PRIVCAP FUNDING, LLC, Appellant/Plaintiff, v. MADISON TITLE AGENCY, LLC; ANDREW SELEVAN; JOHN DOE, LLC, Respondent/Defendant.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO.: A-001710-24** **Civil Action** **On Appeal From:** Law Division Union County Docket No.: UNN-L-3863-21 **Sat Below:** Hon. Daniel R. Lindemann, J.S.C.

BRIEF ON BEHALF OF APPELLANT/PLAINTIFF, PRIVCAP FUNDING, LLC

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PRELIMINARY STATEMENT

This appeal concerns whether a title agent owes a duty to a mortgagee when recording a "naked discharge" (a discharge without proof of payment). The trial court found no duty existed without an oral or written agreement, but this contradicts New Jersey law that a duty can arise from an undertaking. The industry standard is for private lenders to deliver executed discharges before closing, which Appellant did. Madison Title recorded the discharges without verifying payment, causing Appellant to lose its lien priority.

Here, the naked discharges were for two mortgages held by a private lender, Privcap Funding, LLC (the "Appellant" or "Privcap"). The industry standard in New Jersey is for private lenders to deliver a fully executed discharge of mortgage before a loan closing unlike institutional lenders who deliver a discharge of mortgage after a loan closing. This industry standard was confirmed by the Appellant and Respondent's expert witnesses and is not in dispute. Consistent with the industry standard, Privcap delivered executed discharges of its mortgages to counsel for the borrower prior to the closing with written instructions to hold the executed discharges in escrow until Privcap was paid. Privcap believed that it could rely upon a New Jersey licensed attorney to act properly and abide by its written instructions.

Privcap's discharges were subsequently delivered to a title agent working for Madison Title Agency, LLC ("Respondent" or "Madison Title") who testified (1) he

did not know who sent him the two naked discharges, (2) there were no payoff statements for the mortgages being discharged, and (3) he had no proof that the debts secured by the mortgages were paid. The naked discharges without any payoff letter, received from an unknown and unverified source, were recorded with no questions asked. Madison Title simultaneously recorded new mortgages on both properties causing Privcap to lose its lien priority and the ability to foreclose its valid mortgages.

The trial court erred by holding there was no duty owed from the title agent to Privcap because there was (1) no oral or written agreement between the two parties, and (2) the title agent was not given any instructions from Privcap directing it to hold the two discharges of mortgage until the satisfaction of a condition (i.e., payment). However, New Jersey law does not require an oral or written agreement to create a duty. An "undertaking" can create a duty. An undertaking is the willing assumption of an obligation by one party with respect to another which gives rise to a duty with respect to the action undertaken. When the title agent agreed to voluntarily record the naked discharges, he created a duty running to Privcap and breached that duty by not reaching out to Privcap to confirm the debt had been paid and Madison Title is authorized to record the discharges. Not only does New Jersey law recognize the creation of a duty by an undertaking, the title industry does too as shown by the expert testimony discussed below and the leading New Jersey treatise on land title issues.

The trial court also erred in failing to find that Privcap was not an intended third-party beneficiary of the escrow relationship created by the borrower and title agent when the borrower's lawyer sent the naked discharges to the tile agent with express instructions to hold the discharges until the loans were paid. At a minimum, the existence of the agreement between Madison Title and the borrower's counsel and what instructions were provided are fact questions for the jury. Also, the delivery of the naked discharges to the title agent created a bailment relationship which required the tile agent to act reasonably in handling the naked discharges. Finally, since Madison Title's actions were intentional and against the industry standard, Privcap established the malice requirement for a tortious inference claim against Madison Title.

Recognition of a duty in this case does not create a heavy burden on the title industry and is based upon fundamental fairness and sound policy. When a naked discharge arrives at the office of a title agent, all the title agent must do to satisfy its legal duty is phone the mortgagee and ask, "hey, is this mortgage paid and can I record the discharge of mortgage? If so, can you send me a confirming email or letter?" Not a heavy lift. Moreover, in this case, Madison Title and Privcap had an existing business relationship since Madison Title closed one of the original loans discharged (ELV Loan) and issued Privcap a tile policy a year before the refinancing. Privcap was a customer of Madison Title.

STATEMENT OF FACTS[1]

A. The Privcap Loans to ELV and PMN.

In February 2018, Privcap made a $600,000 loan (the "ELV Loan") to Elizabeth Louisa Ventures LLC ("ELV"), an entity formed and controlled by non-party Seth Levine ("Levine"), as evidenced by a Promissory Note. (Pa290). The loan to ELV was secured by a mortgage (the "ELV Mortgage") on property owned by ELV located at 1041 Louisa Street, Elizabeth, New Jersey (the "ELV Property"). (Pa299). The ELV Mortgage was recorded with the Union County Clerk's Office on February 28, 2018 (the "ELV Mortgage"). (*Id*.)

In March 2018, Privcap made a $725,000 loan (the "PMN Loan") to another entity owned by Mr. Levine known as Passaic Main Norse, LLC ("PMN") as evidenced by a second Promissory Note. (Pa219). The loan to PMN was secured by a mortgage (the "PMN Mortgage") on property owned by PMN located at 249 Main Avenue in Passaic, New Jersey (the "PMN Property"). (Pa228). The ELV Mortgage was recorded with the Passaic County Clerk's Office on March 15, 2018. (*Id*.).

Privcap's loans to ELV and PMN were to mature on March 1, 2019 and April

[1] The transcript of the hearing on the Motion For Summary Judgment held October 11, 2024 is referred to a "T". Deposition transcripts are referred to as follows, with a reference to the Appendix for their location:
"T2" Transcript of Deposition of Ira Karas, dated June 1, 2021 (Pa801)
"T3" Transcript of Deposition of Chava Halberstadt, dated September 21, 2022 (Pa832)
"T4" Transcript of Deposition of Lev Lefkowitz, dated October 28, 2022 (Pa859)
"T5" Transcript of Deposition of William Slover, dated September 15, 2021 (Pa887)
"T6" Transcript of Deposition of William Slover, dated May 15, 2024 (Pa930)
"T7" Transcript of Deposition of J. Bushnell Nielsen, Esquire, dated May 15, 2024 (Pa955).

1, 2019, respectively. (Pa300 and Pa229). The two loans were known as "bridge loans" which are short-term loans (usually for a term of one year). Madison Title handled the closing on the ELV Mortgage one year earlier and issued a title policy to Privcap. (Pa329). Privcap was an existing client of Madison Title. (Pa866)(Mr. Lefkowitz testified "we have insured – we have done business with Privcap and insured Privcap").

B. The ELV and PMN Mortgages Are Wrongfully Discharged by Madison Title.

In November 2018, Mr. Levine and Privcap's principal, Daniel Cohen, were in discussions concerning Levine's intent to obtain new loans to pay off the Privcap loans to ELV and PMN. (Pa209, Pa213 and Pa 214.) Mr. Levine and Madison Title started the refinancing process, including ordering title commitments and searches as follows.

1. Madison Title issued title commitment confirmations for both refinancings where the Privcap mortgages were to be repaid. (Pa1074 and Pa 1077). The confirmation orders expressly state the transactions are "App. Type: Refinance" meaning old loans (Privcap loans) were to be paid off with new loans. (Id.).
2. Madison Title's in-house counsel Ira Kara confirmed Madison Title issued title commitments for a refinancing of

the Privcap mortgage, the only two mortgages of record. (Pa813; T2 45:5-14).

3. The ELV Mortgage and PMN Mortgage both state on their face that the borrowers were to make interest only payments for one year when the loans would be due and payable. (Pa229 and Pa300).

At this point, Madison Title had actual knowledge that a new lender was going to make new loans to pay off the ELV Loan and PMN Loan, and the ELV Mortgage and PMN Mortgage would need to be discharged in order to issue a new title policy to the new lender.[2]

At Mr. Levine's request, Mr. Cohen signed a discharge of the PMN Mortgage (the "PMN Discharge") on November 27, 2018. (Pa209, at ¶¶ 24, 27) (Pa280 and Pa281). Mr. Cohen sent the PMN Discharge to defendant Andrew Selevan ("Selevan"), outside counsel for Levine's companies, by email dated November 27, 2018, directing that "[i]t is to be held in escrow until payoff funds are received and release authorized." (Pa267). Mr. Selevan certified he is outside counsel to the Levine companies. (Pa1087).

On December 6, 2018, Mr. Cohen signed a discharge of the ELV Mortgage (the "ELV Discharge" and, together with the PMN Discharge, the "Discharges").

[2] The new lender was Madison Park Investors, LLC.

(Pa213-214). On December 6, 2018, Mr. Levine emailed Mr. Cohen asking him to send the original Discharges to Mr. Selevan, "to be held in escrow until Payoff."(Pa272).

Mr. Selevan sent the PMN Discharge and ELV Discharge to Madison Title "be held by Madison Title in escrow until the loans to Privcap were paid." (Pa1089). Mr. Selevan also certified that he never gave Madison Title authorization to record the PMN Discharge or ELV Discharge, or that the loans were paid. (Pa1088). Madison Title admits it never received instructions to record the naked discharges. (Pa880 T4 78:3-13).

Up to this point, it is clear Privcap acted reasonably by delivering an executed discharge of mortgage (as is an industry custom as described below) to a licensed lawyer with express written instructions to hold them in escrow until the loans are paid, and the lawyer sent the discharges to Madison Title to hold in escrow pending payment to Privcap. However, when the discharges arrived at Madison Title, the transaction took a turn for the worse since Madison Title ignored the many red flags and industry standard for handling naked discharges and proceeded to record the naked discharges without question.

Lev Lefkowitz is the employee of Madison Title who recorded the PMN Discharge and ELV Discharge. ***Mr. Lefkowitz testified he does not know who him to record the discharges, or if anyone actually told him to record the discharges.***

(Pa880, T4 78:3-13). Mr. Selevan certifies he never told Madison Title to record the discharges. (Pa1088).

C. All Experts Agree the Industry Standard in New Jersey is for Private Lenders to Deliver Fully Executed Discharge of Mortgage Before Closing on a Refinance.

Mr. Lefkowitz, the Madison Title employee who handled the discharges, testified it is a normal industry practice for private lenders to be required to deliver executed discharges before closing. (Pa879, T2 75:9-23). Madison Title's in-house counsel agreed (Pa817, T2 58:16-59:3) as did Madison Title's two experts, Mr. Nielson and Mr. Slover. Nielson opined "the custom of some New Jersey title agents of requiring private lenders to deliver original mortgage discharges in advance of settlement, to be held in escrow." (Id. 453).

William Slover, Madison Title's New Jersey title expert, testified under oath that delivering executed discharges of mortgages to borrower's counsel is an acceptable industry practice:

> Q. If there is a private lender under your definition, are they often required to deliver discharges prior to closing?
>
> A. Under my definition almost always they are required to do so, yes.
>
> Q. And are they generally given to the closing agent, either the title agent or borrower's counsel?
>
> A. Yes, because we would -- if it were

> my title agency, I would require that the discharge be delivered either to me or to the borrower's counsel.
>
> Q. Prior to closing?
>
> A. Prior to closing, yes.

(Pa907).

In accordance with this custom and practice, Privcap delivered executed discharges of the PMN Mortgage and ELV Mortgage to counsel for the borrower prior to the closing on the refinance consistent with New Jersey practice. Privcap's expert confirmed Privcap's actions were in accordance with standard New Jersey practice for loan closings. (Pa1016) ("Under the circumstances of this matter, Privcap followed industry standards when it delivered the PMN and ELV discharge of mortgages to the borrower's counsel with written instructions to hold the discharges in escrow pending Privcap's receipt of the amounts necessary to payoff the PMN and ELV mortgages.")).

Mr. Cohen believed that sending an executed discharge of mortgage to a lawyer with express instructions to hold until the mortgage was paid would protect him. (Pa209). Also, Privcap delivered executed discharge of mortgages to Mr. Selevan between 8 and 10 times on prior refinances of other Levine loans without a problem. (Pa195, 108:10-18).

D. Madison Title's Training Programs and Procedures, Coupled with Industry Standards, Established A Duty Exists.

Madison Title regularly conducts in-house training, including how to spot fraud. (Pa807, T2 21:4-23 and Pa838, T3 21:4-23). During discovery, Madison Title produced an in-house PowerPoint presentation captioned "Title Claims Prevention II: Case Studies", written by Debra Smith and Ira Karas, Madison Title's in-house counsel. (Pa1038). The PowerPoint Presentation discusses numerous issues, including spotting "Red Flags", and goes through case studies to highlight red flags. (Pa1053). The training expressly asks the question "WHY COULD A PROPERTY WITH NO OPEN MORTGAGES BECOME A PROBLEM?" On the next slide Madison Title gives the answer "If a property has no open mortgages, there is an elevated risk of fraud . . ." (Pa1045-1046). The Fraud Presentation continues with "Takeaway Question: Why would a large mortgage have been paid off prior to closing?" (Pa1054). A telling question.

It is very clear Madison Title was training its employee to spot red flags that would allow them to avoid mortgage fraud in refinancing transactions. The training is important when evaluating whether Madison Title's actions were unreasonable under the circumstances of this case.

Mr. Lefkowitz confirmed his understanding of the term "red flag" as something you take notice of**.** (Pa868, T4 30:16-22). Mr. Lefkowitz confirmed that

Madison Title provides training on how to spot red flags. (Id., 30:23-31:4). Mr. Lefkowitz was given some factual scenarios that might fall within his definition of a red flag, including:

1. "How about if there is a mortgage that was less than a year old that was being paid off, that was part of a refinancing, but was paid off outside of closing?" Response: "Yeah, I think that would be something we would take notice of." (Pa868, 31:16-20).
2. "If the mortgage is still of record at the time of closing and was being discharged without any proof of payment, would that be a red flag requiring further investigation?" Response: "Yes, that would be something we would want to understand more of." (Pa870, T4 41:10-15).

Ira Karas, Madison Title's in-house counsel, admitted the following scenario would be a red flag:

> Q. Would you agree that having an executed discharge of mortgage on a refinance for the only mortgage that's going to be recorded without any proof of pay-off is a red flag?
>
> A. Possibly.
>
> Q. Would you consider it a big red flag?
>
> A. It depends on the surrounding circumstances; the size of the mortgage, the size of the purchase, you know, but it's a red flag in some measure, yes.

(Pa817).

Lawrence Feinberg is recognized as a leading authority in the area of real estate and title law in the State of New Jersey. (Pa452); (Pa871, T4 42:25-43:14) (also cited by Joseph Grabas in his expert report). Lawrence Feinberg's treatise titled New Jersey Title Practice has a section captioned "Naked Satisfaction", section 81.05(C), which was marked as Exhibit MT-3(B) at several depositions and referenced by experts in this case. (Pa1071).

In his learned treatise, Lawrence Feinberg makes the following statement:

> ***It is relatively uncommon for real estate to be owned free and clear of mortgages***. Although the title examiner may encounter situations where there are reasonable explanations for the lack of mortgages encumbering the land (*e.g.*, cash purchase, inheritance), they are atypical. Some title insurers have therefore adopted guidelines similar to the following in order to address such situations:
>
> - If the title under examination appears to be unencumbered by a mortgage, the search must be carefully reviewed to determine whether any mortgages have been discharged in the absence of a corresponding sale or refinance transaction. If that appears to be the case, ***the lender should be contacted*** for confirmation that the mortgage has been legitimately satisfied.

(Pa1071) (emphasis added).

Lawrence Feinberg expands on this issue stating:

> If a seller, buyer, or ***third party presents***, at or prior to closing, a discharge or release of an open mortgage, ***the***

> ***lender must be contacted for confirmation that the mortgage has in fact been paid***, and that the discharge is legitimate. The best practice is to use an independent means to obtain the lender's contact information, rather than relying on contact information supplied by the party presenting the document.

(Pa1071) (emphasis added).

Lawerence Feinberg also provides the following example of a hypothetical situation, with an analysis and solution:

> *Example 1*. An examination of title to a residential lot in connection with a refinance transaction discloses no open mortgages. Upon closer examination, it appears that a $250,000.00 mortgage made in 2010 was discharged in 2015. However, it was not replaced by another mortgage.
>
> *Analysis*: Unless the borrower was a lottery winner or received a large inheritance, it is unlikely that he or she would have had sufficient funds available to pay off a $250,000.00 mortgage without refinancing the existing debt.
>
> **Solution**: ***Contact the holder of the mortgage*** which was supposedly discharged in 2015 in order to verify that that the discharge is genuine.

