court Of New Jersey Somerset County: Law Division SAT BELOW: Hon. John E. Bruder, Superior Court, Civil Division, Somerset County

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS NEXT LEVEL BUSINESS SERVICES, INC., NIKHIL ANAND, AND SHRUTI SINGH

Date of Submission to Court: March 24, 2025

SQUIRE PATTON BOGGS (US) LLP
382 Springfield Avenue
Summit, New Jersey 07901

Attorneys for Defendants Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh

Of Counsel and On the Brief:
Mark C. Errico, Esq. (# 033631998)
D. Lewis Clark Jr. (admitted pro hac vice)
Melissa Legault (admitted pro hac vice)

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PRELIMINARY STATEMENT

The Trial Court properly granted summary judgment on Plaintiff's claims against NLB Defendants. First, the undisputed facts demonstrate Ms. Sanger was not an NLB employee and was thus not entitled to protections under the NJ LAD. In so holding, the Trial Court carefully analyzed each of the *Pukowsky* factors, citing the following facts in the record in support of its ruling: NLB did not control the means and manner of Ms. Sanger's performance or supervise her work; Ms. Sanger had autonomy to perform her job how she saw fit; Ms. Sanger testified she was a contractor, not an employee; Ms. Sanger did not work on NLB premises; NLB did not provide Ms. Sanger with any equipment; Ms. Sanger did not require training, and she had 15 years of experience in recruiting, so she did not need, nor did NLB or Cognizant provide, oversight or instruction; the contracts between the parties were not exclusive; NLB paid Mirosoft Corporation for the work Ms. Sanger performed; Ms. Sanger was not provided with annual leave and was not paying Social Security taxes; and Ms. Sanger's project was a limited term project with the possibility of extensions. Accordingly, Ms. Sanger was not an NLB employee and thus the Trial Court properly held NLB is not liable to Ms. Sanger under the LAD.

Further, even if Ms. Sanger was an employee of NLB, summary judgment was still appropriate because Ms. Sanger's allegations did not rise to the level

of actionable sexual harassment or retaliation under the LAD, and no reasonable factfinder could find in favor of Ms. Sanger on her claims against NLB Defendants. Ms. Sanger's claims hinge on her allegation that she was "propositioned for a sexual encounter" with Mr. Srinivas by either Ms. Singh or Mr. Anand sometime after Mr. Srinivas allegedly touched her leg with his for one to two seconds, and that her contract was terminated because she refused. However, despite the repeated mischaracterization of these conversations by Ms. Sanger's attorney as "propositions for sex," during her deposition, when asked about the alleged "proposition," Plaintiff testified Ms. Singh had invited her to a party at a hotel room, to be attended by several men, including Mr. Srinivas, and several women, and she was told "they were going to have a good time."

Ms. Sanger could not articulate why she thought Ms. Singh was proposing sex with Mr. Srinivas or saying Mr. Srinivas wanted to have sex with her. Although NLB Defendants deny these conversations occurred, even assuming they happened exactly as Ms. Sanger testified, they are insufficient to form the basis of a successful sexual harassment claim. There is no evidence in the record to support that the alleged invitation was of a sexual nature or occurred because of her gender – particularly because she testified both men and women were going to attend the party. Accordingly, putting aside the mischaracterizations and baseless innuendo proffered by Plaintiff's attorney and instead looking at the

actual evidence in the record (including Ms. Sanger's actual testimony), Plaintiff adduced no evidence from which a reasonable juror could return a verdict in her favor. Therefore, summary judgement was proper.

Further, the record evidence shows Cognizant decided to terminate Ms. Sanger's contract for legitimate, non-retaliatory reasons after NLB discovered that Ms. Sanger was defrauding the companies by using her husband's company, Staffing Idea Factory, to receive referral fees, without disclosing her clear conflict of interest, and there is no competent evidence that this reason was pretextual. In fact, in addition to Ms. Sanger, NLB also terminated the contracts of the 17 consultants she onboarded through Staffing Idea. Moreover, the Trial Court used the appropriate legal standards when assessing Ms. Sanger's claims, and credibility determinations did not improperly factor into the Trial Court's decision. In fact, the Trial Court made it clear that it was *not* making or relying upon credibility assessments. Finally, the Trial Court correctly denied Ms. Sanger's motion for reconsideration and motion to amend because such an amendment would have been futile and prejudicial to Defendants.

Ultimately, the Trial Court carefully assessed the evidence in the light most favorable to Ms. Sanger and correctly concluded that no reasonable juror could find in Ms. Sanger's favor on any of her claims. Accordingly, the Trial Court's rulings should be affirmed.

PROCEDURAL HISTORY

Plaintiff filed the Complaint in this action on October 30, 2020 against Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh (together, "NLB Defendants") as well as Cognizant Technology Solutions U.S. Corporation, Aarti Chopra, and Narasimha Srinivas Nandagiri (together, "Cognizant Defendants"), alleging violations of the New Jersey Law Against Discrimination, ("LAD") and Conscientious Employee Protection Act ("CEPA"), including: LAD hostile work environment sexual harassment; LAD retaliation; CEPA retaliation; LAD aiding and abetting; and CEPA aiding and abetting. (Pa1-Pa19.)

On April 26, 2024, NLB Defendants and Cognizant Defendants filed motions for summary judgment on all of Plaintiff's claims. (Pa78-Pa81; Pa360-Pa361.) The Court heard oral argument on Defendants' motions on July 19, 2024. (1T.) After analyzing all the evidence in the record, the Court applied the correct standard for summary judgment and concluded that each of Plaintiff's claims failed as a matter of law. (*Id.*) Specifically, the Court held, as an initial matter, Defendants could not be held liable under the LAD and CEPA because both laws require an employment relationship exist between a plaintiff and a defendant, and Plaintiff could not demonstrate that she was an employee of either company. (*Id.*) Even still, the Court addressed the remaining arguments

of the parties and concluded that summary judgment was also appropriate because Plaintiff failed to demonstrate, as a matter of law, the severe or pervasive element of her hostile work environment claims, and her retaliation and aiding and abetting claims similarly failed because she could not rebut Defendants' legitimate, nonretaliatory reason for her termination by demonstrating pretext. (*Id.*) Following oral argument, on July 19, 2024, the Court entered two Orders granting summary judgment to all Defendants on Plaintiff's claims. (Pa1240-Pa1243.)

On August 8, 2024, Plaintiff moved for reconsideration of the Court's July 19, 2024, orders and, in the alternative, to amend the complaint to include a Sixth Cause of Action against all Defendants for failure to contract based upon Plaintiff's gender in violation of N.J.S.A § 10:5-12(l). (Pa1244-Pa1245.) The Court heard oral Argument on September 27, 2024 (2T), and on September 30, 2024, the Court entered an Order denying Plaintiff's Motion. (Pa1337-Pa1338.)

Plaintiff filed a Notice of Appeal on October 29, 2024. (Pa1339.) Ms. Sanger subsequently filed her appellate brief and appendix asserting six grounds for appeal. Plaintiff elected to limit her appeal to her LAD claims based on CEPA's election of remedies provision.

COUNTER STATEMENT OF FACTS

A. Background on Defendants

NLB is an information technology, consulting, and staffing solutions company with headquarters in Georgia. (Pa104-Pa107 at ¶7.) Its purpose is to help companies connect with permanent, temporary, and contractual professionals. (*Id.*) Among other things, NLB onboards individuals as independent contractors and then assigns them to work at other client entities, such as, in this case, Cognizant. (*Id.* at ¶ 8.) Cognizant is an information technology services and consulting company. (*Id.* at ¶ 9.)

During Ms. Sanger's contract term, Shruti Singh served as NLB's Manager of Client Relations, and she has since served as Director of Client Relations and Associate Vice President of Client Relations. (Pa1131-Pa1149 at 16:15-21; 18:3-9; 23:3-24:5.) In her role, Ms. Singh is responsible for managing client relationships. (*Id.*) Nikhil Anand has worked for NLB since February 2008. (Pa1111-Pa1129 at 15:2-9; 16:18-22.) During Ms. Sanger's contract term, Mr. Anand served as NLB's Senior Vice President of Operations, which is the role he still holds today. (*Id.*) In this role, Mr. Anand is responsible for managing day-to-day operations, managing deliveries, as well as ensuring and maintaining client relationships. (*Id.*) NN Srinivas worked for Cognizant from approximately 2004 until February 2020. (Pa1092-Pa1109 at 18:17-21:17.) Mr. Srinivas held

numerous positions at Cognizant, but during Ms. Sanger's contract term, Mr. Srinivas served as Senior Director. (*Id*.) In this role, Mr. Srinivas was responsible for running talent acquisition for management recruitment. (*Id*. at 21:6-22:6.) Aarti Chopra worked for Cognizant from approximately 2010 until April 2022. (Pa1065-Pa1081 at 14:7-13.) During Ms. Sanger's contract term, Ms. Chopra served as a Senior Manager for Cognizant. (*Id*. at 14:20-15:6) In this role, Ms. Chopra was responsible for overseeing recruitment. (*Id*.)

B. NLB Engaged Ms. Sanger as an Independent Contractor Through her Company, Mirosoft.

In February 2019, Cognizant asked NLB to engage Ms. Sanger as an independent contractor to serve as a technical recruiter through Ms. Sanger's company, Mirosoft Corporation ("Mirosoft"), and NLB did so. (Pa104-Pa107 at ¶11.) Ms. Sanger's contractor onboarding documents included an Agency Agreement and a Purchase Order between NLB and Mirosoft. (Pa191-Pa197; Pa281-Pa282.) Ms. Sanger also entered into a Consultant Agreement with Cognizant. (Pa182-Pa187.) Notably, in Exhibit B-1 of that document, Ms. Sanger agreed to abide by Cognizant's Core Values and Standards of Business Conduct, which explains the importance of avoiding conflicts of interest. (*Id*.; *see also* Pa199-Pa231) Further, as part of the contractor onboarding process, Ms. Sanger completed a Personal Data/Emergency Contact Information form, listing her address as 3 Margret Pl, East Brunswick, NJ 08816, and her emergency

contact as her spouse, Manoj Sanger. (Pa189.)

It was the parties' clear intention that NLB engaged Ms. Sanger as an independent contractor and that Ms. Sanger would perform work for NLB's client, Cognizant. (Pa104-Pa107 at ¶12.) Ms. Sanger worked approximately two days per week at Cognizant's Bridgewater, New Jersey office and approximately three days per week from home. (*Id.* at ¶ 13; *see also* Pa551 at 83:4-24) Ms. Sanger did not perform work on NLB premises, and NLB did not provide Ms. Sanger with a laptop or a phone. (Pa104-Pa107 at ¶14; *see also* Pa551 at 83:4-24; Pa633 at 165:15-23) In practice, NLB did not control the means and manner of Ms. Sanger's performance or supervise Ms. Sanger's work, and Ms. Sanger had the autonomy to perform her job when and how she saw fit, with very little oversight from either Cognizant or NLB. (Pa104-Pa107 at ¶15; *see also* Pa962-Pa965 at 568:7-571:7.) The contracts between NLB and Cognizant on the one hand and Ms. Sanger and Mirosoft on the other were not exclusive. (Pa104-Pa107 ¶ 16.) Further, NLB did not provide Ms. Sanger annual leave and did not pay social security taxes, and the project term was limited to 12 months in duration, with possible extensions. (*Id.* at ¶ 17.) Overall, NLB served as little more than a payment processor, ensuring Mirosoft was paid for the services Ms. Sanger provided to Cognizant. (*Id.* at ¶ 18.)

C. NLB Uncovered Fraudulent Activity by Ms. Sanger and Her Husband's Company, Staffing Idea Factory.

In the early summer of 2019, Ms. Sanger introduced a company called Staffing Idea Factory ("Staffing Idea") to NLB and Cognizant and began passing the resources hired and on-boarded by NLB through that company, giving Staffing Idea sizable referral fees. (Pa1143-Pa1147 at 46:18-63:22.) At first, because it was not uncommon for recruiters to use such third parties from time to time, NLB agreed to work with Staffing Idea without questioning Ms. Sanger. (*Id.* at 46:18-47:15.) However, after a few months, the business going to Staffing Idea steadily increased, and something about the company seemed suspicious. (*Id.* at 50:14-57:16.) For example, Ms. Sanger told NLB to use Staffing Idea only for onboarding, and she told NLB personnel to never contact Staffing Idea because they did not want to speak with NLB. (*Id.* at 50:19-23; 53:19-54:8.) Further, Ms. Sanger was giving repeated business to Staffing Idea, and a substantial number of her candidates were being placed through the company, which was unusual. (*Id.*)

Because the situation surrounding Staffing Idea seemed so strange, Ms. Singh decided to conduct some online research and saw Staffing Idea had virtually no online presence. (*Id.* at 50:19-23; 52:4-12; 53:19-54:8.) Ms. Singh also discovered the address associated with Staffing Idea on file with the New Jersey Division of Revenue Business Registration was the same home address

Ms. Sanger had given on her onboarding forms. (*Id.* at 53:19-54:8; 58:6-17; *see also* Pa104-Pa153.) Further, the person listed as the company contact associated with Staffing Idea was Manoj Sanger, Ms. Sanger's husband. (*Id.*) Until Ms. Singh discovered the connection between Staffing Idea and Ms. Sanger's husband, NLB had no knowledge of Mr. Sanger's ownership interest in Staffing Idea. (Pa104-Pa107 at ¶19.) Because of this failed disclosure, NLB improperly paid Staffing Idea $13,872 in contracting referral fees and $28,000 in full time placement referral fees, for a total of $41,872. (*Id.* at ¶ 20.) Soon after Ms. Singh discovered this information, on November 6, 2019, she shared her findings with her superiors, Nikhil Anand, NLB's SVP of Operations and Sachin Alug, NLB's CEO. (Pa1146-Pa1147 at 59:13-62:6; *see also* Pa104-Pa153.)

D. NLB and Cognizant Terminated the Contracts with Mirosoft.

On that same day, November 6, 2019, NLB informed Mr. Srinivas of the flagged case, via phone and via email. (Pa1103-Pa1104 at 44:3-48:18; *see also* Pa155-Pa166.) After considering the information uncovered by NLB, Cognizant decided to end Cognizant's relationship with Mirosoft and Ms. Sanger immediately. (*Id.*) NN Srinivas, Brian Riley, and Ron Fish called Ms. Chopra together to inform her that the company had been made aware that Ms. Sanger had acted in a way that was not compliant, and Cognizant had made the decision to end the relationship. (Pa1077- Pa1081 at 46:5-65:22.) Due to the immediacy

of the situation, Ms. Chopra was not given all the details behind the reason for the decision at that time, other than the brief mention of fraudulent activity. (*Id*.)

Cognizant asked Ms. Chopra to meet with Ms. Sanger to inform her that her contract was terminated. Ms. Chopra agreed. (*Id*.) Ms. Chopra called Ms. Sanger and asked her to come to the office the next day, November 7, 2019. (*Id*.) During the meeting, Ms. Chopra told Ms. Sanger that her contract with Cognizant was being terminated effective immediately. (*Id*.) At that time, Ms. Chopra did not have all the details regarding the reason for the termination, and she was acting on the instructions she received during her conversation with Mr. Srinivas, Mr. Riley, and Mr. Fish. (*Id*.) After her meeting with Ms. Chopra, Ms. Sanger called Ms. Singh to inform her about the termination. (Pa732-Pa733 at 264:25-265:24.) Ms. Sanger never mentioned any allegations of sexual harassment to Ms. Singh or indicated she believed retaliation was the motive behind the termination. (Pa733-Pa734. at 265:11-266:20.) Neither Ms. Singh nor Mr. Anand participated in the decision to terminate the contract with Ms. Sanger's company. (Pa1125 at 55:21-56:3; Pa1147 at 63:11-22.)

On November 7, 2019, NLB confirmed via email that NLB and Cognizant had detected potential fraud and that the MSA and Purchase Order were being terminated. (Pa284.) In the email, Ms. Sanger was informed that, upon completion of the investigation, NLB would consider bringing legal proceedings

against Mirosoft and other related parties. (*Id*.) In addition, on November 8, 2019, NLB contacted Staffing Idea to inform the company that NLB and Cognizant had detected potential fraudulent activity and that it was immediately terminating the MSA, Referral Purchase Orders, and FTE Agreements for their 17 consultants. (Pa286.) Further, NLB demanded that Staffing Idea refund the amounts paid by NLB. (*Id*.)

E. Ms. Sanger's Post-Termination Communications.

Shortly after her termination, Ms. Sanger subsequently reached out to various members of NLB and Cognizant asking for payment from NLB for work she completed for Cognizant in October and November 2019. (Pa289-Pa292.) NLB notified Ms. Sanger it could not consider her October and November invoices for payment while the investigation into her suspected fraudulent activity was still ongoing and informed her that her case had been transferred to the legal department for review. (*Id*.) Notably, Ms. Sanger did not mention in any of these communications that she had been sexually harassed by Mr. Srinivas or anyone else or that she believed her termination was in retaliation for refusing sexual advances. (*Id*.)

Once NLB had time to investigate and understand the extent of the fraud perpetrated on it by Ms. Sanger, on December 9, 2019, NLB's attorney sent a letter to Ms. Sanger outlining her fraudulent behavior and demanding she

immediately refund the $41,872 she had improperly collected from NLB through Staffing Idea. (Pa294.) NLB never received a response to this letter from Ms. Sanger or any representative from Mirosoft or Staffing Idea.

On February 14, 2020, Ms. Sanger emailed Ms. Chopra, asking again for payment regarding work she completed in October and November 2019. (Pa296-Pa298.) Once again, Ms. Sanger did not mention anything about sexual harassment or retaliation. (*Id*.) In response to Ms. Sanger's email, on February 18, 2020, counsel for NLB followed up with Ms. Sanger demanding she stop communicating directly with Cognizant and reminding her about the money she owed NLB based on her fraudulent activity. (Pa300-Pa301.) Again, NLB received no direct response, but around this time, Ms. Chopra began receiving threatening text messages from an unknown sender demanding payment and threatening Ms. Chopra's children. (Pa388-Pa394.) During this time, NLB was still trying to determine the best course of action regarding payments for Ms. Sanger's services in October and November and how to recoup the amount she fraudulently obtained through Staffing Idea. (Pa104-Pa107 at ¶21.)

NLB ultimately decided that, despite the outstanding amount owed to NLB by Staffing Idea, NLB would pay Mirosoft for the services Ms. Sanger performed in October and November. NLB tried to get in touch with Ms. Sanger in order to bring closure to the outstanding invoices, but they were unable to

reach her. (*Id*. at ¶ 22 *see also* Pa303.) On February 25, 2023 NLB paid Mirosoft for the service Ms. Sanger rendered in October and November. (*Id.* at ¶ 23; *see also* Pa333-Pa335.)

F. Ms. Sanger's Allegations Against Ayan Saha

In her Complaint, Ms. Sanger asserts multiple allegations against Cognizant employee, Ayan Saha. (Pa1-Pa19.) However, based on her deposition testimony, Ms. Sanger concedes none of Mr. Saha's alleged behavior was directed at her and that she experienced none of his behavior firsthand. (Pa675-Pa709 at 207:2-241:5.) In fact, Mr. Saha worked in India, and Ms. Sanger never interacted with Mr. Saha in person. (Pa998-1002 at 604:10-608:5.)

G. Ms. Sanger's Allegations Against NN Srinivas

In her Complaint, Ms. Sanger claims "defendant Srinivas' brazen, harrowing sexual harassment of Sanger … began during or around October 2019" when he "inappropriately touched Sanger by rubbing his legs against hers." Ms. Sanger alleged that, in response, she "recoiled and turned away, clearly signaling to defendant Srinivas that his conduct was unwelcome." (Pa1-Pa19.) However, during her deposition, Ms. Sanger admitted she was referencing an interaction she had with Mr. Srinivas during which he entered the doorway during a meeting she was having with Ms. Chopra and Ms. Patnaik, and his leg made contact with her right calf for only "one or two seconds."

(Pa727-Pa728 at 259:20-260:1.)

Ms. Sanger was unable to recall when this interaction allegedly occurred. (Pa729 at 261:3-5; Pa1009 at 615:1-2.) When asked how she reacted, Ms. Sanger testified "I just moved a little bit on the left towards [Ms. Patnaik]. I don't know if I moved like this or I shifted my chair, but I just moved a little bit on the other side." (Pa1008 at 614:13-17.) According to Ms. Sanger, she and Mr. Srinivas did not make eye-contact, and she did not say anything to Mr. Srinivas, Ms. Chopra, or Ms. Patnaik about the alleged contact. (*Id.* at 614:4-25.) In fact, Ms. Sanger did not express that the contact was unwelcome, and she did not report the incident to anyone. (Pa1010 at 616:12-14.) Neither Ms. Chopra nor Ms. Patnaik recall this alleged contact between Mr. Srinivas and Ms. Sanger's right calf, and Mr. Srinivas denies he ever intentionally rubbed his leg against Ms. Sanger's leg. (Pa1092-1109 at 43:1-3.)

H. Ms. Sanger's Allegations Regarding Ms. Singh and Mr. Anand

In her Complaint and in her verified answers to NLB Defendants' interrogatories, Ms. Sanger alleged that, sometime after Mr. Srinivas allegedly touched her leg with his, Mr. Anand called Ms. Sanger and "propositioned her to engage in sexual relations with defendant Srinivas" and offered to pay for the hotel room using "his personal credit card[.]" (Pa1-Pa19; Pa337-Pa359.) She then alleges that, just a few days later, Ms. Singh called her and asked "if she

had made a decision with regard to defendant Anand's offer[,]" stating "[i]f you refuse, it's not going to end well for you." (*Id.*)

However, during her deposition, Ms. Sanger's story changed. At that time, she testified that *Ms. Singh* was the one who called her first about the "proposition" and said that the hotel would be booked and paid for using NLB's credit card and that *Mr. Anand* is the one who followed up asking if she had made a decision. (Pa770-789 at 302:3-321:12; Pa1011-Pa1020 at 616:22-626:4.) Notably, Ms. Sanger could not recall the details of the alleged telephone call between her and Ms. Singh in which Ms. Singh allegedly propositioned Ms. Sanger to have sex with Mr. Srinivas. (Pa770-789 at 302:16-305:8) In fact, Ms. Sanger was not even able to articulate what led her to contend that she believed Ms. Singh was proposing sex with Mr. Srinivas or saying that Mr. Srinivas wanted to have sex with her. (*Id.*) Ms. Sanger remembered even less about her alleged conversation with Mr. Anand regarding the alleged proposition for her to have sex with Mr. Srinivas. (*Id.* at 319:1-321:15.)

