ANSELL GRIMM & AARON, P.C.
Anthony J. D'Artiglio, Esq. (117682014)
Gabriel R. Blum, Esq. (301742021)
Anthony Sango, Esq. (336412021)
365 Rifle Camp Road
Woodland Park, NJ 07424
(973) 247-9000
adartiglio@ansell.law
gblum@ansell.law
asango@ansell.law

Attorneys for Peter Christopher Gerhard, II and Dynamic Solutions Group, Inc.

ATLAS SEPTIC INC. and ROBERT VAN SADERS, Plaintiffs/Counterclaim Defendants, v. PETER CHRISTOPHER GERHARD, II, Defendant/Counterclaim Plaintiff.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1112-24 On Appeal from: SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY – LAW DIVISION DOCKET NO.: MON-L-2967-23 Sat below: Hon. David A. Nitti, J.S.C.
DYNAMIC SOLUTIONS GROUP, INC. Plaintiff, v. ATLAS SEPTIC INC. and ROBERT VAN SADERS, Defendants.	

APPELLANTS PETER CHRISTOPHER GERHARD, II AND DYNAMIC SOLUTIONS GROUP, INC.'S BRIEF IN SUPPORT OF THEIR APPEAL

On the brief:
Anthony J. D'Artiglio, Esq.
Gabriel R. Blum, Esq.
Anthony Sango, Esq.

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Appellants, Peter Christopher Gerhard, II ("Gerhard") and Dynamic Solutions Group, Inc. ("DSG" and, together with Gerhard, "Appellants"), respectfully submit this brief in support of their Appeal of the trial court's Order (the "Disqualification Order"), dated November 7, 2024, disqualifying Ansell Grimm & Aaron, PC ("AGA") from its representation of Appellants.

PRELIMINARY STATEMENT

In its oral opinion granting the Disqualification Order, the trial court admitted disqualification was not an appropriate remedy:

> ***Nothing has been provided to the Court*** regarding the corporate litigation that the Court would find sufficiently specific, nor the matters therein, as compared to the present one, ***to be sufficiently substantially similar as to warrant disqualification*** on their own. Although the Longo matter and the present one involved a failed attempt to expand the business of Atlas Septic through ventures that ultimately failed, ***there is nothing else so similar about them*** so as to distinguish their relevance beyond those exhibited in City of Atlantic City v. Trupos, 201 N.J. 447. ***Thus, no apparent violation of RPC 1.9(a) based on the representation alone***.

(T21:4-17) (emphasis added). The trial court could have (and should have) stopped its analysis there. Now, the Appellate Division must end the analysis where the trial court should have, and reverse and overturn the Disqualification Order because the instant matter is not sufficiently similar to any matter wherein AGA represented its prior clients, among a plethora of other reasons.

Although disqualification is a harsh discretionary remedy that is only to be used sparingly and calls for a ***painstaking*** analysis of the facts, the trial court

failed to undertake such a painstaking analysis, entirely misapprehended (and misapplied) the controlling law, and failed to appreciate that the disqualification motion was a transparent litigation tactic, having been delayed without excuse for over a year and only filed at the eleventh hour when this matter was on for arbitration and trial in early 2025.

First, the trial court erred and should not have disqualified AGA since Respondents Atlas Septic, Inc. ("Atlas") and Robert Van Saders ("RVS," and together with Atlas, "Respondents") failed to demonstrate that the instant matter and prior matters involving AGA's representation of Respondents were substantially related, a requirement for disqualification.

Second, the trial court erred since Respondents never specifically identified or pinpointed the confidential information that was purportedly disclosed to AGA in connection with the prior matters. Instead, Respondents asserted that "Atlas Financials" -- a term that is vague, amorphous, and undefined -- were disclosed, and that AGA has information about Respondents' attitudes towards litigation.

Third, RPC 1.9(c) was not argued by Respondents and is not an independent basis for disqualification in any event. Nevertheless, even though the trial court found that there was no violation of RPC 1.9, it nonetheless

disqualified AGA under RPC 1.9(c) which merely restricts how information can be used but does not provide an independent basis for disqualification.

Fourth, the trial court erred in permitting Respondents to submit RVS's Certification (the "Certification") *in camera* and *ex parte*, after previously denying the request on the record at oral argument, thereby running afoul of the constitutional guarantees of due process. As such, it was impossible for AGA to rebut the contentions contained therein. Indeed, Respondents argue circuitously that this *in camera* review was necessary to prevent AGA from reviewing information that Respondents purport AGA already has.

Fifth, even assuming *arguendo* that Respondents sufficiently demonstrated (they have not) that confidential information was revealed to AGA, the trial court still erred since Respondents failed to demonstrate that the alleged confidential information is prejudicial.

Finally, the trial court further erred since Respondents should not have been permitted to inexcusably delay the filing of the Disqualification Motion for over a year, after the parties had exchanged voluminous paper discovery, engaged in substantial motion practice and, most egregiously, ***after*** arbitration and trial were already scheduled.

Thus, for the reasons more fully set forth below, this Court should reverse the Court's Order disqualifying AGA. Due process requires nothing less.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

I. Respondents' Complaint Against Gerhard (1a – 23a).

On May 11, 2023, Respondents commenced this action against Gerhard,[1] alleging among other things, that Gerhard misappropriated Atlas' company funds while he was working for Atlas from a Chase Bank account that the parties jointly opened and had access to in furtherance of expanding Atlas' septic business. (1a – 23a). On September 20, 2023, Gerhard filed an Answer and asserted Counterclaims against Respondents for failure to compensate him for his work. (24a – 60a).

II. DSG Complaint Against Respondents (61a – 72a).

Thereafter, on September 20, 2023, DSG[2] filed a separate Complaint in the Law Division, Monmouth County against Respondents in connection with a variety of separate loan transactions and financing that DSG provided to Respondents for the purchase of certain vehicles and other expenses, totaling in excess of $500,000.00.[3] (61a – 72a). However, despite the parties' verbal agreement that the loans would be repaid in an amount no less than $10,000.00

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1 Gerhard was previously engaged to RVS's daughter and the parties had a close relationship before the action was commenced. RVS even acted in the capacity of Gerhard's mentor and, yet, RVS filed a lawsuit against him.

2 Gerhard and his father, Peter Gerhard Sr., are principals of DSG.

3 The matters have since been consolidated in the law division under docket number MON-L-2967-23.

per month, Respondents defaulted on the loans and, apparently, never had an intention of making DSG whole for the monies loaned despite their assurances that the amounts would be paid back. (61a – 72a).

III. AGA's Prior Representation Of Respondents In The Lortech And Longo Matters (141a – 158a).[4]

On or about February 14, 2020, Lortech Inc. Construction Engineering ("Lortech") filed a collection complaint in the Law Division, Monmouth County against Atlas (the "Lortech Matter"). (141a – 142a). Lortech alleged that Atlas owed $32,570.00 in connection with engineering services it provided to Atlas. (141a – 142a). On March 17, 2020, AGA filed an Answer on behalf of Atlas. (144a – 146a). The Lortech matter has no connection to this case as that matter involved entirely different parties and claims. (141a – 142a). Lortech and/or its principal(s) are not parties to the instant litigation. (1a – 23a; 61a – 72a).

On March 17, 2020, AGA filed a Complaint on behalf of RVS and Gary Van Saders against William Longo and Atlas Waste Management -- a separate legal entity (the "Longo Matter"). (150a – 158a). The Complaint alleges that Longo usurped certain business opportunities and that, as a result of Longo's

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[4] Absurdly, Respondents had initially asserted that AGA should also be disqualified based AGA's representation of Mathew L. Rodriguez ***against*** Lawrence L. Griffin, Garrette E. Van Saders, and Atlas (the "Rodriguez Matter"). However, AGA did ***not*** represent Atlas or RVS in this unrelated personal injury matter as AGA filed the lawsuit ***against*** Atlas. Respondents recognized this argument lacked merit and did not address this matter in their reply or supplemental briefing.

actions, RVS and Gary Van Saders suffered damages, including lost business opportunities. (150a – 158a). Just as the Lortech matter, the Longo Matter involved different parties and unrelated claims. (150a – 158a). Longo and Atlas Waste Management are not parties to this case. (1a – 23a; 61a – 72a).

IV. Respondent's Motion To Disqualify AGA (102a – 201a).

At the outset of this case, Respondents' prior counsel requested that AGA provide the files in AGA's possession concerning the prior matters. In response, on or about May 31, 2023, AGA provided Respondents with the files. (256a). However, ***although Respondents now claim they are prejudiced as a result of the information purportedly provided to AGA in connection with the prior matter, inexplicably, no further action was taken by Respondents for over a year***. Indeed, although this matter has now been pending for nearly two years, voluminous discovery exchanged, substantial motion practice held, and the matter was scheduled for arbitration and trial, Respondents employed a clear litigation tactic to disqualify AGA (the "Disqualification Motion") as a last-ditch attempt to gain an advantage before the matter proceeded to arbitration and trial.[5] (102a

[5] Certainly, Respondents could have filed this Motion over a year ago at the outset of this litigation or, better yet, four (4) years ago in connection with the 2020 Rodriguez matter. Instead, Respondents commenced this action as a desperate cash grab against Gerhard and his father Peter Gerhard Sr. while likely failing to disclose to their attorneys that RVS owed Gerhard's father ***north of half a million dollars*** in outstanding loans. Now, at the eleventh hour after this matter was pending for over a year, and only months before arbitration and trial were scheduled for early 2025,

– 201a). In the Disqualification Motion, Respondents argued that the Longo, Lortech, and Rodriguez matters were substantially related to this matter (they are not). (102a – 201a). Respondents claimed that they disclosed confidential information to AGA in connection with those matters. (102a – 201a). However, Respondents have never (i) ***specifically*** identified the confidential information or documents that it purportedly disclosed to AGA and (ii) have not otherwise demonstrated that the information is prejudicial to Atlas in this case (it is not). (102a – 201a; 257a – 286a; 294a – 323a).

On August 2, 2024, the trial court held an initial hearing on the Disqualification Motion. (T20:2-7). On August 9, 2024, the trial court entered an Order reserved on the Disqualification Motion but permitting Respondents to file supplemental briefing to the Disqualification Motion. (352a – 354a). The trial court also permitted Appellants to submit supplemental briefing "to respond to [Respondents'] supplemental submission." (353a). At bottom of that Order, the trial court left a handwritten note that the "[f]orm of order was contested," adding "[t]he Court finds [the Order's] provisions stated within sufficiently represent the findings and requests of the Court." (354a). At no time after this

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and recognizing there is a likelihood of losing on the merits, Atlas employed the tactic of moving to disqualify AGA.

first hearing did the trial court indicate it would reverse its decision on the submission of *in camera* certifications nor amend its Order of August 9, 2024.

V. ***In Camera* Review Of The Certification (T23:21-25).**

Following the initial hearing on the Disqualification Motion, and as part of the supplemental submissions permitted by the trial court, Respondents submitted a certification prepared by RVS (the "Certification") for review by the trial court *in camera* which purportedly identifies the confidential information disclosed to AGA. (297a). On November 7, 2024, the trial court held another hearing and inexplicably reserved course, now accepting the Certification submitted *ex parte*. (T23:17-24:22; 25:20-24). To be clear, AGA has never seen the contents and is not aware of the information contained in the Certification. Nevertheless, the trial court exclusively relied on the Certification in disqualifying AGA, thereby depriving AGA and Appellants of their due process rights:

> Again, ***I know that counsel is at a disadvantage for not having that information***. The Court has averred to the fact that the information provided was not just financial, but also personal in nature and would have the ability to affect -- and most likely would affect how litigation involving Mr. Van Saders himself, especially as an individual in this case, might be conducted, continued, prosecuted, defended, or ultimately resolved. And for those reasons, although the Court is always reluctant to do so, and ***I specifically am reluctant to do so***, I am finding for disqualification in this matter.

(T28:2-14) (emphasis added). Permitting Respondents to present purportedly confidential information disclosed in connection with prior matters *in camera* completely undermined the stated purpose of the August 9, 2024 Order, which, as the trial court explained, was to "provide[] counsel an opportunity to brief and argue the issue [of the prior representations]." (T21:18-22:1). In other words, the trial court intended to provide AGA with more specific information regarding why disqualification was sought and to permit Appellants the opportunity to respond to newly raised arguments.

The trial court never reversed its decision on the *in camera* Certification until the November 7, 2024 hearing.

Tellingly, Respondents could have (but did not) seek a protective order or confidentiality order with an attorney's eyes-only designation or sought to file the Certification under seal, which would have maintained the confidentiality of the information that Respondents paradoxically assert AGA already possesses.

VI. Appellate Procedural History.

On November 27, 2024, Appellants filed a Motion for Leave to Appeal. (344a). On December 18, 2024, Respondents filed their response to the Motion for Leave to Appeal. (344a). On December 19, 2024, the Appellate Division granted Appellants leave to appeal. (344a-345a). On February 6, 2025, Appellants filed their Case Information Statement. (346a-347a).

STANDARD OF REVIEW

I. De Novo Review.

The disqualification of counsel is an issue of law. *City of Atl. City v. Trupos*, 201 N.J. 447, 463 (2010) (citing *J.G. Ries & Sons, Inc. v. Spectrasery, Inc.*, 384 N.J. Super. 216, 222 (App. Div. 2006)). Accordingly, appellate courts apply a de novo standard of review when evaluating the impropriety of a motion to disqualify counsel. *Twenty-First Century Rail Corp. v. N.J. Transit Corp.*, 210 N.J. 264, 274 (2012). This evaluation requires the Court to balance competing interests, weighing the standards of attorney professionalism against a client's right to choose counsel. *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 218 (1988). "[D]isqualification motions are often made for tactical reasons…." *Id.* at 218. "The court should also be cognizant that disqualification motions can be misused as a litigation tactic that can delay an examination of the merits of the claims and can undermine the judicial process." *Richardson v. DeFazio*, 2016 N.J. Super. Unpub. LEXIS 497, *7 (App. Div. March 7, 2026) (citing *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218, 221).