(Pa1071-1072) (emphasis added).

Chava Halberstadt, Lefkowitz's supervisor, was asked to review the naked discharge section of the Feinberg treatise. At the conclusion, Ms. Halberstadt admits:

> THE WITNESS: Generally when one is trying to contact someone to confirm something, independent means should be used to obtain, and I believe that is what Madison generally does.

> BY MR. DUGGAN:
> Q. And when you're looking to confirm whether a discharge or release of an open mortgage is genuine, ***you have to contact the lender not the borrower, correct?***
>
> MR. SLIMM: Objection to form.
>
> THE WITNESS: That would make sense.
>
> BY MR. DUGGAN:
>
> Q. ***And that would be consistent with Madison Title's policies***?
>
> ***Yeah***.

(Pa845, T3 48:8-22).

Madison Title's expert, William Slover, read the following parts of the Feinberg treatise and admits that contacting a lender to confirm whether a naked discharge can be recorded is the industry standard in New Jersey:

> Q Well, let's go down to his example here. If I go down to here, on page -- it's the second page at the bottom, it's 81-26. It starts with "If a seller, buyer, or third party presents at or prior to closing." Okay? So this is the seller, buyer, or third party. "***Presents at or prior to closing a discharge or release of an open mortgage," <u>which is what we have here</u>, "the lender must be contacted for confirmation that the mortgage has, in fact, been paid and that the discharge is legitimate***."
>
> So Feinberg's saying that you have to confirm that it's been paid and confirm it's legitimate; correct?

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A Yes. But -- but all -- all of what you're reading is taken out of context. In this case -- I'll leave it –

Q I'm just asking specifically as to this treatise.

A Yes.

Q Okay. So you agree with the statement that I just read on page 81-26 of what Feinberg says you need to do?

A I agree that you read the sentence accurately. That Feinberg says that, yes.

Q And you agree that that's the industry standard in New Jersey?

A Feinberg's treatise is the industry standard in New Jersey. I agree.

Q Yes. ***And this paragraph, because it's part of that, would be the industry standard in New Jersey; correct?***

10 ***Yes.***

(Pa950-951 T6 81:4-82:10) (emphasis added).

Likewise, Privcap's expert, Craig Alexander, opined that:

> It is also my opinion that Madison failed to comply with and confirm to accepted and standard industry custom and practice by closing the refinances and recording the discharges without obtaining Privcap's authorization and without verifying the amounts due to satisfy Privcap's loans. These are fundamental obligations of any settlement agent. It is even more critical to

> proceed with caution when, as in this case, there are suspicious circumstances present, such as a "naked" discharge (a discharge without an accompanying payoff letter), or the title company receives a discharge from a third-party or unknown source.

(Pa1016).

Privcap's second expert, Joseph Grabas, opined, after reviewing the Feinberg treatise:

> [43] Therefore, Madison was mandated to contact the lender to confirm the legitimacy of the discharges and the satisfaction of the underlying debt.
>
> [44] It is evident that Madison and their employees made unilateral decisions regarding the nature and sufficiency of the discharges delivered to it without regard for the requirement of veracity. Not only did they disregard their own internal fraud training, but they also failed to adhere to the underwriting mandates of Fidelity.

(Pa1011).

Madison Title did not know whether the Privcap mortgages were paid when it recorded the discharges. (Pa877, T4 69:5-7). Madison Title never received proof of payment of the Privcap mortgages. (Pa878,T4 71:8-16). Madison Title never called Privcap to ask if the debt secured by the PMN Mortgage or ELV Mortgage were paid before recording the discharges. (Pa816,T2 55:16-56:2) ("And nothing in the file indicating that Madison Title verified, verbally, with Privcap, whether or not the $600,000 Privcap mortgage had been paid in full." Answer: "No.").

E. Madison Title Did Not Respond to Privcap's Counterstatement of Undisputed Facts as required by N.J. Court Rule Making The Facts Undisputed.

Privcap filed a response to Madison Title's Statement of Undisputed Facts as required by New Jersey Court Rule 4:46-2(b). (Pa766). Privcap also filed a responding statement of material facts as permitted by the Court rules. (Pa781). Madison Title did not respond or challenge the factual allegations made by Privcap in the responding

PROCEDURAL HISTORY

Privcap filed an Amended Complaint on August 1, 2022. (Pa0014). Madison Title filed an Answer to the Amended Complaint on September 2, 2022 (Pa00034) and Defendant Selevan filed an Answer to the Amended Complaint on September 3, 2022 (Pa0050).

On July 2, 2024, Madison Title filed a Motion for Summary Judgment. (Pa0066). On July 26, 2024, Privcap filed opposition to Madison Title's Motion For Summary Judgment. (Pa0766). On August 20, 2024, Privcap filed a supplemental letter opposition to Madison Title's Motion For Summary Judgment (Pa1085). On August 20, 2024, Madison Title filed a reply brief in reply to Privcap's opposition to the Motion For Summary Judgment. (Pa1090). On August 21, 2024, Madison Title filed a letter reply to Privcap's August 20, 2024 supplement reply (Pa1109) and a second response on August 23, 2024 (Pa1122).

On October 11, 2024, the Court heard oral argument on Madison Title's Motion For Summary Judgment and reserved decision. (T1). On October 28, 2024, the Trial court entered an Order granting Madison Title's Motion For Summary Judgment and a Statement of Reasons. (Pa004).

Om January 24, 2024, a Consent Order was filed with the Court dismissing Privcap's claims against Selevan. (Pa001).

On February 13, 2025, Privcap filed a Notice of Appeal. (Pa1136).

STANDARD OF REVIEW

An appellate court reviews a trial court's grant or denial of a motion for summary judgment under the same standard as the trial court. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Pursuant to Rule 4:46-2(c), a motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." In other words, a reviewing court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am.,

142 N.J. 520, 540 (1995).

LEGAL ARGUMENT

I. MADISON TITLE'S ACCEPTANCE OF THE NAKED DISCHARGES AND AGREEMENT TO RECORD THEM CREATED A DUTY. (Pa006; Pa008-0010).

The trial court found that no duty was created since there was no oral or written agreement between Privcap and Madison Title creating an escrow relationship. (Pa008-0010). The trial court ignored New Jersey case law that holds that one who undertakes to render a service to another is subject to liability for his or her failure to exercise reasonable care to protect the undertaking. During oral argument, the trial court seemed to be going in this direction, but reversed position when it came to the written decision. The trial court explained:

> THE COURT: But if it's not your obligation or, in the world of negligence, if it's not your duty to do it, but you take it on, doesn't then your action have to be reasonable? And is it reasonable to just go ahead and take a lender's discharge and recorded for them regardless of how much it happens in the industry or not? Is it reasonable to do that? And isn't that the essence of the motion?
>
> (T:14:1-8)
>
> * * * * *
>
> This is a commercial businessman setting. And I just -- this is the essence of the problem. Why did you do the courtesy here? It was okay the 97 other times you did it that day. But, here, you tripped and fell because you caused all the dominoes to fall.

By this act, all that debt could be incurred. All those other encumbrances improperly were attached to the property that hadn't been released from a debt. And it's all because the title company said let's do a courtesy for the lender.

And you call the buyer and say, heads up. Why, instead of calling the buyer and saying heads up and maybe wasting time, aren't you asking the lender go take care of it yourself and then come back to me, which is the normal way. The exception, I believe, is the custom.

The custom and practice is the lender does it. If you want to do it as a courtesy, you're taking on a duty that's not part of your normal scope. That's the position of the opposition at its essence. And I have a hard time wondering how reasonableness is not established by anything but a fact finder here?

What was reasonable to do under those circumstances? It was a nice favor. It's how you keep customers happy. You take them to the Yankee game. You can take them to the Mets game now, too.

So it's -- that's -- that's where we're at. You want good client feelings. You want to keep the business relationship going properly by doing things that you can. Help them out. But this is beyond driving their kid to little league games for them because they couldn't go.

This is a business dealing that sets dominoes in play that have caused chaos financially to a lot of other third parties. And primarily Privcap here in terms of the case that we have in front of us. That's my issue, Counsel.

I know you have a lot to say. But how is this not an issue of reasonableness for a fact finder? What your client did, what they relied on, why they took it upon themselves to do this and did they act reasonably? Do they have an obligation to act reasonably when they take on a duty? And that's, effectively, what you did.

> You took on a duty to do it right. And it didn't. It didn't happen, obviously.

(T 19:23-21:18).

As explained below, the trial court was correct when it said:

> The custom and practice is the lender does it. If you want to do it as a courtesy, you're taking on a duty that's not part of your normal scope. That's the position of the opposition at its essence. And I have a hard time wondering how reasonableness is not established by anything but a fact finder here?

A. New Jersey Law Does Not Require an Oral or Written Agreement to Create a Fiduciary Duty; An Undertaking is Sufficient.

When a party acts as an escrow agent in a transaction, it owes a fiduciary duty to all parties involved in the transaction. See In re Hollendonner, 102 N.J. 21, 26 (1985) ("It is well settled that an escrow holder acts as an agent for both parties."); see also Innes v. Marzano-Lesnevich, 224 N.J. 584, 598 (2016) (finding that an individual acting as an escrow agent, owed a fiduciary duty to all parties in a transaction, regardless of whether the individual had a direct agreement with them.). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." McKelvey v. Pierce, 173 N.J. 26, 57 (2002) (quoting F.G. MacDonell, 150 N.J. 550, 564 (1997)). "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." Ibid. The fiduciary who breaches these duties

and causes harm to another is liable. See ibid; Restatement (Second) of Torts § 874 (1979).

Under New Jersey law and the Restatement 2d of Torts as adopted by New Jersey, a duty can arise by an undertaking. For example, in the case of Kuskin v. Dworkin cited by the Appellant in support of its motion for summary judgment, the Appellate Division found a special relationship can create a duty, with a special relationship "created by agreement, undertaking, or contact." (Pa867). Citing the New Jersey Supreme Court, the Appellate Division noted:

> An agreement is essentially a meeting of the minds between two or more parties on a given proposition. Black's Law Dictionary 44 (6th ed.1991). ***An undertaking is the willing assumption of an obligation by one party with respect to another or a pledge to take or refrain from taking particular action***. Id. at 1060. A contact is the loosest of the three terms, defined as the "establishment of communication with someone." Webster's Ninth New Collegiate Dictionary 282 (9th ed.1984). ***Both an agreement and an undertaking will give rise to a duty with respect to the subject agreed upon or undertaken.***

(Id.) (emphasis added).

New Jersey also follows the Restatement 2d of Torts, Section 324(A), captioned "Liability to Third Parties for Negligent Performing of Undertaking." Fackelman v. LacD'Admiante, 398 N.J.Super. 474, 481 (App.Div. 2008)(analysis in a matter involving personal injury). Although this section of the Restatement of Torts has not been applied in a fact pattern like the one before this Court, its scope

and fairness support imposing a duty on a title agent. Restatement 2d of Torts, Section 324(A)states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

While this case presents a unique fact-pattern, other courts have found that a title agent, acting as an escrowee, owed a duty to the parties in a transaction. For instance, in Meridian Title Corp. v. Pilgrim Fin., Ltd. Liab. Co., 947 N.E.2d 987 (Ind. Ct. App. 2011), the Indiana Court of Appeals found a title insurance company acting in their capacity as an escrowee, violated their fiduciary duty by negligent releasing funds. There, the title agent failed to secure the release of a mortgage lien on a property that the plaintiff was financing. Id. at 989-990. Rather, the title agent released the funds to the mortgagors.

When analyzing the title agent's duty, the court first determined that there is no requirement under Indiana law that a written escrow agreement or fee be in place

as a prerequisite to forming an escrow relationship. Id. at 992. Instead, the court found an escrow was established because the title agent was provided a written instrument and given instructions to hold the instrument upon the satisfaction of a condition (to be held until the plaintiff received the proceeds from the transaction). Ibid. The court also rejected the title agent's claim it only owed a duty to the mortgagors, finding one who acts as an escrow holder "owes an obligation to each party" to a transaction. Ibid. (quoting In re Marriage of Glendenning, 684 N.E.2d 1175, 1178 (Ind. Ct. App. 2005)).

Here, an escrow relationship was established because Madison Title accepted receipt of an instrument for recording and collected a fee for same. Once Madison Title received the instrument, it was under a duty to all parties in the transaction to exercise reasonable care with regard to the instrument. See Innes v. Marzano-Lesnevich, 224 N.J. 584, 598 (2016) (finding that attorneys acting as escrow agents owed a fiduciary duty to non-client). This duty necessarily requires Madison Title to await clear instructions before taking any action with regard to the instrument.

The record shows that Madison Title agreed to take on the responsibility of recording the naked discharges even though it could not recall who gave them the naked discharges or whether anyone ever told them to record the naked discharges. This is the sown testimony of Mr. Lefkowitz, the person who recorded the naked discharges, and Madison Title's in-house counsel, Ira Karas. Privcap was a customer

of Madison Title - Madison Title closed the original ELV Loan a year earlier and had issued other title policies to Privcap.

Madison Title's agreement to take possession and record the naked discharges was an undertaking creating a duty to Privcap, a third party who has an interest in the naked discharges. As the trial court stated, "the custom and practice is the lender does it. If you want to do it as a courtesy, you're taking on a duty that's not part of your normal scope." Said another way, just send back the naked discharges and tell the mortgagee to record himself, or accept the fact you now have a duty to act reasonably.

This Court should reverse the trial court's ruling that Madison Title did not owe Privcap a duty and permit the jury to determine whether the duty was breached.

B. <u>The Industry Standard For Title Agent's Supports Imposing a Duty</u>.

In New Jersey, the preeminent treatise that discusses the standard of care for title agencies is Lawrence J. Feinberg's New Jersey Title Practice, § 59.01 (5th Ed. 2021). Mr. Feinberg dedicates a section of his treatise to discussing "Naked" Satisfactions. (Pa1071). He describes a "Naked Satisfaction" as "either (a) mortgages which were discharged without corresponding evidence of the source of funds for pay-off of the loan; or (b) unsatisfied mortgages where the seller, buyer, or a third party presents a forged or fraudulent discharge at or prior to closing." (Pa1071). Thus, "[a] discharge recorded or presented for recording under these

circumstances is sometimes referred to as a naked satisfaction, owing to a lack of evidence that the mortgage holder actually received payment in consideration therefor. *Both situations deserve more than a casual inquiry*." Id.

Mr. Feinberg includes several examples of situations in which a naked satisfaction may be an issue. For instance:

> *Example 1*. An examination of title to a residential lot in connection with a refinance transaction discloses no open mortgages. Upon closer examination, it appears that a $250,000.00 mortgage made in 2010 was discharged in 2015. However, it was not replaced by another mortgage.
>
> *Analysis*: Unless the borrower was a lottery winner or received a large inheritance, it is unlikely that he or she would have had sufficient funds available to pay off a $250,000.00 mortgage without refinancing the existing debt.
>
> *Solution*: Contact the holder of the mortgage which was supposedly discharged in 2015 in order to verify that that the discharge is genuine.

(Pa1071).

If such a situation arises, Feinberg cautions:

> If a seller, buyer, or third party presents, at or prior to closing, a discharge or release of an open mortgage, **the lender must be contacted for confirmation that the mortgage has in fact been paid, and that the discharge is legitimate**. The best practice is to use an independent means to obtain the lender's contact information, rather than relying on contact information supplied by the party presenting the document.
>
> (Id.) (emphasis added).
>
> In addition, to prevent a wrongful naked satisfaction, Feinberg observes that

title insurers have adopted the following guideline:

> If the title under examination appears to be unencumbered by a mortgage, the search must be carefully reviewed to determine whether any mortgages have been discharged in the absence of a corresponding sale or refinance transaction. If that appears to be the case, the lender should be contacted for confirmation that the mortgage has been legitimately satisfied.
>
> (Id.) (emphasis added)]

The treatise therefore is not just setting the standard in New Jersey for naked discharges, but confirming a practice already prevalent in New Jersey, and in fact, which title insurers were already on notice about. William Slover confirmed he became aware of the naked discharge issue in 2018 when he was hired as an expert witness in a case where this issue arose. (Pa933 T6 12:20-13:4; 31:6-10). William Slover also confirmed that the issue of Naked discharges was discussed in seminars given to title agents in New Jersey and he has been bringing up the issue "consistently for three years" and can't conceive that he is the only person doing so. (Pa938 T6. 30:5-16).

