SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET # A-001930-23-2T

ERIC WEISS,
Plaintiff

v

INVESTORS BANK, ABBIE ROSE REALTY LLC, PNC BANK, STEVE MARDER, INKWELL USA, INKWELL GLOBAL MARKETING
Defendant

On Appeal from:
Superior Court of NJ,
Essex County Civil Division
DK# ESX L-006431-18

Sat Below:
The Honorable
Judge Russell Passamano

PLAINTIFF'S BRIEF AND APPENDIX

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Feb 25, 2025

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APPENDIX

I. PRELIMINARY STATEMENT

It is beyond peradventure that the interest of justice requires the granting of this appeal and that out of an abundance of caution a new judge should be assigned the case. With all due respect, you must find the trial Court rulings made without a plenary hearing were erroneous, arbitrary and capricious, are not supported by the law and ignored PLT's constitutional rights. Also, the ample, undeniable contrary evidence does not support the findings and decisions made to the point that would give a reasonable person the belief the appearance of bias exists.

One example, it was without dispute that DEF never believed that the parties ever had an enforceable agreement or that a "meeting of minds" on all material terms existed. DEF's March 16, 2023 email states such.

> "I attach here **a proposed settlement agreement** with exhibits (attached)... Please note these attachments **have not yet been reviewed or approved by the client** and therefore they are subject to change. Pa120 (emphasis added)
>
> "**No agreement shall be deemed valid and enforceable unless and until it is reduced to writing, signed by all parties and a fully executed copy delivered to all parties.**"Pa120 (emphasis added)

DEF's March 17, 2023, email further confirmed no agreement existed:

> "**I sent you the original proposed settlement agreement** in.." (Pa121)

Also, Sec 14 of DEF's March 16 proposed settlement agreement confirmed that there was never any enforceable settlement agreement.Pa128

> **"This Agreement shall have no legal effect whatsoever and shall not bind any Party to this Agreement until such time as a fully executed copy of the Agreement (including fully executed copies of all exhibits hereto) is delivered by Weiss to the Abbie Rose Defendants."**

The ruling defies logic, ignored evidence and the law. The Court found that on March 8 2023 PLT accepted ALL the terms and definitions of DEF's March 16 2023 "proposed settlement" agreement, because they are the ones that were conveyed to the Court on March 15 2023.Pa21 It's axiomatic if DEF believed they had a "meeting of minds" and enforceable agreement

before March 15th they would not have stated on March 16th it is a "proposed settlement" agreement and "subject to change." Moreover, if DEF thought the material terms were the same, DEF would not have said the "proposed agreement" had "no legal" effect and was "nonbinding." Lastly, a quick review of the March 16th terms shows the 13 pages are not DEF "fleshing out" terms of March 8th but DEF's desire to have an agreement enforced that included terms that PLT would never and did refused to agree to.

A second example of an egregious ruling, despite the overwhelming evidence confirming that the parties on March 8th 2023 agreed that a proposed settlement agreement would include an "NDA with liquidating damages," a "standard" in DEF's agreements the Court without explanation ruled that the parties never agreed to "liquidating damages."Pa17

The Court ignored all of the following indisputable evidence accepting Mr. Blaha's "bare statement" that DEF's never agree to "liquidating damages" over: 1) A recording of the March 8th telephone call confirming the parties agreed that a settlement agreement would contain DEF's NDA with liquidating damages.(Ex Pa Rec1) The files metadata confirmed they was never edited and done at the time of the call. 2) The Court ordered, certified transcript from the Union County transcriber for appeals confirmed the March 8th call DEF's attorney saying "yes" to prepare their standard "boilerplate" NDA with liquidating damages".Pa93

MR. WEISS: Yeah. And I know for -- I -- I'm sure you will hand over a standard release that you already have. (Indiscernible).
MR. HORNICK: I mean, Blaha's going to prepare it. I'm not preparing it. But he'll be -- whatever, yes he'll (indiscernible).
MR. WEISS: I -- I'm sure he had to have some kind of boilerplate, you know.
MR. HORNICK: Yes.
MR. WEISS: You know, you'll prepare an NDA --
MR. HORNICK: Yes. Yes.
MR. WEISS: -- with the liquidating damages.
MR. HORNICK: Yes.

Pa93

and 3) DEF's reply cert wherein **DEF's admit the recording confirmed they were to prepare an NDA with "liquidating damages".**(Pa111)

To sum up, the Court without having a plenary hearing, as required to resolve disputed facts, ruled for DEF finding an enforceable agreement existed despite DEF's lawyer repeatedly stating that no such one ever existed. Without any analysis whatsoever or even stating there was a "meeting of minds" as required to have an enforceable agreement, the Court found such occurred despite the client and PLT never seeing the terms. The Court also ignored the fact PLT rejected and never accepted any of DEF's proposed changes after the March 8th call. Also, you could only conclude the Court intentionally ignored evidence to erroneous find "liquidating damages" were not agreed to. PLT repeatedly warned Mr. Blaha the March 8th call was recorded. When caught committing perjury he frivolously argued in a "one party consent state" that they should not be held accountable for lying because they did not know the call was recorded.(Pa111) Without explanation the Court ignored Mr. Blaha's perjury and instead rewarded his repugnant and illegal conduct.

As such, a reasonable person would conclude the Court ignored its obligations of impartiality, applying the law, ignored R.1:18 and intentionally made erroneous findings. The facts undeniably established 1) There was never a meeting of the minds to support a finding of an enforceable agreement. 2) The March 8th call included agreeing to a "NDA with liquidating damages." 3) The Oct 17 order did not "flesh out" terms of the March 8th proposed settlement agreement but was a "Better agreement" that added material terms and parties that PLT specifically never agreed to. PLT also showed ½ dozen more examples including testimony (the Court refused to hear) of "Investors" lawyer confirming DEF motion was a Fraud on the Court, included knowingly false testimony, thus frivolous.pA57,58 Therefore, for the above and below reasons, this appeal must be granted.

II. RELEVANT FACTS

A. PROCEDUAL CASE BACKGOUND

1) PLT was suing DEF(s) for failure to pay real estate commissions.Pa176
2) The March 2006 was a standard commercial real estate commission agreement. It contained inchoate rights that PLT is entitled to be paid a commission by the property owner, the owner of the lease, and a "mortgagee in possession" of the property if the tenant(s) that PLT procured leased, renewed their lease, entered into a new lease agreement, expanded their space or obtained any "interest" in the property. PLT was entitled to a commission on all future interest his tenants (and any related entities) obtained at the property even if the terms of the new agreements were not outlined in the initial leasing agreements or of PLT was not assisting. PLT's Commission agreement was incorporated into the March 2008 leasing contract.Pa177
3) Both the 2006 Commission and Lease agreements required future property leasehold owners, and "mortgagee in possession" of the property be bound by and to accept the terms of PLT's commission agreement.Pa184
4) Oct 2006 DEF Abbie Rose, after review and negotiations with his lawyer signed the lease agreement. Pa177
5) Unbeknown to PLT, in Jan 2007, DEF Investors Savings purchased the leasehold interest and became the landlord to Abbie Rose. As per the 2006 lease contract, they became obligated to pay PLT commission for the Oct 2006 Abbie Rose lease. Investors hired the seller of the leasehold interest to act as their agent who collected Abbie Rose's rent and managed the property on their behalf.Pa184
6) Unbeknown to PLT, in Feb 2008 DEF and Sub-landlord Abbie Rose subleased the space to a related entity of Abbie Rose Inkwell. Pursuant to the 2006 lease agreement and commission agreement PLT was entitled to be paid a commission.Pa176

7) Unbeknown to PLT, in 2011 the property owner defaulted on Investors construction loan, Investors started foreclosure proceedings and fired them as their agent. They became a "mortgagee in possession" in addition to still owning the leasehold interest at the property and directed Abbie Rose and Inkwell to make future rental payments directly to them.
8) Unbeknown to PLT, in March 2012 DEF Abbie Rose (as buyer) and Investors (as seller) entered into a "fee simple" purchase agreement. Pursuant to the 2006 lease, 2006 commission agreement, the 2007 purchase of the leasehold agreement by DEF, and the Jan 2011 Court order PLT obtained, PLT was entitled to be paid a commission.Pa179
9) June 2012, PLT files an OTSC to stop the foreclosure sale to enforce his Jan 2011 judgment from failure to pay his leasing commission and to enforce the judgment that stated that PLT 2006 commission agreement was enforceable and in the event any of the tenant(s) purchases the property, that he was to be paid a sales commission of $125,000.Pa177
10) Unbeknown to PLT, in a clandestine operation, around July 2012 DEF's in connection and at the direction of their lawyers canceled the May 2012 fee simple purchase to deny paying PLT (also a judgment creditor) commissions that he earned and the Court directed them to pay.Pa179
11) Unbeknown to PLT, in or around July 2012 DEFs Inkwell and Investors entered into a "bid purchase agreement" that would transfer Investors interest in the property to Inkwell. Pursuant to the lease and commission agreement, as well as the 2011 Court order and Judgment PLT was entitled to be paid a $125,000 commission.Pa180
12) Unbeknown to PLT, in or around Sep 7, 2012 Investors was the winning bidder at the foreclosure sale. On Sep 17, 2012 by operation of law they became the fee simple owner of the property. Pa180
13) Unbeknown to PLT In Sep 2012, Inkwell and Investors cancelled their bid purchase agreement. Investors then entered an agreement with Abbie

Rose to sell them the "winning bid." Then Abbie Rose transferred the fee simple ownership to themselves. Pursuant to the lease and commission agreement, as well as the 2011 Court order and Judgment PLT was entitled to be paid a $125,000 commission.Pa181

14) Unbeknown to PLT in Sep 2012, Abbie Rose, as property owner and landlord signed a 20 year lease contract with Inkwell (a related entity) Pursuant to the lease and commission agreement, as well as the 2011 Court order and Judgment PLT was entitled to be paid a commission.

15) May 2015, DEF's law firm, (the lawyers at Larooca Hornick who also represents PLT's former wife and children (a clear conflict of interest) in their matrimonial dispute) intentionally and willfully violated FOUR non-contact, non-disclosure and non-disseminate of information orders that PLT obtained to stop them and his former wife from having any contact with "Richter" a former partner that PLT was suing. PLT's former wife and lawyers illegally broke into PLT computers and stole information including what was protected by attorney client privilege. They wanted to give it to "Richter" to harm him economically.

The lawyers made contact and sent to "Richter's lawyers" unredacted documents with confidential information they were specifically ordered not to give them to show that there was an order at the end of the documents that forbade them from sending that confidential information to them and that they were not to have any contact with them.Pa134-138

Similar to the instant matter, the trial Court ignored the printed evidence of Larocca's letter sending the information to them and Larocca's admission that they had in fact made contact and sent them the information and found that PLT's proof's were woefully insufficient to find they violated any of the FOUR Court orders and sanctioned PLT $6,000 for filing such a motion.Pa134-138

16) June 2017, the appellate Court ruling started with that the trial Court sanctioned DEF (PLT in the instant matter) for the law firms "bad acts" and thus must vacate the trial Courts findings and rulings.Pa134 That it was obvious that Larocca twice violated the Courts orders and the Judge finding otherwise was clearly "erroneous." Pa137

B. STATEMENT OF FACTS RELEVANT TO THE APPEAL

17) March 2023, PLT entered into a proposed settlement agreement with DEF Investors Savings. The parties required 30 days to work out the actual terms and conditions and to execute an enforceable agreement.

18) March 8th 2023, during a phone call that was recorded, PLT entered into a proposed settlement agreement that: Pa139, Pa93-95, (Pa Rec1)

a. Had the amount PLT was to be paid; (redacted for confidentiality)
b. DEF was to pay PLT within one week;
c. The agreement was limited to Abbie Rose, Inkwell and non-party Steve Marder who is the owner of both Abbie Rose and Inkwell.
d. That "Blaha" was to draft the enforceable agreement using their standard settlement "boilerplate" agreements that Hornik confirmed it would include a "NDA with liquidating damages."[1]
e. That a writing and confirmation in writing was required to confirm what the parties were proposing to agree to.

19) On March 8, 2023 4:42 PM in accordance with the terms agreed to, PLT sent DEF the email confirming the proposed terms: Pa139

1) Amount XXXXXXXXX(redacted for confidentiality)
2) Payment By certified check (I assume such)
3) Timing Funds to be received in 7 days
4) Agreement to be prepared by Blaha
Resolved against Steve Marder, Inkwell and Abbie Rose Realty
NDA to be included

20) On March 8, 2023 4:53 PM DEF lawyer replied with modifications to the above proposed settlement agreement. Pa139

> A few clarifications, payment made after agreement and all documents fully signed by all parties. You will need to release all claims against Steve, his affiliated entities, family members and professionals as well (standard language). Steve may want to wire.

[1]PLT knew a NDA with liquidating damages was necessary from his experience with DEF's law firm who intentionally violated PLT's 4 No contact, no dissemination orders as they represent PLT's former wife (and his children) in their matrimonial action.Pa134

Subject to your agreement to the foregoing the adjournment is granted. Thank you.

