POLO NORTH COUNTRY CLUB, INC., Plaintiff-Appellant, v. ACOWRE, LLC AND TEN RE ACNJ, LLC, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001921-23 Civil Action ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION ATLANTIC COUNTY DKT. ATL-L-4255-20 SAT BELOW: HON. DANIELLE J. WALCOFF, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT POLO NORTH COUNTRY CLUB, INC.

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Plaintiff-Appellant
Polo North Country Club, Inc.

Of Counsel and On the Brief
Brian J. Molloy, Esq. (Attorney ID No. 017831978)
(bmolloy@wilentz.com)

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PRELIMINARY STATEMENT

In April, 2017, Plaintiff-Appellant, Polo North Country Club, Inc. ("Polo North") signed a contract with Defendants-Respondents Acowre, LLC and Ten Re ACNJ, LLC (collectively "Defendants") for the sale of the former Revel Casino (the "Contract"). As part of that sale, Polo North was granted a 99 year revenue stream derived from the number of cars entering the casino's parking garage.

The relevant Contract language provides as follows:

> [A]s compensation paid to Seller for selling to Buyer the parking garage, in addition to the purchase price, Buyer shall pay Seller the following fee for a period of ninety-nine (99) years from the closing date, except for Buyer's employees and residents (owners of condominium units and their tenants but not hotel guests), Buyer's Tenant's employees, all Vendors, State Agency Vehicles and Tow Trucks in addition to paying all CAM related expenses for the parking garage: (i) years 1 and 2; $0.00 **per car**; (ii) years 3 through 6; $1.50 **per car**; (iii) years 7 through 9; $3.00 **per car**; and (iv) year 10, and each year thereafter $4.00 **per car**. (emphasis added)

Defendants made no payment in year three (3), and eventually submitted a check in the amount of $1,025,580, with a cover letter indicating it was final payment as a condition to cashing the check. Significantly, Defendants provided no documentary or other evidence as to how the payment was calculated. The manner and method in which the payment was calculated is important because the Contract provides for a fee per car entering the parking garage with certain limited exclusions. Simply stated, Polo North would be entitled to a fee for

almost every car or vehicle entering the garage starting in year three (3) of the Contract.

Polo North had valid reasons to believe that its royalty payments were substantially under calculated. First, Defendants refused to provide any information as to how the payment was calculated and insisted as a condition to cashing the check that it was deemed to be a final payment.

Then, when the casino resumed full operations after limited operations during COVID, the check tendered by Defendants for 2022 was for $1,438,756, representing only a 1.6% increase from the prior year's payment of $1,415,619 when there were limited casino operations due to COVID restrictions. However, public records show a very substantial increase in casino revenue from 2021 to 2022.

Defendants refused to produce the raw data or other supporting documentation for how it calculated the contractual royalty payments, and instead the sole support of the payment was an unaudited summary spreadsheet allegedly provided by Defendants to the State of New Jersey as support for a parking tax payment. But, royalty payments owed to Polo North under the Contract are different from parking tax payments owed to the State. Discovery revealed that there were errors identified in the categorization of charges in the spreadsheets. For example, the accounting manager responsible for the

calculation testified that the cars of hotel guests are assessed only on a taxable charge per hotel stay, but the State tax is a $3.00 tax per day/per car. Moreover, Defendants' representative testified that the State parking tax has not been audited by the State since 2018, long before Defendants re-opened the casino. Thus, neither the state nor Polo North had a chance to verify the data presented by Defendants.

Defendants contended, contrary to the Contract language, that Polo North was entitled to only one (1) parking fee for an entire hotel stay, regardless as to the number of times that car entered the garage. This error, combined with Defendants' non-payment for garage use by limousines or cars of job applicants (which are not exceptions under the Contract), demonstrate further error.

With the knowledge of some errors in the calculation of the parking royalty, Polo North's requested production of the raw data used by Defendants to calculate the royalty due to Polo North in 2020, 2021 and 2022. Surprisingly, the Trial Court denied Polo North any discovery of the underlying data, contrary to fundamental discovery rules. The underlying parking data is the only evidence that could substantiate or disprove the accuracy of Defendants' unilateral calculation of royalty payments.

As discussed herein, the Judgment below should be vacated and the case remanded for full discovery and a new trial.

PROCEDURAL HISTORY

This action was commenced by Polo North with the filing of a six (6) count complaint against Acowre, LLC and Ten Re ACNJ, LLC[1] on December 30, 2020. (Pa0122). Defendants filed an Answer and Affirmative Defenses on January 15, 2021. (Pa0170).

On July 19, 2021, Defendants filed a Motion for Summary Judgment (Pa0183) and Polo North filed opposition to that motion on August 17, 2021. (Pa0185). The Motion was argued on December 20, 2021[2]. On January 10, 2022, Judge Porto denied the motion for summary judgment except to hold that payments pursuant to the Contract were due annually. Judge Porto held that there were disputed issues of material fact precluding summary judgment and

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[1] Acowre is the owner of the real estate for the Ocean Casino Resort, which Casino is operated by Ocean Casino Resort Holdings, LLC, formerly Ten Re ACNJ, LLC. Acowre is the party responsible for the payment of parking royalties to Polo North under the Memorandum of Interest dated January 4, 2018 (Pa0165).

[2] Transcript references are as follows: "1T" refers to the transcript of the oral argument on the Motion for Summary Judgment on December 20, 2021. "2T" refers to the transcript of oral argument on a Discovery Motion on October 24, 2022. "3T" refers to the transcript of the oral argument on a Discovery Motion on November 14, 2022. "4T" refers to the transcript of the oral argument on several Discovery Motions on January 20, 2023. "5T" refers to the transcript of the oral argument and partial Decision on Defendant's Motion for Summary Judgment on June 30, 2023. "6T" refers to the transcript of the Bench Trial on October 23, 2023. "7T"refers to the transcript of the Trial Court Decision on January 4, 2024. "8T" refers to the transcript of Supplemental Bench Trial Decision on January 5, 2024. "9T" refers to the transcript of the Decision on Motion for Reconsideration on February 2, 2024.

that discovery was necessary "[A]s to how the Defendants calculated the amounts due or how the Plaintiff may verify the annual amount due." January 10, 2022 Opinion at p. 21 (Pa0221).

Accordingly, Polo North sought discovery as to how Defendants calculated the amounts due pursuant to Judge Porto's Order. Defendants objected to that discovery and filed a Second Motion for Summary Judgment. (Pa0226). Polo North moved to compel discovery and at the same time Polo North responded to Defendants' Motion for Summary Judgment (Pa0422) and Defendants responded to Polo North's Motion to Compel (Pa0488). By Order dated November 16, 2022, Judge Walcoff granted in part Polo North's Motion to Compel and Ordered that Defendants submit supplemental interrogatory responses and reopened discovery for sixty (60) days. (Pa0493).

On December 23, 2022, Defendants moved for a Protective Order to bar Polo North from obtaining the underlying raw data used to calculate the parking royalty owed to Polo North. (Pa0498). On January 10, 2023, Plaintiff took the depositions of Korrin Carrieri, a corporate designee of Defendants with knowledge of the operation of the parking garage. Polo North cross-moved to compel production of this information on January 12, 2023. (Pa0507). By Order dated January 20, 2023 Judge Walcoff granted Defendants' Motion for a Protective Order and denied Polo North's Motion to Compel. (Pa0001).

On July 3, 2023 the Trial Court granted Defendants' Motion for Summary Judgment as to Counts Two (2) – Six (6) of the Complaint, and denied it as to Count I for breach of contract. (Pa0007).

On July 21, 2023, Judge Walcoff then denied Polo North's Motion for Reconsideration of the January 20, 2023 Opinion and Order. (Pa0055).

A four (4) hour bench trial was held on October 23, 2023 after which the Court entered Judgment in favor of Polo North on its breach of contract claim of $8,229.00. (Pa0102). Polo North filed a Motion for Reconsideration (Pa0802), and Judge Walcoff entered an Order on February 2, 2024 denying the Motion for Reconsideration, but clarifying her interpretation of what parking fees were due to Polo North for cars parked in connection with hotel stays. (Pa0103).

Polo North now appeals from the January 20, 2023, July 3, 2023, July 21, 2023, January 5, 2024 and February 2, 2024 orders of the Trial Court.

STATEMENT OF FACTS

In April 2017, Polo North negotiated with Acowre to sell the former Revel Casino Resort (the "Casino") in Atlantic City, New Jersey. Acowre was unable to finance the cost to purchase all of the assets of the Casino, and accordingly, the parties structured the Purchase and Sale Agreement (the "Contract") for the Casino such that Polo North was granted a 99 year revenue stream from the

operations of the Casino's parking garage. (Pa0138). In relevant part, the provision controlling this aspect of the Contract stated as follows:

> [A]s compensation paid to seller for selling to buyer the parking garage, in addition to the purchase price, buyer shall pay seller the following fee for a period of ninety-nine (99) years from the closing date, except for Buyer's employees and residents (owners of condominium units and their tenants but not hotel guests), Buyer's Tenant's employees, all Vendors, State Agency Vehicles and Tow Trucks in addition to paying all CAM related expenses for the parking garage: (i) years 1 and 2; $0.00 **per car**; (ii) years 3 through 6; $1.50 **per car**; (iii) years 7 through 9; $3.00 **per car**; and (iv) year 10, and each year thereafter $4.00 **per car**.

(Pa0161). (Emphasis added).

The transaction closed as of January 4, 2018. (Pa0164). Acowre owns the real estate which operates as the Ocean Casino Resort, including the parking deck subject to the revenue sharing agreement quoted above. (Pa0165). The first payments of garage revenues to Polo North were due under the Contract starting on January 4, 2020. (Pa0165). Defendants communicated to Polo North that it would not make the payment unless Polo North registered with the New Jersey Division of Gaming Enforcement (the "Division") as a vendor.[3] After

[3] As the Division had approved the sale of the Casino to Acowre, it is uncertain whether such registration was necessary, but to facilitate the process, Polo North filed a vendor registration, which was accepted by the Division on or about August 13, 2020. Complaint, Paragraph 16 (Pa0125).

filing the registration, Defendants still failed to make the payments now owing starting in January 2020 and accordingly, when no payments had been received by the end of 2020, Polo North filed a Complaint seeking damages for breach of contract and an equitable accounting, as well as several other claims that are not the subject of this appeal. (Pa0122).

After Polo North filed this action, Defendants delivered a check in the amount of $1,025,580, the cover letter to which indicated was in final payment as a condition to cashing the check. (Pa0837). As Defendants provided **no backup** for the computation of this payment (and never did), Polo North could not accept the check under a condition that Polo North must trust Defendants to pay the correct royalty. The check was not negotiated. The attempt to foist a final payment condition to the check was a second "red flag" (after the late payment) to any simple acceptance of Defendants' calculation of sums due, which already were far lower than the historical revenues which were generated pre-pandemic as understood by Polo North – a third red flag.

Admittedly, the Ocean Casino was closed for a significant time in 2020, which would appear to be a factor in the greatly reduced sum which was paid in that first year.[4] However, in 2021, when the Casino was operated the entire year,

[4] The Ocean Casino was closed for most of March and all of April, May and June, 2020.

albeit with some restrictions, the payment rose only to $1,415,619.00. For 2022, with no COVID restrictions remaining, Acowre sent a check of $1,438,756.50 in supposed compensation for the parking fees due—which would represent only a 1.6% increase in usage for that year.[5]

As is discussed below in greater detail, Polo North was precluded from having any opportunity to prove its case by a series of both substantive and procedural rulings that constitutes legal error and/or an abuse of discretion.

Thus, it is clear that Polo North had reason to believe that its royalty payment was substantially under calculated. The sole support for the royalty payments is an unaudited, summary spreadsheet allegedly provided by Defendants to the Division as support for the parking related tax payments. (CPa0001, CPa0014).[6] But the unaudited, summary spreadsheet is no substitute for the backup data for the contractual royalty payment.

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[5] Public records from the Division reveal that the Ocean Casino increased its gaming wins from $183,567,188 in 2020 to $282,742,779 in 2021 and $356,825,403 in 2022. See, njoag.gov/about/divisions-and-offices/division-of-gaming-enforcement-home/financial-and-statistical-information/quarterly-financial-reports/. It simply defies logic that with an almost 100% increase in gaming revenue, the parking revenue increased by less than 30%. Certainly, it raises significant questions about how the parking royalty owed to Polo North was computed. Yet the trial court never allowed Polo North to obtain the information necessary to compute the proper royalty nor compel Defendants to account for its computation.

[6] "CPa" refers to the Plaintiff-Appellant's Confidential Appendix.

Polo North has identified serious errors in the categorization of charges in that spreadsheet. First and most serious, the accounting manager responsible for the calculation testified that the royalty payment to Polo North was computed in the same manner as tax payment to the State. She further testified that cars of hotel guests are assessed only one taxable charge per stay, although the State casino parking fee is $3 per day per car, so that Defendants' own stated method of calculation, i.e., the same as tax payments, was incorrect on its face (Pa 0579-581 at 23:1-25:1).[7] While Defendant's representative testified (in hearsay fashion) that this calculation was approved by the State, she admitted that the Ocean parking garage had not been audited by the State since 2018, long before Acowre reopened the Ocean Casino, so no weight can be given to that testimony. (Pa0623 at 67:14-22). If only one taxable charge payable to Polo North is made for a weeklong stay at the Ocean Casino Hotel, at $1.50, that is an underpayment of $9.00 even under Acowre's method of calculation.

She further revealed that the parking attendant/cashier at the garage has the ability to exclude cars from the royalty payment beyond the limited Contract

[7] *Also see*, N.J.S.A. 5:12-173.3; *State v. Trump Hotels & Casino Resorts, Inc.*, 160 N.J. 505, 539, 734 A.2d 1160 (1999)(Recognizing statutory parking fee is assessed per day). Indeed, Defendants previously had represented to Judge Porto that the state parking tax was $3 per day and he incorporated that in his findings on the first summary judgment motion. See, Order and Opinion dated January 10, 2022 at p. 23 (Pa0223).

exclusions by circumventing the equipment recording the vehicle and entering it as an exempt visit. (Pa0628-629 at 72-73).

Even without access to the raw data for the royalty payment, Polo North identified other errors in Defendants' calculation, namely nonpayment for garage use by certain limousines (Pa0607-611 at 51-55) and cars of job applicants at the Ocean (Pa0604-606 at 48-50).

Moreover, as Polo North contended, and the Trial Court later found, the Contract required Defendants to pay the royalty for every car that entered the garage, and had nothing to do with hotel stays. Since the payment was due per entry of each car, as the Trial Court determined was the plain language of the Contract[8], Polo North was owed far more than even daily payment for hotel guests, as they are likely to go in and out of the garage on multiple occasions during a hotel visit.

With the ammunition of the multiple and serious errors in the method of calculation, Polo North sought production of the raw data used by Defendants to calculate the royalty owed to Polo North in 2020, 2021 and 2022. (Pa0507). Defendants strenuously opposed having to provide this clearly relevant factual

[8] See, Judge Walcoff's February 2, 2024 Order at p. 9 (Pa0111) ("the Court found the "per car" language of the PSA to be clear and unambiguous and, as such Plaintiff should get paid each time a vehicle enters the parking garage, regardless of the number of times the car entered and regardless of when the car entered.").

information on the grounds that it would amount to an equitable accounting, to which it argued that Polo North was not entitled.[9]

Judge Walcoff ruled in favor of Defendants on this crucial discovery issue and held that to allow the discovery would provide Polo North with final relief on an accounting, which the Court believed was not available to Polo North under the terms of the contract. See, Judge Walcoff's Order of January 20, 2023 at p. 5. (Pa0005). Thus, Judge Walcoff dismissed the claim for an accounting and denied Polo North's request for discovery of the underlying data allegedly supporting Defendants' calculation of the royalty fee.