Later in the deposition, Ms. Sanger clarified that, when Ms. Singh asked her to go to a hotel room with Mr. Srinivas, she was actually inviting Ms. Sanger to a party where there would be several men and several women in attendance. (Pa938-Pa940 at 544:6-546:20.) Both Mr. Anand and Ms. Singh vehemently deny these conversations occurred and deny they ever propositioned Ms. Sanger

to have sex with Mr. Srinivas. (Pa1125 at 54:6-55:16); Pa1147-Pa1148 at 65:24-68:10.) Further Mr. Srinivas denies he ever instructed Mr. Anand to invite Ms. Sanger to a hotel room to meet with him. (Pa1103 at 43:4-16.) Ms. Sanger testified she did not report the alleged propositions to anyone at Cognizant or NLB. (Pa1019 at 625:2-5.)

Notably, in response to Defendants' discovery requests and in support of her claims, Ms. Sanger produced WhatsApp messages purporting to be between her and Ms. Singh in which "Ms. Singh" attempts to pressure Ms. Sanger to have sex with Mr. Srinivas and threatens her job if she refuses. (Pa273-Pa279.) However, once numerous inconsistencies and flaws in these messages[1] were pointed out to Ms. Sanger and her counsel, Ms. Sanger contrived a new story in which she claimed to have received the screenshots via text message from an anonymous source sometime after she filed the Complaint. (Pa796-Pa817 at 328:9-349:17.) Upon receiving the screenshots, she saved them, blocked the number that sent them, emailed them to herself, and then emailed them to her attorney. (*Id.* at 329:2-333:5.) Because Ms. Sanger blocked the sender and

[1] For example, an export of the entirety of Ms. Singh and Ms. Sanger's WhatsApp communications does not contain these messages (see Pa233-Pa271); Plaintiff made no prior mention of these messages in her demand letter or Complaint; the "sender" and "recipient" nonsensically switch over between the first and second conversation; the messages did not contain a date or time indicating when they were sent or received, etc.

deleted the messages containing the screenshots, she is unable to provide any details that could help identify the alleged sender. (*Id.* at 323:24-349:17.) When questioned about the messages during her deposition, Ms. Sanger revealed that she originally thought someone (likely Ms. Singh) sent her the messages in an attempt to help her case, but since the flaws in the messages were brought to her attention, she now believes that someone deliberately sent her fabricated text messages in an attempt to undermine her case. (*Id.* at 341:24-346:1.) Even still, Ms. Sanger indicated she does not recall whether she actually received the messages, and she now does not seem to be alleging that these messages are authentic. (*Id.* at 323:24-349:17.)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS AGAINST THE NLB DEFENDANTS (PA1240-PA1241)

Appellate review of a trial court's grant of summary judgment employs the same standard of review as the trial court. *See Busciglio v. DellaFave*, 366 *N.J. Super.* 135, 139 (App. Div. 2004). Rule 4:46-2(c) provides that summary judgment should be granted when pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is "no genuine issue of any material fact challenged and that the moving party is entitled to a

judgment or order as a matter of law." *R.* 4:46-2 (2008). An issue of fact becomes genuinely disputed only if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Id.*

The standard for summary judgment as set forth in R. 4:46-2 has been clarified by the Supreme Court of New Jersey in *Brill v. Guardian Life Ins. Co. of America.*, 142 N.J. 520 (1995). In *Brill*, the New Jersey Supreme Court held:

> [W]hether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.

Id. at 540. Even in light of the deference afforded to the non-movant, summary judgment is still appropriate in some instances. It will not suffice for the non-moving party to raise the issue of just any disputed fact. In the case where only insubstantial factual disputes arise, the court should grant summary judgment. *Id*. at 529.

On a motion for summary judgment, the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id*. at 540. However, the fact that the trier of

fact makes determinations as to credibility "does not require a court to turn a blind eye to the weight of the evidence" and "the opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Triffin v. Am. Int'l Grp, Inc., et al*, 373 N.J. Super. 517 (App. Div. 2004) (internal quotations omitted). Further, unsupported self-serving deposition testimony, which is contradicted by the record, is insufficient to defeat summary judgment. *Parker v. Sch. Dist. Of Philadelphia,* 823 F. App'x 68, 72 (3d Cir. 2020).

A. The Trial Court properly concluded that plaintiff was an independent contractor, not an employee.

The Trial Court correctly determined that Ms. Sanger's LAD claims failed as a matter of law because Ms. Sanger was NLB's independent contractor – not an employee – and as such was not entitled to the protections provided under the LAD. *Pukowsky v. Caruso*, 312 N.J. Super. 171, 184, 711 A.2d 398, 405 (App. Div. 1998) ("In sum, we hold that the LAD was intended to prohibit discrimination in the context of an employer/employee relationship, and that independent contractors are not 'employees' within the meaning of the statute.").

To determine whether Plaintiff was an independent contractor or an employee as a matter of law, the Trial Court analyzed the facts in the record using the *Pukowsky* twelve-part "totality of the circumstances test." (1T33). Specifically, the Court utilized the following factors to determine Plaintiff's status:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Pukowsky, *supra*, 312 N.J. Super. at 184). Notably, under this test, majority rule does not apply. Although "right to control" is typically viewed as the "most important" factor, "'[a] principled application' of the factors and a consideration of which factors are more important under the peculiar circumstances" is necessary when making the employee versus independent contractor analysis. *Chrisanthis v. Cnty. Of Atlantic*, 361 N.J. Super. 448, 455, 825 A.2d 1192, 1197 (App. Div. 2003). Absolute unanimity also is not required to support summary judgment, meaning an individual may be found to be an independent contractor even if there are factors favoring a finding of employee status. *Id.* at 465. The Court must balance those factors supporting employee status with those supporting independent contractor status. *Id.*

Here, after considering the totality of the circumstances and balancing the relevant factors, the Trial Court correctly determined Plaintiff was an independent contractor and not an employee. Contrary to Plaintiff's assertions,

the Court did not find the intention of the parties to be "controlling" but instead refused to ignore it completely and simply analyzed it as one of the many factors in the analysis. Further, by lumping NLB and Cognizant Defendants together, Plaintiff grossly misstates the factual evidence with respect to NLB Defendants.

From the beginning of the relationship, it was the parties' clear intention that Ms. Sanger was an independent contractor – not an employee. Notably, the arrangement with NLB was facilitated through Ms. Sanger's company, Mirosoft, and was governed by an Agency Agreement and Purchase Order executed between NLB and Mirosoft. (Pa190-Pa197; Pa280-Pa282.) Further, Ms. Sanger testified specifically that she was engaged by Cognizant and NLB as a contractor, not as an employee. (*See* Pa85 at ¶ 12.) Even still, while the Court did begin its analysis with the intent of the parties,[2] that was by no means the only factor the Court considered. Rather, the Court provided a thorough analysis of each factor, including the right to control, and concluded no employment relationship existed between Plaintiff and NLB (or Cognizant).

Ms. Sanger was a contractor in both name and practice. Importantly, contrary to the assertions in her Brief, Plaintiff herself testified that she had the

[2] Contrary to Plaintiff's assertions, the case law does not suggest that the twelve factors are in order from most important to least important, and there is no set order in which the factors must be analyzed. Accordingly, Plaintiff's claim that the intention of the parties is listed as the "**twelfth** *Pukowsky* factor" or that there was a problem with the Court analyzing that factor first, is without merit.

autonomy to perform her services how she saw fit, with little oversight, and that neither Cognizant nor NLB controlled the means and manner of her performance. (Pa962-Pa965 at 568:7-570:24 (testifying she had 15 years of experience in recruiting, she did not require oversight or instruction, she knew how to source, vet, and screen candidates, and was familiar with the job boards and agencies).)

Further, the contract between NLB and Mirosoft was not exclusive, meaning Ms. Sanger was free to perform work for other companies during her contract with NLB. (Pa104-Pa107 at ¶16.) NLB paid Mirosoft for Ms. Sanger's work, NLB did not provide Ms. Sanger annual leave, she did not pay social security taxes, and the project term was limited to 12 months in duration, with possible extensions. (*Id* at ¶17.) Further, Ms. Sanger did not perform work at NLB facilities, and NLB did not provide her with equipment, such as a laptop or a cell phone. (Pa104-Pa107 at ¶14; Pa551 at 83:4-24; Pa633 at 165:15-29.)

In short, NLB served as little more than a payment processor, ensuring Ms. Sanger's company was paid for the work she performed for Cognizant. (Pa104-Pa107 at ¶18.) These were all factors the Trial Court considered when concluding that Ms. Sanger was an independent contractor as a matter of law and that, by virtue of N.J.S.A. 10:5-12(a), she was not entitled to relief under the LAD. (1T.)

Further, it is worth noting that Plaintiff's counsel "openly concede[d]" during oral argument that the facts supporting employment are not as strong with respect to NLB. (*Id.* at 23:20-24:18.) In fact, the *only* evidence Plaintiff proffers in support of an employment relationship with respect to NLB is that "NLB exerted control over her workplace through Singh's oversight as Plaintiff remained in contact with her during her employment" and the fact that "Plaintiff was onboarded by NLB, was paid by NLB, and NLB played a substantial part in her termination." (Pb36.) However, Plaintiff's counsel blatantly misstates Ms. Sanger's actual testimony, as Ms. Sanger did not testify that NLB exerted control over her workplace. (Pa962-Pa965 at 568:7-570:24.) Moreover, none of those facts demonstrate sufficient control to support an employment relationship as contact, onboarding, payment, and termination would all be present in a contractor relationship as well.

For all of these reasons, the Trial Court correctly determined Plaintiff was not an employee of NLB and thus, her LAD claims against NLB fail as a matter of law based on her independent contractor status alone.

B. Ms. Sanger's allegations did not rise to the level of actionable sexual harassment.

Even assuming *arguendo* that Ms. Sanger was an employee of NLB under New Jersey law (she was not), the evidence does not support her hostile work environment sexual harassment claims because the conduct she allegedly

endured was not sexual in nature nor based on her gender. In order to establish a hostile work environment claim under the LAD, a Plaintiff must show (1) the conduct complained of was unwelcome, (2) it occurred because of protected-class status, and (3) a reasonable person in the same protected class would consider it sufficiently severe or pervasive to alter the plaintiff's working conditions. *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-04 (1993).

In reviewing a hostile work environment claim, courts review all circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physical, and whether it unreasonably interferes with an employee's work performance. *Shepherd v. Hunterdon Dev. Ctr.*, 174 N.J. 1, 124 (2002). "When evaluating whether conduct is sufficiently severe or pervasive to create a hostile work environment, we focus on the harassing conduct, not its effect on the plaintiff or the work environment." *Cutler v. Dorn*, 196 N.J. 419, 431 (2008). Whether harassing conduct makes a work environment hostile is assessed by use of a reasonable person standard. *Id.* Thus, severe or pervasive conduct must be conduct that would make a *reasonable person believe* the conditions of employment are altered and the working environment is hostile. *Id.*

Here, Ms. Sanger could not demonstrate that a reasonable person would consider the alleged conduct by NLB sufficiently severe or pervasive to alter the

conditions of employment and create an intimidating, hostile, or offensive working environment. Ms. Sanger's harassment allegations fell into three main categories: (1) conduct by Cognizant employee, Mr. Saha – whom Ms. Sanger never met in person because he worked in India;[3] (2) conduct by Cognizant employee, Mr. Srinivas; and (3) conduct by NLB employees, Shruti Singh and Nikhil Anand on behalf of Mr. Srinivas.

As a preliminary matter, NLB notes that any claims regarding the alleged behavior of Cognizant employees, Mr. Saha and Mr. Srinivas, are directed at Cognizant and not NLB, as NLB had no control over these Cognizant employees, and Ms. Sanger never reported the alleged behavior to anyone at NLB. *See*, *e.g.*, *Devine v. Prudential Ins. Co. of America*, Civil No. 03-03971 (FLW), 2007 WL 1875530, at *23 (D.N.J. June 28, 2007) ("An employer is only liable for a hostile work environment if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and remedial action.") (internal citation and quotation omitted). To the extent that Ms. Sanger brings these claims against NLB Defendants, they simply do not rise to the level of

[3] It appears that Ms. Sanger has abandoned her claims with respect to Mr. Saha's alleged behavior, as she does not mention Mr. Saha or her allegations against him in her Brief. Accordingly, we will only address the allegations Ms. Sanger relies on in her Brief.

actionable harassment under New Jersey law.

1. The alleged contact between Mr. Srinivas and Ms. Sanger's leg does not constitute actionable sexual harassment.

In her Complaint, Ms. Sanger's attorney claimed she experienced "brazen harrowing sexual harassment" that began when Mr. Srinivas "inappropriately touched her leg during a meeting." (Pa1-Pa19 at p. 17.). However, based on Ms. Sanger's own testimony, the actual encounter was far less salacious than this mischaracterization implies. Specifically, when asked about this incident during her deposition, Ms. Sanger testified she was in a meeting with Ms. Chopra and Ms. Patnaik at Cognizant's office in Bridgewater, New Jersey when Mr. Srinivas entered the doorway, and his leg made contact with her right calf for "one or two seconds." (Pa727-Pa728 at 259:20-260:1.)

When asked how she reacted, Ms. Sanger testified she "just moved a little bit" and "shifted [her] chair." (Pa1008 at 614:13-25.) Ms. Sanger and Mr. Srinivas did not make eye-contact, and Ms. Sanger did not say anything to Mr. Srinivas, Ms. Chopra, or Ms. Patnaik. (*Id.*) In fact, Ms. Sanger did not express that the contact was unwelcome, and she did not report the incident to anyone. (Pa1010 at 616:12-14.) Neither Ms. Chopra nor Ms. Patnaik recall this alleged contact between Mr. Srinivas and Ms. Sanger's right calf. (Pa1092-Pa1109 at 43:1-3.) Notably, during her deposition, Ms. Sanger was unable to

even recall when this interaction allegedly occurred. (Pa729 at 261:3-5; Pa1009 at 615:1-2.)

Ultimately, even if the contact between Mr. Srinivas and Ms. Sanger occurred exactly as Ms. Sanger testified (which NLB disputes), there is simply no way a reasonable factfinder would conclude that Mr. Srinivas's behavior was severe or pervasive such that a reasonable person would believe the conditions of employment were altered or the working environment was hostile based on this one, isolated incident. *See Sessoms v. Trustees of Univ. of Penn.*, 739 Fed. App'x 84, 90 (3d Cir. 2018) (finding summary judgment on hostile work environment claim was proper where plaintiff alleged a single incident where her supervisor made a single unwanted physical contact with plaintiff's leg).

2. No reasonable factfinder could find in favor of Ms. Sanger on her claims against NLB employees, Mr. Anand and Ms. Singh.

Ms. Sanger has presented a convoluted and elaborate story regarding NLB employees, Mr. Anand and/or Ms. Singh, allegedly "propositioning her to engage in sexual relations with defendant Srinivas." Ms. Sanger's attorney asserts Defendants' alleged proposition was "sexual in nature" and would not have occurred but for her gender. However, there is absolutely no evidence in the record – including Plaintiff's own testimony – that supports this claim.

Despite the repeated characterization in the pleadings of these conversations as "propositions for sex," during her deposition, when asked about the alleged "proposition," Plaintiff testified Ms. Singh had invited her to a party at a hotel room, where there would be several men, including Mr. Srinivas, and also several women in attendance and "they were going to have a good time." (Pa938-Pa940 at 544:6-546:20.) Ms. Sanger also claims Ms. Singh followed up a few times to ask if she had made a decision about whether she would attend. Ms. Sanger admitted she could not recall what Ms. Singh actually said during the initial phone call, and she was not even able to articulate why she may have believed Ms. Singh was proposing sex with Mr. Srinivas or saying Mr. Srinivas wanted to have sex with her. (Pa770-Pa776.)

Although NLB Defendants deny these conversations occurred, even assuming they happened exactly as Ms. Sanger testified, they are insufficient to form the basis of a successful sexual harassment/hostile work environment claim. Despite Plaintiff's counsel's attempts to characterize the alleged invitation as a "sexual proposition," when considering Ms. Sanger's actual testimony, no reasonable person would conclude that the alleged invitation was of a sexual nature or occurred because of her gender – particularly because she testified that both men and women were going to attend the party. Plaintiff's entire position relies exclusively on unsupported speculation and innuendo that,

because the alleged (mixed-gender) party was set to take place in a hotel room, it was somehow sexual in nature. Such unsupported assumptions, without any supporting evidence, are insufficient to defeat a meritorious motion for summary judgment.

Moreover, the alleged conduct (a few phone calls encouraging Ms. Sanger to accept the invitation) was not objectively severe or pervasive enough such that a reasonable person would believe the conditions of employment were altered or the working environment was hostile. In fact, other than citing her termination, Plaintiff does not offer any examples of how she contends the terms and conditions of her "employment" were altered or how the work environment was hostile or abusive. Indeed, when asked if she had talked to anyone else about the invitation to meet with Mr. Srinivas, Plaintiff testified she did not because she "never thought that this [was] that serious." (Pa786-Pa787.)

Overall, the image Ms. Sanger's counsel paints of NLB employees Mr. Anand and Ms. Singh as sexual liaisons, working in concert with the common goal of ensuring Cognizant employee Mr. Srinivas was able to have sexual relations with Ms. Sanger, is simply not supported by the evidence – including Ms. Sanger's own testimony. The Trial Court said it best when it concluded that what Plaintiff described in her deposition was "a far cry from [being] told [she] need[ed] to go to a hotel room and have sex with

Mr. Srinivas….” (Pa1272.) Accordingly, even viewing the evidence in the light most favorable to Plaintiff, no reasonable juror could find in Ms. Sanger’s favor. Therefore, NLB Defendants were entitled to summary judgment on her claims.

3. Plaintiff’s eleventh-hour *quid pro quo* sexual harassment claim should be disregarded.

Plaintiff’s arguments regarding a *quid pro quo* theory of harassment should be disregarded as Plaintiff did not bring a *quid pro quo* claim in her Complaint and the first mention of a *quid pro quo* claim came in Ms. Sanger’s Opposition to Defendants’ summary judgment motion. *See Thompson v. Kessler Inst. for Rehab., Inc.*, Civil Action No. 15-5533 (D.N.J. Aug. 31, 2017); *Warfield v. SEPTA*, 460 Fed. App’x 127, 132 (3d Cir. 2012) (“A plaintiff may not amend a complaint by raising arguments for the first time in a brief in opposition to a motion for summary judgment.”). Further, her post-dismissal attempt to amend her Complaint to include a cause of action under Section 10:5-12(l) (which relies on a *quid pro quo* theory of harassment) was properly denied.

Putting Plaintiff’s clear subterfuge aside, a *quid pro quo* claim nevertheless fails for the same reasons her hostile work environment claim fails. *Quid pro quo* sexual harassment occurs when an employer “attempts to make an employee’s submission to sexual demands a condition of his or her employment,” and it involves “an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive

unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences." *Lehmann, supra.*, 132 N.J. at 601.

Here, first and foremost, according to Plaintiff's own testimony, there is no record evidence that the alleged invitation to the mixed-gender party was sexual in nature, and Ms. Sanger simply was not asked to submit to sexual demands as a condition of her contract. Moreover, there is no evidence of a causal connection between Ms. Sanger's purported refusal to attend the party and the termination of her contract. Plaintiff's vague assertion that Ms. Singh stated "it will not end well" if she refused to attend is not enough to form a causal link, particularly since Ms. Singh was not a decisionmaker with respect to her termination. Accordingly, Plaintiff's sexual harassment claims against NLB Defendants fail under either theory.

C. Ms. Sanger's Retaliation Claims Fail Under LAD.

Because she cannot demonstrate that the proffered legitimate, nonretaliatory reason for ending her contract is pretext or that retaliation was the real reason for the decision, Ms. Sanger's retaliation claims fail as well. LAD retaliation claims are analyzed under the familiar *McDonnell Douglas* paradigm. *Battaglia v. UPS, Inc.*, 214 N.J. 518, 546 (2013) (applying *McDonnel Douglas* to LAD). Under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which New Jersey courts adopted in *Grigoletti v. Ortho*

Pharm., Corp., 118 N.J. 89, 97 (1990), the employee carries the initial burden of establishing a prima facie case of retaliation. The burden of production then shifts to the employer to articulate some legitimate, nonretaliatory reason for the adverse employment action. *Id.* Once the employer does so, "the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the [employee]."*Blackburn v. UPS, Inc.*, 179 F.3d 81, 92 (3d Cir. 1999). Then, to prevail at trial, the plaintiff must convince the factfinder both the reason given by the employer was false and retaliation was the real reason. *Id.* The ultimate burden of proving retaliation remains with the plaintiff at all times. *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 449-50 (2005). "For summary judgment purposes, the court must determine whether the plaintiff has offered sufficient evidence for a reasonable jury to find the employer's proffered reason for the discharge was pre-textual and retaliation for the whistleblowing was the real reason for the discharge." *Blackburn*, *supra*, 179 F.3d at 92-93.

1. Plaintiff cannot establish a prima facie case of retaliation.

Plaintiff cannot establish a prima facie case of retaliation under LAD because she did not engage in protected activity. Even if she did engage in protected activity, NLB was not aware of such activity, and thus there was no causal connection between the activity and her termination. A prima facie case of retaliation under the LAD requires a showing that (1) Plaintiff was in a

protected class, (2) she engaged in a protected activity known to the employer, (3) she was subjected to an adverse employment action, and (4) there is a causal link between the protected activity and the adverse employment consequence. *Victor v. State*, 203 N.J. 383, 409, 4 A.3d 126, 141 (2010). To be considered protected activity under the LAD, an employee must make a good faith complaint about conduct that she thinks is discriminatory. *Battaglia*, *supra*, 214 N.J. at 548.