21) The March 8th call required confirmation in writing to proposed terms. As such, PLT never replied to the email or confirmed in anyway the new proposed terms were accepted to them. Pa139

22) On March 13, 2023, the lawyer for Investors sent PLT and DEF a proposed letter to the Court asking for an adjournment.Pa140

23) On March 14, Mr Blaha waived Hornik's March 8th proposed changes by ignoring PLT never agreeing to them in writing as required. Also, by never reaching out to PLT to confirm if they were acceptable before Mr. Blaha agreed to the adjournment despite Hornik changing the "adjournment" to be conditioned upon the changes.Pa140-141

24) March 15, 2023, Investors attorney sent letter to the Court.Pa174

25) On March 16, 2023, one day after the parties proposed and agreed that PLT would be paid, DEF's lawyer finally sent the proposed settlement agreement and what they called an "individual general release." Pa120 DEF's email told PLT that:

> "I attach here **a proposed settlement agreement** with exhibits (attached)... Please note these attachments **have not yet been reviewed or approved by the client** and therefore they are subject to change. Pa120 (emphasis added)
>
> "**No agreement shall be deemed valid and enforceable unless and until it is reduced to writing,** signed by all parties and a fully executed copy delivered to all parties."Pa120 (emphasis added)

26) Also, Sec 14 of DEF's March 16 proposed settlement agreement confirmed that there was never any enforceable settlement agreement.Pa128

> "This Agreement shall have **no legal effect whatsoever and shall not bind any Party** to this Agreement until such time as a fully executed copy of the Agreement (including fully executed copies of all exhibits hereto) is delivered by Weiss to the Abbie Rose Defendants."

27) DEF's March 16 proposed settlement agreement added, changed and removed material terms that were agreed to on the March 8th call. (Pa122-33) DEF expanded and added material terms way beyond as to what was even discussed or proposed on the March 8th call. For Example,

a. Quick payment was a material term and inducement for PLT to agree to settle as PLT intended use the money to buy a real estate project.

i. On the call, DEF's originally promised and agreed it would be done in a week.R1, Pa94
ii. DEF's then proposed changing this material term to payment being made to the vague time of 7 days after all the agreements were executed. Pa139 (PLT never agreed to this proposed changed.)
iii. DEF's, took 8 days to provide PLT with their "standard" agreement, changed the time of the payment to the vague 20 days after all agreements were executed.Pa124 (Over a month later)[2]

b. Despite agreeing that their standard NDA that they would produce includes liquidating damages,(Pa95) DEF's March 16 proposed settlement agreement removed this agreed to material term.

c. Despite agreeing the settlement was only limited to Abbie Rose, Inkwell and Steve Marder, DEF's proposed agreement expanded it to anything, everything and everyone currently and in the future associated with the DEF "since the beginning of time" which included claims that are not part of this litigation.Pa121-130

d. Despite it never being discussed or agreed to, DEF now wanted PLT to include Representations and Warranties.Pa126

e. Despite never being discussed DEF demanded an unlimited indemnification that required PLT to pay any of their costs and expenses for any claims made from any broker that the DEF's might have done

[2]Despite DEF previously agreed that payment was to be made within 7 days, DEF never tried to pay PLT or to put payment in an escrow account waiting execution of the agreements like any other person who thought they had an enforceable agreement would.

business with since the "begging of time" and liability was not limited to the claims that are the subject of the current litigation. Pa125 f. They did not use a "general release" for a lawsuit as agreed to on the March 8 phone call. Instead, DEF used a general release for "title insurance" that they also modified and greatly expanded the terms.Pa125

28) March 17, 2023, DEF's email further confirmed no agreement existed: "**I sent you the original proposed settlement agreement** in.." (Pa121)

DEF'S MARCH 16 PROPOSED SETTLEMENT AGREEMENT REQUIRED PLT TO WAIVE VALUABLE RIGHTS TO OTHER CAUSES OF ACTIONS AGAINST OTHER PARTIES THAT WERE NEVER DISCUSSED OR AGREED TO BY PLT.

29) For example, Blaha now demanded PLT waive his right to sue his firm. DEF inserted in the general release that PLT had to give "A full release including any and all claims and not limited to the claims in this action for PLT and his children for Mr. Blaha, his law firm, their lawyers and any lawyers that had done business with any of the DEF from the begging of time to the date of execution.Pa129

30) On March 16th PLT tried to act in "good faith" and acted within the spirit of the March 8th phone call, made his counter proposal to DEF. Most importantly, he added back in the liquidating damages and gave an amount. PLT also removed the expansion of the agreement to include everyone and anyone DEF had done business with. PLT also removed the unlimited indemnification they sought from third parties suing DEF.Pa26-30

31) On March 21, 2023 12:51 PM PLT informed DEF that they were in breach of the material term of the proposed agreement of March 8th that payment would be made to PLT within 7 days. As DEF could not restore the material term of "Time," if they wanted to still settle the amount increases by $1,500 per day. Pa131

32) On March 21 2023 2:38 DEF's responded with their changes. Most notably, they never objected to PLT's $1,500 a day increase in amount. However, despite PLT still agreeing to give all the DEF a complete and total release from claims PLT might have as previously agreed to, DEF still demanded that it be expanded to "anyone & everyone" that DEF's did business with - but specifically demanded that PLT and his children give Mr. Blaha, his law firm and all its lawyers to be released from any and all claims and it not be limited to the current action.Pa132

33) DEF's also still demanded PLT give an unlimited release from actions that companies and individuals that PLT does not control.Pa126

34) DEFs also refused to the agreement including liquidating damages that was initially agreed upon. They did not object to the amount, just that under no circumstances that they would be included.pa123-130

35) At the end of March 2023, DEF's and Mr. Blaha intentionally and repeatedly breached the material term of confidentiality of the agreement that DEF agreed to include in the "proposed settlement agreement" that was reached. Without PLT's consent, they discussed the settlement agreement and the proposed settlement agreement with the lawyer from Citizens Bank.(Citizen's bought Investors Bank)Pa100

36) March 2023, with no enforceable deal in place, PLT files a motion for summary judgment.

37) On April 12, 2023, DEFs and Mr. Blaha again intentionally and willfully breached the material term of confidentiality of the proposed agreement that DEF had agreed to include.Pa100

38) On April 12, 2023 DEF files the OTSC to enforce the settlement agreement and for the Court to not hear PLT's motion until the his OTSC was heard. PLT demanded DEF remove the confidential information and he refused. PLT warned DEF the March 8th call was recorded and they agreed to "NDA with liquidating damages." Pa56

39) Mr. Blaha, his firm, their lawyers and their clients clearly have a habit of not following contracts and honoring confidentiality clauses and orders.Pa134-138 Just like they did with Richter, in violation of the proposed settlement agreement DEF's entered the proposed settlement agreement in the "public domain" when they did not file their OTSC "under seal." This breach of confidentiality continues, as they still have not removed their filing from the public record despite PLT's repeated demand such be removed. Pa100

40) On April 23, 2023, DEF and Mr. Blaha again ignored PLT demands and breached the material term of confidentiality by again placing the proposed agreements in the "public domain." This breach of confidentiality continues, as they still have not removed their filing from the public record despite PLT demand such be removed. The confidentiality of the agreement existing as well as it terms were material and cannot be restored.Pa101

III. THE LAW

A. THERE WAS NEVER A MEETING OF THE MINDS ON THE MATERIAL TERMS. PA48,49 PA109)

"There must be a meeting of the minds for an agreement to exist before enforcement is considered.'" Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. at 319. "A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). "Ambiguous terms are generally construed against the drafter of the contract."Pacifico v. Pacifico, 190 N.J. 258, 267-68 (2007)

Also, in instances where there are "credibility [issues] and diverse contentions, a plenary hearing is required." Dunne v. Dunne, 209 N.J. Super. 559, 571 (App. Div. 1986); see also Tancredi v. Tancredi, 101 N.J.

Super. 259, 262 (App. Div. 1968)(holding that oral testimony should be taken when there are factual and credibility issues before the Court)

Lastly, "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal,178 N.J. 169, 177, 836 A. 2d 794 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co.,27 N.J. 144, 153, 141 A. 2d 782 (1958)).

B. DEF'S REPEATED STATEMENTS THE PARTIES ONLY HAD A PROPOSED SETTLEMENT AGREEMENT AND THAT NO ENFORCEABLE AGREEMENT EVER EXISTED PRECLUDED THE COURT FROM FINDING OTHERWISE IN DEF'S FAVOR. (PA46-PA47)

The Court acted arbitrary and capriciously ignoring the facts and the law ruling DEF's March 16 "proposed settlement agreement" that DEF said was "unenforceable" that added, removed and expanded the material terms of the March 8th proposed settlement to basically cover "anyone" who has ever been associated with DEF for whatever they might have done.

It's axiomatic that PLT could not "agree to" or a "meeting of minds" occurring on March 8th for the terms 1st conveyed to him in an agreement he didn't receive until March 16th. Lastly, as a matter of law the material terms are different and the Court's ruling DEF was "fleshing" out the March 8th ambiguous and vague terms was arbitrary and capricious.

Given the facts and the law it is without dispute that both PLT and DEF knew there was never a *"meeting of minds" that could be considered to be an enforceable agreement.* Most notably, both parties never intended any agreement to be binding until it was reduced in writing and executed.Pa120,128 Hornik immediately proposing changes on material issues after the phone call again shows DEF did not want to be bound until the agreement was in writing and executed.Pa139. *DEF also repeatedly said in both email and the agreement itself that there is no binding agreement until fully executed.*Pa120,128 Moreover, obviously PLT would never suggest DEF draft the proposed settlement agreement if PLT believed it would be binding and DEF would not have sought

PLT changes if DEF felt they had a binding agreement. Lastly, again, PLT could not agree to binding terms that were never presented or agreed to.

Moreover, DEF repeatedly stated that the parties only had "proposed settlement agreements" and that there could never be an enforceable agreement until a writing existed that all parties executed.[3]Pa120,121,128 Furthermore, DEF's admission that his client did not read the "proposed settlement agreement" and that it was "subject to further changes" is further proof that DEF knew they never had an enforceable agreement. The law does not allow a Court to rule beyond a reasonable doubt (or even by a "preponderance") DEF's "new found" legal position only made after PLT would not agree to terms in his proposed agreement and PLT filing a MSJ.

In addition, if a Settlement is Unclear, then it must be ambiguous. If Ambiguous it, must be Vacated. A contract is ambiguous if its terms are "susceptible to at least two reasonable alternative interpretations." When a contract is ambiguous in a material respect, the parties must be given the opportunity to illuminate the contract's meaning through the submission of extrinsic evidence. A court may "consider all of the relevant evidence that will assist in determining the intent and meaning of the contract" in attempting to resolve ambiguities in the document.

Thus, as a matter of law, the Court acted arbitrary and capricious. It had to accept DEF's clear statements there was never any enforceable agreement, the March 8th terms were to vague and ambiguous to enforce. Also, the Court had to find that DEF's March 16th "proposed settlement" was materially different than either of the ones proposed on March 8th.

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[3]On March 28, 2023, in a published decision, Gold Tree Spa, Inc. v. PD NAIL, 291 A. 3d 1185 the Appellate Court expanded the NJ Supreme Court's seminal decision in Willingboro Mall, Ltd. v. 240/242 Franklin Ave. LLC. The court concluded, "when a settlement is reached but not reduced to a signed written agreement, the agreement is not enforceable."

That DEF and PLT never believed they had a "meeting of minds" on all material items and never intended to be bound and have an enforceable agreement until reduced in writing and executed. That PLT never agreed to any of DEF's proposed changes or waived any rights on March 8th as PLT did not know what rights DEF expected him to waive until March 16th.

It is impossible for a "meeting of minds" and an enforceable contract to exist when DEF did not ever see or agreed to the terms. Thus, the Court was required to dismiss DEF's motion outright. However, if the Court did not want to dismiss the motion outright, a plenary hearing was required to resolve the facts and dispute. Therefore, the Court must vacate the order because a meeting of the minds never occurred, the March 16th proposed terms are materially different and the parties never intended to be bound before both parties executed an agreement in writing.

C. DEF CONSTANTLY ADDING, PROPOSING AND "DEFINING" MATERIAL TERMS PROVES THAT THE MARCH 8TH PROPOSED AGREEMENTS WERE NEVER MEANT TO BE BINDING UNTIL REDUCED TO WRTING AND EXECUTED BY BOTH PARTIES, THEY WERE TOO VAGUE AND AMBIGUOUS TO BE ENFORCEABLE AND THAT NO "MEETING OF MINDS COULD EXIST TO HAVE AN ENFORCEABLE AGREEMENT. (PA49)

The fact that DEF from the very start wanted to include, expand, and remove material terms and add parties after the March 8th call proves three things. 1) DEF knew a "meeting of minds" could not have occurred as the terms were too vague, unclear, ambiguous and unenforceable as honest, different interpretations could be made. 2) That not all material terms was agreed to have an enforceable agreement. 3) That neither party ever intended to enter into an enforceable agreement until all material terms were agreed to in writing and executed.