LEGAL ARGUMENT

I. The Disqualification Order Has No Basis In Law Or Fact.

Disqualification of counsel is an extreme measure that can only be exacted after a careful balancing of the rights of the parties involved. *See Dewey v. R.J.*

Reynolds Tobacco Co., 109 N.J. at 218; *see also Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. 184, 192 (App. Div. 2002). Unfortunately, here, the trial court did not undertake the required careful balancing of rights and instead took the self-serving and conclusory statements of Respondents about "concerns" without any actual legal or factual analysis. In fact, the trial court ***admitted*** that it lacked certain factual predicates, namely, substantial similarities between past and current matters, which should have ended the trial court's analysis immediately. Still, the trial court incorrectly proceeded to disqualify AGA for little more than hypothetical concerns based on no law. Accordingly, the trial court's Disqualification Order should be reversed.

A lawyer's duty to former clients is governed by RPC 1.9 which provides that:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a ***substantially related matter*** in which that person's interests are ***materially adverse to the interests of the former client*** unless the former client gives informed consent confirmed in writing. (b) A lawyer shall not knowingly represent a person ***in the same or a substantially related matter*** in which a firm with which the lawyer formerly was associated had previously represented a client, (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9 that is material to the matter unless the former client gives informed consent, confirmed in writing.

See RPC 1.9 (emphasis added).

The prohibition delineated in RPC 1.9(a)[6] is "triggered when two factors coalesce: the matters between the present and former clients must be the same or...substantially related, and the interests of the present and former clients must be materially adverse." *City of Atl. City v. Trupos*, 201 N.J. at 462. The initial burden of persuasion lies with the party seeking disqualification. *Dewey v. R. J. Reynolds Tobacco Co.*, 109 N.J. at 201.

"Whether the matters are the same or substantially related must be based in fact." *City of Atl. City v. Trupos*, 201 N.J. at 464. The Supreme Court provided controlling guidance in *City of Atlantic City v. Trupos*:

> [F]or the purposes of RPC 1.9, matters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought ***received confidential information*** from the former client ***that can be used against that client*** in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.

Id. at 453 (emphasis added).

"To demonstrate a lawyer received confidential information from the prior relationship, the client must make ***more than bald and unsubstantiated assertions*** that the lawyer disclosed business, financial and legal information related to the matter for which disqualification is sought." *Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. at 194 (emphasis

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[6] RPC 1.9(b) similarly requires a substantially related mater.

added) (internal quotations omitted); *O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. 109, 129 (2011) (requiring more than mere "bald and unsubstantiated assertions" to grant disqualification).

Disclosed records and information are deemed significantly harmful if prejudicial to the former prospective client "within the confines of the specific matter in which disqualification is sought." *Greebel v. Lensak*, 467 N.J. Super. 251, 258 (App. Div. 2021) (concluding that information disclosed was "significantly harmful" where the information was substantially related to the instant matter and goes to the heart of the instant litigation). "Disqualification of counsel is a harsh discretionary remedy which must be used sparingly." *Cavallaro v. Jamco Prop. Mgmt*., 334 N.J. Super. 557 (App. Div. 2000).

Further, RPC 1.9(c) provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RPC 1.9(a) acts on a prohibition on a representation adverse to a former client under certain circumstances while RPC 1.9(c) prohibits a lawyer from using or revealing a former client's confidential information. *See, e.g.*, *Dental*

Health Associates South Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. at 193.

For the reasons set forth, *infra*, the trial court wholly lacked legal and factual support for its entry of the Disqualification Order since the court failed to undertake a careful analysis of the facts and even found that the matters were not substantially related. Thus, the trial court's decision must be overturned.

A. Respondents Failed To Demonstrate, And The Trial Court Did Not Find, Substantial Similarity (214a – 219a).

As set forth above, matters are deemed to be "substantially related" only "if (1) the lawyer for whom disqualification is sought received confidential information from the former client ***that can be used against that client in the subsequent representation*** of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation." *City of Atl. City v. Trupos*, 201 N.J. at 467 (emphasis added). In *City of Atlantic City v. Trupos*, the Supreme Court considered whether a law firm's representation of a municipality in defense tax appeals was substantially related to the law firm's prosecution of an individual taxpayer's appeals against the municipality requiring disqualification under RPC 1.9(a). The Court held that the City did not meet its burden of proving that, in fact, the current and former representations are "substantially related." *Id.* at 470.

The Court reasoned that the "superficial similarity of the subject matter of both representations -- the propriety of real estate tax assessments -- does not withstand closer scrutiny." *Id.* at 469. In rejecting the lower court's "unfounded concern" that the law firm ***might*** have been privy to confidential information in the prior representation which ***could*** be used against the plaintiff, the Court concluded that there was "no proof in the record that the facts of the prior representation" are relevant or material to the prior tax appeals.[7] *Id.* at 469.

Here, Respondents asserted that AGA should be disqualified since AGA previously represented Atlas and RVS in substantially related matters, *i.e.*, in the Lortech, Longo, and Rodriguez matters. (102a – 201a). Respondents contend that as a result of the prior litigation, AGA has in its possession confidential information about Atlas' "business operation." (107a ¶ 3). However, just as in *Trupos*, Respondents' arguments in support of disqualifying AGA are meritless. These arguments are, at most, the sort of superficial similarity that the *Trupos* Court previously found unavailing. *See City of Atl. City v. Trupos*, 201 N.J. at 469. Merely representing Atlas, RVS, or a party

[7] Indeed, the same issues alleged here were presumably at issue in *Trupos*. For instance, counsel presumably learned the municipality's settlement positions and financial information. Notwithstanding, that alone would not justify disqualification, and certainly does not here.

adverse to either in prior litigation is insufficient to warrant the extreme remedy of disqualification.

For the avoidance of doubt, Lortech, Longo, and Rodriguez are ***wholly*** unrelated to the instant litigation and are not substantially related to this matter as they have no connection to this case. Indeed, those cases involve different entities, parties, claims, and witnesses -- and the trial court agreed. (141a – 158a). The Lortech matter was a collection matter for engineering fees wherein AGA defended Atlas. (141a – 142a; 144a – 146a). The Longo matter was an action for business torts resulting from diversion of business from Atlas, and included different defendants not party to this matter. (1a – 23a; 61a – 72a; 150a – 158a). The Rodriguez matter is even more unrelated; there, AGA ***sued*** -- not represented -- Atlas. Conversely, this matter involves allegations of stolen funds and defaulted loans. (1a – 23a; 61a – 72a). In fact, the dispute underlying DSG's Complaint did not arise until 2022, while the other matters arose years earlier, with both the Lortech and Long matters arising sometime in late 2019 or early 2020. (63a ¶ 16; 140a – 148a; 149a – 158a). There were years between these matters. Plainly, none of these selected matters bear any substantial relation to this matter. This alone should have precluded disqualification.

Remarkably, the trial court even acknowledged that Respondents failed to demonstrate substantial similarity and that nothing was provided to the trial Court to find substantial similarity and, in turn, a violation of RPC 1.9(a):

> ***Nothing*** has been provided to the Court regarding the corporate litigation that the Court would find sufficiently specific, nor the matters therein, as compared to the present one, ***to be sufficiently substantially similar as to warrant disqualification*** on their own. Although the Longo matter and the present one involved a failed attempt to expand the business of Atlas Septic through ventures that ultimately failed, ***there is nothing else so similar about them so as to distinguish their relevance*** beyond those exhibited in City of Atlantic City v. Trupos, 201 N.J. 447. ***Thus, no apparent violation of RPC 1.9(a) based on the representation alone***.

(T21:4-17) (emphasis added). The trial court readily admitted there was not a scintilla of proof of substantial similarity and, yet, disqualified AGA anyway

Evidently, the trial court misapprehended the mandate of *Trupos*. Disqualification under RPC 1.9(a) is only appropriate where ***two*** factors coalesce: first, "the matters between the present and former clients must be the same or...substantially related," and second, "the interests of the present and former clients must be materially adverse." *City of Atl. City v. Trupos*, 201 N.J. at 462. As the trial court acknowledged, the instant matter and prior matters are not "substantially similar." (T21:4-9). The trial court's misapprehension arises from its mistaken belief that *Trupos* provides either/or factors: either substantial similarity or material adversity, stating there is "no apparent violation of RPC1.9(a) ***based on the representation alone***." (T21:15-17). Conversely,

Trupos requires a two-prong test. *See City of Atl. City v. Trupos*, 201 N.J. at 462. As a result, the trial court made an error of law that the Appellate Division should review de novo and reverse.

For these reasons, the Disqualification Order should be overturned as Respondents failed to demonstrate that the matters are substantially related to the instant litigation, and the trial court admittedly lacked a legal basis to find substantial relation.

B. Respondents Failed To Specifically Identify The Purported Confidential Information (289a – 290a).

Respondents also failed to specifically identify the purportedly confidential information that they claim was disclosed to AGA. Other than facts and information specific to the claims involved in the prior unrelated matters, as is set forth in the Certification of Lawrence Shapiro, Esq. (the "Shapiro Certification"), Respondents did not provide AGA with confidential information. (340a ¶¶ 15 – 18).

"To demonstrate a lawyer received confidential information from the prior relationship, the client must make more than bald and unsubstantiated assertions that the lawyer disclosed business, financial and legal information related to the matter for which disqualification is sought." *Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. at 194. Respondents made precisely those types of assertions: undescribed and unsubstantiated assertions

of disclosure of a string of vague "business operations, proprietary information, business models, clients, customers, contracts, and Atlas financials" without any description or specification or even identifying a single document or communication. (115a). This is precisely what is ***not*** permitted for the basis of disqualification.

Not only did Respondents fail to provide any of the allegedly disclosed "financial information," they failed to even identify ***what the information is.*** Clearly, Respondents did not specifically identify any information ***because they could not***, instead repeatedly resorting to the vague and generalized term "Atlas financials" to obscure their inability to meet their burden. Respondents then resorted to the misplaced argument that AGA has "insight" into RVS's attitude towards settlement and litigation based on the prior representations. (305a). However, just as Respondents failed to demonstrate that AGA has confidential information, Respondents failed to demonstrate that AGA obtained any "insight" into RVS's personality, thinking, or how he approaches particular decisions that can be used against Atlas in this case. (340a ¶ 20 – 341a ¶ 22). Indeed, Respondents did not point to a single "insight" or specify exactly the information AGA has that can be used against Respondents in this case. (340a ¶ 20 – 341a ¶ 22). The truth is that AGA does not have any "insight" into RVS's thinking or litigation strategy in this case.

Even assuming *arguendo* that AGA had insight into RVS's thinking or strategy from the prior unrelated matters that have been resolved for years, Respondents further failed to explain how precisely the purported "financial information" or "insight" would be significantly harmful to them in this case. Significant harm is narrow, and Respondents cannot show potential harm and prejudice for the same reason they cannot show substantial relation: these are completely unrelated matters. *See Greebel v. Lensak*, 467 N.J. Super. at 258. It is wholly unspecified what sort of "insight" or "personal information" would somehow work to the detriment of Respondents. Evidently, a person's attitudes towards litigation may change depending on financial health, posture of a case, stage of life, and even mood -- all of which are subject to change in the ***years*** since AGA handled the unrelated matters for Respondents.

AGA only had an initial intake call with RVS. During this intake call, no remarkable and unique information was provided to AGA that might now pose an issue to Respondents. Accordingly, AGA is not privy to Respondents' financial information and does not have information about RVS's general attitude towards settlement or litigation in general. (340a ¶ 20 – 341a ¶ 22). AGA certainly does not have information concerning RVS's personality, thinking, or litigation strategy in this case as AGA's relationship with RVS was short-lived and limited as AGA only held an initial consultation with RVS years

ago and predominately communicated with his secretary thereafter in connection with the prior matters. (340a ¶ 20 – 341a ¶ 22). Critically, Respondents never provided AGA with "bank statements, balance sheets, financial documents, or any similar documents demonstrating [their] assets, liabilities or ability to fund litigation." (340a ¶ 16). It is axiomatic that Appellants do not believe Respondents have a proverbial war chest; this entire dispute arises from Respondents' inability to pay back loans owed to Appellants, so no unique insight can be gleaned from this vague information about "attitudes." Respondents use of vague terms is a tacit admission they cannot point to specific information that can be used against Respondents in this case.

Moreover, the Shapiro Certification disputes the *in camera*, *ex parte* Certification of RVS. Therein, Mr. Shapiro states:

- He represented Atlas in the Lortech matter (339a ¶ 4);
- He represented RVS in the Longo matter (339a ¶ 5);
- He is ***not*** involved in this instant matter (339a ¶ 6);
- The Lortech matter bears no factual relation to this matter (339a ¶ 8);
- The Longo matter also bears no factual relation to this matter (339a ¶ 11);
- Both matters were resolved by or before May 17, 2021 (339a ¶ 9; 340a ¶ 12);
- RVS only told him information related to those Lortech and Longo matters (340a ¶ 14);

- Respondents did not disclose any information about Atlas's business operations or practices beyond information needed to litigate those two matters (340a ¶ 15);
- Respondents did not provide any bank statements, balance sheets, financial documents, or comparable documents to Mr. Shapiro (340a ¶ 16);
- The only "confidential business plans" provided to Mr. Shapiro regarded a non-party, Atlas Waste Management (340a ¶ 17);
- The general business information provided has no relation to the allegations of this matter, which involve allegations of Appellants' misappropriation of funds and Respondents' failure to repay loans to Appellants (340a ¶ 18);
- Respondents' attitudes towards settlement have no bearing on their attitudes in this matter (340a-341a ¶ 21);
- AGA predominantly communicated with Respondents' secretary after an initial consultation with Respondents (341a ¶ 22); and
- Mr. Shapiro was not aware of any document that would prejudice Respondents (341a ¶ 23).