All experts in this action agree that Mr. Feinberg's treatise sets the standard for title agencies in New Jersey. Madison Title's expert, William Slover, read the following parts of the naked discharge treatise and admits that **contacting a lender** to confirm a naked discharge is valid is the industry standard in New Jersey:

> Q Well, let's go down to his example here. If I go down to here, on page -- it's the second page at the bottom, it's 81-26. It starts with "If a seller, buyer, or third party presents at or

prior to closing." Okay? So this is the seller, buyer, or third party. "***Presents at or prior to closing a discharge or release of an open mortgage," which is what we have here, "the lender must be contacted for confirmation that the mortgage has, in fact, been paid and that the discharge is legitimate***."

So Feinberg's saying that you have to confirm that it's been paid and confirm it's legitimate; correct?

A Yes. But -- but all -- all of what you're reading is taken out of context. In this case -- I'll leave it –

Q I'm just asking specifically as to this treatise.

A Yes.

Q Okay. So you agree with the statement that I just read on page 81-26 of what Feinberg says you need to do?

A I agree that you read the sentence accurately. That Feinberg says that, yes.

Q And you agree that that's the industry standard in New Jersey?

A Feinberg's treatise is the industry standard in New Jersey. I agree.

Q Yes. ***And this paragraph, because it's part of that, would be the industry standard in New Jersey; correct?***

11 ***Yes.***

(Pa950-951, 81:4-82:5).

Slover acknowledges the industry standard in New Jersey imposed a duty upon Madison Title to contact Privcap before recording the discharge.

Privcap's experts also agree that the Feinberg treatise sets the industry standard in New Jersey and that Madison Title breached this standard. Privcap's expert, Craig Alexander, opined that:

> It is also my opinion that Madison **failed to comply with and confirm to accepted and standard industry custom and practice** by closing the refinances and recording the discharges without obtaining Privcap's authorization and without verifying the amounts due to satisfy Privcap's loans. These are fundamental obligations of any settlement agent. It is even more critical to proceed with caution when, as in this case, there are suspicious circumstances present, such as a "naked" discharge (a discharge without an accompanying payoff letter), or the title company receives a discharge from a third-party or unknown source.

(Pa1016) (emphasis added).

Likewise, Privcap's expert, Joseph Grabas, opined, after reviewing the Feinberg treatise

> [43] Therefore, Madison was mandated to contact the lender to confirm the legitimacy of the discharges and the satisfaction of the underlying debt.
>
> [44] It is evident that Madison and their employees made unilateral decisions regarding the nature and sufficiency of the discharges delivered to it without regard for the requirement of veracity. Not only did they disregard their own internal fraud training, but they also failed to adhere to the underwriting mandates of Fidelity.

(Pa1011).

In conclusion, Feinberg's treatise and the testimony of Privcap and Madison

Title's experts confirm an accepted industry standard: that naked discharges, may occur from time to time, and anyone discharging a mortgage should take extra care to ensure the mortgage was indeed paid off. This extra step simply involves contacting the lender through independent methods to verify the information, a simple task.

C. A Duty Should be Imposed Since The Harm Was Foreseeable And Imposition of a Duty is Fair.

Under general New Jersey law, "Whether, in a given context, 'a duty to exercise reasonable care to avoid the risk of harm to another exists is [a question] of fairness and policy that implicates many factors.'" Coleman v. Martinez, 247 N.J. 319, 337 (2021). "[I]n all duty-of-care determinations, a 'court must first consider the foreseeability of harm to a potential plaintiff and then analyze whether accepted fairness and policy considerations support the imposition of a duty. '" Id. at 338 (quoting Jerkins v. Anderson, 191 N.J. 285, 294 (2007)). In other words, foreseeability is an essential nexus to establish the scope of the duty owed by an alleged tortfeasor. Also, "because imposing a duty based on foreseeability alone could result in virtually unbounded liability, [courts] have been careful to require that the analysis be tempered by broader considerations of fairness and public policy." Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 319 (2013).

Although the duty of care cases most often arise in personal injury matters, the concepts should apply to other matters involving imposing a duty of care. The

title industry is crucial to the real estate and lending industries throughout the country. Developers, investors, owners and lenders all need to rely upon accurate land records and various statutes governing property of mortgages. Title agents like Madison Title understand the importance of what they do and the reliance placed in them in the real estate and lending industries, which is why they exist.

In this case, the harm to Privcap is clearly foreseeable if the naked discharges are recorded when the debt is still due since Privcap will no longer have mortgage liens. Also, Madison Title recorded the new mortgages on the same properties simultaneously with the discharge of the Privcap mortgages leaving Privcap with no recourse.

Fairness is a low hurdle in this case, because all Madison Title had to do was contact its own customer, Privcap, and ask if anything was due on the mortgage – call, email or text message. This is a simple task and not an onerous one, especially when Madison Title spent time training its employees to avoid these types of frauds

D. <u>Madison Title Breached its Duty And Did Not Act Reasonably.</u>

Here, Madison Title ignored each and every red flag presented. This is despite the fact that Madison Title regularly conducts in-house training, including how to spot and present fraud (See Statement of Facts, at 16-22). More egregious are the admissions made by Madison Title (via sworn statements at depositions), that there were many red flags in the transactions where the Privcap naked discharges were

recorded. For example, Mr. Lefkowitz was given some factual scenarios that might fall within his definition of a red flag, including:

A. "How about if there is a mortgage that was less than a year old that was being paid off, that was part of a refinancing, but was paid off outside of closing?" Answer". Response: "Yeah, I think that would be something we would take notice of." (Pa868, T4 31:16-20).

B. "If the mortgage is still of record at the time of closing and was being discharged without any proof of payment, would that be a red flag requiring further investigation?" Response: "Yes, that would be something we would want to understand more of". (Pa870, T4 41:10-15).

Ira Karas, Madison Title's in-house counsel, admitted the following scenario would be a red flag:

> Q. Would you agree that having an executed discharge of mortgage on a refinance for the only mortgage that's going to be recorded without any proof of pay-off is a red flag?
>
> A. Possibly.
>
> Q. Would you consider it a big red flag?
>
> A. It depends on the surrounding circumstances; the size of the mortgage, the size of the purchase, you know, but it's a red flag in some measure, yes.

(Pa817 T1 60:16-25).

The testimony from the experts as well as Madison Title's own employees demonstrates that not only was Madison Title aware of the Feinberg standard on naked discharges, but also that Defendant's employees ignored their training when recording the discharges at issue here - they simply ignored the numerous red flags.

Madison Title incredibly alleges that because it emailed Mr. Cohen before recording the discharge, Mr. Cohen implicitly assented to the discharge. While under certain circumstances, silence to an agreement can constitute acceptance, that is not the case here. As our Supreme Court has stated "silence does not ordinarily serve as an acceptance of an offer, although it may suggest acceptance where the particular circumstances reasonably impose on the offeree a duty to speak if the offer is rejected." Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526 (1953) (citing Anson on Contracts (Turck's ed. 1929), section 23).

E. The Trial Court Did Not Decide The Balance of the Claim For Breach of Fiduciary Duty.

The trial court did not reach any other issues on the breach of the fiduciary duty claim, but the record supports the balance of the claim.

II. THE TRIAL COURT ERRED FINDING NO BAILMENT RELATIONSHIP (Pa006; Pa010).

The trial court denied Privcap's claim of a bailment finding that Privcap did not deliver the naked discharges to Madison Title and there is no evidence Madison Title accepted delivery of the naked discharges. This finding was made even though Mr. Selevan, borrower's counsel, testified he send the discharges to Madison title to be held in escrow until the loans were repaid. (Pa1089). Madison title admitted to receiving and recording the naked discharges. Delivery and receipt are uncontested facts.

The New Jersey Supreme Court has held:

> A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust. Inherent in the bailment relationship is the requirement that the property be returned to the bailor, or duly accounted for by the bailee, when the purpose of the bailment is accomplished, or that it be kept until it is reclaimed by the bailor.

[LaPlace v. Briere, 404 N.J. Super. 585, 598 (App. Div. 2009) (citing 8A Am. Jur. 2d Bailments § 1 (1997))].

Good faith by the bailee is irrelevant to the analysis such that "a bailee who mistakenly destroys or disposes of the goods is liable in conversion although there is no intent to steal or destroy the goods." Lembaga Enters., Inc. v. Case Trucking & Warehouse, Inc., 320 N.J. Super. 501, 507 (App. Div. 1999). Further, "[o]nce a bailee accepts responsibility for the goods delivered, the bailee has the burden of

producing evidence as to the fate of those goods." Gonzalez v. A-1 Self Storage, 350 N.J. Super. 403, 407 (Law Div. 2000).

Here, it is irrelevant that Privcap did not directly deliver the discharges to Madison Title. Madison Title accepted receipt of the discharges, and it was aware the mortgages rightfully belonged to Privcap. Mr. Selevan was simply the conduit for the transfer of the Privcap discharges. As an experienced title agent, Mr. Lefkowitz understood the naked discharges were the property of Privcap and needed to be handled with care. As such, Madison Title was under a duty to Privcap to account for the instrument, and more importantly, to exercise care when handling the document. See LaPlace, 404 N.J. Super. at 600.

III. PRIVCAP IS AN INTENDED THIRD-PARTY BENEFICIARY OF THE ESCROW AGREEMENT BETWEEN MADISON TITLE AND THE BORROWERS(Pa006; Pa0012).

The trial court did not apply the undisputed facts to the existing case law. The contract that is the focus of this argument is the one between Madison Title and its borrowers, ELV and PMN. ELV and PMN's lawyer, Andrew Selevan, testified he sent the discharges to Madison Title to be held in escrow until the two loans were paid. It is undisputed that Madison Title accepted delivery of the discharges and agreed to record them. At this point a contract was formed, or at the very least there is a fact question as to the intent of the parties to be decided by a jury.

The key issue for courts to determine is whether the parties intended for the

third party to receive a benefit. See Broadway Maint. Corp. v. Rutgers, State Univ., 90 N.J. 253, 259 (1982). To determine the contracting parties' intent, courts look to the agreement itself and the facts and circumstances surrounding it. See Rieder Cmtys. v. N. Brunswick, 227 N.J. Super. 214, 222 (App. Div. 1988). The third-party beneficiary cannot simply derive an incidental benefit from the contract. Id. at 221-222.

The subject matter of the agreement are the ELV Discharge and PMN Discharge. The owners of these discharges is Privcap, a fact that is clear from reading the discharges. Also, the "condition precedent" to the recording of the discharges was payment to Privcap, once again driving home the fact that Privcap is an intended beneficiary of this agreement.

The jury should decide whether a contract exists and whether Privcap is an intended beneficiary of that agreement.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE TORTIOUS INTERFERENCE CLAIM (Pa006; P0013).

The trial court merely recites the elements of a tortious interference claim and finds, without any explanation, there is no evidence Madison Title acted with malice. Privcap assumes the trial court believes Privcap most prove some type of ill will or evil intent. However, that is not what malice means in the context of a tortious interference claim.

A party alleging tortious interference needs to show: "(1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage." Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003) (citing 214 Corp. v. Casino Reinvestment Dev. Auth., 280 N.J. Super. 624, 628 (Law Div. 1994)). An interference is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." Ibid. (quoting Restatement (Second) Torts, § 766A, comment e (1977)). Further, a party acts with "malice" if it acts without excuse or justification. Ibid.

Hence, the question is whether Madison Title acted intentionally or without excuse or justification. See Russo, 358 N.J. Super. at 268. Madison Title certainly acted without excuse or justification when it recorded the discharge without first independently verifying with Privcap that it was permitted to do so. Further, Madison Title acted intentionally as it is not alleging the recordation of the mortgage was a mistake or accident on its part. In addition, Madison Title interfered with Privcap's contractual right to be repaid for its loan. By recording the mortgage without authority, Madison Title deprived Privcap of funds it was contractually entitled to receive at the refinancing of its loans. If Madison Title held off recording the naked discharges until Privcap was paid, Privcap would have no claim.

CONCLUSION

The trial court's decision should be reversed because (1) Madison Title's acceptance of the naked discharges created a duty, even without a formal agreement, (2) the industry standard supports imposing a duty on title agents to verify naked discharges before recording, (3) a duty should be imposed as the harm was foreseeable and fair, (4) Madison Title breached its duty by ignoring red flags and not acting reasonably, (5), a bailment relationship existed when Madison Title accepted delivery of the discharges, (6) Privcap was an intended third-party beneficiary of the escrow agreement between borrower's counsel and Madison Title, and (7) the tortious interference claim should not have been dismissed, as Madison Title acted intentionally and without justification.

Finally, the entire real estate industry functions on trust placed with title agents and the expectation that title agents will act in accordance with industry standards. Without confidence in the title industry, commercial real estate

transactions would collapse, particularly because lenders would be reluctant to make loans without assurance their mortgage liens are valid.

STARK & STARK, P.C.

By: /s/ *Timothy P. Duggan*
TIMOTHY P. DUGGAN

Dated: May 7, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001710-24

PRIVCAP FUNDING, LLC,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM A
Plaintiff-Appellant,	:	JUDGMENT OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	UNION COUNTY
	:	
MADISON TITLE AGENCY, LLC; ANDREW SELEVAN; JOHN DOE, LLC,	:	Docket No. UNN-L-3863-21
	:	
	:	Sat Below:
	:	
	:	HON. DANIEL R. LINDEMANN,
Defendants-Respondents.	:	J.S.C.
	:	

BRIEF FOR DEFENDANT-RESPONDENT MADISON TITLE AGENCY, LLC

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PRELIMINARY STATEMENT

The instant action is one of dozens of matters that resulted from a long-running fraud perpetrated by non-party Seth Levine ("Levine"). Here, plaintiff-appellant PrivCap Funding, LLC ("PrivCap"), a private lender, seeks to recover against defendant-respondent Madison Title Agency, LLC ("Madison Title") for the loss of two mortgage interests, notwithstanding that another court in a related matter previously determined that PrivCap was the very cause of that loss.

PrivCap's claims against Madison Title stem from loans it made in early 2018 to Elizabeth Louisa Ventures LLC ("ELV") and Passaic Main Norse, LLC ("PMN"), both of which were owned by Levine. The loans were secured by mortgages on real properties held, respectively, by ELV and PMN. In late 2018, Levine requested that PrivCap's principal, Daniel Cohen ("Cohen"), provide discharges of the two PrivCap mortgages, purportedly in connection with a refinancing. Though neither loan had been repaid and there was no pending refinance, Cohen executed discharges of the mortgages and provided them to Levine via Levine's in-house attorney, defendant Andrew Selevan ("Selevan"), apparently with the understanding that Selevan would hold them in escrow. From the moment PrivCap gave the original discharges—which expressly stated that the PrivCap loans had been repaid—to its borrowers, Levine or Selevan could have submitted them for recordation, and a new lender or title agent would

have no idea that the loans had not been repaid. Thus, PrivCap gave Levine and Selevan the ability to commit the fraud they eventually committed.

At some point thereafter, Selevan, falsely indicating that the mortgages had been satisfied, but the discharges not recorded, provided the discharges to Madison Title and requested that Madison Title submit them for recordation—a ministerial act which Selevan could have done without Madison Title's courtesy assistance. In doing so, representatives from Madison Title emailed Cohen to request that he provide documentation sufficient to terminate the related UCC financing statement for the ELV loan—thus, putting PrivCap on notice that Madison Title was in the midst of processing the discharges for recordation—but Cohen failed to respond. Ultimately, Madison Title was able to complete the process of recordation without PrivCap's assistance.

Although PrivCap remained silent, in January 2019, when Madison Title advised it that it was recording the Discharges, PrivCap later claimed that its mortgages were fraudulently discharged and that they were thus superior to a June 2019 mortgage held by non-party Conventus, LLC ("Conventus") and secured by the ELV and PMN properties. In 2022, the Superior Court of New Jersey granted Conventus summary judgment on that issue, holding that "Privcap is the party whose actions first enabled Seth Levine's fraud and Privcap is the one who could have first prevented it from ever occurring."