As such, DEF March 16th "proposed agreement" was not a "fleshing out" of terms but "proposed terms" as DEF clearly and repeatedly stated. DEF now wanted PLT to waive other legal rights and accept liabilities well beyond the settling of commission claims in the litigation and with other

parties beyond just "Abbie Rose" Inkwell and "Steve." DEF's proposal also removed the material term they offered to induce PLT into accepting a proposed settlement of being paid in a "week" and that the NDA would include liquidating damages. Even the material term "NDA" is ambiguous as it did not detail the "who and how" the agreement can be shared or "where and how" the matter should be litigated in the event of a breach.

"An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 282 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal,178 N.J. 169, 177, 836 A. 2d 794 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co.,27 N.J. 144, 153, 141 A. 2d 782 (1958) "Ambiguous terms are generally construed against the drafter of the contract."Pacifico v Pacifico 190 NJ 258, 267-68 (2007)

It's obvious by DEF's actions and words that the parties never had or intended to have an enforceable agreement until reduce to writing and executed. DEF repeatedly stated such. Moreover, you do not try to change material terms that you believe are complete and enforceable.

It was arbitrary and capricious and against settled law for the Court to rule PLT's "silence" and allowing the adjournment as PLT agreeing to Hornick's March 8th modifications. On the March 8th call DEF agreed to the adjournment.Pa95 Thus, PLT was not required to act or agree to any changes for DEF to agree 7 days latter to the adjournment. The Court, without a hearing or explanation ruled Blaha (a 30-year veteran attorney) did not have to obtain acceptance in writing as agreed to on the March 8th call. Also, Blaha no longer had the affirmative obligation to see if PLT intended to waive rights as the law requires. The Court again ignored the obvious evidence. PLT, a *Pro Se*, "silence" is not having the intent

to accept the changes or to waive his rights. Moreover, Blaha agreeing to the adjournment knowing PLT did not agree to the changes is DEF intent to agree to go forward without the changes.

D. THE PROPOSED SETTLEMENT AGREEMENT OF MARCH 8TH CONVEYED TO THE COURT ON MARCH 15TH IS UNDISPUTABLY VASTLY DIFFERENT AS THE MATERIAL TERMS ARE WELL BEYOUND THE INTENT OF "WHO" AND "WHAT" WAS AGREED TO THAT THE COURT ORDERED TO BE ENFORCED ON OCT 17TH AND THUS MUST BE VACATED.[4](PA58-59)

As with the interpretation of any other contract, **a court shall not rewrite a settlement agreement "to provide a better bargain than contained in [the] [parties'] writing."** Kaur v. Assured Lending Corp 405 N.J. Super. at 477 (quoting Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008)). "[C]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."' A reviewing court must consider contractual language '"in the context of the circumstances" at the time of drafting . . .'" In re County of Atlantic, 230 N.J. 237, 254 (2017) Lastly, "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal,178 N.J. 169, 177, 836 A. 2d 794 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co.,27 N.J. 144, 153, 141 A. 2d 782 (1958)).

In NJ it is a well-settled that :settlement agreements" are contracts governed by basic contract principles. Among the principles applicable to settlement agreements "are that courts should enforce the intentions of the parties" and not "rewrite or revise a settlement agreement when the intent of the parties is clear." To the extent that there is any ambiguity in the expression of the terms of a settlement agreement, a hearing is necessary to determine the intent of parties at the time the agreement

[4]The Court must also vacate the two other October 17, 2023 orders as they are not "moot" and hear the motions.

was entered and to implement that intent. DEFs March 16th proposed settlement is materially different then the March 8th:

1. The ONLY material issue DEF did not change was the payment amount.
2. Instead of payment in a week, DEF wanted payment to be paid at the vague time of 20 days after all the agreement were executed which would be at least a month later.
3. Instead of the settlement being limited to Abbie Rose, Inkwell and Steve Marder, they now wanted it to include any and every one that worked for, did business with or had a business relationship with Abbie Rose, Inkwell or Steve Marder.
4. DEF wanted to expand the settlement to include claims outside the causes of actions in the suit.
5. DEF wanted to expand issues that was covered under the settlement agreement to now include any and all causes of actions against anyone DEF basically may have known or done business with.
6. DEF wanted PLT on behalf of his children to waive their rights to sue Def's lawyers and their firms for claims not part of this litigation.
7. DEF wanted PLT to make Representations and Warranties.
8. DEF wanted PLT to fully indemnify DEF for any lawsuits from any real estate brokers that makes a claim, threatens to sue them for any transactions that DEF ever had done including transactions that could not be part of the instant matter.
9. DEF's no longer would agree to a "NDA with liquidating damages"

E. THE COURT RULING DID NOT "FLESH OUT" TERMS BUT INSTEAD EXPANDED THE TERMS AND CONDITIONS OF THE PROPOSED SETTLEMENT AGREEMENT OF MARCH 8TH TO INCLUDE MATERIAL TERMS AND ADD PARTIES THAT WERE SPECIFICALLY REJECTED AND NEVER AGREED TO BY PLT.(PA50)

F. THE OCT 17 ORDER "WROTE A BETTER AGREEMENT" FOR DEF BY ADDING MATERIAL TERMS, LEGAL OBLIGATIONS AND PARTIES THEY KNEW THAT PLT SPECIFICALLY RUFUSED TO AGRRE TO AND THOSE THAT WERE NEVER DISCUSSED OR CONTEMPLATED.THE COURT TERMINATED TERMS THAT WERE AGREED TO(PA52)

G. IT IS WITHOUT DISPUTE THE COURT ACTED ARBITRARY AND CAPRICIOUS AND ABUSED ITS DISCRETION FINDING THE PARTIES HAD NOT AGREED TO "LIQUIDATING DAMAGES AND MATERIALLY MODIFYING TIME OF PAYMENT. (PA46)

The recording and transcript of the March 8th call leaves no dispute what the agreed material terms of the proposed settlement agreement were and that DEF March 16th "proposed settlement" agreement was entirely different. As outlined above in "Sec D 1-9" and further highlighted below, the Court's OCT 17 Order. 1) Added parties beyond "Abbie Rose, Inkwell and "Steve." 2) Expanded the definition of material terms beyond what PLT (or a reasonable person) would believe to have included. 3) It waived PLT rights to pursue other claims that were never discussed and/or specifically were not agreed to. 4) It waive PLT's children's rights that were never discussed. 5) PLT is now required to indemnify DEF against claims for transactions that he is not involved in from third parties that he is not associated with. 6) It removed the material term of "Liquidating Damages."

Thus as a matter of law this court must vacate the Oct 17th order in the entirety including issues that the Curt found "moot" by its ruling.

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." Brick Tp. Mun. Util. Auth. v. Diversified R.B. T., 171 N.J. Super. 397, 402 (App.Div. 1979). 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. James v. Federal Ins. Co., 5 N.J. 21, 24 (1950). Schor v. FMS Financial Corp., 357 N.J. Super. 185, 192 (App. Div. 2002)

"An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 282 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). "An effective waiver requires

a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal,178 N.J. 169, 177, 836 A. 2d 794 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co.,27 N.J. 144, 153, 141 A. 2d 782 (1958) "Ambiguous terms are generally construed against the drafter of the contract."Pacifico v Pacifico 190 NJ 258, 267-68 (2007)

The March 8th recording (and transcripts) made it without dispute that PLT only intended to limit the settlement to claims in the current suit with Abbie Rose, Inkwell, and Steve Marder. That payment within a week was a crucial material term. A "NDA with liquidating damages" was material to PLT and part of DEF's "standard NDA".Pa92-95

Immediately after on March 8th Hornik proposed material changes to the terms.Pa139 He no longer wanted "payment" to be in a week but to the to the "vague time" of 7 days after all documents are executed. It was vague because DEF was in control of preparing the agreements and as to when DEF would sign. He also wanted to expand the settlement to include the vague and ambiguous term of "professionals." Most notably, he wanted to confirm the "nonparty" "Steve" but not "attorney's," himself or his law firm despite PLT's pending motion to amend and add him and his firm as Defendants. He also did not "clarify" that his law firms "Standard" "Boilerplate" NDA agreements do not contain "liquidating damages."

Even of the Court wanted to ignore settled law and find PLT accepted the modification to add the catch all phrase "professionals," the failure to include the specific professionals left the term to vague and ambiguous to be enforceable or to find it waive any of PLT rights. Ambiguities go against the "drafter." DEF constantly argued PLT's case as frivolous and him being extremely litigious. Moreover, DEF did not include "attorneys" in Sec 5 of their proposed settlement agreement when they listed all the professionals and entities.Pa125 Instead, Sec 6 refers to "Ex B" labeled "General release" and DEF buried the word "attorney" with 75+/- generic and mostly irrelevant

terms. Given all the "gymnastics" and word play DEF went through to hide "attorney," the only reasonable conclusion is they knew PLT would never release them and they acted in Bad faith in arguing they were included. Thus if Blaha DEF wanted "attorneys" included, he was legally obligated to confirm the modification and waiver of rights before agreeing to the adjournment.

Therefore, its arbitrary and capricious and not supported by the evidence for the Court to find the March 16th proposed settlement agreement was a "fleshing" out and the same material terms that the parties agreed to before March 15th. Therefore, it is a clear abuse of discretion for the Court to enforce, as it is writings a better agreement for DEF.

H. THE DOCTRINE OF UNCLEAN HANDS ALSO FORBADE THE COURT FROM FINDING THAT AN ENFORCEABLE AGREEMENT EXISTED AND GRANTING DEF MOTION(PA48)

The doctrine of unclean hands provides "that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 158 (2001) (Faustin v. Lewis, 85 N.J. 507, 511 (1981).

DEF refused to abide by the terms they agreed to. The 1st page of Hornick's website states they can close transactions in "24 hours."Pa142 Despite payment to be made within a week, DEF ignored their representation and took 9 days to produce the proposed agreement. Moreover, they refused to have a "NDA with Liquidating Damages.[5]" DEF also failed to properly define and had ambiguity in their March 8th modifications as to "who" and "what" causes of actions were covered by the March 8 proposed settlement agreement. DEF breached the confidentiality. Moreover, the March 16th proposal contained material terms the parties never discussed or agreed to. The Court cannot order DEF to go back in time and make the payment as agreed they would or restore the confidentially of the agreement that

[5] Obviously had DEF not intended to breach the agreement they would not care about liquidating damages because it would not affect them.

DEF intentionally violated, left them with "unclean hands" and a unenforceable agreement requiring the Court to dismiss the motion. Thus, the order must be vacated.

I. TO FIND THAT THEIR WAS A MEETING OF THE MINDS ON ALL THE MATERIAL TERMS AND THAT AN ENFORCEBAL CONTRTACT EXISTED THE COURT WAS REQUIRED TO HAVE A PLENARY HEARING TO RESOLVE THE MATERIAL DISPUTED FACTS. THUS, ALL THE OCTOBER 17, 2023 ORDERS MUST BE VACATED. (PA53)

To be clear, despite the Court ruling the March 8, proposed settlement agreement was to be enforced the Court never made a finding there was a meeting of the minds on material terms as the law requires. The Court choose to expand the order to include all the terms of the March 16 proposed settlement agreement that was clearly rejected by PLT. The Court "just accepted" DEF's definition of "professional" DESPITE all evidence showing that PLT never agreed to the lawyers or "professionals" being included and it was DEF's obligations to define who that included.

An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. Nester v O'Donnell 301 N.J. Super. at 210. "When faced with evidence of disputed material facts, a judge must permit a plenary hearing in order to reach a resolution." Milne v. Goldenberg, 428 N.J. Super. 184, 201 (App. Div. 2012) (quoting Tretola v. Tretola, 389 N.J. Super. 15, 20 (App. Div. 2006)). "When the evidence discloses genuine material issues of fact, the failure to conduct a plenary hearing to resolve those issues requires us to reverse and remand for such a hearing." K.A.F. v. D.L.M., 437 N.J. Super. 123, 138 (App. Div. 2014). In instances where there are "credibility [issues] and diverse contentions, a plenary hearing is required." Dunne v. Dunne, 209 N.J. Super. 559, 571 (App. Div. 1986); see also Tancredi v. Tancredi, 101 N.J. Super. 259, 262 (App. Div. 1968) (holding that oral testimony should be taken when there are factual and credibility issues before the court) The interpretation of a contract

cannot be decided on summary judgment where there is uncertainty, ambiguity or the need for parol evidence to aid in interpretation. Serico v. Rothberg, 234 N.J. 168, 178 (2018).