These sworn and specific statements, made part of the record, contradict the trial court's vague characterization of the *in camera* and *ex parte* Certification of RVS. (T24:4-22). The record is bereft of any evidence to contradict the Shapiro Certification. Still, the trial court took "the representations of [RVS] and g[a]ve them deference," (T25:20-24), while affording no deference whatsoever to Mr. Shapiro's statements. Due process requires, at a minimum, that the trial court held a hearing to allow Mr. Shapiro to testify and be cross-examined. Indeed, Mr. Shapiro even offered to do so.

(341a ¶ 24). Instead, the trial court took RVS's uncontested, unchallenged, and undisclosed statements with absolute deference.

For these reasons, the Disqualification Order should be overturned as Respondents failed to specifically identify the purportedly confidential information that could be used against them, and the trial court lacked legal or factual basis to find the confidential information was harmful or prejudicial.

C. RPC 1.9(c) Was Not Argued And Is Not An Independent Basis For Disqualification (102a – 135a).

The trial court mistakenly and *sua sponte* applied RPC 1.9(c) despite no party arguing for its application or even a factual or legal basis for its application. Like RPC 1.9(a), the trial court already found no substantial similarity, which should have ended the analysis there. Incorrectly, the trial court pressed ahead and applied RPC 1.9(c).

RPC 1.9(c) provides as follows:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Inexplicably, the trial court misconstrued the law and held that disqualification was warranted under RPC 1.9(c) when taken in conjunction with

RPC 1.9(a) even though the trial court ***already*** held there is no substantial similarity and also that there was no evidence that RPC 1.9 was violated:

> That [RPC 1.9(c)], in conjunction with [RPC] 1.9(a) where, in a totality of the circumstances, ***the similarity of the proceedings in and of themselves would be insufficient to otherwise disqualify the firm***, the nature of the information provided, in conjunction with those representations, together leads the Court to conclude that there is probably no likelihood that information will not, to some degree -- or I would not say would -- could not, in some degree, inure to the detriment of Robert Van Saders in his attempt to defend against the counterclaims that were brought against him.

(T27:10-21) (emphasis added). What the trial court did was write its own rule: it combined RPC 1.9(a) and RPC 1.9(c) to fashion relief that it otherwise -- and admittedly -- could not grant. Notably, this is the one and only reference to RPC 1.9(c) in the ***entire*** record, meaning the trial court undertook this inapposite analysis without argument from Respondents, ***or a chance to respond by Appellants***. The *sua sponte* nature of this analysis is further evidence of its lack of foundation. Thus, the trial court's Disqualification Order pursuant to RPC 1.9(c) was based not on actual facts and circumstances but on hypothetical circumstances and a rewriting of the RPC.

Moreover, Respondents did not even argue that disqualification was warranted under RPC 1.9(c) since it is not an independent basis for disqualification but merely restricts the use of information when a lawyer who has formerly represented a client obtains information in connection with the

representation. (102a – 135a). Indeed, Appellants are not aware of any case or rule that supports the contention that a law firm may be disqualified based on RPC 1.9(c) alone, and certainly none were cited in the record below.

Further, and in any event, the trial court held that there was no evidence that any information obtained in connection with the prior matters was being used against Respondents in this case and that there is no basis to find any violation of RPC 1.9. (T24:23-25; T25:1-3). Accordingly, the Disqualification Order is both legally and factually baseless.

D. Respondents Failed To Demonstrate How The Alleged Confidential Information Could Or Is Being Used Against them (102a – 135a).

Respondents bear the burden of persuasion to show that business information or records from years ago can be used against Atlas in the instant matter. *See Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 221. The trial court should have determined that Respondents failed to meet that burden. In any event, Atlas's "business operation" is simply not at the heart of this litigation. (1a – 72a). Rather, this matter involves claims that (i) Gerhard misappropriated company funds from a joint company Chase Bank Account while he was working for Respondents; (ii) Respondents failed to pay Gerhard for his services; and (ii) DSG is owed sums which remain due and owing in connection with a series of loan transactions. (1a – 72a).

Indeed, other than facts and information specific to the claims involved in the prior unrelated matters -- which, ***again***, is entirely irrelevant to the instant litigation -- Respondents never demonstrated how that information is being used, or even that it ***could be*** used against them in this case. Respondents have failed to demonstrate that the claimed "confidential" business information would be unavailable or beyond the reach of AGA during the ordinary course of pre-trial discovery in any event. *See O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. 109, 130 (2011) (noting that Defendant has been unable to demonstrate what of its claimed confidential information would be beyond the reach of pre-trial discovery). Put simply, there has been no showing that the information is privileged or confidential or otherwise not subject to normal disclosures in the course of discovery. *See* Rule 4:10-2(a) (scope of discovery is broad and permits a party to obtain information concerning "any matter, not privileged, which is relevant to the subject matter involved in the pending action"); *see also O Builders & Associates Inc. v. Yuna Corp.*, 206 N.J. at 130 (2011). Just as in *O'Builders*, where the court found that "defendant has been unable to demonstrate what of its claimed confidential information would be beyond the reach of [either] pre-trial discovery," Respondents have failed to demonstrate that the claimed "confidential" information or business records in

the case would not be discoverable. *See O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. at 130.

Simply alleging that Respondents disclosed "general attitudes about litigation" in connection with the prior matters is simply insufficient to disqualify an attorney or a law firm. *See McCarthy v. John T. Henderson, Inc.*, 246 N.J. Super. 225 (App. Div. 1991) (holding that "there is no reason to conclude that the issues in the earlier litigation would generate the type of broad, philosophical discussion" between the attorney and former client that would lead to a revelation of the former client's "personal views concerning litigation in general or his attitude toward negotiations and settlement"). Indeed, if this alone would be sufficient for disqualification, it would be tantamount to a blanket prohibition on representation adverse to former clients because it is difficult to imagine any litigation wherein settlement is not discussed at some juncture. Such a blanket prohibition is not the law.

Here, AGA did not have any broad or philosophical discussions with RVS regarding settlement strategies or approach to litigation and, in fact, merely held an initial consultation and then predominately communicated with Atlas' secretary thereafter. (340a – 341a ¶ 20 – 22). Notably, the trial Court recognized that Respondents submitted no evidence that AGA had utilized information obtained from the prior matters:

> It should also be noted that there is ***no evidence that the Ansell firm has so utilized this information in the current litigation*** and, as such, this Court is specifically finding no basis upon which to determine that any RPCs, including 1.9 or 1.10, were in any way violated.

(T24:23 – T25:3) (emphasis added). This is telling. Despite approximately one and a half years of litigation and discovery, Respondents have not produced a single shred of evidence that this purported "confidential information" has been misused, or used at all in this straightforward matter involving the failure to pay back loans

Thus, the trial court should have rejected Respondents' request for disqualification as there was no evidence submitted that AGA had obtained confidential information or insight and certainly no evidence that the information was being utilized against Respondents.

II. The Disqualification Order Violated Appellants' And AGA's Procedural Due Process Rights As Appellants Were Precluded From The *In Camera* Review Of The Certification (T23:21-25; T24:1-3).

The Disqualification Order is predicated on a violation of one of the fundamental tenets of American jurisprudence: allowing a party accused to review and respond to the evidence presented against it. Respondents submitted and the trial court accepted the Certification, which was provided not under seal but directly to the trial court for *in camera* review. To be clear: Appellants are not aware of the contents of the Certification and accordingly cannot respond to

it. This is troubling considering Respondents claim that they already provided this privileged information to AGA, so there could be no concerns about violation of attorney-client privilege. Circuitously, they also argue that AGA should not receive this information. It is wholly unclear how AGA could both have this information already but is not entitled to review it in the Certification. This merely confirms the tactical nature of the disqualification application.

The due process clause of the Fourteenth Amendment of the United States Constitution and the First Article of the New Jersey Constitution both guarantee procedural due process for parties to a litigation. U.S. Const. amend. XIV § 1.; N.J. Const. Art. I ¶ 1. These constitutional guarantees grant "all parties in litigation ***the right to know the evidence and contentions advanced against them*** as well as the perceived facts which inform a judge's decision. The guarantee includes a fair opportunity to meet those proofs, arguments and perceptions of fact." *Ledezma v. A & L Drywall*, 254 N.J. Super. 613, 618 (App. Div. 1992) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) and *Hewitt v. Hollahan*, 56 N.J. Super. 372, 377-78 (App. Div. 1959)) (emphasis added).

Respondents submitted the Certification to the trial court for *in camera* review. However, the trial court erred in permitting Respondents to submit the Certification *in camera* and *ex parte* because it rendered it ***impossible*** for AGA to respond and rebut the (false) contention that AGA received confidential

information in connection with the prior matters. The trial court acknowledged that Appellants were not provided with the Certification, (T4:9-12), and were at a "disadvantage" for not having the information. (T28:2-3). As such, the trial court should not have reversed course and permitted Respondents to claim they specifically identified the information in the Certification all while preventing Appellants from rebutting these contentions.

Respondents could have sought a protective order with an attorneys' eyes-only designation or sought to file the Certification under seal, thereby maintaining the confidentiality of the information ***and*** providing Appellants with the ability to review and respond to its contents. Indeed, as the trial court itself recounted, the Certification "expressed significant concern…regarding how [RVS's] personal and financial information, ***which he claimed was provided to Ansell's office***[8]…could be used to his detriment in the current litigation…." (T24:4-13) (emphasis added). Therefore, there can be no fear that the Certification provides new information that could be misused if submitted under seal: RVS already purportedly provided that information to AGA.

If RVS had not provided that information to AGA, then there could be no conflict. *See City of Atl. City v. Trupos*, 201 N.J. 447 at 453. In denying AGA

[8] Due process required the trial court to afford AGA the opportunity to contest the ***claim*** that the evidence was provided to AGA. This did not occur.

the opportunity to review and rebut the evidence and arguments against it, the trial court violated the due process rights of AGA and Appellants. *See Ledezma v. A & L Drywall*, 254 N.J. Super. at 618; *see also Goldberg v. Kelly*, 397 U.S. at 267-71; *see also Hewitt v. Hollahan*, 56 N.J. Super. at 377-78. Accordingly, it was legally and logically unfounded for the trial court to forbid AGA from reviewing information that it purportedly already has in its possession.

Moreover, Respondents deployed the age-old sharp tactic of "better to ask for forgiveness than to ask for permission." In this case, that tactic was designed to have the exact unconstitutional effect it had on Appellants and AGA. Respondents made the impermissible but calculated tactical decision to file for disqualification in the first place, coming after ***months*** of discovery and only filed once a trial date was set. *See Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218. Respondents acknowledged they were not permitted to file the *in camera* Certification but submitted it anyway: "Notwithstanding the fact that [RVS] was denied the opportunity to obtain a Certification for *in camera* inspection…." (300a). Respondents did so only after it appeared that the trial court would rule against them as a deliberate and impermissible tactic. *See Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218. The trial court admitted Appellants did not review the Certification, (T4:9-12), and were accordingly at a "disadvantage" for not having the information. (T28:2-3). Respondents

misused disqualification and misused *in camera* review, which the trial court then condoned. *See Richardson v. DeFazio*, 2016 N.J. Super. Unpub. LEXIS at *7 (citing *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218, 221). Respondents ***wanted*** to disadvantage Appellants. The trial court assisted Respondents in doing so in violation of constitutional precepts.

At a minimum, the trial court should have given AGA notice that it intended to reverse its prior ruling concerning *in camera* review of the Certification so AGA could have elected to retain screening counsel to address the issue. However, the trial court did not provide AGA an opportunity to respond whatsoever which was a gross violation of Appellants' due process rights. *See Doe v. Poritz*, 142 N.J. 1 (1995) (holding that the minimum requirements of due process are "notice and the opportunity to be heard."). The trial court's Disqualification Order thus lacks the basic legitimacy required by the Constitutions.

For these reasons, the trial court erred and the Disqualification Order should be reversed.

III. Respondents' Dilatory Conduct Should Have Precluded Disqualification (220a – 222a).

The unexplained and unreasonable delay in filing the Disqualification Motion should have precluded disqualification pursuant to the doctrine of laches and waiver. Respondents waited to disqualify AGA after significant discovery

was exchanged and ***after*** arbitration and trial dates were set. Clearly, Respondents had no issue with this purported conflict until it suited their strategic needs.

The doctrine of laches is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. *Knorr v. Smeal*, 178 N.J. 169, 180-81 (2003). "Laches may only be enforced when the delaying party had ***sufficient opportunity to assert the right in the proper forum*** and the prejudiced party acted in good faith believing that the right had been abandoned." *Dorchester Manor v. Borough of New Milford*, 287 N.J. Super. 114 (App. Div. 1996) (emphasis added). The key factors to be considered in deciding whether to apply the doctrine are "[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay." *Lavin v. Bd. of Educ.*, 90 N.J. 145, 152 (1982). The core equitable concern in applying laches is whether a party has been harmed by the delay. *Id.* at 153.

Waiver is a valid basis for the denial of a motion to disqualify. *See Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099, 1115 (D.N.J. 1993); *see also Commonwealth Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200 (E.D. Pa. 1992) (holding that "a finding of waiver is justified...when a former client was concededly aware of the former attorney's representation of an

adversary but failed to raise an objection promptly when he had the opportunity"). "In determining whether the moving party has waived its right to object to the opposing party's counsel, consideration must be given to (1) the length of the delay in bringing the motion to disqualify, (2) when the movant learned of the conflict, (3) whether the movant was represented by counsel during the delay, (4) why the delay occurred and (5) whether disqualification would result in prejudice to the non-moving party." *Alexander v. Primerica Holdings, Inc*., 822 F. Supp. at 1115; *see also Commonwealth Ins. v. Graphix Hot Line, Inc.,* 808 F. Supp. at 1208.