Because she has not shown she engaged in protected activity, that NLB was aware she engaged in protected activity, or that there was a causal link between any such protected activity and the termination of her contract, Ms. Sanger has failed to make out a prima facie case of retaliation under the LAD. Ms. Sanger claims she engaged in protected activity by "opposing and questioning" unlawful discrimination and harassment. (Pa1-Pa19.) However, during her deposition, Ms. Sanger admitted she did not report any of the alleged conduct by Mr. Srinivas, Ms. Singh, or Mr. Anand to anyone at NLB. (Pa1010-Pa1020, at 616:12-13; 625:2-626:4.) Therefore, the only potential protected activity Ms. Sanger can rely upon is her alleged refusal to attend the mixed-gender party in the hotel room, which simply does not constitute protected activity sufficient to form the basis of a retaliation claim.

Moreover, Ms. Sanger cannot demonstrate a causal connection between

her alleged protected activity and her termination, as neither Ms. Singh nor Mr. Anand were responsible for Cognizant's ultimate decision to terminate her contract. (*See* Pa89 at ¶ 3); *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 196 (3d Cir. 2015) ("The plaintiff, however, cannot establish that there was a causal connection without some evidence that the individuals responsible for the adverse action knew of the plaintiff's protected conduct at the time they acted.").

2. NLB terminated Plaintiff's contract for legitimate, non-retaliatory reasons.

Assuming *arguendo* that Plaintiff could establish a prima facie case of retaliation (which she cannot), NLB need only articulate a legitimate, non-retaliatory reason for any alleged adverse "employment" decision. *Young, infra*, 385 N.J. Super. at 465. Here, the evidence demonstrates NLB's decision to terminate Ms. Sanger's contract was based on legitimate, non-retaliatory reasons, namely Ms. Sanger's use of her husband's company, Staffing Idea, as a passthrough company, giving Staffing Idea sizable referral fees. (Pa1143-Pa1147 at 46:18-63:22.) At first, because it was not uncommon for recruiters to use such third parties from time to time, NLB agreed to work with Staffing Idea without questioning Ms. Sanger. (*Id.* at 46:18-47:15.) However, after a few months, the business going to Staffing Idea steadily increased, and many things about the company seemed suspicious to Ms. Singh. (*Id.* at 50:14-57:16.)

For example, Ms. Sanger told NLB personnel to never contact Staffing Idea. (*Id.* at 50:19-23; 53:19-54:8.) Further, Ms. Sanger was giving repeated business to Staffing Idea, and a substantial number of her candidates were being placed through the company, which was unusual. (*Id*.) Because the situation surrounding Staffing Idea seemed so strange, Ms. Singh decided to conduct some online research and saw Staffing Idea had virtually no digital media presence. (*Id.* at 50:19-23; 52:4-12; 53:19-54:8.) More importantly, Ms. Singh was surprised to discover the address associated with Staffing Idea on file with the state of New Jersey was the same address Ms. Sanger had given on her onboarding forms, and the person listed as the company contact associated with Staffing Idea was Manoj Sanger, Ms. Sanger's husband. (*Id.* at 53:19-54:8; 58:6-17; *see also* Pa104-Pa153.) Until Ms. Singh discovered the connection between Staffing Idea and Ms. Sanger's husband, NLB had no knowledge of Mr. Sanger's ownership interest in Staffing Idea. (Pa104-Pa107 at ¶19.)

Because of this failed disclosure, Staffing Idea improperly received $41,872 in referral fees. (*Id.* at ¶ 20.) Soon after Ms. Singh discovered this information, on November 6, 2019, she shared it with her superiors, Mr. Anand and Sachin Alug, which is well documented. (Pa1146-Pa1147 at 59:13-62:6; *see also* Pa104-Pa153.) That same day, NLB informed Cognizant of the flagged case, and considering this information, Cognizant decided to end its relationship

with Ms. Sanger immediately. (Pa1103-Pa1104 at 44:3-48:18; *see also* Pa154-Pa166.) In the following days, NLB informed both Ms. Sanger and Staffing Idea that NLB and Cognizant had detected potential fraud and that NLB was immediately terminating the MSAs, Purchase Orders, and FTE Agreements for their consultants. (Pa283-Pa287.) Further, NLB demanded that Staffing Idea refund the total amount paid by NLB against each referral Purchase Order and FTE placement. (*Id*.) Accordingly, the undisputed facts support that NLB's decision to terminate Ms. Sanger's contract was based solely on its discovery of her fraudulent activity.

3. Plaintiff cannot demonstrate the proffered reason was pretextual.

After the employer articulates its legitimate, non-retaliatory reason, the burden shifts back to the plaintiff, who "must come forward with evidence of a discriminatory motive of the employer, and demonstrate that the legitimate reason was merely a pretext for the underlying discriminatory motive." *Young v. Hobart W. Grp.*, 385 N.J. Super. 448, 465, 897 A.2d 1063, 1073 (App. Div. 2005). To establish pretext, a plaintiff must show the employment decision at issue would not have been made but for the employee's protected activity. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) ("[A] plaintiff making a retaliation claim ... must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

Furthermore, a plaintiff cannot simply rest on the laurels of her prima facie case; rather, she must adduce "significantly probative" evidence of pretext to create a question of fact sufficient for the jury. *See Lombardi v. Cosgrove*, 7 F. Supp. 2d 481, 491 (D.N.J. 1997) ("When the non-moving party's evidence in opposition to a properly-supported motion for summary judgment is merely 'colorable' or 'not significantly probative,' the Court may grant summary judgment.") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

A plaintiff may show pretext either directly by persuading the court that a retaliatory reason more likely than not motivated the employer or indirectly by showing that weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action exist such that a reasonable factfinder could find them unworthy of credence. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). A reason cannot be a pretext for retaliation unless is the plaintiff shows both that the reason was false and that retaliation was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Here, Ms. Sanger simply has no evidence she engaged in protected activity or that a retaliatory reason motivated NLB's decision to terminate Ms. Sanger's contract. Despite Plaintiff's attempts to obscure the issues and criticize Defendants' investigatory process, there is no actual evidence to refute the

proffered chronology which led to Ms. Sanger's termination. Further, Plaintiff's self-serving testimony that she told Ms. Chopra and Ms. Singh that Staffing Idea was her husband's company is completely contradicted by the rest of the evidence in the record and is insufficient to demonstrate pretext. The documentary evidence supports that Ms. Singh discovered Ms. Sanger's husband owned Staffing Idea – a clear conflict of interest in light of the circumstances – through a Google search, which she reported to NLB's CEO, Sachin Alug, who, in turn, notified Mr. Srinivas about the discovery. On its face, the documentation sufficiently showed Ms. Sanger's wrongdoing and that no further investigation was needed, particularly due to Ms. Sanger's status as a contractor. Further, NLB and Cognizant not only terminated Ms. Sanger's contract, but also the contracts of the 17 consultants placed through Staffing Idea. (Pa286).

Without providing any case law to support her contentions, Plaintiff lambastes NLB and Cognizant for failing to complete a thorough enough investigation (by her own arbitrary standards), and she claims the swiftness of the decisions somehow suggests pretext. However, it is improper for Plaintiff to make such assertions, as NLB and Cognizant were well within their rights, even if Plaintiff believes the decision was hasty or unfair. *See Viscik v. Fowler Equip. Co*., 173 N.J. 1, 21, 800 A.2d 826, 838 (2002) (under LAD, "employer's

subjective decision-making may be sustained even if unfair"); *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 561, 569 *A.*2d 793 (1990) (holding an "employee can be fired for a false cause or no cause at all. That firing may be unfair, but it is not illegal"); *Andersen v. Exxon Co.*, U.S.A., 89 N.J. 483, 496, 446 A.2d 486, 493 (1982) ("There should be no second-guessing the employer").

Accordingly, the undisputed facts demonstrate NLB Defendants had a legitimate, non-retaliatory reason for its decision to terminate its contract with Mirosoft, and Ms. Sanger simply has no evidence that a retaliatory reason motivated NLB's decision. She cannot proffer a single fact that would indicate that NLB's articulated reason for her termination is false, unworthy of credence, or implausible, and no reasonable juror could conclude based on the evidence in the record that the proffered reasons were pretextual.

As such, even viewing the facts in the light most favorable to Plaintiff, she cannot establish a retaliation claim under applicable law. Thus, the Trial Court properly granted summary judgment on her retaliation claims.

D. Ms. Sanger's Claims for Aiding and Abetting Under LAD Fail.

For the reasons discussed above, Ms. Sanger also cannot sustain her claims against Ms. Singh and Mr. Anand for "aiding and abetting" under the LAD. Under the LAD, it is unlawful for any person, whether employer or employee, to aid, abet, incite, compel or coerce any acts forbidden under the

LAD. N.J. Stat. Ann. § 10:5-12. Individual liability under the LAD can only arise when a plaintiff establishes the following elements: (1) the party whom the individual defendant aids must perform a wrongful act that causes an injury; (2) the individual defendant must be generally aware of their role as party of an overall illegal or tortious activity at the time they provided assistance, and (3) the defendant must knowingly and substantially assist the principal violation. *Tarr v. Ciasulli*, 181 N.J. 70, 83 (2004). Substantial assistance can be found by analyzing five factors: (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor. *Id.* at 84.

Applying those factors here, because Ms. Sanger failed to present evidence of any underlying actionable claim of harassment or retaliation, her aiding and abetting claims against Ms. Singh and Mr. Anand also fail.

E. The Trial Court Did Not Improperly Rely On Credibility Determinations.

Contrary to Ms. Sanger's assertions, the Trial Court did not improperly make credibility assessments when granting summary judgment. Although it is true that, when reviewing summary judgment motions, courts must view the "evidential materials ... in the light most favorable to the non-moving party," *Brill, supra*, 142 N.J. at 540, "'conclusory and self-serving assertions by one of

the parties are insufficient to overcome the motion." *Puder v. Buechel*, 183 N.J. 428, 440, 874 A.2d 534 (2005). Such assertions, "without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." *Hoffman v. Asseenont v.Com, Inc*., 404 N.J.Super. 415, 425-26, 962 A.2d 532 (App.Div.2009). "[O]pposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" *Id.; see also O'Loughlin v. Nat'l Cmty. Ban*k, 338 N.J.Super. 592, 606-07, 770 A.2d 1185 (App.Div.) (stating opposition to summary judgment must do more than establish abstract doubt regarding material facts), *certif. denied*, 169 N.J. 606, 782 A.2d 424 (2001).

Where evidence presented is so one-sided that one party must prevail as a matter of law, courts should not hesitate to grant summary judgment. *Globe Motor Company v. Igdalev*, 225 N.J. 469 (2016); *see also Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

Here, the Trial Court did not disregard Ms. Sanger's testimony. In fact, the Trial Court carefully evaluated Ms. Sanger's deposition testimony and, considering her own words, determined that the evidence was insufficient as presented. When Judge Bruder mentioned the "substantial credibility gaps" in

Plaintiff's testimony, he did so not as a basis for the Court's decision, but instead, because he was attempting to recount Plaintiff's allegations accurately but was having difficulty doing so because Plaintiff indeed has provided multiple different versions of events. In fact, Judge Bruder specifically stated the Court was "not going to make a credibility assessment" and the Court was "not hanging its hat, so to speak, on a credibility assessment" of the parties. (1T40:22-42:2). Further, Ms. Sanger's assertion that the Court's acknowledgement of credibility gaps somehow tainted its decision is without merit. Importantly, in denying Ms. Sanger's motion for reconsideration, Judge Bruder reiterated that credibility determinations did not factor into the Court's assessment, and that he construed the evidence in the light most favorable to Ms. Sanger:

> The Court was not making a credibility assessment between the different versions. But even using the versions that the plaintiff offers, and she offered multiple versions, and the Court, for the record, did not make a credibility assessment as part of its determination of the facts of this case and I -- in fact, I even indicated that at the point in time where I mentioned that there were some credibility gaps in the plaintiff's testimony the Court can't turn a blind eye to it, but that didn't really play at all into the Court's assessment because the Court's assessment was based on the law in com -- in comparison with the facts, and the facts even in a light most favorable to the plaintiff.

(2T 31:5-18)

Moreover, the specific findings that Plaintiff claims were impacted by the Court's credibility assessments ultimately were not material to the Court's decision. For example, whether Ms. Sanger and Mr. Srinivas had met before is not a material fact. However, we note Plaintiff did testify she never had any one-on-one interactions with Mr. Srinivas (Pa721 at 253: 17-19) and she never had any direct conversations with him (Pa722 at 254:5-9). Further, the Court's pretext determination is ultimately not material because, based on the Court's ruling on the other matters, Plaintiff's claims failed as a matter of law before the Court even made it to the pretext analysis. Therefore, the pretext analysis was not material to the ultimate grant of summary judgment.

Even still, there is no evidence that credibility assessments improperly factored into the ultimate decision. To the contrary, it is clear from the Court's decision that it used the proper standard for summary judgment when analyzing the evidence in the record and ultimately concluded that no reasonable juror could find in Ms. Sanger's favor.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (PA1337-PA1338)

"Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests

within the sound discretion of the trial court." *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382 (App. Div. 2015). Thus, a trial court's reconsideration decision should be left undisturbed unless it represents a clear abuse of discretion. *Hous. Auth. of Morristown v. Little*, 135 N.J. 274, 283, 639 A.2d 286 (1994). An "abuse of discretion only arises on demonstration of 'manifest error or injustice,' " *Hisenaj v. Kuehner*, 194 N.J. 6, 20 (2008) (*quoting State v. Torres*, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis,' " *Milne v. Goldenberg*, 428 N.J. Super. 184, 197 (App. Div. 2012) (*quoting Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571 (2002)).

Here, the Trial Court properly denied Plaintiff's Motion for Reconsideration, as the Court's original ruling was correct and Ms. Sanger failed to meet her burden in providing a sufficient basis for why reconsideration was warranted. As a threshold matter, the "magnitude of the error" on which the motion for reconsideration is based "must be a game-changer for reconsideration to be appropriate." *Palombi v. Palombi*, 414 N.J. Super. 274, 289 (App. Div. 2010). Dissatisfaction with the decision of the Court is not an appropriate basis for a motion for reconsideration. *See D'Atria v. D'Atria*, 242 N.J.Super. 392, 401 (Ch. Div. 1990). Further, reconsideration should be utilized only for those

cases which fall into the following two categories, neither of which is present here: "1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." *Id.* In other words, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." *Id.*

Here, Ms. Sanger is not entitled to reconsideration simply because she is dissatisfied with the Trial Court's decision. The Trial Court used the correct legal standards in evaluating NLB Defendants' summary judgment motion, and its decision was comprehensive and well-reasoned. There is nothing palpably incorrect or irrational about the grounds on which the Trial Court ruled. Instead, the Trial Court thoroughly considered all the probative, competent evidence in the light most favorable to Ms. Sanger but ultimately and correctly determined that the evidence was insufficient to permit a rational factfinder to resolve the claims in Ms. Sanger's favor. Accordingly, there is no reason why the Trial Court's decision should be revisited.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MS. SANGER'S MOTION FOR LEAVE TO AMEND HER COMPLAINT (PA1337-PA1338)

A trial court's decision to grant or deny a motion to amend a complaint also is reviewed for abuse of discretion. *Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urb. Renewal Co.*, 435 N.J. Super. 51, 62, 86 A.3d 730 (App. Div. 2014). Courts have discretion to grant leave to amend pursuant to R. 4:9-1. That exercise of discretion requires a two-step analysis: (1) whether the non-moving party will be prejudiced, and (2) whether granting the amendment would nonetheless be futile. *See Notte v. Merchants Mut. Ins. Co.*, 185 N.J. 501 (2006). In examining whether the amendment will be futile, the Court must determine whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. *Id.* Thus, while motions for leave to amend are to be determined without consideration of the ultimate merits of the amendment, those determinations must be made "in light of the factual situation existing at the time each motion is made." *Interchange State Bank v. Rinaldi*, 303 N.J.Super. 239, 256, 696 A.2d 744 (App.Div.1997). More specifically, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to

dismiss must be granted." *Id*. at 256-57, 696 A.2d 744.

Here, the Trial Court did not abuse its discretion in denying Ms. Sanger's post-dismissal Motion for Leave to Amend her Complaint, as her proposed amendment would have been both futile and prejudicial to Defendants.

Specifically, the amendment was futile because the newly asserted cause of action under Section 10:5-12(l) was not sustainable as a matter of law, and allowing the amendment would have been a useless endeavor. First, no such claim can be stated against the individual defendants Anand and Singh as they were not parties to the contract on which this putative claim was based. Because Ms. Sanger did not have a contract with the individual defendants, any amendment to add a discriminatory failure to contract claim against them is futile. Ms. Sanger signed the Agency Agreement and Purchase Order with NLB, not Anand or Singh. (Pa181-187; Pa190-197; Pa281-282.)

In addition, Plaintiff's amendment would have been futile because she asserts that her new claim for contractual discrimination/retaliation would rely on the same facts and same law as her existing claims, which had already been deemed insufficient to form the basis of a LAD claim by the Trial Court. Accordingly, whether Plaintiff brought her LAD claims under Section 12(a) or Section 12(l), they nonetheless would fail because the facts did not rise to the level of actionable sexual harassment/retaliation.

Moreover, allowing Plaintiff to amend her Complaint at this late stage would indubitably prejudice Defendants. Plaintiff claims that the proposed amendment "would not introduce new facts or claims" and thus, the amendment would not result in prejudice to Defendants. However, in the original Complaint, Plaintiff brought her sexual harassment claims solely under the theory of hostile work environment sexual harassment based on Plaintiff's gender. Specifically, she alleged, "Based on her gender, plaintiff was subjected to relentless harassment, which was sufficiently severe and pervasive, such that a reasonable individual of the same gender would have deemed the conditions of employment altered and the working environment hostile, abusive, intimidating and offensive." (Complaint, ¶ 30). Ms. Sanger did not plead a *quid pro quo* theory of sexual harassment in her original Complaint, and the text of her First Cause of Action clearly relates to a hostile work environment claim only.

If Ms. Sanger had been allowed to amend her Complaint to include a failure to contract claim under N.J.S.A § 10:5-12(l), that claim would have depended on a *quid pro quo* theory of sexual harassment, thereby prejudicing Defendants. Specifically, while New Jersey courts have recognized *quid pro quo* harassment claims under Section 12(l), the courts have **not** approved of hostile work environment claims outside of the employment context. *See J.T.'s Tire Services v. U. Rentals*, 411 N.J. Super. 236 (App. Div. 2010). Accordingly,

because Ms. Sanger did not plead *quid pro quo* sexual harassment, Defendants focused its discovery in this matter only on evidence that would support or refute the elements of hostile work environment harassment. Thus, adding such a claim at this late stage would clearly prejudice Defendants.

In addition, Ms. Sanger has been on notice since the beginning of this case that Defendants were asserting Plaintiff's independent contractor status as a defense. Accordingly, she had ample time to seek to amend her Complaint but waited, instead, until *after* the Trial Court issued its summary judgment order dismissing her Complaint with prejudice. For all these reasons, the Trial Court was correct in denying Ms. Sanger's motion to amend her Complaint.

CONCLUSION

Based on the foregoing, NLB Defendants respectfully request that this Court affirm the Trial Court's Order granting summary judgment to Defendants, as well as the Order denying Ms. Sanger's Motion for Reconsideration and Motion for Leave to Amend the Complaint.

Dated: March 24, 2025

SQUIRE PATTON BOGGS (US) LLP
Attorneys for Defendants
Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh

By: *s/ Mark C. Errico*
Mark C. Errico
D. Lewis Clark Jr.
Melissa Legault

NISHA SANGER, Plaintiff, vs. NEXT LEVEL BUSINESS SERVICES, INC., COGNIZANT TECHNOLOGY SOLUTIONS COMPANY, and NN SRINIVAS, AARTI CHOPRA, AYAN SAHA, SHRUTI SINGH, NIKHIL ANAND, and JOHN AND/OR JANE does 1-20 (Names Being Fictitious), in their individual and corporate capacities and as aiders and abettors. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-000592-24 DOCKET NO: SOM-L-001274-20 Appeal From Summary Judgment Entered by Superior Court Of New Jersey Somerset County: Law Division SAT BELOW: Hon. John E. Bruder, Superior Court, Civil Division, Somerset County

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS NEXT LEVEL BUSINESS SERVICES, INC., NIKHIL ANAND, AND SHRUTI SINGH

Date of Submission to Court: March 24, 2025

SQUIRE PATTON BOGGS (US) LLP
382 Springfield Avenue
Summit, New Jersey 07901

Attorneys for Defendants Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh

Of Counsel and On the Brief:
Mark C. Errico, Esq. (# 033631998)
D. Lewis Clark Jr. (admitted pro hac vice)
Melissa Legault (admitted pro hac vice)

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PRELIMINARY STATEMENT

The Trial Court properly granted summary judgment on Plaintiff's claims against NLB Defendants. First, the undisputed facts demonstrate Ms. Sanger was not an NLB employee and was thus not entitled to protections under the NJ LAD. In so holding, the Trial Court carefully analyzed each of the *Pukowsky* factors, citing the following facts in the record in support of its ruling: NLB did not control the means and manner of Ms. Sanger's performance or supervise her work; Ms. Sanger had autonomy to perform her job how she saw fit; Ms. Sanger testified she was a contractor, not an employee; Ms. Sanger did not work on NLB premises; NLB did not provide Ms. Sanger with any equipment; Ms. Sanger did not require training, and she had 15 years of experience in recruiting, so she did not need, nor did NLB or Cognizant provide, oversight or instruction; the contracts between the parties were not exclusive; NLB paid Mirosoft Corporation for the work Ms. Sanger performed; Ms. Sanger was not provided with annual leave and was not paying Social Security taxes; and Ms. Sanger's project was a limited term project with the possibility of extensions. Accordingly, Ms. Sanger was not an NLB employee and thus the Trial Court properly held NLB is not liable to Ms. Sanger under the LAD.