J. DEF'S VIOLATION OF THE CONFIDENTIALITY OF THE PROPOSED SETTLEMENT AGREEMENT AND DEF FAILURE TO PAY WITHIN 7 DAYS MADE ANY AGREEMENT THAT THE COURT MIGHT HAVE FOUND EXISTED VOIDABLE BY PLT, AS THE MATERIAL TERMS COULD NO LONGER BE ENFORCEABLE. (PA47,PA50)

"[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Capparelli v. Lopatin, 459 N.J. Super. at 604 (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

DEF's refused to pay within 7 days and intentionally breached the NDA confidentially as agreed to in all the proposed settlement agreements cannot be restored. Had DEF intended to comply (and act in good faith) they would have wired the money into their lawyers escrow account within 7 days so payment could be made upon execution. The Court cannot order DEF to go "back in time" and make the payment as agreed to or restore the "peace of mind" the confidentiality was supposed to protect. DEF knew the harm they would cause. The main reason PLT needed confidentiality, and DEF knew this to be true, is landlords and property owners do not like to do business with brokers who stand up to them and sue for their commissions. Its axiomatic if DEF really thought the confidentiality was to hide the settlement from PLTs former wife, they would not have entered it into the public record where she (or her lawyers at Larocca Hornick) could "find it." Also, the false statement of the Investors Lawyer saying "he told him that he wants to hide the money from his former wife" was for them to get around Larocca Hornick saying such and give them the ability to argue that Prima facia evidence exists that PLT is hiding money regardless if the Court granted their motion. DEF intentionally destroyed the peace of mind the NDA was to provide. As such, even if the Court were

to legitimately find that an enforceable agreement had existed, doing so would lead to an absurd result, as the majority of the material terms could no longer be enforced.

IV. AT A MINIMUM, THE APPEARANCE OF BIAS IS WELL ESTABLISHED AND THE COURT HAVING COMMITTED TO A DECISION AND CREDIBILITY WITHOUT A HEARING OUT OF AN ABUNDANCE OF CAUTION REQUIRES THE TRIAL COURT RECUSED TO MAINTAIN THE APPEARANCE OF IMPARTIALITY. (PA46,47,49,54,55)

To determine if an appearance of impropriety exists, we ask "[w]ould a reasonable, fully informed person have doubts about the judge's impartiality?" DeNike v. Cupo, 196 NJ 502, 517 (2008); see also Code of Judicial Conduct R. 2.1 cmt. 3. DeNike v. Cupo, 196 NJ 502, 517 (2008); see also Code of Judicial Conduct R. 2.1 cmt. 3the Court ruled that the RPCs prohibit "misrepresentation as a permissible litigation tactic, even when carried out in the name of zealous representation." Seelig, 180 N.J. at 250. The Court ruling are in direct contradiction to "common sense" and all the evidence. The Court refused to follow settled law, Stare Decisis, and PLT's basic constitutional rights. Such conduct gives the appearance of indifference and lack of neutrality that would make a reasonable, fully informed person have doubts about the trial Courts impartiality.

1) The Court knew that proper due process required a plenary hearing to resolve the dispute and determine credibility and without any explanation whatsoever still refused to have one. Without dispute the terms were vague and ambiguous.
2) The Court ignored DEF's repeated admissions that there was never an enforceable agreement only proposed agreement.
3) "Liquidating damages" - The recording, the certified transcript, DEF's admission in his reply certification that Hornik agreed to "liquidating dames" but not $100,000 and PLT certification makes it impossible for the Court to find otherwise. Nevertheless, it did without explanation.

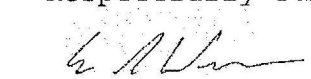
4) Mr. Blaha was caught several times committing perjury and fabricating evidence, yet the Court ignored its Judicial obligation and to PLT refusing to hold him accountable. Where the Court should have been sanctioning DEF, it instead chose to reward the repugnant behavior and ignored its obligation to enforce Court rules and the RPC's
5) The Court also choose to enforce 100% of the terms DEF March 16 proposed settlement agreement despite knowing most of the terms were never agreed to or were rejected by PLT.
6) Despite knowing quick payment was a material term, the Court without explanation refused to enforce it.
7) Defying logic, the Court found that PLT on March 8th agreed to material terms that he had not seen until March 16th.
8) Defying logic and the law, the Court found a "meeting of minds" occurred despite neither party seeing the material terms.
9) The Court finding PLT silence and DEF agreeing to the adjournment as "acceptance" instead of DEF complying to the March 8th call agreement or DEF going forward as them waving the demand for the changes

V. CONCLUSION

In the interest of justice and as a matter of law for all the above facts and legal arguments, with all due respect, the Court must grant this appeal, vacate all of the Oct 17 orders. Lastly, out of an abundance of caution to preserve the appearance of impartiality, the case should be assign to another trial judge.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,



Eric Weiss, PLT

Superior Court of New Jersey

Appellate Division

Docket No. A-001930-23

ERIC WEISS, *Plaintiff-Appellant,* vs. INVESTORS BANK, *Defendants,* ABBIE ROSE REALTY, LLC, *Defendant-Respondent,* PNC BANK, STEVEN MARDER, *Defendants,* INKWELL USA, INKWELL GLOBAL MARKETING *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO.: ESX L-006431-18 Sat Below: HON. RUSSELL PASSAMANO, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

This appeal is an attempt by appellant Eric Weiss to undo a settlement agreement he initiated, accepted, and benefited from. Weiss appeals from an order dated October 17, 2023, granting respondents' motion to enforce the settlement agreement, and an order dated January 16, 2024, denying his motion for reconsideration—filed after the matter had been dismissed with prejudice and after Weiss had received and retained the settlement payment.

After years of hotly contested litigation, the parties reached a binding settlement in March 2023. The material terms were clearly set forth in email exchanges and confirmed by both parties. Based on a joint letter in which all parties represented that the matter had been resolved, the court adjourned the trial. Weiss then consummated his portion of the settlement with respondent Investors Bank, and executed a dismissal with prejudice and accepted (and retained) full payment of the agreed-upon settlement amount in settlement with the respondents.

The appeal from the October 17 order must be dismissed as untimely, or, in the alternative, the October 17 order should be affirmed. It is untimely because Weiss did not file his notice of appeal within the 45-day period required by Rule 2:4-1(a). His subsequent motion for reconsideration did not

toll that deadline because the case had already been dismissed with prejudice by the time he filed the motion, and Weiss never moved to reinstate the action.

If this Court declines to dismiss the appeal from the October 17 order as untimely, it should nevertheless affirm the October 17 order because the trial court's decision was sound and well-reasoned. The court correctly found that the parties reached a binding agreement on all essential terms and rejected Weiss's effort to insert a one-sided liquidated damages clause after the fact. The court properly declined to hold a plenary hearing where no genuine factual dispute existed and entered judgment dismissing the action with prejudice.

Weiss's motion for reconsideration was procedurally defective, as it was filed after final dismissal with prejudice and without a motion to vacate or reinstate the action. Substantively, his motion failed to meet the governing standard. Weiss did not show that the trial court acted arbitrarily or capriciously, nor did he identify any palpably incorrect reasoning, overlooked evidence, or misapplied controlling law.

Having dismissed his claims, accepted the benefits of settlement, and failed to meet the standard for reconsideration, Weiss cannot now avoid the consequences of the agreement he orchestrated. The trial court's orders should be affirmed in their entirety.

PROCEDURAL HISTORY

This action arises out of a dispute over allegedly unpaid real estate brokerage commissions. (Pa23, Pa122, Pa176-178). On September 10, 2018, the appellant commenced this action in the Superior Court of New Jersey, Law Division, Essex County, Docket No. ESX-L-006431-18, asserting claims against Investors Bank, Abbie Rose Realty LLC, PNC Bank, Steven Marder, Inkwell USA, and Inkwell Global Marketing. (Pa176, Pa179). Weiss sought monetary damages based on his contention that he was wrongfully denied commissions for introducing the parties to a commercial real estate transaction. (Pa178-179). The complaint alleged various contract, tort, and equitable claims, including fraud-based theories. (Pa23, Pa176–186).

Defendants filed their answer on October 16, 2018, and subsequently amended it on September 5, 2019, asserting multiple affirmative defenses. (Pa145, Pa176).

Over the course of the litigation, Weiss (appearing pro se) filed at least ten motions, including six dispositive motions, a motion to disqualify opposing counsel, and motions to amend and join additional defendants. (Pa145-146, Pa157, Pa160). All Weiss motions were denied. (Pa145-146, Pa157, Pa160).

Discovery concluded on August 12, 2019. (Pa11). Multiple trial dates were scheduled from January 2020 through 2023, but were adjourned. (Pa11-12, Pa158). A firm trial date was ultimately set for March 20, 2023. (Pa11–12).

In early March 2023, with trial imminent the parties engaged in settlement negotiations in earnest. (Pa11-12, Pa148-150). On March 8, 2023, following extensive negotiations, Weiss emailed proposed terms of settlement, including the payment amount, method of payment, and a confidentiality provision. (Pa148). Counsel for the respondents accepted the offer with clarifications that Weiss agreed to (Pa149). Then, on March 15, 2023, Weiss joined in a joint letter to the trial court confirming that a settlement had been reached and requesting an adjournment of the trial. (Pa11–12, Pa150–Pa151).

On March 15, 2023, the trial court granted the parties' joint request for an adjournment to finalize the settlement documentation and rescheduled the trial for May 1, 2023. (Da14, Da84).

On March 17, 2023, having proposed and agreed to settlement terms and obtained the requested adjournment from the court, Weiss then unilaterally altered the settlement agreement without the respondents' consent. (Pa8; Da15). When the respondents refused to accept his unauthorized revisions, most notably a proposed liquidated damages clause demanding $100,000 for

each breach of confidentiality, Weiss repudiated the settlement. (Pa11-13; Da26-29).

On April 4, 2023, respondents moved to enforce the settlement agreement. (Pa14, Pa22, Pa62, Pa148-Pa151). Weiss opposed the motion, contending that there was no final agreement and that the absence of a liquidated damages clause was material (Pa11-13). In reply, respondents reaffirmed that no such clause had ever been negotiated or agreed upon. (Pa160, Da26-Da29). Respondents further contended that a liquidated damages provision was incompatible with the express goal of achieving finality, particularly in light of Weiss's reputation as a serial litigator who had already prolonged the litigation through excessive, unsuccessful motion practice. (Pa145–146, Pa160). Such a provision, they argued, would have given Weiss a pretext to continue litigating under the guise of enforcement, thereby undermining the very purpose of settlement. (Pa145-146, Pa160).

On October 17, 2023, the trial court issued an order granting respondents' motion to enforce settlement (the "Settlement Order"), holding that "the motion record is sufficient to show that the parties reached an enforceable settlement" and that "a trial or plenary hearing on the settlement issues is not necessary" (Pa14). The court deemed the agreement enforceable as if fully executed, ordered respondents to make the agreed-upon payment

(which they did), and dismissed all claims and amended pleadings in the action with prejudice. (Pa22, Da75). That same day, in a separate order, the court denied respondents' cross-motion to preclude Weiss from further motion filings without leave of court as moot, in light of the Settlement Order concluding the matter. (Pa36).

On October 18, 2023, though the court had already dismissed the action with prejudice, respondents re-filed Weiss's signed Notice of Dismissal with prejudice (Pa8).

On October 23, 2023, Weiss received and retained his settlement payment of $162,500, in full and final settlement of his claims. (Da71-74, Da111-112). Weiss disclosed the settlement sum in papers he submitted to the court that remain within the public domain. (Da71-74; Da111-112).

Despite dismissal of the action with prejudice and acceptance and retention of settlement funds, Weiss moved for reconsideration of the Settlement Order on November 6, 2023, without first moving to reinstate the case (Pa43).

By order dated January 16, 2024, the court denied the motion for reconsideration (the "Reconsideration Order") (Pa51–52). The court found that Weiss failed to demonstrate that the October 17, 2023 Settlement Order was based on a palpably incorrect basis or that the court failed to consider

competent, probative evidence. (T39-T41). It reaffirmed its prior finding that the parties had entered into an enforceable settlement agreement and concluded that Weiss's disagreement with the outcome, without more, did not satisfy the standard for reconsideration (T39-T41).

On January 16, 2024, Weiss filed a Notice of Appeal seeking review of both the Settlement Order and the Reconsideration Order (Pa1).

STATEMENT OF FACTS

On March 8, 2023, appellant Eric Weiss and Jon Hornik, counsel for the respondents, culminated extensive negotiations during a telephone call in which they discussed and agreed upon the material terms of settlement. (Pa93-95, Pa139). Later that same day, Weiss sent a follow-up email confirming material settlement terms, including the amount of payment, payment by certified check within seven days, preparation of an agreement by respondents' counsel, resolution of claims against certain named defendants, and inclusion of a non-disclosure agreement. (Pa139). Hornik promptly responded, confirming the understanding and clarifying that payment would be made after full execution of the agreement and related documents, and that Weiss would be required to release claims against not only the named defendants but also their affiliates, family members, and professionals (Pa140; Pa95).