The upshot of these rulings was that at trial, Polo North had **no evidence** to present on the crucial issues of the number of car entries and/or the number of days of hotel stays for which only one parking charge was assessed, as well as limousine stays and job applicant stays, not to mention other errors which could have been discovered if Polo North's discovery requests were not quashed by the Court. As noted above, the Casino's revenues increased by almost 100% over the relevant period, during which the hotel reopened and stays at the hotel

[9] Judge Porto had previously made the finding that Polo North "was denied the means of determining the amount of parking revenue payment actually due" and "Plaintiff has demanded the opportunity to audit all parking lot records, including the raw data, and to observe the actual ingress of vehicles…" in his January 10, 2022 Order and Opinion. (Findings of Material Fact Nos. 29 and 45). (Pa0213 and Pa0215).

likely substantially increased as well. Polo North was blocked from discovering how the unaudited spreadsheets presented at trial were calculated and obtaining the evidence that was necessary to calculate damages.

The Trial Court Order denying Polo North any discovery as to how Defendants calculated the parking royalty, unless reversed, has the potential of allowing Defendants to submit any payment for the royalty payment for the next 90 years without any ability of Polo North to verify if the payment is accurate or not.

STANDARD AND SCOPE OF REVIEW

There are three major issues before this Court on this appeal. First Judge Walcoff's January 20, 2023 Order granting Defendants' motion for protective order and denying Polo North's Motion to Compel Discovery of the raw data necessary to calculate the parking royalty owed to Polo North is a discovery ruling. Discovery rulings are subject to deference absent an abuse of discretion or a judge's misunderstanding or misapplication of the law. *State v. Ramerez*, 252 N.J. 277, 298, 284 A.3d 839 (2022); *Capital Health Syst. v. Horizon Health Care Servs.*, 230 N.J. 73, 79-80, 165 A.3d 73 (2017). Courts find an abuse of discretion when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. *U.S. Bank, N.A. v. Guillaome*, 209 N.J. 449, 467-68, 38 A.3d 570 (2012).

Second, Judge Walcoff granted summary judgment on July 3, 2023 to Defendants dismissing Count II of the Amended Complaint for an equitable accounting and affirmed that Order denying a Motion for Reconsideration on July 21, 2023. The Appellate Division reviews *de novo* a ruling on a motion for summary judgment, applying the same standard to the consideration of the motion as the Trial Court, i.e., whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Town of Kearny v. Brandt*, 214 N.J. 76, 91, 67 A.3d 601 (2013). The scope of review of the Court's legal determinations is plenary. *New Gold Equities Corp. v. Jaffe Spindler Co.*, 453 N.J. Super. 358, 372, 181 A.3d 1050 (App. Div. 2018).

The final major issue concerns the Trial Court's interpretation of the Contract such that it found that it entitled Polo North to only one royalty payment for every hotel stay. The standard of review for the interpretation of a contract is *de novo*. *Fastenberg v. Prudential Ins. Co. and Amer.*, 309 N.J. Super. 415, 420, 707 A.2d 209 (App. Div. 1998). The scope of the review is plenary with no deference to the Trial Court's interpretation. *Barr v. Barr*, 418 N.J. Super. 18, 31, 11 A.3d 875 (App. Div. 2011).

ARGUMENT

I. The Trial Court Abused Its Discretion When It Granted Defendants' Motion For A Protective Order And Refused To Allow Polo North Critical Discovery Of The Computation Of The Royalty Owed To It By Defendants (Pa 0001-0006).

A. New Jersey Rules Provide for Liberal Discovery of All Information Relevant to a Claim or Defense:

New Jersey's procedures for discovery are designed to eliminate the element of surprise at trial by requiring litigants to disclose the facts upon which a cause of action or defense is based. *McKenney ex rel. McKenney v. New Jersey Med. Center*, 167 N.J. 359, 370, 771 A.2d 1153 (2001). The search for truth in the furtherance of justice is the paramount consideration. *Id., citing Caparella v. Bennett*, 85 N.J. Super. 567, 571, 205 A.2d 466 (App. Div. 1964). As a result, our rules expressly state that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," and it is not "ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a). *See Isetts v. Borough of Roseland*, 364 N.J. Super. 247, 261-62, 835 A.2d 330 (App. Div. 2003). As stated by the Appellate Division:

> [t]he discovery rules which have been promulgated by the Supreme Court displaced what had been called the "sporting" concept of a law action which all too often characterized the former practice. They inaugurated an open season on facts. The purpose of broad discovery

> now provided by our rules is to give a party "a wide latitude in securing such discovery as he may need concerning the details of the evidence so that the outcome of case will depend less on surprise testimony and the maneuverings of counsel and more upon the merits of the issues.

Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 216, 521 A.2d 872 (App. Div. 1987).

Accordingly, in most situations, parties to litigation have the right to discovery of all relevant information concerning the action. *Paladino v. Auletto Enterprises*, 459 N.J. Super. 365, 370, 211 A.3d 729 (App. Div. 2019), *citing, Capital Health System, Inc. v. Horizon Healthcare Servs., Inc.*, 230 N.J. 73, 80, 165 A.3d 729 (2017). And as held by the Supreme Court in *Capital Health, supra*, there is a presumption in favor of discoverability and "[t]o overcome the presumption in favor of discoverability, a party must show "good cause" for withholding relevant discovery." *Id.*

B. Polo North's Requests for Production of the Raw Data Compiled by Defendants to Calculate the Royalty Owed to Polo North Was Clearly Relevant and Defendants Provided No "Good Cause" Justifying the Entry of the Trial Court's Protective Order:

Though not specifically defined in the discovery rules, "relevant evidence" is defined in our evidence rules as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. *See Matter of Estate of Counselman*, 2023 WL 4229279 (at *3) (App. Div. 2023) (applying definition to discovery dispute). *See Camden*

Co. Recovery Assocs., L.P. v. N.J. Dept. of Environmental Protection, 320 N.J. Super. 59, 64, 726 A.2d 968 (App. Div. 1999). ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory . . . ").

There can be little evidence in this case more relevant to the determination of whether Defendants paid Polo North the correct royalty owed under the Contract concerning the parking garage royalty than the raw data evidencing the number cars entering the parking garage each day. Indeed, Judge Porto in his January 10, 2022 Order and Opinion made specific findings that Polo North had been denied the information necessary to calculate the proper royalty and that it had been seeking the raw data to do so. See, footnote 8, supra. The particularized need for this information was highlighted when Defendants' representative testified that the spreadsheet produced by Defendants only recorded one "taxable" charge per stay of hotel guests, whereas the Contract requires payment per car, not per visit. (Pa0579-580 at 23:1-24:16).

Ms. Carrieri acknowledged that the Contract did not provide that Polo North was entitled to payment of only per hotel visit and further admitted that she was instructed by her superiors to pay the State one parking tax per hotel visit as well although State regulations require the payment to be per car, per day. (Pa0579-581 at 23:1-25:1). Ms. Carrieri asserted that this calculation was "approved by the state" (Pa0581 at 25:1), but later admitted the parking data had

not been audited by the State since 2018 (Pa0623 at 67:19-22), long before Acowre acquired the Ocean Casino property. The fact that Defendants' own designee admitted that the royalty was miscalculated by considering any hotel visit to be calculated as a single tax to the State and charge to Polo North no matter how many days a person stayed at the hotel with a vehicle nor how many times that vehicle entered the parking garage certainly entitled Polo North to obtain the records necessary to calculate how the parking charges were undercounted, and it could compute its damages.

The Court later found that the Contract provided for payment per entry of each car (February 2, 2024 Order at p. 9, Pa0111) so that the Order permitting Defendants to hide the records which are likely to have disclosed a substantial royalty undercount is a clear abuse of discretion. Indeed, given that even under Acowre's representative's testimony that Polo North was to be paid in the same manner as the State with respect to hotel visitors, they were not paid in the same manner as required by the State parking fee regulations. It is inexplicable how discovery of the data of cars entering the garage was blocked.

New Jersey law clearly provides that a party must provide "good cause" for resisting discovery of relevant information. Judge Walcoff found that the new data sought by Polo North was not burdensome nor a trade secret or confidential material. July 21, 2023 Order at p. 9. (Pa0063). Thus, there was

no "good cause" for the Protective Order. The Court's decision to block Polo North from obtaining the discovery of the data by which it (not Acowre[10]) could calculate the royalty to which it believed it was entitled and present those findings as a basis for damages in its case in chief was an abuse of discretion under New Jersey law.

C. The Fact that Polo North Sought an Equitable Accounting Should Have Had No Bearing on Whether Polo North Was Entitled to Discovery of Clearly Relevant Evidence

The Court agreed with Defendants' argument that if it allowed Polo North to obtain the records by which Defendants allegedly calculated the royalty owing to Polo North, it would be "essentially paramount to the Court entering judgment in favor of plaintiff [on its claim for an equitable accounting.]" January 20, 2023 at p. 5 (Pa0005). The Court went on to state that if the discovery sought by Polo North was obtained "Plaintiff would be able to perform an audit and/or accounting." *Id*. The Court cited no case law or other authority

[10] Acowre's argument that the production of these records would, in essence, provide Polo North with the equivalent of final judgment on its claim for an accounting—an argument accepted by the trial court, was incorrect on its face. An "accounting" requires the Defendant to calculate the royalty and supply the analysis of its calculations to the plaintiff. Discovery merely permits the plaintiff to calculate the royalty and present its findings to the Court. Indeed, the caselaw on this issue clearly holds that the reason equitable accountings often are not required is because discovery provides an adequate remedy at law precluding an equitable remedy such as an accounting. But if the Court blocks discovery (an abuse of discretion in this case), the dismissal of the equitable accounting claim was erroneous as well. *See* Point II, *infra*.

that allowing a plaintiff the discovery that would allow it to calculate damages should be denied if the Complaint contains a cause of action for an equitable accounting, and there is no legal support for this decision.

The Court doubled down on this decision in its July 21, 2023 Order denying reconsideration of the January 21 Order in which it stated as follows:

> Pursuant to *Catalpa Investment Group v. Franklin Twp.*, 254 N.J. Super. 270, 273-274 (Law Div. 1991), the Court had considered the following factors in re-affirming that defendant showed good cause for the entry of the protective order. The nature of the lawsuit is a breach of contract claim. The substantive law is clear on the four elements of breach of contract that must be proven by plaintiff. Plaintiff has had ample discovery time and resources to investigate "defendants' manner of counting cars." Plaintiff continues to seek raw data, which would essentially lead to an accounting and/or audit with regard to generation of defendants' parking lot revenue, which would have been akin to the Court granting summary judgment in favor of plaintiff on its claim for an equitable accounting (Count II of the Amended Complaint which has been dismissed with prejudice). The kind of evidence that could be introduced at trial includes documentation, witness testimony and deposition testimony. Although the information sought is raw data, **not a trade secret or confidential or privileged information**, the discovery would enable plaintiff to conduct an audit accounting which, again, would be akin to the Court granting summary judgment in favor of plaintiff on its claim for an equitable accounting. The contract between the parties does not provide for plaintiff to access such information. **The Court is aware that there would be no real expense nor burden to defendant who sought the protective order**.

July 21 Order at p. 9 (Pa0063).

Thus, despite the fact that the information sought was neither confidential nor privileged and despite the fact that the requests were not burdensome, the Court denied the requested discovery of clearly relevant data supposedly based on the holding in *Catalpa Investments*. However, *Catalpa Investment* is completely distinguishable and is not controlling on and did not consider the issue of whether the existence of an equitable accounting claim in a complaint for breach of contract requires a court to deny a plaintiff clearly relevant discovery as to damages because it would, in essence, give the plaintiff final judgment on its claim for an accounting.

In *Catalpa*, the issue was the scope of discovery in an action in lieu of prerogative writs challenging the denial of a use variance. Id. at 272. More specifically, the attempt to discover the deliberative process of zoning Board members. Plaintiff was appealing the denial of a use variance and sought to obtain discovery of the Zoning Board, including production of all documents upon which the Board members considered in their decision to deny the variance and the depositions of the Board members. The Court granted the Board a protective order on the basis that the plaintiff had no right to inquire into the mental processes of the Board members surrounding their decision and found

that the burden on the members who were unpaid volunteers would be great. *Id.* at 274-75.

In this case, contrary to *Catalpa Investments*, the Court specifically held that there was no real expense or burden to Defendants from complying with the discovery requests for the data by which Defendants calculated the royalty due to Polo North nor was the decision justified by the kind of confidentiality found in *Catalpa Investments*. Indeed, there was no legal basis cited by the Court as there was in *Catalpa Investment* to justify its finding that Polo North was not entitled to the information.

As the Court expressed in its January 20 Opinion, Judge Porto's Order extending discovery in January 2022 "was for the parties to address a method of calculation of the payment derived from the parking revenue due to plaintiff." January 20 Opinion at p. 5 (Pa0005). Specifically, Judge Porto stated the following in his January 2022 Opinion denying Acowre's motion for summary judgment and ordering discovery:

> Defendants' counsel concedes discovery is incomplete but argues a party opposing a motion for summary judgment on the grounds that discovery is incomplete, however, must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." *Badiali v. New Jersey Mfrs. Ins. Grp.*, 220 N.J. 544, 555 (2015). In addition, "discovery need not be undertaken or completed if it will patently not change the outcome." *Minoia v. Kushner*, 365 N.J. Super. 304, 307

> (App. Div. 2004). Defendants contend this Court need only consider the Agreement with MOI, and the fact that plaintiff was paid for year 2020 in rendering a decision on this motion. On the other hand, plaintiff asserts discovery is needed as well as a full financial accounting to verify the accuracy of parking lot revenue payment such as the raw data by which parking revenues were calculated, and any other documents that would reflect whether the information given to the State complied with their legal requirements as defendants themselves set forth in their motion. . . . Plaintiff contend they "demonstrate[ed] with some degree of particularity the likelihood that further discovery will supply the missing elements" of the frequency and amount of the re venue payments. *See Badiali*, 220 N.J. at 555.
>
> Plaintiff argues, at a minimum, the defendants must show by competent evidence they are correct regarding the frequency of the revenue payment being an annual payment as well as to accuracy of the amount they remit or shall remit from the cars parking in the parking garage. . . . **As to how the defendants calculated the amount due or how the plaintiff may verify the annual amount due, the Court finds discovery is necessary. The Calculation of that revenue payment was not included in either of the contract documents and there is no competent and credible proof of how either party intended to calculate the revenue payable to the plaintiff.** The Court finds that is an outstanding issue of a material fact sufficient to deny summary judgment.

January 10, 2022 Opinion at pp. 20-21 (Pa0220-221). (Emphasis added).

The Trial Court somehow interpreted this acknowledgment that Polo North needed discovery to verify the calculation of the revenue payment as being limited to discovery as to the "manner of counting cars." January 10

Opinion at p. 6.[11] That limitation was not expressed by Judge Porto, who denied Defendants' summary judgment motion because Polo North was entitled to discovery of how the royalty was calculated and in his findings, he specifically referenced the raw data. Without the raw data from the parking garage, Polo North was unable to perform that calculation. Under the liberal rules of discovery and Judge Porto's Order, Polo North was unquestionably entitled to the data by which Defendants calculated the royalty so that it could offer evidence of its damages at trial. By denying Polo North that discovery, Polo North was forced to come to trial without relevant evidence of damages based on what it contended should have been the royalty payment.

The Court's January 20, 2023 Order, if upheld, would mean that in all cases in which an equitable accounting is sought, discovery of the underlying data forming a basis for damages in an accompanying breach of contract claim would be blocked because such discovery would be "akin to an audit." A plaintiff would never be able to prove its damages and simply would have to "trust" the defendant that its calculation of damages (if any) was correct. The fact that Polo North had reason to believe the calculation was incorrect is the reason for this lawsuit. The Trial Court's refusal to allow Polo North essential

[11] Actually, Judge Walcoff did acknowledge that Judge Porto had extended discovery "to address a method of calculation of the payment." The limitation to the "manner of counting cars" was not in Judge Porto's discovery orders.

discovery to prove its case was therefore an abuse of discretion warranting reversal.