Further, even if Ms. Sanger was an employee of NLB, summary judgment was still appropriate because Ms. Sanger's allegations did not rise to the level

of actionable sexual harassment or retaliation under the LAD, and no reasonable factfinder could find in favor of Ms. Sanger on her claims against NLB Defendants. Ms. Sanger's claims hinge on her allegation that she was "propositioned for a sexual encounter" with Mr. Srinivas by either Ms. Singh or Mr. Anand sometime after Mr. Srinivas allegedly touched her leg with his for one to two seconds, and that her contract was terminated because she refused. However, despite the repeated mischaracterization of these conversations by Ms. Sanger's attorney as "propositions for sex," during her deposition, when asked about the alleged "proposition," Plaintiff testified Ms. Singh had invited her to a party at a hotel room, to be attended by several men, including Mr. Srinivas, and several women, and she was told "they were going to have a good time."

Ms. Sanger could not articulate why she thought Ms. Singh was proposing sex with Mr. Srinivas or saying Mr. Srinivas wanted to have sex with her. Although NLB Defendants deny these conversations occurred, even assuming they happened exactly as Ms. Sanger testified, they are insufficient to form the basis of a successful sexual harassment claim. There is no evidence in the record to support that the alleged invitation was of a sexual nature or occurred because of her gender – particularly because she testified both men and women were going to attend the party. Accordingly, putting aside the mischaracterizations and baseless innuendo proffered by Plaintiff's attorney and instead looking at the

actual evidence in the record (including Ms. Sanger's actual testimony), Plaintiff adduced no evidence from which a reasonable juror could return a verdict in her favor. Therefore, summary judgement was proper.

Further, the record evidence shows Cognizant decided to terminate Ms. Sanger's contract for legitimate, non-retaliatory reasons after NLB discovered that Ms. Sanger was defrauding the companies by using her husband's company, Staffing Idea Factory, to receive referral fees, without disclosing her clear conflict of interest, and there is no competent evidence that this reason was pretextual. In fact, in addition to Ms. Sanger, NLB also terminated the contracts of the 17 consultants she onboarded through Staffing Idea. Moreover, the Trial Court used the appropriate legal standards when assessing Ms. Sanger's claims, and credibility determinations did not improperly factor into the Trial Court's decision. In fact, the Trial Court made it clear that it was *not* making or relying upon credibility assessments. Finally, the Trial Court correctly denied Ms. Sanger's motion for reconsideration and motion to amend because such an amendment would have been futile and prejudicial to Defendants.

Ultimately, the Trial Court carefully assessed the evidence in the light most favorable to Ms. Sanger and correctly concluded that no reasonable juror could find in Ms. Sanger's favor on any of her claims. Accordingly, the Trial Court's rulings should be affirmed.

PROCEDURAL HISTORY

Plaintiff filed the Complaint in this action on October 30, 2020 against Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh (together, "NLB Defendants") as well as Cognizant Technology Solutions U.S. Corporation, Aarti Chopra, and Narasimha Srinivas Nandagiri (together, "Cognizant Defendants"), alleging violations of the New Jersey Law Against Discrimination, ("LAD") and Conscientious Employee Protection Act ("CEPA"), including: LAD hostile work environment sexual harassment; LAD retaliation; CEPA retaliation; LAD aiding and abetting; and CEPA aiding and abetting. (Pa1-Pa19.)

On April 26, 2024, NLB Defendants and Cognizant Defendants filed motions for summary judgment on all of Plaintiff's claims. (Pa78-Pa81; Pa360-Pa361.) The Court heard oral argument on Defendants' motions on July 19, 2024. (1T.) After analyzing all the evidence in the record, the Court applied the correct standard for summary judgment and concluded that each of Plaintiff's claims failed as a matter of law. (*Id.*) Specifically, the Court held, as an initial matter, Defendants could not be held liable under the LAD and CEPA because both laws require an employment relationship exist between a plaintiff and a defendant, and Plaintiff could not demonstrate that she was an employee of either company. (*Id.*) Even still, the Court addressed the remaining arguments

of the parties and concluded that summary judgment was also appropriate because Plaintiff failed to demonstrate, as a matter of law, the severe or pervasive element of her hostile work environment claims, and her retaliation and aiding and abetting claims similarly failed because she could not rebut Defendants' legitimate, nonretaliatory reason for her termination by demonstrating pretext. (*Id.*) Following oral argument, on July 19, 2024, the Court entered two Orders granting summary judgment to all Defendants on Plaintiff's claims. (Pa1240-Pa1243.)

On August 8, 2024, Plaintiff moved for reconsideration of the Court's July 19, 2024, orders and, in the alternative, to amend the complaint to include a Sixth Cause of Action against all Defendants for failure to contract based upon Plaintiff's gender in violation of N.J.S.A § 10:5-12(l). (Pa1244-Pa1245.) The Court heard oral Argument on September 27, 2024 (2T), and on September 30, 2024, the Court entered an Order denying Plaintiff's Motion. (Pa1337-Pa1338.)

Plaintiff filed a Notice of Appeal on October 29, 2024. (Pa1339.) Ms. Sanger subsequently filed her appellate brief and appendix asserting six grounds for appeal. Plaintiff elected to limit her appeal to her LAD claims based on CEPA's election of remedies provision.

COUNTER STATEMENT OF FACTS

A. Background on Defendants

NLB is an information technology, consulting, and staffing solutions company with headquarters in Georgia. (Pa104-Pa107 at ¶7.) Its purpose is to help companies connect with permanent, temporary, and contractual professionals. (*Id.*) Among other things, NLB onboards individuals as independent contractors and then assigns them to work at other client entities, such as, in this case, Cognizant. (*Id.* at ¶ 8.) Cognizant is an information technology services and consulting company. (*Id.* at ¶ 9.)

During Ms. Sanger's contract term, Shruti Singh served as NLB's Manager of Client Relations, and she has since served as Director of Client Relations and Associate Vice President of Client Relations. (Pa1131-Pa1149 at 16:15-21; 18:3-9; 23:3-24:5.) In her role, Ms. Singh is responsible for managing client relationships. (*Id.*) Nikhil Anand has worked for NLB since February 2008. (Pa1111-Pa1129 at 15:2-9; 16:18-22.) During Ms. Sanger's contract term, Mr. Anand served as NLB's Senior Vice President of Operations, which is the role he still holds today. (*Id.*) In this role, Mr. Anand is responsible for managing day-to-day operations, managing deliveries, as well as ensuring and maintaining client relationships. (*Id.*) NN Srinivas worked for Cognizant from approximately 2004 until February 2020. (Pa1092-Pa1109 at 18:17-21:17.) Mr. Srinivas held

numerous positions at Cognizant, but during Ms. Sanger's contract term, Mr. Srinivas served as Senior Director. (*Id*.) In this role, Mr. Srinivas was responsible for running talent acquisition for management recruitment. (*Id*. at 21:6-22:6.) Aarti Chopra worked for Cognizant from approximately 2010 until April 2022. (Pa1065-Pa1081 at 14:7-13.) During Ms. Sanger's contract term, Ms. Chopra served as a Senior Manager for Cognizant. (*Id*. at 14:20-15:6) In this role, Ms. Chopra was responsible for overseeing recruitment. (*Id*.)

B. NLB Engaged Ms. Sanger as an Independent Contractor Through her Company, Mirosoft.

In February 2019, Cognizant asked NLB to engage Ms. Sanger as an independent contractor to serve as a technical recruiter through Ms. Sanger's company, Mirosoft Corporation ("Mirosoft"), and NLB did so. (Pa104-Pa107 at ¶11.) Ms. Sanger's contractor onboarding documents included an Agency Agreement and a Purchase Order between NLB and Mirosoft. (Pa191-Pa197; Pa281-Pa282.) Ms. Sanger also entered into a Consultant Agreement with Cognizant. (Pa182-Pa187.) Notably, in Exhibit B-1 of that document, Ms. Sanger agreed to abide by Cognizant's Core Values and Standards of Business Conduct, which explains the importance of avoiding conflicts of interest. (*Id*.; *see also* Pa199-Pa231) Further, as part of the contractor onboarding process, Ms. Sanger completed a Personal Data/Emergency Contact Information form, listing her address as 3 Margret Pl, East Brunswick, NJ 08816, and her emergency

contact as her spouse, Manoj Sanger. (Pa189.)

It was the parties' clear intention that NLB engaged Ms. Sanger as an independent contractor and that Ms. Sanger would perform work for NLB's client, Cognizant. (Pa104-Pa107 at ¶12.) Ms. Sanger worked approximately two days per week at Cognizant's Bridgewater, New Jersey office and approximately three days per week from home. (*Id.* at ¶ 13; *see also* Pa551 at 83:4-24) Ms. Sanger did not perform work on NLB premises, and NLB did not provide Ms. Sanger with a laptop or a phone. (Pa104-Pa107 at ¶14; *see also* Pa551 at 83:4-24; Pa633 at 165:15-23) In practice, NLB did not control the means and manner of Ms. Sanger's performance or supervise Ms. Sanger's work, and Ms. Sanger had the autonomy to perform her job when and how she saw fit, with very little oversight from either Cognizant or NLB. (Pa104-Pa107 at ¶15; *see also* Pa962-Pa965 at 568:7-571:7.) The contracts between NLB and Cognizant on the one hand and Ms. Sanger and Mirosoft on the other were not exclusive. (Pa104-Pa107 ¶ 16.) Further, NLB did not provide Ms. Sanger annual leave and did not pay social security taxes, and the project term was limited to 12 months in duration, with possible extensions. (*Id.* at ¶ 17.) Overall, NLB served as little more than a payment processor, ensuring Mirosoft was paid for the services Ms. Sanger provided to Cognizant. (*Id.* at ¶ 18.)

C. NLB Uncovered Fraudulent Activity by Ms. Sanger and Her Husband's Company, Staffing Idea Factory.

In the early summer of 2019, Ms. Sanger introduced a company called Staffing Idea Factory ("Staffing Idea") to NLB and Cognizant and began passing the resources hired and on-boarded by NLB through that company, giving Staffing Idea sizable referral fees. (Pa1143-Pa1147 at 46:18-63:22.) At first, because it was not uncommon for recruiters to use such third parties from time to time, NLB agreed to work with Staffing Idea without questioning Ms. Sanger. (*Id.* at 46:18-47:15.) However, after a few months, the business going to Staffing Idea steadily increased, and something about the company seemed suspicious. (*Id.* at 50:14-57:16.) For example, Ms. Sanger told NLB to use Staffing Idea only for onboarding, and she told NLB personnel to never contact Staffing Idea because they did not want to speak with NLB. (*Id.* at 50:19-23; 53:19-54:8.) Further, Ms. Sanger was giving repeated business to Staffing Idea, and a substantial number of her candidates were being placed through the company, which was unusual. (*Id.*)

Because the situation surrounding Staffing Idea seemed so strange, Ms. Singh decided to conduct some online research and saw Staffing Idea had virtually no online presence. (*Id.* at 50:19-23; 52:4-12; 53:19-54:8.) Ms. Singh also discovered the address associated with Staffing Idea on file with the New Jersey Division of Revenue Business Registration was the same home address

Ms. Sanger had given on her onboarding forms. (*Id.* at 53:19-54:8; 58:6-17; *see also* Pa104-Pa153.) Further, the person listed as the company contact associated with Staffing Idea was Manoj Sanger, Ms. Sanger's husband. (*Id.*) Until Ms. Singh discovered the connection between Staffing Idea and Ms. Sanger's husband, NLB had no knowledge of Mr. Sanger's ownership interest in Staffing Idea. (Pa104-Pa107 at ¶19.) Because of this failed disclosure, NLB improperly paid Staffing Idea $13,872 in contracting referral fees and $28,000 in full time placement referral fees, for a total of $41,872. (*Id.* at ¶ 20.) Soon after Ms. Singh discovered this information, on November 6, 2019, she shared her findings with her superiors, Nikhil Anand, NLB's SVP of Operations and Sachin Alug, NLB's CEO. (Pa1146-Pa1147 at 59:13-62:6; *see also* Pa104-Pa153.)

D. NLB and Cognizant Terminated the Contracts with Mirosoft.

On that same day, November 6, 2019, NLB informed Mr. Srinivas of the flagged case, via phone and via email. (Pa1103-Pa1104 at 44:3-48:18; *see also* Pa155-Pa166.) After considering the information uncovered by NLB, Cognizant decided to end Cognizant's relationship with Mirosoft and Ms. Sanger immediately. (*Id.*) NN Srinivas, Brian Riley, and Ron Fish called Ms. Chopra together to inform her that the company had been made aware that Ms. Sanger had acted in a way that was not compliant, and Cognizant had made the decision to end the relationship. (Pa1077- Pa1081 at 46:5-65:22.) Due to the immediacy

of the situation, Ms. Chopra was not given all the details behind the reason for the decision at that time, other than the brief mention of fraudulent activity. (*Id*.)

Cognizant asked Ms. Chopra to meet with Ms. Sanger to inform her that her contract was terminated. Ms. Chopra agreed. (*Id*.) Ms. Chopra called Ms. Sanger and asked her to come to the office the next day, November 7, 2019. (*Id*.) During the meeting, Ms. Chopra told Ms. Sanger that her contract with Cognizant was being terminated effective immediately. (*Id*.) At that time, Ms. Chopra did not have all the details regarding the reason for the termination, and she was acting on the instructions she received during her conversation with Mr. Srinivas, Mr. Riley, and Mr. Fish. (*Id*.) After her meeting with Ms. Chopra, Ms. Sanger called Ms. Singh to inform her about the termination. (Pa732-Pa733 at 264:25-265:24.) Ms. Sanger never mentioned any allegations of sexual harassment to Ms. Singh or indicated she believed retaliation was the motive behind the termination. (Pa733-Pa734. at 265:11-266:20.) Neither Ms. Singh nor Mr. Anand participated in the decision to terminate the contract with Ms. Sanger's company. (Pa1125 at 55:21-56:3; Pa1147 at 63:11-22.)

On November 7, 2019, NLB confirmed via email that NLB and Cognizant had detected potential fraud and that the MSA and Purchase Order were being terminated. (Pa284.) In the email, Ms. Sanger was informed that, upon completion of the investigation, NLB would consider bringing legal proceedings

against Mirosoft and other related parties. (*Id*.) In addition, on November 8, 2019, NLB contacted Staffing Idea to inform the company that NLB and Cognizant had detected potential fraudulent activity and that it was immediately terminating the MSA, Referral Purchase Orders, and FTE Agreements for their 17 consultants. (Pa286.) Further, NLB demanded that Staffing Idea refund the amounts paid by NLB. (*Id*.)

E. Ms. Sanger's Post-Termination Communications.

Shortly after her termination, Ms. Sanger subsequently reached out to various members of NLB and Cognizant asking for payment from NLB for work she completed for Cognizant in October and November 2019. (Pa289-Pa292.) NLB notified Ms. Sanger it could not consider her October and November invoices for payment while the investigation into her suspected fraudulent activity was still ongoing and informed her that her case had been transferred to the legal department for review. (*Id*.) Notably, Ms. Sanger did not mention in any of these communications that she had been sexually harassed by Mr. Srinivas or anyone else or that she believed her termination was in retaliation for refusing sexual advances. (*Id*.)

Once NLB had time to investigate and understand the extent of the fraud perpetrated on it by Ms. Sanger, on December 9, 2019, NLB's attorney sent a letter to Ms. Sanger outlining her fraudulent behavior and demanding she

immediately refund the $41,872 she had improperly collected from NLB through Staffing Idea. (Pa294.) NLB never received a response to this letter from Ms. Sanger or any representative from Mirosoft or Staffing Idea.

On February 14, 2020, Ms. Sanger emailed Ms. Chopra, asking again for payment regarding work she completed in October and November 2019. (Pa296-Pa298.) Once again, Ms. Sanger did not mention anything about sexual harassment or retaliation. (*Id*.) In response to Ms. Sanger's email, on February 18, 2020, counsel for NLB followed up with Ms. Sanger demanding she stop communicating directly with Cognizant and reminding her about the money she owed NLB based on her fraudulent activity. (Pa300-Pa301.) Again, NLB received no direct response, but around this time, Ms. Chopra began receiving threatening text messages from an unknown sender demanding payment and threatening Ms. Chopra's children. (Pa388-Pa394.) During this time, NLB was still trying to determine the best course of action regarding payments for Ms. Sanger's services in October and November and how to recoup the amount she fraudulently obtained through Staffing Idea. (Pa104-Pa107 at ¶21.)

NLB ultimately decided that, despite the outstanding amount owed to NLB by Staffing Idea, NLB would pay Mirosoft for the services Ms. Sanger performed in October and November. NLB tried to get in touch with Ms. Sanger in order to bring closure to the outstanding invoices, but they were unable to

reach her. (*Id*. at ¶ 22 *see also* Pa303.) On February 25, 2023 NLB paid Mirosoft for the service Ms. Sanger rendered in October and November. (*Id.* at ¶ 23; *see also* Pa333-Pa335.)

F. Ms. Sanger's Allegations Against Ayan Saha

In her Complaint, Ms. Sanger asserts multiple allegations against Cognizant employee, Ayan Saha. (Pa1-Pa19.) However, based on her deposition testimony, Ms. Sanger concedes none of Mr. Saha's alleged behavior was directed at her and that she experienced none of his behavior firsthand. (Pa675-Pa709 at 207:2-241:5.) In fact, Mr. Saha worked in India, and Ms. Sanger never interacted with Mr. Saha in person. (Pa998-1002 at 604:10-608:5.)

G. Ms. Sanger's Allegations Against NN Srinivas

In her Complaint, Ms. Sanger claims "defendant Srinivas' brazen, harrowing sexual harassment of Sanger … began during or around October 2019" when he "inappropriately touched Sanger by rubbing his legs against hers." Ms. Sanger alleged that, in response, she "recoiled and turned away, clearly signaling to defendant Srinivas that his conduct was unwelcome." (Pa1-Pa19.) However, during her deposition, Ms. Sanger admitted she was referencing an interaction she had with Mr. Srinivas during which he entered the doorway during a meeting she was having with Ms. Chopra and Ms. Patnaik, and his leg made contact with her right calf for only "one or two seconds."

(Pa727-Pa728 at 259:20-260:1.)

Ms. Sanger was unable to recall when this interaction allegedly occurred. (Pa729 at 261:3-5; Pa1009 at 615:1-2.) When asked how she reacted, Ms. Sanger testified "I just moved a little bit on the left towards [Ms. Patnaik]. I don't know if I moved like this or I shifted my chair, but I just moved a little bit on the other side." (Pa1008 at 614:13-17.) According to Ms. Sanger, she and Mr. Srinivas did not make eye-contact, and she did not say anything to Mr. Srinivas, Ms. Chopra, or Ms. Patnaik about the alleged contact. (*Id.* at 614:4-25.) In fact, Ms. Sanger did not express that the contact was unwelcome, and she did not report the incident to anyone. (Pa1010 at 616:12-14.) Neither Ms. Chopra nor Ms. Patnaik recall this alleged contact between Mr. Srinivas and Ms. Sanger's right calf, and Mr. Srinivas denies he ever intentionally rubbed his leg against Ms. Sanger's leg. (Pa1092-1109 at 43:1-3.)

H. Ms. Sanger's Allegations Regarding Ms. Singh and Mr. Anand

In her Complaint and in her verified answers to NLB Defendants' interrogatories, Ms. Sanger alleged that, sometime after Mr. Srinivas allegedly touched her leg with his, Mr. Anand called Ms. Sanger and "propositioned her to engage in sexual relations with defendant Srinivas" and offered to pay for the hotel room using "his personal credit card[.]" (Pa1-Pa19; Pa337-Pa359.) She then alleges that, just a few days later, Ms. Singh called her and asked "if she

had made a decision with regard to defendant Anand's offer[,]" stating "[i]f you refuse, it's not going to end well for you." (*Id.*)

However, during her deposition, Ms. Sanger's story changed. At that time, she testified that *Ms. Singh* was the one who called her first about the "proposition" and said that the hotel would be booked and paid for using NLB's credit card and that *Mr. Anand* is the one who followed up asking if she had made a decision. (Pa770-789 at 302:3-321:12; Pa1011-Pa1020 at 616:22-626:4.) Notably, Ms. Sanger could not recall the details of the alleged telephone call between her and Ms. Singh in which Ms. Singh allegedly propositioned Ms. Sanger to have sex with Mr. Srinivas. (Pa770-789 at 302:16-305:8) In fact, Ms. Sanger was not even able to articulate what led her to contend that she believed Ms. Singh was proposing sex with Mr. Srinivas or saying that Mr. Srinivas wanted to have sex with her. (*Id.*) Ms. Sanger remembered even less about her alleged conversation with Mr. Anand regarding the alleged proposition for her to have sex with Mr. Srinivas. (*Id.* at 319:1-321:15.)

Later in the deposition, Ms. Sanger clarified that, when Ms. Singh asked her to go to a hotel room with Mr. Srinivas, she was actually inviting Ms. Sanger to a party where there would be several men and several women in attendance. (Pa938-Pa940 at 544:6-546:20.) Both Mr. Anand and Ms. Singh vehemently deny these conversations occurred and deny they ever propositioned Ms. Sanger

to have sex with Mr. Srinivas. (Pa1125 at 54:6-55:16); Pa1147-Pa1148 at 65:24-68:10.) Further Mr. Srinivas denies he ever instructed Mr. Anand to invite Ms. Sanger to a hotel room to meet with him. (Pa1103 at 43:4-16.) Ms. Sanger testified she did not report the alleged propositions to anyone at Cognizant or NLB. (Pa1019 at 625:2-5.)