Left without recourse to the properties, PrivCap attempted to shift the blame from itself (and Levine and Selevan) to Madison Title. But, as the trial court correctly held, each of PrivCap's claims against Madison Title lacks merit in law or in fact. Contrary to PrivCap's contention, Madison Title did not owe a duty to PrivCap, and accordingly, PrivCap's claim for breach of duty cannot stand. That is the case regardless of whether the discharges were, as PrivCap contends, so-called "naked" discharges, since, despite PrivCap's suggestion to the contrary, a purported breach of industry standards cannot be used to establish a duty to a third party that does not otherwise exist. Similarly, no contract of bailment existed between PrivCap and Madison Title, and thus Madison Title did not owe a bailee's duty of care to PrivCap. Further, there was no contract between Madison Title, Selevan, PMN, and ELV to ensure that PrivCap was paid prior to submitting the discharges for recordation, and accordingly, PrivCap cannot assert a claim for breach of a non-existent contract as a purported third-party beneficiary. Finally, Madison Title did not act with malice towards PrivCap in submitting the discharges for recordation and therefore, PrivCap cannot prove that Madison Title tortiously interfered with its contractual relationships with PMN and ELV.

For those reasons, and as set forth more fully below, the trial court's grant of summary judgment in Madison Title's favor should be affirmed in its entirety.

PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS[1]

A. The Loans By PrivCap

PrivCap is an experienced lender and real estate company. (Pa0173-174.) In February 2018, PrivCap made a loan in the amount of $600,000, to ELV, an entity controlled by Levine.[2] (Pa0206, Pa0212.) That loan was secured by a mortgage on property owned by ELV located at 1041 Louisa Street, Elizabeth, New Jersey (the "ELV Property") and the mortgage was recorded with the Union County Clerk's Office on February 28, 2018 (the "ELV Mortgage"). (Pa0212.)

Also, in March 2018, PrivCap made a loan in the amount of $725,000 to PMN, another entity controlled by Levine. (Pa0206-207.) That loan was secured by a mortgage on property owned by PMN located at 249 Main Avenue Passaic, New Jersey (the "PMN Property") and the mortgage was recorded with the Passaic County Clerk's Office on March 15, 2018 (the "PMN Mortgage" and, together with the ELV Mortgage, the "Mortgages"). (Pa0207.)

The two loans were to mature in March and April 2019, respectively. (Pa0291; Pa0220.) However, by November or December 2018, Levine and

[1] Madison Title respectfully submits that the procedural and factual aspects of this matter are intertwined and therefore, are presented together.

[2] Levine pleaded guilty to conspiracy to commit bank fraud and securities fraud and was sentenced to 97 months in prison in conjunction with a scheme to, among other things, fraudulently refinance multifamily properties by providing materially false information to financial institutions, which resulted in losses to victim lenders of at least $47 million. (Pa0199-200.)

PrivCap's principal, Cohen, were in discussions concerning Levine's intent to obtain new loans from other parties to be used to pay off the PrivCap loans to ELV and PMN. (Pa0209; Pa0213.)

B. PrivCap's Principal Executes And Provides Discharges To Its Borrowers Although Its Loans Had Not Been Repaid

Though PrivCap's loan to PMN had not yet been repaid and Levine had not scheduled a refinance or even identified a potential refinance lender, on or about November 27, 2018, Cohen foolishly signed, at Levine's request, a discharge of the PMN Mortgage (the "PMN Discharge"). (Pa0372; Pa0376-380; Pa0209.) And, even though the PMN loan had not yet been paid off, the PMN Discharge unequivocally states that PrivCap's loan to PMN had been fully satisfied and thus, could be discharged as of record: "[i]n consideration of the full payment and satisfaction of said note and Mortgage…the Mortgagee releases, quit claims, exonerates and discharges…the lien…from the record." (Pa0372; Pa0379.) Cohen sent the PMN Discharge to Levine and Selevan, the in-house attorney for Levine's companies,[3] by email dated November 27, 2018,

[3] PrivCap falsely claims that Selevan was independent, outside counsel for Levine. But that claim is belied by the fact that Selevan's emails—just like Levine's emails—were sent to and from "@NorseHoldings.com" and listed his work address at Norse Holdings (i.e., Levine's real estate company). (Pa009; Pa0341.) It is further belied by the fact that, prior to the discovery of Levine's fraud, Selevan's resume described his position at Norse Holdings as "In-House Counsel." (Pa1134.) Thus, there can be no legitimate dispute, contrary to PrivCap's claim, that Selevan was acting as the in-house general counsel for

indicating that "[i]t is to be held in escrow until payoff funds are received and release authorize." (Pa0267; Pa0372.)

Similarly, though PrivCap's loan to ELV had not yet been repaid, and Levine had not scheduled a refinance or even identified a potential refinance lender, on or about December 6, 2018, Cohen signed a discharge of the ELV Mortgage (the "ELV Discharge" and, together with the PMN Discharge, the "Discharges"). (Pa0372-373; Pa0382-384; Pa0213-214.) Just like the PMN Discharge, the ELV Discharge states that PrivCap's loan to ELV had been fully satisfied and thus, could be discharged as of record: "[i]n consideration of the full payment and satisfaction of said note and Mortgage…the Mortgagee releases, quit claims, exonerates and discharges…the lien…from the record." (Pa0372; Pa0383.) On December 6, 2018, Levine emailed Cohen asking him to send the original Discharges to Selevan, "to be held in escrow until Payoff."

Levine and his companies. See also Selevan v. U.S. Securities and Exchange Commission, 482 F. Supp. 3d 90, 93 (S.D.N.Y. 2020) (refusing to quash a subpoena served on Selevan and noting that "Selevan was the general counsel of Norse Holdings….").

After PrivCap submitted Selevan's belated Certification below, neither he nor PrivCap addressed the foregoing, which contradict his Certification that he was outside counsel and not in-house counsel as all of the evidence supports. It is important to note that Selevan was in-house counsel for Levine who committed one of the largest real estate frauds ever in New Jersey. (Pa0199-200.) PrivCap thus secured a belated Certification from Selevan which is inconsistent with Selevan's own resume and findings by a federal judge but which helped PrivCap attempt to "create" an issue of fact. It is not surprising that the lower court did not consider the Certification. Yet, on appeal, PrivCap continues to rely on it.

(Pa0272.)

Thereafter, Cohen foolishly—and, as conceded by PrivCap's own lending expert, something he would "never counsel[]" a lender to do—sent the original executed Discharges to Selevan, in-house counsel for PrivCap, apparently with the understanding that Selevan would hold the Discharges in escrow, although no formal escrow agreement was executed. (Pa0373-373.) Although PrivCap's false narrative states that Selevan was an independent outside counsel, he was, in fact, Levine's in-house counsel, as evidenced by his resume, email address, and a federal court decision. (See Note 3, supra). PrivCap's own expert conceded that by giving a borrower original discharges "[t]here is a danger that someone [i.e., the borrower] may record it [i.e., the Discharges] improperly." (Pa0154-155.) Thus, but for PrivCap's conduct, neither Levine nor Selevan could have orchestrated the fraud which ultimately caused PrivCap's loss.

C. Selevan Delivers The Discharges To Madison Title For Recordation

On November 28, 2018, Selevan contacted Madison Title, a title agency which had had prior dealings with Levine, to request that it issue a title commitment for the PMN Property in connection with a potential loan. (Pa0081-082; Pa0089-091.) He also attached the executed PMN Discharge and instructed that, in light of the PMN Discharge, the PMN Mortgage not be included in the resulting title commitment. Thus, Selevan, Levine's in-house counsel, falsely

indicated that the PMN Mortgage loan had been repaid and should not be included on the title commitment's Schedule B exception list. (Id.) A representative of Madison Title, Zev Lefkowitz ("Lefkowitz") responded by email a short time later and advised Selevan, "We will place, however cannot close until we have the original [PMN Discharge] in hand." (Pa0082; Pa0093.)

The next day, November 29, 2018, Selevan contacted Madison Title to request that Madison Title also issue a title commitment for the ELV Property in connection with a potential loan. (Pa0082; Pa0096.) The resulting December 2, 2018 commitment listed the ELV Mortgage as an exception to any potential title policy. Upon receiving the commitment from Madison Title, Selevan responded in a December 7, 2018 email (to which he attached a copy of the ELV Discharge, which Cohen had emailed him the prior day): "Please see attached discharge. Please remove the PrivCap mortgage from title." (Pa0082-083; Pa0098-101.) As with the PMN Discharge, the ELV Discharge expressly stated that the ELV Mortgage had been paid off in full. Thus, Selevan falsely indicated that the ELV Mortgage loan had been repaid and should be removed from the commitment's Schedule B exception list. (Pa0082-0083.) Lefkowitz responded by email a few minutes later and advised Selevan, "We can remove [the ELV Mortgage as an exception] from title, however we cannot close until we have the original [discharge] in hand." (Pa0083; Pa0103.)

In early January 2019, Selevan provided the original Discharges to Madison Title, and, as an accommodation, requested that Madison Title submit them for recordation. (Pa0083; Pa0107 (January 2, 2019 email from Selevan to Lefkowitz stating that he had "overnighted…the Privcap Discharges…for 249 Main Ave [the PMN Property] and 1041 Louisa St. [the ELV Property].").)[4]

The Discharges were recorded on January 11 and 17, 2019. (Pa0377-380; Pa0382-383.)[5] At the time that it received the Discharges from Selevan, and at

[4] PrivCap has suggested that no one actually told Madison Title to record the Discharges (Pb7) because, at the time Lefkowitz was deposed in the Conventus action, he did not recall that Selevan was the person who instructed Madison Title to submit the Discharges for recordation. PrivCap's position, however, strains credulity, particularly considering that documentary evidence exists demonstrating that Lefkowitz made it clear that a title policy could not be issued for a new loans until "we have the original [discharges] in hand," and Selevan emailed Lefkowitz advising that he (Selevan) had overnighted the original Discharges to Madison Title. (Pa0107.). That email, which would clearly have refreshed Lefkowitz's memory, was not shown to Lefkowitz when PrivCap deposed him. (Pa861-862.) Clearly the only reason "originals" were needed and emailed copies were insufficient was for recordation. Also, PrivCap's Statement of Facts paints a false picture of PrivCap tendering the Discharges to Selevan in connection with Levine's refinance of PrivCap's loans to ELV and PMN. (Pb4-7.) However, nothing could be further from the truth; Cohen gave the original Discharges to Selevan even though Selevan never identified any pending refinance and Madison Title was never made aware that there had been no loan payoff—notwithstanding the Discharge language that the loans had been fully paid off and the mortgage lien had been discharged.

[5] Of course, from the moment that Cohen provided the original PNM and ELV Discharges to Selevan, Selevan himself could have submitted them for recordation. Simply put, once Cohen foolishly gave the original Discharges to Selevan and Levine, even though neither had identified a potential refinance lender, Selevan and Levine had all they needed to complete the fraud and they did not need the clerical assistance of Madison Title.

the time that it submitted them for recordation, Madison Title was unaware that PrivCap's loans to PMN and ELV had not been repaid and instead believed that the loans had been paid off, as indicated by Selevan and Levine. (Pa00085-085.) Indeed, Madison Title believed that PrivCap's loans to PMN and ELV had been repaid but that, as is often the case with private lenders, PrivCap had failed to record the Discharges at the time its loans were repaid. (Pa0085.)[6]

Though PrivCap's moving brief spends an inordinate number of pages asserting that Madison Title breached a purported duty to alert it to the fact that it possessed "naked" discharges and that that it was recording the Discharges, PrivCap fails to acknowledge that during the recordation process, representatives from Madison Title in fact emailed Cohen on multiple occasions to request that he provide documentation to Madison Title sufficient to terminate the recorded UCC financing statement for the ELV loan—thus, putting PrivCap on notice that Madison Title had the Discharges and had either already submitted them for recordation or was taking steps to do so. Specifically, on January 10, 2019, Lefkowitz sent an email to Cohen with the subject "Elizabeth Louisa

[6]Both of PrivCap's experts, Craig Alexander, Esq. and Joseph Grabas, testified that private lenders often fail to record discharges when their loans are paid in full. (Pa0156-157; Pa0422.) Indeed, Madison Title's expert, J. Bushnell Nielsen, Esq., explained that "[i]ndividuals and private lenders who hold mortgages are notoriously sloppy or delinquent in preparing and delivering mortgage discharges. Once the private lender is paid, it also has no motivation to perform its duty to draft, sign and deliver a mortgage discharge." (Pa0453-454.)

Release" which stated: "Mr. Cohen – The release attached is unable to terminate the recorded UCC referenced therein. Can you please provide a UCC Termination, or authorize us to prepare and file?" (Pa0386-388; Pa0373 (admission that email was in PrivCap's file); Pa0084; Pa0112-114.)[7] Six days later, on January 16, 2019, Lefkowitz's colleague, Miriam Esther Baddouch ("Baddouch"), sent another email to Cohen with the subject "Order MTANJ-133817 / Elizabeth Louisa Ventures LLC 1041 Louisa Street, Elizabeth, NJ" which stated as follows: "Hi, In regard to the above-transaction, the county rejected [for recording] the attached [ELV Discharge] for the following: The UCC cannot be terminated in item #3, it must be terminated with a UCC termination. Please confirm that I can cross it out and if you can please provide a UCC3 form to terminate the UCC. Thanks, Esther." (Pa0374 (admission that email was received by PrivCap); Pa0390-393.)

Notably, both the January 10, 2019 email from Lefkowitz to Cohen and the January 16, 2019 email from Baddouch to Cohen included, as attachments, a copy of the ELV Discharge (Pa0386-388; Pa0390-393; Pa0373-374), and Baddouch expressly informed Cohen that when Madison submitted the ELV

[7] Selevan, who had been copied on Lefkowitz's January 10, 2019 email, responded only to Lefkowitz that "Seth [Levine] said he already spoke with Donny [Cohen] about this and we will get you a UCC3" (Pa0084; Pa0116)—implicitly confirming, again, that PrivCap's loan to ELV had been repaid.

Discharge for recordation, the "county rejected" it. Thus, notwithstanding PrivCap's contention (Pb2; Pb16) that Madison Title failed to inform PrivCap that it was recording Discharges of the PrivCap loan, Cohen had actual knowledge that Madison Title had the ELV Discharge and was in the process of submitting it for recordation. Only Cohen knew that the ELV Mortgage had not been satisfied and the ELV Discharge was not to have been released by Selevan until PrivCap's loan to ELV had been paid off. Yet, Cohen never responded to the emails from Madison Title to (i) inquire why it was in possession of the ELV Discharge, (ii) object to Madison Title's possession of the alleged "escrowed" ELV Discharge, (iii) object to Madison Title's submission of the ELV Discharge for recordation, or (iv) advise Madison Title that the ELV Discharge was supposed to be held in escrow by Selevan and should not have been released until after the ELV loan had been repaid. (Pa0373 (admission that Cohen did not respond to the January 10, 2019 email from Lefkowitz); Pa0374 (admission that Cohen did not respond to the January 16, 2019 email from Baddouch); Pa0084.)

When asked about Cohen's failure to respond to Baddouch's email, PrivCap's own expert, Mr. Alexander, stated that had he received such an email—which clearly indicated Madison had submitted the ELV Discharge for recordation—he would have been concerned and taken action, and that Cohen should have been concerned, as well:

> Q. Okay. **If you were representing Privcap and you received this email, what would you do?** And you knew that the loan had not been paid off, but somebody was trying to record the discharge, what would you have done?
>
> A. **I would have called up the title company [Madison Title] and inquired why they are trying to record the document.**
>
> Q. Would you be concerned that someone is trying to record a discharge of your client's mortgage even though the mortgage had not been paid off?
>
> A. Yes.
>
> Q. So is it -- is it true that this would be a red flag? In other words, if you were on vacation and you saw this email come in, would you wait until you got back from vacation to act or would you immediately ring the bell and be concerned?
>
> A. **If I saw this, I would be concerned.**
>
> Q. **Okay. And if Mr. Cohen had seen it, should he have been concerned?**
>
> A. **Yes.**

(Pa0163 (objection omitted and emphasis added).) PrivCap's other expert, Mr. Grabas, similarly testified that he would have responded to this email and that Cohen should have done so, as well:

> Q. **My question is if you were the lender and the email had been sent to you knowing that you had given the discharges to Mr. Selevan and Mr. Levine, would you have contacted Madison Title to inquire about what's going on?**
>
> A. **I would have responded to this, if I got this email I would have responded to this email, yes.**
>
> Q. What would you have said in your response?
>
> A. Which I probably would have asked when the closing was going to happen.
>
> Q. **And would you ask him if they were in possession of the original discharges?**

A. I might, I might, **yeah**.

***

Q. **Do you think it's negligent on the part of the lender to not respond to emails?**

A. I mean, if they didn't, I mean I have no idea whether they got the email or whether they actually looked at the email.

