MELISSA SCHWARTZ & STEVEN SCHWARTZ, Plaintiffs/Appellants, v. MICHAEL KOPELMAN, ESQ., 1266 APARTMENT CORP., AND CAROL RACHESKY, A/K/A CAROL REINFELD, A/K/A CAROL WOLFE Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-00795-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY SAT BELOW: THE HONORABLE JOHN O'DWYER **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLANT

Thomas A. Gentile (01336-2005)
Attorney of Record

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
7 Giralda Farms
Madison, New Jersey 07940
Phone: (973) 735-5785
Fax: (973) 624-0808
e-mail: thomas.gentile@wilsonelser.com

Attorneys for Appellants
Melissa Schwartz & Steven Schwartz

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PRELIMINARY STATEMENT

For more than thirty years, Steven and Melissa Schwartz (the "Schwartzes") have resided in their apartment at Horizon House, which is part of a cooperative housing association known as 1266 Apartment Corporation ("1266"). Steven Schwartz (who is 76 years old) suffers from multiple sclerosis, while Melissa Schwartz (who is 64 years old) is battling a recurrence of cancer. Never have the Schwartzes been in arears on their maintenance obligations to the cooperative.

In 2018 there was a physical and verbal altercation in the lobby (and in an elevator) of Horizon House. When the Schwartzes filed a civil complaint alleging that another resident (Michael Kopelman, who is an attorney) had battered and defamed them, they could not have known that years of protracted and acrimonious litigation would ensue. The Schwartzes took the normal step of naming the cooperative as a defendant; but 1266 retaliated by embarking on a fierce campaign to eject the Schwartzes from their apartment. *See* n.1, *infra*.

1266 ultimately conducted a sham meeting that was not properly noticed, at which 1266 purported to terminate the Schwartzes' proprietary lease and to forfeit their shares in the cooperative. Amazingly, 1266 slyly scheduled this meeting for a time when 1266 knew that the Schwartzes would be away (in fact, the Schwartzes were in Alaska on a business trip). 1266 thus conducted the meeting without the Schwartzes present, in a blatant deprivation of due process.

This appeal seeks review of the trial court's grant of summary judgment to 1266. In that decision, the trial court held that 1266 did not act improperly when it terminated the Schwartzes' lease and forfeited their shares. The gravitas of the trial court's decision is that 1266's actions are (supposedly) protected by the business judgment rule. Yet the business judgment rule does not shield the actions that 1266 took against the Schwartzes, because 1266's actions repeatedly violated the terms of the proprietary lease (and other governing documents). 1266 thereby deprived the Schwartzes of due process, most flagrantly by conducting the meeting with the Schwartzes not present (so that they could not be heard). The trial court judge, who is unabashed in blaming the Schwartzes for the protracted nature of the trial court litigation, ignored these numerous violations of due process. This resulted in the extraordinary outcome of an older, sick couple being ordered to surrender their longtime home, all on summary judgment (without the benefit of a trial).

This appeal also seeks review of the trial court's award ordering the Schwartzes to pay an astonishing **$301,859.03** in attorneys' fees to 1266. This is just shy of the full amount that 1266 requested. The trial court's opinion making this award is (again) unabashed in assigning blame to the Schwartzes for the protracted nature of the trial court litigation. The Schwartzes urge this Court to hold that the fee shifting provision at issue is void, as a unilateral fee shifting provision that is violative of public policy. The trial court also misapplied the fee shifting

provision's applicability to a "counterclaim," which (in keeping with New Jersey public policy disfavoring fee awards) should be construed to preclude almost all of the fees that the trial court awarded. Finally, if this Court were to hold that 1266 is entitled to any award of attorneys' fees, the amount awarded must be reduced dramatically, due to numerous deficiencies in the amounts claimed (such as vague and/or unspecific time entries, and billing for issues that are unrelated to the summary judgment motion or otherwise not part of the case).

STATEMENT OF FACTS

This tragic litigation had its genesis in a physical and verbal altercation that occurred in the lobby (and in an elevator) of a cooperative apartment building owned by 1266. The Schwartzes (who own a unit in the cooperative) field a complaint in the trial court, alleging (among other things) that Michael Kopelman, a resident of the cooperative (who is also an attorney) committed acts of battery and defamation against the Schwartzes. *See* Pa48-51. The Schwartzes' complaint also named 1266 as a defendant, alleging that such acts of battery and defamation resulted from negligence by 1266. *See* Pa49 (Second Count).

In retaliation against the Schwartzes for naming 1266 as a defendant,[1] 1266 waged protracted and (very) acrimonious litigation against them. In the trial court,

[1] When asked at his deposition if he "had a bias against Mrs. Schwartz," Howard Pearl (who was 1266's board secretary at the time) responded, **"[t]he only bias I had was that she sued us."** Pa104 at 59:21-23 (emphasis added).

1266 campaigned (with unceasing motion practice) to have the Schwartzes removed from their cooperative apartment unit. 1266, meanwhile, took steps outside of court to accomplish this goal. On July 1, 2021, 1266 conducted a sham meeting, at which the cooperative purported to terminate the Schwartzes' proprietary lease and forfeit their shares in the cooperative. *See* Pa713. The flaws of that meeting are numerous (as set forth in detail, *infra*), including failure to provide the Schwartzes with notice in accordance with the terms of the proprietary lease and the cooperative's other governing documents. But most egregious of all, 1266 craftily scheduled the meeting for a time when 1266 knew that the Schwartzes would not be able to attend. *See* Pa705-707; 1130-32. Without the Schwartzes having any opportunity to be heard, 1266's board (improperly) voted to terminate their proprietary lease and forfeit their shares. And all of this was based on highly disputed allegations of supposed "objectionable conduct," the basis of which the Schwartzes vigorously contest. *See*, *e.g.*, Pa339-345; 599-605; 1208-1213.

On August 23, 2023, the trial court granted 1266's motion for summary judgment, thereby rubber stamping the actions that 1266 took at that meeting. Pa1-3; 08/23/2023 Tr. (2T). The trial court ordered that the Schwartzes (both of whom face serious illnesses) be ejected from their home of over 30 years. *See id*.

The Schwartzes now appeal that ruling.

PROCEDURAL HISTORY

In the complaint that they filed on January 8, 2020, the Schwartzes alleged that Michael Kopelman committed acts of battery and defamation against the Schwartzes. *See* Pa48-51. That complaint also named 1266 as a defendant, alleging that such acts of battery and defamation resulted from negligence by 1266. *See* Pa49.

On March 31, 2020, 1266 brought against the Schwartzes a counterclaim, alleging that the Schwartzes had engaged in objectionable conduct in violation of 1266's governing documents. Pa52-75. 1266's board of directors thereafter took action against the Schwartzes that (purported to) terminate the Schwartzes' proprietary lease and forfeit the Schwartzes' shares in the cooperative entity.

After voluminous discovery and motion practice, on July 7, 2023, 1266 made a motion for partial summary judgment on its counterclaims only. *See* Pa828-29. In that motion, 1266 sought possession of the premises and ejection of the Schwartzes.

On August 23, 2023, the trial court granted that motion, and ruled, *inter alia*, that the Schwartzes are to be ejected from their apartment, and that a judgment of possession was to be entered in favor of 1266. *See* Pa1-3; 08/23/2023 Tr. (2T).

There followed various orders of the trial court that concerned the issue of the Schwartzes obtaining from this Court review of the order of ejectment. Along with a motion for reconsideration, there followed in the trial court much procedural

wrangling as to whether the ejectment order constituted a final order that this Court could review, even though other proceedings in the trial court were ongoing.

The Schwartzes filed a Notice of Appeal (soon thereafter amended due to a procedural issue), *see* Pa37-47, after which there followed briefing before this Court. On December 14, 2023, this Court entered certain Orders on a motion that the Schwartzes had filed in this Court. *See* Pa35-36. One of those Orders provided that "[t]he evictions are stayed for the pendency of the remand ordered in M-1727-23 **and the pendency of the appeal**." Pa36 (emphasis added). With this Court's stay in effect, other proceedings in the trial court continued.

On January 3, 2024, the trial court issued an order that granted 1266's fee application, entering judgment against the Schwartzes for $301,859.03 in attorney's fees and expenses. *See* Pa4-32. Also, pursuant to R. 4:50, the Schwartzes filed a motion to vacate the trial court's grant of summary judgment to 1266. On January 19, 2024, the trial court issued an order by which it declined to hear the Schwartzes' motion under R. 4:50, due to a supposed lack of jurisdiction. *See* Pa33-34.

STANDARD OF REVIEW

"When a party appeals a trial court's grant of summary judgment," a New Jersey appellate court must "review *de novo* whether summary judgment was proper." *Mohamed v. Iglesia Evangelica Oasis De Salvacion*, 424 N.J. Super. 489, 495 (App. Div. 2012). Summary judgment is appropriate only if the record

establishes there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). When reviewing a trial court's grant of summary judgment, this Court must "view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was entered." *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421, 424 (App. Div. 2004), citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). This Court must therefore consider whether all of "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*, *id*.

As to the trial court's refusal to entertain the Schwartzes' motion to vacate (made pursuant to R. 4:50) due to a supposed lack of jurisdiction, this Court exercises *de novo* review, since "[a]ppellate review of a ruling on jurisdiction is plenary because the question of jurisdiction is a question of law." *Rippon v. Smigel*, 449 N.J. Super. 344, 358 (App. Div. 2017).

As to the trial court's award of attorneys' fees to 1266, the Schwartzes' public policy arguments concerning the validity and applicability of the fee-shifting provision upon which the trial court relied, *see* Legal Argument Sections II.A and II.B, *infra*, are questions of law over which this Court exercises *de novo* review. If any attorneys' fees are to be allowed, a New Jersey appellate court "is constrained

to remand" (that is, has no choice but to remand), as an abuse of discretion, a fee award to the trial court for a recalculation of the attorneys' fee award, when the appellate court's holding on the underlying issue so warrants. *Equity Real Estate Mgmt., LLC v. Paul V. Profeta & Assocs.*, No. A-2042-19, 2021 N.J. Super. Unpub. LEXIS 3188 at *14 (App. Div. Dec. 30, 2021).

LEGAL ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO 1266 AND ORDERED THE SCHWARTZES TO BE EJECTED FROM THEIR APARTMENT.

(Pa1-3; 08/23/2023 Tr. (2T))

The trial court committed reversible error when it granted 1266's motion for summary judgment and ordered (*inter alia*) that the Schwartzes be ejected from their apartment. As such, this Court should vacate (in its entirety) the trial court's order of August 23, 2023; and remand this case to the trial court for a full trial.

A. The Business Judgment Rule Does Not Shield 1266's Conduct.

(Pa1-3; 08/23/2023 Tr. (2T) at 15-21)

The trial court committed reversible error when, in granting 1266's motion for summary judgment, it held that "the plaintiffs have failed to provide competent evidence to demonstrate any failure by the Board and the Board's decision in accordance with [the] Business Judgment Rule." 08/23/2023 Tr. (2T) at 15:19-22.

To the contrary, in opposing 1266's motion for summary judgment, the Schwartzes raised voluminous questions of fact as to whether 1266 acted within the business judgment rule's protections when 1266 acted to terminate the Schwartzes' proprietary lease. These numerous questions of fact should have precluded a grant of summary judgment. This warrants reversal and a full trial.

There is a paucity of New Jersey case law analyzing objectionable conduct claims in the context of a cooperative apartment association. In fact, the leading New Jersey case analyzing such issues, *Plaza Rd. Co-op., Inc. v. Finn*, 201 N.J. Super. 174, (App. Div. 1985), presented issues that required analysis under New York law. For these reasons, the briefing before the trial court on 1266's motion for summary judgment cited mostly cases from New York, where this body of law is significantly more developed. The trial court's decision accordingly applied New York law. Although New York case law may (or may not) be persuasive as to the issues that this appeal presents, this Court should decide these issues with an eye towards effectuating the public policy of the State of New Jersey.

Although the business judgment rule generally prohibits judicial scrutiny of the actions of a board of directors, this is not true in cases of fraud, self-dealing or unconscionable conduct by a board. The business judgment rule's immunity attaches **only** when business judgments are made in **good faith based on reasonable business knowledge.** *Alloco v. Ocean Beach & Bay Club*, 456 N.J. Super. 124, 192

A.3d 24 (App. Div. 2018). The business judgment rule generally asks (1) whether the actions were authorized by statute or by charter; and even if so, (2) whether the actions were fraudulent, self-dealing or unconscionable. *In re PSE&G S'holder Litig.*, 173 N.J. 258, 277 (2002).

Board members have a fiduciary duty of fairness to all shareholders. This includes those whose tenancies they seek to terminate for "objectionable conduct." *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 156 (2003). When a board seeks to impose discipline that would involve forfeiture of vested rights, *rigid adherence to procedures is required*. Procedural fairness in such situations requires that the member be advised of all the charges; receive notice of the hearing; and be given an opportunity to hear and be heard. *Mobarak v. XYZ Two Way Radio Serv.*, 2006 NYLJ LEXIS 3099 at *8 (Sup. Ct. Kings Cty. May 31, 2006). In evaluating an objectionable conduct claim, the Court must use "heightened vigilance" in assessing the board's exercise of its business judgment. *Horwitz v. 1025 Fifth Ave., Inc.*, 7 A.D.3d 461, 462, 777 N.Y.S.2d 482 (1st Dep't. 2004).

B. 1266 Did Not Follow the Requirements of Its Own Governing Documents.

(Pa1-3; 08/23/2023 Tr. (2T) at 16-20)

A cooperative's allegation of objectionable conduct against a unit holder is contractual in nature. *Plaza Rd. Co-op., Inc.,* 201 N.J. Super. at 179-81. The relationship between the cooperative and its unit holders are controlled by the

cooperative's governing documents and the terms of the unit holder's proprietary lease. Therefore, to terminate a proprietary lease for objectionable conduct, a board must do so following the express provisions of its governing documents. Given the extreme consequences of such action, any court reviewing such a board decision must use "heightened vigilance" in assessing a board's (supposed) exercise of its business judgment. *See Horwitz*, 7 A.D.3d at 462; *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 943–44, 782 N.Y.S.2d 554 (Civ. Ct. 2004). This Court must apply such heightened vigilance in reviewing the trial court's grant of summary judgment (which upheld 1266's putative termination of the Schwartzes' proprietary lease and ordered their ejectment from their home). A "court cannot allow the business judgment rule to serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations." *13315 Owners Corp.*, 7 A.D.3d at 944, quoting *Pullman*, 100 N.Y.2d at 157.

13315 Owners Corp., *supra*, is instructive. In that case, the court noted three procedural defenses asserted by the tenant-shareholder that demonstrated that the cooperative exceeded its authority under the business judgment rule. Specifically, the court found that the cooperative's failure to: (1) properly notice its board meeting or to give the correct name on the notice; (2) have a cooperative board officer sign the notice of the board meeting; and (3) have the shareholders properly elect the board members responsible for making the decision on the supposed objectionable

conduct, were sufficient to overcome the business judgment rule's presumption. *13315 Owners Corp.*, 4 Misc. 3d at 944.

Similarly, in this case, 1266 should not be afforded protection under the business judgment rule because (among other reasons) 1266 exceeded its authority by not following the clear requirements of its own governing documents.

1. 1266 Did Not Provide the Required Proper Notice.

(Pa1-3; 08/23/2023 Tr. (2T) at 10-20)

First, 1266 violated the proprietary lease's clear terms regarding the Schwartzes' right to cure (here, as to allegations of objectionable conduct). The procedure for issuing a Notice to Cure is addressed in Section 27, p.15 of the proprietary lease, which reads as follows:

> All notices by or demands from either party to the other **shall be** in writing and sent by registered mail, return receipt requested; if by the Lessee, addressed to the Lessor at the Building with a copy sent by regular mail to the Lessor's managing agent**; if to the Lessee, addressed to the Building. Either party may by notice served in accordance herewith designate a different address for service of notices or demands.** Notices or demands shall be deemed given on the date when mailed.

Pa217 (emphasis added).

> Article IV, Section 4 of the by-laws reads (in relevant part) as follows:
>
> Section 4. Secretary. The Secretary shall keep the minutes of the Board and of the meetings of shareholders; **he shall attend to the giving and serving of all notices of the Corporation** and shall be empowered to affix the, corporate seal to all written instruments authorized by the

> Board or these Bylaws, and shall attest every stock certificate issued by the Corporation.

Pa628 (emphasis added).

1266 violated these governing provisions. Although Howard Pearl was 1266's board secretary at the time, the notice sent in 2020 was issued by 1266's attorney (Matthew Earle) rather than by Mr. Pearl (as the by-laws require). *See* Pa1208-1213. That 2020 Notice was sent not to the address of the Schwartzes within the building, but rather to their then-attorney, Scott Piekarsky, in violation of the terms of the proprietary lease. *See* Pa1208. Similarly, a (putative) amended notice sent in 2021 (which was unsigned) was also issued by attorney Earle, not served by the board secretary. *See* Pa339-345. And there is no evidence in the record that this 2021 amended notice was served on the Schwartzes at their address in the building.