Notably, in response to Defendants' discovery requests and in support of her claims, Ms. Sanger produced WhatsApp messages purporting to be between her and Ms. Singh in which "Ms. Singh" attempts to pressure Ms. Sanger to have sex with Mr. Srinivas and threatens her job if she refuses. (Pa273-Pa279.) However, once numerous inconsistencies and flaws in these messages[1] were pointed out to Ms. Sanger and her counsel, Ms. Sanger contrived a new story in which she claimed to have received the screenshots via text message from an anonymous source sometime after she filed the Complaint. (Pa796-Pa817 at 328:9-349:17.) Upon receiving the screenshots, she saved them, blocked the number that sent them, emailed them to herself, and then emailed them to her attorney. (*Id.* at 329:2-333:5.) Because Ms. Sanger blocked the sender and

[1] For example, an export of the entirety of Ms. Singh and Ms. Sanger's WhatsApp communications does not contain these messages (see Pa233-Pa271); Plaintiff made no prior mention of these messages in her demand letter or Complaint; the "sender" and "recipient" nonsensically switch over between the first and second conversation; the messages did not contain a date or time indicating when they were sent or received, etc.

deleted the messages containing the screenshots, she is unable to provide any details that could help identify the alleged sender. (*Id.* at 323:24-349:17.) When questioned about the messages during her deposition, Ms. Sanger revealed that she originally thought someone (likely Ms. Singh) sent her the messages in an attempt to help her case, but since the flaws in the messages were brought to her attention, she now believes that someone deliberately sent her fabricated text messages in an attempt to undermine her case. (*Id.* at 341:24-346:1.) Even still, Ms. Sanger indicated she does not recall whether she actually received the messages, and she now does not seem to be alleging that these messages are authentic. (*Id.* at 323:24-349:17.)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS AGAINST THE NLB DEFENDANTS (PA1240-PA1241)

Appellate review of a trial court's grant of summary judgment employs the same standard of review as the trial court. *See Busciglio v. DellaFave*, 366 *N.J. Super.* 135, 139 (App. Div. 2004). Rule 4:46-2(c) provides that summary judgment should be granted when pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is "no genuine issue of any material fact challenged and that the moving party is entitled to a

judgment or order as a matter of law." *R.* 4:46-2 (2008). An issue of fact becomes genuinely disputed only if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Id.*

The standard for summary judgment as set forth in R. 4:46-2 has been clarified by the Supreme Court of New Jersey in *Brill v. Guardian Life Ins. Co. of America.*, 142 N.J. 520 (1995). In *Brill*, the New Jersey Supreme Court held:

> [W]hether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.

Id. at 540. Even in light of the deference afforded to the non-movant, summary judgment is still appropriate in some instances. It will not suffice for the non-moving party to raise the issue of just any disputed fact. In the case where only insubstantial factual disputes arise, the court should grant summary judgment. *Id*. at 529.

On a motion for summary judgment, the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id*. at 540. However, the fact that the trier of

fact makes determinations as to credibility "does not require a court to turn a blind eye to the weight of the evidence" and "the opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Triffin v. Am. Int'l Grp, Inc., et al*, 373 N.J. Super. 517 (App. Div. 2004) (internal quotations omitted). Further, unsupported self-serving deposition testimony, which is contradicted by the record, is insufficient to defeat summary judgment. *Parker v. Sch. Dist. Of Philadelphia,* 823 F. App'x 68, 72 (3d Cir. 2020).

A. The Trial Court properly concluded that plaintiff was an independent contractor, not an employee.

The Trial Court correctly determined that Ms. Sanger's LAD claims failed as a matter of law because Ms. Sanger was NLB's independent contractor – not an employee – and as such was not entitled to the protections provided under the LAD. *Pukowsky v. Caruso*, 312 N.J. Super. 171, 184, 711 A.2d 398, 405 (App. Div. 1998) ("In sum, we hold that the LAD was intended to prohibit discrimination in the context of an employer/employee relationship, and that independent contractors are not 'employees' within the meaning of the statute.").

To determine whether Plaintiff was an independent contractor or an employee as a matter of law, the Trial Court analyzed the facts in the record using the *Pukowsky* twelve-part "totality of the circumstances test." (1T33). Specifically, the Court utilized the following factors to determine Plaintiff's status:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Pukowsky, *supra*, 312 N.J. Super. at 184). Notably, under this test, majority rule does not apply. Although "right to control" is typically viewed as the "most important" factor, "'[a] principled application' of the factors and a consideration of which factors are more important under the peculiar circumstances" is necessary when making the employee versus independent contractor analysis. *Chrisanthis v. Cnty. Of Atlantic*, 361 N.J. Super. 448, 455, 825 A.2d 1192, 1197 (App. Div. 2003). Absolute unanimity also is not required to support summary judgment, meaning an individual may be found to be an independent contractor even if there are factors favoring a finding of employee status. *Id.* at 465. The Court must balance those factors supporting employee status with those supporting independent contractor status. *Id.*

Here, after considering the totality of the circumstances and balancing the relevant factors, the Trial Court correctly determined Plaintiff was an independent contractor and not an employee. Contrary to Plaintiff's assertions,

the Court did not find the intention of the parties to be "controlling" but instead refused to ignore it completely and simply analyzed it as one of the many factors in the analysis. Further, by lumping NLB and Cognizant Defendants together, Plaintiff grossly misstates the factual evidence with respect to NLB Defendants.

From the beginning of the relationship, it was the parties' clear intention that Ms. Sanger was an independent contractor – not an employee. Notably, the arrangement with NLB was facilitated through Ms. Sanger's company, Mirosoft, and was governed by an Agency Agreement and Purchase Order executed between NLB and Mirosoft. (Pa190-Pa197; Pa280-Pa282.) Further, Ms. Sanger testified specifically that she was engaged by Cognizant and NLB as a contractor, not as an employee. (*See* Pa85 at ¶ 12.) Even still, while the Court did begin its analysis with the intent of the parties,[2] that was by no means the only factor the Court considered. Rather, the Court provided a thorough analysis of each factor, including the right to control, and concluded no employment relationship existed between Plaintiff and NLB (or Cognizant).

Ms. Sanger was a contractor in both name and practice. Importantly, contrary to the assertions in her Brief, Plaintiff herself testified that she had the

[2] Contrary to Plaintiff's assertions, the case law does not suggest that the twelve factors are in order from most important to least important, and there is no set order in which the factors must be analyzed. Accordingly, Plaintiff's claim that the intention of the parties is listed as the "**twelfth** *Pukowsky* factor" or that there was a problem with the Court analyzing that factor first, is without merit.

autonomy to perform her services how she saw fit, with little oversight, and that neither Cognizant nor NLB controlled the means and manner of her performance. (Pa962-Pa965 at 568:7-570:24 (testifying she had 15 years of experience in recruiting, she did not require oversight or instruction, she knew how to source, vet, and screen candidates, and was familiar with the job boards and agencies).)

Further, the contract between NLB and Mirosoft was not exclusive, meaning Ms. Sanger was free to perform work for other companies during her contract with NLB. (Pa104-Pa107 at ¶16.) NLB paid Mirosoft for Ms. Sanger's work, NLB did not provide Ms. Sanger annual leave, she did not pay social security taxes, and the project term was limited to 12 months in duration, with possible extensions. (*Id* at ¶17.) Further, Ms. Sanger did not perform work at NLB facilities, and NLB did not provide her with equipment, such as a laptop or a cell phone. (Pa104-Pa107 at ¶14; Pa551 at 83:4-24; Pa633 at 165:15-29.)

In short, NLB served as little more than a payment processor, ensuring Ms. Sanger's company was paid for the work she performed for Cognizant. (Pa104-Pa107 at ¶18.) These were all factors the Trial Court considered when concluding that Ms. Sanger was an independent contractor as a matter of law and that, by virtue of N.J.S.A. 10:5-12(a), she was not entitled to relief under the LAD. (1T.)

Further, it is worth noting that Plaintiff's counsel "openly concede[d]" during oral argument that the facts supporting employment are not as strong with respect to NLB. (*Id.* at 23:20-24:18.) In fact, the *only* evidence Plaintiff proffers in support of an employment relationship with respect to NLB is that "NLB exerted control over her workplace through Singh's oversight as Plaintiff remained in contact with her during her employment" and the fact that "Plaintiff was onboarded by NLB, was paid by NLB, and NLB played a substantial part in her termination." (Pb36.) However, Plaintiff's counsel blatantly misstates Ms. Sanger's actual testimony, as Ms. Sanger did not testify that NLB exerted control over her workplace. (Pa962-Pa965 at 568:7-570:24.) Moreover, none of those facts demonstrate sufficient control to support an employment relationship as contact, onboarding, payment, and termination would all be present in a contractor relationship as well.

For all of these reasons, the Trial Court correctly determined Plaintiff was not an employee of NLB and thus, her LAD claims against NLB fail as a matter of law based on her independent contractor status alone.

B. Ms. Sanger's allegations did not rise to the level of actionable sexual harassment.

Even assuming *arguendo* that Ms. Sanger was an employee of NLB under New Jersey law (she was not), the evidence does not support her hostile work environment sexual harassment claims because the conduct she allegedly

endured was not sexual in nature nor based on her gender. In order to establish a hostile work environment claim under the LAD, a Plaintiff must show (1) the conduct complained of was unwelcome, (2) it occurred because of protected-class status, and (3) a reasonable person in the same protected class would consider it sufficiently severe or pervasive to alter the plaintiff's working conditions. *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-04 (1993).

In reviewing a hostile work environment claim, courts review all circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physical, and whether it unreasonably interferes with an employee's work performance. *Shepherd v. Hunterdon Dev. Ctr.*, 174 N.J. 1, 124 (2002). "When evaluating whether conduct is sufficiently severe or pervasive to create a hostile work environment, we focus on the harassing conduct, not its effect on the plaintiff or the work environment." *Cutler v. Dorn*, 196 N.J. 419, 431 (2008). Whether harassing conduct makes a work environment hostile is assessed by use of a reasonable person standard. *Id.* Thus, severe or pervasive conduct must be conduct that would make a *reasonable person believe* the conditions of employment are altered and the working environment is hostile. *Id.*

Here, Ms. Sanger could not demonstrate that a reasonable person would consider the alleged conduct by NLB sufficiently severe or pervasive to alter the

conditions of employment and create an intimidating, hostile, or offensive working environment. Ms. Sanger's harassment allegations fell into three main categories: (1) conduct by Cognizant employee, Mr. Saha – whom Ms. Sanger never met in person because he worked in India;[3] (2) conduct by Cognizant employee, Mr. Srinivas; and (3) conduct by NLB employees, Shruti Singh and Nikhil Anand on behalf of Mr. Srinivas.

As a preliminary matter, NLB notes that any claims regarding the alleged behavior of Cognizant employees, Mr. Saha and Mr. Srinivas, are directed at Cognizant and not NLB, as NLB had no control over these Cognizant employees, and Ms. Sanger never reported the alleged behavior to anyone at NLB. *See*, *e.g.*, *Devine v. Prudential Ins. Co. of America*, Civil No. 03-03971 (FLW), 2007 WL 1875530, at *23 (D.N.J. June 28, 2007) ("An employer is only liable for a hostile work environment if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and remedial action.") (internal citation and quotation omitted). To the extent that Ms. Sanger brings these claims against NLB Defendants, they simply do not rise to the level of

[3] It appears that Ms. Sanger has abandoned her claims with respect to Mr. Saha's alleged behavior, as she does not mention Mr. Saha or her allegations against him in her Brief. Accordingly, we will only address the allegations Ms. Sanger relies on in her Brief.

actionable harassment under New Jersey law.

1. The alleged contact between Mr. Srinivas and Ms. Sanger's leg does not constitute actionable sexual harassment.

In her Complaint, Ms. Sanger's attorney claimed she experienced "brazen harrowing sexual harassment" that began when Mr. Srinivas "inappropriately touched her leg during a meeting." (Pa1-Pa19 at p. 17.). However, based on Ms. Sanger's own testimony, the actual encounter was far less salacious than this mischaracterization implies. Specifically, when asked about this incident during her deposition, Ms. Sanger testified she was in a meeting with Ms. Chopra and Ms. Patnaik at Cognizant's office in Bridgewater, New Jersey when Mr. Srinivas entered the doorway, and his leg made contact with her right calf for "one or two seconds." (Pa727-Pa728 at 259:20-260:1.)

When asked how she reacted, Ms. Sanger testified she "just moved a little bit" and "shifted [her] chair." (Pa1008 at 614:13-25.) Ms. Sanger and Mr. Srinivas did not make eye-contact, and Ms. Sanger did not say anything to Mr. Srinivas, Ms. Chopra, or Ms. Patnaik. (*Id.*) In fact, Ms. Sanger did not express that the contact was unwelcome, and she did not report the incident to anyone. (Pa1010 at 616:12-14.) Neither Ms. Chopra nor Ms. Patnaik recall this alleged contact between Mr. Srinivas and Ms. Sanger's right calf. (Pa1092-Pa1109 at 43:1-3.) Notably, during her deposition, Ms. Sanger was unable to

even recall when this interaction allegedly occurred. (Pa729 at 261:3-5; Pa1009 at 615:1-2.)

Ultimately, even if the contact between Mr. Srinivas and Ms. Sanger occurred exactly as Ms. Sanger testified (which NLB disputes), there is simply no way a reasonable factfinder would conclude that Mr. Srinivas's behavior was severe or pervasive such that a reasonable person would believe the conditions of employment were altered or the working environment was hostile based on this one, isolated incident. *See Sessoms v. Trustees of Univ. of Penn.*, 739 Fed. App'x 84, 90 (3d Cir. 2018) (finding summary judgment on hostile work environment claim was proper where plaintiff alleged a single incident where her supervisor made a single unwanted physical contact with plaintiff's leg).

2. No reasonable factfinder could find in favor of Ms. Sanger on her claims against NLB employees, Mr. Anand and Ms. Singh.

Ms. Sanger has presented a convoluted and elaborate story regarding NLB employees, Mr. Anand and/or Ms. Singh, allegedly "propositioning her to engage in sexual relations with defendant Srinivas." Ms. Sanger's attorney asserts Defendants' alleged proposition was "sexual in nature" and would not have occurred but for her gender. However, there is absolutely no evidence in the record – including Plaintiff's own testimony – that supports this claim.

Despite the repeated characterization in the pleadings of these conversations as "propositions for sex," during her deposition, when asked about the alleged "proposition," Plaintiff testified Ms. Singh had invited her to a party at a hotel room, where there would be several men, including Mr. Srinivas, and also several women in attendance and "they were going to have a good time." (Pa938-Pa940 at 544:6-546:20.) Ms. Sanger also claims Ms. Singh followed up a few times to ask if she had made a decision about whether she would attend. Ms. Sanger admitted she could not recall what Ms. Singh actually said during the initial phone call, and she was not even able to articulate why she may have believed Ms. Singh was proposing sex with Mr. Srinivas or saying Mr. Srinivas wanted to have sex with her. (Pa770-Pa776.)

Although NLB Defendants deny these conversations occurred, even assuming they happened exactly as Ms. Sanger testified, they are insufficient to form the basis of a successful sexual harassment/hostile work environment claim. Despite Plaintiff's counsel's attempts to characterize the alleged invitation as a "sexual proposition," when considering Ms. Sanger's actual testimony, no reasonable person would conclude that the alleged invitation was of a sexual nature or occurred because of her gender – particularly because she testified that both men and women were going to attend the party. Plaintiff's entire position relies exclusively on unsupported speculation and innuendo that,

because the alleged (mixed-gender) party was set to take place in a hotel room, it was somehow sexual in nature. Such unsupported assumptions, without any supporting evidence, are insufficient to defeat a meritorious motion for summary judgment.

Moreover, the alleged conduct (a few phone calls encouraging Ms. Sanger to accept the invitation) was not objectively severe or pervasive enough such that a reasonable person would believe the conditions of employment were altered or the working environment was hostile. In fact, other than citing her termination, Plaintiff does not offer any examples of how she contends the terms and conditions of her "employment" were altered or how the work environment was hostile or abusive. Indeed, when asked if she had talked to anyone else about the invitation to meet with Mr. Srinivas, Plaintiff testified she did not because she "never thought that this [was] that serious." (Pa786-Pa787.)

Overall, the image Ms. Sanger's counsel paints of NLB employees Mr. Anand and Ms. Singh as sexual liaisons, working in concert with the common goal of ensuring Cognizant employee Mr. Srinivas was able to have sexual relations with Ms. Sanger, is simply not supported by the evidence – including Ms. Sanger's own testimony. The Trial Court said it best when it concluded that what Plaintiff described in her deposition was "a far cry from [being] told [she] need[ed] to go to a hotel room and have sex with

Mr. Srinivas….” (Pa1272.) Accordingly, even viewing the evidence in the light most favorable to Plaintiff, no reasonable juror could find in Ms. Sanger’s favor. Therefore, NLB Defendants were entitled to summary judgment on her claims.

3. Plaintiff’s eleventh-hour *quid pro quo* sexual harassment claim should be disregarded.

Plaintiff’s arguments regarding a *quid pro quo* theory of harassment should be disregarded as Plaintiff did not bring a *quid pro quo* claim in her Complaint and the first mention of a *quid pro quo* claim came in Ms. Sanger’s Opposition to Defendants’ summary judgment motion. *See Thompson v. Kessler Inst. for Rehab., Inc.*, Civil Action No. 15-5533 (D.N.J. Aug. 31, 2017); *Warfield v. SEPTA*, 460 Fed. App’x 127, 132 (3d Cir. 2012) (“A plaintiff may not amend a complaint by raising arguments for the first time in a brief in opposition to a motion for summary judgment.”). Further, her post-dismissal attempt to amend her Complaint to include a cause of action under Section 10:5-12(l) (which relies on a *quid pro quo* theory of harassment) was properly denied.

Putting Plaintiff’s clear subterfuge aside, a *quid pro quo* claim nevertheless fails for the same reasons her hostile work environment claim fails. *Quid pro quo* sexual harassment occurs when an employer “attempts to make an employee’s submission to sexual demands a condition of his or her employment,” and it involves “an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive

unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences." *Lehmann, supra.*, 132 N.J. at 601.

Here, first and foremost, according to Plaintiff's own testimony, there is no record evidence that the alleged invitation to the mixed-gender party was sexual in nature, and Ms. Sanger simply was not asked to submit to sexual demands as a condition of her contract. Moreover, there is no evidence of a causal connection between Ms. Sanger's purported refusal to attend the party and the termination of her contract. Plaintiff's vague assertion that Ms. Singh stated "it will not end well" if she refused to attend is not enough to form a causal link, particularly since Ms. Singh was not a decisionmaker with respect to her termination. Accordingly, Plaintiff's sexual harassment claims against NLB Defendants fail under either theory.

C. Ms. Sanger's Retaliation Claims Fail Under LAD.

Because she cannot demonstrate that the proffered legitimate, nonretaliatory reason for ending her contract is pretext or that retaliation was the real reason for the decision, Ms. Sanger's retaliation claims fail as well. LAD retaliation claims are analyzed under the familiar *McDonnell Douglas* paradigm. *Battaglia v. UPS, Inc.*, 214 N.J. 518, 546 (2013) (applying *McDonnel Douglas* to LAD). Under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which New Jersey courts adopted in *Grigoletti v. Ortho*

Pharm., Corp., 118 N.J. 89, 97 (1990), the employee carries the initial burden of establishing a prima facie case of retaliation. The burden of production then shifts to the employer to articulate some legitimate, nonretaliatory reason for the adverse employment action. *Id.* Once the employer does so, "the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the [employee]."*Blackburn v. UPS, Inc.*, 179 F.3d 81, 92 (3d Cir. 1999). Then, to prevail at trial, the plaintiff must convince the factfinder both the reason given by the employer was false and retaliation was the real reason. *Id.* The ultimate burden of proving retaliation remains with the plaintiff at all times. *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 449-50 (2005). "For summary judgment purposes, the court must determine whether the plaintiff has offered sufficient evidence for a reasonable jury to find the employer's proffered reason for the discharge was pre-textual and retaliation for the whistleblowing was the real reason for the discharge." *Blackburn*, *supra*, 179 F.3d at 92-93.

1. Plaintiff cannot establish a prima facie case of retaliation.

Plaintiff cannot establish a prima facie case of retaliation under LAD because she did not engage in protected activity. Even if she did engage in protected activity, NLB was not aware of such activity, and thus there was no causal connection between the activity and her termination. A prima facie case of retaliation under the LAD requires a showing that (1) Plaintiff was in a

protected class, (2) she engaged in a protected activity known to the employer, (3) she was subjected to an adverse employment action, and (4) there is a causal link between the protected activity and the adverse employment consequence. *Victor v. State*, 203 N.J. 383, 409, 4 A.3d 126, 141 (2010). To be considered protected activity under the LAD, an employee must make a good faith complaint about conduct that she thinks is discriminatory. *Battaglia*, *supra*, 214 N.J. at 548.

Because she has not shown she engaged in protected activity, that NLB was aware she engaged in protected activity, or that there was a causal link between any such protected activity and the termination of her contract, Ms. Sanger has failed to make out a prima facie case of retaliation under the LAD. Ms. Sanger claims she engaged in protected activity by "opposing and questioning" unlawful discrimination and harassment. (Pa1-Pa19.) However, during her deposition, Ms. Sanger admitted she did not report any of the alleged conduct by Mr. Srinivas, Ms. Singh, or Mr. Anand to anyone at NLB. (Pa1010-Pa1020, at 616:12-13; 625:2-626:4.) Therefore, the only potential protected activity Ms. Sanger can rely upon is her alleged refusal to attend the mixed-gender party in the hotel room, which simply does not constitute protected activity sufficient to form the basis of a retaliation claim.

Moreover, Ms. Sanger cannot demonstrate a causal connection between

her alleged protected activity and her termination, as neither Ms. Singh nor Mr. Anand were responsible for Cognizant's ultimate decision to terminate her contract. (*See* Pa89 at ¶ 3); *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 196 (3d Cir. 2015) ("The plaintiff, however, cannot establish that there was a causal connection without some evidence that the individuals responsible for the adverse action knew of the plaintiff's protected conduct at the time they acted.").