An accounting is no substitute for discovery. Under New Jersey law, "the party seeking to obtain an accounting must establish: (1) a fiduciary or trust relationship; (2) the complicated [complex] nature of the character of the account; and (3) the need of discovery." A matter is complex if "[T]he issues necessary to be determined, in order to arrive at a just conclusion, are so numerous, and dependent upon such a variety of evidence, or of evidence of such a technical character, as that is substantially impossible for a jury, retiring in the ordinary way to a jury room and obliged to carry all of the oral evidence in their memories, to come, at one session, to anything like just and proper conclusion." *In re Vertis Holdings, Inc.*, 536 B.R. 589, 645 (Bankr. D. Del. 2015) (applying NJ law).

An accounting is an equitable remedy requiring the defendant to perform a calculation and support its findings. *See, e.g., Delzotti v. Morris*, 2015 WL 5306215 (at *13) (D.N.J. 2015). Discovery is the opposite of an accounting—it simply provides the plaintiff with sufficient information for it to perform the necessary calculations. Accordingly, the ability to obtain discovery is a remedy at law which precludes an accounting. *Id.* (dismissing an accounting claim "without prejudice to plaintiff's right to obtain full discovery of defendants'

financial information sufficient [for it] to perform an accounting."). The availability of discovery precludes an accounting—the assertion for an accounting claim does not preclude discovery. The Trial Court committed legal error when it denied discovery of the basis for Defendants' calculation of Polo North's royalty because Polo North sought an order requiring Defendants to perform an accounting.

II. The Trial Court Erred In Granting Summary Judgment To Defendants On The Equitable Accounting Claim Because All Evidence Concerning The Accuracy Of The Royalty Payment Was In The Hands Of The Defendant And Polo North Was Denied Discovery Of The Records To Calculate The Royalty Itself (Pa 0007-0027).

A. Standards for the Remedy of an Equitable Accounting:

As held in *Delzotti v. Morris, supra*, "The exercise of the equitable jurisdiction to compel an accounting rests on three grounds—first, the existence of a fiduciary or trust relation; second, the complicated nature of the account; and the need for discovery. *Id.* at *10, *citing, Borough of Kenilworth v. Graceland Mem. Park Ass'n*, 124 N.J. Eq. 35, 199 A. 716, 717 (Ch. 1938). While the Trial Court was correct that the Agreement did not expressly provide a contractual right to an accounting, our Supreme Court has made it clear that in contractual circumstances where one party possesses a monopoly on information necessary for monitoring compliance with an agreement, access to such information must be imputed into the contract and a trust relationship be deemed to exist between the parties. *Onderdonk v. Presbyterian Homes of New Jersey*,

85 N.J. 171, 187, 425 A.2d 1057 (1981). This holding is consistent with the general common law principle that a trust and/or confidential relationship exists and an accounting may be had where one party is under an obligation to pay money under facts and records which are known and kept exclusively by a party to whom the obligation is owed. *P.V. Properties, Inc. v. Rock Creek Vill. Assocs.*, 77 Md. App. 77, 549 A.2d 403, 409 (Md. Ct. Spec. App. 1988). *Accord: Bates v. Northwestern Human Servs., Inc.*, 466 F. Supp. 2d 69, 103 (D.D.C. 2006) (denying motion to dismiss equitable accounting claim because it was alleged that the accounts are complicated and all records are in the defendants' exclusive control, making it impossible for the plaintiff to determine what funds were received, spent and remain, without discovery and judicial intervention."). *Also see*, *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972) ("An accounting is a species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any money is due from another" but denying that remedy because "The appellant obtained by discovery all information to which he could have entitled in an accounting."); Accord: *Haynes v. Navy Fed. Credit* Union, 52 F. Supp. 3d 1, 10 (D.D.C. 2014) (citing *Bradshaw).*

In its July 3, 2023 Opinion, the Trial Court acknowledged that while the information pertaining to the calculation of Polo North's parking royalty was solely in the hands of Defendants, casinos are "heavily regulated" and the State

has approved the "system of counting" used by Defendants. July 3, 2023 Opinion at p. 11 (Pa0017)[12]. Not only was the Court's conclusion that the State had approved Defendants' calculation erroneous, it has nothing to do with Defendants' obligation under the rules of discovery to support its calculation by producing the records to support them under *Onderdonk* and the general common law caselaw holding that where the records are in the hands of the contractual obligor, there is a duty to account under the covenant of good faith incorporated into every contract. The only exception to this duty in the context of litigation is if the plaintiff has an adequate remedy at law through discovery to calculate the royalty on its own. *Delzotti, supra* at *10; *Carbone v. Carbone,* 2023 WL 3452333 (D.N.J. 2023) ("Plaintiffs likewise have not shown why the information sought through an accounting cannot be obtained through typical mechanisms.").

Thus, had the Court allowed Polo North to obtain all of the underlying records by which Defendants' spreadsheet was prepared, an equitable accounting would properly be denied unless records were missing or could not be reconciled with the findings. However, here, the Court both dismissed the accounting claim while simultaneously denying Polo North the discovery it

[12] There was no competent evidence from the State to support this finding. Ms. Carrieri simply testified that the State approved the method of calculation, but then admitted that the State had not audited Defendants' payment of parking tax.

needed to check whether the spreadsheet prepared by Defendants—which the Court was shown to have serious errors in its categorization of hotel stays, job applicant visits and limousines—was calculated properly.[13] In such a situation, it was legal error to dismiss the accounting claim. The dismissal of Count II should be reversed and the case remanded for determination of whether plaintiff is capable of calculating its damages after production of the new parking data. If there is information missing or the data cannot be reconciled with the spreadsheet, the remedy of accounting should remain available.

III. The Trial Court's Interpretation Of The Contract Was Contradictory To Its Conclusion That It Was Unambiguous And Required Payment For Every Car That Entered The Garage (Pa 0103-0114).

It is black letter law that,

> When the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the court must enforce those terms as written. The court has no right to rewrite the contract merely because one might conclude that it might have

[13] It must be noted that the Court found that Defendants were liable to Polo North for under counting the royalty. Having found that liability existed and Polo North was unable to determine the amount owed to it because it was not permitted to discover how many multiple-day hotel stays had been taxed only a single parking fee to the State and Polo North, an Order compelling an accounting after trial would have been appropriate. *See, Haynes, supra* at 10 (an accounting is appropriate only after liability has been determined.). The Court determined that an accounting was not available as a matter of law at the summary judgment stage, before liability was found on the part of Defendants, and after Polo North was denied the discovery necessary to determine its damages. Under this state of facts, the Order dismissing the accounting claim was error.

> been functionally desirable to draft it differently. Nor may the courts remake a contract better than the parties themselves have seen fit to enter into, or to alter it for the benefit of one party to the detriment of the other.

Sons of Thunder, Inc. v. Borden, Inc., 285 N.J. Super. 27, 48-49, 666 A.2d 549 (App. Div. 1995), *rev'd on other grounds*, 148 N.J. 396, 690 A.2d 575 (1997) (and cases cited therein). First Judge Porto in his January 10, 2022 Opinion found that the Contract plainly provided that Polo North was to be paid "based on the number of cars that entered the garage." January 10, 2022 Opinion at p. 22.[14]

The Trial Court, in its decision on the Motion for Reconsideration of the Final Judgment, held that the contractual promise to pay a royalty per car was unambiguous and meant:

> [t]he "per car" language of the PSA [is] clear and unambiguous and, as such **Plaintiff should get paid**

[14] Interestingly, at that time, Defendants argued to Judge Porto that it paid the State $3 per car per day and that calculation should be sufficient because there is no evidence that that calculation was not accurate. January 10, 2022 Opinion at p. 23 (Pa0223). The Court ordered discovery on how the calculation provided to the State was computed, and in the deposition of Acowre's designee, it was admitted that the payment to the state was <u>not</u> per day for hotel guests. Carrieri deposition at pp. 23:1-24:16 (Pa0579-580). Thus, there was an admission that the calculation provided to the State was incorrect. Then, at trial, the Court held that Polo North was entitled to a payment every time a car enters the garage. February 2, 2024 Opinion at p. 9 (Pa0111). An amount potentially larger than a per day charge and far larger than a single charge for an entire hotel stay. Yet Polo North was never allowed discovery of the royalty to which it was entitled under the Court's own interpretation of the Contract.

> **each time a vehicle enters the parking garage, regardless of the number of times the car entered and regardless of when the car entered**.

February 2, 2024 Order and Opinion at p. 9 (Pa0111). (Emphasis added).

Inconsistently with this finding, however, the Court found that Defendants' payment of only one charge to Polo North for an entire hotel stay, no matter how many days the stay lasted and no matter how many times the guest went into the garage, did not "breach the clear and unambiguous language of the contract." February 2, 2024 Order and Opinion at p. 9. Respectfully, having found that the only interpretation of this provision that makes sense is to charge a fee each time a car enters the lot, the Court then re-wrote the contract in favor of Defendants when it allowed it to pay Polo North only one fee for an entire hotel visit, even if the stay lasted multiple days and the car entered the garage on multiple occasions.

Polo North agrees with the Court's statement concerning the meaning of the relevant provision. It, on its face, requires payment for every car that enters the parking garage. It does not distinguish between cars entering as part of a hotel stay and daily guests. If the parties who the Court recognized were sophisticated parties with knowledge of the Casino and hotel businesses, intended to distinguish between daily customers and hotel guests, they would have done so and put language to that effect into the Contract. Accordingly, the Court's acceptance of Defendants' calculations which only paid Polo North one

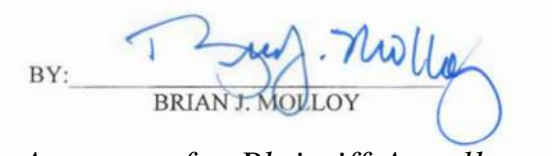
fee per hotel stay as consistent with the clear and unambiguous language it highlighted in its opinion, was error and a new trial should be ordered, along with discovery of the underlying records which would evidence the number of cars entering the garage.

IV. Conclusion

For all the reasons set forth herein, the Trial Court judgment should be vacated and the case remanded for discovery of the raw date, used to calculate the parking royalty and a new trial.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER



Date: August 27, 2024

Attorneys for Plaintiff-Appellant, Polo North Country Club, Inc.

90 Woodbridge Center Drive
Suite 900 – Box 10
Woodbridge, NJ 07095
732-636-8000
bmolloy@wilentz.com

POLO NORTH COUNTRY CLUB, INC., Plaintiff-Appellant, v. ACOWRE, LLC AND TEN RE ACNJ, LLC Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001921-23 CIVIL ACTION On Appeal From: January 4, 2024 Bench Trial Decision and January 5, 2024 Final Judgment of the Superior Court of New Jersey, Atlantic County – Law Division Docket Number: ATL-L-4255-20 Sat Below: Hon. Danielle J. Walcoff, J.S.C. Hon. John C. Porto, P.J. Civ.

BRIEF OF DEFENDANTS-RESPONDENTS ACOWRE, LLC AND TEN RE ACNJ, LLC

FOX ROTHSCHILD LLP
Formed in the Commonwealth of Pennsylvania
1301 Atlantic Avenue, Suite 400
Atlantic City, NJ 08401
Tel: (609) 348-4515
Fax: (609) 348-6834
Attorneys for Defendants/Respondents Acowre, LLC and Ten Re ACNJ, LLC

Of Counsel and on the Brief:
Jacob S. Perskie, Esq. (NJ Bar Id. No.: 020862007)
Amanda Moscillo, Esq. (NJ Bar Id. No.: 0276042018)
Michael W. Sabo, Esq. (NJ Bar Id. No.: 306252019)

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PRELIMINARY STATEMENT

This is a case about an agreement to share revenue "per car," not "per car per entrance," "per car per exit," or "per car per day" as Plaintiff-Appellant Polo North Country Club, Inc. ("Plaintiff") would have this Court believe. As the trial court found, this is clear from the parties' agreements. Likewise, despite its current claims to the contrary, Plaintiff received all the discovery to which it was entitled, despite its foot-dragging, missed discovery deadlines, and expired discovery end dates. The truth is the trial court bent over backwards to afford Plaintiff discovery over at least 806 days, resulting in five depositions following the production of 5,413 pages, which specifically included the "Raw Data" Plaintiff now claims it could not obtain.

Indeed, Plaintiff tried its case and prevailed on one aspect of its claims. Dissatisfied, however, with that result, Plaintiff now asks this Court to disregard settled contract law and apply inapplicable standards of review to make bad law that would turn every commercial payment dispute between sophisticated (and represented) parties into a court-supervised accounting. There is no reason to do so.

This Court should affirm the trial court's orders granting summary judgment to Defendants-Respondents, ACOWRE, LLC and TEN RE ACNJ, LLC (together "Acowre") because the trial court neither abused its discretion in

limiting Plaintiff's discovery nor erred as a matter of law. These sophisticated parties' Purchase Sale Agreement ("PSA") and Memorandum of Interest ("MOI" and with the PSA, the "Contracts") provide that Acowre would pay Plaintiff "per car" and the trial court held that the Contracts mean exactly that—Plaintiff was entitled to be paid once per car regardless of how many times that car entered or exited the parking garage during the hotel guest's stay.

Plaintiff's suggestion that the trial court halted Plaintiff's discovery efforts or that Acowre was evasive and uncooperative throughout this case are likewise false. Context matters. In truth, the trial court denied Plaintiff's requests for the belated discovery at issue because Plaintiff's demands arose outside the discovery end date, and in the attempt to defeat summary judgment. But in support of its attempt to confuse, Plaintiff omits critical context. Plaintiff did not demand discovery until seven months after Plaintiff filed the Complaint (defined below) and ***only after*** Acowre filed its First Motion for Summary Judgment ("First MSJ").

Plaintiff's claim that Acowre's cover letter enclosing the first parking payment to Plaintiff indicated "final payment," is equally false. The cover letter contains no such statement and, instead, Acowre advised Plaintiff that it could cash the check "without prejudice."

But, most importantly, Acowre produced to Plaintiff 5,413 pages of discovery, which included daily spreadsheets showing the number of cars in the parking garage (i.e., the "Raw Data" Plaintiff claims it could not obtain). Worse still, Acowre timely paid Plaintiff for parking fees and tendered checks to Plaintiff, which Plaintiff refused to cash, electing instead to sue Acowre for an accounting to which Plaintiff is not entitled under the Contracts or the case law.

For these reasons and those that follow, this Court should affirm the trial court's orders: (1) granting summary judgment to Acowre on Counts II through VI; (2) entering final judgment on Count I for $8,229.00; and (3) denying Plaintiff's motion for reconsideration and to compel discovery Plaintiff already received.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. BACKGROUND AND THE PURCHASE SALE AGREEMENT.

Plaintiff is the former owner of the Revel Casino and Resort ("Revel Resort") located in Atlantic City (Pa138), now known as the Ocean Casino Resort ("Ocean"). Pa123. On or about April 17, 2017, Plaintiff and TEN RE ACNJ signed the PSA, through which TEN RE ACNJ agreed to purchase and

[1] Acowre submits a combined procedural history and statement of facts for the convenience of the Court as the procedural history and facts are intertwined.

Plaintiff agreed to sell the Revel Resort, including its parking garage. Pa136-Pa163. TEN RE ACNJ thereafter assigned the PSA to ACOWRE, LLC. Pa123.