Here, pursuant to the doctrines of laches and waiver, the trial court should have denied Respondents' disqualification application at this late stage since Respondents inexcusably sat on their rights and took no action although they now claim prejudice will result. On May 17, 2023, Respondents requested AGA's complete file on the Longo matter. (201a). On May 31, 2023, AGA provided Respondents with the complete Longo file. (256a). Then, on July 2, 2024, ***over one year later***, after voluminous discovery was exchanged, and after arbitration and trial dates were set, Respondents suddenly filed the Disqualification Motion. (114a – 135a). This is a classic waiver.

If Respondents legitimately believed AGA's representation in the prior matters would prejudice them in this matter, they would not have delayed filing

the Disqualification Motion until after the matter had already been litigated for over a year, significant paper discovery had been exchanged, and arbitration and trial were scheduled. Respondents did not provide the trial court with a single reason why they delayed filing the Disqualification Motion until now or explain why they should be permitted to do so at this late stage, confirming the delay is unreasonable and is nothing more than an impermissible tactic which will result in severe prejudice to Appellants should the disqualification order be upheld. The trial court paid no mind to this utter lack of explanation.

Respondents decided to "ask for forgiveness" instead of "ask for permission." This is a disappointing misuse of the disqualification rules and the trial court should incorrectly failed to recognize that. *See Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218. Respondents knew they did not have authority to file the *in camera* Certification. (300a). Respondents did so only after it appeared this matter was set for trial and arbitration in order to delay these proceedings. *See Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. at 218.

Again, Appellants would be significantly prejudiced if the disqualification was upheld as Appellants would be forced at the eleventh hour to retain new counsel and get new counsel up to speed on a complex and voluminous file. Appellants' new counsel would need to duplicate many hours of work performed by AGA through discovery, of which there is a massive amount. It would be

significantly damaging to Appellants if they were now forced to replicate that substantial work resulting solely as a result of Respondents' unreasonable and unexplained delay. Appellants would be forced pay two sets of attorneys for essentially the same work. Had Respondents not strategically (and impermissibly) timed its bogus request, Appellants would not have been prejudiced.

Accordingly, for these reasons, the trial court erred in not applying the doctrine of laches and the Disqualification Order should be reversed.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court (i) overturn the Disqualification Order in the interest of justice and (ii) grant such other further relief as the Court deems just and proper

Respectfully submitted,

ANSELL GRIMM & AARON, P.C.

Dated: March 20, 2025

Anthony J. D'Artiglio, Esq.
Gabriel R. Blum, Esq.
Anthony Sango, Esq.

ATLAS SEPTIC INC. and ROBERT VAN SADERS Plaintiffs/Counterclaim Defendants v. PETER CHRISTOPHER GERHARD, II Defendant/Counterclaimant	SUPERIOR COURT OF NEW JERSEY DOCKET NO.: A-1112-24 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION
DYNAMIC SOLUTIONS GROUP Plaintiff v. ATLAS SEPTIC INC. and ROBERT VAN SADERS Defendants	DOCKET NO.: MON-C-51-23 and MON-L-2967-23 (Consolidated) CIVIL ACTION Sat Below: Hon. David A. Nitti, J.S.C.

MEMORANDUM OF LAW ON BEHALF OF RESPONDENTS ATLAS SEPTIC, INC. AND ROBERT VAN SADERS IN OPPOSITION TO APPEAL FILED ON BEHALF OF PETER CHRISTOPHER GERHARD AND DYNAMIC SOLUTIONS GROUP, INC.

John J. Novak, Esq.
THE LAW OFFICES OF
JOHN J. NOVAK, P.C.
3 Franklin Avenue
Toms River, NJ 08753
Tel: 732-505-4321
Attorney ID #: 018721989
Attorney for: Atlas Septic, Inc. and
Robert Van Saders

On the Brief:
Deborah A. Plaia, Esq.

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INDEX FOR APPENDIX
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[1] Respondents respectfully submit that an exception to Rule 2:6-1(a)(2) applies concerning the submission of trial court briefs. The briefs submitted regarding the Order to Show Cause are germane to the issues of Laches and Waiver argued by the Appellants. Without the briefs, the Appellate Division will have an incomplete record as Appellants did not bring to the Court's attention the Orders to Show Cause in the Procedural History or in their legal arguments. Accordingly, respondents have included the briefs in their Appendix as germane to the issues on appeal.

PRELIMINARY STATEMENT

Appellant's Case Information Statement states: "*On November 7, 2024, the Court entered an order disqualifying Ansell Grimm & Aaron, P.C. from representing Gerhard and Dynamic Solutions Group based on a certification filed by opposing counsel that was not provided for in-camera review for Ansell Grimm.*" Accordingly, the only issue appealed under the CIS is the propriety of granting disqualification based on the submission of the Van Saders supplemental certification for *in-camera* review, not on any other basis.[1]

The Court did not err in disqualifying Ansell, Grimm & Aaron. The Court found that Ansell Grimm's previous representation of Respondent Robert Van Saders involved a personal relationship. (T23:6-16; T25:20 to T26:1-17).[2] The Court recognized that the attorney-client privilege is within Van Saders' purview to assert. (T25:22-24). It also recognized that the information contained in the Certification signed by Van Saders met the criteria and warranted disqualification under 1.9. (T26:8-11). Accordingly, it was proper to disqualify AGA. (T26:8-11).

COUNTER STATEMENT OF PROCEDURAL HISTORY

Appellants' statement of the Procedural History fails to disclose the

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[1] The August 28, 2024 Certification of Robert Van Saders will be submitted for *in-camera* review.

[2] T represents the transcript from oral arguments of November 7, 2024.

complete procedural history including an Order To Show Cause filed when the Verified Complaint was filed on May 11, 2023, as follows:

I. COMPETING ORDERS TO SHOW CAUSE AND FIRST CERTIFICATION OF ROBERT VAN SADERS.

A. Respondents' Order to Show Cause and Verified Complaint.

The Complaint forming the basis of this litigation commenced with the filing of an Order to Show Cause (OTSC) and Verified Complaint on May 11, 2023 by Atlas Septic and Robert Van Saders (hereinafter, either "Atlas," "Van Saders" or collectively "Respondents") against Peter Gerhard under docket no. Mon-C-51-23. (Hereinafter, "Gerhard" or "Appellant"). As of May 11, 2023, Respondents were represented by the Lomurro Law Firm. The Verified Complaint filed on May 11, 2023, was an Eleven Count Complaint asserting, *inter alia*, claims of Misappropriation/Theft/Conversion against Appellant Gerhard and sought Injunctive Relief. The claims were based on allegations that Gerhard had misappropriated hundreds of thousands of dollars from Atlas and had caused Atlas to lose a very lucrative contract with Medford Township resulting in hundreds of thousands of dollars in damages. When Atlas determined that Gerhard was still using the name Atlas Septic, Respondents sought temporary restraints. The OTSC was signed and filed by the Court on May 12, 2023. (Pa1).

B. Order to Show Cause filed by Ansell Grimm & Aaron .

On May 30 2023, Ansell Grimm & Aaron (hereinafter, "Ansell") filed a competing OTSC on behalf of Peter Gerhard (hereinafter, "Gerhard" or "Appellant") seeking to vacate the OTSC signed on May 12, 2023. (Pa8; 1T21:4-5)[3].

C. The June 2023 Certification of Robert Van Saders and Objections to Representation of Appellants on the Basis of Conflict of Interest.

Respondents also fail to inform this Court that in response to the OTSC filed by the Ansell law firm on behalf of Gerhard, on June 1, 2023, Van Saders, then represented by Lomurro, Munson, LLC, filed Opposition to Gerhard's Motion to Vacate and a Cross Motion to Enforce Litigant's Rights. (Pa25). Importantly, that Brief attached a certification signed by Van Saders in which he certified that the Ansell law firm had previously represented Van Saders and Atlas. (Pa38-41; 1T21:6-9).[4] In his June 1, 2023 Certification, Van Saders also certified that the Ansell law firm had a conflict of interest because of that prior representation and

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[3] Atlas Septic and Robert Van Saders are plaintiffs/counterclaim defendants in the matter Atlas Septic and Robert Van Saders v. Gerhard. They are defendants in the matter Dynamic Solutions Group v. Atlas Septic and Robert Van Saders. For purposes of this motion, Atlas and Van Saders Appendix will be numbered as "Pa" for Plaintiff's Appendix.

[4] 1T represents the transcript from oral arguments of August 2, 2024.

that he did not waive any conflict of interest. (Pa39; 1T19:18). The Lomurro Law Firm also directed a letter to Ansell advising that they believed it had a conflict of interest pursuant to RPC 1.9 and that it had represented Van Saders in a "substantially related" matter. (Pa42). It concluded: "*Nothing in this letter shall constitute a waiver of my clients' legal rights regarding this conflict.*" (Pa42). The brief filed by the Lomurro law firm on behalf of Van Saders also included an argument that there was a conflict of interest. (Pa29-30).

The Show Cause hearings were adjourned over a period of several months as the parties were seeking mediation. Ultimately, the motions were never decided and were withdrawn in or about January 2024. As a result, the Certification and brief in which Van Saders brought to the trial court's attention that the Ansell law firm had a conflict of interest was never argued to the court.

D. Withdrawal by Lomurro Law Firm and Entry of Appearance by The Law Offices of John J. Novak, P.C.

On February 6, 2024, Respondents moved to consolidate. (Pa43). On March 1, 2024, the motion for consolidation was granted. (Pa45). On March 8, 2024, the Lomurro law firm moved to be relieved as counsel. (Pa47). That motion was granted on March 28, 2024. (Pa49). On April 30, 2024, John J. Novak, Esq. of The Law Offices of John J. Novak, P.C. entered his appearance on behalf of Atlas Septic and Robert Van Saders. (Pa52).

II. MOTION TO DISQUALIFY.

A. Oral Arguments on August 2, 2024 and Court's Request for Supplemental Briefs.

On July 2, 2024, slightly more than two months after entering his appearance, Respondents moved to disqualify Ansell on July 2, 2024 under RPC 1.9 and RPC 1.10. (102a). The first oral arguments were conducted on August 2, 2024. (1T). At the conclusion of oral arguments, the Court requested supplemental briefs on a specific issue. (1T45:21 to 1T47:1-7; See also, T21:18 to T22:1). Specifically, during oral arguments, Respondents argued, *inter alia*, that because Ansell had previously represented Van Saders and Atlas, they would know Van Saders attitude about and ability to litigate. (1T13:23 to 1T14:1-12; 1T18:6 to 1T19:1-8; 1T30:2-16). Ansell would know if Van Saders was of the mind-set to settle and the reasons why. The Court agreed with Respondents and stated that his litigation strategy, settlement posture, ability – financial ability to pay are all things recognized as matters to be considered when determining disqualification. (1T30:7-11). Appellants raised the argument that the afore-mentioned had not been argued in Respondents' moving papers. (1T30:20-25). Thereafter, the Court afforded Appellants and Respondents the opportunity to serve supplemental briefs addressing those specific issues. (1T45:21 to 1T47:1-7).

B. Supplemental Briefs.

1. Respondent's Brief.

On August 29, 2024, Respondent submitted its Supplemental Brief. (294a). Respondents cited O Builders & Associates Inc. v. Yuna Corp., 206 N.J. 109 (2011) and informed the Court that they were submitting a supplemental Certification signed by Van Saders which they asked that the Court review *in-camera*. (297a-301a).

2. Appellant's Brief.

Following submission of Respondents' Supplemental Brief, Ansell directed a letter to the Court objecting to the *in-camera* review of Van Saders' Certification. (Pa53). Appellants did not raise due process or the Fourteenth Amendment in that letter. Atlas/Van Saders responded to Appellants' objections on that same day. (Pa56)

On September 30, 2024, Appellant filed its Supplemental brief. (324a). Appellant's brief objected to the *in-camera* review, but never raised due process or the Fourteenth Amendment as a basis for not permitting *in-camera* review. (324a). Legal Argument I raised the issue: "Atlas Failed to demonstrate That an *In-Camera* Review is Warranted." (324a-330a).

D. Oral Arguments of November 7, 2024 and Court's Decision.

Oral arguments on the Supplemental Briefs were conducted on November 7,

2024 at which time the court differentiated between the representation of Atlas and the representation of Van Saders, individually. (T20:25 to T21:1-3 and T23:6-16; T25:20 to T26:1-17). The court found that the dispute involving Atlas in the prior litigation was nothing more than a business dispute. (T20:25 to T21:1-3). The Court found, however, that the representation of Van Saders was different, it involved a personal relationship. (T23:6-16; T25:20 to T26:1-17). The Court recognized that the attorney-client privilege is within Van Saders' purview to assert. (T25:22-24). It also recognized that the information contained in the Certification met the criteria and warranted disqualification under 1.9. (T26:8-11). Accordingly, it was proper to disqualify AGA. (T26:8-11).

III. Status of Discovery.

Discovery of this matter is still ongoing. The first Management Order was entered on February 7, 2024. (Pa59). On May 21, 2024, the second Case Management order was entered. (Pa60). That management order provided for supplemental Interrogatories and Requests for Documents to be served to be served by no later than July 1, 2024. (Pa60). On July 18, 2024, a third Management Order was filed amending the dates for paper discovery to be answered. (Pa61). As of July 18, 2024, paper discovery was to be answered by August 15, 2024. (Pa62). The motion to disqualify was filed on July 2, 2024, which was before paper discovery was even completed.

Paper discovery was not completed. Depositions were not completed. Depositions of fact witnesses were to be completed in November 13, 2024. (Pa62). Service of expert's reports was due on or before December 30, 2024. (Pa62). Rebuttal reports were not due until February 7, 2025 and expert depositions were to be completed by March 1, 2025. (Pa62). The discovery end date was March 1, 2025. (Pa62). Arbitration was scheduled for March 12, 2025 and trial was May 19, 2025. (Pa62). As of July 2, 2024, when the motion was filed trial was still 10 months away.