2. NLB terminated Plaintiff's contract for legitimate, non-retaliatory reasons.

Assuming *arguendo* that Plaintiff could establish a prima facie case of retaliation (which she cannot), NLB need only articulate a legitimate, non-retaliatory reason for any alleged adverse "employment" decision. *Young, infra*, 385 N.J. Super. at 465. Here, the evidence demonstrates NLB's decision to terminate Ms. Sanger's contract was based on legitimate, non-retaliatory reasons, namely Ms. Sanger's use of her husband's company, Staffing Idea, as a passthrough company, giving Staffing Idea sizable referral fees. (Pa1143-Pa1147 at 46:18-63:22.) At first, because it was not uncommon for recruiters to use such third parties from time to time, NLB agreed to work with Staffing Idea without questioning Ms. Sanger. (*Id.* at 46:18-47:15.) However, after a few months, the business going to Staffing Idea steadily increased, and many things about the company seemed suspicious to Ms. Singh. (*Id.* at 50:14-57:16.)

For example, Ms. Sanger told NLB personnel to never contact Staffing Idea. (*Id.* at 50:19-23; 53:19-54:8.) Further, Ms. Sanger was giving repeated business to Staffing Idea, and a substantial number of her candidates were being placed through the company, which was unusual. (*Id*.) Because the situation surrounding Staffing Idea seemed so strange, Ms. Singh decided to conduct some online research and saw Staffing Idea had virtually no digital media presence. (*Id.* at 50:19-23; 52:4-12; 53:19-54:8.) More importantly, Ms. Singh was surprised to discover the address associated with Staffing Idea on file with the state of New Jersey was the same address Ms. Sanger had given on her onboarding forms, and the person listed as the company contact associated with Staffing Idea was Manoj Sanger, Ms. Sanger's husband. (*Id.* at 53:19-54:8; 58:6-17; *see also* Pa104-Pa153.) Until Ms. Singh discovered the connection between Staffing Idea and Ms. Sanger's husband, NLB had no knowledge of Mr. Sanger's ownership interest in Staffing Idea. (Pa104-Pa107 at ¶19.)

Because of this failed disclosure, Staffing Idea improperly received $41,872 in referral fees. (*Id.* at ¶ 20.) Soon after Ms. Singh discovered this information, on November 6, 2019, she shared it with her superiors, Mr. Anand and Sachin Alug, which is well documented. (Pa1146-Pa1147 at 59:13-62:6; *see also* Pa104-Pa153.) That same day, NLB informed Cognizant of the flagged case, and considering this information, Cognizant decided to end its relationship

with Ms. Sanger immediately. (Pa1103-Pa1104 at 44:3-48:18; *see also* Pa154-Pa166.) In the following days, NLB informed both Ms. Sanger and Staffing Idea that NLB and Cognizant had detected potential fraud and that NLB was immediately terminating the MSAs, Purchase Orders, and FTE Agreements for their consultants. (Pa283-Pa287.) Further, NLB demanded that Staffing Idea refund the total amount paid by NLB against each referral Purchase Order and FTE placement. (*Id*.) Accordingly, the undisputed facts support that NLB's decision to terminate Ms. Sanger's contract was based solely on its discovery of her fraudulent activity.

3. Plaintiff cannot demonstrate the proffered reason was pretextual.

After the employer articulates its legitimate, non-retaliatory reason, the burden shifts back to the plaintiff, who "must come forward with evidence of a discriminatory motive of the employer, and demonstrate that the legitimate reason was merely a pretext for the underlying discriminatory motive." *Young v. Hobart W. Grp.*, 385 N.J. Super. 448, 465, 897 A.2d 1063, 1073 (App. Div. 2005). To establish pretext, a plaintiff must show the employment decision at issue would not have been made but for the employee's protected activity. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) ("[A] plaintiff making a retaliation claim ... must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

Furthermore, a plaintiff cannot simply rest on the laurels of her prima facie case; rather, she must adduce "significantly probative" evidence of pretext to create a question of fact sufficient for the jury. *See Lombardi v. Cosgrove*, 7 F. Supp. 2d 481, 491 (D.N.J. 1997) ("When the non-moving party's evidence in opposition to a properly-supported motion for summary judgment is merely 'colorable' or 'not significantly probative,' the Court may grant summary judgment.") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

A plaintiff may show pretext either directly by persuading the court that a retaliatory reason more likely than not motivated the employer or indirectly by showing that weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action exist such that a reasonable factfinder could find them unworthy of credence. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). A reason cannot be a pretext for retaliation unless is the plaintiff shows both that the reason was false and that retaliation was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Here, Ms. Sanger simply has no evidence she engaged in protected activity or that a retaliatory reason motivated NLB's decision to terminate Ms. Sanger's contract. Despite Plaintiff's attempts to obscure the issues and criticize Defendants' investigatory process, there is no actual evidence to refute the

proffered chronology which led to Ms. Sanger's termination. Further, Plaintiff's self-serving testimony that she told Ms. Chopra and Ms. Singh that Staffing Idea was her husband's company is completely contradicted by the rest of the evidence in the record and is insufficient to demonstrate pretext. The documentary evidence supports that Ms. Singh discovered Ms. Sanger's husband owned Staffing Idea – a clear conflict of interest in light of the circumstances – through a Google search, which she reported to NLB's CEO, Sachin Alug, who, in turn, notified Mr. Srinivas about the discovery. On its face, the documentation sufficiently showed Ms. Sanger's wrongdoing and that no further investigation was needed, particularly due to Ms. Sanger's status as a contractor. Further, NLB and Cognizant not only terminated Ms. Sanger's contract, but also the contracts of the 17 consultants placed through Staffing Idea. (Pa286).

Without providing any case law to support her contentions, Plaintiff lambastes NLB and Cognizant for failing to complete a thorough enough investigation (by her own arbitrary standards), and she claims the swiftness of the decisions somehow suggests pretext. However, it is improper for Plaintiff to make such assertions, as NLB and Cognizant were well within their rights, even if Plaintiff believes the decision was hasty or unfair. *See Viscik v. Fowler Equip. Co*., 173 N.J. 1, 21, 800 A.2d 826, 838 (2002) (under LAD, "employer's

subjective decision-making may be sustained even if unfair"); *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 561, 569 *A.*2d 793 (1990) (holding an "employee can be fired for a false cause or no cause at all. That firing may be unfair, but it is not illegal"); *Andersen v. Exxon Co.*, U.S.A., 89 N.J. 483, 496, 446 A.2d 486, 493 (1982) ("There should be no second-guessing the employer").

Accordingly, the undisputed facts demonstrate NLB Defendants had a legitimate, non-retaliatory reason for its decision to terminate its contract with Mirosoft, and Ms. Sanger simply has no evidence that a retaliatory reason motivated NLB's decision. She cannot proffer a single fact that would indicate that NLB's articulated reason for her termination is false, unworthy of credence, or implausible, and no reasonable juror could conclude based on the evidence in the record that the proffered reasons were pretextual.

As such, even viewing the facts in the light most favorable to Plaintiff, she cannot establish a retaliation claim under applicable law. Thus, the Trial Court properly granted summary judgment on her retaliation claims.

D. Ms. Sanger's Claims for Aiding and Abetting Under LAD Fail.

For the reasons discussed above, Ms. Sanger also cannot sustain her claims against Ms. Singh and Mr. Anand for "aiding and abetting" under the LAD. Under the LAD, it is unlawful for any person, whether employer or employee, to aid, abet, incite, compel or coerce any acts forbidden under the

LAD. N.J. Stat. Ann. § 10:5-12. Individual liability under the LAD can only arise when a plaintiff establishes the following elements: (1) the party whom the individual defendant aids must perform a wrongful act that causes an injury; (2) the individual defendant must be generally aware of their role as party of an overall illegal or tortious activity at the time they provided assistance, and (3) the defendant must knowingly and substantially assist the principal violation. *Tarr v. Ciasulli*, 181 N.J. 70, 83 (2004). Substantial assistance can be found by analyzing five factors: (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor. *Id.* at 84.

Applying those factors here, because Ms. Sanger failed to present evidence of any underlying actionable claim of harassment or retaliation, her aiding and abetting claims against Ms. Singh and Mr. Anand also fail.

E. The Trial Court Did Not Improperly Rely On Credibility Determinations.

Contrary to Ms. Sanger's assertions, the Trial Court did not improperly make credibility assessments when granting summary judgment. Although it is true that, when reviewing summary judgment motions, courts must view the "evidential materials ... in the light most favorable to the non-moving party," *Brill, supra*, 142 N.J. at 540, "'conclusory and self-serving assertions by one of

the parties are insufficient to overcome the motion." *Puder v. Buechel*, 183 N.J. 428, 440, 874 A.2d 534 (2005). Such assertions, "without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." *Hoffman v. Asseenont v.Com, Inc*., 404 N.J.Super. 415, 425-26, 962 A.2d 532 (App.Div.2009). "[O]pposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" *Id.; see also O'Loughlin v. Nat'l Cmty. Ban*k, 338 N.J.Super. 592, 606-07, 770 A.2d 1185 (App.Div.) (stating opposition to summary judgment must do more than establish abstract doubt regarding material facts), *certif. denied*, 169 N.J. 606, 782 A.2d 424 (2001).

Where evidence presented is so one-sided that one party must prevail as a matter of law, courts should not hesitate to grant summary judgment. *Globe Motor Company v. Igdalev*, 225 N.J. 469 (2016); *see also Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

Here, the Trial Court did not disregard Ms. Sanger's testimony. In fact, the Trial Court carefully evaluated Ms. Sanger's deposition testimony and, considering her own words, determined that the evidence was insufficient as presented. When Judge Bruder mentioned the "substantial credibility gaps" in

Plaintiff's testimony, he did so not as a basis for the Court's decision, but instead, because he was attempting to recount Plaintiff's allegations accurately but was having difficulty doing so because Plaintiff indeed has provided multiple different versions of events. In fact, Judge Bruder specifically stated the Court was "not going to make a credibility assessment" and the Court was "not hanging its hat, so to speak, on a credibility assessment" of the parties. (1T40:22-42:2). Further, Ms. Sanger's assertion that the Court's acknowledgement of credibility gaps somehow tainted its decision is without merit. Importantly, in denying Ms. Sanger's motion for reconsideration, Judge Bruder reiterated that credibility determinations did not factor into the Court's assessment, and that he construed the evidence in the light most favorable to Ms. Sanger:

> The Court was not making a credibility assessment between the different versions. But even using the versions that the plaintiff offers, and she offered multiple versions, and the Court, for the record, did not make a credibility assessment as part of its determination of the facts of this case and I -- in fact, I even indicated that at the point in time where I mentioned that there were some credibility gaps in the plaintiff's testimony the Court can't turn a blind eye to it, but that didn't really play at all into the Court's assessment because the Court's assessment was based on the law in com -- in comparison with the facts, and the facts even in a light most favorable to the plaintiff.

(2T 31:5-18)

Moreover, the specific findings that Plaintiff claims were impacted by the Court's credibility assessments ultimately were not material to the Court's decision. For example, whether Ms. Sanger and Mr. Srinivas had met before is not a material fact. However, we note Plaintiff did testify she never had any one-on-one interactions with Mr. Srinivas (Pa721 at 253: 17-19) and she never had any direct conversations with him (Pa722 at 254:5-9). Further, the Court's pretext determination is ultimately not material because, based on the Court's ruling on the other matters, Plaintiff's claims failed as a matter of law before the Court even made it to the pretext analysis. Therefore, the pretext analysis was not material to the ultimate grant of summary judgment.

Even still, there is no evidence that credibility assessments improperly factored into the ultimate decision. To the contrary, it is clear from the Court's decision that it used the proper standard for summary judgment when analyzing the evidence in the record and ultimately concluded that no reasonable juror could find in Ms. Sanger's favor.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (PA1337-PA1338)

"Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests

within the sound discretion of the trial court." *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382 (App. Div. 2015). Thus, a trial court's reconsideration decision should be left undisturbed unless it represents a clear abuse of discretion. *Hous. Auth. of Morristown v. Little*, 135 N.J. 274, 283, 639 A.2d 286 (1994). An "abuse of discretion only arises on demonstration of 'manifest error or injustice,' " *Hisenaj v. Kuehner*, 194 N.J. 6, 20 (2008) (*quoting State v. Torres*, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis,' " *Milne v. Goldenberg*, 428 N.J. Super. 184, 197 (App. Div. 2012) (*quoting Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571 (2002)).

Here, the Trial Court properly denied Plaintiff's Motion for Reconsideration, as the Court's original ruling was correct and Ms. Sanger failed to meet her burden in providing a sufficient basis for why reconsideration was warranted. As a threshold matter, the "magnitude of the error" on which the motion for reconsideration is based "must be a game-changer for reconsideration to be appropriate." *Palombi v. Palombi*, 414 N.J. Super. 274, 289 (App. Div. 2010). Dissatisfaction with the decision of the Court is not an appropriate basis for a motion for reconsideration. *See D'Atria v. D'Atria*, 242 N.J.Super. 392, 401 (Ch. Div. 1990). Further, reconsideration should be utilized only for those

cases which fall into the following two categories, neither of which is present here: "1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." *Id.* In other words, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." *Id.*

Here, Ms. Sanger is not entitled to reconsideration simply because she is dissatisfied with the Trial Court's decision. The Trial Court used the correct legal standards in evaluating NLB Defendants' summary judgment motion, and its decision was comprehensive and well-reasoned. There is nothing palpably incorrect or irrational about the grounds on which the Trial Court ruled. Instead, the Trial Court thoroughly considered all the probative, competent evidence in the light most favorable to Ms. Sanger but ultimately and correctly determined that the evidence was insufficient to permit a rational factfinder to resolve the claims in Ms. Sanger's favor. Accordingly, there is no reason why the Trial Court's decision should be revisited.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MS. SANGER'S MOTION FOR LEAVE TO AMEND HER COMPLAINT (PA1337-PA1338)

A trial court's decision to grant or deny a motion to amend a complaint also is reviewed for abuse of discretion. *Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urb. Renewal Co.*, 435 N.J. Super. 51, 62, 86 A.3d 730 (App. Div. 2014). Courts have discretion to grant leave to amend pursuant to R. 4:9-1. That exercise of discretion requires a two-step analysis: (1) whether the non-moving party will be prejudiced, and (2) whether granting the amendment would nonetheless be futile. *See Notte v. Merchants Mut. Ins. Co.*, 185 N.J. 501 (2006). In examining whether the amendment will be futile, the Court must determine whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. *Id.* Thus, while motions for leave to amend are to be determined without consideration of the ultimate merits of the amendment, those determinations must be made "in light of the factual situation existing at the time each motion is made." *Interchange State Bank v. Rinaldi*, 303 N.J.Super. 239, 256, 696 A.2d 744 (App.Div.1997). More specifically, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to

dismiss must be granted." *Id*. at 256-57, 696 A.2d 744.

Here, the Trial Court did not abuse its discretion in denying Ms. Sanger's post-dismissal Motion for Leave to Amend her Complaint, as her proposed amendment would have been both futile and prejudicial to Defendants.

Specifically, the amendment was futile because the newly asserted cause of action under Section 10:5-12(l) was not sustainable as a matter of law, and allowing the amendment would have been a useless endeavor. First, no such claim can be stated against the individual defendants Anand and Singh as they were not parties to the contract on which this putative claim was based. Because Ms. Sanger did not have a contract with the individual defendants, any amendment to add a discriminatory failure to contract claim against them is futile. Ms. Sanger signed the Agency Agreement and Purchase Order with NLB, not Anand or Singh. (Pa181-187; Pa190-197; Pa281-282.)

In addition, Plaintiff's amendment would have been futile because she asserts that her new claim for contractual discrimination/retaliation would rely on the same facts and same law as her existing claims, which had already been deemed insufficient to form the basis of a LAD claim by the Trial Court. Accordingly, whether Plaintiff brought her LAD claims under Section 12(a) or Section 12(l), they nonetheless would fail because the facts did not rise to the level of actionable sexual harassment/retaliation.

Moreover, allowing Plaintiff to amend her Complaint at this late stage would indubitably prejudice Defendants. Plaintiff claims that the proposed amendment "would not introduce new facts or claims" and thus, the amendment would not result in prejudice to Defendants. However, in the original Complaint, Plaintiff brought her sexual harassment claims solely under the theory of hostile work environment sexual harassment based on Plaintiff's gender. Specifically, she alleged, "Based on her gender, plaintiff was subjected to relentless harassment, which was sufficiently severe and pervasive, such that a reasonable individual of the same gender would have deemed the conditions of employment altered and the working environment hostile, abusive, intimidating and offensive." (Complaint, ¶ 30). Ms. Sanger did not plead a *quid pro quo* theory of sexual harassment in her original Complaint, and the text of her First Cause of Action clearly relates to a hostile work environment claim only.

If Ms. Sanger had been allowed to amend her Complaint to include a failure to contract claim under N.J.S.A § 10:5-12(l), that claim would have depended on a *quid pro quo* theory of sexual harassment, thereby prejudicing Defendants. Specifically, while New Jersey courts have recognized *quid pro quo* harassment claims under Section 12(l), the courts have **not** approved of hostile work environment claims outside of the employment context. *See J.T.'s Tire Services v. U. Rentals*, 411 N.J. Super. 236 (App. Div. 2010). Accordingly,

because Ms. Sanger did not plead *quid pro quo* sexual harassment, Defendants focused its discovery in this matter only on evidence that would support or refute the elements of hostile work environment harassment. Thus, adding such a claim at this late stage would clearly prejudice Defendants.

In addition, Ms. Sanger has been on notice since the beginning of this case that Defendants were asserting Plaintiff's independent contractor status as a defense. Accordingly, she had ample time to seek to amend her Complaint but waited, instead, until *after* the Trial Court issued its summary judgment order dismissing her Complaint with prejudice. For all these reasons, the Trial Court was correct in denying Ms. Sanger's motion to amend her Complaint.

CONCLUSION

Based on the foregoing, NLB Defendants respectfully request that this Court affirm the Trial Court's Order granting summary judgment to Defendants, as well as the Order denying Ms. Sanger's Motion for Reconsideration and Motion for Leave to Amend the Complaint.

Dated: March 24, 2025

SQUIRE PATTON BOGGS (US) LLP
Attorneys for Defendants
Next Level Business Services, Inc., Nikhil Anand, and Shruti Singh

By: *s/ Mark C. Errico*
Mark C. Errico
D. Lewis Clark Jr.
Melissa Legault

CERTIFICATE OF FILING AND SERVICE

I certify that true copies of the foregoing were electronically filed with this Court and simultaneously served upon all counsel of record through eCourts on this 24th day of March 2025.

s/ Mark C. Errico
MARK C. ERRICO

NISHA SANGER, Plaintiff, v. NEXT LEVEL BUSINESS SERVICES, INC., COGNIZANT TECHNOLOGY SOLUTIONS COMPANY, and NN SRINIVAS, AARTI CHOPRA, AYAN SAHA, SHRUTI SINGH, NIKHIL ANAND, and JOHN AND/OR JANE DOES 1-20 (Names Being Fictitious), in their individual and corporate capacities and as aiders and abettors, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-000592-24 DOCKET NO. BELOW: SOM-L-1274-20 SAT BELOW: Hon. John Bruder, J.S.C. LAW DIVISION – SOMERSET COUNTY

REPLY BRIEF OF PLAINTIFF-APPELLANT NISHA SANGER

BRANDON J. BRODERICK, LLC
65 Route 4 East
River Edge, New Jersey 07661
Attorneys for Plaintiff-Appellant Nisha Sanger

Of Counsel and On the Brief:
Michael K. Fortunato (#037542010)
mfortunato@brandonjbroderick.com

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PRELIMINARY STATEMENT

Defendants' Opposition Briefs are predicated upon a disregard for Plaintiff's testimony that is inappropriate at the summary judgment stage. As set forth in Plaintiff's initial Brief, the Trial Court improperly resolved disputed factual issues in favor of the moving parties. Underlying much of Defendants' argument — both below and on appeal — is their position that Plaintiff is simply not to be believed. They urge this Court, as they did the Trial Court, to discount and reinterpret Plaintiff's sworn testimony and draw adverse inferences about her motives. But that is not the role of a Court on summary judgment. Whether Plaintiff's version of the facts should prevail is a question to be left to the jury as there is sufficient record evidence to support her claims.

The absurdity of Defendants' position is highlighted by their depiction of the case's seminal event, the proposition made to Plaintiff. A suggestion that a subordinate join a senior executive for a "good time" in a hotel room, arranged and for by the company, is facially sexual. It needs no translation. No reasonable person could interpret such an invitation as anything other than a sexual overture — especially where, as here, it was preceded by casual physical contact and accompanied by warnings that refusal would have negative consequences – which it did when she was terminated shortly thereafter under the guise of a conflict of interest. Defendants' position that this purported hotel meeting could have, in theory,

referred to a non-sexual gathering (while at the same time denying that the invitation was ever made) should not be seriously entertained. Their contention that Plaintiff, who reported to work at Cognizant and performed the exact same functions as a Cognizant employee, somehow is not an employee for the purpose of the Law Against Discrimination is equally specious.

Plaintiff has presented sufficient evidence through her deposition testimony, and that of other witnesses, to support a jury determination that she was functionally an employee, that she was subjected to harassment, and that her employment relationship was terminated because she refused to acquiesce. Defendants have sought to obscure these simple facts with white noise. The Trial Court's summary judgment order deprived Plaintiff of the opportunity to have her claims adjudicated at trial and have a jury decide who to believe.

For these reasons, and the reasons set forth in Plaintiff's initial Brief, the Trial Court's grant of summary judgment should be reversed.