Q. Fair enough. Fair enough.

A. I know that Madison saw it and sent it, right.

Q. Fair enough. So let me give you a hypothetical. **Assuming that the email was sent and received by Donny Cohen, would it be negligent for Mr. Cohen to not respond to this type of email which you have testified indicates that they're getting ready to record the document, the discharges?**

A. **He should have responded to his emails, yes.**

(Pa0429-430 (objections omitted and emphasis added).)[8]

D. The Madison Park Investors Loan

In or about early 2019, after Selevan had ordered the title commitment for the ELV and PNM Properties from Madison Title, Levine sought loans from an unrelated company (Pa0083), Madison Park Investors, LLC ("Madison Park Investors"), to be secured by the ELV Property and the PNM Property, and which loans would be insured via a title insurance policy issued by Madison

[8] Thus, not only did PrivCap foolishly provide its borrower with the original Discharges, which falsely stated that its loans had been repaid in full, but both of PrivCap's experts fault PrivCap for ignoring Madison Title's emails, which put PrivCap on notice that Madison Title was in the process of submitting the ELV Discharge for recordation. Cohen's providing Selevan with original Discharges and then failing to respond to Madison Title's inquiries regarding recording the ELV Discharge alone is the proximate cause of PrivCap's loss.

Title (as agent for an underwriter). Madison Title issued a title insurance commitment naming Madison Park Investors as proposed insured. (Pa0085-086.) Thereafter, PMN and ELV granted mortgages to Madison Park Investors, encumbering the PMN Property and the ELV Property (the "Madison Park Mortgages"). Madison Title issued a loan title insurance policy to Madison Park Investors, as agent of Commonwealth Land Title Insurance Company, insuring the Madison Park Mortgages. (Id.) Madison Title did not act as settlement agent with respect to disbursement of the proceeds of the Madison Park Investors loans and was not obligated to pay off any prior loans. (Pa0086.) Instead, Madison Park Investors' counsel acted as settlement agent distributing the loan proceeds and paying off any open monetary liens. (Pa0086; Pa0119 (email from counsel for Madison Park Investors providing wire confirmation information for the disbursement of the proceeds of the Madison Park Investors loans).)

E. The Modification Of The ELV Loan

By February 2019, "[i]t was clear" to PrivCap that the loan to ELV "was not going to be paid off." (Pa0185.) PrivCap then agreed to enter into a First Note Modification Agreement with ELV and Levine (the "Modification Agreement"), which extended the maturity date for the loan to June 1, 2019. (Pa0374; Pa0395-398.) Though the Modification Agreement stated that ELV would pay PrivCap for "all fees associated with procuring any updated title

work, searches" and other fees "immediately upon execution of this Agreement," (Pa0396), PrivCap entered into it without conducting a title search or any other updated title work. (Pa0215; Pa0183.)[9]

PrivCap entered into the Modification Agreement without requesting that the original ELV Discharge that Cohen had provided to Selevan, apparently to be held in escrow, be returned. (Pa0374-375.) When asked about PrivCap's inaction, Cohen admitted that PrivCap was not "on top of it to ask for it back":

> Q. **And if it was clear to you at that point that it wasn't going to be paid off, did you request that Mr. Levine give you back the executed discharge of the ELV loan?**
>
> A. Unfortunately, I did not. It didn't come to -- **it just wasn't in my mind that they would do what they ultimately did with it**.
>
> Q. …Would you say it's not common to have a discharge held in escrow for several months?
>
> A. …so I think we were busy, and we lost track of the fact that it was out there…We have a small staff and, you know, we just -- **I guess we weren't on top of it to ask for it back.**

(Pa0175-176 (objection omitted and emphasis added)).

F. The Conventus Loan

In June 2019, six of Levine's entities, including PMN and ELV, obtained a loan in the amount of $4,150,000 from Conventus. (Pa0502-503.) Levine

[9] Of course, a title search at that time would have divulged that the ELV Discharge had already been recorded (Pa0382), and PrivCap could have immediately confronted Levine and Selevan and taken steps to secure payment from the proceeds of the Madison Park Investors loan and thereby mitigate its damages. Thus, PrivCap's loss is due to its own failures.

signed, on behalf of the entities, a mortgage in favor of Conventus as security for that loan. (Id.) The mortgage encumbered six parcels, including the PMN Property and the ELV Property, and was recorded in the Passaic County Clerk's Office and the Union County Clerk's Office, among others. (Id.)

Despite the fact that Cohen had delivered the original Discharges to Selevan, at no point between January 2019 (when the Discharges were recorded) and June 2019 (when the loan by Conventus was made) did anyone from PrivCap review the public records of the Passaic County Clerk's Office or the Union County Clerk's Office concerning the loans made to PMN and ELV. (Pa0375.)

G. The Conventus Action

Conventus filed an action in the Superior Court of New Jersey to foreclose its mortgages in 2020 (the "Conventus Action"). (Pa0506-529.) PrivCap filed counterclaims and crossclaims in the Conventus Action, seeking, among other things, a declaration that the Mortgages were valid and enforceable despite the recording of the Discharges. (Pa0531-550.)

In January 2022, both Conventus and PrivCap moved for summary judgment in the Conventus Action. By Orders dated March 8, 2022, the Court granted Conventus's motion for summary judgment and dismissed PrivCap's counterclaims. (Pa0552-563.) In its Statement of Reasons, the Court concluded that, while the Mortgages had been fraudulently discharged of record, "Privcap

is the party whose actions first enabled Seth Levine's fraud and Privcap is the one who could have first prevented it from ever occurring." (Id.) It further noted:

> Privcap itself could have reviewed the public records of the County Clerk's Office at any point between January 2019 and June 2019 and, if Privcap had done so, it would have discovered the recording of its own discharges in part because they had delivered them to the Borrowers, Elizabeth Louisa Ventures, LLC and Passaic Main Norse, LLC and/or their principal, Seth Levine prior to final payment. **Privcap could have taken action to prevent the loss**, months before the closing of Plaintiff's loan, but instead Privcap allowed Plaintiff's loan and mortgage to close without taking any steps to rectify the situation **caused by Privcap's earlier actions regarding its discharges. Privcap prematurely executed its discharges and delivered them to its borrowers, even though the loans were not paid, instead of to a neutral third party to hold in escrow….If not for Privcap's actions as stated above, the Parties would not have found themselves in this situation.**

(Id. (emphasis added).)

H. The Instant Action

PrivCap commenced the instant action against Madison Title and Selevan in November 2021, and filed an Amended Complaint in July 2022. PrivCap's Amended Complaint asserted five causes of action. First, PrivCap asserted that Madison Title breached a duty to PrivCap in connection with its issuance of the title commitment and policy to Madison Park Investors, namely, that Madison Title had an obligation to ensure that the debts secured by the Mortgages were repaid at the time of the Madison Park Investors loan. (Pa0020-024.) Second, PrivCap asserted that Selevan breached a duty when he did not hold the

Discharges in escrow and instead, provided them to Madison Title for recordation. (Pa0025-026.) Third, PrivCap asserted a claim for breach of bailment, alleging that a contract of bailment existed between PrivCap, Selevan, and Madison Title, and that Selevan and Madison Title breached it by releasing and recording the Discharges without ensuring that PrivCap's loans to PMN and ELV had been repaid. (Pa0027-028.) Fourth, PrivCap asserted a claim for "breach of contract, equitable estoppel, third-party beneficiary," wherein it claimed that PMN and ELV entered into an agreement with Selevan and Madison Title to record the Discharges only after PrivCap had been repaid, that PrivCap is an intended third-party beneficiary of such agreement, and that Selevan and Madison Title breached that agreement. (Pa0028-29.) And, finally, PrivCap asserted that Madison Title and Selevan tortiously interfered with its rights under its contracts with PMN and ELV. (Pa0030.)

Madison Title filed an Answer, together with cross-claims for indemnity and contribution against Selevan, on September 2, 2022. (Pa0034-048.) On July 2, 2024, Madison Title moved for summary judgment as to the claims pending against it. (Pa0066). By Order dated October 28, 2024, the trial court granted Madison Title's motion in its entirety. (Pa0004-013.) This appeal followed.

ARGUMENT

POINT I

THE APPLICABLE LEGAL STANDARDS

Summary judgment pursuant to R. 4:46-1 constitutes a "prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial." Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Thus, where the evidence before the Court demonstrates that "there is no genuine issue as to any material fact challenged," as is the case here, summary judgment is appropriate. R. 4:46-2(c).

While the movant must show the absence of questions of material fact, the standards are to be applied with discriminating care so as not to defeat summary judgment if the movant is justly entitled to it. Pierce v. Ortho Pharm. Co., 84 N.J. 58, 65 (1980). Further, whether there is a genuine issue of material fact requires a consideration of whether the evidence presented, "when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, [is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

Measured by these standards, the trial court properly granted Madison Title's motion for summary judgment and its decision should be affirmed in all respects.

POINT II

THE TRIAL COURT PROPERLY CONCLUDED THAT MADISON TITLE IS ENTITLED TO SUMMARY JUDGMENT ON PRIVCAP'S CLAIM FOR BREACH OF DUTY

The trial court correctly concluded that Madison Title is entitled to summary judgment on the first count of the Amended Complaint, as no formulation of PrivCap's nebulous claim for breach of duty has merit.

A. Madison Title Did Not Have A Fiduciary Relationship With, Or Owe A Fiduciary Duty To, PrivCap

First, Madison Title had no fiduciary relationship with PrivCap and thus owed PrivCap no fiduciary duty. "As a threshold matter in a breach-of-fiduciary-duty claim, the party alleging the breach must establish the existence of a fiduciary relationship." Kwon v. MDTV Realty, LLC, 2023 WL 3606632, at *8 (App. Div. May 24, 2023). "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." F.G. v. MacDonnell, 150 N.J. 550, 563 (1997) (citing Restatement (2d) of Torts § 874 cmt. a (1979)). Between those

parties, "there must exist a certain inequality, dependence, weakness of age, or mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other." United Van Lines, LLC v. Lohr Printing, Inc., 2014 WL 837087, at *4 (D.N.J. Mar. 4, 2014)(citing Alexander v. CIGNA Corp., 991 F. Supp. 427, 427 (D.N.J. 1998)). See also Read v. Profeta, 397 F. Supp. 3d 597, 633 (D.N.J. 2019) ("'…fiduciary relationships arise where one party has the power and opportunity to take advantage of the other, because of that other's susceptibility or vulnerability.'") (citation omitted). As a result, courts traditionally find fiduciary relationships between, for example, trustees and beneficiaries, guardians and wards, attorneys and their clients, and the members of a partnership, see Avon Bros. v. Tom Martin Constr. Co., 2000 WL 34241102, at *4 (App. Div. Aug. 30, 2000), but "fiduciary duties are not imposed in ordinary commercial business transactions." Alexander, 991 F. Supp. at 438.

Madison Title had no fiduciary relationship with, or duty to, PrivCap because Madison Title had no relationship with PrivCap. There were no agreements, oral or written, entered into between Madison Title and PrivCap; indeed, there were no communications between Madison Title and PrivCap other than the two emails sent by Madison Title to PrivCap—both of which went unanswered. (Pa0373-374; Pa0084.) In the absence of a relationship between

the parties, there can be no fiduciary relationship and, accordingly, no breach thereof. See, e.g., Miesels v. Fox Rothschild LLP, 240 N.J. 286, 301 (2020) (no fiduciary duty, and thus no breach, where law firm "lacked knowledge of [the plaintiff's] existence, lacked contact with him, and possessed no knowledge about any agreement between [the plaintiff] and [a third party]").

And, even assuming, arguendo, that Madison Title's unanswered emails to PrivCap were sufficient to constitute the existence of a "relationship" between the parties—*which is clearly not the case*—they signify an ordinary commercial business transaction, not one with an unequal power dynamic or any other indicia of a fiduciary relationship. Indeed, the record is devoid of any evidence that Madison Title was in a dominant or superior position to that of PrivCap—*a sophisticated and experienced lender*—or that Madison Title had the ability to take advantage of PrivCap because of PrivCap's susceptibility or vulnerability. New Jersey courts have routinely refused to recognize so-called "confidential" or "fiduciary" relationships with far more interaction and trust between the parties than that between PrivCap and Madison Title. See, e.g., Kwon, 2023 WL 3606632, at *8 (affirming dismissal of counterclaim for breach of fiduciary duty for lack of fiduciary relationship where realty firm signed written agreement of sale with the plaintiff); Harry Kuskin 2008 Irrevocable Trust by Dworkin v. PNC Financial Group, Inc., 2023 WL 4693141, at *8 (App. Div. July 24, 2023) (no

fiduciary duty between bank and customer where they signed numerous account agreements because there was no evidence that "plaintiff reposed their trust and confidence in PNC to monitor the deposit accounts or that PNC ever maintained a 'dominant and controlling position' over them"); McDonald Motors Corp. v. Delaney, 2022 WL 893469, at *6-7 (App. Div. Mar. 28, 2022) (no breach of fiduciary duty claim where "plaintiff and defendants were arms-length adversaries" and duty did not extend to the public); IVF Inv. Co., LLC v. Estate of Natofsky, 2014 WL 3743366, at *10 (App. Div. July 31, 2014) (no fiduciary relationship where appellee was "an equal partner" in business); United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997).

Though PrivCap argues that Madison Title owed a fiduciary duty to PrivCap because Madison Title was an escrow agent (Pb21-25), PrivCap is incorrect. In order for an escrow arrangement to have been created, the Discharges must have been deposited in escrow with Madison Title itself, instead of the purported escrow with Selevan. See Cooper v. Bergton, 18 N.J. Super. 272, 277 (App. Div. 1952) ("An escrow may be created by writing or by parol, or partly by both; upon the deposit in escrow a contract between the parties as to the delivery by the depositary of its subject matter is created; the depositary becomes the agent for both parties as to such delivery; and neither party can alone rescind.") But that did not occur; rather, the Discharges were

delivered by Selevan to Madison Title with express instructions to submit them for recordation, not to hold them in escrow. (Pa0083-084.) And PrivCap has offered no evidence establishing otherwise, or any evidence that Madison was aware of its arrangement with Selevan.

PrivCap claims that the Selevan Certification establishes that Madison Title received the Discharges from him to hold in escrow. But Selevan's Certification must be disregarded. Not only was it untimely submitted to the court below, but it is false and directly contradicted by Selevan's interrogatory responses (Pa1111-1114), in which Selevan claimed to have "no independent recollection" of (i) any allegation in the Complaint, (ii) "any oral communications" with Madison Title "concerning the subject matter of the Action" and (iii) "receiv[ing] the signed PrivCap Passaic Main Mortgage Discharge from PrivCap before it was recorded." Accordingly, Selevan Certification is barred by the sham affidavit doctrine. See Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002); Metro Mktg., LLC v. Nationwide Vehicle Assurance, Inc., 472 N.J. Super. 132, 148 (App. Div. 2022).

And, while PrivCap may have entered into an unmonitored escrow arrangement with fraudsters Selevan and Levine, PrivCap does not dispute that Madison Title was a never part of that arrangement. First, Madison Title was wholly unaware that such an arrangement even existed (Pa0084-085), and

moreover, PrivCap was wholly unaware of Madison Title's involvement with the Discharges. (Pa0210-211; Pa0215-216.) Indeed, PrivCap's own expert admitted that Madison Title never became part of that escrow arrangement. (Pa0156 (testifying that the parties to the escrow agreement were PrivCap, Selevan and Selevan's client, and that "Madison [Title] did not become a party to this escrow agreement.").)

The record is clear that there were no express or implied agreements between PrivCap and Madison Title, nor did they communicate with each other in any regard. In fact, PrivCap negligently failed to acknowledge or seemingly even read Madison Title's attempts at communication and thus, was not aware of Madison Title's existence in relation to the submission of the Discharges for recordation. (Pa0373-374; Pa0084.) At most, PrivCap and Madison Title were generally involved in the same commercial transaction, but "[a] commercial transaction does not ordinarily give rise to a fiduciary relationship." Ergowerx Int'l LLC v. Maxell Corp. of America, 2017 WL 3160270, at *2 (App. Div. July 26, 2017). Under such circumstances, the trial court properly granted Madison Title summary judgment on PrivCap's first cause of action.[10]

[10] PrivCap has suggested that a fiduciary duty exists between Madison Title and PrivCap by reason of Madison Title's undertaking to record to so-called "naked" discharges. (Pb21-23.) But, as the Restatement 2d of Torts, relied upon by PrivCap, makes clear, the duty created by an undertaking is to avoid "physical harm," and PrivCap has offered no basis for extending it to include economic

B. Madison Title Had No Duty To Hold The Discharges For PrivCap Until Confirming That PrivCap's Loans Were Repaid

PrivCap's assertion that Madison Title also owed it an amorphous non-fiduciary duty to ensure that PrivCap's loans to PMN and ELV were repaid prior to recording the Discharges is likewise without merit.