Thereafter, the parties promptly took steps in reliance on the settlement. (Pa140-141, Pa150-151, Pa163-164). On March 13, 2023, counsel for respondent Investors Bank circulated a draft joint letter to the court requesting an adjournment based on the parties' agreement. (Pa149-150, Pa163-164). Weiss approved the letter by email on March 14, stating, "It looks fine to me" (Pa141), and counsel for the Abbie Rose Defendants also confirmed the language was acceptable (Pa140–141; Da4-7). On March 15, the parties submitted the joint letter to the court stating that they had reached "an agreement in principle to settle the matter in full" and requested a 45-day adjournment to finalize documentation. (Pa120, Pa150-151, Pa163-164). The court granted the request and rescheduled the trial for May 1, 2023. (Da14, Pa164).

That same day, March 15, 2023, respondents' counsel circulated a draft settlement agreement and general release to formalize the parties' agreement. (Pa21–32). On March 17, Weiss had unilaterally inserted numerous material changes to the settlement agreement, without prior discussion or consent, including a provision for $100,000 in liquidated damages in the event of a breach of confidentiality. (Pa151-152, Pa168; Da15). Weiss's summary of the settlement terms contained no such provision for liquidated damages, and at no time between March 8 and March 17 did Weiss raise any concern that the

agreement was incomplete or that any essential terms were unresolved. (Pa139-140, Pa151-152).

Weiss later admitted that he sought to include the liquidated damages provision out of concern that his ex-wife might learn of the settlement payment, which might impact his unrelated divorce proceedings. (Pa165, Pa173). When the respondents declined to accept Weiss's newly introduced material terms, Weiss repudiated the agreement. (Pa11–13; Da26-29).

Despite having repudiated the agreement, Weiss demanded in writing that respondents deliver the settlement payment after the court granted their motion to enforce the settlement. (Da65-Da74). On October 23, 2023, respondents tendered full payment of the $162,500 settlement amount. (Da71-74, Da111-112). Weiss accepted the funds and confirmed receipt three days later, on October 26, 2023. (Da65-74; Da111-112). He has held onto that money ever since, benefiting from the very agreement he now disavows. (Da71-75, Da111-112).

ARGUMENT

POINT I: WEISS'S APPEAL FROM THE OCTOBER 17, 2023 SETTLEMENT ENFORCEMENT ORDER MUST BE DISMISSED AS UNTIMELY

Weiss's appeal from the trial court's October 17, 2023 order enforcing the settlement agreement must be dismissed for lack of jurisdiction. Under

Rule 2:4-1(a), a party has 45 days from the entry of a final judgment to file a notice of appeal. That deadline is both mandatory and jurisdictional.

The October 17 order was final, as it resolved all claims and dismissed the case with prejudice. (Pa22, Pa36); *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545, 549–50 (App. Div. 2007); *see also Velasquez v. Franz*, 123 N.J. 498, 507 (1991) ("a dismissal with prejudice constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial."). Weiss's time to appeal expired on December 1, 2023, but he did not file his notice of appeal until January 16, 2024, 91 days after entry of the order. (Pa1–3). This untimely filing is dispositive and deprives this appellate Court of jurisdiction.

Weiss may argue that his November 6, 2023 motion for reconsideration tolled the appeal period, but it could not do so as a matter of law because the case had already been dismissed with prejudice. A motion for reconsideration under Rule 4:49-2 presumes an active case. Once dismissed with prejudice, the trial court loses jurisdiction to act further unless a party first moves to vacate the dismissal or reinstate the case, steps Weiss never took. *See Washington v. Donegan*, No. 03-2855 (GEB), 2006 U.S. Dist. LEXIS 36564, at *4 (D.N.J. June 6, 2006); *Mason v. Nabisco Brands, Inc.*, 233 N.J. Super. 263, 267 (App. Div. 1989); *Miller v. Estate of Kahn*, 140 N.J. Super. 177, 179 (App. Div.

1976). As such, the reconsideration motion was a legal nullity with no tolling effect.

Because Weiss failed to file a timely notice of appeal and no valid tolling event occurred, the appeal from the October 17, 2023, order is untimely and must be dismissed.

POINT II: THE TRIAL COURT CORRECTLY FOUND AN ENFORCEABLE SETTLEMENT AGREEMENT

A. Applicable Legal Standards

New Jersey courts have long recognized the strong public policy favoring the enforcement of settlement agreements. This policy is rooted in the judiciary's interest in resolving disputes efficiently. As the Appellate Division explained in *Pascarella v. Bruck*, "settlement of litigation ranks high in our public policy" and courts will enforce such agreements where the essential terms are clear and supported by mutual assent. 190 N.J. Super. 118, 124–25 (App. Div.), *certif. denied*, 94 N.J. 600 (1983). That policy was reaffirmed in *Bistricer v. Bistricer*, where the Chancery Division emphasized that courts should "strain to uphold" settlements once reached. 231 N.J. Super. 143, 151 (Ch. Div. 1987).

Under New Jersey law, a binding settlement agreement exists when the parties agree on sufficiently definite essential terms and demonstrate an intent to be bound by those terms. *Williams-Hopkins v. Zizmor*, No. CV 20-7168

(MAH), 2022 WL 2803260, at *3 (D.N.J. July 18, 2022) (citing *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992)). The enforceability of a settlement agreement does not depend on its reduction to a formal written contract; what matters is whether the parties reached agreement on all material terms. *See Lahue v. Pio Costa*, 263 N.J. Super. 575, 596 (App. Div. 1993); *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 476 (App. Div. 1961); *see also Williams v. Vito*, 365 N.J. Super. 225, 232 (Law Div. 2003); *Davidson v. Davidson*, 194 N.J. Super. 547 (Ch. Div. 1991) (enforcing oral settlement agreement in matrimonial action where attorneys held negotiations and agreed to settlement on clients' behalf); *U.S. v. Lightman*, 988 F. Supp. 448, 459 (D.N.J. 1997) ("the fact the written document was never executed is irrelevant to the enforceability of the [settlement] agreement").

New Jersey courts apply traditional contract law principles (offer, acceptance, and consideration) to determine whether a settlement is enforceable. *Kaur v. Assured Lending Corp.*, 405 N.J. Super. 468, 474 (App. Div. 2009). The inquiry focuses on objective manifestations of assent, not subjective intent or post hoc disavowals. *See Weichert*, 128 N.J. at 436. Even when the parties anticipate preparing a more formal document at a later time, an agreement is enforceable if the essential terms are agreed upon and no

material terms remain open. *See Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 120 (2004); *Brawer v. Brawer*, 329 N.J. Super. 273, 278 (App. Div. 2000).

Thus, a party may not avoid enforcement of a settlement simply by expressing dissatisfaction with the outcome or by asserting that a written memorialization was expected but never executed. Once the elements of contract formation are met, the agreement is binding and enforceable.

B. The Record Establishes Offer, Acceptance, and Consideration

The trial court correctly held that the email exchange on March 8, 2023 reflected all the material elements of contract formation—offer, acceptance, and consideration. Weiss initiated the settlement by confirming the core terms in a March 8 email at 4:42 p.m., including the payment amount, timing, confidentiality, and dismissal with prejudice. (Pa139). Within minutes, counsel for respondents responded with minor clarifications, which Weiss did not reject (Pa139–Pa140). The court properly found these communications sufficient to form a binding agreement. (Pa16–Pa17).

Weiss's argument that there was no "meeting of the minds" is inconsistent with this record and applicable law. The law does not require a signed document to find an enforceable agreement, nor do labels like "proposed" negate assent when the objective conduct demonstrates otherwise. *Pascarella*, 190 N.J. Super. at 124–25. Weiss's and the respondents' agreement

to adjourn trial based on this exchange (Pa140–141), followed by the submission of a draft letter to the court confirming the negotiated terms, further corroborates intent to be bound.

C. The Court Properly Rejected Weiss's Liquidated Damages Argument

Weiss contends that a liquidated damages clause was part of the March 8 agreement, but the trial court thoroughly considered and rejected that claim, finding no credible evidence that such a provision was ever agreed upon. (Pa17). Weiss offered no proof of mutual assent to such a term.

The only purported support for this argument is an alleged recording of a call between Weiss and Hornik, which he claims reflects an agreement on liquidated damages. (Br. at 12–13). Notably, Weiss omitted any mention of such a liquidated damages provision (let alone provision for a $100,000 penalty for each violation) in the contemporaneous email summary of the settlement terms he himself prepared. (Pa93–95; Pa139). That omission undermines any assertion that a liquidated damages term was material or mutually agreed upon.

Even if Weiss's interpretation were accepted, the absence of an agreed-upon liquidated damages provision does not render the settlement unenforceable. While such clauses are common in contracts, they are not required to create a valid and enforceable settlement agreement. New Jersey

courts enforce settlements where the parties have agreed on essential terms—such as payment, release, and timing—and manifested intent to be bound, even if other provisions, including remedies for breach, remain open or unaddressed. *See Lahue v. Pio Costa*, 263 N.J. Super. 575, 596 (App. Div. 1993) (enforcing oral settlement agreement despite unresolved details of performance); *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992).

Whether a liquidated damages clause, when present, is enforceable is a separate inquiry governed by established principles, namely, whether the provision represents a reasonable estimate of anticipated damages rather than a penalty. *See MetLife Capital Fin. Corp. v. Washington Ave. Assocs., L.P.*, 159 N.J. 484, 495 (1999). But that analysis is only relevant where such a clause exists. It has no bearing on the threshold question of whether the parties reached a binding settlement.

Accordingly, Weiss's focus on a liquidated damages clause in an attempt to unravel the agreed-upon settlement is a red herring. The absence of such a term neither undermines the validity of the parties' agreement nor excuses his refusal to honor its terms.

D. The Court Did Not Expand the Agreement or Misconstrue Its Terms

Contrary to Weiss's claim, the trial court did not "write a better agreement" for the defendants. (Br. at 18). The court merely enforced the terms

clearly reflected in the March 8 exchange and confirmed in the parties' March 15 joint adjournment letter. (Pa140–141). Nor does the language in a subsequent draft stating that the agreement was "subject to execution" alter the binding effect of the March 8 exchange. New Jersey courts have consistently held that a settlement is enforceable when the parties have agreed to the essential terms, even if they contemplate a later formalization. *See Hagrish v. Olson*, 254 N.J. Super. 133, 138 (App. Div. 1992); *Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utilities*, 206 N.J. Super. 523, 530 (App. Div. 1985). The record supports the trial court's finding that the parties reached a complete agreement, and the court simply enforced that agreement as stated.

Further, Weiss's reliance on a boilerplate provision stating that the agreement would not be effective until executed by all parties (Br. at 12; Pa28) is misplaced. That language, found in a draft document circulated after the March 8 agreement, is a standard reservation commonly included in draft settlement agreements. It does not undermine or override the parties' prior agreement on all essential terms. New Jersey courts do not elevate formalities or standard disclaimers above substance. Rather, they give effect to the parties' objectively manifested intent to be bound. *Ortho-Clinical Diagnostics, Inc. v. Fulcrum Clinical Labs., Inc.*, CV212530MASTJB, 2023 WL 3983877, at *3 (D.N.J. June 13, 2023).

What matters under New Jersey law is not whether a formal writing was executed, but whether the parties reached agreement on essential terms and intended to be bound. *Id.*; *Hagrish v. Olson*, 254 N.J. Super. 133, 138 (App. Div. 1992). Here, the March 8 exchange, followed by the joint letter to the court, confirms that the parties had already reached a binding settlement. (Pa139-141, Pa150-151, Pa163-164). The presence of a standard execution clause in a subsequent draft does not retroactively negate that agreement. *See Ortho-Clinical Diagnostics,* CV212530MASTJB, 2023 WL 3983877, at *3.

E. No Plenary Hearing Was Required

The trial court did not abuse its discretion in concluding that a plenary hearing was unnecessary. No genuine dispute of material fact existed to require a hearing. The emails clearly set forth all terms essential to form a binding agreement, and Weiss's opposition consisted of post hoc justifications unsupported by contemporaneous evidence. As the New Jersey Supreme Court has stated, plenary hearings are only required when there are "substantial factual disputes that cannot be resolved based on the written submissions." *DeNike v. Cupo*, 196 N.J. 502, 517 (2008). Here, based on the record, the court reasonably found none.

F. Alleged Breaches or Delay Do Not Invalidate the Agreement

Weiss's assertion that any subsequent delay in payment or alleged breach by respondents rendered the agreement void is unsupported by law. (Br. at 23). Weiss's allegations of breach presuppose the existence of a contract. Weiss's contradictory arguments should be rejected; one cannot breach an agreement that never existed.

As the Appellate Division made clear in *Palombi v. Palombi*, 414 N.J. Super. 274, 289 (App. Div. 2010), performance disputes after formation do not negate the existence of a binding contract. Remedies may be available for breach, but they do not undo the underlying agreement.

G. Weiss's Conduct Confirms Assent

Weiss's conduct throughout the relevant period confirms his understanding that a binding agreement had been reached. On March 8, he circulated a written summary of the material settlement terms, including payment, confidentiality, and dismissal with prejudice. (Pa93-95, Pa139-140). He then participated in a joint letter to the court informing the court that the parties had reached a settlement in principle and requesting adjournment of the upcoming trial to finalize documentation, based upon the agreement. (Pa150-151, Pa163-164, Da14).