Substantively, Section 31(f), p17 of the proprietary lease provides that action may be taken for supposedly objectionable conduct **only** if that objectionable conduct is "repeated after written notice." Pa219. Meanwhile, Article XIV, Section 14 of the 1266 Apartment Corporation "House Rules" provides that such action may be taken only "after two (2) notices to cure any condition which has become objectionable to the Corporation in accordance with the terms of the Proprietary Lease." Pa248. However, neither the notice sent in 2020, nor the amended notice sent in 2021, make reference to any "repeated" conduct. Pa1208-1213; 726-729. Nor does either refer to any prior notices regarding any of the instances of

objectionable conduct alleged therein. *See id*. In fact, there are **zero** instances of overlapping claims of objectionable conduct in the two notices. The 2020 Notice lists five specific alleged instances of confrontations with other residents,[2] *see* Pa1209-1210, but there was never another notice concerning these alleged incidents. The amended notice sent in 2021 makes **zero** reference to those alleged incidents, instead relying upon eleven[3] allegations concerning a leak in the Schwartzes' apartment. *See* Pa340-342. This represents an obvious switching of gears by 1266 towards a new strategy of persecuting the Schwartzes for supposedly not allowing 1266 to have "access" to the apartment to address supposed leaks.

2. The Schwartzes Were Denied the Opportunity to Attend the Meeting.

(Pa1-3; 08/23/2023 Tr. (2T) at 18-19)

Second, and unquestionably most shocking of all, the board's action against the Schwartzes took place at a sham of a board meeting at which **the Schwartzes were not present**. As set forth herein, this was a denial of the Schwartzes' right to

[2] Even accepting 1266's (disputed) versions of these supposed confrontations, these were isolated incidents that (by their nature) are incapable of being "repeated," as would be required under the terms of the proprietary lease. This differs from, say, disturbing other residents by playing loud music in one's apartment.

[3] The last allegation of objectionable conduct in the 2021 amended notice refers to alleged abusive conduct towards staff, "notwithstanding our March 4, 2020 Notice to Cure." There is no March 4, 2020 notice in the record. Pa342. Most importantly (and again in violation of the governing documents) there is no evidence in the record of **any** prior notice to the Schwartzes regarding conduct towards 1266 staff.

hear and be heard, which is required under both the governing documents and under any semblance of due process. This alone warrants evaporation of any notion that the board's actions could be protected under the business judgment rule.

On June 24, 2021, 1266 purported to notice a "Directors Meeting Open to Attendance by ALL Shareholders" for July 1, 2021. Pa705-708. However, this (purported) meeting notice was (again) unsigned. It is unknown who prepared it. It was not served in the manner required of all notices for special meetings under 1266's by-laws. Rather, this (purported) meeting notice was sent only by e-mail, *see* Pa708, which is not a proper form of service under the by-laws.

These irregularities, while certainly improper, merely set the stage for the most egregious due process violation of all: the meeting was called for a time when 1266's board knew that the Schwartzes would be away (in fact, the Schwartzes were in Alaska on business for the travel agency that Mrs. Schwartz runs). The Schwartzes' attorney had previously notified 1266's attorney (in connection with attempting to schedule a water test) that on July 1st, the Schwartzes would away on this business opportunity. *See* Pa1130-32. Armed with this knowledge that the Schwartzes would be unable to attend, 1266's board scheduled the meeting for July 1st anyway. *See* Pa1130-32. This was a conscious, bad faith decision by 1266's board to deprive the Schwartzes of their due process rights. Against this backdrop,

the presumption of the business judgment rule cannot insulate 1266's actions from this Court's scrutiny.

The Schwartzes (by 1266's own careful design) therefore were not present at this meeting, deprived of any opportunity to defend themselves against 1266's concocted charges. This Court should reverse the trial court's rubber stamp of 1266's actions against the Schwartzes, because the trial court's decision flat-out ignored all of the foregoing egregious deprivations of due process. The protections of the business judgment rule do not attach to 1266's actions.

C. The Trial Court's Decision Ignores Disputes of Material Fact.

(Pa1-3; 08/23/2023 Tr. (2T) at 4-20)

The trial court was wrong to grant summary judgment because there were voluminous disputes of fact as to the underlying allegations of "objectionable conduct" that served as the pretext for the board's action against the Schwartzes. In the trial court's decision, Judge O'Dwyer was dismissive as to the existence of disputes of fact, stating (wholly conclusively) that "the facts themselves are not in dispute." 08/23/2023 Tr. (2T) at 5:22-23. The trial court thus completely ignored that the Schwartzes, throughout the trial court proceedings, had vigorously contested 1266's versions of the supposed incidents. It also ignored that even 1266's board members themselves were unable to substantiate 1266's versions of those incidents.

1. There Are Disputes of Material Fact as to Due Process.

(Pa1-3; 08/23/2023 Tr. (2T) at 10-20)

When asked if he personally investigated the truthfulness of the allegations against Mr. and Mrs. Schwartz which formed the basis for 1266's claims to terminate the Schwartzes' proprietary lease and shares, Howard Pearl (1266's board secretary at the time) stated that "I left the investigation to others." Pa102 at 22:11-14. When Mr. Pearl was asked about the basis for the allegations of objectionable conduct, and who conducted any investigations into those allegations, Mr. Pearl replied "I have no idea as to exactly who this would [be for] each matter. I would assume management was involved and our legal team." Pa107 at 84:23-85:10. Despite these assertions that management was involved, Michael Denker (Horizon House's General Manager) testified that he had no personal knowledge of where any of the information that forms the basis of 1266's allegations against the Schwartzes came from;[4] nor did Mr. Denker have any knowledge that any members of 1266's board conducted their own investigations into those allegations. *See* Pa115 at 118:5-13.

[4] *See*, *e.g.*, Pa119 at 144:10-14 (Mr. Denker testified that he has no knowledge of who provided the information contained in the notice letter sent in 2020); Pa123 at 534:1-11 (Mr. Denker testified that he has no knowledge of what was reviewed or considered by 1266's counsel for the notice to cure); Pa118 at 143:7-144:1 (Mr. Denker testified that he has no knowledge of who provided 1266's counsel with the information included in a board resolution to terminate the Schwartzes' ownership shares in July 2021, which was virtually identical to the allegations in the notices).

The foregoing establishes that 1266's board acted arbitrarily when it terminated the Schwartzes' proprietary lease based on allegations that were not substantiated. Or (at the very least), these issues raised numerous disputed questions of material fact as to whether the 1266's board acted improperly. With the board having played so fast and loose with the underlying facts, the trial court committed reversible error when it dismissively proclaimed that "the facts themselves are not in dispute." 08/23/2023 Tr. (2T) at 5:22-23. For this reason alone, this Court should reverse the trial court's grant of summary judgment to 1266.

Yet that is just the beginning of the trial court's reversible errors. Judge O'Dwyer was also dismissive of the deprivation of due process that the Schwartzes suffered when 1266's board proceeded with the meeting (at which the Schwartzes' proprietary lease was terminated) **without the Schwartzes present**. In defiance of caselaw such as *13315 Owners Corp.*, *supra* (which held that a cooperative's failure to comply with notice rules was sufficient to overcome the business judgment rule), Judge O'Dwyer intoned bitterly that "[i]n the context of the protracted litigation resulting in court appearance [on] virtually every motion they opened over the course of years, it is unfathomed to suggest the plaintiffs weren't aware of the notices."[5]

[5] This acerbic statement by Judge O'Dwyer exposes the bias that the Schwartzes maintain that Judge O'Dwyer has held against them throughout the period in which he presided over the trial court proceedings. In that statement, Judge O'Dwyer blames the Schwartzes for the protracted nature of the trial court proceedings. He went so far as to rule that the notice requirements of 1266's governing documents

08/23/2023 Tr. (2T) at 16:12-16. Yet the mere fact that litigation is ongoing between a cooperative and a unit holder does not erase the notice requirements set forth in the proprietary lease, the other governing documents and the law.

Judge O'Dwyer professed that this case is governed by the maxim that "[p]rocedural safeguards designed to protect persons such [as] the plaintiffs are to ensure notice [and] an opportunity to be heard." *Id*. If Judge O'Dwyer is to be held to this, this Court must reverse his grant of summary judgment. This is because the Schwartzes **had no opportunity to be heard** at the meeting, due to 1266 craftily holding the meeting at a time when the 1266's board knew that the Schwartzes would be away. This intentional violation of the Schwartzes' rights by 1266 goes to the heart of due process, was done in bad faith, and is unconscionable. The business judgment rule does not protect such a decision.

2. There Are Disputes of Material Fact as to the "Access" Issue.

(Pa1-3; 08/23/2023 Tr. (2T) at 14, 18-19)

The trial court also committed reversible error when it held that termination of the Schwartzes' proprietary lease was appropriate due to their supposed "failure

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should not apply because the Schwartzes "opened" motions "over the course of years." 08/23/2023 Tr. (2T) at 16:12-16. The Schwartzes maintain that the protracted nature of the litigation was in fact caused by 1266, which itself brought motion after motion (especially in connection with the manufactured "access" issue as it concerned the 2020 and 2023 leaks). In any event, a trial judge's distaste for a case's protracted nature cannot be a reason for that judge to rule spitefully against the parties whom that judge (here, wrongfully) blames for the situation.

to provide the corporation access to the apartment." 08/23/2023 Tr. (2T) at 14:14-15. This is the much-litigated question of the terms under which the Schwartzes would allow 1266 to enter their apartment to make certain repairs (including specifically, as to certain leaks, which 1266 disingenuously seized upon to claim that the Schwartzes were uncooperative as to access). This is a wholly manufactured issue that should not be part of the case, since it was not pled in 1266's counterclaim (and no amended pleading making any relevant allegations was ever filed). There are, at the very least, considerable questions of fact as to the Schwartzes allowing 1266 to have such access to the apartment. These issues were addressed thoroughly in the motion to vacate the trial court's grant of summary judgment, which the Schwartzes filed pursuant to R. 4:50. With that motion, Melissa Schwartz filed a certification that sets forth in detail the Schwartzes' repeated efforts to cooperate with regard to access. *See* Pa86-95, ¶¶ 63-118. In that certification, Mrs. Schwartz sets forth substantial (and obvious) disputes of fact as to the access issue. Mrs. Schwartz testifies as to (among numerous examples of such disputed facts) how the Schwartzes immediately allowed access to their apartment (twice) in response to the much-ballyhooed leak of December 22, 2020 (which lasted about 24 hours and did not reoccur).[6] As just a small sample of how that certification sets forth such

[6] That leak took place during the most critical (and uncertain) days of the COVID-19 pandemic, in December of 2020. The Schwartzes sought protection from the risks of COVID-19 during any time that workers or 1266 representatives might be

disputed questions of fact, consider the following paragraphs, in which Mrs. Schwartz describes how the Schwartzes allowed repeated access in connection with that leak of December 22, 2020 (even though that leak lasted less than 24 hours and was not a problem in the following months):

> 100. In March through June of 2021, I also gave access to the Unit to handle the leak. There were some concerns addressed regarding COVID-19 protocols but access was offered. For instance, I gave access on April 26, 2021 in the morning. I also gave access on May 6, 2021 in the morning for a ceiling inspection and repair. I also gave access on May 10, 2021 in the morning for 1266 Apartment Corp. to paint the living room ceiling.
>
> 101. Between June - July 2021, I made the Unit available to 1266 Apartment Corp. 1266 Apartment Corp. came into the Unit on July 21, 2021 and refused to do the water testing saying that there was no need for the water testing since there was no leak since December 22, 2020.
>
> 102. I gave 1266 Apartment Corp. access to the Unit multiple times in September 2021, including on September 27, 2021.

Pa92-93 at ¶¶ 100-102.

The Schwartzes continued to provide access into 2022 and 2023, as follows:

> 114. In January 2022 through September 2022, I was willing to provide access to the Unit for numerous days in furtherance of the repairs. I gave 1266 Apartment Corp. access to the Unit on January 4, 5, 26, 2022, February 9, 2022, September 15, 2022.

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in their apartment. This was especially important given that Mr. Schwartz suffers from multiple sclerosis, an autoimmune disease. *See generally* Pa90-92 at ¶¶ 87-100. Yet despite the fact that this leak lasted less than 24 hours, 1266 seized upon it to file endless motions, in an ongoing campaign to paint the Schwartzes as uncooperative as to the manufactured "access" issue. This certainly raises disputes of fact that should have precluded summary judgment.

> … In addition, we were available to grant access on January 5, 2022 at 10:00am, January 6, 7, 10, 11, 12, 14, and 18 and no one ever came.
>
> 115. On October 2022 through December 2022, I was willing to provide access to the Unit.
>
> 116. In June 2023, I was willing to provide 1266 Apartment Corp access to the Unit.
>
> 117. I granted 1266 Apartment Corp. access to the Unit multiple times between May 2023 and October of 2023. …

Pa95 at ¶¶ 114-117. 1266 may proffer its own version of events as to each of the dates to which Mrs. Schwartz refers in her certification, but such conflicting versions of events is the very essence of a dispute of material fact that warrants a denial of a motion for summary judgment.

Meanwhile, the words of 1266's personnel themselves establish the existence of major disputes of material fact as to the "access" issue, including the following testimony of Steve Austin (the vice president of 1266's board):

> Q: Based on your communications with Mr. and Mrs. Schwartz, did it seem to you that they wanted to give access and have the problem rectified?
>
> A: They said they were willing to give access anytime.

Pa130 at 54:1-6.

The following testimony of Melissa Dabal (who was an employee of 1266) further establishes an obvious dispute of fact as to the access issue:

> Q. Did Mr. and Mrs. Schwartz, in fact, allow you access to their apartment three days in a row at least September 27th, 28th, and 29th?
>
> A. Yes.

Pa111 at 176:8-11.

Remarkably, Judge O'Dwyer **flat-out refused to even hear** the Schwartzes' motion (made pursuant to R. 4:50) in which the Schwartzes pointed out these obvious disputes of fact. Rather, Judge O'Dwyer issued an order by which the trial court declined to hear that motion, due to a supposed "lack of jurisdiction per R. 2:9-1." Pa33-34. R. 2:9-1(a) states (in relevant part) as follows:

> [T]he supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to R. 1:10 and as otherwise provided.

Judge O'Dwyer reasoned that because there were proceedings already underway in the Appellate Division (i.e., a notice of appeal had already been filed as to the grant of summary judgment, due to the complicated appellate posture arising from the earlier stay proceedings in this Court), the trial court lacked jurisdiction over a motion to vacate the summary judgment order. *See generally* 01/05/2024 Tr. (4T). Yet R. 4:50-1 specifically indicates that a motion to vacate shall be litigated at the trial level; and further indicates that such a motion does not alter the finality of the order in question. Thus, the trial court could certainly have

heard the motion to vacate, while the proceedings in this Court remained pending. This is especially true given that there remained pending in the trial court 1266's own motion seeking to compel access, which is an issue that was intimately connected to the issues on the motion to vacate. It is also important to note that this Court itself held off on setting a briefing schedule on the pending appeal until **all** proceedings in the trial court had been completed. Therefore, in no way would the trial court hearing the motion to vacate under R. 4:50 have infringed upon this Court's jurisdiction over the then-pending appeal. (Significantly, protecting this Court's jurisdiction is the purpose of R. 2:9-1).

For these reasons, the trial court committed reversible error when it granted summary judgment to 1266 (despite obvious disputes of material fact) and refused to even hear the Schwartzes' motion to vacate. This Court should thus reverse the trial court and order a full trial, at which these disputed questions of fact (which are determinative of an older, sick couple's ejectment) will be decided by a trier of fact.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT AWARDED $301,859.03 IN ATTORNEYS' FEES TO 1266.

(Pa4-32)

The trial court committed reversible error when it granted 1266's application for attorneys' fees, awarding a massive **$301,859.03** in attorneys' fees to 1266. *See* Pa4-32. Amazingly, this mammoth award of $301,859.03 (entered against a couple

evicted from their longtime home while suffering from severe illnesses) is just shy of the full amount of attorneys' fees that 1266 requested.[7]

This award of attorneys' fees should be thrown out when this Court reverses the trial court's grant of summary judgment, for all of the reasons discussed in Section I, *supra*. There can be no fee award when the underlying grant of summary judgment as to ejectment and forfeiture of shares is reversed.

Yet even if the trial court's grant of summary judgment were to be upheld, the award of attorneys' fees should be reversed, for several legal reasons discussed in Sections A and B, *infra*. Furthermore, even if 1266 is entitled to any award of attorney's fees, such an award should be significantly reduced from the extreme amount of $301,859.03 that the trial court awarded, due to much of the requested fees not being proper, for the reasons discussed in Section C, *infra*.