REPLY LEGAL ARGUMENT

I. PLAINTIFF'S RELATIONSHIP WITH DEFENDANTS WAS THAT OF AN EMPLOYER/EMPLOYEE RELATIONSHIP FOR THE PURPOSE OF THE LAD.

Defendants' assertion that Plaintiff was indisputably an independent contractor, and therefore not entitled to the protections of the New Jersey Law Against Discrimination (LAD), rests on a distorted reading of the factors set forth in Pukowsky v. Caurso, 312 N.J. Super. 171 (App. Div. 1998). Plaintiff was not a remote transactional vendor working in a silo. She was embedded in Cognizant's daily operations. She worked out of Cognizant's Bridgewater office multiple days per week, used Cognizant-issued equipment, and reported directly to Defendant Chopra, who oversaw her daily work like a typical employee. (Pa450, Pa1160). She used a Cognizant email address and worked from a conference room similar to other employees. (Pa451, Pa1161). Plaintiff was placed on the same team as Cognizant recruiters and performed identical functions (Pa450, Pa1160). Defendants also terminated Plaintiff in a manner consistent with employee separations, by summoning her to the office. (Pa459, Pa1169).

Defendants exercised control over Plaintiff's job performance, the single most important Pukowsky factor. See Chrisanthis v. Cnty of Atl., 361 N.J. Super. 448, 456 (App. Div.), certif. denied, 178 N.J. 31 (2003). As Plaintiff cited in her initial Brief, these facts are similar to cases in which employment relationships have been

determined to exist under Pukowsky. See generally D'Annunzio v. Prudential Insurance Co., 192 N.J. 110 (2007); see also Hoag v. Brown, 397 N.J. Super. 34, 38 (App. Div. 2007).

Defendants rely heavily on Plaintiff's statements in her pleadings and testimony acknowledging she was engaged as a contractor, as though her own understanding of the relationship ends the Pukowsky inquiry. But whether Plaintiff considered herself an employee is not dispositive—nor are contractual labels or titles. If it were, the twelfth Pukowsky factor, "intent of the parties," would swallow the entire test.

Defendants' collective description of Plaintiff's working relationship is also disingenuous. They paint Plaintiff's engagement as a carefully structured, arms-length vendor relationship. The actual facts of Plaintiff's day-to-day work make clear that this structure was fiction and not based in the reality of the relationship itself. Plaintiff was recruited by Cognizant through interviews with senior managers, worked directly under Cognizant's supervision and received assignments indistinguishable from those given to direct hires. (Pa450, Pa1160). Most tellingly, as Plaintiff testified, the classification of workers as "contractors" or "employees" bore no relation to their job functions—it depended solely on the source of their recruitment . (Pa450-51, Pa1160-61).

Plaintiff's label as a contractor did not reflect the substance of her role. Plaintiff was performing the work of an employee, alongside employees, subject to the same expectations and oversight and is entitled to the same protection under the LAD.

II. PLAINTIFF'S SEXUAL HARASSMENT CLAIM PRESENTS A TRIABLE CLAIM UNDER THE LAD.

Like their obfuscation of the employment relationship itself, Defendants have strained to recharacterize what was very obviously a request for a sexual encounter. Plaintiff has testified that she was subjected to a coercive and inappropriate proposition through intermediaries acting on behalf of a senior executive. She was invited to a hotel for a "good time," told this had been done before, and warned that things would "not end well" if she refused. (Pa455-56, Pa1165-66). She recounted how on one occasion this executive had made contact with her leg prior to the solicitation. (Pa455, Pa1165). Under the standard established in Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993), Plaintiff can sustain a claim for a hostile work environment if the complained of conduct was sexual in nature and was severe or pervasive enough to make a reasonable woman believe that the conditions of her employment had been altered. See Lehmann, at 603-05; see also Woods Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 266 (App. Div. 1996)

All Defendants can do is ask this Court to split hairs to recast plainly inappropriate conduct. Defendants ask this Court to either disregard Plaintiff's

testimony or strip it of all reasonable meaning. They urge this Court to parse the hotel invitation from the follow-up threats, to view the leg brush as a discrete accident, and to assess Plaintiff's termination as a standalone HR matter. However, Plaintiff is entitled to have the totality of the record viewed in the light most favorable to her under the Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) standard. Plaintiff's testimony is clear — and at this stage, the only question is whether a reasonable juror could believe it.

This Court should not lose sight of the overall context of Plaintiff's allegations and her testimony. For example, Defendants' references to Defendant Srinivas' touching of Plaintiff's leg brush does not exist in a vacuum but within the context of subsequent events. Following that incident, Plaintiff received communications suggesting that she should meet Defendant Srinivas and others at a hotel for a "good time." She was told that arrangements would be made discreetly, that this had been done before, and that it would "not end well" if she declined. In that light, the contact is not incidental, but part of a broader course of conduct.

Defendants assert that none of this occurred at all—that there was no proposition, no hotel arrangement, no "good time" invitation. This is a classic factual dispute. However, because Defendants understand that this invitation is plainly sexual harassment under the Lehmann standard and that Plaintiff's testimony regarding it is sufficient to defeat summary judgment, they have concocted a

theoretical alternative explanation, without any support in the record, of an event they claim never took place.

Defendants' presentation of the hotel room invite as non-sexual is farcical. Defendants insist that Plaintiff was simply invited to a harmless social gathering, free of any sexual overtones. They point to her deposition testimony describing the event as involving "several men and several women" and the promise of a "good time" in a hotel room and argue that this language was not necessarily a sexual proposition. They imply that Plaintiff misunderstood or mischaracterized some type of benign business gathering. Yet, there is no evidence, testimony, or documentation suggesting the existence of a planned social event involving multiple colleagues at a hotel. The insinuation that such a gathering was contemplated, and that Plaintiff merely misinterpreted it, is not only speculative—it is preposterous.

Plaintiff—a female subordinate—was urged by Defendant Singh and Defendant Anand to join Defendant Srinivas in a hotel room for a "good time," with the cost covered, and was told it had been done before. (Pa455, Pa1165). It is an obvious proposition that is unmistakable in its intent. Further, Defendant Singh's follow-up comments—that "it will not end well" if Plaintiff refuse constitute a threat of retaliation tied to Plaintiff's compliance.

The fact that Defendants can invent some alternative theory of what the solicitation might have meant is immaterial. The Lehmann standard is objective: it

asks whether a reasonable person in the plaintiff's position would find the conduct sufficiently severe or pervasive. See Lehmann, 132 N.J. at 603-04. There is only one reasonable interpretation of an invite to a hotel for a "good time," that it is sexual in nature and the threat of retaliation was coercive. A juror could easily determine that Plaintiff suffered sexual harassment under Lehmann.

III. PLAINTIFF'S RETALIATION CLAIM PRESENTS A TRIABLE CLAIM UNDER THE LAD.

Defendants again try to obscure a simple record through distraction with regard to Plaintiff's LAD retaliation claim. As stated, and as set forth in Plaintiff's initial Brief, Plaintiff refused to participate in the "good time," was warned that of retaliation by Defendant Singh and then terminated shortly thereafter.

Defendants advance several arguments in Opposition, namely that she did not engage in protected activity and that she was terminated for reasons that were legitimate and independently sufficient to justify termination. To the extent that Defendants claim Plaintiff did not engage in protected activity because there was no sexual proposition, this argument fails for the reasons outlined above regarding the hotel invitation. However, if the Court acknowledges that a jury could interpret the overture as sexual then Plaintiff's refusal to participate is clearly protected activity under the LAD's anti-retaliation provision, which protects "any person because that person has opposed any practices or acts forbidden under" the LAD from reprisals. See N.J.S.A. 10:5-12(d); see also Farrell v. Planters Lifesavers Co., 206 F.3d 271

(3d Cir. 2000) (noting that the District Court held that rejection of a sexual advance was protected activity).

Moreover, there is sufficient evidence in the record to deny summary judgment prior to an analysis of circumstantial evidence under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Defendant Singh's statement to Plaintiff that "it will not end well" if she declined to go to the hotel is direct evidence of retaliatory intent. It was not a vague comment or general observation—it was a pointed warning tied explicitly to Plaintiff's refusal to comply with a proposition conveyed to her. As Plaintiff testified, the invitation to the hotel came less than a month before her termination. (Pa455, Pa1165). In the intervening days, Defendant Singh and Defendant Anand repeatedly followed up, urging her to reconsider. (Pa455-56, PA1165-66). When she did not, she was terminated. (Pa459, Pa1169). Moreover, Defendant Singh's threat—that things would "not end well"—is not circumstantial; it is direct evidence of retaliatory intent. Defendant Singh acted on Defendant Srinivas's behalf and initiated the communications that formed the basis for Plaintiff's termination. This alone is sufficient evidence for a jury to causally connect Plaintiff's termination to her protected activity.

Even if this direct evidence of retaliatory intent is set aside, there is ample circumstantial evidence to question whether Defendants' termination of Plaintiff was legitimate. In the McDonnell Douglas analysis of circumstantial evidence, Plaintiff

is not required to definitively prove that she was terminated in retaliation for rejecting a sexual proposition. As this Court explained in Kelly v. Bally's Grand, Inc., it is sufficient to overcome summary judgment that Plaintiff "cast such serious doubt on the veracity of" the articulated reasons for termination. 285 N.J. Super. 422, 432 (App. Div. 1995).

Plaintiff testified that she disclosed her husband's involvement with Staffing Idea to both Defendant Singh and Defendant Chopra well in advance of her termination. (Pa452–Pa453, Pa1162–Pa1163). As Plaintiff stated in her initial Brief, this calls into question the entire termination process, which was purportedly predicated upon Defendant Singh's discovery of this involvement by happenstance and is sufficient to create the necessary pretext. Defendant Cognizant makes much of purported inconsistencies in Plaintiff's husband's testimony, stating that the "factual disputes . . . are all on Sanger's side" with regard to the operation of Staffing Idea. (Rb35.) However, this is a strawman argument. Plaintiff is a party to this litigation, and her husband testified as a fact witness. There is no "Sanger's side" qualifier to factual disputes any more than would exist with another fact witness.

In addition to evidence of the disclosures, Defendants' arguments regarding the other evidence of pretext miss the mark. Plaintiff only needs to raise factual issues that call into question the legitimacy of the termination to establish pretext. Plaintiff is not claiming, nor does she have to, that a company can never make a

quick decision without deliberation. Plaintiff is merely claiming that the decision is called into question when many of the key players profess to know very little about why it was taken. Defendant Srinivas was the undisputed decisionmaker in terminating Plaintiff for alleged violations of Cognizant's Code of Conduct and accused Plaintiff of defrauding Cognizant. (Pa458, Pa1168.) However, he testified that he had very little understanding of what the purported fraud actually was, or if Cognizant was harmed by it. (Pa458, Pa1168.) Moreover, Defendant Anand testified that he was unaware of any NLB policies that had been violated and that he had no objection to the use of Staffing Idea. (Pa457, Pa1157). Nobody spoke to Defendant Chopra, Plaintiff's direct supervisor, about the purported fraud. (Pa459, Pa1169.) The entire termination process unfolded within 24 hours, without basic fact-gathering, and without ever consulting the people who supervised Plaintiff's day-to-day work.

This case, viewed in the light most favorable to Plaintiff, presents a straight evidentiary line from Plaintiff's employment by Defendants, the request that she participate in a "good time" in a hotel room, the threats to her regarding the consequences if she refused, and her quick termination. Everything presented by Defendants, including attacks on her credibility and believability, are intended to misdirect the Court from these facts.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court reverse the Trial Court's Order granting summary judgment to Defendants and remand the matter for trial.

Respectfully submitted,

s/Michael K. Fortunato
Michael K. Fortunato

Dated: April 9, 2025

Littler Mendelson P.C.
One Newark Center
8th Floor
Newark, NJ 07102

Ivan R. Novich
973.848.4705 direct
973.848.4700 main
973.556.1661 fax
inovich@littler.com

Rachel Simone Frey
973.848.4763 direct
973.848.4700 main
rfrey@littler.com

February 17, 2026

VIA ECOURTS

Appellate Division Clerk's Office
Superior Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 006
Trenton, New Jersey 08625

Re: *Nisha Sanger v. Next Level Business, Services, Inc., et al.*
Docket No. A-000592-24

Dear Honorable Judges of the Appellate Division:

This firm represents defendants Cognizant Technology Solutions U.S. Corporation, Aarti Chopra, and Narasimha Srinivas Nandagiri (the "Cognizant Defendants") in the above-referenced matter. The Court has requested counsel to address two questions: (1) whether *Kennedy v. Weichert*, 257 N.J. 290 (2024) has any significance, by analogy or otherwise, to the present matter; and (2) whether the Court's anticipated opinion in *Lopez v. Marmic*, A-27-24, might affect the ABC test and, indirectly, the application of any of the factors of *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998).

Regarding the first question, the *Kennedy* decision has no significance, by analogy or otherwise, to the present matter. *Kennedy* involved allegations by a real estate salesperson against his real estate broker, alleging that the broker violated the New Jersey Wage and Payment Law (WPL), N.J.S.A. 34:1-4.1 to 4.15, by improperly deducting marketing, insurance, and other expenses from his wages without his authorization. Under the written agreements between the parties, the salesperson agreed to affiliate with the broker as an independent contractor (as opposed to an employee), which the New Jersey Real Estate License Act, commonly known as the Brokers Act, N.J.S.A. 45:15-1 to -29.5, expressly authorized "[n]otwithstanding any provision of [the Brokers Act] or any other law, rule, or regulation to the contrary." N.J.S.A. 45:15-3.2(b). As a result, both the Appellate Division and the New Jersey Supreme Court held that the ABC test was inapplicable to determine whether the salesperson was an employee or independent contractor, and the New Jersey Supreme Court held that agreements were dispositive as to the salesperson's independent contractor status based on the clear language of the Brokers Act.

In the present case, by contrast, there are no wage and hour claims. Sanger did not assert any claims under the WPL or the New Jersey Wage and Hour Law (WHL), N.J.S.A. 34:11-56(a) to -56(a)41. Nor did she claim that there were any improper deductions, or that she was misclassified as an independent contractor. On

the contrary, Sanger admitted at her deposition that she considered herself a "sole proprietor" and independent contractor (not an employee), and that she created her company ("Mirosoft") because she wanted to be paid on a 1099 and therefore avoid paying income taxes on a W-2. Pa508-509, 514 & 516. Further, Sanger (who had worked as a professional recruiter for years and required no training, direction, or supervision) was not a real estate agent or salesperson. Thus, unlike as in *Kennedy*, the Brokers Act does not apply to the present case.

As for the Court's second question, Cognizant Defendants do not anticipate that the Court's expected opinion in *Lopez* will affect the ABC test or, indirectly, any of the *Pukowsky* factors. As Justice Paterson correctly pointed out during the oral argument in *Lopez,* the ABC test does not apply because there was no claim by the defendants that Lopez was an independent contractor. Cognizant Defendants expect the Court in *Lopez* will hold that the parties' "barter arrangement" was not a defense to Lopez's claims under WPL or WHL, and that the trial court and Appellate Division incorrectly relied on the barter arrangement to dismiss Lopez's claims. In fact, as Justice Rachel Wainer Apter correctly pointed out during oral argument, the WHL's definition of wages expressly covers "the fair value of any food or lodgings supplied by an employer to an employee." N.J.S.A. 34:11-56a1(d). At most, the "barter arrangement" relates to the ninth *Pukowsky* factor (i.e., mode or method of

payment). However, none of this has any bearing to the present case because Sanger did not have barter arrangement with any of the defendants.

I. The ABC Test Is Inapplicable Here Because Different Considerations Apply To Wage Claims.

While the ABC test and the *Pukowsky* test have some limited overlap, they have different statutory considerations and are not interchangeable. The ABC test, cited in *Kennedy,* and briefly in *Lopez*, was adopted in *Hargrove v. Sleepy's*, 220 N.J. 289, (2015), to determine whether an individual was an employee or independent contractor for the purposes of wage claims. The ABC test, identified in the Unemployment Compensation Law (N.J.S.A. 43:21–19(i)(6)(A)–(C)), presumes an individual is an employee unless the employer can satisfy each of three three prongs. N.J.S.A. 43:21–19(i)(6).

Notably, *Hargrove* explicitly differentiated the ABC test from the test identified in *Pukowsky* and *D'Annunzio v. Prudential*, 192 N.J. 110 (App. Div. 2007) to determine whether an individual is an employee for purposes of the LAD. Indeed, the Court in *Hargrove* stated: "[t]herefore, unlike the ABC test, the *D'Annunzio* test *is not limited* to those three most pertinent factors" and "permitting an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a *totality-of-the-circumstances* analysis that is by its nature case specific." *Hargrove,* 220 N.J. at 315 (emphasis added).

Further, in *D'Annunzio* the Court noted:

> The definition of one's employment status ultimately must take form by distinguishing an employee from an independent contractor. Differing consequences flow from that demarcation from one setting to another. However, in each setting-specific analysis, what matters most is that an individual's status be measured in the light of the purpose to be served by the applicable legislative program or social purpose to be served.

192 N.J. at n.7.

The certainty consideration satisfied by the ABC test in the context of wage-and-hour law violations is not present in the LAD context. For instance, with wage-and-hour claims, if a person is determined to be an employee, then the company will be liable under WHL and WPL, and the only question is as to the amount of liability under these statutes. The same cannot be said for LAD; if an individual is an employee, the LAD merely applies, and that person must still prove a *prima facie* case and go through the burden shifting framework established by *McDonnel Douglas v. Green*, 411 U.S. 792 (1973) and adopted in New Jersey. Thus, the rigidity of the ABC test, which presumes an individual is an employee and results in a higher predictability of liability under WPL and WHL, is inapplicable to the *Pukowsky* totality of the circumstances test used under the LAD and CEPA. Although the two tests share some similarities, they are separate tests that serve *different* legislative programs and societal purposes and, therefore, should not be conflated.

Here, the Trial Court here did exactly as required by *D'Annunzio* and *Pukowsky* and set forth a detailed, fact-specific analysis of each factor to properly

conclude Sanger was an independent contractor. Sanger has made no claim for wages or challenge to her status as an independent contractor. Quite the opposite, in her deposition she testified she was an independent contractor.

II. *Kennedy* Is Not Applicable Because No Similar Statute Applies To Technical Recruiters

In *Kennedy*, which involved wage-and-hour claims, the New Jersey Supreme Court held that the Brokers Act allows real estate agencies to classify real estate salespersons as employees or independent contractors regardless of any other law or rule. Accordingly, the New Jersey Supreme Court held that the written agreement between the parties governed. The LAD also contemplates the existence of independent contractors in that it specifically applies to employees. However the LAD does provide separate protection for contractors under N.J.S.A. 10:5-12(l).

Kennedy has no bearing here because this case does not involve wage-and-hour claims, and there is no similar statute that applies to technical recruiters. At most, the decision in *Kennedy* can be taken to emphasize the importance of the twelfth *Pukowski* factor, the intent of the parties. As in *Kennedy*, by her own admission, Sanger intended to work as an independent contractor through her own company from the outset, just as she did for other companies before providing services for Cognizant and after. While that intent is perhaps not dispositive as it was in *Kennedy* because of the Brokers Act, it is nonetheless an important factor that was properly considered and weighed by the Trial Court below.

III. *Lopez* Is Inapplicable Because The Defendant Did Not Claim The Plaintiff Was An Independent Contractor.

Lopez is similarly inapplicable. *Lopez* involved an undocumented worker who falsified his social security number, which led his employer to come to a barter agreement where the plaintiff traded his services for rent. The plaintiff's former employer did not contend he was an independent contractor even when seemingly invited to do so during oral argument by Justice Wainer Apter when she inquired as to whether any exceptions to the WPL applied. Thus *Lopez* did not include an in-depth discussion of the factors in the ABC test and whether they applied to the plaintiff there – defendant never argued the test was satisfied or that the plaintiff was an independent contractor at all. Based on the oral argument, the Supreme Court is likely to decide that IRCA, the Immigration Reform and Control Act, does not provide an avenue for companies to circumvent New Jersey wage-and-hour laws by coming to a barter agreement and offering payment in a non-monetary form. *Lopez* will likely have very limited discussion of the ABC test because the defendant admitted he was an employee before his immigration status was discovered, and nothing about the relationship changed except the form of payment. Thus, the only factor that might potentially implicate is the sixth factor of the *Pukowsky* test, method of payment.

Here, there is no barter agreement or change payment method. From the outset, all parties understood that Sanger was an independent contractor and would

be paid by Next Level Business Services, Inc. through her own corporation, an arrangement with which she was very familiar. Furthermore, method of payment was only one of the many factors considered by the Trial Court. Unlike the plaintiff in *Lopez,* Sanger was not offered lodging in exchange for her work. Her contract had a limited duration, and the nature of her work was entirely different from the work of the plaintiff in *Lopez*.

IV. Sanger Is Classified As An Independent Contractor Under Both Tests.

Lastly, if analyzed under the ABC test, Sanger would still be considered an independent contractor. In denying Sanger's motion for reconsideration on September 27, 2024, the Trial Court clarified that while the parties' intent and understanding that Sanger was an independent contractor was a factor to be considered, he did not give it undue weight. (T23:6-17). The Trial Court went through a detailed analysis of the *Pukowsky* factors, and considered those *Pukowsky* factors that overlap with the ABC test.

As to control, Prong A, the Trial Court relied on the lack of supervision Cognizant exerted over Sanger, as demonstrated by her ability to surreptitiously use her husband's staffing company to source candidates and essentially "double dip," getting paid twice for the same work. (T25:16-26:22). He considered that she did not need to be given any step-by-step instructions or trainings, as she had fifteen years

of experience. She was not told how to go about sourcing candidates or even through which company she should source them.

As to Prong B of the ABC test, Sanger's contract was for a limited duration, and her role is not integral to Cognizant's business. Cognizant used Sanger's services to source candidates for certain clients and within Cognizant, making her role peripheral at best.