Most significantly, following the court's October 17 order, Weiss repeatedly insisted on immediate payment of the settlement funds. (Da71-74; Da76-83). He later accepted and retained the full settlement payment, an unequivocal act of ratification. (Da75). It was not until after he received the settlement funds, cash in hand, did he move for reconsideration of the order. (*Id.*). Even upon moving for reconsideration Weiss never offered to return the money or have it deposited into court. Weiss has benefited from receiving the settlement sum. Taken together, these objective manifestations demonstrate that the parties had reached a binding agreement and that Weiss understood and acted accordingly.

The trial court's enforcement of the settlement agreement was legally and factually sound. Its findings were supported by the record, consistent with established precedent, and fully within its discretion. Weiss's attempts to undo the agreement rely on subjective dissatisfaction and mischaracterization of facts, not the objective record. *See Pascarella*, 190 N.J. Super. at 126 ("If later reflection were the test of the validity of such an agreement, few contracts of settlement would stand."). Therefore, the Court should affirm the October 17, 2023 order in its entirety.

POINT III: THE JANUARY 16, 2024 ORDER DENYING RECONSIDERATION MUST BE AFFIRMED

A. Procedural Bar to Reconsideration

The appellant's motion for reconsideration was procedurally defective because Weiss did not first seek to reinstate the action, which was dismissed with prejudice and had been closed since October 18, 2023.

In its October 17 order, the court held (i) the settlement documents attached to the order "are the settlement documents reflecting the parties' agreement and may be enforced as if fully executed by the parties"; (ii) "the [settlement] payment shall be made forthwith"; and (iii) "the within matter is concluded and the complaint and all amendment be and hereby are dismissed as are all other claims by and between the parties that were asserted in this litigation." (Pa22).

Thereafter, on October 18, 2023, the parties filed the notice of dismissal with prejudice that Weiss had signed back in March (Pa8; Pa22–23; Pa30), and the case was closed. Once the case was closed, reconsideration was no longer procedurally available unless the case was reinstated. *See Donegan*, 2006 U.S. Dist. LEXIS 36564, at *4; *Mason*, 233 N.J. Super. at 267; *Miller*, 140 N.J. Super. at 179. Weiss's motion for reconsideration, filed on November 6, 2023, was therefore procedurally defective.

It is immaterial that the motion for reconsideration was filed within the 20-day window permitted by Rule 4:49-2. That rule presupposes that the underlying matter remains pending before the trial court. Once an action has been dismissed with prejudice and closed, particularly by stipulation or court order, a party must first seek to vacate the dismissal under Rule 4:50-1 or otherwise reinstate the action before the court can exercise jurisdiction to entertain post-judgment motions. *Id.*

The timely filing of a reconsideration motion does not cure the jurisdictional defect created by the dismissal; absent reinstatement, there is no live controversy before the court upon which it may rule. Courts have long recognized that procedural mechanisms like reconsideration do not override the finality of a dismissal with prejudice, which terminates the action and divests the trial court of authority to take further action unless and until the case is formally reopened. *Id.*; *see also Ashe v. State Operated Sch. Dist. of City of Paterson*, A-1307-11T3, 2012 WL 6681915, at *3 (N.J. Super. Ct. App. Div. Dec. 26, 2012) ("Indeed, the 'with prejudice' feature of the dismissal connotes finality, affirmatively foreclosing the right to maintain an action on the same cause or claim."). Because Weiss did not move to vacate or reinstate the action, the trial court lacked jurisdiction to consider his motion, and it was properly denied on that basis alone.

B. The Reconsideration Motion Was Substantively Deficient

Not only was the motion for reconsideration procedurally defective, it was also substantively deficient. Reconsideration under Rule 4:49-2 is an "extraordinary remedy," and with respect to reconsideration of final orders, such as the October Settlement Order, is granted only when the court has either overlooked dispositive facts or controlling legal authority, or otherwise acted on a palpably incorrect or irrational basis. It is not an opportunity to reargue or relitigate the matter. *See Lawson v. Dewar*, 468 N.J. Super. 128, 134 (App. Div. 2021) (distinguishing the legal standard for motions to reconsider interlocutory versus final orders); *Cummings v. Bahr*, 295 N.J. Super. 374, 384–85 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

The denial of a motion for reconsideration is within the sound discretion of the court and is reviewed only for abuse of discretion. *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021). "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." *10 Millpond Drive, LLC v. Lamson Airtubes, LLC*, A-3233-23, 2025 WL 1455951, at *3 (App. Div. May 21, 2025) (internal quotations omitted; citing *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002). As the Appellate Division has repeatedly

held, it is not an abuse of discretion to deny reconsideration when a party fails to present new, previously overlooked evidence or law. *See Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299, 310 (App. Div. 2008).

Under *Palombi*, a motion for reconsideration must first meet a threshold showing that the court's decision was arbitrary, capricious, or unreasonable before the court will even consider whether it overlooked any controlling law or dispositive facts. 414 N.J. Super. at 289. Mere disagreement with the outcome or dissatisfaction with the court's reasoning is not enough. The movant must demonstrate that the ruling lacked a rational basis or disregarded material evidence that was properly before the court. *Lawson*, 468 N.J. Super at 134; *Cummings*, 295 N.J. Super. 384-85.

Here, the court's denial of Weiss's motion for reconsideration rested on a reasoned and rational basis, as set forth in the court's oral opinion dated January 16, 2024, a transcript of which Weiss omitted from the appendix. (*See* T40 4-22). The court directly addressed and rejected Weiss's claim that its October ruling was arbitrary or ignored probative facts, explaining instead that the record established a binding agreement between the parties. Weiss's disagreement with that conclusion does not warrant reconsideration. (T39 4-17).

Any suggestion that the court failed to fully and carefully consider the matter is unfounded. Judge Passamano thoroughly analyzed the record and applied established principles of contract and settlement enforcement. In its October 17, 2023, 12-page reasoned decision, the court found an enforceable settlement based on the parties' March 8, 2023 email exchange and subsequent communications. (Pa9–20).

The court emphasized that Weiss himself outlined the key terms in writing, including the settlement amount, method and timing of payment, release of claims, confidentiality, and a joint request for adjournment. (Pa12–13). It found no ambiguity or unresolved material terms that would preclude enforcement.

Further, Weiss's motion for reconsideration offered no newly discovered evidence and failed to show that the court overlooked dispositive facts. Instead, he repeated arguments the court had already considered and rejected, including his assertion that the parties had agreed to liquidated damages for a confidentiality breach. But the court expressly considered and rejected this contention, finding that no such term had been agreed upon. (Pa9–20; Pa168; Da15). Thus, Weiss failed to demonstrate that the court's findings were arbitrary, capricious, or unreasonable. That alone ends the reconsideration inquiry. *Palombi*, 414 N.J. Super. at 289.

Weiss did not meet the threshold showing that the October 17 decision lacked a rational basis or failed to consider material evidence. Nor does his appeal establish that the trial court abused its discretion in denying reconsideration. Ultimately, Weiss's motion and his appeal reflect dissatisfaction with the outcome, not any legal or factual basis to disturb the trial court's ruling. Reconsideration is not a mechanism for rearguing settled matters. The trial court correctly exercised its discretion, and its order should be affirmed.

CONCLUSION

The appeal from the October 17, 2023 Settlement Order is untimely and must be dismissed for lack of appellate jurisdiction. That order resolved all claims, directed payment, and dismissed the case with prejudice, and was therefore a final order requiring notice of appeal to be filed within 45 days of its entry. Because he filed his notice of appeal on January 16, 2024 (over 90 days from the entry of the final order), the appeal is untimely and must be dismissed.

Weiss's motion for reconsideration did not toll his deadline to file the notice of appeal because it was defective—filed post-dismissal and without first seeking reinstatement. Under these circumstances, the appeal is untimely.

Even if the appeal is deemed timely, the October 17 order should still be affirmed. The trial court correctly found that the parties reached a binding settlement based on their March 2023 communications, a joint letter to the court, and Weiss's own conduct (*i.e.*, accepting payment, signing a notice of dismissal with prejudice, joining in the letter to the court). Applying settled New Jersey law, the court properly enforced the agreement without a plenary hearing, as there were no genuine factual disputes and no basis to add new terms post hoc.

The January 16, 2024 order denying reconsideration should also be affirmed. The motion itself was procedurally defective and Weiss failed to demonstrate abuse of discretion or identify any overlooked evidence, legal error, or controlling authority ignored, instead rehashing arguments already rejected. Reconsideration is not a vehicle to relitigate unfavorable rulings.

Accordingly, the Court should dismiss the appeal as untimely or, in the alternative, affirm the October 17, 2023 and January 16, 2024 orders in their entirety.

Dated: May 27, 2025

/s/Eric P. Blaha
Eric P. Blaha

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET # A-001930-23-2T

ERIC WEISS,
Plaintiff

v

INVESTORS BANK, ABBIE ROSE REALTY LLC, PNC BANK, STEVE MARDER, INKWELL USA, INKWELL GLOBAL MARKETING
Defendant

On Appeal from:
Superior Court of NJ,
Essex County Civil Division
DK# ESX L-006431-18

Sat Below:
The Honorable
Judge Russell Passamano

PLAINTIFF'S REBUTTAL BRIEF

Eric S. Weiss
Plaintiff – Appellant
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July 14, 2025

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1) PRELIMINARY STATEMENT

Appellant Eric Weiss respectfully submits this rebuttal brief to address and refute every issue and argument raised in the Defendants' (Abbie Rose Realty LLC, et al.) brief filed on June 30, 2025. Defendants' assertions mischaracterize the record, ignore critical evidence, and misapply settled New Jersey law. The trial court's October 17, 2023 order enforcing a purported settlement agreement and the January 16, 2024 order denying reconsideration were erroneous, arbitrary, and capricious, violating Weiss's constitutional rights and defying the evidence. This appeal is timely, and the orders must be vacated due to the absence of a meeting of the minds, the court's improper expansion of terms, and the necessity of a plenary hearing to resolve material factual disputes.

Respondents attempt to obscure the absence of a final and enforceable settlement agreement by mischaracterizing both the procedural posture and the communications that occurred during the March 2023 negotiations. Their brief relies heavily on selectively quoted language and omissions from the record, while ignoring critical facts: namely, that Plaintiff expressly conditioned his consent on inclusion of a confidentiality clause with a liquidated damages remedy; that Defendants never accepted this condition; and that no fully executed agreement ever materialized.

The trial court's ruling wrongly imputed acceptance where there was none, misapplied settlement enforcement jurisprudence, and denied Plaintiff a hearing despite evident disputes over material terms and communications. That Plaintiff later signed a general release with a co-defendant, or that trial was adjourned, does not substitute for a meeting of the minds with Abbie Rose. This reply clarifies the misstatements and urges reversal.

2) REBUTTAL TO DEFENDANTS' ARGUMENTS

POINT I: Weiss's Appeal from the October 17, 2023 Order is Timely

Defendants' Argument: Defendants claim the appeal is untimely under Rule 2:4-1(a), asserting the October 17, 2023 order was final, requiring a notice of appeal by December 1, 2023. They argue

Weiss's November 6, 2023 reconsideration motion did not toll the deadline because the case was dismissed with prejudice, citing *Janicky v. Point Bay Fuel, Inc.*, *Velasquez v. Franz*, *Washington v. Donegan*, *Mason v. Nabisco Brands, Inc.*, and *Miller v. Estate of Kahn*.

Rebuttal: The appeal is timely. Rule 2:4-3(e) permits tolling of the appeal period when a motion for reconsideration under Rule 4:49-2 is filed, provided it is timely. Weiss filed his reconsideration motion on November 6, 2023, within the 20-day period required by Rule 4:49-2, tolling the appeal deadline. The case's dismissal with prejudice does not negate this tolling, as the trial court retained jurisdiction to hear post-judgment motions absent a formal closing of the case. *Washington v. Donegan* (2006 U.S. Dist. LEXIS 36564) and *Mason* (233 N.J. Super. 263) are inapposite, as they address vacated dismissals, not reconsideration motions. *Miller* (140 N.J. Super. 177) involved a failure to reinstate, unlike here, where the court considered and ruled on the motion (Pa51-52). Weiss filed his notice of appeal on Jan 16, 2024, within 45 days of the January 16, 2024 reconsideration order, complying with Rule 2:4-1(a). Defendants' jurisdictional argument fails, and this Court has authority to hear the appeal.

- The motion for reconsideration was filed on **November 1, 2023**, well within the **20-day limit** set by *R. 4:49-2*, which tolled the appeal period under *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996).
- The trial court **retained jurisdiction** and ruled on the reconsideration motion on **January 16, 2024**—an implicit acknowledgment that the case remained active.
- The appeal was filed **within 45 days** of that order, rendering it timely. Procedural finality cannot be used to bar appellate review where the trial court itself took post-order action.