[7] The trial court itself recognized the "excessive" nature of this "substantial" award of attorneys' fees, asserting that "[t]his is that rare instance" that would justify such an award. Pa7, 20. Yet in making this statement, Judge O'Dwyer (again) reverted to blaming the Schwartzes for the protracted nature of the trial court proceedings, saying that "[f]or reasons best known to the Plaintiffs, they chose at every turn in the litigation to aggressively pursue their perceived claims, and to deny those of all other parties to the litigation." Pa19. Therein lies Judge O'Dwyer's true motivation in imposing this crushing fee award: to punish the Schwartzes because Judge O'Dwyer believed that they were responsible for the protracted nature of the litigation.

A. 1266 Should Recover No Attorneys' Fees Under the Proprietary Lease's Unilateral Fee Shifting Provision, Which Is Violative of Public Policy.

Pa12-14

The contractual provision under which the trial court made its award of attorneys' fees is deeply problematic on its face, as a unilateral fee shifting provision. This provision, set forth in Section 28 of the Proprietary Lease, reads as follows:

> If the Lessee is at any time in default hereunder and the Lessor incurs any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending or asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements shall be paid by the Lessee to the Lessor, on demand, as additional rent.

Pa217.

On its face, this is a unilateral fee shifting provision. This means that the provision provides a mechanism by which only one party (here, 1266) may recover attorneys' fees; while not providing any mechanism by which the other party (here, the Schwartzes) might possibly recover attorneys' fees.

Such unilateral fee shifting provisions are deeply suspect under public policy, because they embolden one party with a litigation advantage that the other party does not have. For this reason, states such as California and Washington have (by statute) outlawed unilateral fee shifting provisions in all contracts. *See* Calif. Civ. Code § 1717; Wash. R.C.W. § 4.84.330. Indeed, New Jersey has outlawed unilateral fee

shifting provisions in residential leases between landlords and tenants, a context which is similar to that of this case. *See* N.J.S.A. 2A:18-61.66.

The Schwartzes ask this Court to hold that the unilateral fee shifting provision in this case is invalid as a matter of New Jersey public policy. This is because this particular provision had the effect of encouraging 1266 to assert (and to litigate relentlessly) retaliatory counterclaims that are wholly unrelated to the Schwartzes' original tort claim. Under this provision's protection, 1266 knew (throughout the protracted litigation in the trial court) that no matter how zealously it prosecuted the litigation, there could be no outcome in which 1266 could owe attorneys' fees to the Schwartzes; whereas a finding of "default" would mean that the Schwartzes could end up owing a treasure trove of attorneys' fees to 1266. For these reasons, as a matter of equity, and as a matter of public policy as applied to the circumstances of this case, 1266 should recover no attorneys' fees under this unilateral fee shifting provision. Whereas the trial court's decision awarding attorneys' fees failed to even address this argument, this Court should hold that this unilateral fee shifting provision is violative of New Jersey public policy and is thus void.

B. 1266 Should Recover No Attorneys' Fees as to 1266's Counterclaims.

(Pa12-14)

As an independent basis for reversal, this Court should reverse the trial court's award of attorneys' fees to 1266 because the trial court improperly applied the fee

shifting provision's reference to "a counterclaim." The fee shifting provision allows for recovery of attorneys' fees incurred "defending or asserting a counterclaim in any action or proceeding brought by the Lessee." Pa217. The Schwartzes submit that the provision's reference to "a counterclaim" is applicable only in a situation in which the counterclaims that the Lessor asserts against the Lessee somehow bear upon the claims that the Lesse asserted in the original complaint.

Here, the counterclaims that 1266 asserted (various ejectment issues) had absolutely nothing to do with any issue raised in the Schwartzes' original complaint (which concerned only tort claims arising from Mr. Kopelman's violent conduct). Only by 1266's own choice did such ejectment issues come to be a part of this case.

Therefore, the counterclaims that 1266 brought are not what the provision's text envisions as triggering an award of attorneys' fees (that is, a counterclaim that the Lessor had no choice but to litigate due to the Lessee's having brought an action). Any contrary interpretation (such as that of the trial court, Pa12-14) would allow any Lessor to do exactly what 1266 did in this case: assert a kitchen sink of counterclaims wholly unrelated to the Lessee's original claim, in the hope of a crippling award of attorneys' fees against the Lessee.

This has significant public policy implications, since this would result in **any Lessee** being terrified to bring any claim against a Lessor, even if (as in this case) such a Lessee's claim were wholly unrelated to any issue that could somehow result

in the Lessee's ejectment. Emboldened by the ability to run up an enormous bill of legal fees (that the Lessee would have to pay), any Lessor could do exactly what 1266 has done here: just keep litigating until ejectment is achieved.

The trial court rejected this argument, holding that the term "counterclaim" in the fee shifting provision should be read so as to apply to *any* counterclaim, saying that "[t]o interpret this provision in a manner that does not include counsel fees associated with defending against both claims brought affirmatively by the Schwartzes against the Corporation and for the counterclaim as a result thereof would attribute a narrower meaning to these terms than suggested by a plain reading." Pa14. To the contrary, the Schwartzes submit that this (and any) fee shifting provision must be construed in keeping with New Jersey's strong public policy **disfavoring** fee awards. As the trial court itself pointed out, "[t]he Supreme Court of New Jersey has noted that fee awards are in derogation of the usual policy applied by New Jersey courts." Pa13, quoting *McGuire v. Jersey City*, 125 N.J. 310, 326 (1991). As such, a fee shifting provision should not be interpreted as allowing an award of attorney's fees unless that fee shifting provision is clear and unambiguous as to such an award. The fee shifting provision at issue on this appeal is indeed ambiguous as to the meaning of "counterclaim," since allowing an award of attorneys' fees for *all* counterclaims is inherently at odds with New Jersey's public

policy disfavoring fee shifting. As such, this Court should construe this fee shifting provision favorably to the Schwartzes.

For these reasons, this Court should reverse the trial court's order granting attorneys' fees insofar as it granted any fees in connection with 1266's counterclaim; and remand this case to the trial court for a new determination of attorneys' fees that will not award any fees incurred in connection with 1266's counterclaim.

C. This Court Should Reverse the Deficient Award of Attorneys' Fees.

(Pa14-32)

Finally, if this Court were to hold that 1266 is entitled to any award of attorneys' fees, the amount awarded must be reduced dramatically from the trial court's excessive award of $301,859.03, due to numerous substantive deficiencies in the claimed fees.[8] In the record is a copy of the billing materials that 1266 submitted with its fee application, as annotated by the Schwartzes' counsel.[9] *See* Pa132-191. As set forth in detail herein, this annotated version of 1266's billing materials establish that the fee award must be substantially reduced.

[8] 1266 itself believed that the amount of attorney's fees incurred in this litigation was excessive. Steve Austin, who is the vice president of 1266's board, testified that 1266 spent a "ridiculous amount of money" in its attempts to eject the Schwartzes, when the chances of success were "pretty low." Pa127 at 37:4-15.

[9] The version of this document that is included in the Appendix is identical in all respects to the version that was submitted to the trial court, including annotations and highlighting that were present in the version that was submitted to the trial court.

First, 1266's billing materials are for the most part incomprehensible. The time entries do not set forth reasonable descriptions of the task and the reason for the task. *See Owner-Operator Indep. Drivers Ass'n v. Supervalu, Inc.*, No. 05-cv-2809, (JRT/JJG), 2012 U.S. Dist. LEXIS 184055, *48-*49 (D. Minn. Sept. 30, 2012) ("Incomplete or imprecise billing records prevent the Court from exercising meaningful review and are grounds for reducing a fee award").

Second, numerous entries on 1266's billing materials make the reader guess whether the entry is related to the ejectment action. Just by way of example, there are numerous cryptic entries that say: "Legal research," "Review of file material," "Telephone conference with M. Earle," "Review emails," "Correspondence," "Attend phone call," and "Review correspondence." With entries like these, there is no way of knowing whether these fee claims are related to the case. On the Schwartzes' annotated copy of 1266's billing materials, Pa132-191, color-coded in yellow, the total amount of fees attributable to entries that are not specific enough to determine a purpose is **$89,011.97,** which should be excluded from any fee award. The trial court was wrong to say that "the Corporation is entitled to reimbursement of its fees in defending or asserting a counterclaim in any action or proceeding brought by the Lessee," Pa24, because there is zero indication of how these entries in any way relate to any part of the litigation between 1266 and the Schwartzes.

Third, 1266's billing materials include numerous entries that are not relevant to the summary judgment motion, and some that are in no way part of this case at all. The term "access" is used throughout the billing materials, most often in connection with leaks. Yet as set forth in footnote 7, *supra*, 1266 ran up immense amounts of legal fees in connection with supposed "access" issues resulting from a leak (that lasted less than 24 hours) in 2020, at the height of fear over the COVID-19 pandemic. Meanwhile, a roof leak that took place in 2023 **is not part of the case**. One need only look at 1266's counterclaim to see that the 2023 roof leak is not mentioned anywhere in that pleading (and no relevant amendment was ever filed). The trial court never adjudicated anything concerning that 2023 leak. In any event, after seemingly endless motion practice brought by 1266 over the "access" issue, on January 28, 2025, Judge O'Dwyer ultimately issues a "Final Order" in this case that **denied** 1266's most recent cumulative motion regarding "access." With 1266's quixotic crusade for "access" not having achieved fruition, any and all attorneys' fees supposedly incurred in connection with it must be disallowed.

More generally, 1266's billing materials are replete with entries that have nothing to do with the subject matter of the summary judgment motion (and thus nothing to do with the "counterclaim" under which fees were supposedly awarded). Specifically, there are numerous entries that relate to the Kopelman part of the lawsuit (that is, the claims of battery and defamation) or concurrent municipal court

proceedings. On the Schwartzes' annotated copy of 1266's billing materials, Pa132-191, color-coded in pink, the total amount of fees attributable to entries that are not related to the counterclaim is **$88,787.39**, which should be excluded from any fee award. The trial court was wrong to say that "the fees are inextricable intermingled and should not be excluded," because these unrelated issues had zero bearing on the subject matter (or the legal claims) that were at issue on the motion for summary judgment, which is the underlying basis of 1266's claim to attorneys' fees.

Fourth, there are remaining categories of deficient time entries, such as block billing and billing for administrative time. Block billing is the grouping of a number of individual billable tasks into one collective billing entry with a cumulative time value. Block billing prevents the reader from determining the reasonableness of the amount of time spent for any individual task. Although the trial court pointed out that New Jersey courts have said that block billing can be acceptable if the court sorts out the billed tasks and "determin[es] the hours reasonably correlate to all of the activities performed," Pa26, quoting *Piccinetti v. Clayton Myrick McClanahan & Coulter PLLC*, Civ. A. No. 16-4032 (TJB), 2022 U.S. Dist. LEXIS 115838 at *15 (D.N.J. June 30, 2022), **the trial court did not do this**. Instead, the trial court just declared that 1266's block billing entries were fine. On the Schwartzes' annotated copy of 1266's billing materials, Pa132-191, color-coded in green, the total amount of fees attributable to such block billing is **$4,100.00**, which should be excluded

from any fee award. Finally, there is also **$10,665.00** (color-coded in orange) billed for purely administrative tasks, such as Bates stamping and scheduling, which also should be excluded.

In conclusion, if this Court were to hold that 1266 is entitled to any award of attorneys' fees at all, the amount awarded must be reduced dramatically from the trial court's award of $301,859.03, as set forth herein. This Court should set forth the trial court's errors in making its excessive fee award; and remand this matter for a new determination in line with this Court's instructions.

CONCLUSION

For all of the foregoing reasons, Appellants Melissa Schwartz and Steven Schwartz respectfully request that this Court vacate the trial court's grant of summary judgment, and its grant of attorneys' fees; and remand this case to the Law Division, Bergen County, for a full trial.

Dated: May 1, 2025

Respectfully submitted,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

By: /s/ Thomas A. Gentile
Thomas A. Gentile (01336-2005)

Attorney of Record

7 Giralda Farms
Madison, New Jersey 07940
Phone: (973) 735-5785
Fax: (973) 624-0808
e-mail: thomas.gentile@wilsonelser.com

Attorneys for Appellants
Melissa Schwartz & Steven Schwartz

Superior Court of New Jersey

Appellate Division

Docket No. A-000795-23

MELISSA SCHWARTZ and STEVEN SCHWARTZ, *Plaintiffs-Appellants,* vs. MICHAEL KOPELMAN, ESQ., 1266 APARTMENT CORP., and CAROL RACHESKY, a/k/a Carol Reinfeld, a/k/a Carol Wolfe, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-128-20 Sat Below: HON. JOHN D. O'DWYER, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT 1266 APARTMENT CORP. D/B/A HORIZON HOUSE

KATES NUSSMAN ELLIS FARHI & EARLE, LLP
Attorneys for Defendant 1266 Apartment Corp. d/b/a Horizon House
190 Moore Street, Suite 306
Hackensack, New Jersey 07601
(201) 488-7211
clandolfi@nklaw.com
mearle@nklaw.com

On the Brief:
CARA LANDOLFI, ESQ.
Attorney ID# 909792012
MATTHEW Z. EARLE, ESQ
Attorney ID# 042842004

Date Submitted: July 28, 2025

COUNSEL PRESS (800) 4-APPEAL • (381605)

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PROCEDURAL HISTORY

A brief procedural history in this matter is necessary in order to provide the Court with the extraordinary circumstances and procedural posture in this matter that ensued for years. The Plaintiffs filed their Complaint in January of 2020 following a physical altercation with another shareholder. Plaintiffs proceeded to litigate the instant dispute in a contentious and dilatory manner. Plaintiffs had four (4) attorneys withdraw as counsel, their pleadings dismissed for failure to provide discovery, and engaged in a longstanding, willful, and deliberate course of conduct resulting in significant motion practice including their depositions being court ordered on ten (10) different occasions. Da1388.

On July 7, 2023, the Co-op filed its motion for summary judgment on its counterclaims. Similarly, despite now arguing the existence of disputed material facts, Plaintiffs filed their own motion for summary judgment as to the Co-op's claims against them on July 7, 2023.[1] Da2283-553. Summary judgment in favor of the Co-op was granted on August 23, 2023. On September 6, 2023, the Schwartzes filed a motion for reconsideration seeking to vacate the August 23,

[1] The Plaintiffs failed to include their own Summary Judgment Motion Exhibits. This failure is in violation of R. 2:6-1(a)(1) and should result in the dismissal of their appeal. Noren v. Heartland Payment Sys., 449 N.J. Super. 193 (App. Div. 2017).

2023 order granting the Co-op summary judgment. Da881. On September 22, 2023, the trial court denied the Schwartz motion to reconsider. Da892.

STATEMENT OF FACTS

1266 Apartment Corp. (hereinafter referred to as the "Co-op") is a residential housing cooperative that owns and operates six buildings containing 1266 units and related grounds. Pa855 ¶2. The instant appeal arises out of the trial court's grant of summary judgment terminating the Plaintiffs Steven and Melissa Schwartz's ("Plaintiffs" or "Schwartzes") ownership of shares of stock in the Co-op and appurtenant Lease[2] ("Lease") to Apartment 2908 in Building 6 (the "Apartment"). See Pa 198. The trial court granted summary judgment terminating the Schwartzes' stock and lease and ejecting them from Apartment 2908 on two separate grounds: (1) their repeated acts of objectionable conduct. Pa 1-3, 2T; and (2) their repeated failure to provide the Co-op access after receipt of appropriate notices to cure (a fact that was not disputed by the Schwartzes before the trial court).

Since the inception of their ownership in the Co-op, the Schwartzes have repeatedly engaged in objectionable conduct resulting in disputes with

[2] The Lease is a contract entered into between the shareholder and the cooperative which defines their relationship, and specifically includes the conditions under which a shareholder's stock and lease may be terminated, including based on objectionable conduct. See Pa 198.

neighbors, residents, staff, police officers, and others in the building. See Pa 855, ¶13, Pa 873-1058. By way of example, in just eight months from August of 2019 through March of 2020 , the Co-op received reports that the Schwartzes had engaged in seven (7) separate incidents of objectionable conduct including at least two (2) acts of physical violence against other Shareholders. See Pa 598, 972-1001. Many of these complaints of objectionable conduct were caught on Co-op's surveillance camera resulting in indisputable evidence of their conduct. See Pa 741, 941, 968, 1001, 1029. This objectionable conduct was in breach of Paragraph 31 of the Lease, which constitutes grounds to terminate their stock and lease.