"The question of whether a duty exists is a matter of law properly decided by the court, not the jury, and is largely a question of fairness or policy." Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991). Where, as here, the parties do not have a relationship with each other, courts routinely find that there can be no duty giving rise to an actionable claim. For instance, in Pennsylvania Nat. Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196, 199 (App. Div.), certif. denied, 77 N.J. 506 (1978), the plaintiff, which operated a racetrack and provided check cashing services in conjunction therewith, sought to recover from the defendant bank the balance due on checks it had cashed for the bank's depositor when the checks were returned due to insufficient funds. Though the bank had initially agreed to an unusual arrangement with its customer by

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harm like that at issue herein, particularly in light of the clear precedent establishing that "there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible harm to persons and tangible things." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 310 (2002). And, to the extent that PrivCap relies upon Meridian Title Corp. v. Pilgrim Fin. Ltd. Liab. Co., 947 N.E.2d 987 (Ind. Ct. App. 2011) (Pb23), that case is entirely inapposite, as it involved a title company acting as an escrowee—a fact not present here (as discussed more fully, supra).

allowing him to incur and then cover overdrafts from checks drawn on the account, the customer soon stopped covering the overdrafts and the bank stopped honoring his checks, including those cashed by the plaintiff. Id. at 199-200. Though the trial court entered judgment for the plaintiff because "the bank's pattern of conduct in handling [the customer's] account throughout its existence constituted a negligent failure to exercise reasonable care which, in turn, permitted [the customer] to carry out his scheme to the damage of [the plaintiff]," id. at 201, the Appellate Division reversed. Recognizing that the "fundamental requisite for tort liability is the existence of a duty owing from defendant to plaintiff," the court held that the bank owed no duty to the plaintiff and thus, "cannot be held liable to [the plaintiff] under any legal theory regardless of the [bank's] patently unbusinesslike deviations from good banking practices in the handling of the [customer's] account." Id. at 201-02. Indeed, the court concluded that the plaintiff's loss "was brought about solely through the plaintiff's relationship with and reliance upon the trustworthiness" of the customer, and that it "cannot recoup by attempting to shift responsibility to the bank which had no relationship with it." Id. at 203. See also Globe Motor Car Co. v. First Fidelity Bank, 273 N.J. Super. 388, 393-94 (Law Div. 1993), aff'd, 291 N.J. Super. 428 (App. Div.), certif. denied, 147 N.J. 263 (1996).

With respect to PrivCap's loans to PMN and ELV and their subsequent

discharge, PrivCap and Madison Title were strangers; they had no relationship of substance. Further, though PrivCap has asserted that Madison Title's issuance of the title commitment and policy to Madison Park Investors created an obligation on Madison Title's part to ensure that PrivCap's loans to PMN and ELV were repaid, or that Madison Title's purported duty to ensure that PrivCap's loans to PMN and ELV were repaid arose from its role as settlement agent for the Madison Park Investors loans, that is patently incorrect. PrivCap was also a stranger to the Madison Park Investors transaction; indeed, PrivCap was not even aware that the Madison Park Investor loans were being made and, thus, could not have had any expectation of a relationship with Madison Title stemming from them. And, in any event, Madison Title did not act as settlement agent with respect to disbursement of the proceeds of the Madison Park Investors loans and was not obligated to pay off any prior loans, as Madison Park Investors' counsel handled and disbursed the loan proceeds.[11] (Pa0086; Pa0119.) Thus, as in Pennsylvania Nat. Turf Club, Inc., 158 N.J. Super. at 203, PrivCap's loss was brought about through its own reckless conduct (Pa0552-

[11] And, even if Madison Title was involved in the disbursement of the proceeds of the Madison Park Investors' loans, Madison Title still would not have a duty to PrivCap to ensure its loans to PMN and ELV were repaid, since PrivCap was not a party to the transaction, and Madison Title only had a contractual obligation to its title insurance underwriter, on whose behalf it issued a title policy to Madison Park Investors. (Pa0454-460.)

563) and the conduct of Levine and Selevan; PrivCap cannot recoup those losses by attempting to shift responsibility to Madison Title.

And, to the extent that PrivCap attempts to portray Madison Title's conduct as deviating from the "industry standard" or its own internal training with respect to the recording of a purportedly "naked" discharge, it likewise fails. First, and most notably, the entire premise of PrivCap's argument in this regard relies upon the conclusory assertion that Madison Title was acting as an escrow agent for PrivCap. (Pb21.) But, no matter how many times PrivCap repeats that claim, it simply is not true, and PrivCap has cited no evidence to the contrary. And, even if Madison Title did not follow its own internal training with respect to so-called "red flags" (Pb29-32), that does not create a duty to PrivCap where one does not otherwise exist.

Moreover, PrivCap's assertion that Madison Title breached its duty by failing to contact PrivCap to confirm that its loans had been repaid prior to the submission of the Discharges for recordation,[12] assumes that Madison Title owed a duty to PrivCap, simply because the Discharges were purportedly "naked."

[12] At the risk of being repetitive, PrivCap's assertion that Madison Title never contacted it is incorrect. Emailing Cohen, the principal of PrivCap, and telling him that Madison Title possessed the Discharges (i.e., Selevan had broken escrow) and it was in the process of submitting them for recordation is the equivalent of letting PrivCap know that Madison Title had been told that the loans had been paid off. At that point it was PrivCap's duty to speak up or bear the consequences of its initial foolish decision to trust its borrower with original Discharges.

Essentially, PrivCap is asking this Court to conclude that a duty existed simply because an alleged breach occurred—that is, because Madison Title submitted the allegedly "naked" Discharges for recordation, it must have owed a duty of care to PrivCap—rather than requiring PrivCap to establish the existence of a duty of care before a breach thereof can be found. But that was simply not possible, no matter how much PrivCap wishes (and throughout its brief assumes) it to be so. PrivCap ignores the fact that in connection with Madison Title's examination of title for the Madison Park Investor loan, Madison Title only owed a duty to its underwriter (with whom it had a contractual relationship), which could face a title claim from its insured—here, Madison Park Investors—if the PrivCap Discharges were fraudulent. Indeed, the premise of Feinberg's "naked" discharge analysis is to prevent title claims by insureds with whom title insurers (via title policies) have contractual privity to its insureds (Pa0452 (noting that Feinberg's analysis of the "naked" discharge issue in his treatise "describes the risk for a title insurer [to its insured under a title policy] when a person 'presents a forged or fraudulent discharge at or prior to closing.'"), not liability from entities which lack contractual privity.[13] Thus, while PrivCap devotes substantial effort to establishing Madison Title's purported breach of a fabricated duty to PrivCap, its failure to establish the primary prerequisite of

[13] Of course, the Discharges were not forged.

such a claim—*the existence of a duty itself*—is plainly fatal to its claim. PrivCap's first cause of action, therefore, was properly dismissed.

POINT III

THE TRIAL COURT PROPERLY CONCLUDED THAT MADISON TITLE IS ENTITLED TO SUMMARY JUDGMENT ON PRIVCAP'S CLAIM FOR BREACH OF BAILMENT

PrivCap's third cause of action asserts that a "contract of bailment" existed between PrivCap and Madison Title and that Madison Title breached its obligations as bailee. PrivCap, however, is incorrect.

In order to establish the existence of a bailment, a plaintiff must show (1) delivery of personal property by one person to another in trust for a specific purpose, (2) acceptance of such delivery, and (3) an express or implied agreement to carry out the trust and return the property to the bailor. Pisack v. B & C Towing, Inc., 240 N.J. 360, 381 (2020). If a plaintiff establishes the existence of a bailment relationship and that the goods subject to the bailment were lost while in the bailee's possession, "a presumption of negligence arises, requiring the bailee to come forward with evidence to show that the loss did not occur through its negligence or that it exercised due care." Rivera v. Canseo, 2019 WL 6873630, at *3 (App. Div. Dec. 17, 2019) (citation omitted).

A. PrivCap And Madison Title Did Not Have A Bailment Relationship

PrivCap's claim for breach of bailment fails to show any of the elements

required to establish a bailment. First, PrivCap did not deliver the Discharges to Madison Title, and Madison Title did not accept the Discharges from PrivCap. (Pa0372-373.) Rather, PrivCap delivered them to Selevan, Levine's in-house counsel and agent, and Selevan delivered them to Madison Title with the instruction that they be submitted for recordation. (Id.; Pa0081-083.)[14] In fact, at all relevant times, PrivCap was unaware that Selevan had given the Discharges to Madison Title to be submitted for recordation. (Pa0210-211; Pa0215-216.) When asked about the agreement between PrivCap and Selevan (acting on behalf of Levine, PMN and ELV), PrivCap's own expert admitted that Madison Title "did not become a party to this escrow agreement." (Pa0156.)

Moreover, Madison Title never had any agreement, express or implied, with PrivCap to hold the Discharges in trust and return them later. (Pa0085.) PrivCap has not offered any evidence of an express bailment agreement—nor can it, because no such evidence exists. Nor did PrivCap offer anything but conclusory allegations as to an implied agreement between it and Madison Title. (Pa0027-028.) Madison Title received the Discharges from Selevan with instructions to submit them for recordation, not to hold them in escrow and return them to PrivCap at a later date. (Pa0081-084; Pa0089; Pa0098; Pa0107.)

[14] PrivCap argues that Selevan "testified he send [sic] the discharges to Madison [T]itle to be held in escrow until the loans were repaid." (Pb34.) However, the trial court properly disregarded Selevan's sham certification. See Note 3, supra.

Notably, no one from PrivCap was copied on Selevan's emails and PrivCap was never aware that the Discharges had been given to Madison Title because Cohen never looked at (or ignored) the two emails which Madison Title sent him which, had he read them, would have informed him that Madison Title was submitting the Discharges for recordation. (Pa0373-374; Pa0386; Pa0390.) Moreover, the Discharges themselves unequivocally indicate that PrivCap's loans to PMN and ELV had been fully satisfied and thus, could be discharged as of record. (Pa0379; Pa0383.) There was, therefore, no implied bailment agreement between PrivCap and Madison Title, either. In the absence of such an agreement, Madison Title did not owe a duty to PrivCap to hold the Discharges in trust and return them to PrivCap. See Bratka v. Castles Ice Cream Co., 40 N.J. Super. 576, 582 (App. Div.), certif. denied, 22 N.J. 226 (1956) (no bailment relationship where "[t]he record [was] devoid of any evidence of such an arrangement").

Though PrivCap argues that "it is irrelevant that PrivCap did not directly deliver the discharge to Madison Title" (Pb35), that is not the case; indeed, it is the delivery of property by one person to another *in trust* that creates a bailment relationship. See, e.g., LaPlace v. Briere, 404 N.J. Super. 585, 600 (App. Div. 2009) ("[W]e conclude that when plaintiff delivered his horse to Briere stable and left it in Briere stable's care for safekeeping, a bailment arrangement arose."). Moreover, Madison Title never had any agreement, express or implied,

with PrivCap to hold the Discharges in trust and return them later. (Pa0085.) Indeed, Madison Title received the Discharges from Selevan with instructions to submit them for recordation, not to hold them in escrow and later return them to PrivCap. (Pa0082-084.) Plainly, there was no bailment arrangement.

B. Madison Title Has Overcome Any Presumption Of Negligence

And, even if PrivCap could show the existence of a bailment with Madison Title (which it cannot), any subsequent loss resulted not from Madison Title's negligence, but PrivCap's negligence.

As the court in the Conventus Action determined, "Privcap is the party whose actions first enabled Seth Levine's fraud and Privcap is the one who could have prevented it from ever occurring." (Pa0556.) PrivCap prematurely signed the Discharges (which falsely affirmed that the loans had been repaid) and delivered them to Levine and Selevan (rather than to a neutral third-party) without any sort of formal escrow agreement. (Pa0372-372.) When the promised refinance failed to materialize, PrivCap imprudently failed to request that the Discharges be returned because it was not "on top of it to ask for [them] back." (Pa0175-176.) PrivCap ignored Madison Title's repeated emails, though those emails clearly put PrivCap on notice that Madison Title had the Discharges and was submitting them for recordation (Pa0373-374; Pa0386; Pa0390)—*which PrivCap's own expert admitted should have been cause for concern*. (Pa0163.)

PrivCap also failed to have a title search performed in conjunction with the Modification Agreement (even though ELV would have been responsible for the cost of such a search), and imprudently failed to request that the Discharges be returned at that time, as well. (Pa0215; Pa0183; Pa0374-375.)

Thus, even assuming, arguendo, that PrivCap and Madison Title had formed a bailment relationship—*which they did not*—PrivCap's own conduct rebuts any presumption of negligence as to Madison Title.[15] (Pa0600-601.) Summary judgment should, therefore, was properly awarded to Madison Title on this claim. See Rivera, 2019 WL 6873630, at *3; Potomac Aviation, LLC v. Port Authority of New York and New Jersey, 413 N.J. Super. 212, 228 (App. Div. 2010); LaPlace, 404 N.J. Super. at 603.

POINT IV

THE TRIAL COURT PROPERLY CONCLUDED THAT MADISON TITLE IS ENTITLED TO SUMMARY JUDGMENT ON PRIVCAP'S CLAIM ALLEGING THAT IT WAS A THIRD-PARTY BENEFICIARY TO AN AGREEMENT BETWEEN SELEVAN, PMN AND ELV

The trial court also properly granted summary judgment for Madison Title on the muddled fourth count of PrivCap's Amended Complaint. That claim

[15] Madison Title, for its part, relied upon the representations of Selevan, Levine's in-house counsel (an attorney, bound by the Rules of Professional Conduct) that the loans had been paid off and the Discharges themselves, which affirmatively represent that PrivCap's loans to PMN and ELV had been repaid. (Pa0379; Pa0383.) Acting in reliance on such representations was reasonable.

alleges that PrivCap was an intended third-party beneficiary of a purported agreement between Madison Title, Selevan, PMN, and ELV to ensure that PrivCap was paid prior to recording the Discharges, as well as that Madison Title should be estopped from denying liability for the damages it allegedly caused PrivCap. Both aspects of this claim fail in law and in fact.

A. Madison Title Had No Contract With Selevan, PMN Or ELV; Nor Was PrivCap An Intended Third-Party Beneficiary Of Such Non-Existent Contract

In order to establish a claim for breach of contract, a plaintiff must prove (1) the parties entered into a contract, containing certain terms;[16] (2) the plaintiff performed what was required under the contract; (3) the defendant did not fulfill its obligations under the contract; and (4) the defendant's breach caused a loss to the plaintiff. See Pollack v. Quick Quality Restaurants, Inc., 452 N.J. Super. 174, 188 (App. Div. 2017), certif. denied, 232 N.J. 394 (2018). If the party asserting the claim of breach is a third party, rather than a direct party to the

[16] "A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'…Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (internal citations omitted). Further, "no contract is enforceable...without the flow of consideration—both sides must 'get something' out of the exchange." Cont'l Bank of Pa. v. Barclay Riding Academy, Inc., 93 N.J. 153, 170, cert. denied, 464 U.S. 994 (1983) (citation omitted).

contract, the third-party must also demonstrate that "the contracting parties intended that a third party should receive a benefit which might be enforced in the courts." Reider Communities, Inc. v. Township of North Brunswick, 227 N.J. Super. 214, 222 (App. Div.), certif. denied, 113 N.J. 638 (1988).

On that note, "New Jersey courts have been hesitant to imply a third-party beneficiary obligation without an explicit indication by the parties[.]" Dravo Corp. v. Robert B. Kerris, Inc., 655 F.2d 503, 509 (3d Cir. 1981). Unless such an obligation can be derived, "the third party has no cause of action despite the fact that it may derive an incidental benefit from the contract's performance." Reider, 227 N.J. Super. at 222; see also Broadway Maintenance Corp. v. Rutgers, State University, 90 N.J. 253, 259 (1982).