POINT II: The Trial Court Erred in Finding an Enforceable Settlement Agreement

A. Applicable Legal Standards Misapplied

Defendants' Argument: Defendants cite *Pascarella v. Bruck*, *Bistricer v. Bistricer*, *Williams-Hopkins v. Zizmor*, *Lahue v. Pio Costa*, *Jannarone v. W.T. Co.*, *Williams v. Vito*, *Davidson v. Davidson*, *U.S. v. Lightman*, *Kaur v. Assured Lending Corp.*, *Weichert Co. Realtors v. Ryan*, *Morton v. 4 Orchard Land Trust*, and *Brawer v. Brawer* to argue that New Jersey favors settlement enforcement when essential terms are agreed upon, even without a formal written contract, focusing on objective assent.

Rebuttal: Plaintiff's March 8 email was a **conditional proposal** with liquidated damages, not an acceptance. Material terms—such as NDA enforcement, and payment timing—were never agreed upon. Moreover, Defendants' March 16 email explicitly stated:

> "No agreement shall be deemed valid and enforceable unless and until it is reduced to writing, signed by all parties and a fully executed copy delivered to all parties." (PA120)

There can be no enforceable contract where the party seeking enforcement expressly conditioned formation on execution. Defendants misapply these precedents. *Weichert* (128 N.J. 427, 435) and *Kaur* (405 N.J. Super. 468, 474) require a "meeting of the minds" on all material terms, which is absent here. *Pascarella* (190 N.J. Super. 118, 124-25) and *Lahue* (263 N.J. Super. 575, 596) emphasize clear mutual assent, not unilateral impositions. The March 8, 2023 email exchange (Pa139-140) was a proposed agreement, explicitly requiring written execution (PaL20, PaL28). *Morton* (180 N.J. 118, 120) and *Brawer* (329 N.J. Super. 273, 278) hold that agreements contemplating formalization are not binding if material terms remain unresolved. Defendants' reliance on *Gold Tree Spa, Inc. v. PD NAIL* (291 A.3d 1155) is misplaced, as it reinforces that unsigned agreements are unenforceable absent clear intent (PaL20). The trial court ignored *Kernahan v. Home Warranty Adm'r* (236 N.J. 319), which mandates definite terms, and *Pacifico v. Pacifico* (190 N.J. 258, 267-68), which construes ambiguities against the drafter, here Defendants.

a. The march 8 recording confirms the parties agreed to include liquidated damages

Contrary to Respondents' assertion that no agreement was reached on a liquidated damages clause, the evidence conclusively demonstrates that this was a material term agreed to on March 8, 2023. Specifically, Plaintiff recorded the call during which their counsel affirmatively stated:

> "Yes, we'll use our standard boilerplate NDA with liquidated damages." (PA93; Rec1)

The Union County certified transcript prepared for appellate purposes confirms this exchange. Notably, Defendants later admitted in their own certification that this clause was part of the negotiated terms: **"Defendants' attorney agreed to prepare an NDA with liquidated damages." (Pa111)**

This recording and the transcript prove that the parties did not merely leave the NDA undefined—it was a critical term, discussed and agreed to. Defendants' later refusal to include it represents not a clarification or technical omission, but a material breach of the parties' March 8 understanding. Given this, the trial court's finding that the NDA was not discussed or that "liquidated damages" were never agreed upon was not only factually wrong—it was reached in willful disregard of competent, admissible evidence. At minimum, this factual conflict mandated a plenary hearing. (*Palombi v. Palombi*, 414 N.J. Super. 274 (App. Div. 2010)).

b. Defendants' March 16 email confirmed no binding agreement existed

On March 16, 2023—after the supposed agreement was reached—Defendants explicitly confirmed in writing that no binding agreement existed. Their counsel's email stated:

> "Please note these attachments have not yet been reviewed or approved by the client and therefore they are subject to change." ….. "No agreement shall be deemed valid and enforceable unless and until it is reduced to writing, signed by all parties and a fully executed copy delivered to all parties." (PA120, emphasis added)

This is not mere boilerplate. It is an express, unequivocal condition precedent to contract formation. New Jersey law is clear that where a party makes execution a condition to being bound, no enforceable agreement exists absent that execution. (*Weichert Co. Realtors v. Ryan*, 128 N.J. 427 (1992); *Morton v. 4 Orchard Land Trust*, 180 N.J. 118 (2004)). It is disingenuous for Respondents to now argue the March 8 communications reflected a complete, binding agreement when—eight days later—they explicitly disclaimed any such agreement. Their own words defeat their enforcement motion.

Moreover, this admission fatally undermines the trial court's conclusion that the March 8 exchange created an enforceable agreement. At minimum, it confirms that the parties did not share a mutual intent to be bound as of that date—negating the very "meeting of the minds" the court claimed to find without a hearing. Plaintiff's March 8 email conditioned settlement on inclusion of a liquidated damages provision for any breach of confidentiality—a core term. Respondents never accepted this clause. Indeed, the record shows they objected to it and refused to sign any document including it. That

is not a meeting of the minds. The trial court's conclusion otherwise was legally flawed and unsupported by the record. It is well established that **a party cannot unilaterally finalize a settlement by declaring it so**, especially where subsequent negotiations show ongoing material disagreements (*Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 120 (2004)).

B. The Record Does Not Establish Offer, Acceptance, and Consideration

Defendants' Argument: Defendants assert the March 8, 2023 email exchange (Pa139-140) reflects offer, acceptance, and consideration, claiming Weiss's silence and the joint adjournment letter (Pa150-151) confirm assent. They cite *Pascarella* and *Weichert* to argue objective conduct overrides subjective intent.

Rebuttal: Defendants admit that material additions and clarifications (e.g., release of nonparties, waiver of damages) occurred after March 8.No full agreement was ever signed, and key terms were actively rejected by Plaintiff (PA121–128). Plaintiff's later redline edits and refusal to sign Defendants' version demonstrate continued negotiation, not acceptance.

The record refutes Defendants' claim of a binding agreement. The March 8 email from Weiss outlined proposed terms, which Defendants modified significantly (Pa139-140), adding releases for affiliates and professionals and altering payment timing. Weiss never accepted these changes in writing, as required by the March 8 call (Pa93-95). *Weichert* (128 N.J. 427, 436) requires objective mutual assent, not unilateral modifications. Defendants' March 16 email and proposed agreement (PaL20, PaL28) explicitly stated no agreement was enforceable until executed, contradicting their claim of a binding contract. The joint adjournment letter (Pa150-151) was based on a proposed settlement, not a finalized agreement, as Defendants' own emails confirm (PaL21). *Knorr v. Smeal* (178 N.J. 169, 177) holds that waivers require full knowledge and intent, which Weiss lacked. The trial court's finding of assent ignores this evidence and violates contract law principles.

C. The Court Improperly Rejected Weiss's Liquidated Damages Argument

Defendants' Argument: Defendants claim the trial court correctly found no liquidated damages clause, asserting Weiss's email omitted it (Pa139) and the recording lacks credible support. They argue such clauses are not required, citing *Lahue* and *Weichert*.

Rebuttal: THE TRIAL COURT ERRED IN ENFORCING TERMS NEVER AGREED TO OR MUTUALLY UNDERSTOOD

Respondents wrongly argue that enforcement was proper because the "essential" terms were agreed upon. But the inclusion of the confidentiality/liquidated damages clause was not merely ancillary—it was **a condition precedent to agreement**. Courts routinely invalidate putative settlements where a party conditions assent on later acceptance of a proposed material term (*Brawer v. Brawer*, 329 N.J. Super. 273, 276 (App. Div. 2000)).

THE COURT IN FACT EXPAND THE AGREEMENT AND MISCONSTRUED ITS TERMS

Respondents contend that the trial court merely "enforced" the agreement as written and did not expand its terms or misconstrue its scope. That is false, and the record proves otherwise. First, the trial court's October 17, 2023 Order added material terms that were never agreed to by Plaintiff, including:

1. The omission of a **liquidated damages** that had been expressly agreed to on the March 8 call;
2. The **expansion of the release provision** to include non-party professionals and entities that Plaintiff never agreed to release;
3. The modification of **payment timing**, contrary to the agreed-upon seven-day deadline;
4. The inclusion of **Defendants' own drafted language**, never reviewed or accepted by Plaintiff, as though it were the March 8 term sheet.

These were not mere "clarifications" or ministerial fill-ins; they were fundamental alterations that materially affected the scope, obligations, and enforceability of the agreement. As New Jersey courts have repeatedly held, courts may "flesh out" minor or implied terms to facilitate enforcement but may **not supply new or disputed material terms or write a better contract for one side**. *Grow Co. v. Chokshi*, 403 N.J. Super. 443, 464 (App. Div. 2008); *Pacifico v. Pacifico*, 190 N.J. 258, 267-68 (2007); *Knorr v. Smeal*, 178 N.J. 169, 177 (2003). Yet here, the court **inserted terms the** Plaintiff expressly rejected **and** removed terms the Defendants previously admitted were agreed to. The record shows that even

Defendants acknowledged their proposed March 16 agreement was a "nonbinding draft" and that "[n]o agreement shall be deemed valid and enforceable unless and until it is reduced to writing, signed by all parties and a fully executed copy delivered to all parties." (PA120). Yet, the court nonetheless "enforced" that March 16 draft as if it reflected mutual assent from March 8—even though it was never executed, never agreed to, and contradicted prior communications and the audio transcript.

In doing so, the court improperly:

- Ignored Plaintiff's March 17 rejection of the revised terms;
- Ignored Defendants' own confirmation on March 16 that they had "no binding agreement";
- Adopted a version of the settlement that favored Defendants by eliminating liability **and** adding immunities not bargained for;
- Removed material obligations that Defendants had originally agreed to include (e.g., NDA with liquidated damages).

This is the textbook definition of a court improperly expanding the terms of an agreement and misconstruing its scope. As a matter of law and equity, the trial court exceeded its authority and committed reversible error. Furthermore, Plaintiff's conduct in resisting enforcement, refusing to sign the agreement, and promptly opposing the motion to enforce, undermines any suggestion of assent. Respondents cite no signed writing or mutual confirmation of final terms—only cherry-picked email language taken out of context.

Conclusion: The trial court's rejection of the liquidated damages clause is unsupported. A recording of the March 8 call proves otherwise. Defendants' attorney agreed to prepare a standard NDA "with liquidated damages" (PA93). The certified transcript and Defendants' own reply certification (PA111) confirm this was discussed and agreed to. The trial court **ignored this evidence entirely**, a clear factual error requiring reversal. The March 8 call, recorded and transcribed (Pa93-95, Ex Fa Rec1), confirms Defendants agreed to a "standard NDA with liquidating damages," corroborated by metadata and Defendants' admission (PaL11). Weiss's email (Pa139) referenced an NDA, consistent with the call, and Defendants' failure to object until March 16 (PaL23-130) waives their challenge. *Kaufman v. Provident Life* (828 F. Supp. 275, 282) holds that ambiguities favor the non-drafter, here Weiss.

Defendants' claim that liquidated damages are unnecessary ignores their materiality, as Weiss sought protection due to Defendants' history of breaches (PaL34-138).

The court's reliance on Defendants' bare denial over overwhelming evidence (Pa93, PaL11) was arbitrary, necessitating reversal.

D. The Court Expanded the Agreement and Misconstrued Its Terms

Defendants' Argument: Defendants argue the court did not expand the agreement, claiming the March 8 terms were clear and the March 16 draft's execution clause (Pa28) was boilerplate, not negating assent. They cite *Hagrish v. Olson*, *Dep't of Pub. Advocate*, and *Ortho-Clinical Diagnostics*.

Rebuttal: The October 17 order rewrote the agreement by:

(1) Eliminating liquidated damages,
(2) Expanding releases to include parties never agreed to,
(3) Altering payment timing, and
(4) Gave unlimited indemnification to Defendant against actions from third parties that Plaintiff had no control over.

Courts may not "write a better agreement" or impose disputed terms absent a plenary hearing *Grow Co. v. Chokshi,* 403 N.J. Super. 443 (App. Div. 2008. The trial court impermissibly expanded the agreement. The March 8 proposal limited the settlement to Abbie Rose, Inkwell, and Steve Marder, with payment in seven days and an NDA with liquidated damages (Pa139). The March 16 draft (PaL22-33) added releases for unrelated parties, indemnification clauses, and extended payment to 20 days, terms Weiss rejected (Pa26-30). *Kaur v. Assured Lending Corp.* 405 N.J. Super. 468, 477 prohibits rewriting agreements to favor one party, yet the court enforced the March 16 terms (Pa9-20). *Hagrish* (254 N.J. Super. 133, 138) and *Ortho-Clinical* (2023 WL 3988877) require agreement on essential terms, not post hoc additions. The execution clause (PaL28) explicitly conditioned enforceability on signing, which never occurred. The court's ruling created a "better agreement" for Defendants, violating *Brick Tp. Mun. Util. Auth.* (171 N.J. Super. 397, 402).

E. If the Court was to find a contract existed, a Plenary Hearing Was Required

Defendants' Argument: Defendants assert no plenary hearing was needed, claiming no genuine factual disputes existed, citing *DeNike v. Cupo* and the clarity of the March 8 emails (Pa139-140).