In addition to engaging in years of objectionable conduct continued after notice to cease, the Schwartzes have routinely refused to grant access to their apartment when requested, oftentimes to the detriment of other shareholders or the Co-op as a whole. See Pa834 ¶¶34-51, Pa 1063-1153. Plaintiffs' failure to provide the Co-op with access when reasonably requested constitutes a breach of paragraph 25 of the Lease. See Pa198. Crucially, the Schwartzes failed to oppose before the trial court the Co-op's termination of their stock and lease for failure to provide access. The Schwartzes' failure to oppose this basis is likely due to the fact that their refusal to provide access has been litigated at length before the trial court and therefore the facts relating to same simply cannot be

denied. See Pa352, Pa514, Da1-280, Da581-604, Da821-865, Da893-1385. To date, by the Schwartzes' own admission, their apartment remains in a state of utter disrepair based solely on their continued refusal and outright opposition to provide access to the apartment. Da1-280, Da581-604, Da821-865, Da893-1385.

As the trial court properly recognized, when exercising its business judgment to terminate the Plaintiffs' stock and lease the Board relied upon extensive corporate records that reflected the Schwartzes' multitude of acts of objectionable conduct and repeated failures to provide access to the Apartment. See Pa 834 ¶¶69-80, Pa855 ¶13.

Paragraph 25 of the Lease requires shareholders to provide access to their apartments when requested. Paragraph 31(e) of the Lease states that if a breach of the Lease, such as failure to provide access, is not cured within thirty days of receipt of a Notice to Cure, the Co-op may declare the breaching party to be in default under the Lease and seek to terminate same. See Pa198.

The Schwartzes refused to grant the Co-op access to their apartment on numerous occasions. See Pa834, ¶24-51, Pa1075-1153, Pa855 ¶15, Pa352, Pa514, Pa522. In December of 2020, following a leak in their apartment, the Schwartzes refused to grant the Co-op access to their apartment for a period of eight (8) months to conduct a necessary water test to determine the source of the leak. See Pa834 ¶24-51, Pa1075-1153, Pa855 ¶15, Pa352, Pa514, Pa522. As

required by Paragraph 31(e) of the Lease, on March 17, 2021, the Co-op served the Schwartzes with a notice to cure requiring them to provide access to the apartment within thirty (30) days or potentially face termination of stock and lease. See Pa338. Access was not granted within thirty (30) days of the notice. In fact, access was not granted until July 2021, after the Co-op obtained two (2) Court Orders for access, voted to terminate the Plaintiffs' stock and lease, and sent them a Notice of Termination. See Pa834, ¶24-51, Pa1075-1153, Pa855 ¶15, Pa352, Pa514, Pa522, Pa529, Pa533. Thus, as the trial court properly observed, the Plaintiffs failed to cure their breach of the Lease within the 30-day timeframe.

A review of the parties' briefs demonstrate that both parties agree that the decision of the Board to terminate Plaintiffs' stock and lease is subject to the business judgment rule, and thus is not subject to judicial review, absent the presence of fraud, self-dealing, or unconscionability. The Board acted in accordance with the Lease by voting to terminate their stock and lease based upon the Schwartzes failure to cure their lease violations. Pa198, Da236-279. Further, as the trial court properly analyzed, in rendering its decision to eject the Schwartzes and terminate their stock and lease, the Board complied with all procedural requirements of its governing documents and relevant state law as detailed in length in Point IB3(b).

Notably, as detailed in the numerous additional Amended Notices of Termination, the Schwartzes have continued to refuse to grant the Co-op access and on one such occasion their refusal to grant access resulted in raw sewage leaking into the apartment below theirs for several weeks. See Pa 834, ¶¶69-80, Pa338, 529, 539, 576, 598, 714-745.

Based on the foregoing, the trial court properly granted summary judgment in finding that the Board acted within its business judgment discretion to terminate the Schwartzes' stock and lease in good faith out of genuine concern for all shareholders.

I. LEGAL ARGUMENT

A. Standard of Review

The appeal of a trial court's alleged error in granting a motion for Summary Judgment is "subject to de novo plenary appellate review." City of Ati. City v. Trupos, 201 N.J. 447, 463 (2010). Summary Judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Thus, "when the evidence is so one-sided that one party must prevail as a matter of law[,]… the trial court should

not hesitate to grant Summary Judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

B. The Trial Judge Did Not Commit Reversible Error by Granting Summary Judgment in Favor of the Co-Op

1. Plaintiffs failed to oppose termination of their stock and lease for failure to provide access at the trial court and therefore cannot raise it on appeal.

The Schwartzes now attempt to improperly rely on their R. 4:50 motion rather than the summary judgment record from below to argue for the first time that there are issues of material fact as to their failure to provide access to their apartment. Crucially, Plaintiffs never argued against termination for failure to provide access before the trial court. See 2T 14:11-25. Likewise, at oral argument, counsel for Plaintiffs acknowledged that they did not dispute the lack of access as a basis for termination but instead addressed the purported procedural deficiencies. See 1T 28-35. The reason Plaintiffs were unable to oppose the access issue is because the facts that form the basis for the termination for failure to provide access are supported by contemporaneous filings with the trial court. See Pa352-515, Pa522-528. This was acknowledged by Judge O'Dwyer explicitly in granting summary judgment. See 2T 10-11, 18:21-25,19:1-5.

Plaintiffs repeatedly refused to provide the Co-op access to their apartment and failed to cure the refusal to provide access within thirty (30) days

of March 17, 2021, Notice to Cure as required by paragraph 31 (e) of the Lease. Pa338. In April of 2021, the Co-op filed an Order to Show Cause seeking access to the apartment that was granted by Judge Thurber on April 23, 2021. Pa352-515, Pa522-528. Even after the Court Order requiring access (which was more than 30 days after the expiration of the Notice to Cure) the Co-op was compelled to obtain a second order on May 21, 2021. Pa522-528. Despite the notice to cure and two court orders, the Schwartzes refused to provide access on June 22, 2021, for an inspection scheduled pursuant to the Court Orders. It was only after this refusal that occurred over 90 days after the initial notice to cure that the Board decided to vote to terminate the Schwartzes' stock and lease. Notably, the Schwartzes did not provide the access until after their stock and lease was terminated. Pa529-Pa538. Thus, the mere existence of the two (2) court orders compelling access that were issued over 30 and over 60 days after the expiration of the March 17, 2021, Notice to Cure on its face provide undisputable facts that the Schwartzes failed to provide access within 30 days. Pa352-515, Pa522-528.

A party may not appeal from the entry of an order granting summary judgment which it never opposed in the lower court. See Infante v. Gottesman, 233 N.J. Super. 310, 319 (App. Div. 1989), reversed on other grounds. In Infante, the court held that, since the "plaintiff offered no opposition to defendant's motion for summary judgment … in the trial court, he will not be

heard to complain that the trial court accepted as true the uncontradicted facts in defendant's moving papers, and thus he cannot challenge the summary judgment order entered in defendant's favor." Id.; Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 234 (App. Div. 1988), certif. den. 113 N.J. 353 (1988); Burlington County Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App.Div.1987).

Accordingly, since the Schwartzes failed to oppose the portion of the summary judgment motion seeking to terminate their stock and lease on the grounds that they failed to provide access they cannot oppose it now by using citations to documents that were not a part of the summary judgment record. Likewise, since there are contemporaneous trial court proceedings including court orders that illustrate that access was not provided within 30 days of the March 17, 2021 notice to cure, it is the law of the case and cannot be disputed the same occurrence.

2. The Court Should Disregard Any Arguments Raised by the Schwartzes on Appeal that was not Part of the Summary Judgment Record

In an effort to create purported disputes of material fact, the Schwartzes attempt to mislead the Court by referring to their R. 4:50 motion that was filed six months after the Schwartzes filed their own summary judgment motion,

opposed the Co-op's summary judgment motion, filed a motion for reconsideration, and filed the instant appeal.

Importantly, the totality of the facts relied upon on the Plaintiffs' brief under the heading "The Trial Court's Decision Ignores Disputes of Material Fact" on pages 16 through 24 **were not a part of the trial court's summary judgment record.** This is evidenced by the fact that the totality of this section refers to documents in the appendix that were not a part of the summary judgment record. Pa76-Pa125. As admitted by the Plaintiffs, the totality of these issues were only raised in the Plaintiffs' R. 4:50 Motion to Vacate, including the Certification of Melissa Schwartz that the Plaintiffs rely on to support the totality of these allegedly disputed facts.

Whether reviewing an appeal from summary judgment, an appellate court is limited to an examination of "the original summary judgment record." Lombardi v. Masso, 207 N.J. 517, 542 (2011); Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188 (1963) (in reviewing the disposition of a summary judgment motion, a court is limited to a consideration of "the case only as it unfolded to that point"). It is crucial for the appellate division to only consider the original summary judgment record, because otherwise "an appellate court could easily stray from its proper function by affirming or reversing in light of material never presented when the trial judge considered the motion."

Noren v. Heartland Payment Systems, Inc., (No. A-2651-13T3) (App. Div, 2017).

This is exactly what the Schwartzes are attempting to do by misleading the court and raising purported issues of material fact that were never submitted to the trial court as a part of the summary judgment record. Accordingly, the totality of these arguments must be disregarded as same was not a part of the summary judgment record and is improperly before this court.

3. **Application of the Business Judgment Rule requires the Court to Uphold the grant of summary judgment terminating the Stock and Lease**.

The trial court properly found that as a matter of law the business judgment rule applies, and Co-op properly terminated the Schwartzes stock and lease. The Appellate Division has explicitly held that decisions of cooperative boards are protected by the business judgment rule and cannot be "second guessed" by the court absent fraud, self-dealing, or dishonesty. Davis v. Howell Mgmt. Co., 2009 WL 4251170 (N.J. Super. Ct. App. Div. Nov. 19, 2009); Papalexiou v. Tower West Condominium, 167 N.J. Super 516, 527 (Ch. Div.1979); See also Riley v. Riviera Towers Corp., 310 N.J 265, (1998) (holding that the business judgment rule bars judicial inquiry into a decision made by the board of directors in good faith within the scope of its Bylaws).

Importantly, because New Jersey case law is not as developed regarding the remedies available to cooperative associations and since Cooperatives are creatures of New York City, it is typical for New York law to be applied. The seminal New Jersey cooperative cases such as Sulcov and Plaza Road all relied heavily on New York law. Thus, while the New Jersey precedent is clear that the actions of the Board are governed by the business judgment rule, there is no New Jersey case which deals directly with a cooperative corporation terminating a shareholder's stock and lease for objectionable conduct or failure to provide access. Therefore, it is appropriate for the Court to also look to New York case law as to the application of the business judgment rule in the context of objectionable conduct. New York case law further confirms business judgment rule applies to a cooperative's board decision to terminate a stock and lease for objectionable conduct.

The seminal case relating to the termination of a shareholder's stock and lease for objectionable conduct in New York is 40 West 67th Street Corp. v. Pullman, 100 N.Y.2d 147 (N.Y. 2003). In Pullman the court held that in an action by a cooperative to eject a shareholder and recover possession of his apartment based on his "objectionable conduct" is governed by the business judgment rule requiring the court to defer to the cooperative board's determinations. The court further stated that deference must be granted to the

Board's business judgment "where the co-op followed procedures contained in the lease, and provided appropriate notice, it acted on a supermajority vote, and its resolution set forth a list of specific findings as to tenant's objectionable behavior." Id.

As required by Pullman, there is a two (2) phase process the Court must engage in when reviewing a cooperative's decision to terminate a shareholder's stock and lease. First, the Court must look to whether the cooperative's action is entitled to business judgment deference. As detailed above, it is. "If the business judgment rule applies, the court must grant summary judgment to the cooperative corporation if the cooperative moves for it…without requiring the cooperative corporation to prove whether the shareholder-tenant is innocent or guilty of the purported objectionable conduct." Id. at 610 (emphasis added).

Recently, in furtherance of Pullman, the supreme court of New York in Haimovici v Castle Vil. Owners Corp., 2022 NY Slip Op 32836(U) (decided August 23, 2022), held that "the business judgment rule prevents the supreme court from second guessing a coop board's decision simply because it might disagree with it." In fact, absent proof of one of the exceptions to the business judgment rule, the vote to terminate a tenancy because of the shareholder-tenant's objectionable conduct is sufficient to grant the cooperative summary

judgment because the Court does not have the authority to look at the facts behind proper board votes.

C. The only Material Facts to be Considered is whether the Co-op followed all Procedural Requirements to Terminate the Stock and Lease

Based on the aforementioned case law, since all parties are already in agreement that the business judgment rule applies the only facts that are material to the review of the Board's decision to terminate the stock and lease relate to whether the Board had authority to act in accordance with its governing documents. In other words, if the Board had the authority to act, then its decision cannot be second guessed by the court absent a showing of fraud, unconscionability, or self-dealing.

As detailed herein, the Board had authority to act pursuant to Paragraph 31(f) and Paragraph 25 of the Lease. The Board sent the Schwartzes the requisite Notices to Cure, properly noticed a meeting to terminate their stock and lease, and then voted to terminate their stock and lease with a 2/3rd majority of the Board. Pa 338-345, 529-538, 598-605, 712-717, 704-708, 1204-1215. The Notice of Terminate and resolution were served upon the Schwartzes. Pa1214-1215. Thus, all procedural pre-requisites to terminate have been met.

The trial court already evaluated the totality of the material facts and held that "the facts themselves are not in dispute." T2, 5:21-23. Moreover, the Court

further stated that "suffice to say that Plaintiffs have failed to provide competent evidence to demonstrate any failure of the Board and the Board's decisions in accordance with the Business Judgment Rule. Stated another way, there was **no fraud, self-dealing, or unconscionable acts**." T2,15:17-23.

Based on the foregoing, the business judgment rule applies, and the decision of the Board can only be overruled if there is fraud, self-dealing or unconscionable conduct, none of which have been alleged here.

1. **The Co-op had authority to act and adhered to the provisions of its Governing Documents.**

Paragraph 31 (f) of the Lease prohibits "objectionable conduct." Pa198 ¶31(f). The Lease does not specifically define objectionable conduct and determination of what constitutes same rests with the Board. The Board may terminate a Lease for objectionable conduct upon an "affirmative vote of two-thirds of [the Corporation's] Board of Directors at a meeting duly called for the purpose, that because of the objectionable conduct on the part of the Lessee…repeated after written notice from the Lessor, the tenancy of the Lessee is undesirable." Pa198 ¶31.

Paragraph 25 of the Lease requires Plaintiffs and other shareholders to provide access to their apartments when requested by the Co-op, and states:

> The Lessor, its agents, and authorized workmen shall be permitted to visit, examine, or enter the apartment and any storage space assigned to Lessee at any reasonable hour of the

> day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the Building or to cure any default by the Lessee and to remove such portions of the walls, floors and ceilings of the apartment and storage space as may be required for any such purpose…Pa198 ¶25.

Paragraph 31(e) of the Lease states that if breaches of the Lease, such as failure to provide access, are not cured within thirty days of receipt of a Notice to Cure, the Co-op may declare the breaching party to be in default under the Lease and seek to terminate same. Pa198, ¶31(e).

Accordingly, the Board has acted pursuant to two separate provisions of the Lease to terminate Plaintiffs' interest: (1) objectionable conduct repeated after two (2) written notices both with regard to incidents with other residents and staff members; and, (2) failure to provide access that was not cured within 30 days.

Further, in terminating the Schwartzes stock and lease, the Board strictly adhered to all procedural requirements. Specifically:

> (1) Plaintiffs were properly served with two (2) notices to cure in March of 2020 and March of 2021 for their objectionable conduct as required by Paragraph 31 and 25. Pa338, Pa1204-1213. The March 17, 2021 Notice to Cure included that the Schwartzes must provide the Co-op with access to their apartment to complete a water test within 30 days pursuant to Paragraph 25 of the Lease. Pa338;
> (2) The Schwartzes failed to cure their objectionable conduct as there were continued additional acts of objectionable after March 17, 2021 and they also failed to provide the Co-op with access

within 30 days of March 17, 2021. Pa834, ¶24-51, Pa1075-1153, 855 ¶15, 352, 514, 522-529, 533, 352-515, 522-528, 718-741;

(3) After Plaintiffs unilaterally cancelled Court Ordered access on an agreed upon date in June of 2021, the Board decided to call a meeting to vote to terminate the Schwartzes stock and lease as required by Paragraph 31 of the Lease;

(4) On June 24, 2021, the Board posted a notice of a board meeting open to attendance by shareholders in the public areas of the Co-op, and emailed same to all shareholders that have email addresses on record with the Co-op, which included the Schwartzes. Pa704. The Notice of Meeting was disseminated via email and posted at multiple locations on the property on seven (7) days advance notice and set forth an agenda for terminating a shareholder's stock and lease, all as required by the N.J.A.C. 5:26-8.12 (c) for a properly authorized board action. Pa 704;

(5) The meeting was properly noticed to all shareholders on 7 days' notice and held on July 1, 2021 via zoom where at least two thirds of the board of directors voted to terminate the Schwartzes stock and lease based upon their repeated acts of objectionable conduct and their refusal to provide access. In particular, the notice was emailed to all shareholders and also posted throughout the buildings with the agenda, as required by all as required by the N.J.A.C. 5:26-8.12 (c) for a properly authorized board action. Pa529-538, 712, 1214-1215, 834 ¶59, 704;

(6) The Co-op issued a detailed resolution setting forth the basis for termination and on July 2, 2021 served the Notice of Termination and resolution on the Schwartzes attorney at that time Mark Guralnick, Esq. Pa529-538, 712, 1214-1215.