In December 2024, Appellants filed a motion to stay discovery which was granted. (344a). Accordingly, there is no prejudice to the Respondents and there is no basis for Respondents' claim that the filing of the motion was tactical. Indeed, Respondents fail to provide any support for their claim that the filing of the motion was tactical.

COUNTERSTATEMENT OF FACTS

Gerhard misappropriated approximately $600,000 from Atlas Septic and caused Atlas Septic to lose a very lucrative contract with Medford Township resulting in approximately an additional $400,000 in damages. Gerhard was the future son-in-law of Respondent Robert Van Saders. In March 2022, Gerhard approached Van Saders about expanding Atlas' business to include removal of sludge from municipal septic systems. (3a). Thereafter, Van Saders and Gerhard

entered into an oral agreement whereby Gerhard agreed to expand Atlas' business in exchange for a percentage of the net profits with Gerhard acting as an independent contractor. (3a). In furtherance of that endeavor, Atlas opened a bank account at Chase bank for the deposit of monies from this municipal work and for payment of the costs associated with this part of Atlas' business. (3a). Gerhard was a signatory to this account. (3a). It was his sole responsibility to deposit all revenue generated from the municipal contracts, to pay all employees of Atlas who were working on these municipal contracts, to pay all accounts receivable and to balance the accounts every month. (3a).

In May 2022, Atlas was awarded its first municipal contract for the removal of sludge with the town of Medford, NJ. (4a). Gerhard was obligated to pay all costs associated with this subset of Atlas' business. (4a). Rather than paying the costs associated with the sludge removal, defendant withdrew the money from Atlas' Chase account for his own individual purposes which included, but was not limited to, paying hundreds of thousands of dollars to his business associate Eric Reid and financing his own personal vehicle through the Chase business account. (4a). Not only did Gerhard misappropriate several hundreds of thousands of dollars from the business account for his own personal use, he failed to pay business expenses. (5a). Gerhard's actions also resulted in the cancellation of a lucrative contract with Medford Township which caused further loss of hundreds of

thousands of dollars. (17a). Atlas and Gerhard's business relationship ended in or about April 2023. In May 2023, Atlas filed its OTSC and Verified Complaint.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Ansell, Grimm & Aaron are disqualified from representing a party adverse to Atlas Septic and Robert Van Saders where Ansell, Grimm & Aaron previously represented Robert Van Saders, Individually and Van Saders objected to the subsequent representation. A trial court's "determination of whether counsel should be disqualified is, as an issue of law, City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010), citing, J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 348 N.J.Super. 216, 222 (App. Div. 2006). When reviewing such a determination, we must "'balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel.'" Id. at 462, quoting, Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988). As part of the balancing process, we recognize "'a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" Ibid, quoting Dewey, supra, 109 N.J. at 218. Therefore, "'[*i*]*f there be any doubt as to the propriety of an attorney's representation of a client, such doubt must be resolved in favor of disqualification.*'" Herbert v. Haytaian, 292 N.J.Super. 426,

438-39 (App. Div. 1996) (alterations in original) (citation omitted).

Ansell, Grimm & Aaron previously represented Atlas Septic in the matter *Lortech, Inc. Construction Engineering v. Atlas Septic*, filed under docket no. MON-L-536-20. (Pa63) and in the Complaint against Lortech's principal entitled *Robert Van Saders v. William Longo and Atlas Waste Management* filed under docket no. MON-L-967-20. (Pa66-74). Notably, the Answer filed in the Lortech Case and the Complaint filed in the Longo matter both have Certifications signed by counsel from Ansell Grimm pursuant to R. 4:5-1 certifying the matters as being "related." (Pa65 and Pa74).

Parenthetically, inexplicably, Appellants continue to misrepresent Respondents' argument and incorrectly state that Respondents argued that the Rodriguez matter was substantially related. At page 16 of their brief, Respondents cited the Rodriguez case as another case in which Ansell represented Atlas. (Db16). However, Respondents never argued that the matters were substantially related. (125a-126a; See also, 1T8:4-21). When Respondents brought to the Court's attention the inaccuracy of Appellants' arguments on August 2, 2024, the Court acknowledged that it had seen that in Respondents' brief and agreed that Respondents were not arguing the Rodriguez case was substantially related. (1T8:22-24).

Respondents respectfully request that the Court take notice that on June 1,

2023, a mere 2 days after the Ansell law firm filed an OTSC on behalf of Gerhard, Van Saders filed a Certification in which he expressly stated: "I have indicated to the Ansell firm that I do not waive any conflict." (Pa38; 1T19:18). He further stated: "*Nor has the Ansell firm provided any response to my claim that there is an unwaivable conflict of interest.*" (Pa40).

It is interesting to note and Respondents respectfully request that the Court also take notice that nowhere in their brief do Appellants even mention the fact that Robert Van Saders signed his first Certification two (2) days after Ansell Grimm & Aaron entered their appearance. Indeed, since the commencement of this action, Ansell, Grimm & Aaron have not addressed the Certification and continue to assert the fallacious claim that Van Saders waived any conflict by an alleged delay.

In disqualifying the Ansell law firm, the court differentiated between the Ansell's representation of a corporate entity, i.e., Atlas and the representation of Robert Van Saders, an individual, in the prior litigation. The Court viewed the dispute in the Lortech/Longo matter and in the Atlas/Gerhard/DSG matters as merely business disputes, stating that "there was nothing else so similar about them as to distinguish their relevance." (T21:10-14). The Court viewed the representation, though, of Robert Van Saders very differently. The Court was concerned about the representation of Robert Van Saders in his individual capacity in the Lortech/Longo matter. It cited to RPC 1.9(a) and (c). (T22:5 to T23:1-5).

The Court stated:

> Here, the Ansell firm represented not only Atlas Septic but, "***IMPORTANTLY TO THE COURT***," Robert Van Saders individually in the Longo matter. They're asserting direct claims against him as an individual in the case – in the present case by way of a counterclaim. This is a more personal relationship that which might exist in other corporate litigation and is one of the facts that the Court considers when determining the potential for implications of RPC 1.9 not only (a), but part (c). In this regard, Robert Van Saders provided a four-page certification, along with counsel's submission of August 29, 2024, which shall be marked as C-1 for identification. [emphasis added].

(T23:6-20).

The Court continued:

> I will say that certification expressed significant concern on the part of Robert Van Saders regarding how his personal and financial information which he claimed was provided to Ansell's office and which he claims materially affected and would continue to materially affect the decision-making process vis-à-vis the management and resolution of litigation in which he is involved and how it could be used to his detriment in the current litigation where, again, he is an individual defendant by way of a counterclaim.

(T24:4-13).

The Court found that the information contained in the certification and which Van Saders represented had been given to the Ansell law firm is subject to attorney-client privilege. (T25:20 to T26:1-17). The Court found that the information in the Certification "is intrinsic to the handling of any litigation to which, in this instance, Mr. Van Saders may be involved." (T26:14). The Court

also considered that the attorney-client privilege belongs to Van Saders and it is his privilege to waive. (T25:22 to T26:1-8). The Court also stated that it would consider and give deference to the representations of Van Saders. (T25:20).

Under the circumstances of this case, RPC 1.9 precludes Ansell, Grimm & Aaron from representing Peter Christopher Gerhard, II and Dynamic Solutions Group in a case adverse to Atlas Septic and Robert Van Saders. R. 1.10 imputes conflicts of interests to all lawyers employed by that law firm and states:

> RPC 1.10 Imputation of Conflicts of Interest: General Rule
>
> (a) ***When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9,*** unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
> [emphasis added].
>
> RPC 1.10.

II. THE COURT DID NOT ERR IN DISQUALIFYING ANSELL, GRIMM & AARON.

A. Respondents Met the Requirements for Disclosure of Confidential Information.

Respondents have met the requirements for disclosure of confidential information. A client's financial information and attitudes about litigation and settlement are confidential and grounds for disqualification. The trial court

recognized that a client's attitudes about litigation and settlement are grounds for disqualification. (1T30:5).

An attorney's knowledge of a former client's financial information which can be used in a subsequent lawsuit to the detriment of the former client is grounds for disqualification. "[N]o amount of discovery would be likely to uncover such useful information as the strengths and weaknesses of [a] corporate client's decision-makers or their attitude towards settlement." See Reardon v. Marlayne, 83 N.J. 460, 476, 476 (1980). Similarly, in an unpublished opinion, Delaney v. Dykstra, A-1953-19T1 (App.Div. Jul. 9, 2020) (309a), the Appellate Division upheld the trial's finding that Brach Eichler's ***knowledge of its former client's financial information was grounds for disqualification***. Id. at *5-*7. (311a to 312a). While the court in Delaney did not remove Brach Eichler due to plaintiff's delay of ***several years*** to move for disqualification. The Appellate Division affirmed the trial court which had found a conflict and stated:

> Analyzing RPC 1.9(b), the court held Kasolas and Brach Eichler "were privy to confidential information from . . . Delaney" and that Kasolas "***certainly has some insights into [Delaney's] personality, thinking, [and] how he approaches particular decisions whether it be in litigation, business, etc.***" determined Kasolas and Brach Eichler should be disqualified because they represented Delaney regarding CCH matters during the events giving rise to Delaney's current suit.

Id. at *5. (311a).

In the subject case, during oral arguments on August 2, 2024, Respondent

argued, *inter alia*, that Ansell had previously represented Van Saders and Atlas would know whether or not Van Saders was or was not able to litigate the subject lawsuit. (1T18:15-19). Ansell would know if Van Saders was of the mind-set to settle and the reasons why. (1T18:15-19).

The Court agreed with Respondents and stated that:

> You're making the technical argument, which I would expect and I agree with and I understand fully. The metamorphous argument is litigation strategy, settlement posture, ability – financial ability to pay. They're all things that have been recognized by the court as a potential basis for exclusion. (1T30:5-11).

At the conclusion of oral arguments, the Court gave the parties the opportunity to submit Supplemental briefs and stated:

> THE COURT: As defense counsel has correctly pointed out, the issues that you have raised here, specifically with regard to litigation tactics, ability to settle, compromising your client's ability to represent – or prosecute their case efficiently and properly because of knowledge that may be held by the Ansell firm was not raised in the papers, admittedly, right and counsel did not have an opportunity to refute that or in any way combat that, and Mr. Shapiro is not here. (1T45:23 to 1T46:1-6).

On August 29, 2024, Respondents submitted a supplemental brief which addressed the issues raised at oral arguments on August 2, 2024. (301a). Respondents also submitted a supplemental Certification signed by Van Saders for *in-camera* review. Following submission of Respondents' Supplemental Brief, Ansell directed a letter to the Court objecting to the *in-camera* review of Van Saders' Certification. (Pa53). Although Appellant objected to the *in-camera*

review, Appellant did not request the opportunity to be heard nor did Appellant file a motion asking to be heard on the matter. Ansell filed its supplemental brief on September 30, 2024 with a Certification signed by Lawrence Shapiro, Esq. (338a). Mr. Shapiro's Certification addressed the issue of knowledge of Van Sader's attitude about settlement or litigation.

At the conclusion of oral arguments on November 7, 2024, the court found that based on Van Saders' Certification, Respondents had met their burden. The court took notice of the fact that the Ansell law firm represented not only Atlas Septic, but more importantly to the Court, it had represented Robert Van Saders, Individually. (T23:6-8). The Court stated that the representation of Van Saders was a "more personal relationship than that which might exist in other corporate litigation and is one of the facts that the Court considers when determining the potential for implications of RPC 1.9 not only (a), but part (c)." (T23:12-16). The court also noted that the attorney-client privilege is within the purview of Van Saders to assert. (T25:20-24). It also found that the information contained in the Certification met the requirements warranting disqualification under 1.9. (T26:1-11).

B. Disqualification of Ansell Grimm & Aaron Is Proper.

The Court's decision to disqualify Ansell was not based solely on RPC

1.9(c) as represented by Appellants. The Court considered RPC 1.9(a) and (c) stating:

> RPC 1.9 is the focus of the inquiry here. There are multiple parts to 1.9 that the Court can point to. The focus primarily has been 1.9(a),
>
> > A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent.'
>
> And there is part (b), but there is also part (c). Part (c) reads,
>
> > A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter; (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known.
>
> (T22:5 to T23:1-5).

As previously stated, the court took notice of the fact that the Ansell law firm represented not only Atlas Septic, but more importantly to the Court, it had represented Robert Van Saders, Individually which the court considered to be a "more personal relationship" when considering RPC 1.9 (a) and (c). (T23:6-16). The court also noted that the attorney-client privilege is within the purview of Van Saders to assert. (T25:20-24). It also found that the information contained in the Certification met the requirements warranting disqualification under 1.9. (T26:1-

11). The Court concluded that Rule 1.10 operates to disqualify the firm if Mr. Shapiro's knowledge would disqualify him. (T26:22-23).

Thus, the court performed the proper analysis it is required to perform and determined that under RPC 1.9(a), RPC 1.9(c) and RPC 1.10, disqualification was proper.

Further, Courts are permitted to make decisions on other grounds. See Cf. Shark River Cleanup Coalition v. Twp. Of Wall, 47 4th 126, 136 (3d Cir. 2022), quoting Panzarella v. Navient Sols, Inc., 37 F.4th 867, 872 (3d Cir. 2022) and stating: "Courts may affirm on any basis supported by the record." See also, Reyes v. Egner, 404 N.J.Super. 433 (App.Div.), certif. granted on other grounds, 199 N.J. 130 (2009) (Granting Certification to the realtor on the issue of the realtor's duty owed in a short term rental and not considering the Appellate Court's determination that a duty was owed by the landlord to disclose known latent defects to a tenant in a short term rental).