Rebuttal: THE COURT IMPROPERLY DENIED A PLENARY HEARING DESPITE MATERIAL FACTUAL DISPUTES

The record shows genuine disputes of material fact about whether a meeting of the minds occurred. Respondents dispute whether the $100,000 clause was agreed to, while Plaintiff asserts it was a non-negotiable term. These disputes are material. The trial court's refusal to hold a plenary hearing contravenes Palombi v. Palombi, 414 N.J. Super. 274 (App. Div. 2010), which mandates an evidentiary hearing where settlement formation is contested on factual grounds. Without testimony, cross-examination, and a complete record, the court's findings were speculative and unsupported by credible evidence. Respondents argue that no plenary hearing was required because no "genuine" factual disputes existed. That argument is demonstrably false and reflects a misapplication of well-settled New Jersey law. Under *Palombi v. Palombi*, 414 N.J. Super. 274, 285–86 (App. Div. 2010), and *DeNike v. Cupo*, 196 N.J. 502, 515–17 (2008), a trial court must conduct a plenary hearing before enforcing a settlement where "material facts concerning the existence or terms of an agreement are in dispute." The rule is not discretionary. It exists to ensure that courts do not enforce agreements that may never have existed or that include terms one side never accepted. Here, there were multiple disputed facts that made a plenary hearing not just advisable but mandatory:

1. **Whether liquidated damages were agreed to**: Plaintiff has provided a certified transcript and a contemporaneous recording confirming that Defendants' attorney stated "yes" to a liquidated damages clause during the March 8 call (PA93, Rec1). Defendants deny this. That alone mandates a hearing.
2. **Whether Plaintiff agreed to release "professionals, family members, and affiliates"**: Defendants assert this was "standard language" that Plaintiff accepted. Plaintiff denies ever agreeing to that expansive release and argues it was first introduced in a March 16 draft which he rejected (PA120, PA140–41).
3. **Whether a binding agreement ever existed**: Plaintiff maintains that Defendants' own March 16 email expressly stated that no agreement would be valid "unless and until" executed by all parties. This contradicts their claim that a binding agreement existed eight days earlier. That is a material dispute on contract formation itself.

4. **Whether Plaintiff repudiated or rejected Defendants' proposed draft**: The record includes Plaintiff's redlined revisions, emails refusing terms, and consistent objections to specific language. Defendants ignore these objections and claim Plaintiff "assented."

These factual disputes go to the heart of whether a meeting of the minds ever occurred. The trial court, without taking testimony or weighing credibility, simply accepted Defendants' narrative. This was reversible error under *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), which prohibits trial courts from resolving contested facts on motion papers alone when those facts are critical to contract enforcement. Moreover, the trial court never explained why it deemed the Plaintiff's evidence—including transcripts, recordings, and emails—as insufficient to warrant a hearing. That silence itself supports reversal. A court may not bypass a plenary hearing when confronted with directly contradictory evidence on material terms of settlement. Accordingly, the failure to hold a plenary hearing deprived Plaintiff of due process, resulted in factual findings unsupported by the record, and warrants vacatur of all orders enforcing the alleged settlement.

Palombi v. Palombi, 414 N.J. Super. 274 (App. Div. 2010), mandates a plenary hearing when such disputes exist. A plenary hearing was mandatory. *DeNike* (196 N.J. 502, 517) requires hearings for substantial factual disputes, present here regarding liquidated damages, payment timing, and the scope of releases (Pa93-95, Pa139-140, PaL20-33). *Dunne v. Dunne* (209 N.J. Super. 559, 571) and *Tancredi v. Tancredi* (101 N.J. Super. 259, 262) mandate oral testimony for credibility issues, such as Defendants' perjury allegations (PaL11). The court's reliance on Defendants' assertions without testing evidence, including the recording (Ex Fa Rec1), was arbitrary. *Milne v. Goldenberg* (428 N.J. Super. 184, 201) and *K.A.F. v. D.L.M.* (437 N.J. Super. 123, 138) require hearings when material facts are disputed, as here. The court's failure to hold one violated Weiss's due process rights.

F. Defendants' Breaches and Delays Invalidate Any Agreement

Defendants' Argument: Defendants claim alleged breaches or delays do not invalidate the agreement, citing *Palombi v. Palombi* and arguing Weiss's breach allegations presuppose a contract.

Rebuttal: RESPONDENTS' BREACHES AND DELAY WERE MATERIAL AND MADE THE ALLEGED AGREEMENT VOIDABLE

Plaintiff's March 8 proposal stated: "Funds to be received in 7 days." (Pa139)

Defendants missed this deadline and then unilaterally proposed changes and additions. Additionally, they violated confidentiality—another material term—by discussing the terms of the agreement with non covered third parties and by publicly filing the agreement. These are not technical defects; they are material breaches justifying rescission (Pacifico v. Pacifico, 190 N.J. 258 (2007)). Defendants' breaches void any agreement. The March 8 proposal required payment within seven days and confidentiality (Pa139), both materially breached by Defendants' delay until October 2023 (Da71-74) and public filings (Pa100-101). *Capparelli v. Lopatin* (459 N.J. Super. 584, 604) holds that clear intent governs, and breaches of material terms render agreements voidable. Defendants' failure to escrow funds (PaL15) and repeated confidentiality violations (Pa100) destroyed the agreement's purpose, as Weiss needed confidentiality to protect his business reputation (PaL29). *Palombi* (414 N.J. Super. 274, 289) addresses performance disputes, not formation failures. The court's enforcement despite these breaches was absurd and must be vacated.

Respondents argue that even if they breached the purported settlement agreement or failed to perform within the agreed timeframe, such conduct did not invalidate the agreement. This argument is legally and factually meritless. Where time of performance is material, as it was here, failure to perform is a material breach and renders the agreement unenforceable or voidable.

This seven-day deadline was not a courtesy or suggestion—it was a core term of Plaintiff's offer. Defendants' response did not object to or counter that term. Accordingly, it became a condition of the deal. When Defendants failed to make payment within seven days and instead returned to the table with an entirely redrafted agreement on March 16–17 (Pa120–28), they materially breached the offer they now claim was binding. New Jersey law is clear: **failure to perform by a material date, where time is of the essence or is otherwise made explicit, constitutes a material breach.** (*Kernahan v. Home*

Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019); *Pacifico v. Pacifico*, 190 N.J. 258, 267 (2007)). Such a breach discharges the non-breaching party's obligations and renders the contract voidable at their option. These dual breaches—(1) failure to timely pay and (2) violation of confidentiality—go to the very essence of the purported agreement. They materially prejudiced Plaintiff and undermined the foundation of the alleged settlement. Defendants cannot claim enforcement of an agreement they themselves disregarded and restructured to suit their advantage post hoc.

The Appellate Division has consistently rejected attempts to enforce settlement agreements where performance failures or conduct following the purported agreement undermine the core conditions of the deal. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018); *Capparelli v. Lopatin*, 459 N.J. Super. 584, 604 (App. Div. 2019). Thus, even assuming arguendo that some agreement existed on March 8—which Plaintiff firmly disputes—Defendants' material breaches rendered it voidable and unenforceable. The trial court's failure to consider these breaches, let alone hold a plenary hearing on their materiality, further confirms that its ruling must be reversed.

G. Weiss's Conduct Does Not Confirm Assent

Defendants' Argument: Claims Weiss's conduct—circulating terms, joining the adjournment letter, demanding payment, and retaining funds—confirms assent, citing *Pascarella* and *Palombi*.

Rebuttal: Weiss's conduct does not imply assent. His March 8 email (Pa139) proposed terms, not acceptance of Defendants' modifications. The adjournment letter (Pa150-151) reflected a proposed settlement, not a binding contract, as Defendants' emails confirm (PaL20-21).

Weiss's demand for payment post-October 17 was under court order (Da71-74), not voluntary assent, and retaining funds does not waive appeal rights. *Pascarella* (190 N.J. Super. 118, 126) requires objective mutual assent, absent here due to Weiss's consistent rejections (Pa26-30). *Knorr v. Smeal* (178 N.J. 169, 177) holds that waivers require intent, which Weiss lacked. The court's inference of assent from silence was erroneous.

POINT III: The January 16, 2024 Order Denying Reconsideration Must Be Reversed

A. No Procedural Bar to Reconsideration

Defendants' Argument: Defendants argue the reconsideration motion was defective because Weiss did not reinstate the dismissed case, citing *Washington v. Donegan*, *Mason*, *Miller*, and *Ashe v. State Operated Sch. Dist.*.

Rebuttal: The reconsideration motion was procedurally proper. The trial court ruled on the reconsideration motion on the merits, waiving any procedural bar. Plaintiff filed it within 20 days, as required by R. 4:49-2. The denial was therefore subject to review. Rule 4:49-2 allows motions within 20 days, which Weiss met on November 6, 2023 (Pa43). The dismissal with prejudice (Pa22) did not divest the court of jurisdiction, as it ruled on the motion (Pa51-52). *Washington*, *Mason*, and *Miller* involve failures to reinstate vacated dismissals, not reconsideration of final orders. *Ashe* (2012 WL 6681915) addresses claim preclusion, not motion jurisdiction. The court's jurisdiction persisted, as no formal case closure occurred, and Defendants' procedural bar argument fails.

B. The Reconsideration Motion Was Substantively Meritorious

Defendants' Argument: Defendants claim the motion failed to show arbitrary or capricious rulings or overlooked evidence, citing *Capital Fin. Co.*, *Palombi*, *Lawson*, and *Cummings*. They assert the court's 12-page decision (Pa9-20) addressed all issues.

Rebuttal: THE COURT MISAPPLIED RULE 4:49-2 IN DENYING RECONSIDERATION

Reconsideration was improperly denied despite a clear showing that the October 17 order rested on incorrect assumptions, including that all essential terms were agreed upon and that Plaintiff had accepted the agreement's terms unconditionally. Reconsideration is warranted under Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), where the court overlooks "relevant, probative evidence" or misapplies settled law. Here, Plaintiff identified both. The court's failure to hold a plenary hearing and its misreading of the communications, coupled with its factual conflation of unrelated parties' conduct (e.g., separate settlement with Investors Bank), justifies reversal. The motion identified overlooked

evidence (the March 8 recording, Defendants' emails disclaiming an agreement). It also cited the trial court's failure to hold a plenary hearing—a clear legal error warranting reconsideration. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996), supports reversal when a court ignores competent, probative evidence. The reconsideration motion was meritorious. *Palombi* (414 N.J. Super. 274, 289) requires reversal if the court overlooked evidence or misapplied law, both present here. The court ignored the March 8 recording (Pa93-95), Defendants' admissions (PaL11), and emails (PaL20-21) confirming no enforceable agreement. It misapplied *Weichert* and *Kaur* by finding a meeting of the minds despite disputed terms (Pa139-140, PaL22-33). *Lawson* (468 N.J. Super. 128, 134) and *Cummings* (295 N.J. Super. 374, 384-85) mandate reconsideration for overlooked probative evidence, such as the recording and transcript (Pa93-95). The court's failure to address Defendants' perjury (PaL11) and confidentiality breaches (Pa100) was arbitrary. The motion identified these errors, warranting reversal.

3) CONCLUSION

The trial court's October 17, 2023 order did far more than "enforce." It rewrote the agreement by:

- **Omitting** the agreed-upon liquidated damages clause;
- **Expanding** the release to include individuals and entities Plaintiff never agreed to release;
- **Altering** the time of payment from seven days to an unspecified later date;
- **Inserting** Defendants' March 16 proposed language over Plaintiff's objection.

This was not enforcement; it was judicial redrafting. New Jersey law forbids courts from imposing terms that were neither discussed nor agreed to. (*Grow Co. v. Chokshi*, 403 N.J. Super. 443 (App. Div. 2008)). The trial court erred in finding a binding settlement where the parties never mutually assented to key terms. The court further erred in denying Plaintiff a plenary hearing and misapplying Rule 4:49-2.

Plaintiff's motion for reconsideration was timely. It identified clear factual error (ignoring the March 8 recording) and legal error (failing to hold a plenary hearing). This satisfies the standard under Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). The trial court failed to even address Plaintiff's evidence and arguments. Reconsideration should have been granted. Thus, this Court should:

1. Reverse the October 17, 2023 order enforcing settlement;

2. Reverse the January 16, 2024 order denying reconsideration;
3. Out of an abundance of caution a new judge should be assigned as the Court has already committed twice to a decision that was unsupported by the record;
4. Remand for a plenary hearing on whether a settlement was formed; or
5. In the alternative, vacate the enforcement order and restore the matter to the trial calendar.

For the foregoing reasons, Weiss's appeal is timely, and the October 17, 2023 and January 16, 2024 orders must be vacated. The trial court erred in finding an enforceable agreement, ignored evidence, expanded terms, and denied a plenary hearing. Defendants' breaches and the appearance of bias further necessitate reversal. This Court should grant the appeal, vacate the orders, and remand with instructions for a new judge to conduct a plenary hearing.

Respectfully submitted,

Eric S. Weiss, Plaintiff-Appellant