(7) On July 2, 2021, the Schwartzes via their counsel at that time, Mark Guralnick, Esq., were sent a Notice of Termination and a copy of the confidential resolution advising them that their stock and lease was terminated effective July 13, 2021. Pa 529-538, 1214.

(8) Despite termination of their stock and lease, the Schwartzes' objectionable conduct and refusals to provide access continued and the Schwartzes were sent an additional four (4) amended notices of termination since the July 1, 2021, board meeting. See Pa725-Pa741.

(9) On July 9, 2021, Mr. Guralnick filed an Order to Show Cause challenging the termination of the stock and lease making the exact

same arguments that the Schwartzes made on summary judgment and in the current pending appeal. Da682-697.

(10) On July 15, 2021, Judge Thurber entered an Order to Show Cause setting a return date. Da707. Following briefs by both parties and the Order to Show Cause hearing, Judge Thurber denied the Schwartzes' Order to Show Cause, thereby rejecting the aforementioned arguments, and Ordered that the parties must submit "their disputes concerning termination of plaintiff's interest in defendant to mediation with court appointed mediator, Douglas Brierly." Da707-714.

(11) The parties mediated the dispute before Douglas Brierly, Esq. as Court Ordered and the Co-op did not rescind its notice of termination. Da712; and

(12) Following the failed mediation, the Co-op amended its Complaint in August of 2021 to include terminating the Schwartzes stock and lease Pa1216-1321.

The Schwartzes raise substantially the same purported procedural deficiencies already address and evaluated by the trial court as part of both the July 2021 Order to Show Cause and the summary judgment motions, none of which have any merit and are addressed as follows:

(1) The Schwartzes Received Proper Notice of the March 2020 and March 2021 Notices to Cure

The Schwartzes allege they did not receive proper notice of the March 2020 Notice to Cure because the notice was served on their attorney Scott Piekarsky, Esq., who was representing them in the litigation at that time. At the time the March 2020 Notice to Cure was served, the Schwartzes had already filed this litigation naming the Co-op as a defendant and were represented in this litigation by Mr. Piekarsky. Paragraph 27 of the Lease provides that either party may designate an alternative address for service of notices or demands. By retaining counsel in this matter, the Schwartzes effectively designated him as the party to receive related notice. Mr. Piekarsky acknowledged service of the Notice, did not object to the

service, and instead requested time to respond to it. Da632**.** Thus, the purpose of the service provision, to ensure that the parties have proper notice were undeniably met. Furthermore, RPC 4.2 prohibits direct communications with those represented by counsel, thereby necessitating sending the notice to their then attorney. As seen herein and in the record, the Plaintiffs were actually represented by counsel with regard to the counterclaims and related notices.

The Schwartzes also allege that the March 2021 Notice to Cure was not "served" by the board secretary and that there is "no evidence in the record that this 2021 amended notice was served on the Schwartzes at their address in the building." This assertion is patently false and is particularly troubling given that the Schwartzes are well aware that part of the summary judgment record below included the proof of mailing via certified and regular mail and the tracking to confirm the March 17, 2021 Amended Notice to Cure was served upon the Schwartzes at their building address as they were not represented by counsel at that time. Da642-666. Further, the Schwartzes received this notice via email and filed a response with the Court on March 18, 2021. Da651.

Thus, it cannot be disputed that the Schwartzes were properly served with both Notices to Cure.

(2) The Notices to Cure Do Not Need to be Signed or Served by the Board Secretary.

The Schwartzes argue the Notices to cure were procedurally defective because they were not issued by Howard Pearl (the board secretary) personally. Article IV, Section 4 of the by-laws requires the Secretary to "attend to giving and serving of all notices…" Pa628. Based on the plain language, there is no requirement that the secretary must sign or personally send the notices but rather that he must "attend to" same.

Mr. Pearl "attended to" giving Notices by delegating this responsibility to other corporate agents, such as corporate counsel and professional management. Da629. In fact, the testimony of Mr. Ng and Mr. Pearl confirmed that the Board granted Mr. Earle this

authority. Da619-625, Da629-621, Da670. This is especially apropos when the shareholder receiving the notice is in active litigation with the Co-op. Courts have long upheld that boards of directors can delegate their authority to others. See, e.g., Hoyt v. Thompson,19 N.Y. 207, 216 (N.Y. 1859) ("The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform."); Burden v. Burden, 40 N.Y.S. 499, 505 (App. Div. 1896) ("I am of opinion that the board does not act outside of the scope of its authority when it delegates to its agents power to perform any act which the board itself can legally perform."). This is further bolstered by the definition of "corporate agent" set forth at N.J.S.A. 14A:3-5.

(3) The Governing Documents Do Not Require Two Acts of identical conduct to be repeated after written notice.

Paragraph 31 (f) of the Lease prohibits "objectionable conduct." Pa219. Specifically, Paragraph 31(f) states:

> (f) If at any time the Lessor determines, **upon the affirmative vote of two-thirds of its then Board of Directors at a meeting duly called for that purpose**, that because of objectionable conduct on the part of the Lessee or of a person dwelling or visiting in the apartment, **repeated after written notice from the Lessor**, the tenancy of the Lessee is undesirable (it being understood, without limiting the generality of the foregoing, that to repeatedly violate or disregard the House Rules attached hereto or hereafter in accordance with the provisions of this, or to permit or tolerate a person of dissolute, loose, or immoral character to enter or remain in the Building or the apartment, shall be deemed to be objectionable conduct)…[emphasis added].

Thus, the elements required to terminate a stock and lease for objectionable conduct are as follows: (1) the Shareholder engages in conduct the Board deems objectionable; (2) the Shareholder is sent a Notice advising them that the conduct is objectionable and

requiring them to cure same; (3) the Shareholder continues to engage in objectionable conduct after receipt of a Notice to Cure; and, (4) there is an affirmative 2/3rds vote of the Board in favor of terminating the stock and lease at a meeting of the Board of Directors called for said purpose.

The Plaintiffs' attempt to rely upon Article XIV, Section 14 of the House Rules for the proposition that they must receive two notices to cure for the same exact identical conduct before being terminated. To the contrary, this Rule merely states that after two notices to cure an "objectionable condition," the shareholder may be charged administrative costs. It explicitly states that this is "without limitation" to other remedies and has been superseded by subsequent resolution. Da636.

The Schwartzes argue that unless they repeated the exact same instances of objectionable conduct, then their stock and lease cannot be terminated. This is simply incorrect as the March 12, 2020, Notice to Cure explicitly states, "Your clients can cure their objectionable conduct if they cease and desist engaging in verbal and physical alterations with the residents and staff of the complex. If they have complaints about the conduct of other residents or staff, they should submit same in writing to security who will address same in an appropriate fashion." Pa598.

The March 17, 2021 Notice specifically states its intention to **"place you on notice of <u>additional instances of objectionable conduct that have occurred since</u> <u>our March [12] Notice to Cure"</u>, "as noted you have continued your abusive conduct towards the Co-op's staff, notwithstanding our March [12] Notice to Cure",** and "as we detailed in our March 12, 2020 Notice to Cure, the Co-op deems your verbal abuse towards staff to be objectionable conduct…[y]ou have failed to cure your objectionable conduct. Accordingly, we demand you cease and desist from engaging in further such objectionable conduct, and the Co-op reserves the right to terminate your stock and lease and seek your ejectment based on the incidents that have been heretofore described." It clearly

incorporated the March 2020 Notice to Cure by numerous references and by explicitly stating these were additional acts of objectionable conduct. Pa338.

Further, Paragraph 12 of the March 2021 Notice and incident reports attached to the Notice refer explicitly to Plaintiffs' objectionable conduct towards staff. Pa338. It should be noted that if the Schwartzes' argument was accepted and carried to its logical conclusion it would lead to unacceptable and dangerous results. For example, if a shareholder was warned that throwing watermelons of the terrace was objectionable conduct, they could not have his or her stock and lease terminated for subsequently throwing cantaloupes off the terrace. This result would make no sense, as the objectionable conduct rests in throwing things off the terrace, not the exact nature of the thing thrown. As to the Schwartzes, the record makes clear that the objectionable conduct was in fighting with, cursing at, and abusing other residents and staff, not the particular identities of who they were fighting with, or the precise nature of the disputes.

Most importantly, as has been conceded to by all parties, the determination as to what is or is not objectionable conduct and whether same is repeated is a matter for the business judgment of the Board. In this case, the Board determined that the Schwartzes have continued to engage in objectionable conduct when sending the March 2021 Notice to Cure and all the subsequent notices.

(4) **The Board meeting where action was taken to terminate Plaintiffs' Lease was proper**.

The meeting was properly noticed to all shareholders on 7 days' notice and held on July 1, 2021, via zoom where at least two thirds of the board of directors voted to terminate the Schwartzes stock and lease based upon their repeated acts of objectionable conduct and their refusal to provide access. In particular, the notice was emailed to all shareholders and posted throughout the buildings with

> the agenda, as required by N.J.A.C. 5:26-8.12 (c) for a properly authorized board action. Pa529-538, 712, 1214-1215.

The Schwartzes' reliance on 13315 Owners Corp. v. Kennedy, 4 Misc. 3d 931, 947 (N.Y. Civ. Ct. 2004) in support of its position that the Co-op did not properly adhere to procedural requirements is misplaced. In Kennedy, the Court held "[i]n light of **the incorrect notice** for the February 10 meeting **and the board's improper election**, the court finds that respondent has proven that petitioner acted outside the scope of its authority." 13315 Owners Corp. v. Kennedy, 4 Misc. 3d 931, 948 (N.Y. Civ. Ct. 2004).

In that case, the New York landlord-tenant court determined that the cooperative's decision to terminate the shareholder's stock and lease was not subject to business judgment rule deference due to three procedural defects: (1) the directors had not been properly elected; (2) the meeting was procedurally irregular because the notice of meeting listed the wrong corporate entity and it was unclear if it was authorized by the proper corporate officer or board; and, (3) the shareholder did not receive due process as he and his attorney were told to "shut-up" at the board meeting where action was taken.

The court was significantly concerned that 13315 Owners Corp. did not have a duly elected Board of Directors. The meeting minutes of 13315 Owners Corp show that no annual meeting occurred in accordance with its bylaws. Thus, there was not a duly elected Board in existence to carry out Co-op business,

which is starkly different from the instant matter. The Court further explained, a situation where a board can evict shareholder-tenants who never had a chance to vote for its members is precisely the kind of situation the Court wished to avoid in requiring that the board unfailingly follow procedure. Id. 948.

In Kennedy, further compounding the procedural confusion, in addition to not having a duly elected Board, it is also not clear who noticed the Board meeting that occurred to vote on the objectionable conduct because the notice of meeting was posted on the letterhead of an entity that was not the Co-op and was signed by an entity that did not match the Co-op. Id. at 945. The meeting was only attended by "three board members, some shareholders, an employee of the management company, an attorney, and the defendant and his attorney." Id. at 935. At the conclusion of the meeting, the Board members that had not been elected voted to terminate the lease and not the shareholders as required by 13315 Owners Corp.'s governing documents. Id. at 935. The procedural shortcomings are starkly different and more significant than the purported procedural shortcomings in this case.

D. The Schwartzes Received Due Process

The Schwartzes argue throughout their brief that were "denied the opportunity to attend the meeting" where the Board voted to terminate their stock and lease and also that they were denied due process. To the contrary,

despite this assertion, the Schwartzes had over three (3) years of due process during this protracted litigation with the Co-op, attended Alternative Dispute Resolution ("ADR") with the Co-op, and have had numerous meetings with the current Board of Directors in furtherance of their rights.

First, the Schwartzes allege they were deprived the right to appear at the July 1, 2021 Board Meeting because they were traveling at this time. This argument completely ignores that the Notice of Meeting was sent to them via electronic mail and the meeting was held via zoom, thus, they could have appeared. Pa704. Further, the Schwartzes attendance at the July 1, 2021 Board Meeting would not have meaningfully provided another layer of due process beyond that provided by ADR and the litigation.

Second, and more importantly, the Schwartzes received due process regarding the termination of their stock and lease in court as it was litigated in July and August of 2021. Following the Schwartzes' receipt of the July 2, 2021, Notice of Termination and Resolution, on July 9, 2021, the Schwartzes filed an Order to Show Cause. Da682. In their Order to Show Cause, the Schwartzes specifically alleged:

1. The Notice of Meeting was not proper because it was not served on the Schwartzes and did not provide enough notice;
2. The Meeting was not proper because the Shwartzes were away;
3. The Notice of Termination was not proper;
4. The vote was not proper because there was no finding of objectionable conduct by the board;

5. The termination was retaliatory;
6. The termination was not in accordance with the governing documents; and
7. The Schwartzes were entitled to due process and alternative dispute resolution.

Following its filing, on July 15, 2021, Judge Thurber entered an Order to Show Cause setting a return date. Da707-714. Following briefs and the Order to Show Cause hearing, Judge Thurber denied the Schwartzes' Order to Show Cause, thereby rejecting the aforementioned arguments, and Ordered that the parties submit "their disputes concerning termination of plaintiff's interest in defendant to mediation with court appointed mediator, Douglas Brierly." Da712.

Based on the foregoing, the Schwartzes already raised the totality of these arguments even prior to summary judgment and the trial court already considered these same arguments thereby giving them due process. It is the law of this case that the Schwartzes were given due process as to these arguments as they were ultimately Court Ordered to be raised at mediation. The parties did attend this mediation with no resolution or recission of the Schwartzes notice of termination. Thus, any allegation that the Schwartzes were not given due process regarding the termination of their stock and lease is patently false.

The Schwartzes have had "due process" above and beyond what they claim they were not afforded at a hearing before the Board of directors by way of the Order to Show Cause, the ADR, and this litigation. It is unclear what

further due process the Co-op could offer the Schwartzes or even what further due process the Schwartzes believe they are entitled to under the law.

1. Kennedy does not stand for the proposition that the Schwartzes were required to be present at the Board meeting terminating their stock and lease.

The Schwartzes argue that because they were not present at the July 1 meeting of the Board that they have been deprived of due process, and therefore the termination was improper. In order to make this argument, the Schwartzes seemingly again place reliance on Kennedy.

While Kennedy seemed to look favorably upon allowing the Shareholder to be heard by the Board before voting, the case did not contemplate whether such a proceeding could be conducted or could be meaningful when there was ongoing litigation between the parties. Furthermore, and as will be discussed at length, *infra,* the New York cases on this subject are distinguishable for two reasons: (1) New York does not have a statutory alternative dispute resolution requirement like New Jersey which provides for due process above and beyond that which may be provided at a board meeting; and, (2) New York Article 78 and Holdover proceedings (which are where opposition to co-op ejectments are heard) are summary proceedings that limit discovery and do not afford parties the full array of litigation procedures.

As an initial proposition, there is no requirement in the Lease or New Jersey law that a hearing before the board is required when the board decides to terminate a shareholder's stock and lease. Instead, New Jersey law sets forth an obligation that does not exist in New York, namely the obligation to afford a shareholder alternative dispute resolution ("ADR"). N.J.S.A. 45:22A-44 (c) of the Planned Real Estate Development Full Disclosure Act provides that, "The association shall provide a fair efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation." See Bell Tower Condo. Ass'n v. Haffert, 423 N.J. Super. 507,518 (App. Div. 2012).

In the present case, the Co-op has complied with this mandate by adopting an ADR policy. Da715, Da707-714. Every notice to cure sent to Plaintiffs included an offer to participate in ADR. Indeed, even after the notice to terminate was sent the Co-op again offered to participate in ADR on July 7, 2021. Da752-773. The record reflects that the Plaintiffs did not seek to avail themselves of the ADR program until after the Notice to Terminate was served. Ultimately, the parties did mediate their disputes with a court appointed mediator and did not reach a resolution. Da719-778.