Under the PSA, Plaintiff is entitled to receive a fee "per car" for certain cars in connection with Ocean's parking garage (the "Parking Garage"):

> 14.19 PARKING GARAGE. The parking garage servicing the Property (the "Parking Garage") is included in the definition of Property being sold to Buyer pursuant to this Agreement and all management, operations, maintenance, repairs, improvements, utilities and taxes including all costs and expenses related thereto after closing, shall be the sole responsibility of Buyer As compensation paid to Seller for selling to Buyer the Parking Garage, in addition to the Purchase Price, Buyer shall pay Seller the following fee for a period of ninety-nine (99) years from the Closing Date, except for Buyer's employees and residents (owners of condominium units and their tenants (but not hotel guests), Buyer's Tenant's employees, all Vendors, State Agency vehicles and Tow Trucks in addition to paying all CAM related expenses for the parking garage: (i) years 1 and 2: $0.00 per car; (ii) years 3 through 6: $1.50 per car; (iii) years 4 through 9: $3.00 per car; and (iv) year 10, and each year thereafter $4.00 per car. Seller shall be entitled to record a Memorandum of Interest in the Public Records of Atlantic County, New Jersey memorializing the ninety-nine (99) year revenue income stream. Buyer's principals shall personally guaranty the payment of these Parking Garage fees for the entire ninety-nine (99) year period pursuant to the written guaranty in the form attached hereto or a similar guaranty to be executed by the Principals at Closing. This provision shall survive the Closing.
>
> [Pa160-Pa161 (emphasis supplied).]

The transaction closed on January 4, 2018. Pa124. As contemplated in the PSA, the parties memorialized and recorded their understandings in a MOI (Pa124)[2], which mirrors Paragraph 14.19 other than to correct a typo and states: "(i) years 1 and 2: $0.00 per car; (ii) years 3 through 6: $1.50 per car; (iii) years 7 through 9: $3.00 per car; and (iv) year 10, and each year thereafter $4.00 per car." Pa165.[3]

B. THE PARKING FEE DISPUTE AND PLAINTIFF'S REFUSAL TO EXECUTE DGE REQUIRED FORMS.

AC Ocean Walk LLC holds a casino license pursuant to Section 84 of the New Jersey Casino Control Act, N.J.S.A. 5:12-1 et seq. (the "Act") and operates the Ocean Casino Resort. Pa247. As the owner and lessor of the Ocean Casino Resort property, ACOWRE holds a gaming related casino service industry enterprise license pursuant to Section 92(a) of the Act as issued by the Division via Director Order 1757 dated June 25, 2018. Pa247-Pa248.

On June 7, 2018, the New Jersey Division of Gaming Enforcement ("DGE") issued a "Report to the Casino Control Commission on the Application

[2] The parties recorded the MOI in the Public Records of Atlantic County, New Jersey, on January 17, 2018 in ORB 14368, Page 1966. Pa124.

[3] Paragraph 14.19 of the PSA mistakenly reads as follows: "(i) years 1 and 2: $0.00 per car; (ii) years 3 through 6: $1.50 per car; (iii) years 4 through 9: $3.00 per car; and (iv) year 10, and each year thereafter $4.00 per car." Pa161. Years 4 through 6 are mistakenly accounted for twice. Pa161.

of AC Ocean Walk LLC for a Casino License." Pa40; Pa249. At the time, the DGE deferred resolution of issues related to Plaintiff's (and its principal, Mr. Glenn Straub's) need for licensure/registration to receive parking fees until those fees became due and the issue became ripe:

> The [DGE] has previously submitted plenary casino licensure reports to the [Casino Control Commission] detailing the qualifications of [Plaintiff] and its 100% owner, Glenn Straub. As indicated, [Plaintiff] will not be eligible to receive parking fees until mid-2020. Therefore, ***licensure or qualification of [Plaintiff] and Straub will be addressed, if necessary, at that time***.
>
> [Pa40 (emphasis supplied).]

On July 23, 2019, Luxor Capital Group, LP ("Luxor") sought to obtain a majority and controlling interest in Ocean, and therefore applied for interim authorization to operate a casino from the DGE. Id. In issuing its report on Luxor's petition, the DGE acknowledged again Plaintiff's and Mr. Straub's needed to obtain a casino vendor license before Plaintiff could receive any fees related to the Parking Garage:

> The [DGE] has previously submitted plenary casino licensure reports to the [CCC] detailing the qualification of [Plaintiff] and Glenn Straub. Given that [Plaintiff] claims to be eligible to receive parking fees in early 2020, the regulatory status of [Plaintiff] and Straub will need to be addressed by the end of 2019.
>
> [Id.]

Pursuant to N.J.S.A. 5:12-92, "[a]ny business to be conducted with a casino applicant or licensee by a vendor offering goods or services which directly relate to casino or gaming activity or Internet gaming activity, including gaming equipment and simulcast wagering equipment manufacturers, suppliers, repairers, and independent testing laboratories, shall require licensure as a casino service industry enterprise[.]"

On November 4, 2019, Acowre sent a letter to Plaintiff enclosing: (1) a DGE Vendor Registration Form; (2) a Vendor Registration Supplemental Disclosure Form; and, (3) a W-9 Request for Taxpayer Identification Number and Certification, and advised Plaintiff that "no payments can be made by [Acowre] if the documents are not completed and filed with the State." Pa232.

Plaintiff refused to execute the DGE Vendor Registration Form or the Vendor Registration Supplemental Disclosure Form (the "Vendor Registration Forms") because Plaintiff claimed the PSA "contains no contractual obligations on the part of Polo North as a condition of payment" to prepare or submit the Vendor Registration Forms. Pa232-Pa234.

C. THE TRIAL COURT DISMISSES PLAINTIFF'S FIRST COMPLAINT BECAUSE THE DGE HAD EXCLUSIVE JURISDICTION OVER PLAINTIFF'S NEED FOR LICENSURE.

In accordance with the PSA, Plaintiff was entitled to parking fees beginning on January 4, 2020. Pa236. On January 16, 2020, Plaintiff sued

Acowre for the alleged breach of the PSA because Acowre refused to make payments for parking fees until Plaintiff fulfilled its obligations to DGE ("the First Complaint."). Pa235-Pa246. Acowre moved to dismiss the First Complaint because the payment claim was not ripe in light of Plaintiff's lack of a license and because the Superior Court lacked jurisdiction over the licensure issue, a matter entrusted to the DGE's exclusive jurisdiction. Pa41; Pa81.

On those grounds, ***Acowre*** filed a Petition for a Declaratory Ruling with the DGE as to whether Plaintiff must be registered as a vendor, or otherwise licensed by the DGE to receive parking fees. Pa247-Pa254. The trial court then dismissed Plaintiff's First Complaint without prejudice subject to reinstatement after the DGE resolved the registration/licensure issue. Pa255-Pa256. On that issue, the DGE agreed with Acowre and declared that Plaintiff must register as a vendor to receive the parking fees. Pa257-Pa258.

D. PLAINTIFF FILES A SECOND COMPLAINT ALLEGING DAMAGES BEFORE PLAINTIFF WAS ENTITLED TO ANY PAYMENT OF PARKING FEES.

Acowre informed Plaintiff on December 14, 2020, that Ocean would make its 2020 Parking Garage payment on January 15, 2021. Pa271. ***Before Plaintiff even knew the amount of the 2020 payment,*** Plaintiff contested its accuracy. Id. Despite ongoing communications in late 2020 relating to how the payment was to be made and discussions related to wiring instructions (and the party to

whom the money was to be payable), and with knowledge that payment for year 2020 was coming shortly, Plaintiff filed a new six-count complaint (the "Second Complaint") for: breach of contract (Count I); an "action for equitable accounting" (Count II); acceleration (Count III); common law fraud (Count IV); "reclaiming of property") (Count V); and "appointment of receiver" (Count VI). Pa 270-273; Pa122-Pa135. In short, Plaintiff alleged that Acowre breached the PSA by failing to pay Plaintiff the parking fees. Pa122-Pa135.

On January 14, 2021, Plaintiff's counsel acknowledged receipt of a check for $1,025,580.00 representing parking fees for calendar year 2020. Pa274. The cover letter enclosing this payment did not state that it was "final payment" (as Plaintiff claims), but rather that the payment "represents the total parking fees that Polo North earned for 2020." Pa837. In accordance with Judge Porto's decision, this payment was timely as the Contracts require Acowre to pay parking fees to Plaintiff once per year. Pa225.

E. THE TRIAL COURT GRANTS ACOWRE'S FIRST MOTION FOR SUMMARY JUDGMENT AND RE-OPENS LIMITED DISCOVERY.

In respect of the Second Complaint, the discovery period was set to conclude on November 11, 2021. Pa30; Pa66; Pa72. On January 26, 2021, well in advance of that date, Acowre served interrogatories and a notice to produce on Plaintiff. Pa283-Pa319.

Acowre filed its first Motion for Summary Judgment (the "First MSJ") in July 2021, which was fully-briefed by August 2021. Pa183-184; Pa185; Pa201. Notwithstanding that Acowre filed the First MSJ seven months after Plaintiff filed the Second Complaint, Plaintiff opposed summary judgment on the grounds that ***Plaintiff had not yet served its discovery on Acowre***. Pa192; Pa203. More particularly, Plaintiff argued that it needed discovery and a financial accounting to verify the accuracy of Acowre's payment (i.e., the "raw data by which parking revenues were calculated") and other documents to determine whether Acowre complied with its obligations to report parking revenue to the State. Pa193; Pa220.

Plaintiff, however, did not serve discovery on Acowre until August 24, 2021, ***after*** Acowre filed its reply brief in further support of the First MSJ. Pa712. Acowre responded to Plaintiff on October 12, 2021 (before the trial court addressed these issues in its January 10, 2022 decision) with a production of 1,090 documents, which included daily spreadsheets documenting the number of vehicles parked in the parking garage. 1Rca-631Rca. Thereafter, Acowre produced an additional 1,934 documents on October 21, 2021, comprised of communications among Acowre representatives regarding the Contracts. 229ra.

The trial court held oral argument on the First MSJ on December 20, 2021 (Pa201) and thereafter: (1) granted summary judgment as to the frequency of the

parking fee payments because "the intent of the parties was to have the . . . garage payment be paid on an annual basis" and (2) found that Plaintiff was entitled to additional discovery, which precluded summary judgment on Counts II through VI of the Complaint. Pa201; Pa225.

In respect of that additional discovery, the trial court ***reopened limited discovery for ninety (90)*** days as follows:

> [T]he Court finds an additional period of discovery is necessary for the parties to address a method of calculation of the payment derived from the parking revenue due to Plaintiff. The Court finds that it is appropriate to permit Plaintiff time for discovery and ***limit that discovery to the Defendants' manner of counting cars as well as access to the garage to verify the lack of or existence of other garage entry points for cars. The limitation of the discovery is premised on the four corners of the Agreement. The parties to this Agreement are sophisticated people of business and must have had contemplated and discussed how this revenue was to be counted going forward for ninety-nine years.***
>
> . . .
>
> ***The Court, at this point in the litigation, finds it is appropriate to limit access to the financial documents and discovery related to the parking garage because this Court can also find on this record that an expanded access to financial information was clearly not contemplated or incorporated within the subject Paragraph by the parties***. The Court can find the parties intent by the fact that the 99[-]year car payment revenue was personally guaranteed by the Defendants' Principals and not the casino or hotel business of Ocean

> as stated in 14.19. The discovery is limited by this Court because that was the parties[’] intent.
>
> [Pa223-Pa224 (emphasis supplied).]

F. ACOWRE PAYS PLAINTIFF FOR 2021 PARKING FEES AS CONTEMPLATED IN THE PSA.

On January 13, 2022, three days after the trial court granted partial summary judgment to Acowre and permitted Plaintiff limited additional discovery, Acowre sent Plaintiff a check for the 2021 parking fees. Pa374. One week later, Acowre provided Plaintiff with a spreadsheet supporting its 2021 parking fee calculation. Pa376-377; CPa1-13. Plaintiff then served Plaintiff’s Supplemental Notice to Produce to Acowre and Plaintiff’s Supplemental Interrogatories to Acowre on January 27, 2022. Pa378-Pa391.

Plaintiff’s additional discovery focused primarily on the spreadsheet regarding the 2021 payment to Plaintiff as opposed to the limited discovery the trial court had permitted. Id. Plaintiff did not move to extend the discovery end date of April 10, 2022. Pa483. Acowre responded to Plaintiff’s Supplemental Notice to Produce to Acowre on March 4, 2022 and Plaintiff’s Supplemental Interrogatories to Acowre on March 30, 2022 and produced 500 pages of discovery, which included daily spreadsheets evidencing daily car counts for January 1, 2021 to December 31, 2021. 632Rca-1131Rca.

G. ACOWRE FILES A SECOND MOTION FOR SUMMARY JUDGMENT AFTER THE DISCOVERY END DATE OF APRIL 10, 2022.

Acowre filed its Second Motion for Summary Judgment on April 15, 2022 (the "Second MSJ") to dismiss Plaintiff's claims for: breach of contract (Count I); an "action for equitable accounting" (Count II); acceleration (Count III); common law fraud (Count IV); "reclaiming of property") (Count V); and "appointment of receiver" (Count VI). Pa9-Pa11; Pa764. Plaintiff responded with a Cross Motion to Compel and Opposition in which Plaintiff argued that Acowre's response to the Supplemental Notice to Produce and Supplemental Interrogatories was deficient for several reasons, including Acowre's objection to producing the location of all security cameras. Pa429.

Because the parties had agreed to submit the dispute to mediation, on May 27, 2022, the trial court denied both motions without prejudice, ordered the parties to mediation, and directed that if unsuccessful the parties could reinstate the motions. Pa764. When the August 12, 2022 mediation was unsuccessful, the parties refiled their motions. Pa766; Pa226; Pa421.

The parties argued the Motion to Compel on October 24, 2022 and November 14, 2022. Pa493. Acowre opposed the motion, among other things, on the grounds that its responses to Plaintiff's supplemental interrogatories were complete, Plaintiff filed the Motion to Compel outside the discovery end date,

Plaintiff failed to seek an extension of that discovery end date, and there were no exceptional circumstances present to warrant extending discovery. Pa495-496.

The Court granted in part and denied in part[4] Plaintiff's Motion to Compel and otherwise "re-opened" discovery for sixty days "for the limited discovery as permitted in the attached Memorandum of Decision and Judge Porto's Memorandum of Decision dated January 10, 2022." Pa493.

In particular, the trial court held that Acowre had provided sufficient responses to Defendants' supplemental interrogatories number 1, 7, 11, 16, 20, 21, 25, 26, 27, and 30. Pa496. In respect of number 29, the trial court directed Plaintiff to provide the "name of an employee that works in the booth at the parking lot exit who has knowledge as to what (s)he does as an employee when a person attempts to exit the parking lot, but does not have a ticket." Pa493. The trial court further held that:

> in the spirit of Judge Porto's Order of January 10, 2022 and since the court finds the parties have been diligent and additional discovery is necessary regarding the "accounting" or "counting" issue, discovery is herein opened for sixty (60) days, for the limited purpose set forth both in this Memorandum of Decision and in Judge Porto's Order and Memorandum of Decision dated January 10, 2022.

[4] Although Plaintiff sought to compel responses to twelve of its supplemental interrogatories propounded on January 27, 2022, the trial Court denied those requests as to all but interrogatory number 29. Pa493.

[Pa497.]

Acowre provided a supplemental response to supplemental interrogatory 29 on November 23, 2022. 225ra-226ra.

H. THE TRIAL COURT GRANTS ACOWRE'S MOTION FOR PROTECTIVE ORDER AND DENIES PLAINTIFF'S MOTION TO COMPEL AN ACCOUNTING AND/OR FOR PRODUCTION OF AUDIT DOCUMENTS.

More than a month after Judge Walcoff's November 16, 2022 order, on December 20, 2022, Plaintiff requested the following items from Acowre:

> 3. the latest CVPS[5] printouts for gate vend reports, cashier summary reports and parking volume retrieval reports, as well as a print screen out of the reports available in the CVPS software.
>
> 4. the cashier audit reports for the same month as the documents provided in the number above.
>
> 5. Mr. Garcia indicated that he had performed a reconciliation between the camera at the exit gates and the data collected at the gates themselves. I would like a copy of the memorialization of that reconciliation.
>
> [Pa502-Pa503.]