In Shark River, the District Court found that Plaintiff's notice of an alleged violation of the Clean Water Act was defective. In affirming the District Court *on an alternative basis*, the court stated:

> Although the Notice was sufficient to permit Defendants to locate the site of the alleged violation, it was defective in another, key respect. It did not 'provide enough information to enable the recipient, i.e., [Defendants], to identify the specific effluent discharge limitation which has been violated, including the parameter violated[.]'

> Hercules, 50 F.3d at 1348 ("We read the regulation to require just what it says[.]"). Thus, *WE WILL AFFIRM THE DISMISSAL OF THE CLEANUP COALITION'S CITIZEN SUIT ON THIS ALTERNATIVE GROUND – ALTHOUGH IT WAS NOT REACHED BY THE DISTRICT COURT.* Panzarella v. Navient Sols, Inc., 37 F.4th 867, 872 (3d Cir. 2022) ("We may affirm on any basis supported by the record[.] [emphasis added].

Shark River Cleanup Coalition, supra, 47 4th at 136.

The record here reflected a sufficient basis to disqualify. RPC 1.9 was argued. Indeed, it formed the basis of the motion to disqualify. RPC 1.9 encompasses paragraphs (a) through (c). Further, even though Appellants conveniently chose to ignore the Certification signed by Robert Van Saders on June 1, 2023 and conveniently chose not to include it in this appeal, the Certification was argued below and considered by the Court in its decision to disqualify. In that Certification, Van Saders stated that there was a conflict of interest which he did not waive. (Pa39; 1T19:18). It is axiomatic that only the client can waive a conflict of interest.

Courts have the authority to make decisions on other grounds. The Court did not err where the record reflects that Respondents argued RPC 1.9 and raised the issue of Conflict of Interest as certified by Van Saders in his June 1, 2023 Certification.

C. The Court Did Not Err in Permitting an *In-Camera* Review of the Supplemental Certification of Robert Van Saders.

The Court was correct in permitting an *in-camera* review of the Certification of Robert Van Saders. As previously discussed above, initial oral arguments were heard on August 2, 2024. At that time, Respondents moved to disqualify AGA on July 2, 2024 under RPC 1.9 and RPC 1.10. The first oral arguments were conducted on August 2, 2024. At the start of oral arguments, counsel for Respondents placed a statement on the record wherein counsel requested the opportunity to submit a supplemental certification. (1T5:18-25 to 1T6:1-21). At oral arguments in August, the Court was not inclined to have supplemental briefs or certifications submitted and indicated that it would consider only the papers that were submitted on that day, i.e. August 2, 2024. (1T7:16-17).

Thereafter, at the conclusion of oral arguments, the Court requested supplemental briefs on a specific issue when Appellants raised the argument that an issue was raised during oral arguments that was not made in the briefs. (1T30:20-25).

During oral arguments, Respondent argued, *inter alia*, that Ansell had previously represented Van Saders and Atlas would know whether or not Van Saders was or was not able to litigate the subject lawsuit. (1T18:15-19). Ansell could know if Van Saders was of the mind-set to settle and the reasons why.

(1T18:15-19). The Court agreed with Respondents and stated that the technical argument were matters which it agreed and fully understood and were "all things that have been recognized by the court as a potential basis for exclusion." (1T30:5-11).

Appellant argued that the afore-mentioned had not been argued in Respondent's moving papers. (1T30:20-25). As a result of Appellant's objection, the Court afforded Appellants and Respondents the opportunity to serve supplemental briefs addressing those specific issues. (1T45:21 to 1T46:16-18). Respondents' brief was filed on August 29, 2024.

In their supplemental Brief, Respondents cited O Builders, supra and informed the Court that they were submitting a supplemental Certification signed by Van Saders which they asked that the Court review *in-camera*. (297a-301a). O Builders permits the submission of a Certification for *in-camera* review. Id. at 129. The Certification which is the subject of this Appeal has been submitted for *in-camera* review by the Appellate Court.

Following submission of Respondents' Supplemental Brief, Ansell directed a letter to the Court objecting to the *in-camera* review of Van Saders' Certification. (Pa53). Although Appellant objected to the *in-camera* review, Appellant did not request the opportunity to be heard nor did Appellant file a motion asking to be heard on the matter. Respondent directed a letter to the Court responding to

Appellant's letter objecting to the *in-camera* review. (Pa56). In that letter, Respondent cited O Builders and stated that under O Builders if Appellant continued in its insistence to see the Certification, then "an appropriate screening device would be to engage substitute counsel to oppose the disqualification motion." (Pa56), See also, O Builders, supra, 206 N.J. at 129.

On November 7, 2024, at the start of oral arguments, the Court stated that it had reviewed the caselaw on the submission of Van Saders' Certification for *in-camera* review and found the submission to be appropriate and in conformity with O Builders. (T4:9-25).

At oral arguments, Appellant argued that "There could be at least a disclosure of the categories of information, for instance, right, Your Honor." (T8:14-16). In response, Respondent stated: "We – you know, we had given them general categories and the Court, in fact, also gave them general categories as to what the Court wanted to address. Litigation strategies, settlement conferences, their ability to pay." (T14:2-8). There is no question Appellant was given the categories of information to be addressed in the Supplemental brief. Respondents identified the categories at oral arguments in August. (1T13:23 to 1T14:1-12; 1T18:6-25). The Court identified the categories in August. (1T19:1-8; 1T30:2-16). When ordering supplemental briefs, the Court identified the categories. (1T45:21 to 1T46:1-6).

During the August 2, 2024 oral arguments, as previously stated, the Court stated, on the record:

> You're making the technical argument, which I would expect and I agree with and I understand fully. The metamorphous argument is litigation strategy, settlement posture, ability – financial ability to pay. They're all things that have been recognized by the court as a potential basis for exclusion.
>
> (1T30:5-11).

At the conclusion of oral arguments, the Court gave the parties the opportunity to submit Supplemental briefs and stated:

> THE COURT: As defense counsel has correctly pointed out, the issues that you have raised here, specifically with regard to litigation tactics, ability to settle, compromising your client's ability to represent – or prosecute their case efficiently and properly because of knowledge that may be held by the Ansell firm was not raised in the papers, admittedly, right and counsel did not have an opportunity to refute that or in any way combat that, and Mr. Shapiro is not here.
>
> (1T45:23 to 1T46:1-6).

In their Reply Brief, Respondent again raised the issue stating: "A client's financial information and attitudes about litigation and settlement are confidential and grounds for disqualification." (301a). Appellant clearly knew to address the issue as Robert Shapiro, Esq. submitted a Certification wherein he stated: "20. Atlas' claim that AGA is privy to RVS' 'attitude' toward settlement or litigation based on the prior representation is also materially false." (340a; See also T14:13-19).

Thus, the Court did not err in permitting an *in-camera* review. Moreover, when Respondents submitted the Certification for *in-camera* review, Appellants did object by letter. They did not request an opportunity to be heard nor did they file a motion. The Court did review O Builders and concluded that *in-camera* review was appropriate. (T4:13-25).

D. Respondents Demonstrated How the Information Could Be Used Against Van Saders.

Respondents met their burden of demonstrating how the information could be used. There is no requirement that confidential information received in a prior representation actually be used. The Supreme Court only requires that confidential information was received by counsel and that such material "can be," "could be" or "might be" used against a former client. Trupos, supra, 201 N.J. at 467-469; See also, Dewey, supra, 109 N.J. at 222-223, stating: disqualification required without regard to whether there has been an actual sharing of client confidences.

The Court reviewed the representations made by Van Saders in his Certification. The Court expressed the concern that the information contained in that Certification would be used against Van Saders in the subject lawsuit. The Court stated that it does not need to sit and hope that such a violation will not occur when the potential for a violation is there.

> In disqualifying the Ansell law firm, the Court stated that "concerns of potential disadvantage, when raised

> by a former client, need to be evaluated and if the Court does – the Court does not need to sit and hope that such violation does not occur when the potential for same seems clear. (T25:4-9).

The Court relied upon the fact that there exists in every attorney-client relationship, an attorney-client privilege that the client can assert and can only be waived by the client. (T25:20-T26:8). The Court expressed the concern that the information contained in the Certification was "intrinsic to the handling of any litigation to which, in this instance, Mr. Van Saders may be involved. As such, there is no way to avoid potential disadvantage he might suffer in the pending litigation." (T26:15-19). The Court was satisfied that Van Saders had demonstrated how the information could be used.

III. APPELLANTS DID NOT RAISE THE ISSUE OF DUE PROCESS OR ANY DENIAL OF CONSTITUTIONAL RIGHTS ISSUES BELOW.

A. Claims of Denial of Due Process Should Not be Considered.

Appellants did not raise any arguments of a denial of due process at the court below. It is a well-established principle that our appellate courts will not consider questions not properly presented to the trial court when an opportunity for such presentation was available, unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234-35 (1973); Krieger v. Jersey City, 27 N.J. 535 (1958); Howard v. Mayor and Bd. of Finance of City of Paterson, 6 N.J.

373 (1951); Morin v. Becker, 6 N.J. 457 (1951); State ex rel. Wm. Eckelmann, Inc., v. Jones, 4 N.J. 207 (1950), rehearing denied 4 N.J. 374 (1950). Here, Appellants raise, for the first time on appeal, the issue of denial of due process and claims under the Fourteenth Amendment of the United States Constitution and the First Article of the New Jersey Constitution. Appellants' arguments should be rejected where the issues were never raised below.

Not only did Appellants not argue due process or any denial of any Constitutional rights below, Appellants never filed any motions on that issue. Appellants did submit a letter to the Court objecting to the submission for *in-camera* review of the Certification. (Pa53). Appellants also included an argument in their brief objecting to the *in-camera* review. (Db328a-330a) However, Appellants never raised the issue of due process or the fourteenth Amendment.

It should be noted that Respondents relied upon O Builders in submitting the Certification for *in-camera* review. Notably, nowhere in Appellant's brief do they address O Builders.

B. The Court Did not Err in Permitting *In-Camera* Review.

The Court was correct in permitting an *in-camera* review of the Certification of Robert Van Saders. The Supreme Court has clearly and decisively articulated that a Certification can be submitted for *in-camera* review and stated:

> [A] movant seeking disqualification of opposing counsel always is presented with a Hobson's choice in respect of the disclosure of confidential information. In those instances where the disclosure of confidential information must be made so that the court can grapple fairly with the issues, the parties may protect the confidentiality of their information by, among other means, requesting that the record be subject to a protective order, *see R.* 3:13-3(f) criminal); *R.* 4:10-3 (civil), and the movant may further request that the application be considered *in-camera. See generally* Pressler Verniero, *supra*, comments 2.2 and 2.3 to *R.* 1:2-1. Furthermore, in those instances, as the one presented in this appeal, where the lawyer whose disqualification is sought denies ever receiving the claimed confidential information, an appropriate screening device would be to engage substitute counsel to oppose the disqualification motion.

O Builders, supra, 206 N.J. at 129.

Here, the Court reviewed O Builders and concluded that submission of the Certification by *in-camera* review was permitted.

1. The August 2, 2024 Oral Arguments.

Oral arguments were first conducted on August 2, 2024. At oral arguments in August, the Court was not inclined to have supplemental briefs or certifications submitted and indicated that it would consider only the papers that were submitted. (1T7:16-17). Thereafter, at the conclusion of oral arguments, the Court requested supplemental briefs on a specific issue. During oral arguments, Respondent argued, *inter alia*, that Ansell had previously represented Van Saders and Atlas would know whether or not Van Saders was or was not able to litigate the subject lawsuit. (1T18:15-19). Ansell could know if Van Saders was of the mind-

set to settle and the reasons why. (1T18:15-19). The Court agreed with Respondents and stated that the technical argument were matters which it agreed and fully understood and were "all things that have been recognized by the court as a potential basis for exclusion." (1T30:5-11).

Appellant raised the argument that the afore-mentioned had not been argued in Respondent's moving papers. (1T30:20-25). Thereafter, the Court afforded Appellants and Respondents the opportunity to serve supplemental briefs addressing those specific issues. (1T45:21 to 1T46:16-18).

2. The Supplemental Briefs.

Respondents' brief was filed on August 29, 2024. In their supplemental Brief, Respondents cited O Builders, supra, and informed the Court that they were submitting a supplemental Certification signed by Van Saders which they asked that the Court review *in-camera*. (297a-301a). O Builders permits the submission of a Certification for *in- camera* review. Id. at 129.

As previously argued, Following submission of Respondents' Supplemental Brief, Ansell directed a letter to the Court objecting to the *in-camera* review of Van Saders' Certification. (Pa53). Although Appellant objected to the *in-camera* review, Appellant did not request the opportunity to be heard nor did Appellant file a motion asking to be heard on the matter. Respondent directed a letter to the Court responding to Appellant's letter objecting to the *in-camera* review. (Pa56).

In that letter, Respondent cited O Builders and stated that under O Builders if Appellant continued in its insistence to see the Certification, then "an appropriate screening device would be to engage substitute counsel to oppose the disqualification motion." (Pa56), See also, O Builders, supra, 206 N.J. at 129. Nowhere in their letter did Appellant raise any due process or Constitutional issues.

On September 30, 2024, Appellant filed its Supplemental brief. Legal Argument I raised the issue: "Atlas Failed to demonstrate That an *In-Camera* Review is Warranted." (Da324-330). Appellant argued: 1. The court had previously rejected the request for *in-camera* review; 2. *In-camera* review renders it impossible for Appellant to rebut Respondent's contentions; and, 3. Respondents could have sought a protective order.

3. The November 7, 2024 Oral Arguments.

On November 7, 2024, at the start of oral arguments, the Court stated that it had reviewed the caselaw on the submission of Van Saders' Certification for *in-camera* review and found the submission to be appropriate and in conformity with O Builders. (T4:9-25).