As an initial matter, Madison Title did not enter into any contract with Selevan, PMN, and ELV, let alone one that required it to ensure that PrivCap was repaid prior to submitting the Discharges for recordation. (Pa0085.) Rather, Selevan delivered the Discharges to Madison Title with instructions to submit them for recordation, not to hold them pending repayment of PrivCap's loans. (Pa0082-84.) Indeed, at all relevant times, Madison Title believed that the Mortgages had already been repaid (as the Discharges themselves affirmatively represent). (Pa0082-083.) Moreover, inasmuch as Madison Title submitted the discharges for recordation as a courtesy to Levine and Selevan, there was no

"flow of consideration" from Selevan, PMN and ELV to Madison Title, as required for an enforceable contract. See Cont'l Bank of Pa., 93 N.J. at 170.

And, even assuming, arguendo, that such an agreement existed, PrivCap cannot establish that it was an intended third-party beneficiary of such an agreement. Selevan, PMN, and ELV (and their principal, Levine) clearly never intended to hold off on submitting the Discharges for recordation until PrivCap was repaid; rather, Selevan instructed Madison Title to submit them for recordation. (Pa0081-084; Pa0089; Pa0098; Pa0107.) For its part, Madison Title had no intentions whatsoever regarding PrivCap's repayment. In fact, Madison Title had no knowledge that the Mortgages had not been repaid and, in fact, believed that the Mortgages had been paid off, as the Discharges themselves so stated. (Pa0084-085.) As no party to the alleged contract intended, or would have intended, for PrivCap to be a third-party beneficiary, the trial court properly granted Madison Title summary judgment on this claim. See Bank of New York Mellon v. Narang, 2019 WL 1040431, at *3-4 (App. Div. Mar. 5, 2019), certif. denied, 239 N.J. 270 (2019) (affirming dismissal where "defendant failed to show any intent to make him a third-party beneficiary").

B. PrivCap Cannot Establish That Madison Title Should Be Equitably Estopped From Denying Liability To PrivCap

The trial court also correctly concluded that PrivCap had failed to support its bald claim that, for some reason, Madison Title should be equitably estopped

from denying liability for PrivCap's alleged damages. Equitable estoppel requires a plaintiff to show "a (1) knowing and intentional misrepresentation by the party sought to be estopped; (2) under circumstances in which the misrepresentation would probably induce reliance; and (3) reliance by the party seeking estoppel to his or her detriment." Township of Neptune v. State, Dept. of Environmental Protection, 425 N.J. Super. 422, 438 (App. Div. 2012) (citing O'Malley v. Dept. of Energy, 109 N.J. 309, 317 (1987)).

Here, PrivCap has not established—and indeed, cannot establish—the required elements of equitable estoppel. First, PrivCap cannot show that Madison Title knowingly or intentionally made any misrepresentations to it. As set forth more fully above, the only times Madison Title ever directly communicated with PrivCap with respect to this matter were the unanswered emails in January 2019 concerning the ELV Discharge. These communications were not misrepresentations (much less knowing and intentional ones), but rather honest attempts to obtain documentation sufficient to terminate the UCC financing statement for the ELV loan. (Pa0386; Pa0390.) Second, the circumstances under which Madison Title communicated with PrivCap would not induce PrivCap to rely on any of its statements. In fact, quite the opposite is true: had PrivCap acknowledged Madison Title's emails in January 2019, it would have recognized that Selevan had passed the Discharges to a third-party

to be submitted for recordation even though the loans had not been paid off, and it could have intervened to prevent their recording.[17] Finally, PrivCap did not rely on any statements by Madison Title; as PrivCap has admitted, it does not recall ever seeing the January 2019 emails from Madison Title (Pa0373), so it certainly could not have relied upon them in any way. PrivCap thus cannot invoke equitable estoppel against Madison Title.

POINT V

THE TRIAL COURT PROPERLY CONCLUDED THAT MADISON TITLE IS ENTITLED TO SUMMARY JUDGMENT ON PRIVCAP'S CLAIM FOR TORTIOUS INTERFERENCE

As with its other claims, PrivCap cannot establish that Madison Title tortiously interfered with any of its purported contractual rights. The trial court, therefore, properly determined that Madison Title is entitled to summary judgment on this claim.

To establish a claim for tortious interference with an existing contract, a plaintiff must show "(1) an existing contractual relationship; (2) intentional and malicious interference with that relationship; (3) loss or breach of a contract as a result of the interference; and (4) damages resulting from that interference." DiGiorgio Corp. v. Mendez and Co., Inc., 230 F. Supp. 2d 552, 558 (D.N.J.

[17] And, even if the Discharges had already been recorded, PrivCap could have immediately filed a lis pendens, thereby putting other lenders on notice that its mortgages had not be satisfied, notwithstanding the recorded Discharges.

2002) (citing Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 751-52 (1989)). Notably, a tortious interference claim requires the plaintiff to prove that the defendant's interference was malicious, meaning "that harm was inflicted intentionally and without justification or excuse." Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306 (2001) (citing Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div. 1995)). And, to constitute a wrongful act for the purpose of this cause of action, the conduct must be "transgressive of generally accepted standards of common morality or of law." John C. Evans Project, Inc. v. Valley Nat. Bancorp, 2012 WL 1581148, at *8 (App. Div. May 8, 2012) (citing Lamorte Burns & Co., 167 N.J. at 306).

PrivCap has failed to show that Madison Title interfered with its contract, much less that such interference was intentional and malicious. Madison Title reasonably relied upon and followed the instructions of Selevan—a licensed attorney bound by the Rules of Professional Conduct—in submitting the Discharges for recordation. Such actions certainly do not transgress the generally accepted standards or common morality or the law; in fact, such actions are typical for title agencies when handling courtesy or accommodation recordings. (Pa0449-452; Pa0618-619.) Madison Title also reasonably relied upon the language of the Discharges themselves, which state that PrivCap's loans to PMN and ELV had been fully satisfied and thus, could be discharged

as of record. (Pa0379; Pa0383.) Moreover, when Madison Title emailed PrivCap concerning the termination of the UCC financing statement for the ELV loan, it attached the ELV Discharge—thus, making PrivCap aware that the Discharges were no longer being held in escrow by Selevan, and that Madison Title was submitting them for recordation. (Pa0386; Pa0390.) Rather than demonstrating malicious intent, these facts evince Madison Title's good faith belief that the underlying mortgages had been repaid. Indeed, PrivCap's sole "proof" of Madison Title's allegedly malicious intent is its own conclusions. That is not enough.

And, PrivCap has similarly failed to show that its damages resulted from Madison Title's alleged interference, rather than its own actions. PrivCap prematurely signed the Discharges—affirming that its loans to PMN and ELV had been repaid, even though they had not—and delivered them to its borrowers (rather than to a neutral third-party) without executing any sort of formal escrow agreement. (Pa0372-373.) When the planned refinance fell through, PrivCap did not request that the Discharges be returned to it. (Pa0185-0186.) PrivCap ignored Madison Title's repeated attempts at communication, though they clearly put PrivCap on notice that Madison Title had and was submitting the Discharges for recordation. (Pa0373-0374; Pa0386; Pa0390.) Two months later, PrivCap agreed to extend the maturity date for the ELV Mortgage but failed to

request that the Discharges be returned at that time (Pa0374-375), and failed to obtain a title search. (Pa0215; Pa0183.) Nor did PrivCap check public records at any time between January and June 2019 to verify that the Mortgages were still of record. (Pa0375.) PrivCap's damages resulted from its own reckless, foolish, and negligent conduct.

In light of the foregoing, Madison Title was properly awarded summary judgment on PrivCap's claim of tortious interference. See Skelly v. Hackensack University Medical Center North at Pascack Valley, LLC, 2023 WL 8743202, at *5 (App. Div. 2023) (affirming summary judgment where plaintiff's tortious interference claim "was not supported by any evidence and was based on his own opinions"); John C. Evans Project, Inc., 2012 WL 1581148, at *8 (affirming summary judgment dismissing tortious interference claim with prejudice where "no evidence that Evans actually interfered with or acted with intent or malice with respect to [the defendant's] contract"); Norwood Easthill Associates v. Norwood Easthill Watch, 222 N.J. Super. 378, 386 (App. Div. 1988) (affirming summary judgment where "plaintiff cannot show any injury, loss, or detriment reasonably attributable to defendants' alleged malicious interference").

POINT VI

MADISON TITLE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE PRIVCAP'S ACTIONS WERE THE CAUSE OF ITS LOSSES

Though the trial court did not reach Madison Title's argument in this regard, PrivCap is also bound by the Conventus court's determination that its own actions were the cause of its losses and accordingly, PrivCap is barred from recovering against Madison Title in this action.

A. PrivCap Is Estopped From Disputing The Court's Ruling In The Conventus Action

"Collateral estoppel is an equitable remedy that bars re-litigation of any issue that was determined in a prior action." Matter of Borough of Englewood Cliffs, 473 N.J. Super. 189, 202 (App. Div. 2022) (citing In re Liquidation of Integrity Ins. Co., 214 N.J. 51, 66 (2013)). When applied, the doctrine prevents a party from using two separate forums to contest the same set of facts and reach opposite and conflicting conclusions. See Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67, 85 (2012). To properly invoke collateral estoppel, the moving party must show that:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Id. (citation omitted).

All five factors apply here to bar PrivCap from relitigating whether it bears primary responsibility for the fraud that caused its losses, in light of the Conventus court's conclusion that "PrivCap is the party whose actions first enabled Seth Levine's fraud and PrivCap is the one who could have prevented it from ever occurring." (Pa0556.) First, the Conventus Action concerned the same issue present before this Court: who bore responsibility for the fraudulent discharges of the Mortgages. On that issue, that Court issued summary judgment in favor of Conventus, concluding that "Privcap could have taken action to prevent the loss" but failed to do so as a result of its own failures. (Pa0552-563.)[18] That determination was essential to the Court's grant of summary judgment in favor of Conventus and its dismissal of PrivCap's counterclaims. (Id.) All five elements for collateral estoppel are thus satisfied here, and PrivCap should be estopped from continuing to dispute this issue.

B. PrivCap's Negligence Surpasses Any Alleged Negligent Conduct Of Madison Title And Thus, Bars PrivCap From Any Recovery

New Jersey's comparative negligence statute, N.J.S.A. 2A:15-5.1, limits recovery for a plaintiff whose own negligence contributed to its losses. "[A] plaintiff who is found to be more than fifty percent at fault is entitled to no recovery. A plaintiff who is found to be fifty percent or less at fault is entitled

[18] Final judgment was later entered in favor of Conventus. (Pa0627.)

to a recovery, but any award of damages is diminished by the percentage of negligence attributed to [it]." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 109 (2004).

Here, the recklessness and negligence of PrivCap's own acts and omissions exceed any purportedly negligent conduct alleged of Madison Title, and its recovery is therefore prohibited. As set forth above, the Conventus court already determined that PrivCap "first enabled Seth Levine's fraud" and "could have first prevented it from ever occurring." (Pa0556.) PrivCap executed the Discharges, and without entering into a formal escrow agreement, delivered them to its own borrowers before it had been repaid. (Pa0372-373.) PrivCap not only enabled the fraud to occur, it had the last clear chance to stop the fraud but it failed to do so. PrivCap also failed to recall those Discharges after the planned refinance fell through. (Pa0175-176.) PrivCap also failed to respond to Madison Title's emails indicating that it held and intended to submit those Discharges for recordation. (Pa0373-0374; Pa0386; Pa0390.)[19] PrivCap also later agreed to extend the maturity date for the ELV Mortgage but failed request that the

[19] New Jersey courts routinely hold that receipt of an email constitutes notice of its contents. See, e.g., Jasicki v. Morgan Stanley Smith Barney LLC, 2021 WL 162004 (App. Div. Jan. 19, 2021); Regalbuto v. Director, Div. of Taxation, 2016 WL 7581852 (Tax Ct. Dec. 23, 2016); see also Schmell v. Morgan Stanley & Co., Inc., 2018 WL 4961469, at *2 (D.N.J. Oct. 15, 2018).

Discharges be returned at that time (Pa0374-375)[20], and failed to obtain a title search to verify that the ELV Mortgage was still recorded—even though the Modification Agreement obligated ELV to pay for the title search. (Pa0215; Pa0183.) And, PrivCap also failed to check public records at anytime thereafter to determine whether the Mortgages remained valid. (Pa0375.)[21]

Indeed, PrivCap's own experts could not justify PrivCap's foolish and reckless conduct. Mr. Alexander testified that he would "never counsel[]" any of his lending clients to give original discharges to its borrower because "you don't want to have a discharge floating out—floating out there" since "[t]here is a danger that someone [i.e., the borrower] may record it improperly." (Pa0154-155.) And, this negligent conduct of providing the Discharges to PrivCap is the precise conduct which led the Conventus court to conclude that "PrivCap is the party whose actions first enabled Seth Levine's fraud and PrivCap is the one who could have prevented it from ever occurring." (Pa0556.)

The foregoing sufficiently demonstrates that PrivCap's own negligence surpassed any alleged negligence of Madison Title, thus barring PrivCap's

[20] PrivCap's expert also acknowledged that it would have been "best practice" for PrivCap to have requested that the ELV Discharge be returned when the maturity date for that loan was extended. (Pa0165.)

[21] PrivCap's experts further admitted that if such a search had been conducted, the recorded Discharges would have been discovered. (Pa0160-161; Pa0427-428.)

recovery here. Even more so, PrivCap's experts also both agreed that, unlike Cohen, they would not have ignored Madison Title's emails, which gave PrivCap notice that (i) Selevan and Levine had breached the flimsy "escrow agreement" which PrivCap purportedly had with them; and (ii) Madison Title was in possession of the Discharges and in the process of submitting them for recordation. Neither of PrivCap's experts could justify Cohen's conduct. (Pa0163; Pa0429-430.) Indeed, only Cohen knew that the PrivCap loans had not been paid off; yet, he sat on his hands and said nothing for months.

In contrast to PrivCap's own persistent pattern of negligence, Madison Title's alleged "negligence"—*and there was no negligence on the part of Madison Title*—pales in comparison. Indeed, PrivCap essentially claims that Madison Title should have ignored industry custom and the explicit instructions of Selevan to somehow do more to inform PrivCap—*a party with whom it had no contractual relationship, and to whom it owned no duty*—that it intended to submit PrivCap's executed Discharges for recordation (beyond the multiple unanswered emails which gave PrivCap the exact notice it claims it should have received), even though the Discharges themselves indicate that the loans in question had been repaid. To call these actions negligent is a stretch. But, even assuming, arguendo, that Madison Title's conduct was negligent, PrivCap's own recklessness and negligence still far exceeds that alleged of Madison Title.

Indeed, once PrivCap recklessly gave Selevan the Discharges, Selevan and Levine did not need Madison Title to engage in the ministerial act of submitting the Discharges for recordation in order to complete their fraud; Selevan simply could have submitted the Discharges for recordation himself. Thus, Madison Title's submission of the Discharges for recordation as an accommodation and courtesy for a long-time client did not change the end result here. PrivCap's foolish, reckless, and negligent act of giving the original Discharges to its borrowers is all that was needed by Selevan and Levine to complete their fraud. Thus, PrivCap's claims for damages are barred.

CONCLUSION

For all of these reasons, Madison Title respectfully requests that this Court affirm the trial court's rulings in all respects.

Respectfully submitted

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Dated: June 6, 2025

PRIVCAP FUNDING, LLC, Appellant/Plaintiff, v. MADISON TITLE AGENCY, LLC; ANDREW SELEVAN; JOHN DOE, LLC, Respondent/Defendant.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO.: A-001710-24** **Civil Action** **On Appeal From:** Law Division Union County Docket No.: UNN-L-3863-21 **Sat Below:** Hon. Daniel R. Lindemann, J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANT/PLAINTIFF, PRIVCAP FUNDING, LLC

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PRELIMINARY STATEMENT

Madison Title Agency, LLC ("Madison Title") seeks to avoid liability for damages caused by its failure to adhere to industry standards requiring a title agent to contact the mortgagee before recording a naked discharge. Madison Title takes liberty with the record and embellishes certain testimony to distract this Court form the issue at hand. For example, the parties acknowledge the industry standard is for private lenders to deliver executed discharges of mortgage before a closing – a standard confirmed by the expert witnesses. However, Madison Title keeps referring to Mr. Cohen's adherence to this industry standard as "foolish". Also, Madison Title alleges time and time again Madison Title was told or directed to record the discharge of mortgages. Again, the record shows otherwise. The person who recorded the discharges testified at his deposition he does not know if he was told to record discharges the mortgage and the person who sent the discharges (Mr. Selevan) certifies he never told Madison Title to record the discharges of mortgage. The email referenced by Madison Title does not tell Madison Title to discharge the mortgages, just remove them from the title policy as an exception when the final policy is issued believing the mortgages would be paid at closing.