Acowre responded with a Motion for a Protective Order on December 23, 2022. Pa500. That same day, Acowre filed a Motion to Compel the deposition

[5] "CVPS"—or "Computerized Valet Parking System"—is Acowre's parking accounting system, which generates the parking data/cashier summary report spreadsheets produced in this action. See, e.g., Pa518-Pa522; Pa586; Pa618 (explaining system).

of Glenn Straub and Plaintiff filed a Motion for Protective Order to prohibit the deposition of Glenn Straub. Pa771. Plaintiff then filed a Cross Motion to Compel and Opposition to Acowre's Motion for a Protective Order. Pa771; Pa507-511.

By order and opinion dated January 20, 2023, the trial court granted Acowre's Motion for Protective Order to bar Plaintiff's request that Acowre perform an accounting of the parking fees and denied Plaintiff's Motion to Compel and Motion for Protective Order. Pa1-Pa6; Pa96-Pa101. After extending the then-current discovery end date of January 14, 2023 to March 16, 2023, the trial court found that Acowre demonstrated good cause for a protective order because the "documentation requested by Plaintiff is essentially [tant]amount to the Court entering judgment in favor of Plaintiff" because the Amended Complaint seeks an accounting and/or auditing regarding Acowre' parking lot revenue. Pa769; Pa5.

The trial court next found that Plaintiff's request for "raw data" was outside the scope of permissible discovery Judge Porto outlined in his January 10, 2022 order, which was limited to the "method of calculation of the payment derived from the parking revenue due to Plaintiff" and "[Acowre's] manner of counting cars as well as access to the garage to verify that lack of or existence of other garage entry points for cars." Pa52. ***The trial court held that Plaintiff had obtained the discovery Judge Porto permitted:*** i.e., discovery concerning

Acowre's manner of counting cars through the depositions of Ms. Carrieri and Mr. Garcia;[6] and Plaintiff was not entitled to raw data from Acowre because "Judge Porto's decision permitted discovery with regard to the method of calculation," but "did not direct Acowre to provide Plaintiff with the documentation of raw data."). Pa5-Pa6.

Those truths aside, Plaintiff has had the "Raw Data" regarding the calculation of parking fees since Acowre produced it on October 12, 2021, October 21, 2021, and March 4, 2022. Pa60. Those documents are in the record at 1Rca-1131Rca.

I. THE TRIAL COURT GRANTS THE SECOND MSJ AND DISMISSES COUNTS II, III, IV, V, AND VI OF THE AMENDED COMPLAINT.

Before the parties could be heard on Acowre's Second MSJ, Plaintiff filed an Amended Complaint asserting claims for: breach of contract (Count I); an "equitable accounting" (Count II); "acceleration" (Count III); "common law fraud" (Count IV) "reclaiming of property" (Count V); and ("appointment of receiver") (Count VI). Pa527-Pa541.

[6] Ms. Korrin Carrieri, Acowre's Hotel Manager, served as Acowre's corporate representative with knowledge of the parking garage accounting and payment system, Pa62; Pa532; Pa562, and Mr. Garrett Garcia served as Acowre's parking manager, Pa583.

On May 23, 2023, Acowre requested approval from the Court to submit a supplemental submission in further support of the Second MSJ because the parties had taken five depositions since Acowre filed the Second MSJ, which the Court granted. Pa794; Pa795-796; Pa797.

The trial court then granted the Second MSJ in a twenty-five (25) page well-reasoned order and opinion dismissing Counts II, III, IV, V, and VI of the Amended Complaint with prejudice. Pa7-Pa27. As to Count II (equitable accounting), the trial court found that the Contracts do not "reference an equitable accounting," and Plaintiff's corporate representative testified that an accounting is not an express provision or oral term in the Contracts. Pa15 (Mr. Straub confirming absence of accounting term and claiming Plaintiff did not "have to put everything in contracts."; confirming that Contracts did not permit Plaintiff to look at Acowre's financial records because "the question never came up."). The trial court dismissed Count II with prejudice because there was a "monetary figure" that Plaintiff could obtain (i.e., a remedy at law) and there was "no agreement between the parties for an equitable accounting." Pa15-Pa16.[7]

[7] The trial court further noted that Plaintiff "had 790 days of discovery to investigate" the monetary harm it allegedly suffered. Pa17.

The trial court distinguished Onderdonk v. Presbyterian Homes of New Jersey, because, unlike this case involving the heavily regulated casino industry and sophisticated parties, that case involved a service fee contract for elderly residents in a life-care community with no access to an accounting. Pa17-Pa18 (citing 85 N.J. 171 (1981)). More importantly, there was "no evidence before the Court on this record the Plaintiff intended for an accounting at all and in particular, an accounting other than the same accounting [Acowre] is required to provide the State." Pa17. "Unlike the elderly residents in Onderdonk, in the case before the Court, the State already has a system set up that is subject to audit and review [of Acowre's car counts]." Pa18. As such, Acowre "does not have a monopoly on the information that is required pursuant to Onderdonk to impute into a contract a provision not written into the contract." Id.[8]

The trial court dismissed Count III (Acceleration) because it found that "the contract between the parties does not provide for acceleration, does not reference the word acceleration, and does not reference the concept of

[8] Plaintiff has not raised (and has therefore waived) any challenge to the trial court's well-reasoned order and opinion dismissing with prejudice Count III, Count IV, Count V, and Count VI. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017)) ("An issue not briefed on appeal is deemed waived.").

acceleration" and "Plaintiff cites to no language in either the PSA nor the Memorandum of Interest that states Plaintiff is entitled to acceleration." Pa19.

The trial court dismissed Count IV (Common Law Fraud) because it found there was "no genuine issue of material fact that exists with regard to fraud as there is no evidence at all of a material misrepresentation of a presently existing or past fact." Pa24.

The trial court dismissed Count V (Reclaiming of Property) because the parties agreed on the record that the reclaiming of property was not provided for in the PSA, nor part of any oral agreement. Pa25. Further, if "Plaintiff proves damages as the result of Defendants breach of contract, the amount of cars at the particular rate for each year can be calculated and ascertained." Pa26.

Last, the trial court dismissed Count VI (Appointment of Receiver) because:

> N.J.S.A. 14A:14-2(2) permits the appointment of a receiver when a corporation is insolvent, has suspended its ordinary business for lack of funds, or the business of the corporation is being conducted at a great loss and greatly prejudicial to the interests of its creditors or shareholders. There is no evidence in the record presently before the Court that would permit a rational fact finder to find that the statute applies in this matter.
>
> [Pa26.]

J. THE TRIAL COURT DENIES PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING ACOWRE'S MOTION FOR A PROTECTIVE ORDER AND DENYING PLAINTIFF'S MOTION TO COMPEL AND EXTEND DISCOVERY.

Despite the trial court's well-reasoned opinion dismissing Counts II through VI of the Amended Complaint and refusing to further extend discovery, Plaintiff moved for reconsideration of the trial court's January 20, 2023 Order granting Acowre's Motion for a Protective Order and denying Plaintiff's Motion to Compel. Pa555-Pa556.

The trial court reviewed all discovery exchanged after Judge Porto entered his order and declined to reconsider its protective order against production of the "Raw Data." Pa61 (denying motion for reconsideration because in response to Judge Porto's order, Acowre "sent Plaintiff Bates Stamped documents Defendants-4827-4839 regarding backup documentation for the check issued to Plaintiff for parking garage use in 2021. On January 28, 2022, Plaintiff served a supplemental production demand and second supplemental interrogatories regarding the 2021 payment. On March 30, 2022, Defendants sent responses to the supplemental notice to produce including Bates Stamped documents Defendants-4840-5539."); see 632Rca-1131Rca (producing documents).

The trial court also reviewed "Ms. Carrieri's deposition testimony as cited by Plaintiff, which testimony discussed how the records are kept via receipts,

vouchers, exception logs, meter readings, all of which is documented, then reviewed, and how a vehicle could be reclassed." Pa62. On reconsideration, the trial court recounted in detail that Judge Porto's limited order did not permit discovery of "raw data to be provided for an audit/accounting," and "***Plaintiff has discovery on how Defendants count cars***." Pa63-Pa64 (emphasis supplied).[9]

Finally, the trial court held that Plaintiff failed to show exceptional circumstances warranted yet another discovery extension, particularly because "Plaintiff's motion was not timely filed as it was made returnable after the discovery end date." Pa65. Specifically, Plaintiff did not satisfy the heightened exceptional circumstances standard because: (1) in this Track II case, the parties had at least 790 days[10] of discovery (the original discovery end date was November 11, 2021, and the last discovery end date was March 16, 2023); (2) from Judge Porto's extension of discovery on January 10, 2022, through additional discovery extension for over a year later, counsel pursued discovery;

[9] After the trial court's orders, the "only issue remaining in the case [was] whether Plaintiff was paid for the correct categories of cars based upon the language of the contract, which is an issue for the trier of fact." Pa64.

[10] The Parties had from December 30, 2020 when the Second Complaint was filed to March 16, 2023, the last discovery end date to take discovery, which is a total of 806 days. Pa2.

(3) ***Plaintiff's motions to compel discovery were denied and a protective order granted over the exact discovery Plaintiff continues to seek***; (4) "Plaintiff provides the Court no basis for why counsel failed to request an extension of discovery within the original discovery period since discovery ended on March 16, 2023 and Plaintiff filed its motion four (4) months later on July 5, 2023; (5) "Plaintiff's ability to seek reconsideration for same at any time since January 20, 2023, was well within the control of Plaintiff's counsel and Plaintiff who now seek a discovery extension." Pa66-Pa67. On these grounds, the trial court denied Plaintiff's Motion for Reconsideration on July 21, 2023. Pa55.

K. THE TRIAL COURT ENTERS FINAL JUDGMENT AND DENIES PLAINTIFF'S MOTION FOR RECONSIDERATION.

After an October 23, 2023, ***bench*** trial, the trial court entered final judgment against Acowre on January 5, 2024 for the total amount of $8,229.00 based on a calculation for the total number of "HR" cars in 2020, 2021, and 2022 for which Plaintiff had not received a parking fee, but denied Plaintiff all other relief. Pa102.[11] The trial court explained its findings of fact and conclusions of law on the record,

[11] The trial court explained that its calculations were based on Acowre's raw data; i.e., the court awarded Plaintiff damages for "the number of vehicles in the HR category each year multiplied by the rate to be applied per car for that year pursuant to the PSA." 7T at 15:22-25 to 16:1-3; Id. (noting Acowre produced spreadsheets for 2021 and 2022 to support the calculations); Pa61 (trial court noting same).

including that the trial court found Mr. Straub (Plaintiff's representative who negotiated the Contracts):

> to be the least credible witness that testified at trial. Most times his testimony did not answer the question which was asked of him. Mr. Straub's testimony was circuitous and often times Mr. Straub did not directly answer the question posed. The Court did not take Mr. Straub's testimony to be purposefully untruthful or deceiving, rather the Court found Mr. Straub's memory to be hampered by the amount of time that had passed since the negotiations between the parties had begun and the time of trial, which was several years.
>
> [7T[12] at 4:9-19.]

[12] "1T" refers to the transcript of the oral argument on the Motion for Summary Judgment on December 20, 2021.
"2T" refers to the transcript of the oral argument on a Discovery Motion on October 24, 2022.
"3T" refers to the transcript of the oral argument on a Discovery Motion on November 14, 2022.
"4T" refers to the transcript of the oral argument on several Discovery Motions on January 20, 2023.
"5T" refers to the transcript of the oral argument and partial Decision on Acowre's Motion for Summary Judgment on June 30, 2023.
"6T" refers to the transcript of the Bench Trial on October 23, 2023.
"7T" refers to the transcript of the Trial Court Decision on January 4, 2024.
"8T" refers to the transcript of the Supplemental Bench Trial Decision on January 5, 2024.
"9T" refers to the transcript of the Decision on Motion for Reconsideration on February 2, 2024.

Conversely, the trial court found Acowre's representative, Mr. Ruocco,[13] to be a "credible witness" with a "good recall of the subject matter of the case," who "answered questions promptly and directly." Id. at 5:3-10. The trial court also found Ms. Carrieri's testimony "inherently believable," and credible. Id. at 5:23-6:6.

Four days after entry of final judgment, Plaintiff filed a Motion for Reconsideration. Pa105. The trial court denied Plaintiff's motion in a thorough ten-page opinion in which it reaffirmed that:

> Defendants have paid Plaintiff per car for hotel guests. The testimony of Ms. Carrieri confirmed same as she testified that Plaintiff is paid once for a hotel guest's use of the parking garage. She specifically testified that if a hotel guest vehicle goes out multiple times in the same day, Plaintiff is paid once.
>
> [Pa107.]

After reviewing the entirety of Ms. Carrieri's trial testimony, including the three times Ms. Carrieri discussed the "hotel guest category of cars", the court held that

> [t]he PSA in clear and unambiguous language specifically states that Plaintiff will be paid "per car." The contract does not provide that Plaintiff will be paid per car per entrance, per car per exit nor per car per day. When the hotel guest exits the parking garage for the first time, Plaintiff is properly paid for the car. When the hotel guest car returns to the parking garage and leaves again later that same day or perhaps the next day, Plaintiff is appropriately

[13] Mr. Frank Ruocco, a former TEN RE shareholder and Executive Vice President at Ocean, represented Acowre and communicated with Plaintiff (Mr. Straub) regarding the purchase and sale of the Revel Casino Resort. Pa290; Pa818.

> not paid as Plaintiff has already been paid for that car. As such, the Court specifically finds that Defendant has not breached the contract for failure to pay Plaintiff for vehicles that are placed in the "hotel guest" category.
>
> [Pa110.][14]

The PSA's "per car" language is clear and ambiguous, and Acowre must pay Plaintiff "each time a vehicle enters the parking garage, regardless of the number of times the car entered and regardless of when the car entered." Pa111.[15] In sum, the trial court confirmed that its decision was not "based on a palpably incorrect or irrational basis." Pa113. The trial court relied upon the parties' stipulations, all exhibits, witnesses' testimony, and "enforced the terms [of the PSA] as written[, namely that] Acowre pays Plaintiff once, 'per car' for a hotel guest's use of the subject parking garage." Pa111.

The trial court reached these conclusions after weighing the testimony and credibility of the witnesses before it and found against Acowre on several issues. Pa112-Pa113 (rejecting Mr. Ruocco's claim that the parties agreed Plaintiff would

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[14] In its motion for reconsideration, Plaintiff repeatedly mischaracterized the trial court's opinion and reasoning, including objecting to non-existent conclusion that a car should be counted each time it enters the parking garage. See, e.g., Pa111-Pa112 (refuting Plaintiff's claims and noting that "nowhere in the Court's decision, either written or oral, does the Court make that conclusion.").

[15] Contrary to Plaintiff's claims, the trial court noted that the January 5, 2024 conference involved the damages award for "HR" category, not any discussion of "hotel guest vehicles." Pa111.

be paid "whatever Defendants paid the state."). In the end, however, the trial court declined to re-write the Contracts—agreements negotiated and executed by represented sophisticated commercial parties—in Plaintiff's favor and denied reconsideration because nothing in the trial court's original decision was "palpably incorrect or irrational." Pa113-Pa114.[16]

[16] The trial court did not construe Plaintiff's motion for reconsideration as a request for a new trial under Rule 4:49-1 and therefore did not engage in any analysis on that issue. Pa113.

ARGUMENT[17]

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED (AND AFFIRMED ON RECONSIDERATION) ACOWRE'S MOTION FOR A PROTECTIVE ORDER CONSISTENT WITH JUDGE PORTO'S LIMITED ORDER AND DENIED PLAINTIFF'S MOTION TO EXTEND DISCOVERY. (Pa1-Pa6; Pa55-Pa101).[18]

A. Standard of Review.

This Court affirms discovery orders unless the trial court abused its discretion by misunderstanding or misapplying the law. State v. Ramirez, 252 N.J. 277 (2022); Cap. Health Syst. v. Horizon Health Care Servs., 230 N.J. 73, 79-80 (2017). Appellate courts find an abuse of discretion only when a decision is made without a "rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." U.S. Bank, N.A. v. Guillaome, 209 N.J. 449, 467-68 (2012).