At oral arguments, Appellant argued that "There could be at least a disclosure of the categories of information, for instance, right, Your Honor." (T8:14-16). In response, Respondent stated: "We – you know, we had given them general categories and the Court, in fact, also gave them general categories as to

what the Court wanted to address. Litigation strategies, settlement conferences, their ability to pay." (T14:2-8). There is no question Appellant was given the categories of information to be addressed in the Supplemental brief. Respondents identified the categories at oral arguments in August. (1T13:23 to 1T14:1-12; 1T18:6-25). The Court identified the categories in August). (1T19:1-8; 1T30:2-16). When ordering supplemental briefs, the Court identified the categories. (1T45:21 to 1T46:1-6).

During the August 2, 2024 oral arguments, as previously stated, the Court stated, on the record:

> You're making the technical argument, which I would expect and I agree with and I understand fully. The metamorphous argument is litigation strategy, settlement posture, ability – financial ability to pay. They're all things that have been recognized by the court as a potential basis for exclusion.
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At the conclusion of oral arguments, the Court gave the parties the opportunity to submit Supplemental briefs and stated:

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> (1T45:23 to 1T46:1-6).

In their Reply Brief, Respondent again raised the issue stating: "A client's financial information and attitudes about litigation and settlement are confidential and grounds for disqualification. (301a). Appellant clearly knew to address the issue as Robert Shapiro, Esq. submitted a Certification wherein he stated: "20. Atlas' claim that AGA is privy to RVS' 'attitude' toward settlement or litigation based on the prior representation is also materially false." (340a; See also T14:13-19).

Thus, the Court did not err in permitting an *in-camera* review. Moreover, when Respondents submitted the Certification for *in-camera* review, Appellants did object by letter and included an objection in their supplemental brief. They did not file a motion seeking to bar submission of the Certification for *in-camera* review. The Court did review O Builders and concluded that *in-camera* review was appropriate. (T4:13-25). Most significantly, now Appellants argue, for the first time, that *in-camera* review of the Certification was a denial of due process. Arguments raised for the first time on appeal should not be given any consideration.

IV. RESPONDENTS WERE NOT DILATORY IN MOVING TO DISQUALIFY AND THE DOCTRINES OF LACHES AND WAIVER DO NOT APPLY.

In the subject case, the issue of a conflict of interest was timely raised on

June 1, 2023. (See, 1T19:16 to 1T21:1-25; See also, 271a-278a). On November 7, 2024, the Court stated that "the Court finds no prejudice" based on "the posture of the case vis-à-vis discovery." (T31:14). Indeed, there is no prejudice to the Appellants.

A. Laches.

The doctrine of laches does not apply. Ansell cites Knorr v. Smeal, 178 N.J. 169 (2003), for the proposition that the doctrine of laches and waiver are applicable. Ansell's reliance on laches and waiver are misplaced. In Knorr, the Supreme Court equitably estopped a defendant from raising as a defense the Affidavit of Merit statute where the defendant failed to move to dismiss for failure to file an Affidavit of Merit. Instead, the defendant engaged in discovery and waited until the end of the discovery period to move to dismiss. The court found that the defendant had actively used the discovery process which the plaintiffs relied upon to their detriment. Id. at 178.

The Court in Knorr also discussed the doctrines of laches and waiver. "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in a proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. The key factors to consider are the length of the delay, the reasons for the delay, and the changing circumstances of either or both parties during the delay." Knorr, supra, citing, Lavin v. Bd. of Educ.,

90 N.J. 145, 152 (1982). "The core equitable concern in applying laches is whether a party has been harmed by the delay. Ibid. In Knorr, supra, the Supreme Court found that defendant had slept on its rights and that plaintiffs were harmed by the delay. Ibid.

Here the doctrine of laches does not apply. In Knorr, extensive discovery had been engaged in. Here, there has not been extensive discovery. Indeed, the parties are still conducting paper discovery. Moreover, the procedural history of this case reveals that Atlas and Van Saders raised the issue of conflict almost immediately.

B. Waiver and Delay are Not Applicable.

Appellant's reliance on Alexander v. Primerica Holdings, Inc., 822 F.Supp. 1099 (D.N.J. 1993) in arguing that Respondent waived its right to move to disqualify is also misplaced. The court in Alexander found that "[a]fter three years of delay and silence by Plaintiffs, and three years of reliance by Primerica, it would be unfair and incurably prejudicial." Id. at 1118. The Court based its denial on the length of the 3 year delay in moving to disqualify and the fact that trial was scheduled in 4 months.

In the subject case, the issue of a conflict of interest was timely raised. (1T19:16 to 1T21:1-25; See also, 271a-278a). Atlas and Van Saders filed their OTSC on May 11, 2023. At that time, Respondents were represented by different

counsel. In May 2023, Respondents were being represented by the Lomurro Law Firm.

On May 30, 2023, Ansell filed their own OTSC to vacate the Order of May 12, 2023. (Pa8). A mere two days later, June 1, 2023, Mr. Van Saders, himself, signed a Certification which was included in the Opposition Brief and decisively, clearly and unambiguously stated that he did not waive the conflict of interest. (Pa38). As previously stated, the OTSC's were adjourned on multiple occasions and never decided by the Court. Indeed, the competing Orders to Show Cause were ultimately withdrawn by counsel on January 23, 2024 in favor of consolidating the cases. (Pa43-46). On March 8, 2024, the Lomurro law firm moved to be relieved as counsel. (Pa47). On March 28, 2024, that motion was granted. (Pa49). Thus, there was no untimely delay in raising the issue of conflict of interest.

Following the grant of the motion relieving the Lomurro Law Firm as counsel, The Law Offices of John J. Novak, P.C. entered its appearance on April 30, 2024. (Pa52). The motion to disqualify was filed on July 2, 2024. At that point, the parties were still engaged in paper discovery only. The first management order was filed on February 7, 2024. (Pa59). On May 21, 2024, the second case management order was filed. (Pa60). That management order provided for supplemental Interrogatories and Requests for Documents to be served by July 1,

2024. (Pa60). On July 18, 2024, an amended management order was filed extending the date for answering paper discovery. (Pa61). As of July 18, 2024, paper discovery was to be answered by August 15, 2024. (Pa62). The motion to disqualify was filed on July 2, 2024, which was before paper discovery was even completed.

No depositions had been conducted. Depositions were to be completed in November 13, 2024. (Pa62). Service of expert's reports was due on or before December 30, 2024. (Pa62). Rebuttal reports were not due until February 7, 2025 and expert depositions were to be completed by March 1, 2025. (Pa62). The discovery end date was March 1, 2025. (Pa62). Arbitration was scheduled for March 12, 2025 and trial was May 19, 2025. (Pa62). As of July 2, 2025, when the motion was filed trial was still 10 months away.

Appellant's raise the issue that arbitration and trial dates were set. (Db34). In Hollywood Café Diner, Inc. v. Jaffee, 473 N.J.Super. 210 (App.Div. 2022), the Appellate Division was critical of the practice of setting arbitration and trial dates while discovery was ongoing, stating:

> We recognize '[t]he critical aim of [the 2000 Rule Amendments was] the establishment of a realistic arbitration and trial date. Leitner v. Toms River Reg'l Schs., 392 N.J.Super. 80, 90-91 (App.Div. 2007)(citing Report of the Conference of Civil Presiding Judges on Standardization and Best Practices, 156 N.J.L.J. 80, 82 (April 5, 1999)). But, that laudable goal is not served when the court notifies the parties that a discovery extension motion must be brought within

> the next sixty days or the case 'shall be deemed' ready for trial, and at the same time, or, as in this case halfway through the sixty day period, the court sets the actual trial date.

Id. at 218-219.

Here, the arbitration and trial date were set before paper discovery was even complete. The arbitration and trial date were set in the second case management order dated May 21, 2024. The order of July 18, 2025 also set arbitration and trial dates, although the dates were different than those provided in the May 21, 2025. Order. It is disingenuous for Appellant to rely upon arbitration and trial dates in support of an argument of prejudice when they know that the dates were set when the parties were still conducting paper discovery. The parties are still engaged in paper discovery with Appellant still serving paper as recent as October 21, 2024. Responses to that discovery was not due until December 21, 2024. The Discovery End Date was March 1, 2025(Pa62). Thus, there was and is no prejudice to Appellants.

It is also disingenuous for Appellant to argue that Respondents did not provide the trial court with a single reason why they delayed filing the Disqualification Motion. (Db35). As previously explained, a mere two (2) days after Ansell Grimm entered its appearance, i.e. on June 1, 2023, Robert Van Saders, then represented by the Lomurro Law Firm filed a Certification objecting to the representation by Ansell Grimm on the basis that it constituted a conflict of

interest. (Pa38). That argument was also raised in Van Saders opposition brief filed on June 1, 2023. (Pa29-30). Upon information and belief, mediation was conducted during the fall of 2023. Thereafter, on March 28, 2024 the Lomurro Law Firm was relieved as counsel. (Pa49). On April 30, 2024, John J. Novak, Esq. entered his appearance. (Pa52). Slightly more than two (2) months later, the motion to disqualify was filed. There was no delay. There was no waiver. Just as importantly, there is no prejudice to Appellants.

CONCLUSION

For the above-stated reasons, Respondents respectfully request that Appellants appeal be denied and that the trial court's disqualification of Ansell Grimm & Aaron on the basis of the Van Saders Certification be affirmed.

Respectfully submitted,

THE LAW OFFICES OF
JOHN J. NOVAK, P.C.

John J. Novak, Esq.
Attorneys for Respondents: Atlas Septic, Inc. and Robert Van Saders

April 16, 2025

ANSELL GRIMM & AARON, P.C.
Anthony J. D'Artiglio, Esq. (117682014)
Gabriel R. Blum, Esq. (301742021)
365 Rifle Camp Road
Woodland Park, New Jersey 07424
(973) 247-9000
adartiglio@ansell.law
gblum@ansell.law

Attorneys for Peter Christopher Gerhard, II and Dynamic Solutions Group, Inc.

ATLAS SEPTIC INC. and ROBERT VAN SADERS, Plaintiffs/Counterclaim Defendants, v. PETER CHRISTOPHER GERHARD, II, Defendant/Counterclaim Plaintiff.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1112-24 On Appeal from: SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY – LAW DIVISION DOCKET NO.: MON-L-2967-23 Sat below: Hon. David A. Nitti, J.S.C.
DYNAMIC SOLUTIONS GROUP, INC. Plaintiff, v. ATLAS SEPTIC INC. and ROBERT VAN SADERS, Defendants.	

REPLY BRIEF IN FURTHER SUPPORT OF APPELLANTS' APPEAL OF THE TRIAL COURT'S ORDER, DATED NOVEMBER 7, 2024

On the brief:

Anthony J. D'Artiglio, Esq.
Gabriel R. Blum, Esq.

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Appellants, Peter Christopher Gerhard, II and Dynamic Solutions Group, Inc. ("Appellants") respectfully submit this reply brief in further support of their appeal of the trial court's order dated November 7, 2024 (the "Order"), disqualifying Ansell Grimm & Aaron, P.C.

PRELIMINARY STATEMENT

In opposition, Respondents Atlas Septic, Inc. and Robert Van Saders' fail to provide this court with a single meritorious argument in support of disqualification.

First, Respondents' bald and unsubstantiated claims that AGA has obtained generalized knowledge of Atlas' financial information or RVS' general attitude toward litigation are not grounds for disqualification under controlling law.

Second, Respondents have again failed to demonstrate substantial similarity between this case and the prior (unrelated) matters, which is a prerequisite for disqualification.

Third, even assuming, *arguendo*, that confidential information was disclosed to AGA, Respondents have not demonstrated that the information is prejudicial or articulated how it can be used against them in this unrelated case.

Fourth, the Court should consider Appellants' procedural due process argument since the issue was raised and, and tellingly, Appellants offer nothing to rebut the argument.

Fifth, Respondents have not demonstrated that in-camera review of RVS' supplemental certification (the "Supplemental Certification") was appropriate without ***first*** seeking a protective order or pursuing other available remedies.

Finally, the Court should reject Respondents' excuse that they were not dilatory simply because they raised the alleged conflict at the outset of the case and then took no further action.

Thus, for the reasons more fully set forth below, this Court should reverse the trial court's Order disqualifying AGA.

LEGAL ARGUMENT

I. Unsubstantiated Assertions Concerning The Purported Disclosure Of "Financial" Information And General Attitude Toward Litigation Are Not Grounds For Disqualification (Rb23-24).[1]

Respondents' brief confirms that, to date, it has not either at the trial level or before this Court disclosed the purported, ***specific*** confidential information disclosed to AGA to justify disqualification. This alone compels reversal. "To demonstrate a lawyer received confidential information from the prior relationship, the client must make ***more than bald and unsubstantiated***

[1] "Rb" shall refer to Respondents' brief in opposition.

assertions that the lawyer disclosed business, financial and legal information related to the matter for which disqualification is sought." *See Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. at 194 (emphasis added) (internal quotations omitted); *see also O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. 109, 129 (2011) (noting that a party's "***bald and unsubstantiated assertions*** that she "disclosed business, financial and legal information" related to Yuna [C]orp. and other "general information about the circumstances of [her] business and legal affairs" cannot suffice to satisfy Defendant's burden on a disqualification motion") (emphasis added).