Importantly, as Judge O'Dwyer astutely observed, the instant matter cannot be akin to Kennedy as the parties in this case have engaged in "protracted

litigation resulting in court appearances [on] virtually every motion…" 2T, 16:12-16. In Kennedy, as in all New York cases, New York procedural law on ejectment actions is starkly distinguishable from this case. In New York, co-op terminations and ejectments are filed as either Article 78 proceedings or a summary dispossess holdover proceedings, both of which are summary proceedings of limited scope and discovery. New Jersey has explicitly rejected this approach. See Plaza Rd. Co-op., Inc. v. Finn, 201 N.J. Super. 174, 179 (App. Div. 1985) (holding that "[t]he relationship is not one of landlord-tenant, and the court has no jurisdiction to hear plaintiff's summary dispossess action," and that there was a "need for a forum with more comprehensive jurisdiction to deal with the complex relationship between the parties.").

In contrast to a New York summary proceeding, the instant matter had been pending in the Superior Court for over three (3) years with practically limitless discovery including thousands of pages of documents exchanged and unlimited depositions, of which the Schwartzes took three (3) board members, three (3) current employees, two (2) former employees, and two (2) other shareholders. It is simply not comparable to a summary proceeding like what occurred in Kennedy.

E. The Trial Court properly did not exercise jurisdiction over the R. 4:50 Motion filed by the Schwartzes

Pursuant to R. 4:50, the court may relieve a party from a final judgment. The Plaintiffs cite R. 4:50-1(f) as the catch-all provision to seek relief from the order granting Summary Judgment. Plaintiffs assert that their R. 4:50-1(f) motion must be heard because when their motion for reconsideration was filed it did not contain a certification from Plaintiffs regarding disputed facts.

The Schwartzes are attempting to use the R. 4:50 motion to completely re-litigate the summary judgment motion, which is improper. Relief under R. 4:50-1(f) "is limited to 'situations in which, were it not applied, a grave injustice would occur."' Guillaume, 209 N.J. at 484, 38 A.3d at 590. Courts are cautioned to use R. 4:50-1(f) "sparingly" because relief under it "is available only when 'truly exceptional circumstances are present."' Little, 135 N.J. at 289.To secure relief under this heightened standard, a movant "must show that enforcement of the judgment would be unjust, oppressive or inequitable." Linek v. Korbell, 333 N.J. Super. 464, 474, (App. Div.), certif. denied, 165 N.J. 676 (2000).

Here, Plaintiffs R. 4:50 motion essentially amounts to the Schwartzes seeking a "do over" of (1) the summary judgment motions and their motion for reconsideration. Their failure to allegedly properly provide a certification during the prior motion practices does not constitute exceptional circumstances.

The trial court properly did not exercise jurisdiction over the motion. The Schwartzes filed their motion to vacate on December 27, 2023, after they had

already filed the instant appeal on November 14, 2023. The Schwartzes argue, without citation to any case law, that the trial court should have heard their R. 4:50 motion. The ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule. Rolnick v. Rolnick, 262 N.J. Super. 343, 365–66, (App.Div.1993).

R. 2:9-1(a) provides that "supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed," except as otherwise provided by: (1) R. 2:9-3 (stay pending review in criminal actions); (2) R. 2:9-4 (bail); (3) R. 2:.9-5 (stay pending appeal); (4) R .2:9-7 (temporary relief in administrative proceedings); (5) R .2:9-13 (pretrial detention appeals); and (6) R. 3:21-10(d) (reduction or change in sentence). See Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:9-1(a) (2022) ("Except 18 to the extent of enforcement or correction and except as otherwise expressly provided for by rule, the ordinary effect of the filing of the notice of appeal is to deprive the court below of jurisdiction to act further in the matter under appeal unless directed to do so by the appellate court").

Once a notice of appeal has been filed, a trial court does not have jurisdiction to rule on a motion for a new trial, Dinter v. Sears, Roebuck & Co.,

278 N.J. Super. 521, 527 (App. Div. 1995), motion for reconsideration, Kiernan v. Kiernan, 355 N.J. Super. 89, 94 (App. Div. 2002), or dismissal, State v. Kosch, 458 N.J. Super. 344, 349 (App. Div. 2019). In Kiernan, the court held that "[a] litigant cannot effectively open up the entire . . . proceedings or revise the judgment while an appeal is pending **without** having sought from the appellate court a **remand** with direction to the trial court to allow, if necessary, any changed determination to be incorporated in the pending appeal." Id.

Plaintiffs' motion does not meet any of the exceptions to the trial court retaining jurisdiction. Based on the foregoing, the trial court did not abuse its discretion in denying the Schwartzes R. 4:50 motion for lack of jurisdiction.

II. THE TRIAL COURT PROPERLY AWARDED $301,859.03 IN ATTORNEYS FEES TO THE CO-OP

A. Standard of Review

The decision of the trial court to award and the amount of legal fees awarded is a matter that is a discretionary ruling by the trial court. A reviewing court will disturb a trial court's award of counsel fees "only on the rarest of occasions, and then only because of a clear abuse of discretion." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009).

Trial judges are afforded wide discretion in deciding fee awards. Appellate courts review those decisions only for an abuse of discretion. "A court abuses its discretion when its 'decision is made without a rational explanation,

inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011).

In the instant matter, the trial court was in a uniquely appropriate position to decide the fee application in this matter as the trial court experienced the tormented procedural history and contemptuous behavior of the Plaintiffs that resulted in significant legal time and expenses.

B. The Trial Court Did Not Abuse Its Discretion In Awarding the Co-op with Attorneys' Fees and Damages

The Co-op filed a Motion seeking the totality of its costs and reasonable attorneys' fees incurred in the over three (3) years of litigating this case. Paragraph 28 of the Lease provides in pertinent part: in pertinent part:

> If the Lessee is at any time in default hereunder and the Lessor incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending or asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including

> reasonable attorneys' fees and disbursements shall be paid by the Lessee to the Lessor, on demand, as additional rent.

Based upon the plain language of the Lease, if the Co-op incurs any expense, including reasonable legal fees, in (1) curing a shareholder's default through legal action or (2) defending or asserting a counterclaim in any action or proceeding brought be the Lessee the Co-op is entitled to reimbursement.

In the instant matter, the Co-op incurred reasonable legal fees and costs in asserting a counterclaim against the Schwartzes after they filed this action seeking to cure the Schwartzes' default of the Lease for both their failure to provide access to their apartment in violation of Paragraph 25 and to cure their years of objectionable conduct in violation of Paragraph 31.

In granting the Co-op's motion for Summary Judgment, the trial court found that their conduct constituted a default under the Lease. Thereafter, the trial court appropriately evaluated the Co-op's motion for fees and properly awarded fees pursuant to the clear and unambiguous language of the Lease. Indeed, the Court issued a 28-page opinion evaluating each R.P.C. 1.5 Factor and addressed every single objection submitted by the Defendant. See Pa 4-32.

The starting point for determining an award of attorneys' fees in any matter is calculating the 'lodestar', which is that number of hours reasonably expended by a party's counsel in the litigation multiplied by a reasonable hourly rate. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004). Computing the

lodestar requires "that the trial court determine the reasonableness of the hourly rate '…in comparison to rates for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community."' Rendine v. Pantzer, 141 N.J. 292, 337 (1995)).

The party requesting fees bears the burden of proving that the request is reasonable," Rendine v. Pantzer, 114 N.J. at 335. Further, the Court must consider the degree of success in determining the reasonableness of the time expended. Litton Industries, Inc., 200 N.J. at 387. In addition, a lawyer must comply with all of the requirements of R.P.C. 1.5 (a)(1) through (8).

Notably, each of the R.P.C. 1.5(a)(1) factors were fully detailed in the Certification of Cara Landolfi, Esq., submitted in support of the Motion and evaluated at length by the trial court in its opinion. See Pa 4-32. As detailed in the Certification of Cara Landolfi, Esq., submitted in support of the motion, the Co-op sought reimbursement for a total 1,357.30 hours spent over the course of three (3) years of this litigation in addition to reasonable costs. The hours spent by the firm are based upon contemporaneous time records, the date the work was performed, the amount of time spent on each task, and a detailed description of each task performed. This presentation of billable hours is "set forth in sufficient detail" to allow this court to ascertain the reasonableness of the time spent. See Rendine v. Pantzer, supra, 141 N.J. at 337. Further, as the trial court

acknowledged in its opinion, this case was aggressively litigated by multiple parties over the course of years including almost twenty (20) depositions, voluminous paper discovery, and extensive motion practice.

As to the sufficiency of the records submitted, the Third Circuit reaffirmed that "computer-generated summaries of time spent by each attorney," similar to the time records presented here, meet the standards for specificity necessary to allow the trial court to determine if the hours claimed are unreasonable for the work performed. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1037-38 (3rd Cir. 1996). A review of these time records reveals the Co-op is only seeking reimbursement for hours reasonably expended, that is, "those that competent counsel reasonably would have expended to achieve a comparable result." Rendine v. Pantzer, supra, 141 N.J. at 355.

The Supreme Court has cautioned that as long as the trial court is satisfied that "the assigned hourly rates are fair, realistic, and accurate," the "determination need not be unnecessarily complex or protracted." Id. at 344 (expressing court's "desire to avoid ancillary litigation over counsel-fee awards"). In Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001), aff'd as modified on other grounds, 177 N.J. 413 (2003), for example, the Defendants challenged the hourly rates for both of the partners who "double teamed" at the

trial, similar to Mr. Earle and Ms. Landolfi in this matter. The Appellate Division, however, brusquely dismissed this concern.

As the trial court noted, this matter was extremely contentious and unique with motions on nearly every cycle largely due to the Schwartzes' conduct. It is respectfully submitted that the Schwartzes are asking the appellate division to second guess the sound discretion of the trial court and conduct an analysis that is over complicated and explicitly what the Rendine Court cautions should be avoided. Accordingly, the trial court's award of fees should be undisturbed.

1. The Amount of the Award was Caused by the Schwartzes' Conduct in this Litigation As the Trial Court was Uniquely Positioned to Find

Importantly, as the trial court acknowledged in granting the fee award to the Co-op, the litigation before the trial court was a unique and contentious litigation that spanned over three (3) years resulting in significant legal fees and expenses. The Schwartzes insisted in litigating every in a way that resulted in significant expense to all parties as every single issue that arose resulted in motion practice. Despite the assertions in their brief, as the trial court acknowledged and was intimately aware, it was not the Co-op's litigation decisions and tactics that drove the legal fees and costs in this case.

As reflected by the docket, the matter was extremely litigious with significant amounts of motion practice and other disputes that were largely

caused by the Schwartzes. It must be noted that of the 229 Motions filed in this matter, the Co-op only filed 13 motions relating to the Schwartzes failure to provide discovery and appear at depositions, a motion to amend, three (3) motions relating to access issues, and a motion for summary judgment, all of which were necessitated by the Schwartzes' conduct. See Pa22. In addition, the Schwartzes also sought voluminous discovery from the Co-op. The Schwarzes propounded significant amounts of discovery on the Co-op requiring the Co-op to respond to over fifty (50) interrogatories and produce over 3,000 pages of documents in addition to thousands of pages of emails. Further, due to their egregious behavior and dilatory conduct, the Schwartzes were collectively deposed over 10 days with several rounds of motion practice required to compel their depositions by numerous parties involved. Similarly, the Schwartzes took the deposition of eight (8) witnesses from the Co-op spanning approximately ten (10) days including three (3) days of Corporate designee depositions. Therefore, the significant legal fees and expenses incurred by the Co-op in this matter were largely caused by the Schwartzes' own behavior and litigation choices they made.

Since the decision to award fees and the amount rests within the sound discretion of the trial court the appellate division should not disturb the trial court's findings absent a clear abuse of discretion. See Litton supra at, 386

(2009). All of the arguments raised by the Plaintiffs as a basis to overturn the trial court's decision were already rejected by the trial court and addressed in the January 3, 2024 opinion. In their brief, the Plaintiffs fail to assert any basis or behavior by the trial court that would rise to the level of a clear abuse of discretion. Based upon this failure alone, the award must be upheld.

2. New Jersey Public Policy Does Not Prohibit Fee Shifting in this Instance

Plaintiffs argue that because the fee shifting provision in the Lease between the Co-op and the Plaintiffs is unilateral it should not be enforced. Plaintiffs do not cite any New Jersey law in support of their position, and instead urge this court to overturn the New Jersey Supreme Court and create new public policy based on statutes enacted by other states and the fee shifting provisions contained in residential leases. The totality of the Plaintiffs' argument was properly denied by the trial court as it is without merit.

While New Jersey is governed by the "American Rule" which generally disallows fee shifting, R. 4:42-9 and case law have created several exceptions to same. One exception is rooted in contract law. The New Jersey Supreme Court has held that, "Our law recognizes that a party may agree by contract to pay attorneys' fees, but our courts strictly construe such provisions in light of the general policy disfavoring the award of such fees. Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 260–61 (2023).

With regard to Plaintiffs' arguments based on the law of other states, if the New Jersey legislature wanted to outlaw unilateral fee shifting contracts it could do so by passing a law. The legislature has not done so, and this is telling with regard to the actual state of New Jersey public policy. In addition, Plaintiffs misstate the meaning of N.J.S.A. 2A:18-61.66. This statute does not "outlaw" unilateral fee shifting in a residential lease. Instead, if there is a unilateral fee shifting provision, it converts the same into a prevailing party fee shifting arrangement.

In any event, as established in Plaza Rd. Co-op., Inc. v. Finn, 201 N.J. Super. 174 (App. Div. 1985), the relationship between a cooperative and its shareholders is not one of landlord-tenant. Instead, "The rights and obligations of the parties are limited only by their ingenuity in defining their relationship." Id. "[T]he relationship between a cooperative and its shareholders should be determined by its Certificate, by-laws, and Lease and that the documents must be read together. These documents give reasonable notice to the shareholder of his or her obligations and responsibility as a cooperative shareholder." Sulcov v. 2100 Linwood Owners, Inc., 303 N.J. Super. 13, 30 (App. Div. 1997).

Importantly, as detailed above, by appropriately looking to New York law for persuasive authority, New York case law is replete with fee awards to Cooperatives for enforcing the provisions of its Lease. By way of example, in

1050 Tenants Corp v. Lapidus, 2006 N.Y. Slip Op. 51593 (N.Y. Sup. Ct. 2006), the Court awarded the 1050 Tenants Corp. $125,000, which was subsequently reduced to $75,000 in legal fees in relation to an ejectment action. The 1050 Tenants Corp Court further held that the fees awarded were so high **due to the conduct of the shareholder**, because he acted with such "obduracy" in that "[e]very conceivable motion was made to delay or derail the underlying proceeding…"

This holding is analogous to the instant matter where it is the Schwartzes' own behavior in this litigation that has driven the cost of the fees, as detailed above and as recognized by the trial court in granting the fee award. Specifically, the trial court acknowledged the "Schwartzes, as is their right, chose to vigorously litigate the diverse aspects of the case." Pa8. The trial court held that the discovery in this matter was "extensive, protracted and highly acrimonious." Pa8. The trial court explicitly explained the matter was "extremely litigious with significant amounts of motion practice and other disputes" whereas the Co-op only filed 13 out of the 239 motions the matters were so inextricably linked that the Co-op was obligated to extensively participate. Pa 22. The trial court was "confronted each motion cycle with multiple motions. The Schwartzes affirmatively chose, as is their right, to challenge each step of the discovery process." Pa 22. For instance, the behavior of the Schwartzes in litigating this

case was so acrimonious and dilatory that ultimately the scheduling and taking of depositions "resulted in the Court ordering they occur at the courthouse. Having done so, the Court was confronted with continuous objections and outbursts. This necessitated having a sheriff's officer physically present in the courtroom during the depositions." Pa 22.

The Plaintiffs further argue that the unilateral fee shifting is unfair because "this particular provision had the effect of encouraging 1266 to assert (and to litigate relentlessly) retaliatory counterclaims that are wholly unrelated to the Schwartzes' original tort claim." However, as detailed above, it was the Plaintiffs conduct in repeatedly violating the Lease (as detailed above), refusing to cure their behavior, and their litigation choices that ultimately drove the litigation expenses.

Even after being provided with multiple written notices to cure re (each of which recited the fee shifting), the Plaintiffs chose to continue to breach the Lease and disrupt the lives of their neighbors and staff and refused to comply with even basic obligations such as providing access for repairs to be performed. The true injustice would be if the Co-op's shareholders (i.e. the Schwartzes' neighbors), had to "foot the bill" for the Plaintiffs' intentional and inexcusable misconduct. Accordingly, there is no basis for the appellate division to create new public policy and deny the Co-op's settled legal right to fee shifting.

3. The Co-op was entitled to recover attorneys' fees on its counterclaims

Plaintiffs argue that because the ejectment counterclaims are allegedly unrelated to their claims, then fee shifting should be disallowed. This argument makes no sense. The Lease states:

> If the Lessee is at any time in default hereunder and the Lessor incurs any expense (whether paid or not) in performing acts which the Lessee is required to perform, **or in instituting any action or proceeding based on such default**, or defending **or asserting a counterclaim in any action or proceeding brought by the Lessee**, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements shall be paid by the Lessee to the Lessor, on demand, as additional rent.