The "abuse of discretion" standard also governs appellate review of a denial of a motion for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App.

[17] As a threshold matter, Plaintiff's "Procedural History" and "Statement of Facts" are replete with unsupported claims, speculation, and misrepresentations of what transpired below. See, e.g., Polo Br. at 8 (stating without record citation that Acowre "provided no backup for the computation of this payment (and never did)" and claiming that "Polo North could not accept the check under a condition that Polo North must trust Defendants to pay the correct royalty. The check was not negotiated."); id. at 8-9 (claiming, without evidence or citation that Acowre's conduct raised "red flags" and that an "unaudited, summary spreadsheet is no substitute for the backup data for the contractual royalty payment."); id. at 12 (stating

Div. 1996). In that context, "[a]n abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." AC Ocean Walk, LLC v. Blue Ocean Waters, LLC, 478 N.J. Super. 515, 523 (App. Div. 2024) (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)); Flagg v.

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as fact—without citation—that Plaintiff's casino revenue increased "almost 100% over the relevant time period."). For this independent reason, the Court should dismiss the appeal in its entirety. Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. Super. 282, 283 (App. Div. 1984) (dismissing appeal because the "procedural history does not contain a statement of the nature of the proceedings nor reference to the appendix page of the documents referred to therein," and the "statement of facts is not supported by references to the appendix and transcript.") (citing R. 2:6-2(a)(3)-(4)); see R. 2:6-2(a)(5) (requiring facts asserted in briefs on appeal be "supported by references to the appendix and transcript."); see also Spinks v. Township of Clinton, 402 N.J. Super. 465, 474-75 (App. Div. 2008), certif. denied, 197 N.J. 476 (2009) ("[I]t is [the parties'] responsibility to refer us to specific parts of the record to support their argument. They may not discharge that duty by inviting us to search through the record ourselves.").

[18] Even if the trial court erred in not re-opening discovery for a fourth (or fifth) time, this Court should affirm the trial court's well-reasoned orders and opinions because entering the protective order and denying reconsideration of same was not reversible "plain error" under Rule 2:10–2 given the circumstances. See, e.g., Capparelli v. Lopatin, 459 N.J. Super. 584, 610 (App. Div. 2019) (holding that the failure to exclude certain witness testimony was "harmless error" under Rule 2:10-2 and did not require reversal since the excluded testimony would not "be more probative of the parties' intent in entering into the May 2015 agreement than the testimony of the parties themselves."); Hill v. New Jersey Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 301 (App. Div. 2001) (declining to reverse jury verdict where improperly admitting witness testimony "was not clearly capable of producing an unjust result" under Rule 2:10–2).

Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "The magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010).

B. The Trial Court Did Not Abuse its Discretion in Granting Acowre's Motion for Protective Order Over Acowre's Raw Parking Data.

The trial court did not abuse its discretion either in granting Acowre's motion for a protective order from further discovery or in affirming the same on reconsideration. By the time Acowre sought a protective order, Judge Porto had previously limited discovery because the "lone outstanding issue of genuine material fact remaining for [the breach of contract claim, i.e.,] whether the Plaintiff was paid the correct amount." Pa91. Judge Porto found it "appropriate to permit Plaintiff time for discovery ***and limit that discovery to Acowre's manner of counting cars*** as well as access to the garage to verify the lack of existence of other garage entry points for cars." Pa92 (emphasis supplied). After Judge Porto re-opened discovery for that limited purpose, the parties exchanged written discovery from January 22, 2022 through May 2022, and Acowre produced hundreds of pages of documents evidencing the manner in which it counted cars in the Parking Garage. See generally Acowre's confidential appendices. Plaintiff waited until December 20, 2022 to seek raw parking data that would permit them to conduct an "audit." Pa61.

The trial court also re-reviewed "Ms. Carrieri's deposition testimony as cited by Plaintiff, which testimony discussed how Acowre kept relevant parking

records via receipts, vouchers, exception logs, meter readings, all of which is documented, then reviewed, and how a vehicle could be reclassed." Pa62. Plaintiff cherry picks and misconstrues Ms. Carrieri's testimony to manufacture a discovery-related issue and to suggest that the court deprived it of relevant discovery. Polo Br. at 17. The trial court did not permit Plaintiff to obtain Acowre's raw parking data, but Plaintiff obtained testimony and documents from Acowre "addressing the method of calculation of the payment to Plaintiff from the parking lot revenue." Pa63; See, e.g., CPa1-CPa13 (Acowre parking summary data for calendar year 2021); CPa14 (Acowre Ocean Casino Resort "account analysis" calculating November 2022 parking payments); CPa15-CPa26 (Acowre parking summary data for calendar year 2022).[19] Plaintiff also cross-examined Ms. Carrieri at length during the bench trial, and she explained multiple times the basis for the parking garage fee calculation. Pa108-Pa110. Plaintiff may

[19] In granting Acowre's motion for protective order, the trial court confirmed that "Judge Porto's Order did not direct Defendants to provide Plaintiff with raw data, rather Judge Porto's Order permitted discovery as to the manner of counting cars. Judge Porto's decision permitted discovery with regard to the method of calculation. Judge Porto's decision did not direct Defendants to provide Plaintiff with the documentation of raw data." Pa780-Pa781. As the trial court noted in granting the protective order, Plaintiff was not entitled to raw data from Acowre because "Judge Porto's decision permitted discovery with regard to the method of calculation," but "did not direct Acowre to provide Plaintiff with the documentation of raw data."). Pa5-Pa6.

not like Ms. Carrieri's testimony, but that fact does not establish an abuse of discretion or a basis for reversal. Compare Polo Br. at 17, with Pa108-Pa110.[20]

The trial court properly rejected Plaintiff's repeated attempts to conflate Acowre's reporting obligations to state regulatory authorities with Acowre's discovery obligations. Pa64. Moreover, contrary to Plaintiff's baseless claims, there was "no evidence before the Court in this record that [Acowre was] dishonest with the State with regard to parking lot revenue." Pa62. For these reasons, the trial court did not abuse its discretion in denying Plaintiff's request for parking raw data because Plaintiff obtained the limited discovery Judge Porto permitted, i.e., "Defendants' manner of counting cars." And, central to the trial court's analysis was the fact that Plaintiff repeatedly slept on its rights by failing to seek additional discovery within the discovery end date, failing to seek an extension of the discovery end date, and failing to seek timely reconsideration of Judge Porto's order limiting discovery and thus "Plaintiff had ample time and methods to obtain discovery" related to parking fee calculation. Pa62.

[20] Contrary to Plaintiff's claims, there was "good cause" to issue a protective order over documents (here raw parking data) that are not discoverable based on Judge Porto's limited order and the facts of the case, even if raw parking data does not qualify as a trade secret or confidential material. Compare Polo Br. at 18-22 (noting Judge Porto's January 20, 2022 opinion only permitted parties to "address a method of calculation of the payment derived from the parking revenue due to plaintiff"), with Rule 4:10-3 (permitting issuance of protective order where "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters" or "discovery not be had").

Those truths aside, Plaintiff's claim that it had "no evidence to present" on issues related to "number of car entries and/or the number of days of hotel stays" is outright false. Polo Br. at 12. Acowre produced over 5,000 pages of parking data and a parking spreadsheet in response to Judge Porto's order requiring limited additional discovery. Pa61; see also 7T at 9 to 10 (noting that Acowre uses a "sophisticated system to record vehicle use of the subject parking garage" including "audit" "accounting system" and data input monthly into a "spreadsheet"); id. at 10 (finding Acowre's witness testimony "uncontroverted, accurate, credible, and truthful," and that "no evidence was presented that defendants' system to record vehicle usage of the subject parking lot, which includes a system of checks and balances by the defendant company and is subject to audit by the State is anything other than appropriate and reliable."); id. at 12 (discussing detailed spreadsheet data, parking categories such as "U-turn," "promotions" or "cash car" and parking payment log information Acowre produced).

Plaintiff received all the parking data it requested and no more than Judge Porto or the law permitted. The trial court rendered its initial decision (and reconsideration decision) with a rational explanation, and it did not rest any of its conclusions on an "impermissible basis." AC Ocean Walk, LLC, 478 N.J. Super. at 523. Even if an accounting and discovery serve different purposes, Plaintiff never

had the right (and therefore no legal basis) to seek Acowre's raw parking data based on the trial court's prior orders and issues in the case. But that truth aside, Plaintiff had the documents containing the information they now claim the Court prohibited Plaintiff from obtaining. The Court should affirm the trial court's orders granting the protective order over parking garage raw data (and denying the motion to compel same) because the trial court did not commit legal error or any "game-changer" mistake to warrant reversal. Palombi, 414 N.J. Super. at 289.[21]

C. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiff's Motion to Extend Discovery.

The trial court did not abuse its discretion in denying Plaintiff's belated request to extend discovery "made returnable after the discovery end date" and after the court scheduled the case for trial. Absent exceptional circumstances, "no extension of the discovery period may be permitted after an arbitration or trial date is fixed." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396 (2005) (quoting

[21] The Court should disregard Plaintiff's numerous self-serving statements of what it purportedly "understood" or "believed" all of which Plaintiff makes without any legal support or citation to the record. Compare Polo Br. at 2, 8, 24 (claiming without support that Acowre's production raises "red flags" because Acowre's parking calculations "were far lower than the historical revenues which were generated pre-pandemic as understood by Polo North . . .") (emphasis added); Polo Br. at 9 (stating what Plaintiff "had reason to believe" without support), with Box Seat Subscription Tele. v. Hollenback, 177 N.J. Super. 42, 43 (App. Div. 1981) (disregarding claims where the Court had "no idea at all what the contract was except that plaintiff's brief tells us (without supporting references to the transcript, a clear violation of R. 2:6-2(a)(4)) it was a service agreement.").

Pressler, Current N.J. Court Rules, comment on R. 4:24-1) ("Exceptional circumstances rather than good cause must, however be shown if an extension is sought beyond the day of notice of an arbitration or trial date."); Rivers v. LSC P'ship, 378 N.J. Super. 68, 78-79 (App. Div. 2005) (outlining four factors required for extension and noting that exceptional circumstances "denotes something unusual or remarkable.").

Here, the trial court did not abuse its discretion in denying Plaintiff's request for yet another discovery extension because: (1) in this Track II case, the parties had at least 790 days of discovery; (2) the court previously denied Plaintiff's motion to compel discovery (which it sought again) as irrelevant, duplicative, and covered by the protective order; (3) Plaintiff never sought a discovery extension or reconsideration of the protective order and denial of the motion to compel entered January 20, 2023; and (4) the dismissal of Counts II through VI has no bearing on the need for discovery as to Count I.[22] The trial court noted that Plaintiff referenced Ms. Carrieri's deposition in its original January 12, 2023 cross-motion to compel discovery, and if "Plaintiff wished to pursue additional discovery based upon Ms. Carrieri's testimony, Plaintiff could have done so." Pa62. Plaintiff "also could have filed a motion to extend discovery if more time

[22] Also, the trial court noted in its Second MSJ decision that Plaintiff "had 790 days of discovery to investigate" the monetary harm it allegedly suffered. Pa17.

was needed, but "Plaintiff did not file to extend discovery at that time" and "did not seek reconsideration of the protective order at that time." Pa62.[23]

"In the final analysis, our citizenry is entitled to a continually improving system of justice, and not some ersatz construct where judges are diverted from their duties to baby-sit and spoon-feed those either too lazy or too unwilling to comply with their clearly defined obligations." Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 428 (2010) (Rivera-Soto, J., concurring). Such is the case here. This Court should affirm the trial court's discovery orders, which were not an abuse of discretion.

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO ACOWRE ON PLAINTIFF'S EQUITABLE ACCOUNTING CLAIM (COUNT II) (Pa7-Pa54).[24]

A. Standard of Review.

This Court reviews *de novo* a ruling on a motion for summary judgment, applying the same standard to the consideration of the motion as the trial court, i.e.,

[23] Plaintiff also had the opportunity to conduct additional discovery and/or file a motion to extend discovery if more time was needed in January 2023, but Plaintiff filed "to re-open and extend discovery many months later, on July 5, 2023." Pa62.

[24] The trial court granted Acowre's motion for summary judgment on Counts II, III, IV, V, and VI of the Amended Complaint. Pa7. Plaintiff does not contest the dismissal of Counts III, IV, V, and VI in its brief and thus waives those arguments on appeal). Pa115; See, e.g., Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017) (quoting Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.")).

whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). This Court also reviews a trial court's legal conclusions *de novo*. New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 372 (App. Div. 2018).

B. The Trial Court Properly Granted Summary Judgment to Acowre on Plaintiff's Equitable Accounting Claim (Count II) With Prejudice Because the Contracts Did Not Create a Fiduciary Duty and Plaintiff Obtained Monetary Relief on its Breach of Contract Claim.[25]

The trial court properly granted summary judgment to Acowre on Plaintiff's equitable accounting claim because the sophisticated parties did not share a fiduciary relationship and the Contracts do not provide an equitable accounting right. "An accounting in equity cannot be demanded as a matter of right or of course." Borough of Kenilworth v. Graceland Mem. Park Ass'n, 124 N.J.Eq. 35, 37 (Ch. 1938)). A party can obtain an equitable accounting ***only*** where there exists "a fiduciary or trust relation"; (2) "complicated character of the account"; or (3) "need of discovery".

[25] The trial court correctly granted summary judgment on Plaintiff's equitable accounting claim because the "necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is the absence of an adequate remedy at law." Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (cleaned up). Plaintiff obtained a final judgment for monetary compensation and was made whole on its breach of contract claim (Count I), and thus had and received an adequate remedy at law.

Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 181 n.4 (1981) (citing Messina v. Nat'l Store Co., 140 N.J.Eq. 312, 314 (Ch. 1947)). Plaintiff could satisfy none of these requirements here.

First, the trial court properly dismissed Plaintiff's equitable accounting claim because the admittedly sophisticated commercial contracting parties did not share a fiduciary or "trust" relationship.[26] Onderdonk, 85 N.J. at 181 n.4. Where, as here, "[b]oth plaintiff and defendant are sophisticated business entities, freely entering into a contract which limited defendant's remedies," the Court should hold the parties to "the terms of their bargain." BOC Grp., Inc. v. Chevron Chem. Co., 359 N.J. Super. 135, 150 (App. Div. 2003); see also Chem. Bank v. Bailey, 296 N.J. Super. 515, 529 (App. Div. 1997) (enforcing parties to terms of unambiguous underwriting agreement where "[b]oth parties are sophisticated and deal regularly with contract liability."). And it is settled that a commercial contract dispute where

[26] Plaintiff concedes an equitable accounting claim requires a fiduciary relationship, which is not present here as a matter of fact or law. Compare Polo Br. at 26, with F.G. v. MacDonell, 150 N.J. 550, 563 (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."); see In re Stroming's Will, 12 N.J. Super. 217, 224 (App. Div.), certif. denied, 8 N.J. 319 (1951) (stating essentials of confidential relationship "are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction"); Blake v. Brennan, 1 N.J. Super. 446, 453 (Ch. Div. 1948) (describing "the test [as] whether the relationship between the parties were of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other").

one party alleges non- or under-payment does not create a fiduciary relationship or an equitable right to an accounting. See Borough of Kenilworth, 124 N.J.Eq. at 37 (argument that general contract dispute creates right to accounting and fiduciary relationship was "untenable" because such a suit "is simply whether the defendant is liable to pay money which it has contracted to pay.").

The trial court found (and Plaintiff concedes) that it is a "sophisticated party with knowledge of the Casino and hotel businesses . . . ." Polo Br. at 31; Pa223 (stating that "the parties to this Agreement are sophisticated people of business."); 7T at 7:7-8 (confirming the parties to be "sophisticated business people").[27] Plaintiff is bound by the unambiguous Contracts it negotiated and signed with legal representation, which do not create a fiduciary relationship or an accounting right. See, e.g., Westmark Comm. Mtg. v. Teenform, 362 N.J. Super. 336, 347 (App. Div. 2003) (affirming that "we can perceive no reason why the debtor should be relieved of the terms of the contract freely entered into. The terms were clear and unambiguous, the parties clearly experienced and sophisticated in loan transactions of this type."); Borough of Kenilworth, 124 N.J.Eq. at 37 (same).