Here, Respondents assert that an attorney's knowledge of a former client's "financial information," which can be used in a subsequent lawsuit to the detriment of the former client, is grounds for disqualification. (Rb15). Respondents assert that AGA would know if RVS was of the "mindset" to settle and the reasons why. (Rb16). Respondents assert that AGA "would know whether or not Van Saders was or was not able to litigate the subject lawsuit" and therefore AGA should be disqualified. (Rb16). However, under *Dental Health* and *O Builders,* to demonstrate that a lawyer received confidential information from the prior relationship, a party must make ***more than bald and unsubstantiated assertions*** that the lawyer disclosed business, financial, and/or legal information related to the matter for which disqualification is sought. *See*

Dental Health Assocs. S. Jersey, P.A, at 194 (emphasis added); *O Builders & Assocs., Inc., at 129.* Indeed, Respondents' assertion concerning the purported disclosure of "financial" or "business" information to AGA or that AGA has obtained insight into RVS' "mindset" from the prior matters is wholly insufficient to meet their heavy burden on a disqualification motion.

Respondents do not identify a single particularized "insight" and are unable to articulate how that information is being used against Respondents in this case. AGA does ***not*** have insight into RVS's "mindset" towards settlement or litigation strategy. AGA's representation of RVS in the prior matters was short-lived, with AGA holding an initial consultation with RVS and then predominantly communicating with Atlas' secretary thereafter. (340a – 341a ¶ 20 – 22). Respondents have not demonstrated or even alleged that any settlement discussions or philosophical "litigation strategy" discussions were held in the initial consultation, nor that they would relate to this case.

Moreover, it is just as plausible to conclude that any discussions between AGA and RVS focused solely on issues presented ***by the particular facts of the prior matters***, as it is to conclude that there was a philosophical discussion concerning RVS' general attitudes toward litigation and settlement strategy.[2]

[2] Respondents cite *Reardon v. Marlayne, Inc.*, 83 N.J. 460 (1980) for the proposition that discovery would be unlikely to reveal the strengths and weaknesses of a corporate client's decision makers or their attitudes toward

See McCarthy v. John T. Henderson, Inc., 246 N.J. Super. 225 (App. Div. 1991) (holding that "there is simply no basis in the record to conclude that any information was conveyed to Shanley & Fisher of the nature that could be used to defendants' disadvantage in the present case which involves wholly unrelated issues").

For these reasons, the Order should be reversed as unsubstantiated assertions concerning the purported disclosure of "financial" information and general attitude toward litigation are not grounds for disqualification. Indeed, any other result would be a complete rewriting of the test for disqualification, essentially prohibiting a firm from representing a party adverse to a former client, which is not the law.

II. Respondents Have Not Demonstrated Substantial Similarity (Rb11 - 14).

To reiterate, a lawyer's duty to former clients is governed by RPC 1.9:

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settlement. Notably, Reardon ***no longer controls*** as it preceded the enactment of RPC 1.9. Respondents further cite *Delaney v. Dykstra Assocs.*, No. A-1953-19T1, 2020 N.J. Super. Unpub. LEXIS 1355 (App. Div. July 9, 2020), a case where disqualification was reversed due to the unexcused delay in filing the motion. (Rb15).

In *Delaney*, before being overruled by the appellate division, the trial court reasoned that the law firm should be disqualified because they represented the movant regarding matters during the events ***giving rise to the current suit***. *See Delaney v. Dykstra Assocs.*, at 4. Here, unlike *Delaney*, the prior matters have no connection to this case and ***involve*** different parties, witnesses, and distinct causes of action. Indeed, the trial court conducted an analysis under RPC 1.9 (a) and concluded there was no substantial similarity. (T27:10-21).

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a ***substantially related matter*** in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person ***in the same or a substantially related matter*** in which a firm with which the lawyer formerly was associated had previously represented a client, (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9 that is material to the matter unless the former client gives informed consent, confirmed in writing.

See RPC 1.9(a) and (b) (emphasis added).

Importantly, comment 3 to RPC 1.9 clarifies what constitutes a "substantially related" matter:

> [3] Matters are "substantially related" for purposes of this Rule if they ***involve the same transaction or legal dispute*** or if there otherwise is a ***substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter***.
>
> For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.

Comment 3 further provides that even if confidential information was obtained in connection with the prior matters, the information may be rendered obsolete if significant time has elapsed:

> ***Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.*** In the case of an organizational client, ***general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation***…

See RPC 1.9, Comment 3 (emphasis added).

The prohibition delineated in RPC 1.9 is "triggered when two factors coalesce: the matters between the present and former clients must be the same or...***substantially related***, and the interests of the present and former clients must be materially adverse." *City of Atl. City v. Trupos*, 201 N.J. at 462. "Whether the matters are the same or substantially related ***must be based in fact***." *City of Atl. City v. Trupos*, 201 N.J. at 464 (emphasis added).

Here, Respondents fail to distinguish or even address *Trupos* and provide no evidence that the current case, involving misappropriation of funds and the failure to repay loans, bears any substantial similarity to the prior matters. In fact, the trial court agreed that the matters are not substantially similar as they share no common facts, parties, witnesses, or causes of action. (T21:4-17). ***Again,*** under *Trupos*, matters are deemed "substantially related" ***only*** if:

> (i) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (ii) facts relevant to the prior representation are both relevant and material to the subsequent representation.

See, e.g., Trupos, 201 N.J. at 467.

Respondents failed to demonstrate that any confidential information was revealed to AGA and that the information can be used against Respondents in this unrelated case, or that the facts relevant to the prior representation are both relevant and material to this case. The matters simply do not involve the same transaction or legal dispute. Respondents have not demonstrated that there is any risk that confidential factual information obtained in the prior representation would materially advance Appellants' position in the subsequent matter. Respondents cite no authority that permits disqualification pursuant to RPC 1.9(c), which the court relied on in conjunction with RPC 1.9(a) in rendering its decision. (T27:10-21). Thus, Respondents have failed to demonstrate substantial similarity, which is fatal to their disqualification motion.

III. Respondents Fail To *Specifically* Identify The Purported Confidential Information Or Demonstrate How That Information Is Prejudicial (Rb14 – 20, 23).

Respondents assert they have met their burden of identifying the confidential information by disclosing the "categories" of purported confidential information. (Rb23). However, Respondents have still not ***specifically***

identified the purported confidential information that they claim was disclosed to AGA. The law in New Jersey is clear that merely claiming that "financial" or "business" information was disclosed -- as Respondents have done here -- is insufficient for disqualification. *See Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. at 194.

Once again, in opposition, Respondents failed to specifically identify the confidential information and further failed to demonstrate that the purported disclosure of information from years ago in unrelated matters is prejudicial to Respondents in the instant matter. Respondents do not demonstrate that the information is privileged or confidential or otherwise not subject to normal disclosures in the course of discovery. *See* Rule 4:10-2(a). Thus, Respondents failed to meet their heavy burden that AGA had obtained confidential information or "insight" into RVS' mindset or thinking, and further failed to demonstrate how the information is prejudicial to Respondents in this unrelated case.

IV. The Court Should Consider The Due Process Argument As Respondents' Contention That It Was Not Raised Is False (Rb26 -27).

Respondents assert that "Appellants raise, for the first time on appeal, the issue of denial of due process and claims under the Fourteenth Amendment of the United States Constitution and First Article of the New Jersey Constitution." (Rb27). Respondents assert that "Appellants' arguments should be rejected

where the issues were never raised below." (Rb27). Respondents assert that "Appellants never filed any motions on that issue." (Rb27). Respondents cite *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229 (1973) among a string of other irrelevant cases.[3] In *Neider*, the Court held that a remand was warranted since ***much of the factual data*** before the court "was not presented to the trial court and some of it was not before the Appellate Division." *See Neider*, at 234-235.

However, the issue of submitting RVS' Supplemental Certification in-camera -- without providing Appellants with a meaningful opportunity to review and respond to its contents -- was raised and extensively briefed before the trial court, with due process explicitly raised in argument before the Court after the trial court for the first time agreed to accept the previously prohibited *ex parte* submission. (T:8-1-25; T9:1-18).

Appellants argued, among other things, that the court should deny Respondents' request to submit the Supplemental Certification in camera because it rendered it impossible for AGA to respond and rebut the contention that it received confidential information. Appellants argued that the court

[3] It is unknown why Respondents cite *Howard v. Mayor & Bd. of Fin. of Paterson*, 6 N.J. 373 (1951), *Krieger v. Jersey City*, 27 N.J. 535 (1958), and *State ex rel. Wm. Eckelmann, Inc. v. Jones*, 4 N.J. 207 (1950), as these cases were decided decades ago, have no factual connection to this case and, worse, do not stand for the proposition that Respondents' claim they do.

should not have permitted Respondents to claim they have specifically identified the information in a Supplemental Certification while Appellants were precluded from rebutting these contentions. (T:8-1-25; T9:1-18).

However, even assuming, *arguendo*, that the "issue" was not raised below (it was), appellate courts in New Jersey retain authority to notice issues not brought to the attention of the trial court, provided that it is in the interest of justice to do so. *See* Rule 2:10-2; *State v. Robinson*, 200 N.J. 1 (2009) ("appellate courts retain the inherent authority to notice plain error not brought to the attention of the trial court, provided it is in the interests of justice" to do so"). Furthermore, Appellants were divested of the opportunity in any event. The trial court initially denied Respondents' request to submit the certification *ex parte*. However, Respondents ***violated the Court's Order*** and, without a motion for reconsideration, the Court permitted the supplemental certification for the first time at the hearing disqualifying AGA, divesting Appellants of the opportunity to brief the issue during the hearings below. (T23:17-24:22; 25:20-24). Indeed, the Court had already decided the issue; AGA had no reason to believe it needed to file further motions addressing it. Fundamental justice dictates that Appellants be afforded the opportunity to address the matter.

Here, this Court should consider the due process argument since it concerns the central issue of the submission of the Supplemental Certification,

which was raised and extensively briefed before the trial court. Respondents acknowledge this in their opposition papers. (Rb27). Respondents could have addressed the substance of the due process argument but instead, cite a string of unrelated cases from decades ago and conclude that this crucial argument should be precluded. (Rb26 - 27). Even assuming, *arguendo*, that the court deems that the "issue" was not raised below, the court should consider the argument in the interests of justice and at the risk of substantial prejudice to Appellants who were unable to address the contents of the Supplemental Certification in violation of their due process rights.

V. Respondents Fail to Demonstrate That *In-Camera* Review Was Warranted (Rb27 – 28).

Respondents assert that the trial court "reviewed *O Builders* and concluded that the submission of the Certification by in-camera review was permitted." (Rb28). However, *O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. 109 (2011) provides that a party seeking disqualification and is concerned about the disclosure of confidential information may ***first*** seek a protective order, among other remedies, and then may also seek in camera review. *See O Builders & Assocs., Inc.,* 206 N.J. at 129.

Just like the Respondents, the Defendant in *O Builders* claimed that confidential information was revealed, yet refused to make those disclosures to the court for the purported fear that the information would be disclosed to the

attorney. *See O Builders & Assocs., Inc.*, 206 N.J. at 128. This is precisely the tactic employed by Respondents -- and one that was expressly rejected by the *O Builders* court:

> …***defendant cannot have it both ways***: ***Mrs. Kang cannot claim that she has disclosed confidential information to Attorney Lee yet refuse to make those disclosures to the court*** for fear of disclosing confidential information to Attorney Lee. ***Either the claimed confidential information has been disclosed or it has not***…

See O Builders & Assocs., Inc., at 128.

O Builders is clear that where disclosure of confidential information is necessary for the Court to have a complete record, parties may preserve confidentiality by first seeking a protective order. After doing so, the movant may then request that the application be reviewed in camera. Here, Respondents could have followed that procedure by requesting a protective order with an attorney's eyes-only designation or by seeking to file the Certification under seal, thereby maintaining the confidentiality of the information while affording Appellants a fair opportunity to review and respond. Just as the court in *O Builders* rejected the Defendant's untenable position, Respondents cannot now claim they disclosed confidential information to AGA while simultaneously expressing concern over revealing the very same information they assert was already disclosed. The trial court completely divested Appellants and, more particularly, AGA from contesting the veracity or import of Respondents' undisclosed assertions. This is anathema to

our adversary system. As such, Respondents fail to demonstrate that in-camera review of the Supplemental Certification was warranted.

VI. Respondents' Fail To Demonstrate That They Timely Moved For Disqualification (Rb32 – 38).

Respondents falsely assert that "the issue of a conflict of interest was timely raised on June 1, 2023" and that "there is no prejudice to the Appellants." (Rb33). This is materially false. Here, pursuant to the doctrines of laches and waiver, the trial court should have denied Respondents' disqualification application at this late stage since -- after Respondents initially raised the issue of a potential conflict at the outset of the case -- inexcusably sat on their rights and did not file a disqualification motion until now, after substantial paper discovery had been exchanged and the matter was already slated for arbitration and trial. Respondents cannot legitimately claim that simply "raising" the issue ***without taking further action*** is permitted. Notably, even after Respondents' current attorneys took over the file, they admit ***they took no action for approximately 2 months***, causing more delay and further sitting on their rights as the prior attorneys had done. Appellants should not be penalized for Respondents' failure to timely file the motion. Respondents do not provide this Court with a ***single*** reason why they delayed filing the motion or explain why they should be permitted to do so at this late stage. Indeed, raising the issue of a potential conflict without actually filing a disqualification motion only further

supports wavier. Respondents concede they knew of the purported issue and did nothing.

The mere assertion, without taking further action, carries no legal consequence and cannot serve as a basis for later relief, especially when the relief is sought at a late stage in the case. *See Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099 (D.N.J. 1993) (holding that waiver is a valid basis to deny a disqualification motion). Respondents could have filed this motion at the outset of the litigation, but failed to do so, confirming the delay is unreasonable and should not be permitted under both waiver and laches.

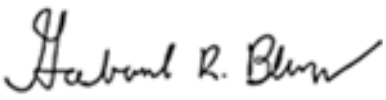
CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court (i) overturn the Order in the interest of justice and (ii) grant such other further relief as the Court deems just and proper.

Respectfully submitted,

ANSELL GRIMM & AARON, P.C.

Dated: May 6, 2025



Anthony J. D'Artiglio, Esq.
Gabriel R. Blum, Esq.