Accordingly, under the plain language of the Lease, the Co-op can recover its legal fees regardless of whether they were brought in a separate lawsuit or not. Furthermore, if Plaintiffs' theory was correct, then the Co-op would be precluded from bringing an action where it could receive its contractually entitled legal fees by operation of R. 4:7-1 and R. 4:30A (i.e. the entire controversy doctrine). The Plaintiffs chose to assert a claim for damage to the apartment, which is directly related to the access issue that formed part of the basis for the ejectment, thus the instant matter is related directly.

4. The trial court did not abuse its discretion as it addressed each of the issues raised by Plaintiffs at length in its opinion

The trial court addressed the totality of the claims raised by the Plaintiffs' in their brief at length in its opinion. The Co-op provides the following

responses to the Schwartzes' allegations relating to the billing records that were already addressed by the trial court:

a. **The billing records submitted are specific as to the amount of time billed and the task performed.**

It is within the sound discretion of the trial court to determine if billing charges by attorneys are vague or improper, which the trial court did in this case. See Rendine, 141 N.J. at 337. Indeed, billing entries should show the task and how the hours were divided. The New Jersey Supreme Court in Rendine, supra at 337, held that it was "not necessary to note the exact number of minutes spent nor the precise activity to which each hour was devoted ...". As to the specificity of the entries, the Third Circuit has affirmed that "computer generated summaries of time spent by each attorney," similar to the time records presented here, meet the standards for specificity necessary to allow the trial court to determine if the hours claimed are unreasonable for the work performed. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1037-38 (3rd Cir. 1996) (citations omitted); See also Rode v. Dellarciprete, 892 F.2d 1177, 1190-91 (3rd Cir. 1990).

A review of these time records reveals the Co-op is only seeking reimbursement for hours reasonably expended, that is, "those that competent counsel reasonably would have expended to achieve a comparable result." Rendine v. Pantzer, supra, 141 N.J. at 355. In fact, the U.S. Supreme Court in

Hensley v. Eckenhart, 461 US. 424, 437 n. 12 (1983) held that counsel is "not required to record in great detail how each minute was expended." In Rode v. Dellarciprete, 892 F.2d 1177 (3d. Cir. 1990), the Third Circuit addressed the proper degree of specificity and held "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." Id. (internal citation omitted).

The trial evaluated the purportedly vague records and found that the majority of the entries complied with the Co-op's obligation to provide specific enough context to confirm the billing was reasonable. The trial court painstakingly evaluated this assertion and in fact deducted $1,969.50 from the total amount sought by the Co-op and specifically indicated what entries were removed. See Pa 29-30. Thus, the trial court did not abuse its discretion, and the opinion indicates the trial court evaluated the Co-op's bills in their entirety.

b. The Schwartzes allege that they must "guess" whether the entries are related to the ejectment action.

First and foremost, there is no obligation that the time entries sought by the Co-op be solely related to the Co-op's ejectment action, as the trial court held, based on the clear language of the lease the entries do not need to be solely related to the ejectment action to be valid. See Pa 24. Under the plain language of the lease, the Co-op is entitled to reimbursement of its fees in defending or asserting a counterclaim in any action or proceeding brought by the Lessee.

Thus, the argument that the Schwartzes cannot tell if the entry is related to the ejectment action is irrelevant.

In any event, despite the language of the Lease, the Co-op is not seeking fees related to defending the Schwartzes' affirmative claims, which were defended by insurance defense counsel. Thus, there is no billing from this firm related to the defense of the Schwartzes' affirmative claim. There were several issues raised over the course of this litigation wherein the defense of the Schwartzes' claim against the Co-op and the prosecution of the counterclaim are inextricably tied, as acknowledged by the trial court. By way of example, the Co-op frequently filed motions, opposed motions, propounded discovery, and responded to discovery jointly with Mr. Rausch. The Courts have recognized that in litigation, claims are often legally interrelated such that fees should only be excluded if they were "distinct in all respects." See Rendine v. Pantzer, 141 N.J. 292 (1995). When handling the case, our firm needed to monitor and review all matters to ensure it did not impact the Co-op's case. An attorney cannot ignore all other aspects of a case and hope that it is irrelevant to their claims.

c. **The Schwartzes argue that the billing included entries that are not relevant to the case**.

Again, in the instant matter, the trial court addressed this allegation of the Schwartzes at length in its opinion finding that the totality of the fees are inextricably intermingled, related to the litigation, and therefore were note

excluded. See Pa 25-26. The Schwartzes assert that charges relating to pursuing repeated refusal of access to their apartment during the pendency of this litigation as well as attendance at depositions, review documents relating to the Kopelman and Schwartz dispute, which form the basis for at least one of the counts asserted by the Schwartzes against the Co-op, and communicating with Michael Raush, Esq. the Co-op's insurance defense counsel should be disallowed as "unrelated."

The Schwartzes' repeated refusals to provide access was one of the bases for which the Co-op sought and the Court granted the termination of their stock and lease. The fact that this is a part of the litigation is further illustrated by the fact that both the Schwartzes and the Co-op conducted discovery, asked deposition questions, and pursued these access issues as a part of this case.

Further, pursuant to R. 4:9-2 the facts relating to the continued access issues during the pendency of this litigation when failure to provide access was pled as a basis for termination of the Lease, is a part of this case as the pleadings can conform to the evidence. There is no obligation for the Co-op to amend its pleadings every time the Schwartzes continued to refuse to provide access or engaged in objectionable conduct.

Furthermore, every time the Schwartzes provided additional bases for termination of their stock and lease, the Co-op sent a Notice and made it clear

that same was included as another basis to terminate their stock and lease, which was the purpose of the counterclaim. As to the assertion that the Co-op is only entitled to seek fees related to their default, same is simply incorrect. Again, New Jersey Courts have repeatedly recognized that in litigation, claims are often legally interrelated such that fees should only be excluded if they were "distinct in all respects." See Rendine v. Pantzer, 141 N.J. 292 (1995).

d. The Schwartzes alleged that the Co-op block billed.

The Schwartzes allege that the Co-op improperly block billed and the trial court failed to sort out the billed tasks and determine the hours reasonably correlated to all the activities performed. This is undeniably inaccurate. Specifically, the trial court stated in its well-reasoned opinion that it "reviewed the entries identified by the Plaintiffs as block billing and determined that by looking at the entire block entry and comparing it to the listed activities in the bloc, these items were reasonable. See Pa 27. Thus, the trial court performed the exact analysis the Plaintiffs assert is required.

Block billing is acceptable in New Jersey. There is no decision that the Schwartzes can cite to prohibiting block billing. The Appellate Division in N.M. v. A.S. explicitly held that block billing is an acceptable practice and the appropriate approach when evaluating block billing is "to look at the entire block, compare the listed activities and the time spent, and determine whether

the hours reasonably correlate to all of the activities performed." N.M. v. A.S., No. A-5310-15T3, 2018 WL 1321106, (App. Div. Mar. 15, 2018). As detailed in its opinion, this is exactly what the trial court did. See pa 27.

e. The Schwartzes allege the Co-op billed for administrative time.

The Co-op did not bill for purely administrative time and the trial court appropriately evaluated this argument. Specifically, the trial court held that the Co-op illustrated that it did not bill for purely administrative tasks. Pa 27.

The argument the Schwartzes made that the Co-op billed for administrative tasks is nonsensical. The alleged administrative time was for work done by attorneys and therefore was billed to and paid by the client. For example, the Schwartzes demanded discovery of Matthew Earle, Esq.'s emails during the course of the litigation. Mr. Earle was forced to go through the totality of his emails, review them for privilege, and forward them to be produced. The Schwartzes are objecting to this time as "administrative" however the need for Mr. Earle to do this was precipitated by their request for the documents. Likewise, reviewing and bates stamping discovery is not administrative in nature since based on the Schwartzes' voluminous demands the Co-op was forced to review thousands of pages of discovery and produce it.

Simply because the Schwartzes consider a task to be "administrative" such as calling the Court or providing links for production of the voluminous

discovery that they sought does not make it so nor does it obligate the firm to delegate same to non-attorney staff. In the instant matter, Cara Landolfi, Esq., handled the review and production of discovery based on the large volume, the need to collect the discovery from numerous sources, and review it for privilege.

As reflected herein, the trial court addressed the totality of the arguments raised herein at length prior to issuing its opinion. See Pa 23-32. Since the trial court deliberately and painstakingly evaluated all of the purported deficiencies raised on appeal and the Schwartzes failed to point to any ways the trial court committed a clear abuse of discretion, the award of fees should not be disturbed.

CONCLUSION

As detailed herein, the Co-op respectfully requests that this Court affirm the trial court's grant of summary and its grant of attorneys' fees in their entirety. Further, the Co-Op reserves the right to seek the additional fees and costs incurred in defending this appeal as authorized by the Lease pursuant to R. 2:11-4.

Dated: July 28 2025

Respectfully submitted,

/s/ Cara Landolfi
Cara Landolfi

MELISSA SCHWARTZ & STEVEN SCHWARTZ, Plaintiffs/Appellants, v. MICHAEL KOPELMAN, ESQ., 1266 APARTMENT CORP., AND CAROL RACHESKY, A/K/A CAROL REINFELD, A/K/A CAROL WOLFE Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-00795-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY SAT BELOW: THE HONORABLE JOHN O'DWYER **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Thomas A. Gentile (01336-2005)
Attorney of Record

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
7 Giralda Farms
Madison, New Jersey 07940
Phone: (973) 735-5785
Fax: (973) 624-0808
e-mail: thomas.gentile@wilsonelser.com

Attorneys for Appellants
Melissa Schwartz & Steven Schwartz

Dated: August 11, 2025

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PRELIMINARY STATEMENT

In January of 2020, Steven and Melissa Schwartz (the "Schwartzes") filed a routine complaint in the Superior Court, Bergen County, arising from an altercation that took place in the lobby and in an elevator of the cooperative housing complex in which they have resided for three decades. In addition to suing the fellow resident who had instigated the altercation, the Schwartzes took the normal step of naming as a defendant the cooperative, 1266 Apartment Corporation ("1266"). One would expect that 1266 would have simply defended against the Schwartzes' claim that 1266 bore some liability for the altercation. Instead, 1266 brought against the Schwartzes a counterclaim seeking to eject the Schwartzes from their apartment.

Protracted and acrimonious litigation ensued. The trial court – unabashed in its (biased) view that the Schwartzes were the party to blame for the litigation's protracted nature – indulged 1266 further, allowing 1266 to litigate (extensively) gripes that 1266 had not even pled in its counterclaim (especially a manufactured claim that the Schwartzes denied 1266 "access" to the apartment to deal with leaks). In its zeal to eject the Schwartzes, 1266 conducted a sham meeting at which 1266 purported to terminate the Schwartzes' proprietary lease and to forfeit their shares in the cooperative. That ersatz meeting violated the Schwartzes' rights under their proprietary lease, because the meeting was not properly noticed, and because 1266 craftily scheduled the meeting for a time when 1266 knew that the Schwartzes would

be away on business (they were in Alaska). There are also deep disputes of fact as to whether 1266 ever investigated the allegations of "objectionable conduct" that formed the basis of 1266's termination decision. For these reasons, the trial court committed reversible error when it granted summary judgment in favor of 1266.

The trial court also committed reversible error when it awarded to 1266 an astonishing **$301,859.03** in attorneys' fees from the Schwartzes. Buried in the proprietary lease is a unilateral fee shifting provision, which purports to allow 1266 (but never its litigation adversary) to recover attorneys' fees. When the Schwartzes filed their complaint about the lobby/elevator altercation, 1266 (and its longstanding counsel) saw a risk-free chance to hit the jackpot with a retaliatory counterclaim. This Court should hold that enforcing this unilateral fee shifting provision, under the circumstances of this case, would violate New Jersey public policy. And wholly apart from such public policy issues, the $301,859.03 award is wildly excessive (especially to the extent that it allowed fees for issues not properly part of this case).

In its brief, Respondent resorts repeatedly to *ad hominem* attacks on the Schwartzes, assigning blame to the Schwartzes for the protracted nature of the litigation. (The Schwartzes, meanwhile, maintain that the litigation's acrimonious tone and lengthy proceedings were due to 1266's vendetta against the Schwartzes). The trial court itself was influenced in its decision making by its own (biased) view

that the Schwartzes were the ones to blame. On appeal, however, this Court must look past 1266's bitterness, and decide the issues presented based solely on the law.

LEGAL ARGUMENT ON REPLY

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO 1266 AND ORDERED THE SCHWARTZES TO BE EJECTED FROM THEIR APARTMENT.

(Pa1-3; 2T)

Respondent's brief fails to rebut Appellants' arguments that the trial court committed reversible error when it granted 1266's motion for summary judgment and ordered (*inter alia*) that the Schwartzes be ejected from their apartment. This Court therefore should vacate (in its entirety) the trial court's order of August 23, 2023; and remand this case to the trial court for a full trial.

A. Under New Jersey Law and Public Policy, as Informed by New York's *Pullman* Standard, Courts Afford Deference Under the Business Judgment Rule Only in Limited Circumstances. (Pa1-3; 2T at 15-21).

Respondent's brief mischaracterizes the rubric of the business judgment rule that is applicable to this appeal. First, since there is a paucity of New Jersey case law analyzing objectionable conduct claims in the context of a cooperative apartment association, it does make sense that a New Jersey court presented with such a case would be informed by the law of New York (where such case law is more developed). Yet this does not mean that New York law governs: New Jersey law does. Although New York case law may (or may not) be persuasive as to the

issues that this appeal presents, only New Jersey law governs. And as to all of the sensitive issues that this appeal presents, this Court should make its decisions with an eye towards effectuating the public policy of the State of New Jersey.[1]

Second, the very New York case law that Respondent cites establishes that there are very real limits to the circumstances under which a court will defer to the (supposed) business judgment of a cooperative board, especially in termination cases.[2] In *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 155 (2003) (a case upon which Respondent relies), New York's Court of Appeals unequivocally pronounced

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[1] Respondent seems to argue that the mere fact that this dispute took place in New Jersey afforded the Schwartzes more due process than New York law requires. *See* Resp. Br. at 27-29. Respondent points to New Jersey's statutory obligation to provide alternative dispute resolution ("ADR"), but the idea that the availability of ADR could impact a party's substantive rights in litigation belies the most basic public policies underlying ADR. Respondent further argues that the fact that New York decides ejectment cases in summary proceedings (rather than in full-blown litigation) means that the Schwartzes had ample due process. *See id*. But the fact that parties (such as the Schwartzes here) assert their legal rights in litigation (which even Judge O'Dwyer twice conceded was "their right," Pa8, Pa22) cannot be held against them. Importantly, none of the numerous New Jersey cases that have looked to New York law concerning such ejectments has ever made either of these points.

[2] New York's Court of Appeals has cautioned that when dealing "with termination, courts must exercise a heightened vigilance in examining whether the board's action" merits deference under the business judgment rule. *Pullman*, 100 N.Y.2d at 158; *see also Horwitz v. 1025 Fifth Ave., Inc.*, 7 A.D.3d 461, 462 (1st Dep't. 2004). A "court cannot allow the business judgment rule to serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations." *Kennedy*, *infra* n.5, 4 Misc.3d at 944, quoting *Pullman*, 100 N.Y.2d at 157. This is especially true in this case, since 1266 is asking this Court to approve the eviction of a 76 year old man suffering from multiple sclerosis, and a 64 year old woman suffering from cancer (having resided in the unit for more than thirty years).

that the business judgment rule's deference will **not** attach when an "aggrieved shareholder-tenant" shows that "the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose **OR** (3) in bad faith." (Emphasis added). The crux of this appeal is thus whether 1266's actions in terminating the Schwartzes' shares and proprietary lease satisfy this test.[3]

B. The Summary Judgment Record Raises Numerous Disputed Questions of Fact as to Whether the Actions of 1266's Board Should Be Afforded Deference Under the Business Judgment Rule. (Pa1-3; 2T at 4-20).