As to Prong C, and as noted above, Sanger created her own Company, Mirosoft Corporation, to provide technical recruiting services prior to performing services for Cognizant. Indeed, Sanger testified that another company, Brainhunter, was "*willing"* to make her a contractor through her own company, meaning she sought the arrangement. She also performed services through Mirosoft after the end of her contract with Cognizant. She obtained the benefits of that corporation-to-corporation payment arrangement as well by avoiding paying W-2 taxes, and classifying her income from her work through Mirosoft as income from her company, just as it was. She cannot now have it both ways and reap those tax benefits yet be considered an employee. *See Pukowski*, 312 N.J. Super. at 184 (holding plaintiff was an independent contractor and looking askance on plaintiff's argument otherwise because "[w]hen it suited [plaintiff's] advantage for tax purposes, plaintiff claimed to be an independent contractor, yet she claimed to be an 'employee' when it was to her advantage to maintain a lawsuit."). The fact that Sanger created her own

corporation and took advantage of the tax implications likewise differentiates this case from *Lopez*.

Accordingly, Sanger fails both the ABC test and the *Pukowsky* test.

V. CONCLUSION

Kennedy and *Lopez* do not alter any factors in the *Pukowsky* test, and the Trial Court correctly concluded that Sanger was an independent contractor for purposes of the LAD. As such, the Appellate Division should affirm.

Respectfully submitted,

LITTLER MENDELSON, P.C.
Attorneys for Cognizant Defendants

Dated: February 17, 2026

By: */s/ Ivan R. Novich*
Ivan R. Novich
Rachel Simone Frey

SQUIRE PATTON BOGGS

Squire Patton Boggs (US) LLP
382 Springfield Ave, Suite 300
Summit, New Jersey 07901

O +1 973 848 5600
squirepattonboggs.com

Mark C. Errico
T +1 973 848 5668
mark.errico@squirepb.com

February 17, 2026

New Jersey Appellate Division
Richard J. Hughes Justice Complex
25 Market St.
5th Floor, North Wing
Trenton, New Jersey 08611

Re: Nisha Sanger v. Next Level Business Services, Inc., et al.
APPELLATE DOCKET NO: A-000592-24
DOCKET NO: SOM-L-001274-20

This Court has asked the parties to address the significance, by analogy or otherwise, of the New Jersey Supreme Court's decision in *Kennedy v. Weichert*, 257 N.J. 290 (2024), as well as the parties' views on whether the outcome in *Lopez v. Marmic*, A-27-24, might affect the ABC test and, indirectly, the application of any of the factors of *Pukowsky v. Caruso* 312 N.J. 171 (App. Div. 1998).

In short, neither *Kennedy* nor any forthcoming opinion in *Lopez* will materially impact the analysis at issue here – i.e., whether the trial court correctly applied the *Pukowsky* factors to determine that Nisha Sanger was not an employee of Next Level Business Services, Inc. ("NLB") for purposes of the New Jersey Law Against Discrimination ("LAD"). Both *Kennedy* and *Lopez* relate to worker classification issues in the context of statutory wage-and-hour and wage payment claims, which are analyzed under the statutory ABC test, not the *Pukowsky* factors.

I. Background

A. The Statutory ABC Test and the *Pukowsky* Factors are Distinct Tests.

As a threshold matter, although both the ABC test and the *Pukowsky* factors are used to distinguish employees from independent contractors in New Jersey, they arise from different sources and serve different statutory purposes. Specifically, the two tests differ materially in source, structure, and operation. The legislative ABC test, which is used in wage-and-hour and wage payment cases, imposes a presumption of employee status and requires the putative employer to satisfy all three prongs. By contrast, the common law *Pukowsky* test is used in LAD cases and sets forth 12 non-exclusive factors that are weighed under a totality-of-the-circumstances analysis, with no single factor controlling.

In *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015), the Supreme Court held that the statutory ABC test is the governing test for determining if an employment relationship exists for purposes of claims under the Wage Payment Law ("WPL") and Wage and Hour Law ("WHL"). *Hargrove* reasoned that the statutory ABC test, enacted as N.J.S.A. 43:21-19(i)(6), is applicable to WPL and WHL claims because "permitting an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a totality-of-the-circumstances analysis that is by its nature case specific." *Id.* at 316. Notably, *Hargrove* did not suggest that the ABC test should supplant *Pukowsky* in LAD cases and instead

specifically acknowledged that the *Pukowsky* test is the appropriate test in that context. *Id.* Further, although the Court in *Hargrove* noted there is some conceptual overlap between the ABC test and some of the *Pukowsky* factors, it expressly recognized that the two tests are not the same and apply in different statutory contexts. Accordingly, although the tests have some similar features, New Jersey courts do not mix the two, and analysis relevant to one does not and should not influence the other.

The ABC test applies by legislative mandate to WPL and WHL claims, reflecting a remedial policy choice to broadly protect workers from misclassification for purposes of compensation, unemployment benefits, and other benefits. Specifically, the ABC test presumes that an individual is an employee unless an employer can satisfy all three factors stated in N.J.S.A. 43:21-19(i)(6)[1]. Failure to satisfy any one of these three criteria results in an employment classification.

By contrast, the *Pukowsky* factors are a judicially developed, common-law, 12-factor framework applied in the absence of statutory direction, including under the LAD, to determine whether an employment relationship exists[2].

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[1] (A) the employer neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work; (B) the services provided were either outside the usual course of business or performed outside of all the places of business of the enterprise; and (C) the individual has a profession that will plainly persist despite termination of the challenged relationship.

[2] (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Here, the *Pukowsky* test is the relevant test, and the trial court correctly applied its 12 factors to conclude Ms. Sanger was not an employee of NLB.

B. *Kennedy* and *Lopez*

In *Kennedy*, the New Jersey Supreme Court addressed the classification of a real estate salesperson as an employee or independent contractor under the WPL. The plaintiff claimed his broker misclassified him as an independent contractor and unlawfully deducted expenses from his commissions in violation of the WPL. *Kennedy*, 257 N.J. at 295. The parties had entered into a written agreement expressly designating the plaintiff as an independent contractor. *Id.* Relying on the "notwithstanding any other law" clause in the New Jersey Real Estate Brokers Act ("Brokers Act"), N.J.S.A. 45:15-3.2, the Court held that the parties' agreement was dispositive, overriding the application of the ABC test. *Id.* at 306-07. The Court concluded that the Legislature expressly intended for real estate professionals to have the autonomy to define their relationship through contract. *Id.* at 309-10.

The issue in *Lopez* is the relevance of work authorization status to the worker's ability to assert New Jersey WPL or WHL claims. *Lopez* arises from WPL and WHL claims asserted by an unauthorized worker who entered into a "barter arrangement" through which he was provided housing in exchange for labor. Mr. Lopez argues that he was an employee and that Marmic could not meet the ABC test to prove otherwise. The Appellate Division, however, held that "the ABC test is inapplicable here because

whether plaintiff was an employee of defendants or worked as an independent contractor is not at issue." *Lopez v. Marmic LLC*, No. A-2391-22, 2024 WL 3060524, at *10 (N.J. Super. Ct. App. Div. June 20, 2024). The court instead focused on the "barter arrangement" characterization and immigration status as dispositive barriers to an employment relationship requiring the payment of statutory wages.

The Supreme Court has not yet issued a decision, but during oral argument, the Justices questioned whether unauthorized status or use of false documents excludes a worker from state wage protections, expressing doubt that federal immigration law preempts state wage claims to such an extent. Notably, the company does not contend that Mr. Lopez was an independent contractor as opposed to an employee, but instead, simply contends Lopez was not an employee because of his unauthorized status. There was limited discussion of the ABC test. Regardless, because *Lopez* is not an LAD case, not surprisingly, there was no direct mention of *Pukowsky*.

II. Argument

A. *Kennedy* reinforces a central principle of statutory interpretation: employee status depends on the statute being applied.

In *Kennedy*, the Supreme Court did not announce a universal rule governing all worker-classification disputes. Instead, it acknowledged the unique remedial goals of the WPL and enforced the Legislature's specific policy decision enacted pursuant to the Brokers Act, which holds that compliant written agreements are dispositive.

In contrast, the statute at issue is the LAD. From its inception, the LAD has

consistently framed its employment protections in terms of employers and employees, not independent contractors. New Jersey courts have long recognized that the LAD's employment protections apply only where an employment relationship exists and have developed multi-factor tests to distinguish employees from independent contractors precisely because the statute does not define "employee" to include contractors. That judicial development reflects an effort to effectuate legislative intent, not to expand it. In that spirit, the Court here should not conflate the ABC test and the *Pukowsky* factors, as that would fly in the face of legislative intent and judicial precedent and would amount to judicial legislation.

B. By analogy, *Kennedy* supports enforcing the parties' express independent contractor relationship.

Kennedy underscores the importance of honoring the parties' expressed intent in worker classification disputes, particularly where, as here, the plaintiff was engaged pursuant to an agreement designating her (actually, her company) as an independent contractor. The *Kennedy* decision is narrowly tailored to the real estate industry due to the specific statutory framework of the Brokers Act, which explicitly permits brokers and salespersons to choose independent contractor status by agreement. *See Kennedy*, 257 N.J. at 308. As such, *Kennedy* does not apply outside the real estate broker context, such as here, where no analogous industry-specific statute mandates deference to the parties' contractual designation. However, the Court's reasoning in *Kennedy* is significant by analogy to this case, particularly since the balance of the

Pukowsky factors, not just the independent contractor agreement,[3] weigh in favor of independent contractor status.

Here, Ms. Sanger, through her company, Mirosoft Corporation, was a contractor in both name and practice. From the beginning of the relationship, it was both NLB's and Ms. Sanger's clear intention that Ms. Sanger was an independent contractor – not an employee. As outlined in greater detail in prior briefing, NLB did not control the means and manner of Ms. Sanger's performance or supervise her work; Ms. Sanger had autonomy to perform her job how she saw fit; Ms. Sanger herself testified she was a contractor, not an employee; Ms. Sanger did not work on NLB premises; NLB did not provide Ms. Sanger with any equipment; Ms. Sanger did not require training, and she had 15 years' of experience in recruiting, so she did not need, nor did NLB provide, oversight or instruction; the contracts between the parties were not exclusive; NLB paid Mirosoft Corporation for the work Ms. Sanger performed; Ms. Sanger was not provided with annual leave and was not paying Social Security taxes; and Ms. Sanger's project was a limited term project with the possibility of extensions.

Under these circumstances, there is no tension between the parties' agreement and the factual realities of the relationship. To the contrary, as in *Kennedy*, the

[3] Notably, factor 12 of the *Pukowsky* test explicitly considers "the intention of the parties." *Pukowsky v. Caruso*, 312 N.J. Super. 171, 183 (App. Div. 1998).

agreement reflects a conscious allocation of professional roles and responsibilities that the courts should respect, and the relationship at issue here was deliberately structured by agreement (and in practice) as an independent contractor arrangement.

C. The parties' agreement should not be disregarded simply because there is no applicable statute that requires deference to the parties' agreement.

Although *Kennedy* involved an agreement executed pursuant to the Brokers Act, which specifically insists upon deference to the parties' agreement without considering the realities of the arrangement, the lack of such a statute here is not dispositive. The Legislature has not provided a statute explicitly allowing recruitment service professionals like Ms. Sanger to conclusively determine independent contractor status by contract for purposes of LAD claims. However, nothing in *Kennedy* or the LAD suggests that courts should disregard a freely negotiated independent contractor agreement simply because it was not provided deference by statute. To the contrary, *Kennedy* highlights that the parties' express agreement should be afforded substantial weight, particularly where, as here, the other factors support independent contractor status as well.

D. Because *Lopez* arises under a different statute and involves different core issues and facts, a ruling in *Lopez* is unlikely to impact this case.

The impact of the *Lopez* decision on the *Pukowsky* test, if any, will be indirect and limited. *Lopez* concerns statutory wage protections, which are remedial and

designed to ensure that workers timely receive earned pay and benefits. Those purposes justify presumptive employee status and a broad, strict test. The LAD, however, has a different legislative purpose, prohibiting discrimination, which historically has not been tied to statutory ABC definitions and does not contain the wage statutes' expansive language. Because *Lopez* involves a different statute, a different test, and different threshold issues (immigration status and barter-based compensation), no likely outcome in *Lopez* will dictate the result or change the analytical framework in an LAD case.

Even if the Supreme Court in *Lopez* clarifies how the ABC test applies to non-traditional work arrangements or reiterates broad worker protections "regardless of status," any such clarification would be statutorily confined to WPL and WHL claims governed by the ABC framework. It would not displace the distinct *Pukowsky* analysis that controls coverage under the LAD. Nor does the policy concern driving *Lopez* translate cleanly here. The core concerns in *Lopez*—protecting vulnerable undocumented workers from wage theft and preventing employer impunity—are not the same concerns implicated by an LAD claim brought by a recruiter classified as an independent contractor.

To the extent the Supreme Court's forthcoming opinion in *Lopez* includes broader discussion of independent contractor status or clarifies the application of one or more prongs of the ABC test, it is possible that such discussion could, by analogy,

inform how courts conceptualize certain considerations that also appear among the *Pukowsky* factors. Any such effect, however, would be indirect. Absent an express holding extending the ABC test beyond the WHL and WPL context (which is not contemplated or sought in *Lopez*), the legal framework governing independent contractor determinations under the LAD will not be impacted. The *Pukowsky* factors remain controlling, and any overlap recognized in *Hargrove* does not render the tests interchangeable or permit wholesale importation of ABC principles into LAD analysis.

The Court in *Lopez* is expected to resolve immigration and "barter" issues under the wage statutes, not to announce a sweeping doctrinal shift that overrides *Pukowsky* for purposes of LAD claims. At most, any broad language about "employment relationships" could be cited as persuasive background, but it would not be controlling where, as here, the governing statutes and tests are materially different.

III. Conclusion

With all this in mind, the Trial Court properly concluded that Ms. Sanger was not an employee of NLB, and its order dismissing Ms. Sanger's claims against NLB should be affirmed.

Respectfully submitted,

SQUIRE PATTON BOGGS (US) LLP

By: *s/ Mark C. Errico*
Mark C. Errico
D. Lewis Clark Jr.
Melissa Legault

Copy: all counsel of records via eCourt

Brandon J. Broderick+
Ryan R. Broderick+°
Matthew H. Broderick+†
Marc S. Borden+^
Eric J. Plantier+^
Greg Shaffer+^*
Bianca N. Pagani+^
Raymond S. Carroll+^
Paul F. Romano+
Paul A. Krauss+
Kenneth W. Thayer+≠
Charles H. Lynch+
Jason A. Richman^
Stephen A. Mennella+«
Matthew V. Futerfas+◊
Tiffany Glenn Burress+^
Bruce S. Cantin^
Christopher A. Bradley+◊
David E. Rehe+^
John (Jake) Van Dyken+^
Brian R. Lehrer+
Justin M. Day+
Christopher T. Karounos+*

BRANDON J. BRODERICK
ATTORNEY AT LAW
A Limited Liability Company

ALL MAIL TO:
65 State Route 4 East, River Edge, NJ 07661

T: (201) 853-1505
F: (201) 489-0878

*Certified by the Supreme Court of New Jersey
as a Civil Trial Attorney

+ NJ Bar ^ NY Bar
° CT Bar ◊ PA Bar
∞ MA Bar † FL Bar
« OH Bar ≤ KY Bar
≠ AZ Bar = LA Bar
£ NH Bar

Susan M. Madar+
Melissa A. Perrotta Marinelli^
Lisa A. Lehrer+◊=*
Martha J. Vasquez+^
Michael K. Fortunato+
Thomas O'Connor+^
William C. Firth^∞
Tyler C. Stearns+
Mark Dumas°^
Tracy A. Redmond+^◊
Ryan J. Veilleux°
Heath C. Murphy†
Austin F. Qi+
Todd A. Greenwell≤
Andrew N. Nirchio+
Matthew Slama+
Mark S. Grodberg^
John Carucci£∞
Stephen J. Devine◊
Dhruv K. Patel+
Jonathan T. Nendze+
Joel S. Moore«^
Jason A. Zajdel◊

February 17, 2026

BY eCOURTS
Appellate Division Clerk's Office
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

RE: Sanger v. Next Level Business Services, Inc. et al.
Docket No. A-592-24

Dear Honorable Court:

Pursuant to the Court's request, Plaintiff Nisha Sanger ("Plaintiff") respectfully submits this supplemental letter brief addressing the relevance of the New Jersey Supreme Court's decision in Kennedy v. Weichert Co., 257 N.J. 290 (2024), and the potential relevance of the Supreme Court's forthcoming opinion in Lopez v. Marmic LLC, A-2391-22 (App. Div. June 20, 2024), which is presently before the Supreme Court on review (A-27-24).

A. The Pukowsky Test Was Adopted Within the Specific Context of the Law Against Discrimination and Relationship to Title VII of the Civil Rights Act of 1964.

The test applied by this Court in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998), was created within the context of a specific statutory scheme, and is used to determine who falls within the class of workers entitled to the protection of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. It has its roots in federal jurisprudence, as Title VII of the Civil Rights Act of 1964 is a "key source of interpretive authority" for the LAD. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600-01 (1993). In developing the test, the Pukowsky Court expressly surveyed federal interpretations of civil-rights statutes containing the term "employee," and concluded that those formulations were "substantially similar" to federal court precedent such as the Third Circuit's approach in EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983). 312 N.J. Super. at 182-83.

The Pukowsky Court, therefore, adopted the twelve-factor test, now known as the Pukowsky test, which incorporates common-law agency principles while accounting for the totality of the circumstances. Id. A "principled application" of the factors is required, and the weight of any particular factor depends on "the peculiar circumstances of each case." Chrisanthis v. Cnty. of Atl., 361 N.J. Super. 448, 455-56 (App. Div. 2003). In D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110 (2007), the New Jersey Supreme Court stated that it "reaffirm[ed] the

appropriateness of the Pukowsky test" for assessing whether an alleged independent contractor qualifies as an employee under CEPA and/or the LAD and reiterated that "the Pukowsky test fulfills [its] purpose." 192 N.J. at 115, 125. The Court emphasized the inquiry's functional focus on employer control. See id. at 123-26. The D'Annunzio Court also stated that the tests applied are related to the applicable statutory schemes: "what matters most is that an individual's status be measured in the light of the purpose to be served by the applicable legislative program or social purpose to be served." See 192 N.J. at n. 7.

B. Weichert and Lopez Arise from Other Statutory Wage and Hour Schemes.

In Hargrove v. Sleepy's, LLC, 220 N.J. 289 (2015), the New Jersey Supreme Court adopted the Department of Labor's ABC test for the New Jersey Wage Payment Law and New Jersey Wage and Hour Law, which presumes a worker is an employee unless the employer proves all three prongs: (A) the worker is free from control or direction in performing the service, both under the contract and in fact; (B) the service is outside the usual course of the employer's business or performed outside all the employer's places of business; and (C) the worker is customarily engaged in an independently established trade, occupation, profession, or business that will continue despite the relationship's termination. See Hargrove, 220 N.J. at 314-16. In selecting the ABC test for wage and hour statutes, the Court discussed multiple standards, including the Pukowsky test, and nothing in Hargrove suggests

that the ABC test displaced Pukowsky for determining who is covered by the LAD. See id. at 316. However, the Court noted that the most important Pukowsky factors closely mirror the ABC test. See id. at 315 ("The three criteria utilized in Pukowsky — employer control, worker economic dependence, and functional integration of the employer's business and the work performed — considered the most pertinent to determine employment status for cases arising under CEPA and LAD, are similar, if not identical to the 'ABC' test.")

Within this context, Weichert and Lopez do not fundamentally alter the case at bar. Weichert is a statutory-construction decision about the Wage Payment Law in the real-estate context, framed narrowly as to whether an agreement between a real estate broker and salesperson identifying the salesperson as an independent contractor excludes the salesperson from the WPL. 257 N.J. at 295. The Court's holding turned on industry-specific language in the New Jersey Real Estate License Act (the "Brokers Act"), which provides that the parties may choose either an employment relationship or an independent-contractor relationship notwithstanding any laws to the contrary and provides that the parties' written agreement is dispositive in that industry-specific setting. See id. at 311-12. Likewise, Lopez raises questions about the relevance of immigration status to wage recovery and the legal characterization of a so-called "barter arrangement." Whatever the Supreme

Court ultimately decides in Lopez is unlikely to interpret the LAD, construe Pukowsky, or create a new coverage test for the LAD or CEPA.

C. Plaintiff is an "Employee" Under Pukowsky (and Under the ABC Test).

This appeal arises from the Motion Court's misapplication of Pukowsky rather than from an insufficiency in the test itself. This Court should apply the Pukowsky factors by emphasizing employer "control," and treating "intent of the parties" as only one factor among many. If contractual language were dispositive, the entire test would be swallowed. The facts present in Weichert that required the Court to forego an analysis under the governing standards (a specific statute overriding the application of the ABC test) are simply not present here. This record reflects the kind of functional control that Pukowsky treats as indicative of employment. As set forth in Plaintiff's Brief, she was recruited, interviewed, and assigned to a team that included other direct employees performing the same job, was directed in her day-to-day activities, supervised by management personnel, required to prepare status reports regarding her ongoing assignments and then terminated.

Although not directly applicable, Plaintiff would also qualify as an employee under the ABC test, which presumes employee status unless the employer proves each prong. See Hargrove, 220 N.J. at 314-16. Here, Defendants cannot satisfy prong A, which requires proof that Plaintiff was free from control or direction, prong

B because Plaintiff's recruiting work was performed at Defendants' place of business and as part of regular and ongoing business operations, or prong C because she performed the same work in the same manner as direct Cognizant employees, negating any argument that there was something intrinsic in her profession that supports a finding of an independent contractor relationship.

D. Conclusion

In sum, neither Weichert nor, potentially, Lopez alters the LAD coverage analysis. Pukowsky remains the controlling framework that requires Courts to look past labels and examine the functional reality of the relationship considering the LAD's remedial purpose and the mandate of liberal construction. Here, the Motion Court's heavy reliance on "intent" improperly narrows LAD coverage. Accordingly, this Court should apply Pukowsky as traditionally applied, reverse the grant of summary judgment.

Plaintiff thanks the Court for its continued attention to this matter.

Respectfully submitted,

BRANDON J. BRODERICK, LLC

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Michael K. Fortunato

cc: All Counsel of Record (by eCourts)