[27] Plaintiff's three complaints allege that the Contracts "impose a fiduciary duty to properly account for the (i) parking counts and (ii) parking revenue generated for the Parking Garage." Pa128; Pa242; Pa534. However, there is no basis in law or fact for this conclusory statement.

Likewise contrary to Plaintiff's claims, see Polo Br. at 26, the trial court properly distinguished Onderdonk v. Presbyterian Homes of New Jersey, because, unlike this case involving the heavily regulated casino industry and sophisticated parties, that case involved a service fee contract for elderly residents in a life-care community with no ability to determine how their funds were used. Pa17-18 (citing 85 N.J. 171 (1981)). More importantly, there was "no evidence before the Court on this record the Plaintiff intended for an accounting at all and in particular, an accounting other than the same accounting Acowre is required to provide the State." Pa17. "Unlike the elderly residents in Onderdonk, in the case before the Court, the State already has a system set up that is subject to audit and review." Pa18. As such, Acowre "does not have a monopoly on the information that is required pursuant to Onderdonk to impute into a contract a provision not written into the contract." Pa18.

Second, Plaintiff obtained all the discovery Judge Porto's limited order permitted, and Plaintiff was not entitled to any other "raw data" or similar relief. Onderdonk, 85 N.J. at 181 n.4. Plaintiff claims that without relief, "all cases in which an equitable accounting is sought, discovery of the underlying data forming a basis for damages in an accompanying breach of contract claim would be blocked because such discovery would be 'akin to an audit.'" Polo Br. at 24.

But if Plaintiff is correct, every breach of contract claim would require an "audit" or "accounting" to prove damages. Moreover, if this Court adopted Plaintiff's theory, every commercial contract negotiated and executed by sophisticated parties would include an implied equitable accounting right. There is no legal support for that proposition and Plaintiff conceded that no accounting right (equitable or otherwise) was contemplated by the parties or set out in the Contracts.

Further, Plaintiff did receive 5,413 pages of discovery from Acowre, which included daily spreadsheets of the number of cars in the parking garage. Plaintiff elected to limit its deposition and trial questions only to those spreadsheets reflecting the yearly and monthly payments. Plaintiff cannot seek a "do over" of its discovery and trial strategies through appeal, and certainly not by claiming that it lacked access to documents it possessed but failed to address with any witness. See also Transmodal Corp. v. EMH Assocs., Inc., 2010 WL 3937042, at *6 (D.N.J. Oct. 1, 2010)) (dismissing an accounting claim between "arm's-length counterparties to a contract, not fiduciaries" because "[t]he parties have conducted discovery in this matter" and damages may be "calculated according to ordinary contracts principles.").

Third, there was nothing "complicated" in the "character of the account" that could support an equitable accounting. Onderdonk, 85 N.J. at 181 n.4. A matter is "complicated" for accounting purposes where "the issues necessary to be determined

in order to arrive at a just conclusion are so numerous, and dependent upon such a variety of evidence, or of evidence of such technical character, as that it is substantially impossible for a jury" to arrive at a "just and proper conclusion." Borough of Kenilworth, 124 N.J.Eq. at 37.

But, this is a case about counting cars. Like in Kenilworth and Transmodal Corp., this bench trial involved a "simple" calculation of contract damages for parking fees. Id. at 37-38. Plaintiff's corporate representative admitted that no "audit" or equitable accounting right appears in the contract, and the sophisticated parties neither included nor anticipated/expected such a right to be included in the Contracts. Pa14-Pa16 (trial court summarizing Mr. Straub testimony confirming there is no contractual language, negotiations or expectation that Plaintiff would be entitled to "audit" Acowre or inspect its books and records). Plaintiff also now admits that the Contracts "did not expressly provide a contractual right to an accounting." Polo Br. at 26. Notwithstanding that it is precisely what Plaintiffs ask this Court to do, Plaintiffs also recognize that this Court may not rewrite a contract "by substituting a new or different provision from what is clearly expressed in the instrument." Rahway Hosp. v. Horizon Blue Cross Blue Shield of N.J., 374 N.J. Super. 101, 111 (App. Div. 2005); id. (holding that a court may not "make a better contract for either party, or supply terms that have not been agreed upon"); see also Polo Br. at 29-32 (citing cases and agreeing that courts "must enforce [contract]

terms as written," and "the court has no right to rewrite the contract merely because one might conclude that it might have been functionally desirable to draft it differently . . . .").

Plaintiff's belated citation to non-New Jersey cases cannot change the analysis or substantiate reversible error. Compare Polo Br. at 26-27 (citing noncontrolling cases from Maryland, the District of Columbia, and the United States Court of Appeals for the Sixth Circuit). In sum, the trial court reviewed (and re-reviewed) all discovery exchanged after Judge Porto entered his order and declined to reconsider the order granting a protective order over the "raw data" Plaintiff sought. Pa61 (noting that Acowre produced "backup documentation for the check issued to Plaintiff for parking garage use in 2021"). For these reasons, the Court should affirm the trial court's order granting summary judgment to Acowre on Count II.[28]

[28] Neither the Amended Complaint nor the Second Complaint contains a count for a breach of the implied covenant of good faith and fair dealing. Pa122-Pa134; Pa527-Pa541. Even if it did, Plaintiff's statement that "general common law caselaw" holds that "where the records are in the hands of the contractual obligor, there is a duty to account under the covenant of good faith incorporated into every contract" is not supported by any case citation or precedent, and this Court should disregard it.

POINT III

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ENTRY OF FINAL JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM (COUNT I) BECAUSE THE FINAL JUDGMENT IS CONSISTENT WITH THE CONTRACT'S UNAMBIGUOUS TERMS. (Pa102-Pa114).

A. Standard of Review.

Appellate courts apply a deferential standard of review to a trial court's factual findings in a bench trial. Rova Farms Resort v. Invs. Ins. Co., 65 N.J. 474, 483-84 (1974). A trial judge's findings are binding on appeal when supported by adequate, substantial, and credible evidence. Id. at 484. These findings will not be disturbed unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). Appellate review of a trial court's legal determinations, however, is plenary. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

B. The Trial Court Did Not Abuse its Discretion in Concluding That the Contracts Required Acowre to Pay "Per Car" Regardless of How Many Times A Car Enters the Parking Garage. (Pa103-Pa114).

This Court should affirm the trial court's final judgment and interpretation of the Contracts that Acowre must pay Plaintiff once "per car" regardless of how many times that car may enter the parking garage during the hotel guest's stay. Pa111-Pa114. This Court views deferentially the trial court's conclusion—sitting as

factfinder—that Mr. Straub was "the least credible witness" during the trial. 7T at 4. The trial court also found that the parties were sophisticated businesspeople who negotiated the Contracts through counsel. 7T at 7 (confirming the parties to be "sophisticated business people").

Contrary to Plaintiff's claims on appeal, see Polo Br. at 29-32, this Court should review the trial court's reconsideration of the final judgment as to Count I (and its other summary judgment decisions) for a clear abuse of discretion, not *de novo* because Plaintiff sought reconsideration of a final judgment, and it did not move for a new trial under Rule 4:49-1. Compare Pa113 (trial court noting that it "considers Plaintiff's motion solely as a motion for reconsideration" because "Plaintiff's motion was noticed as a motion for reconsideration seeking to amend judgment and Plaintiff's brief solely relied upon Rule 4:49-2 which governs a motion to alter or amend a judgment or final order."), with Kornbleuth v. Westover, 241 N.J. 289, 301-02 (2020) (considering whether a "trial court's refusal to reconsider its order granting summary judgment" constituted a "clear" abuse of discretion, meaning the trial court: (1) "expressed its decision based upon a palpably incorrect or irrational basis," or (2) "failed to appreciate the significance of probative,

competent evidence"); accord Guido v. Duane Morris, LLP, 202 N.J. 79, 87-88 (2010) (same).[29]

On reconsideration, the trial court reviewed all relevant evidence and the trial recordings and reaffirmed that the final judgment order and decision were not "based on a palpably incorrect or irrational basis." Pa110. In short, "Plaintiff was paid one time for a hotel guest car, regardless of the number of times the hotel guest's car entered and exited the parking lot during the hotel guest's stay, whether it be one day or multiple days." Pa110 (citing bench trial decision at pgs. 23 and 30). The trial court enforced the Contracts' terms as written, meaning Acowre pays Plaintiff once "per car" for a hotel guest's use of the parking garage. Pa111.[30] Section 14.19 specifically provides that Plaintiff will be paid "per car," i.e. a fee for "each car, not for each car's repetitive daily use, but rather for each car that utilized the subject parking garage." 7T at 8; 7T at 13:10-25 (the PSA is "clear and unambiguous" and requires payment "per car," not "per car entrance, per car per exit, nor per car per day."). Language requiring Acowre to pay Plaintiff per car per entrance "was not in

[29] Plaintiff never sought a new trial before the trial court, but apparently does now for the first time on appeal. Compare Pa113 (noting that Plaintiff only moved for "reconsideration" of a final judgment under Rule 4:49-2), with Polo Br. at 32 (claiming trial "error" and a "new trial should be ordered.").

[30] Although Plaintiff contends that on January 5, 2024 the trial court denied "additional payments for cars entering and leaving the parking garage while driven by an occupant of the adjoining hotel", the court noted that there was no "discussion at all, on the record on January 5, 2024, with regard to hotel guest vehicles." Pa111.

the contract." Pa112. In sum, after reviewing the extensive evidentiary record and the parties' submissions, the trial court reaffirmed that Acowre must pay Plaintiff once "per car" for a "hotel guest's use of the subject parking garage, which the Court found did not breach the clear and unambiguous language of the contract." Pa113-Pa114.

The trial court's voluminous findings were "supported by adequate, substantial and credible evidence" and do not "offend the interests of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (citation omitted); see Rova Farms Resort, Inc., 65 N.J. at 483-84 (an appellate court should not disturb a trial judge's factual findings following a bench trial unless "wholly unsupportable"). The trial court found, and Plaintiff concedes that it is a "sophisticated party with knowledge of the Casino and hotel businesses . . .." Polo Br. at 31; Pa223 (stating that "the parties to this Agreement are sophisticated people of business."). Plaintiff is bound by the unambiguous contracts it negotiated and signed with legal representation. See, e.g., Westmark Comm. Mtg., 362 N.J. Super. at 347 (affirming that "we can perceive no reason why the debtor should be relieved of the terms of the contract freely entered into. The terms were clear and unambiguous, the parties clearly experienced and sophisticated in loan transactions of this type."). Kotkin v. Aronson, 175 N.J. 453, 455 (2003) (holding that unambiguous language controls the rights and obligations of the

parties, and the court will not make a "more sensible contract than the one" the parties made for themselves."); accord Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (absent fraud, coercion or deception, contracts should be enforced as written).[31]

CONCLUSION

For all the reasons stated, this Court should affirm the trial court's orders: (1) granting the Motion for Protective Order (dated January 20, 2023); (2) granting Acowre's Motion for Summary Judgment as to Counts Two through Six of the Amended Complaint (dated July 3, 2023); (3) denying Plaintiff's Motion for Reconsideration of the January 20, 2023 order (dated July 21, 2023); (4) entering judgment in favor of Plaintiff on its breach of contract claim of $8,229.00 (dated January 5, 2024); and (5) denying Plaintiff's Motion for Reconsideration and decision clarifying prior order concerning parking fees (dated February 2, 2024).

Respectfully submitted,

FOX ROTHSCHILD LLP

By: */s/ Jacob S. Perskie*
Jacob S. Perskie, Esq.
Amanda Moscillo, Esq.
Michael W. Sabo, Esq.

[31] The trial court rejected Plaintiff's "anticipatory breach" or "anticipatory repudiation" claim because Judge Porto held that Plaintiff was entitled to a "yearly payment, not quarterly payments." Pa20.

POLO NORTH COUNTRY CLUB, INC., Plaintiff-Appellant, v. ACOWRE, LLC AND TEN RE ACNJ, LLC, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001921-23 Civil Action ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION ATLANTIC COUNTY DKT. ATL-L-4255-20 SAT BELOW: HON. DANIELLE J. WALCOFF, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT POLO NORTH COUNTRY CLUB, INC.

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Plaintiff-Appellant
Polo North Country Club, Inc.

Of Counsel and On the Brief
Brian J. Molloy, Esq. (Attorney ID No. 017831978)
(bmolloy@wilentz.com)

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I. PRELIMINARY STATEMENT

Plaintiff-Appellant Polo North Country Club, Inc. ("Polo North") submits this Reply Brief in further support of its appeal from certain Orders: (i) denying discovery to Polo North of the raw data necessary to support or disprove the accuracy of summary spreadsheets submitted by Defendants-Appellees Acowre, LLC and Ten Re ACNJ, LLC (collectively "Acowre"); (ii) granting Summary Judgment to Acowre as to Polo North's claim for an Equitable Accounting; and (iii) from the final judgment entered in favor of Polo North for $8,229.00 in which the trial judge applied a construction of the parties' contract that Polo North submits was contrary to what she held was its unambiguous meaning.

After the submission of Opening Briefs, it is clear that Acowre acknowledges that its damage calculation undercounted the royalty owed to Polo North by not counting every car that entered the Ocean Casino parking garage as required by the parties' contract. Acowre's Brief chrystallizes in three (3) arguments why the judgment in the trial court must be vacated. First, Acowre inconsistently claims that it actually did produce the raw data supporting its parking royalty calculation, but argues that the trial court correctly denied Polo North discovery of the raw data. When the documents referenced in Acowre's Brief are reviewed, it is clear that they are the summaries, not the raw data. As discussed below, it is the universal law developed since the adoption of modern discovery rules that where a party relies on a summary to argue its position as to a fee or payment, its adversary is entitled to the

raw data utilized to create the summary in discovery. This alone requires a remand for discovery and a new trial.

Secondly, Acowre has misconstrued the holding of the key New Jersey Supreme Court case which Polo North argued required Acowre to properly account for the parking royalty, Onderdonk v. Presbyterian Homes of New Jersey, 85 N.J. 171 (1981). In that case, the Supreme Court held that where a party to a contract has a monopoly to the information by which a fee is to be computed, access to the information in the form of periodic accountings is implied in the contract. This is no different from the legion of cases in which a provision is implied to ensure that the parties receive the fruits of the contract to which they bargained. In this case, as further discussed, infra, Acowre's monopolization of the information necessary to compute the parking royalty it owed to Polo North implies a duty to account for those royalties and the dismissal at the summary judgment stage of Polo North's accounting claim, exacerbated by the denial of discovery, was clear legal error.

Finally, Acowre simply is incapable of articulating a coherent argument how the trial court's statement that the parties' contract required it to pay Polo North a royalty for "each time a vehicle entered the garage, regardless of the number of times the car entered and regardless of when the car entered" is consistent with Acowre's practice of paying only one royalty for an entire hotel stay for guests and only one royalty per day for non-guests, no matter how many times the guest or visitor's car

entered the garage. The trial court impermissibly re-wrote the contract in violation of basic tenets of contract construction.

Accordingly, for the reasons discussed in greater detail below and in Polo North's Opening Brief, the judgment must be vacated for discovery and a new trial.