Of paramount importance to this appeal is the procedural posture of the trial court's decision. Judge O'Dwyer ordered that the Schwartzes be ejected **on a motion for summary judgment**, thereby denying the Schwartzes the benefit of a trial. Of course, summary judgment is appropriate **only** if the record establishes there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Although Respondent eagerly points to statements in Judge O'Dwyer's opinion that "the facts themselves are not in dispute" and "there was not fraud, self-dealing or

[3] Although Respondent's brief attempts to cast *Pullman* as requiring near-automatic attachment of deference under the business judgment rule, *see* Resp. Br. at 12-13, Respondent nonetheless acknowledges (in one passing mention) that such deference applies **only** "absent proof of one of the exceptions to the business judgment rule." *Id*. at 13. Even *Haimovici v. Castle Village Owners Corp.*, No. 156094/2022, 2022 N.Y. Misc. LEXIS 5810, *4-*5 (Sup. Ct. N.Y. Cty. Aug. 23, 2022), an unreported case that Respondent cites as "in furtherance of *Pullman*" (*see id*.) notes that under *Pullman* a court must "get involved if the acts of the co-op were done in bad faith or did not comport with the proper procedures as set forth in the proprietary lease."

unconscionable acts," *see* Resp. Br. at 14-15, the record establishes that these statements are wholly conclusory. In reality, Judge O'Dwyer completely ignored that the Schwartzes, throughout the trial court proceedings, had vigorously contested **not only** 1266's twisted versions of the supposed incidents of "objectionable conduct," **but also** 1266's story concerning the facts underlying 1266's actions purporting to terminate of the Schwartzes' shares and proprietary lease.

Respondent spills much ink reciting various provisions of 1266's governing documents that supposedly form the basis of the board's actions against the Schwartzes; and Respondent recites at length 1266's side of the story as to the supposed incidents of "objectionable conduct." *See* Resp. Br. at 18-23.[4] Yet on the record of the motion for summary judgment, there exist (at the very least) disputed questions of fact as to whether 1266's board acted improperly (in bad faith or otherwise, under the guidance of *Pullman*) when acting to terminate the Schwartzes' shares and proprietary lease. Appellants' opening brief sets forth (at length) numerous and substantial questions of fact as to whether 1266's board ever even investigated the truthfulness of the allegations against the Schwartzes that formed the basis of the board's decision to terminate the Schwartzes' shares and proprietary

[4] All of pages 17 through 22 of Respondent's brief are single-spaced. This includes sizeable passages of legal argument (not just quotations of documents), in violation of Rule 2:6-10(a). Absent this extensive use of single-spacing, Respondent's brief would be significantly over the 50 page limit of Rule 2:6-7. These violations of Rule 2:6-10(a) and Rule 2:6-7 should result in Respondent's brief being stricken.

lease. *See* App. Br. at 17-18. There exist also numerous disputes of fact as to whether 1266 violated the proprietary lease's clear terms regarding the Schwartzes' right to cure, as specifically manifested in a right to be heard. *See id*. at 12-14. Most egregious of all, 1266's action against the Schwartzes took place at a sham of a board meeting that 1266 purposefully scheduled for a day when 1266 knew that the Schwartzes would be away (in fact, they were in Alaska). *See id*. at 15-16.[5]

In light of all of the foregoing disputes of fact, it was reversible error for the trial court to grant summary judgment to 1266, rather than to conduct a full trial.

C. The Trial Court Committed Reversible Error When It Invoked R. 2:9-1 to Refuse to Hear the Schwartzes' Motion Made Under R. 4:50. Pa33-34.

Respondent is wrong when it argues that the trial court properly refused to exercise jurisdiction over the motion that the Schwartzes had made under R. 4:50. *See* Resp. Br. at 29-32. At issue is the order by which Judge O'Dwyer declined to

[5] *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931 (N.Y. Civ. Ct. 2004) exemplifies a court refusing to defer to a cooperative board's termination of a proprietary lease due to the board's bad faith acts. In *Kennedy*, the court found that a cooperative's failure to properly notice the board meeting at which termination occurred constituted "bad faith" under *Pullman*, thereby warranting the court not giving deference under the business judgment rule. Respondent tries to distinguish *Kennedy*, noting that the court "was significantly concerned" that the cooperative's board had not been properly elected. *See* Resp. Br. at 23-24. But as *Kennedy* makes clear, under *Pullman* the board's improper election was an **independent** basis for not giving deference: "respondent raises two successful defenses to applying the business judgment rule, **although he needed to show but one**." *Id*. at 951 (emphasis added). This is consistent with the disjunctive nature of the *Pullman* test. Here, just as in *Kennedy*, the issues that the Schwartzes raise concerning 1266's bad faith conduct are certainly enough to overcome the business judgment rule's presumption.

hear that motion due to a supposed "lack of jurisdiction per R. 2:9-1." Pa33-34. In order to understand this issue, it is crucial to recognize that this case involves a unique (and exceedingly complex) procedural and appellate posture. This is **not** a typical case in which a notice of appeal was filed upon the issuance of an order that ended the case. Rather, as a result of certain orders of the trial court, the Appellate Division urgently conducted certain proceedings (including, *inter alia*, this Court's grant of the Schwartzes' motion for a stay of enforcement)[6] while proceedings in the trial court were ongoing. Indeed, in this unique situation, this Court itself held off on setting a briefing schedule on the appeal until **all** proceedings in the trial court had been completed. Thus when Judge O'Dwyer invoked R. 2:9-1 to refuse to hear the Schwartzes' R. 4:50 motion, the ordinary logic of "all proceedings are in the Appellate Division now" was wholly inapplicable to the situation at hand. For these reasons, the trial court committed reversible error when it invoked R. 2:9-1 to refuse to even hear the R. 4:50 motion.[7] This Court should reverse the trial court and order

[6] 1266's practice of piling on more and more allegations of "objectionable conduct" against the Schwartzes ceased abruptly when this Court entered its stay. This shows that the charges of "objectionable conduct" were never intended to address any such conduct but rather were just a weapon wielded to try to get the Schwartzes out.

[7] The unique and extremely complicated posture of this case also explains why the cases that Respondent cites, *see* Resp. Br. at 31-32, are inapposite. Neither *Dinter v. Sears, Roebuck & Co.*, 278 N.J. Super 521, 527 (App Div. 1995) (holding that R. 2:9-1 barred a motion for a new trial) nor *Kiernan v. Kiernan*, 355 N.J. Super. 89, 94 (App. Div. 2002) (holding that R. 2:9-1 barred a motion for reconsideration) involved the highly unusual circumstance of this case, in which proceedings had

a full trial, at which all disputed questions of fact (raised on both the summary judgment and R. 4:50 motions) will be decided by a trier of fact.

D. Reversal of the Trial Courts' Grant of Summary Judgment is Warranted Even Without Taking into Account the R. 4:50 Motion. (Pa1-3; 2T at 4-20).

Importantly, even if this Court were to decide that the trial court acted properly when it declined to exercise jurisdiction over the Schwartzes' R. 4:50 motion, that would **not** mean that the trial court's grant of summary judgment must be upheld. Respondent trumpets that certain facts raised on the Schwartzes' R. 4:50 motion were not part of the record on 1266's summary judgment motion. *See* Resp. Br. at 10. Yet even absent such facts from the R. 4:50 motion, there remain on the record of 1266's motion for summary judgment voluminous disputes of fact that warrant reversal of the trial court's grant of summary judgment in favor of 1266.

Specifically (and without limitation), the disputed facts as to the Schwartzes' having not received proper notice of the meeting at which their shares and proprietary lease were terminated (s*ee* App. Br. at Section I.B.1) and the disputed facts as to their having been denied attendance at that meeting (s*ee* App. Br. at

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already taken place in the Appellate Division while the case in the trial court was still far from its conclusion. Rather, both of the cases involved the typical pattern of a notice of appeal having been filed upon the case's conclusion, (long) after which a party (in those cases, improperly) sought to initiate further proceedings before the trial court. Meanwhile, *State v. Kosch*, 458 N.J. Super 344, 349 (App. Div. 2019) (concerning dismissal), a criminal case, is inapplicable due to the inherent and fundamental differences between criminal and civil procedure.

Section I.B.2) are more than sufficient to warrant reversal of the trial court's grant of summary judgment in favor of 1266. Meanwhile, the trial court committed yet another reversible error when it held that the so-called "access" issue was a basis for granting summary judgment in favor of 1266. *See* 08/23/2023 Tr. (2T) at 14:14-15. Even aside from the reality that these factual issues are deeply disputed (as set forth in the Schwartzes' motion to vacate, s*ee* App. Br. at Section I.C.2), the "access" issue should never have been considered on 1266's motion for summary judgment because it was not pled in 1266's counterclaim.[8] This wholly manufactured issue exemplifies the campaign that 1266 waged against the Schwartzes throughout the trial court proceedings, transmogrifying a vanilla claim concerning an altercation in a lobby/elevator into an inquisition of endless gripes against the Schwartzes (wholly regardless of whether such grievances were procedurally properly part of the case).

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN AWARDING $301,859.03 IN ATTORNEYS' FEES TO 1266.

(Pa4-32; Pa132-191)

The proceedings in the trial court astonishingly metamorphosized a routine claim about an altercation in a lobby/elevator into a massive award of **$301,859.03**

[8] 1266 believes that filing a counterclaim against the Schwartzes vested the trial court with power to adjudicate any dispute that 1266 had with the Schwartzes **going forward** from that filing. But our court system does not work that way. This is why the "access" issue was never properly a topic for any summary judgment filing. Yet the trial court (again) indulged 1266 in its manipulation of the court system.

in attorneys' fees[9] against a sick and elderly couple (who would be out on the street right now were it not for this Court's intervention in granting a stay of the trial court's order of ejectment). This award of attorneys' fees should (of course) be thrown out when this Court reverses the trial court's grant of summary judgment. Yet even if the trial court's grant of summary judgment were to be upheld, the award of attorneys' fees should be reversed (or at least greatly reduced), for the reasons set forth in Section II of Appellants' opening brief.

First, the unilateral fee shifting provision under which the trial court made its award of attorneys' fees is deeply problematic as a matter of public policy. S*ee* App. Br. at Section II.A. This provision placed 1266 in a position of complete control of the litigation, knowing that they could recover attorneys' fees if they prevailed, yet facing zero threat of having to pay the Schwartzes' attorneys' fees (win or lose). Such a litigation advantage disrupts the very foundation of the adversarial system.[10]

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[9] 1266 is at odds with its own counsel over the excessive amount of attorneys' fees that 1266's counsel ran up: Steve Austin, who is the vice president of 1266's board, testified that 1266 spent a "ridiculous amount of money" in its attempts to eject the Schwartzes. Pa127 at 37:4-15. Indeed, 1266's board subsequently **fired** its counsel from its longstanding role as 1266's general counsel. In light of this, it is indeed rich that Respondent points out (on page one of Respondent's brief) that the Schwartzes had "four attorneys withdraw as counsel." That statement exemplifies the *ad hominem* attacks that Respondent makes against the Schwartzes throughout its brief, which amount to nothing more than the pot calling the kettle black.

[10] *See, e.g.*, *Dare v. Freefall Adventures*, 349 N.J. Super. 205, 223 (App. Div. 2002) (holding that a contractual provision by which skydiving participants were to indemnify the skydiving operator for its attorneys' fees in "any and all actions"

This disparity of power is the reason why states such as California and Washington have (by statute) outlawed unilateral fee shifting provisions in all contracts. *See* Calif. Civ. Code §1717; Wash. R.C.W. § 4.84.330.

Respondent is incorrect in its assertion that Appellants, by asking this Court to hold that the unilateral fee shifting provision in this case is invalid as a matter of New Jersey public policy, "urge this [C]ourt to overturn the New Jersey Supreme Court." Resp. Br. at 39. To the contrary, the Supreme Court has **never** spoken on the issue of unilateral fee shifting provisions. If this Court were to hold that the unilateral fee shifting provision in this case is invalid as a matter of New Jersey public policy,[11] it would do so **in furtherance** of the Supreme Court's "**general policy disfavoring** the award of such [attorneys'] fees." *Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, 254 N.J. 242, 260-61 (2023) (a case cited by Respondent, *see* Resp. Br. at 39) (emphasis added). *See also North Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 570 (1999) ("[W]here attorney-

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brought by the participant "obviously runs counter to our strong policy disfavoring fee shifting" and thus "is void as against public policy" because "it discourages the average recreational participant from seeking the refuge of our courts for fear that he may face the retribution of a substantial legal fee if he does so.").

[11] Appellants do not seek a sweeping pronouncement that all unilateral fee shifting provisions are void under New Jersey public policy. Rather, Appellants ask only that this Court hold that under the circumstances of this case, it would violate New Jersey public policy to enforce the specific fee shifting provision at issue.

fee shifting is controlled by contractual provisions, courts will strictly construe that provision in light of the general policy disfavoring the award of attorneys' fees.").

Second, the trial court misapplied the fee shifting provision's reference to "a counterclaim." Although the fee shifting purports to allow for recovery of attorneys' fees incurred "defending or asserting a counterclaim in any action or proceeding brought by the Lessee" (Pa217), 1266's counterclaims seeking ejection were **wholly unrelated** to the claims that the Schwartzes had brought in their complaint (which concerned only the lobby/elevator altercation).[12] As a matter of public policy, this Court cannot equitably enforce this fee shifting provision as to those counterclaims. Doing so would embolden any cooperative to wield such a provision as an ultimate weapon to deter unit holders from bringing **any** lawsuit against the cooperative, since such unit holders would be risking having to foot the bill for limitless

[12] Contrary to Respondent's assertions (*see* Resp. Br. at 43), the entire controversy doctrine did not require 1266 to bring its ejectment claims as a counterclaim to the Schwartzes' complaint. The entire controversy doctrine does not require that every grievance between two parties be litigated under one caption. Rather, only claims arising from the same transaction or occurrence are subject to the preclusive effects of R. 4:30A. The altercation in the lobby/elevator is an entirely separate transaction or occurrence from the various items that formed the basis of 1266's ejection claim.

retaliatory litigation.[13] Enforcing the provision as to 1266's counterclaims would therefore run afoul of New Jersey's public policy disfavoring fee shifting, *supra*.[14]

Third, above and beyond the foregoing public policy arguments, the trial court's award of $301,859.03 in attorneys' fees is excessive, for all of the reasons set forth in Section II.C of Appellants' opening brief.[15] This is especially true as to billing entries that were not relevant to this case, especially with regard to the so-

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[13] Again, when asked at his deposition if he "had a bias against Mrs. Schwartz," Howard Pearl (who was 1266's board secretary at the time) responded, "**[t]he only bias I had was that she sued us."** Pa104 at 59:21-23 (emphasis added).

[14] In response to this, Respondent argues that "it was the Plaintiffs[']s conduct in repeatedly violating the lease … that ultimately drove the litigation expenses." Resp. Br. at 42. Of course, 1266 always had the option of bringing litigation against the Schwartzes, concerning their (alleged) objectionable conduct, before the complaint about the lobby/elevator altercation. Yet for the decades in which the Schwartzes resided in the cooperative, 1266 took no action against the Schwartzes until **after** they commenced legal action against 1266. This was because the Schwartzes' complaint presented to 1266 (and its longstanding counsel) a golden opportunity to hit the jackpot with a retaliatory counterclaim against the Schwartzes.

[15] Respondent cites to the unreported New York case of *1050 Tenants Corp. v. Lapidus*, 2006 N.Y. Slip Op. 51593 (Sup. Ct. N.Y. Cty. April 14, 2006) for the proposition that "New York case law is replete with fee awards to Cooperatives for enforcing the provisions of its Lease." Resp. Br. at 40-41. Although New York cases can be informative as to the mechanics of cooperative law, New Jersey courts are certainly capable of applying New Jersey public policy to the much broader subject of fee shifting. Meanwhile, *Lapidus* contains no indication that the fee shifting provision in that case was unilateral or involved the "counterclaim" language at issue in this case. Rather (as Respondent itself notes), *Lapidus* tells the story of tribunals repeatedly **reducing** fee awards when it is determined that the cooperative went too far in claiming fees. As for the "obduracy" of the shareholders in *Lapidus*, that case involved repeated findings that the shareholders were in contempt of court, which is something that has never happened in this case.

called "access" issue.[16] This Court must slash from any fee award all such excessive fees, as forth in detail in Section II.C of Appellants' opening brief, and in the color-annotated copy of 1266's billing materials found at Pa132-191.

CONCLUSION

For the foregoing reasons, and the reasons set forth in their opening brief, Appellants Melissa Schwartz and Steven Schwartz respectfully request that this Court vacate the trial court's grant of summary judgment, and its grant of attorneys' fees; and remand this case to the Law Division, Bergen County, for a full trial.

Dated: August 11, 2025

Respectfully submitted,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

By: /s/ Thomas A. Gentile
Thomas A. Gentile (01336-2005)

7 Giralda Farms
Madison, New Jersey 07940
Phone: (973) 735-5785
Fax: (973) 624-0808
e-mail: thomas.gentile@wilsonelser.com

Attorneys for Appellants
Steven and Melissa Schwartz

[16] Whereas 1266's fee application contains numerous entries relating to the Schwartzes' supposed denial of "access" to address (through a "water test" and otherwise) a minor leak that took place in 2020, Michael Walsh (who was then 1266's facilities manager) testified at his deposition that it "was probably a one-time occurrence and that there was no leak" thereafter; and that a water test "was no longer necessary based on the lack of evidence of a continuing leak." Da1240.