In the end, Madison Title assumed the obligation to follow the industry standard when it assumed the obligation to record the discharges. If Madison Title did not want

the liability for this assumed obligation, it should have simply returned the discharges to Mr. Selevan and told him to record himself.

The trial court erred by holding that the title agent owes no duty to Privcap because a voluntary assumption to act creates a duty. An undertaking is the willing assumption by one party with respect to another that gives rise to a duty. Here the title agent willingly assumed the duty of recording the naked discharges and that duty to Privcap was breached but not verifying whether the debt was paid. Both New Jersey law and expert testimony from both parties agree that an undertaking of this sort would create a duty.

STATEMENT OF FACTS

Privcap supplements its Statement of Facts to respond to certain factual allegations made by Madison Title, many of which are material issues in dispute to be decided by the fact finder, the jury. Many of these facts are set forth in Privcap's Appellate Brief so the factual allegations will be summarized with reference to Privcap's Appellate Brief in most circumstances.

A. Mr. Cohen Did Not "Foolishly" Sign And Deliver The Discharge of Mortgages to Borrowers' Counsel.

Madison Title alleges in various parts of its Brief that Mr. Cohen foolishly signed and delivered the discharges before the closing. This alleged factual allegation contradicts the testimony of all the experts in this case, including Madison Title's

expert William Slover, who agreed it is the industry standard to deliver an executed discharge before closing. (Privcap Brief, at 8-9). How can following the industry standard be foolish?

B. Neither Mr. Selevan Nor Mr. Cohen Directed Madison Title to record The Discharges To State The Mortgages Were Paid.

At various places in its Brief, Madison Title alleges that Mr. Selevan directed Madison Title to record the discharge of mortgages. This statement is not supported by the record or, at best, is a factual issue in dispute.

Mr. Lefkowitz testified at his deposition he does not know who, if anyone, told him to record the discharges. (Pa880, T4 78:3-13). Mr. Selevan certifies he never told Madison Title to record the discharges. (Pa1088). More important, the email relied upon by Madison Title does not give an instruction to record the discharge – it does no say that. Rather, the email simply states that the mortgage is to be removed as an exception from the title policy when the policy is to be issued.

This is a fact issue for the jury. What was Madison Title told about recording the discharges? Mr. Lefkowitz did not remember what he was told, Mr. Selevan certifies he never told Madison Title to record the discharges, and the email is ambiguous at best. G

C. **Madison Title and Privcap Had a Business Relationship**.

Madison Title alleges "PrivCap and Madison Title were strangers; they had no relationship of substance." (Brief, at 29). This is not true. Privcap is a

customer of Madison Title and paid for, and obtained, title polices from Madison Title. (Pa866) (Mr. Lefkowitz testified "we have insured – we have done business with Privcap and insured Privcap"). This issue is relevant since it is a very easy lift for Madison Title to call an existing customer to determine if a loan had bene repaid before discharging the naked discharges.

D. Conventus Loan is Not Relevant or Cited in Summary Judgment Decision.

Madison Title attempts to rely upon Judge Mega's decision in the Conventus, LLC v. Passaic Main Norse LLC et al., matter to argue that any finding as to Mr. Cohen's action as they pertained to Conventus bars the claims in this case. (Brief, at 1601-7). Madison Title mischaracterizes Judge Mega's findings. In its statement of reasons, the trial court stated that PrivCap could have reviewed the County Clerk's records "at any points between ***January 2019 and June 2019***." (Brief, at 18). In other words, the court was focused on determining who, between ***PrivCap and Conventus***, was more at fault in the time period between when the discharge was recorded and when the Conventus loan closed, i.e., post-discharge. Ibid. The court was not—as Madison Title alleges—determining the issue at hand in this case, which is whether Madison Title breached its fiduciary duty to PrivCap by wrongfully recording the discharge in the first place. That issue, which is central to this case, was not adjudicated nor presented to Judge Mega.

Also, the trial court did not cite to this decision or rely upon it.

E. Trial Court Confused Which Contract Forms The Basis For The Tortious Interference Claim.

The trial court and Madison Title error when they discuss what contract formed the basis for the third-party beneficiary claim. The trial court states "Privcap incorrectly assumes the existence of a contract between Madison, Selevan, PMN and ELV in the first place." (Pa0012). The trial court continues with "but it is once again unclear how this paragraph establishes that Madison Title was or should have been aware of Cohen's instructions." (Id.).

Privcap is not alleging Madison Title should have been aware of Mr. Cohen's instructions to Mr. Selevan, or that there was a contract between Madison Title and PMN or ELV. The contract in which Privcap was the third-party beneficiary is the ***verbal escrow agreement between Madison Title and Selevan*** where Selevan sent the discharges to Madison Title to hold in escrow. By sending the discharges to Madison Title to hold in escrow, a contract was entered into between Madison Title and Selevan. Privcap was a third-party beneficiary of this agreement.

LEGAL ARGUMENT

I. MADISON TITLE FAILS TO ESTABLISH THERE IS NO DUTY OWED TO PRIVCAP.

Madison Title argues that since there were no agreements, written or oral, entered into between Madison title and Privcap, there is no fiduciary relationship between the parties. (Brief, at 22 and 26). In addition, since the parties did not have

an unequal power dynamic, no fiduciary relationship can be implied. (Brief, at 23). However, Madison Title fails to address New Jersey law holding that one who undertakes to render service to another is subject to liability for his or her failure to exercise reasonable care.

Whether a duty exists or not is a question of law for the judge on fairness or policy. *Wang v. Allstate Ins. Co.*, 125 N.J. 2, 15 (1991). Whether a person owes a duty of reasonable care turns on an analysis of basic fairness under all circumstances. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 439 (1998). By weighing several factors such as, "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest," courts can determine whether a duty exists. *Id.*

First, in determining whether a duty is imposed, courts engage in a complex balancing test. Under New Jersey law, a fiduciary relationship is where "one party places trust and confidence in another who is in a dominant or superior position." *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002). The test for whether a relationship exists is when, "it is reasonably certain that the one party occupied a dominant position over the other." *F.G. v. MacDonell*, 150 N.J. 550, 563 (1997) (citing *Blake v. Brennan*, 1 N.J. Super. 446, 453 (Sup. Ct. 1948)). The fiduciary who breaches these duties and causes harm to another is liable. *Id.* at 564. Also, "[w]hen the plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by

defendant's negligence, and liability can be limited fairly, courts have endeavored to create exceptions to allow recovery." People Express Airlines

In *Walker Rogge Inc. v. Chelsea Title Guar. Co.*, plaintiff acquired a title insurance policy from defendant. 254 N.J. Super. 380, 382-3 (1992). Later, plaintiff discovered the land was small than plaintiff thought. *Id.* They sued for negligence and the court was tasked with whether the defendant assumed a duty outside of the contractual obligation. *Id*. The Supreme Court, before this case was on remand, held that "Chelsea could be liable in negligence if the act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Id.* at 384 (quotations omitted). This was then extended to title companies in *Cocco v. Hamilton*, where the court states the title company could be subject to a negligence action if it was a direct result of duties voluntarily assumed. 2010 N.J. Super. Unpub. LEXIS 1047, at *31 (2010).

A fiduciary duty was established between Privcap and Madison Title. As is uncontested by both parties, Madison Title recorded the naked discharges and passed them along. By "undertaking" this task and in line with *Walker Rogge* and *Cocco*, Madison Title assumed and owed a duty to Privcap. Respondent claims that because there were no express or implied agreements that there is no relationship, however, by voluntarily recording the naked discharges, an implied agreement or duty to handle the discharges with reasonable care was established. With a duty established

it is for the jury to decide whether Madison Title handled the naked discharges with reasonable care and thus should go past the summary judgment stage. Respondents also claim that the undertaking founded in *Restatement 2d of Torts* only applies to physical harm, however, *Cocco* held that this undertaking exists for something very similar to this case which is a lot of land's discounted price value or an economic harm. 2010 N.J. Super. Unpub. LEXIS at *28; *see also In re Kinsman Co.*, 388 F.2d 821, 824 (2d Cir. 1968) (applying proximate cause analysis to claim for purely economic losses). However, even if the court finds that an undertaking does not inherently create the duty, the relationship created through passing this discharge through along with weighing the other factors in the totality of the circumstances, Therefore, this court should find that there is a relationship between Madison Title and Privcap, and therefore, a duty is owed to Privcap for the harm they suffered.

Second, in evaluating the nature of the attendant risk, the greater the risk, the more it weighs in favor of imposing a duty of care. *Hopkins*, 132 N.J. at 453. The traditional test is what a reasonably prudent person would do within the circumstances. *Id.* Duty is knowledge of the risk of harm or the reasonable apprehension of that risk. *Id.* Courts look at the foreseeability of the risk as well as the severity. *See J.S. v. R.T.H.*, 155 N.J. 330, 337 (1998).

In *J.S.*, the wife of the sexual assaulter was added as a defendant stating that she should have known what her husband was doing. *Id.* at 335. Here, the court found

that summary judgment determining no duty was premature because there is a foreseeability factor of the wife having "particular knowledge" or "special reason to know" that the persons being assaulted would suffer an injury. *J.S.*, 155 N.J. at 343, 354; *see also Hopkins*, 132 N.J. at 451-52 (Clifford, J., concurring) (explaining it is appropriate to impose liability on real estate brokers for failing to duty to warn something commonplace if it is only in specific circumstances extending to a limited class).

Similar to the reasoning in *J.S.* and the example in *Hopkins*, there was a foreseeable risk where reasonable care was necessary. To determine that reasonable care is a fact question that should go to the jury. This is not the first encounter Madison Title has had with Privcap. In fact, they were previous clients and have successfully completed similar transactions before. However, in the current transaction, the new mortgage has jumped ahead, and this has occurred twice. Given their prior relationship, it was reasonable to expect Madison Title to exercise some due diligence. The Finberg standard (and the industry standard) emphasizes the importance of verifying payoffs directly with lenders. Simply making a call to inquire, "Have you been paid off?" is sufficient. One must independently contact the lender to confirm, and this is seen in situations like wiring funds. In practices like these, constant triple-checking is essential to ensure accuracy and prevent errors. This is no different from discharging mortgages and complies with the industry

standard of double or even triple-checking to make sure a severe harm like this does not again occur.

Next, courts evaluate the opportunity and ability to exercise care. *Hopkins*, 132 N.J. at 453. In *Rowe v. Mazel Thirty, LLC*, plaintiff argues that the Appellate Division erred in reasoning that the homeowner owed no duty to the police officer to warn about dangerous conditions in the house. 209 N.J. 35, 40 (2012). The court found that there is a duty owed because how easy it would have been to resolve and exercise the care.[1] *Id.* at 45. The court further reasoned that it does not have to be in person but can be a sign like a warning sign near the danger. *Id.* at 48n.2

Madison Title had an easy opportunity to exercise care, but instead recorded the naked discharges without any verifications to lender as specified in the Finberg industry standard. As stated previously, picking up the phone to call the lender or send an email to verify the payoff process. These constitute easy opportunities to check with the lender to ensure no fraud happened. Because of this, the fraud occurred and allowed for Privcap to lose out with two mortgages now jumping ahead. Therefore, the factor of opportunity to exercise case weighs in favor of there being a duty owed to Privcap.

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[1] The case also turns upon whether the officer is an invitee, licensee or trespasser to determine the type of care, but that portion is not factually relevant for the purposes of this analysis.

Lastly, the societal interests are valued for the purposes of public policy and based on these concerns Madison Title owes a duty to Privcap. By calling verification the duty of care it does not extend a great burden on title agents but minimizes any burden courts could face through litigation of these cases. Further, by establishing the duty between Madison Title and Privcap, it would minimize any risk that could happen in the future for similar situated scenarios. In addition, creating a negligence liability would create an adequate incentive for title companies to handle their agreements with care and to make these transactions more seamless.

Therefore, based on the totality of the circumstances, all the factors weigh in favor of Madison Title owing a duty to Privcap, thus summary judgment should be reversed.

II. THE TRAIL COURT DID NOT FIND THE SELEVAN CERTIFICATION WAS A SHAM AND HIS TESTIMONY IS ADMISSIBLE AND CREATES A FACTUAL ISSUE FOR TRIAL.

The sham affidavit doctrine is a trial court practice in disregarding an affidavit that is used in opposition of a motion for summary judgment to contradict testimony. *Shelcusky v. Garjulio*, 172 N.J. 185, 194 (2002). The doctrine rejects such affidavits where the contradiction created is unexplained and unqualified. Id. The origin of the doctrine even specified that if someone who is being examined at length on a

deposition could create a material issue of fact simply by contradicting testimony, it would greatly diminish the idea of a summary judgment. *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 587 (2d Cir. 1969). The New Jersey rules show that "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits[]… show there is [a] genuine issue," of material fact, then summary judgment cannot be ordered. R. 4:46-2(c). If after analyzing the evidence in light most favorable to the non-moving party, the court finds a "single unavoidable resolution" for the alleged dispute of fact, then it does not constitute a genuine issue of material fact. *See Brill v. Guardian Life Insurance Co.*, 142 N.J. 520, 540 (1995).

In the Order for Summary Judgment, the court briefly mentions in a footnote that Madison Title raises an issue regarding the Selevan affidavit. Because there was no finding to determine whether the affidavit is a sham or not there should be no weight given to the trial court's decision that the affidavit does not change the ultimate decision. Madison Title argues that the certification was untimely and contradicts his previous answers to interrogatories. However, Selevan testified that he sent the discharges to Madison Title to be held in escrow until the two loans were paid. Further, it is undisputed that Madison Title accepted delivery of the discharges and recorded them. The arguments made by Madison Title do not go to the question of whether an affidavit is a sham or not under the doctrine. The question is whether the

contradiction created is unexplained and unqualified. *Shelcusky*, 172 N.J. at 194.

To determine whether something is unexplained and unqualified, courts look at whether "the contradiction is reasonably explained, [whether] an affidavit does not contradict patently and sharply the earlier deposition testimony, [and whether] confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement." *Id*. at 201-2.

In evaluating whether the contradiction is reasonable, Selevan had a plausible explanation for any perceived inconsistency. In reviewing the email attached to the Lefkowitz Certification, Selevan explained that he did not tell Lefkowitz to record the discharge, but to just remove the mortgage from the title commitment. Selevan further specified that without a payoff letter or any instructions to have the discharge recorded, no action should have been taken. This is not an impossible scenario, but a plausible one that occurred and Selevan clarified this after reviewing documentation.

Secondly, Madison Title claims that the answers in the certification contradicted previous answers, but these are not patent and sharp contradictions as necessary under caselaw. In *Shelcusky*, the plaintiff stated two different sentences, first that they knew prior to the accident that the aerosol cans were flammable and later that a warning would have caused them to inspect it. *Shelcusky*, 172 N.J. at 202. The court went on to say that those two statements are not inherently irreconcilable. Id.

This is like Selevan's testimonies where originally, he stated he did not have independent recollection of receiving the discharges or agreeing to holding them in escrow. However, in the later certification, after reviewing documents, he recalls what was mentioned and delivered to him. (Pa1088, ¶ 9). These are not inherently irreconcilable and therefore do not constitute patent and sharp contradictions for the purposes of the sham affidavit doctrine.

Therefore, even if the affidavit was not decided by the trial court, the affidavit is not a sham and does not fall within the sham affidavit doctrine analysis.

III. THE CONTRACT FORMING THE BASIS OF THE THIRD-PARTY BENEFICIARY CLAIM IS THE ESCROW AGREEMENT BETWEEN MADISON TITLE AND SELEVAN.

Selevan certifies he sent the discharges to Madison title to hold in escrow until the mortgages were paid. (Pa1089). Madison title accept the document from Mr. Selevan as evidenced by the fact that Madison Title recorded the discharges – what better evidence of accepting delivery. At this point, a contract relationship was created, which was the escrow relationship.

Since the discharges were the property of Privcap, Privcap was clearly a third-party beneficiary of this escrow agreement. It is this agreement which forms the basis of the third-party beneficiary claim alleged by Privcap.

Whether the parties entered into an escrow agreement is a factual issues to be decided by the jury.

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By: /s/ *Timothy P. Duggan*
TIMOTHY P. DUGGAN

Dated: June 20, 2025