II. THE TRIAL COURT'S DETERMINATION THAT POLO NORTH WAS NOT ENTITLED TO THE RAW DATA UNDERLYING THE SUMMARY SPREADSHEETS PRODUCED BY ACOWRE VIOLATES A FUNDAMENTAL DISCOVERY RULE AND WAS A REVERSIBLE ABUSE OF DISCRETION

Acowre falsely attempts to argue in its brief that it did, in fact, produce to Polo North the raw data supporting the summary spreadsheets which it actually produced and used at trial. Acowre Brief at p. 17. The documents to which it then references as supporting this assertion are the summaries of daily parking records which do not identify the individual cars which entered the Ocean Casino parking garage but merely collects the total numbers of entries at each parking gate as Acowre counted them.[1] As noted in Polo North's opening Brief, Acowre's designee admitted that it counted cars of hotel guests only once per hotel stay and cars of non-guests were

[1] Acowre objects to the background statement of why Polo North did not trust its calculation of the royalty which only increased marginally while the Ocean Casino's revenue increased exponentially. See Acowre's Brief at p. 28 and fn 17. Contrary to Acowre's objection, the public records of casino revenue published by the New Jersey Division of Gaming Enforcement showed an increase from 2020 to 2022 in gaming wins of just under 50%. See Polo North's Opening Brief at p. 8, fn 4 (citation to the publication). Public records may be considered by this Court, although frankly, this is background information and Polo North was entitled to a proper calculation of its royalty even if it had no suspicions of Acowre's lack of good faith.

counted only once per day, while allowing others to pass that were not excluded from the required count under the contract.[2] The raw data which would reflect the entry of every vehicle which entered the garage but was not included in the summaries was never produced, which Acowre implicitly acknowledges by arguing, contrary to its assertion that the raw data was produced, that the trial court did not abuse its discretion when it granted Acowre's Motion for a Protective Order barring Polo North from seeking the raw data. See, Acowre Brief at pp. 30-34 ("The trial court did not permit Plaintiff to obtain Acowre's raw parking data."). Acowre cannot have it both ways—if the court was correct in denying Polo North the raw data, it cannot argue from the other side of its mouth that it was produced—and the fact is that it was not produced.

Remarkably, Acowre does not cite a single case to support its argument that a plaintiff is not entitled to discovery of the raw data that serves as the basis for summaries relied upon by a defendant in a civil case. The reason for that is that over the seventy-five (75) years since the Federal Rules of Civil Procedure were adopted, and the New Jersey Civil Practice Rules were derived therefrom, courts have

[2] See Deposition of Korrin Carrieri at pp. 23.1-25.1 (Pa 0579-581). Also see Polo North's Opening Brief at p. 9 and fn 6 thereto. There is no factual dispute that while the trial court correctly found that the contract required a royalty payment for each car that entered the garage, Acowre unilaterally limited the payments to one royalty per hotel stay for guests and one per day for non-guests—a limitation nowhere to be found in the contract. See Point IV, infra, for a full discussion of this error.

universally required such raw data to be produced when summaries of damages are submitted. Indeed, courts have held that failure to produce such raw data and its subsequent destruction constitutes spoliation. See, e.g., Starr v. Berry, 25 N.J. 573, 588 (1958) ("The report itself was furnished to defendants but plaintiff's would not reveal the underlying data. Such data must be furnished if the parties are to be prepared in advance of trial to meet the other's proof. Our practice embraces the thesis that parties should know their case before they try it….[and] the primary principle [is] that a party is entitled to know everything he needs to meet the adversary's case."). Accord: Lanzo v. Cyprus Amax Minerals Co., 467 N.J. Super 476, 523 (App. Div. 2021), (citing Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473, 1478 (D. Mont. 1995) for the proposition that summary reports are "nearly impossible to verify" without the raw data underlying the reports and that destruction of such data constitutes spoliation); Heinzerling v. Goldfarb, 359 N.J. Super. 1, 10 (Law Div. 2002). (Judge Sabatino in the trial Court allowed under Evid. Rule 1006 a summary because the underlying records were produced to the adverse party.) See also, Anthropologie, Inc. v. Forever 21, Inc., 2009 WL 690239 (at *4) (S.D.N.Y. 2009)[3] ("[t]he proffer of summaries….is not a substitute for production of the raw data on which the summaries are based. Plaintiff is not required to take such

[3] "Since our court rules are based on the Federal Rules of Civil Procedure, it is appropriate to turn to federal case law for guidance." Freeman v. Lincoln Beach Motel, 182 N.J. Super. 483. 485 (Law. Div. 1981); Petition of Hall By and Through Hall, 147 N.J. 379, 385 (1997).

summaries…on faith."). Crown Life Ins. Co. v. Craig, 995 F. 2d 1376, 1382-83 (7th Cir. 1993) (respondent's failure to produce computer database containing raw data from which year-end renewal commissions were prepared warranted sanctions disallowing respondent from relying on its own calculations at time of trial).

It was error for the trial Court to accept the argument that Judge Porto's Order of January 22, 2022 denying Acowre's Motion for Summary Judgment and permitting discovery as to Acowre's "manner of counting cars" somehow excludes the duty of Acowre to produce the raw data underlying the summaries they relied upon at trial. Indeed, Acowre's restrictive reading of the Order is contradicted by Judge Porto's Opinion (Pa 0221) stating that discovery was necessary, "[A]s to how the Defendants calculated the amounts due or how the Plaintiff may verify the annual amount due."

Our courts have echoed the United States Supreme Court's seminal holding in Hickman v. Taylor, 329 U.S. 495, 389 (1947) that the discovery rules require that "the full unprivileged relevant facts, not some of the facts, shall be made available to all parties, not simply at the trial, but before the trial." Accord, Lang v. Morgan Hone Equip. Corp., 6 N.J. 333, 338 (1951) ("The way is now clear, consistent with reorganized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial,") citing, Hickman, supra. Hiding the data which would allow Polo North to determine how many vehicle entries were not counted by Acowre clearly violates these principles.

An abuse of discretion "arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex City Prosecutor, 171 N.J. 561, 571 (2002). As discussed above and in Polo North's Opening Brief, there is no question that (1) Polo North was absolutely entitled to obtain the raw data by which Acowre's summary reports were based and (2) Judge Porto's January, 2022 Opinion and Order required Acowre to produce all information relevant to the determination of Polo North's parking royalty in order for Polo North to verify Acowre's calculations. The trial court's entry of a Protective Order forced Polo North to simply accept the summary reports of Acowre on faith even though Acowre's own designee admitted that they were calculated in a manner inconsistent with what the trial court held was the plain language of the contract (each car entering the garage must be counted no matter how many times or when it entered). There can be no clearer example of an abuse of discretion when it comes to a discovery issue. The entry of the Protective Order barring Polo North from obtaining the raw data of the number of cars entering the garage was reversible error requiring remand for discovery and a new trial.

III. ACOWRE FAILS TO UNDERSTAND OR DISTINGUISH ONDERDONK AND THE DISMISSAL OF THE EQUITABLE ACCOUNTING CLAIM WAS LEGAL ERROR

When Acowre's argument concerning Polo North's claim for an accounting is boiled down to its basic elements, it is that (1) the parties' contract did not specifically require periodic accountings and (2) Polo North had an adequate remedy

at law through the discovery process. In the same breath, Acowre argued that Judge Porto's "limited Order" did not allow Polo North to obtain the discovery necessary to verify Acowre's calculations and that Polo North should be required to simply accept Acowre's calculations because this case involves the "heavily regulated casino industry" with a "system set up that is subject to audit and review." Acowre Brief at p. 40. There is no merit whatsoever to these arguments.

First of all, as discussed above, the right of a party to obtain raw data used by its adversary to compile summaries is universally recognized – a point Acowre makes no attempt to refute. Secondly, as Polo North discussed in its Opening Brief, Acowre's parking records were never audited by the state of New Jersey and the state parking tax is computed differently from Polo North's royalty payment.[4] See, Opening Brief at p. 17 (parking data had not been audited since 2018—prior to the contract between Polo North and Acowre). Given that Polo North was denied the ability to verify Acowre's spreadsheet summaries and calculate the proper royalty for itself, it did not have an adequate remedy at law.

Acowre then completely misses the point made in the Onderdonk case with regard to the absence of a specific clause authorizing periodic accountings where a party is in complete control of the date necessary for a fee or charge to be calculated. A duty to provide an accounting in this case flows not from a fiduciary duty, or

[4] The state charges a fee per car per day. Polo North was entitled to a royalty per vehicle entry.

whether the parties are sophisticated, but rather, it flows out of basic contract law because Polo North's right to a stated royalty only has meaning if the royalty is calculated in good faith and with transparency.

Contrary to Acowre's extremely superficial analysis of Onderdonk v. Presbyterian Homes of New Jersey, 85 N.J. 171 (1981), that case is precisely on point and mandates reversal of the dismissal of the equitable accounting claim.[5] As stated by the Supreme Court in Onderdonk:

> When under these circumstances one party to a contract possesses a monopoly on the information necessary for the monitoring of the agreement, it follows, as a matter of logic drawn from the subject matter of the contract itself and sound public policy, that access to that information in a reasonable form must be imputed into the contract by a court to ensure the performance of the parties critical understandings. This is especially true here where the party is without access to the information has justifiably, and by invitation, reposed its trust in the other party and is dependent upon the good faith of that party.

Id. at 187.

[5] Acowre spends most of its argument on this issue reciting elements of this claim which are not contested. The sole question is whether Acowre owed Polo North a duty to account because it had unique control over the records and Polo North needed to conduct comprehensive discovery to compute what Acowre already had the mechanisms to compute. The irony of Acowre's position is that it claims both the right to withhold the records from Polo North so that it cannot verify Acowre's spreadsheets while simultaneously arguing that Polo North has an adequate remedy at law. What everyone knows at this point, however, is that Acowre undercounted all of its hotel visitors by only counting one car visit per hotel stay while the contract required that every car entry must be counted and undercounted others by paying one royalty per day. Acowre easily could compute the proper royalty but simply refuses to do so.

Contrary to Acowre's purported "distinctions" in the situation in Onderdonk and in this case, there is no meaningful difference. In both cases, the defendant had an obligation to compute a fee in good faith and only provided a statement summarizing the fees due under a contract under circumstances in which all of the information was in the hands of the defendant.[6] The Supreme Court held that in those circumstances, the law will imply a duty for the defendant to provide periodic accountings as an essential term of the contract.[7] Thus, Acowre's argument that this contract did not contain an express term requiring an accounting fails to carry any weight. Such a term is implied as an essential term necessary to give business efficacy to a promise in a contract. It is no different from the universal body of case law which supplies a term calling for best efforts under an exclusive agency agreement although the contract itself contains no requirement for the agent to do anything to market the goods or services of the principal such as in Judge Cardozo's seminal opinion in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917). ("A promise may be lacking, and yet the whole writing maybe 'instinct with an obligation,' imperfectly expressed.'") Also see, E. Farnsworth, Contracts §

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[6] The sole difference is that in Onderdonk, the summary was of charges to be paid by the plaintiffs, while in this case the summary was of charges to be paid by the defendant. That is a distinction without a difference.

[7] The Supreme Court analogized this duty to a "breakdown of expenses and disbursements . . . in the same manner that such disclosure is routinely provided by parties to other commercial relationships where disclosure is a prerequisite to evaluating the fairness of an expenditure or a charge." Id. at 181 fn 4. That precisely describes Acowre's duty in this case.

7.17 at pp. 530-31 (1982). ("[c]ourts also supply terms requiring best efforts under percentage leases if a lease is silent on the matter, the court will supply a term requiring the lessee to use best efforts…"). Here, as in Onderdonk, absent an obligation to account for the royalty, the contract as written is unenforceable.

Accordingly, the fact that the parties may have been sophisticated commercial parties and are not in a formal fiduciary relationship is not determinative of Polo North's right to obtain periodic accountings to substantiate Acowre's calculation of the parking royalty. All of the information relevant to the calculation was solely in the hands of Acowre and absent an accounting of the summaries provided by Acowre showing how many cars entered the garage on each day, how many entries were charged and how many entries were not charged, and why, Polo North is at the mercy of Acowre for the entirety of the 99 yearly royalty payments to do exactly what Acowre did in this case, i.e., unilaterally apply exceptions to its payment duties under the contract. Onderdonk clearly requires Acowre to provide periodic accountings to permit Polo North to verify its summary calculations. The court's dismissal of the accounting claim, especially in light of its denial of Polo North's right to take discovery of the records underlying Acowre's calculation, was legal error.

IV. THE COURT'S DETERMINATION THAT ACOWRE'S PAYMENTS OF ONE ROYALTY FEE PER HOTEL STAY FOR GUESTS OR PER DAY FOR NON-GUESTS VIOLATED THE TERMS OF THE CONTRACT AND WAS CLEAR LEGAL ERROR

Acowre does everything within its power to shift this court's attention from the obvious error made by the trial court after that court expressed that the unambiguous terms of the contract required a royalty payment for each time a vehicle enters the parking garage, regardless of the number of times the car entered and regardless of when the car entered,"[8] yet then allowed a judgment to stand which indisputably violated that "unambiguous" interpretation of the contract. Acowre argues that because prior counsel for Polo North moved to alter or amend the judgment rather than for a new trial, a deferential standard of review applies which allows the palpably incorrect application of the trial court's interpretation of the contract to stand. Acowre's Brief at pp. 44-47. Simply stated, this is a frivolous position.

The trial court made a legal finding that the contract, under its plain language, required a royalty payment every time a vehicle entered the parking garage regardless of the number of times it entered. Acowre has not filed a cross-appeal from that determination. It is not a "factual finding," as incredulously argued by Acowre, for the court to allow Acowre to pay a royalty only once per hotel guest stay regardless of the number of times a vehicle of such a guest entered the garage

[8] See Judge Walcoff's February 2, 2204 Order at p. 9 (Pa.0111).

during his or her stay or regardless of the number of times a non-guest entered per day. It is a legal finding entitled to de novo review.

But frankly, it does not matter—it is manifestly incorrect. Acowre's argument that language requiring it to pay per car "per entrance" was not in the contract and thus justified its unilateral limitation to one royalty per hotel stay or per day would require an interpretation limiting the royalty to one payment per car in perpetuity. If the term "per car" is defined without any limitation to time as Acowre suggests, the only other conceivable meaning is one payment per car for all times, an interpretation which fundamentally is absurd. Once a car enters it never can again be charged. Acowre's interpretation would not be feasible under that interpretation either. But that is an absurd result, which contract law does not allow. Hartmann v. Arthur J. Gallagher & Co., 2024 WL 4263202 (at *9) (D.N.J. 2024) (an interpretation is unreasonable "if it produces an absurd result or result that no reasonable person would have accepted when entering the contract."). To allow Acowre to unilaterally limit royalties to one payment per hotel stay for guests and one per day for non-guests is to re-write the contract in favor of Acowre, this violates fundamental rules of contract construction. Where a contract's terms are clear and unambiguous, as the trial court found here, there is no room for interpretation and the contract will be enforced as written. See Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); Shor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). The court has no right "to rewrite the contract merely because one might

conclude that it might well have been functionally desirable to draft it differently." *Id*. Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other. Id., citing James v. Federal Ins. Co., 5 N.J. 21, 24 (1950). In short, the court cannot supply terms that have not been agreed upon in the guise of interpretation. Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). Unlike the implication that Acowre must provide periodic accountings to ensure good faith performance of the contract as written, any limitation of its duty to pay for "each time a vehicle enters the parking lot" as found by the trial court to once per hotel stay or per day fundamentally alters the contract in favor of Acowre.

As Acowre repeatedly argues, the parties were sophisticated commercial parties. It would have been well within Acowre's capacity to insist on a limitation of royalties to once per hotel guest stay, but no such clause was added. Thus, the inclusion of such a clause by implication is a fundamental legal error by the trial court which requires reversal and a new trial.[9]

[9] Acowre appears to argue that a new trial must be sought as a remedy in the trial court. Rule 4:49-1 contains no such limitation. Only in jury trial is the right to a new trial limited if not sought prior to appeal. R.2:10-1.

V. CONCLUSION

For all the reasons set forth herein and in Polo North's Opening Brief, the judgment below should be vacated and the case remanded for discovery and a new trial.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER

BY: _____
BRIAN J. MOLLOY

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Attorneys for Plaintiff-Appellant, Polo North Country Club, Inc.

90 Woodbridge Center Drive
Suite 900 – Box 10
Woodbridge, NJ 07095
732-636-8000
bmolloy@wilentz.com